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# JOURNAL OF MEDIA LAW & ETHICS

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## Articles

- 5      ERIK UGLAND  
*The Aims of Public Scholarship in Media Law and Ethics*
- 27     JEFFREY LAYNE BLEVINS AND SARAH C. BARROW  
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A Critical Analysis*
- 49     DAXTON R. "CHIP" STEWART  
*Managing Conflict over Access: A Typology of Sunshine Law  
Dispute Resolution Systems*
- 83     MINJEONG KIM AND LENA E. VINSON  
*Friends of the First Amendment? Amicus Curiae Briefs in Free  
Speech/Press Cases During the Warren and Burger Courts*
- 107    LYOMBE EKO  
*Suffer the Virtual Little Children: The European Union, the  
United States, and International Regulation of Online Child  
Pornography*

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# JOURNAL OF MEDIA LAW & ETHICS

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Volume 1, Numbers 3/4

Summer/Fall 2009

## Articles

- 155    AMY KRISTIN SANDERS  
*Defining Defamation: Plaintiff Status in the Age of the Internet*
- 186    JASON M. SHEPARD  
*Bloggers After the Shield: Defining Journalism in Privilege Law*
- 217    AIMEE EDMONDSON  
*Packing Heat: A Gun Battle Between Privacy and Access*
- 241    JASON A. MARTIN  
*Return to the Marketplace: Balancing Anonymous Online Speech and Defamation*
- 265    MICHAEL TODD  
*Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany*



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# THE AIMS OF PUBLIC SCHOLARSHIP IN MEDIA LAW AND ETHICS

ERIK UGLAND

*This essay urges scholars in media law and ethics to reevaluate the extent and utility of their public-scholar efforts and to consider ways that they can transfer research-based knowledge to public audiences while also playing a more deliberate role in holding media and government institutions accountable. It suggests that the devolution of standards in mass communication, the increasing encroachments on media autonomy, and the broader collapse of power into fewer hands make this a particularly urgent moment for scholars to reengage the public and to abandon their feckless neutrality on public issues. The overarching aim of public scholars ought to be to serve as bulwarks against the unrelenting and asocial exercise of institutional power, and this essay suggests that media law and ethics scholars, because of the normative emphasis within their fields, are uniquely situated to serve that goal.*

**Keywords:** public scholarship, law, ethics, transference, accountability

## I. INTRODUCTION

One of the occupational hazards of life in the academy is that as faculty advance their research agendas, their attentions inevitably focus on narrower and narrower targets and on increasingly esoteric questions. Scholars are prone, as the old saying goes, to studying more and more about less and less until they know everything about nothing.

Those who do work in mass communication, and particularly those studying media law and ethics, should feel fortunate, however, that relative to their colleagues in other fields, their efforts are more clearly bound to the exigent questions of the day (indeed, they are often undertaken *because of* those linkages) and are more capable of being meaningfully translated to non-experts. Media law and ethics scholars have opportunities to nourish and redirect public dialogue on contemporary controversies that are unavailable or impractical for scholars in other fields.

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Still, too few faculty take seriously the public-scholar role,<sup>1</sup> and the overall yield of those efforts is hard to discern. Polls show profound public ignorance about the most fundamental First Amendment principles,<sup>2</sup> and about the ethical canons of journalism, advertising and public relations.<sup>3</sup> Journalists and media organizations continue to be usurped and intimidated by government officials without triggering significant public outcry.<sup>4</sup> And professional practices in mass communication have deteriorated to the point that these are now among the least trusted American institutions.<sup>5</sup>

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<sup>1</sup> There are many definitions of public scholarship, but the following statement adopted by the faculty of the Department of Communication at the University of Washington provides a representative outline:

“Scholarship and citizenship go hand in hand. Although scholars in higher education ultimately work on behalf of their communities, their nations and the world, much of their scholarship stays within the traditional research process .... Scholars also directly engage the world beyond the academy, drawing on scholarship developed in the rigor of disciplinary tradition. Productive efforts of this kind, herein called public scholarship, may take many forms, such as popularization of research-based ideas in a variety of media and formats, facilitation of deliberation about such social values as equality, justice and freedom, and explanation or appreciation of texts, concepts, values or events. Such efforts can promote constructive dialogue with and among students, citizens, diverse communities, and political and cultural leaders.”

Faculty Statement on Public Scholarship, Department of Communication, University of Washington (2004), <http://www.com.washington.edu/program/publicscholarship/index.html>.

<sup>2</sup> FREEDOM FORUM, STATE OF THE FIRST AMENDMENT 2007 (2007). In this annual survey, 37 percent of respondents disagreed that “newspapers should be *allowed* to freely criticize the U.S. military about its strategy and performance.” *Id.* at 4. (Emphasis added). And 61 percent agreed that the “government should be allowed to *require* newspapers to offer an equal allotment of time to conservative and liberal commentators.” *Id.* at 10. (Emphasis added).

<sup>3</sup> Both scholars and the public can be forgiven for some of this misapprehension, given the pace at which media practitioners are adjusting the moral guideposts of their professions. *See infra*, Part V.

<sup>4</sup> In its 2007 World Press Freedom Index, Reporters Without Borders ranked the United States 48th out of 169 countries, citing, among other things, the decline in access to information and the surge of cases in which reporters have been subpoenaed. Reporters Without Borders, World Press Freedom Index 2007, [http://www.rsf.org/article.php3?id\\_article=24025](http://www.rsf.org/article.php3?id_article=24025).

<sup>5</sup> A 2006 Harris Poll shows that the public has more confidence in “Wall Street” than they do in “The Press,” and more confidence in “The White House” than in “TV News.” *Overall Confidence in Leaders of Major Institutions Remains Steady*, Harris Interactive, March 2, 2006, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=646](http://www.harrisinteractive.com/harris_poll/index.asp?PID=646).

It is too simple to suggest that these circumstances are entirely or even substantially the result of an abdication by scholars, and it is too much to assume that media law and ethics faculty can foment some sweeping cultural reversal. But they ought to *want* to lead that change and to be its catalysts, even if they are only one force among many. There are some scholars, to be sure, who are creatively repackaging their work for broader audiences and lending their expertise as news sources, guest columnists or public lecturers. But much of what people characterize as public scholarship is either too simple, too sequestered or simply too infrequent to have an appreciable impact. It also too often misses what should be the principal aim of most public scholarship: to serve as a bulwark against the unrelenting, asocial exercise of institutional power.<sup>6</sup>

This essay urges scholars in media law and ethics to consider that purpose in evaluating the extent and utility of their public-scholar efforts. It also suggests that this is a particularly urgent time for scholars to reengage the public—not merely by *informing* discussions of law and ethics issues, but by *driving* those discussions as well. The expanding power of government and corporations has heightened the need for robust scrutiny, as have the media’s ethical failings, which are no longer limited to simple acts of omission but include some particularly brazen betrayals of public trust.<sup>7</sup> Academics have a unique role to play in preserving the appropriate balance between freedom and restraint and in serving as the public’s proxy in holding media institutions and professions accountable. Fortunately, those tasks are made easier by the peculiar features of these fields.

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As for advertising professionals, a 2006 Gallup Poll indicates that the public regards them as even less honest than journalists, stock brokers and lawyers, and only slightly more trustworthy than car salesmen, with 11 percent of respondents saying their trustworthiness is “very high” and 35 percent saying it is “very low.” Lydia Saad, *Nurses Top List of Most Ethical and Honest Professions*, Gallup Online, Dec. 14, 2006, <http://www.gallup.com/poll/25888/Nurses-Top-List-Most-Honest-Ethical-Professions.aspx>.

<sup>6</sup> The word “unrelenting” is used to emphasize the fact that power inevitably expands unless checked. As James Madison said, “men are not angels.” If they were, “internal and external controls would be unnecessary,” as would any informal mechanisms of accountability. THE FEDERALIST NO. 51 322 (James Madison) (Clinton Rossiter ed., 1961). The term “asocial” is used to differentiate neutral or benevolent uses of power from those that are primarily driven by self-interest. There is nothing inherently problematic about the possession or exercise of power. What is troubling is the degree to which it is coalescing in the hands of fewer people, the ways in which it is being exerted without regard for the social consequences, and the extent to which people are blithely acquiescing to what is a massive realignment of influence away from individuals and toward government, corporations and, to some extent, the media.

<sup>7</sup> See *infra* notes 47-52 and accompanying text.

## II. THE SPECIAL NATURE OF LAW AND ETHICS RESEARCH

There are a number of challenges confronting faculty who seek to broaden the reach of their scholarly work and to insert themselves into public dialogues. But those obstacles are more easily surmounted by scholars who work in law and ethics than they are by scholars in other areas. The former have an advantage in that their research is more often targeted to current conflicts and to issues whose dynamics are understood by public audiences. A law or ethics scholar would have an easier time drawing the public into a debate about the privacy rights of public figures than a mathematician would have getting people to puzzle over the Riemann Hypothesis.<sup>8</sup> The research contexts in law and ethics are ones with which most people can find some ready connection, even if the theories and methods employed are unfamiliar.

Partly for that reason, research in law and ethics is more capable of rapid diffusion within the public sphere.<sup>9</sup> Most articles in other fields are so tightly focused that their influence is difficult to perceive, at least initially. Their contributions are usually more granular and their impact is felt only after a long process of accretion and after they have bonded with the ideas and discoveries of others. Most media law and ethics scholarship follows a similarly inconspicuous path. But it is easier to trigger major theoretical and doctrinal shifts—and to quickly charge-up public debates, even without reshaping the dominant paradigms—in these fields than in most others.

An early example is the work of George Washington University law professor Jerome Barron whose 1967 article<sup>10</sup> and subsequent book<sup>11</sup> sought to upend the bedrock principle that government cannot limit the speech of some citizens in order to enhance the expressive opportunities of others. Barron argued that the First Amendment protects speech, not speakers, and therefore the government can impose restraints on gate-keeping institutions (e.g., metropolitan daily newspapers) to open channels of communication foreclosed to other members of a community. Barron's argument was rejected by the U.S. Supreme Court (in a case Barron litigated) in *Miami Herald Pub. Co. v. Tornillo*,<sup>12</sup>

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<sup>8</sup> See generally J. Brian Conrey, *The Riemann Hypothesis*, 50 NOTICES OF THE AM. MATHEMATICAL SOC'Y 341 (2003).

<sup>9</sup> Media scholars seeking to disseminate their research can also take advantage of a number of print and online publications (e.g., *American Journalism Review*, *Columbia Journalism Review*, *Atlantic Monthly*, *Harper's*, *Salon.com*, *Slate.com*, etc.), which provide additional forums for their work and which are read by both public and academic audiences.

<sup>10</sup> Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 641 (1967).

<sup>11</sup> JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* (1973).

<sup>12</sup> 418 U.S. 241 (1974) (striking down a Florida statute giving political candidates a right to reply to criticism leveled against them in the state's newspapers).

but it provided a compelling alternative framework that has informed the work of others<sup>13</sup> and that continues to serve as the principal counter-thesis to the Court's speaker-based First Amendment model.<sup>14</sup> There are scores of other examples from every time period and addressing every facet of media law and ethics: such as Mark Fowler's template for media deregulation in the 1980s,<sup>15</sup> Jay Rosen's elucidation of public journalism in the 1990s,<sup>16</sup> and Lawrence Lessig's work on intellectual property in the 2000s.<sup>17</sup> Scholars in these fields are continually challenging consensus and reshaping the theoretical and doctrinal substructures. And many have succeeded in taking their cases to both expert and lay audiences.

Part of what makes these kinds of debate-shifting works possible, and certainly what helps streamline their integration into public discourse, is that there are some fundamental differences between law and ethics compared with other fields. Although there is both a normative and a positive-empirical dimension to all research, law and ethics scholars are generally more attentive to the former. This is reflected in something as basic as their conception of "theory." Most scholars conceive of theory as an overarching set of principles that help explain natural or social phenomena.<sup>18</sup> Theory in those fields is *descriptive*; its purpose is to provide a meta-framework to explain

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<sup>13</sup> See, e.g., ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999), NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988), and BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (1983).

<sup>14</sup> The Court's First Amendment jurisprudence is focused on the expressive autonomy of speakers and on the limits on government intrusions upon that autonomy. It prohibits discrimination among speakers, although the rights of all speakers depend to some extent on the medium they use. See *Reno v. ACLU*, 521 U.S. 844, 868-869 (1997) (distinguishing the rights of broadcasters, cable system operators and Internet communicators), and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) (distinguishing broadcasting from cable television).

<sup>15</sup> Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

<sup>16</sup> JAY ROSEN, *WHAT ARE JOURNALISTS FOR?* (1999).

<sup>17</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) and *CODE: AND OTHER LAWS OF CYBERSPACE* (1999).

<sup>18</sup> This is reflected in most dictionary definitions as well. See, e.g., MERRIAM WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2371 (2002) (Theory: "A judgment, conception, proposition, or formula (as relating to the nature, action, cause, or origin of a phenomenon or group of phenomena) formed by speculation or deduction or by abstraction and generalization from facts.").

processes and to predict outcomes based on the intermingling of certain variables.<sup>19</sup> In law and ethics, however, theory is more *prescriptive*. Its purpose is not to explain phenomena but to provide a vision of how society, or some aspect of it, should be ordered.<sup>20</sup>

In law and ethics, scholars are expected to focus on the social consequences of different legal and ethical arrangements and to propose remedies, in addition to supplying their diagnoses.<sup>21</sup> That is not true all the time, of course, and it is not entirely unique among academic fields of study. But law and ethics scholars are often more inclined—and because of the nature of their fields, more able—to try to extirpate the theoretical pillars and to suggest social changes than are scholars in the hard sciences. In the sciences, the guiding principles are the products of nature. In law and ethics, the guiding principles are human constructs that are only as durable as the social consensus that holds them in place.<sup>22</sup> One cannot convince others to reject  $E=mc^2$  without overwhelming empirical data, but one can persuade others to reject the use of torture, for example, without producing anything more than a single, impassioned appeal to conscience.<sup>23</sup> This makes for less stable disciplines, but it also means there are unlimited opportunities to

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<sup>19</sup> Social and natural science theories are rooted in empiricism; legal theories are generally rooted in philosophy. This, of course, is a generalization. Some legal theories do more than propose some kind of social structuring. The marketplace of ideas theory, for example, not only provides a model for the regulation of expression, it also suggests or presumes a repeatable process that in the absence of government restraints, truth will be more likely to emerge from the clashing of viewpoints than if the government were to mediate the messages. This theory was expressed by Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting), although its roots lie in John Milton's 1644 tract against licensing by the British crown. JOHN MILTON, *AREOPAGITICA* (J.C. Suffok, ed., 1968).

<sup>20</sup> The doctrinal rules that courts create flow from these broader theoretical frameworks. For example, the rule that public officials must prove actual malice (*i.e.*, “reckless disregard for the truth,” *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)) before they can succeed in a libel suit is the product of a theory about the primacy of political speech. *See generally* ERIC BARENDT, *FREEDOM OF SPEECH* 20-23 (1985) (noting that democratic self-governance is one of the principal rationales cited for protecting freedom of expression). *See also* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>21</sup> As Ralph Waldo Emerson suggested, “[T]here is no good theory of disease which does not at once suggest a cure.” RALPH WALDO EMERSON, *The Preacher*, in 10 *THE WORKS OF RALPH WALDO EMERSON* 207 (Fireside ed. 1909).

<sup>22</sup> Most work in media ethics, for example, is less focused on the meta-ethical search for universal rules than on normative and applied examinations that are bound by particular cultures and customs.

<sup>23</sup> In other words, one could make this argument from *principle* without examining empirical evidence about the utility of torture as an interrogation tactic.

modify core principles or exchange them for others, and therefore unlimited chances for scholars to exert their influence.

### III. THE PURPOSE OF PUBLIC SCHOLARSHIP IN MEDIA LAW AND ETHICS

Media law and ethics are dynamic fields whose boundaries are continually being redrawn. They are also quite unusual in that their contours can significantly be shaped by those outside the academy.<sup>24</sup> The legal limits and ethical standards that guide the practice of mass communication are not determined by scientific discovery; they are artificial thresholds established through an ongoing societal negotiation.<sup>25</sup> The advantage of this malleability is that it creates extraordinary opportunities for the public to help determine which legal and ethical rules will be required or expected, and even which theories will predominate.<sup>26</sup> This is something that would not be possible in chemistry, physics, psychology or most other fields where scholars are the dominant arbiters of knowledge.

Unfortunately, the possibilities for public input are not matched by the realities, in part because there is a deteriorating relationship between the public and the other organizations and institutions that demarcate legal rules and establish ethical standards. Those organizations and institutions are increasingly unlikely to view the public as their principal, much less sole, constituency, and are more inclined to target its more pedestrian impulses than to serve its vital needs. Indeed, the whole notion of the “public interest” seems increasingly quaint in this period of exploding profligacy and corruption.<sup>27</sup>

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<sup>24</sup> This is certainly true with professional practices and ethical standards. It is less so with the philosophical foundations of professional ethics, which are more fully the province of ethics scholars. But that is largely because those ideas are less familiar to the public and because the public does not speak the language of moral philosophy. It is not because public and scholarly conceptions of ethics are in any way irreconcilable.

<sup>25</sup> These boundaries are negotiable, but that is not to say they are arbitrary. They are often rooted in principle and reflect the “fundamental presuppositions” of our society. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 326 (1962). They are also often supported by empirical evidence even though their adoption by society does not depend on empirical justifications as is the case in other fields.

<sup>26</sup> Of course these opportunities are often indirect. The public’s ability to shape legal and ethical boundaries is less about their active participation than about their collective will, as expressed through their media choices and feedback.

<sup>27</sup> The phrase “the public interest” continues to be rhetorically exalted by every American institution, but the massive gulf between word and deed suggests that the phrase has become more of a shibboleth than a guide star.

This is a perilous moment for America's principal institutions—government, corporations, media—and for American democracy itself. The health of the latter has always depended on there being a stasis among the key institutions and on their possession of some other-regarding concern<sup>28</sup> and a willingness, at least occasionally, to moderate the pursuit of their own interests. We have never achieved perfect equilibrium, but it appears more elusive now than at any time in the past few decades. The prevailing philosophy seems to discount the public interest as an orienting concern and assumes that the protection of those interests will occur as a natural by-product of the adversarial clashing of the institutions. It is an “invisible hand”<sup>29</sup> approach in which the just end is merely wished-for rather than being the *raison d'être*. It clearly overestimates the extent to which these institutions serve as counterpoise to each other, and it overlooks the manifold ways in which they actively conspire to enrich themselves at the expense of the public.

The American campaign finance system provides one small example. Corporations exert extraordinary and disproportionate influence on the American political process by enlisting high-paid lobbyists to push their agendas, making campaign contributions and doing other favors for political leaders in the hope of building goodwill or securing *quid pro quo* exchanges.<sup>30</sup> Politicians, meanwhile, have built an election structure that is heavily dependent on the purchase of advertisements, particularly broadcast air time.<sup>31</sup> Success, therefore, depends on the accumulation of massive campaign war chests, which are largely filled with corporate dollars.<sup>32</sup> This would be

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<sup>28</sup> In other words, that they share some basic commitment to society as whole and are willing to engage in acts of *altruism*—that is, actions that benefit others to the detriment of themselves. Whether these actions are undertaken out of some deep-seated love (agape) for others, or whether they are the result of utilitarian calculations about what is necessary to preserve stability, self-interest must occasionally yield to the common interest if there is to be a society in the first place.

<sup>29</sup> See ADAM SMITH, *THE WEALTH OF NATIONS* (1776) (suggesting that the market works as an invisible hand to correct imbalances between supply and demand, and that there is nothing inherently problematic about individuals pursuing their own self-interest, because this often produces mutually beneficial outcomes).

<sup>30</sup> Public choice theory suggests that politicians are willing to make these bargains in order to sustain themselves, even if it results in government policy that is inconsistent with the collective will of the public. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

<sup>31</sup> A study by PQ Media in 2007 estimated that more than \$3 billion would be spent on political advertising in the 2008 elections, with \$2.3 billion of that going to broadcast stations. Louis Hau, *Political Ad Spending Set to Climb Sharply*, FORBES.COM, Dec. 7, 2007, [http://www.forbes.com/2007/12/07/politics-campaign-spending-biz-media-cx\\_lh\\_1207bizpolitics.html](http://www.forbes.com/2007/12/07/politics-campaign-spending-biz-media-cx_lh_1207bizpolitics.html).

<sup>32</sup> About 70 percent of the donations to federal candidates come from corporations, while only 2.6 percent come from labor organizations and 5.4 percent from ideological organizations. See

less problematic if the media aggressively monitored these relationships and exposed the influence-peddling. But the media organizations through which most people get their news<sup>33</sup> are essential cogs in this system and are primary beneficiaries of its largesse. Much of the money spent by politicians ends up in the hands of broadcast station owners for whom election season is their most bountiful time of year. Broadcasters have also found ways to exploit loopholes in the campaign finance laws to further fleece political candidates, who are willing to pay any price to get their message out.<sup>34</sup> And because broadcasters are arguably the most powerful lobby on Capitol Hill,<sup>35</sup> they have little trouble overpowering their public-interest counterparts and maintaining the current regime.<sup>36</sup> All of the institutional partners benefit from this arrangement, but the public certainly does not. And in the absence of a checking institution of comparable power,<sup>37</sup> the public must depend on rogue acts of magnanimity from the institutions or on the small amount of pressure exerted by ad hoc coalitions or overmatched public-interest groups.

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*Business-Labor-Ideology Split in PAC and Individual Donations to Candidates and Parties, 2008 Overview*, Center for Responsive Politics, <http://www.opensecrets.org/overview/blio.php>.

<sup>33</sup> See FREEDOM FORUM, STATE OF THE FIRST AMENDMENT 2007 11 (2007) (noting that 61 percent of the public gets most of its news from television and radio and only 20 percent gets it from newspapers and 15 percent from online sources).

<sup>34</sup> For example, although federal law requires that broadcasters give political candidates the rates they would normally give their best advertisers for a given time slot, broadcasters can charge whatever price they want for non-preemptable slots, which cannot be bumped by higher bidders. Because of the compressed time frames under which candidates operate, they are often willing to pay the exorbitant rates for those slots. See Hampton Stephens, *TV Interests Sit Out Campaign \$ Debate*, MULTICHANNEL NEWS, March 5, 2001, <http://www.multichannel.com/article/CA65151.html>.

<sup>35</sup> See Neil Hickey, *TV's Big Stick: Why the Broadcast Industry Gets What it Wants in Washington*, COLUM. JOURNALISM REV., Sept.-Oct. 2002, at 50. Broadcasters' influence is one manifestation of the theory of regulatory capture (or agency capture) in which members of a regulated industry are able to exert influence over government officials and processes in ways that serve their own interests at the expense of the public. See generally Jean Jacques Laffont & Jean Tirole, *The Politics of Government Decision Making: A Theory of Regulatory Capture*, 106 QUARTERLY J. OF ECON. 1089 (1991).

<sup>36</sup> Between 1998 and 2004, broadcasters spent more than \$186 million lobbying the federal government. Robert Morlino, *Broadcast Lobbying Tops \$186 Million*, Center for Responsive Politics, Oct. 28, 2004, <http://projects.publicintegrity.org/telecom/report.aspx?aid=406>.

<sup>37</sup> Vincent Blasi has emphasized the important role media organizations play in monitoring government institutions, and he points out that big, well-funded media institutions are necessary to combat the nearly limitless power vested in government. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521 (1977).

The problem of public disempowerment is also apparent in the more specific context of media law and ethics. The public does not play a meaningful role in shaping the ethical practices of most news organizations,<sup>38</sup> despite some organizations' attempts over the past few years to reconnect with audiences through focus groups and town-hall meetings.<sup>39</sup> News organizations are understandably protective of their autonomy, but their concerns about editorial interference can sometimes distance them from their audiences. That alienation is even more acute in advertising and public relations where media professionals often look at their audiences as targets rather than clients and where ethical restraints tend to be imposed only when the commercial utility of a message or tactic is outweighed by the public backlash it triggers.

The public's ability to shape the law is similarly constrained. Citizens have little access to the policymaking process, at least the most critical aspects of it,<sup>40</sup> and their

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<sup>38</sup> The most ambitious attempt to engage the public in an examination of journalism ethics was the National News Council, which operated from 1973-1984. The NNC was comprised of media and non-media members who heard and resolved complaints by the public against the media. They issued formal written opinions in the most serious cases, and in doing so, sought to integrate public and media voices in the articulation of ethical standards. As it turned out, however, the media members dominated the Council and its decisions rarely challenged the legitimacy of conventional journalistic practices. See Erik Ugland, *The Legitimacy and Moral Authority of the National News Council (USA)*, 9 JOURNALISM: THEORY, PRACTICE & CRITICISM 285, 304 (2008) (noting that the Council's work was "far from revolutionary and may have done as much to entrench journalism's received tenets as it did to either validate or refashion them."). An earlier and more focused press-public collaboration was the Hutchins Commission whose final report was very influential (at least in providing a succinct diagnosis of the state of mass communication), but which is now more than a half-century old. See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

<sup>39</sup> This was more common in the mid-to-late-1990s when public journalism was an emerging concept and when editors sought to empower their audiences and improve their product by trying to better understand the desires of readers and viewers. See *Help Keep Town Hall Spirit Alive*, WIS. STATE J., Feb. 9, 2008, at A8 (describing the paper's 15-year experience with its We The People/Wisconsin project, which engages citizens in town-hall discussions of public issues, and which was started as an experiment in civic journalism). These approaches are less common today, and to the extent that they occur at all, they are more likely to be part of a news organization's efforts to commoditize its coverage by tailoring it to the interests of groups coveted by advertisers. The Federal Communications Commission used to require broadcasters to engage their audiences by seeking to understand the issues they wanted addressed, but this "ascertainment" policy was abandoned in 1984. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1078 (1984).

<sup>40</sup> The House and Senate's floor debates, public hearings and committee meetings are accessible to the public but are largely stages for political showmanship. The real power is exercised in private meetings with lobbyists and donors and in closed-door exchanges between congressional staffers.

representatives are often stymied by artificial roadblocks or are elbowed-out by their better-funded counterparts.<sup>41</sup> There are also limits to what the participants in the legal system can accomplish. Judges are bound by the duties of their offices<sup>42</sup> and by the nature of the cases filed in their jurisdictions. And lawyers, too, are often unreliable advocates of principle, because their desire to affect the law is limited by their obligation to their clients.<sup>43</sup> Even journalists, who tell the story of the law, can be corrupted by other interests and produce shallow or contorted portraits of these controversies.

In 2003, for example, after the FCC voted to relax its media ownership rules and thereby pave the way for more media consolidation,<sup>44</sup> there was considerable public outcry and agitation from both ends of the political spectrum.<sup>45</sup> But there was substantially less media coverage of this issue than was warranted, leading some to suggest that mainstream broadcasters had engaged in a “news blackout”<sup>46</sup> of the story in

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<sup>41</sup> See, e.g., the massive Telecommunications Act of 1996, which lifted or relaxed regulations in nearly every area of electronic communication, and which was largely drafted by industry lobbyists. PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 (1999).

<sup>42</sup> Not only are courts expected to honor the principal of *stare decisis*, which requires that they presume the validity of their prior rulings, but they also risk losing their legitimacy if they get too far ahead of the public on social issues or stretch the limits of their jurisdiction. See Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50-51 (1961).

<sup>43</sup> A recent example of this occurred in the Privacy Act case filed by nuclear scientist Wen Ho Lee who had been accused by the government of espionage. Lee sued the government for improperly releasing confidential personnel information to the media, and to support some of his claims, he subpoenaed reporters from five different news organizations to reveal the identities of the sources who supplied this information. The reporters refused and were held in contempt. They eventually decided to contribute \$750,000 to help facilitate a settlement between the government and Lee rather than continue resisting the subpoenas. Reporters Committee for Freedom of the Press, *Settlement Reached in Lee Case Involving Reporter's Subpoenas*, June 2, 2006, <http://www.rcfp.org/news/2006/0602-con-settle.html>.

<sup>44</sup> See Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003) (increasing the number of TV stations a single entity could own locally and nationally, and relaxing rules limiting the number of radio stations that could be owned within a market, among other things). The FCC's rule changes were largely struck down in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

<sup>45</sup> Those opposed to the new rules included groups as disparate as MoveOn.org and the National Rifle Association (NRA). See Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645, 646-647 (2004).

<sup>46</sup> Charles Layton, *News Blackout*, COLUM. JOURNALISM REV., Dec./Jan. 2004, at 18.

order to satisfy their corporate owners who stood to benefit financially from the rule changes.

The exclusion of public voices and the failure to address public concerns is especially problematic in journalism and mass communication, because those organizations not only exert power through their relationships with their audiences, but also—in the case of news, at least—through their surveillance of other institutions. Unfortunately, many mainstream news organizations have been abandoning their role as public surrogates by de-funding investigative journalism,<sup>47</sup> loading up their programs with entertainment features,<sup>48</sup> using their news operations to promote the interests of advertisers or corporate parents,<sup>49</sup> applying business criteria instead of journalistic criteria to measure their success,<sup>50</sup> heaping attention on the wielders of power rather than the subjects,<sup>51</sup> and slashing newsroom jobs as a first response to fiscal challenges.<sup>52</sup>

To say that mainstream media companies are increasingly unresponsive to their audiences (or that they are too *want*-responsive instead of *need*-responsive) is no revelation. But it goes much deeper than that. Many of the ethical failings today are less the result of inadequacy than of deliberate strategies to exploit the trust of audiences.<sup>53</sup>

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<sup>47</sup> See, e.g., Steve Outing, *Investigative Journalism: Will it Survive?* EDITOR & PUBLISHER, Nov. 16, 2005.

<sup>48</sup> See, e.g., Lawrence K. Grossman, *TV News: The Great Celebrity Chase*, COLUM. JOURNALISM REV., July/Aug. 1998, at 23.

<sup>49</sup> Evening newscasts on local FOX-affiliated stations, for example, are filled with updates and features about other FOX shows like “American Idol.”

<sup>50</sup> See, e.g., DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* (2d ed. 2006) (describing the ascendancy of the “market model” in which profits are the dominant barometers of success, and contrasting it with the “public sphere” model in which success is tied to the advancement of public knowledge and the engagement of citizens in self-governance).

<sup>51</sup> See, e.g., LAWRENCE C. SOLEY, *THE NEWS SHAPERS: THE SOURCES WHO EXPLAIN THE NEWS* (1992) (describing the emphasis in news reporting on the opinions of elites).

<sup>52</sup> See generally, Joe Strupp, *Cuts Like a Knife*, EDITOR & PUBLISHER, Sept. 3, 2008, at 40.

<sup>53</sup> For example, broadcast and cable news organizations now increasingly fill their newscasts with unedited video news releases (VNRs), which are essentially micro-infomercials disguised as regular news segments. They look like news stories but are produced by companies to promote their products, and they are not—as audience members might reasonably assume—subjected to the same journalistic scrutiny and verification processes used by the news staff. See generally Lauren Aiello and Jennifer M. Proffitt, *VNR Usage: A Matter of Regulation or Ethics?* 23 J. OF MASS MEDIA ETHICS 219 (2008) (arguing that the undisclosed use of VNRs is unethical, whether or not it is illegal). The use of these kinds of tactics is particularly common among broadcasters, some of whom have even begun selling on-air interviews to local companies and organizations.

At the same time, government agents are ramping up their control of media content<sup>54</sup> while simultaneously acquiescing to corporate dominion over the communications infrastructure.<sup>55</sup>

However scholars perceive these issues or gauge their severity, it is important that they appreciate their capacity to create change and their obligation to act when important interests (whether the public's or the media's) are threatened by policies or actions that their *reason* or *research* rejects. It will not do anymore for scholars to work in quiet isolation and to treat their publications as the end points of the research process. All societies need active scholars who are willing to work against the forces that misshape public discourse and public policy.

#### IV. WHAT PUBLIC SCHOLARS IN MEDIA LAW AND ETHICS SHOULD DO

What, specifically, can scholars accomplish in this environment, and what influence can they wield in the shadow of all this institutional might? Is it naïve to suppose that they can either dismantle these alliances or at least check their excesses? The public as a whole has been unable to do it, after all. Yet scholars are uniquely situated to address these issues. They have unique claims to the core knowledge in their fields, which is the essential fuel of any regime of accountability, and because of that expertise they have access to channels of communication that are unavailable to the public. They are regularly sought out as news sources and their submissions to op-ed

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*See* Howard Kurtz, *Florida TV Station Cashes in on Interview 'Guests,'* WASH. POST, Oct. 16, 2003, at C1. But these ad-editorial entanglements are not limited to television. *The New Yorker*, for example, partnered with Target, allowing it to be the exclusive advertiser for the entire Aug. 22, 2005, issue. Stuart Elliott, *And What Would Thurber Say? A Single-Sponsor New Yorker*, N.Y. TIMES, Aug. 12, 2005, at C5. It also allowed Target to use the distinctive artistic style of *New Yorker* cartoons for all of its print ads in that issue, blurring the distinction between the editorial and advertising content, and the cover of that issue featured a series of red and white beach balls that were clear references to the trademark colors of the Target brand.

<sup>54</sup> The FCC has accelerated enforcement of its broadcast indecency rules, and it is exploring the possibility of regulating television violence. Congress, meanwhile, is debating whether to revive the Fairness Doctrine, the FCC policy that from 1949-1987 required broadcasters to address issues of public concern and to air competing points of view on those issues.

<sup>55</sup> For example, the FCC's public-interest requirements are rarely enforced against commercial broadcasters, the license renewal process has become a rubber-stamp with no serious evaluation of the public-interest contributions of the licensees, the FCC continues to push for deregulation of media ownership, and Congress has been unable to agree on legislation to prevent Internet service providers from charging fees to websites in order to ensure that their content is delivered promptly to end users.

pages and other public forums often have an imprimatur of credibility, by virtue of the authors' credentials and institutional affiliations, that helps ensure their dissemination.<sup>56</sup>

Scholars are also better positioned than most others because of the nature of their professional charge, which is, essentially, to seek the truth and to speak about it truthfully. Although citizens, corporations and organizations are expected to pursue their self-interests, albeit with some underlying concern for society, scholars *qua* scholars are expected to maintain a neutral detachment in their explorations of evidence and ideas and to eschew the bargains many people make in seeking to improve their economic or social standing. Scholars' overriding professional fidelity is to knowledge, so they are less encumbered by the conflicting loyalties that tend to inhibit or taint the contributions of others. This is not to say that scholars have no biases or corrupting allegiances. But their default posture, like judges applying the law, is assumed to be one of selfless circumspection, and that is something most people appreciate even if they recognize, as most scholars do, that they are not always up to the task.

There are a number of strategies one might employ in order to advance the goals of public scholarship, and there are many definitions of the concept. Some strategies focus on public interaction,<sup>57</sup> others encourage public partnerships,<sup>58</sup> and others suggest that the public be given a role in shaping scholars' research questions.<sup>59</sup> In the context of media law and ethics, the most productive approaches are those that serve two critical objectives: *transference* and *accountability*. The former refers to the basic goal of translating scholarly research in ways that are meaningful and useful to non-experts. This is a core function highlighted in nearly every conception of public scholarship.<sup>60</sup> The

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<sup>56</sup> Many media law and ethics scholars also have worked as media professionals themselves, or have some special familiarity with media systems, professional practices, and social networks so they are particularly well-equipped to promote their work and broker media appearances.

<sup>57</sup> See, e.g., Jeffrey C. Bridger & Theodore R. Alter, *The Engaged University, Community Development, and Public Scholarship*, 11 J. OF HIGHER EDUC. OUTREACH & ENGAGEMENT 175 (2006).

<sup>58</sup> See, e.g., *supra* note 1. This can involve things like commissioned research, service-learning projects or academic-public collaborations.

<sup>59</sup> See, e.g., Statement of Public Scholarship Committee, University of Minnesota (undated), <http://www.engagement.umn.edu/cope/archives/cholar.html> (“[P]ublic scholarship means optimizing the extent to which University research informs and is informed by the public good, maximizes the generation and transfer of knowledge and technology, educates the public about what research the University does, and listens to the public about what research needs to be done.”) (emphasis added).

<sup>60</sup> *Id.* See also *supra* note 1, using the term “popularization.” Scholars serve a similarly useful function when they synthesize existing research to provide the kind of scale and context that is often missing from examinations of public controversies. Debate about whether the Federal Communications Commission (FCC) should begin regulating television violence, for example,

second objective, accountability, gets less attention but is especially vital in light of the challenges to professional ethics, the threats to media independence and the broader collapse of power into fewer hands. Both transference and accountability, properly pursued, are also essential to serving the overarching purpose of public scholarship.<sup>61</sup>

Scholars can serve this transference function by acting as news sources, speaking to community groups, writing for trade or popular publications, or engaging in other acts that are designed to enhance the substantive quality of public discourse. This transfer of knowledge<sup>62</sup> can help people to better understand their worlds and make better choices, provided it is done well. The promise of public scholars is that they will be able to cut through the cacophony of chirping pundits and provide richer assessments. Their role is to complicate the simple and to simplify the complicated by drawing upon their research and expertise to situate public issues in their proper conceptual, theoretical and historical context.<sup>63</sup> They can only do these things, however, if they avoid the trappings of the forum by resisting the pressure to reduce complex problems into the shallow dichotomies that are becoming the staples of popular discourse, particularly on television and radio.<sup>64</sup>

Public scholars are most helpful when they are able to subvert those formulas and bring scale and perspective to public discussions. This is not just desirable; it is necessary, because there are real consequences when scholars fail to do these things. Media lawyers and media law scholars, for example, have long argued that the public's resistance to the journalist's privilege<sup>65</sup> protection is rooted in a false belief that it is a

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should have as its foundation the rich body of existing research examining the relationship between violent content and violent behavior.

<sup>61</sup> See *supra* note 6 and accompanying text.

<sup>62</sup> I have deliberately avoided the phrase "contextualized knowledge," favored by some authors (see, e.g., Inna Kotchetkova, Robert Evans and Susanne Langer, *Articulating Contextualized Knowledge: Focus Groups and/as Public Participation?* 17 *SCIENCE & CULTURE* 71 (2008), because it is redundant. Knowledge without context is simply information. See *infra* note 63.

<sup>63</sup> We need to help move the public up the information-knowledge-wisdom hierarchy. See T.S. Eliot, *Choruses from The Rock* (1934) reprinted in T.S. ELIOT, *COLLECTED POEMS 1909-1962* at 148-149 (1963) ("Where is the wisdom we have lost in knowledge? Where is the knowledge we have lost in information?"). Others have suggested that "data" should precede "information" in this sequence. Russell L. Ackoff, *From Data to Wisdom*, 16 *J. OF APPLIED SYS. ANALYSIS* 3 (1989).

<sup>64</sup> Doing this could also serve another goal of public scholarship noted by Bridger and Alter: to "restore civility to [our] discourse." *The Engaged University*, *supra* note 57, at 175.

<sup>65</sup> The reporter's privilege is the right of journalists to refuse to comply with certain subpoenas seeking their testimony or work products, particularly those requiring disclosure of confidential sources. The U.S. Supreme Court refused to recognize the privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972), but many lower federal courts have recognized some form of the

special right<sup>66</sup> bestowed on the established media rather than a public right claimable by anyone who seeks to serve as a monitor of powerful interests.<sup>67</sup> By more clearly outlining the nature of the protection, whom it benefits and how it fits within the constitutional design, media law scholars can help the public make knowledgeable judgments.<sup>68</sup> Law professor Lawrence Lessig provided another example recently when he suggested that Congress' passage of the Copyright Term Extension Act,<sup>69</sup> and the Supreme Court's refusal to strike down that law,<sup>70</sup> were partly the fault of lawyers and legal scholars who failed to convey to Congress, the Court and the public the nature of the underlying controversy and the full effect of its enforcement.<sup>71</sup> The same kinds of pitfalls and opportunities exist in the world of media ethics. Research showing a systematic bias in media coverage of a political candidate could, if revealed to voters, have a real impact on an election. And evidence of advertising strategies that shift traditional conceptions of truth-telling could affect the economic independence of consumers, but only to the extent that this knowledge is transferred to them.

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privilege, and 37 states and the District of Columbia protect the privilege by statute. See Reporters Committee for Freedom of the Press, *Reporter's Privilege Compendium*, <http://www.rcfp.org/privilege/index.php>.

<sup>66</sup> See Michael Battle, *No Special Privilege*, USA TODAY, June 22, 2006, at 12A.

<sup>67</sup> The definition of "journalist" varies in the jurisdictions that recognize the reporter's privilege. But the trend in the federal courts is to employ an encompassing definition that protects anyone who serves a journalistic function. See *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (granting protection to those who have "the intent to use the material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.").

<sup>68</sup> I do not mean to suggest that all media law scholars do, or should, support recognition of the reporter's privilege; only that they should seek to ensure that the public's judgments on those issues are informed ones.

<sup>69</sup> This law extended copyright owners' rights by 20 years. Pub. L. No. 105-298. 112 Stat. 2827. Concern over the issue was triggered by Disney's copyright on Mickey Mouse, which was about to expire before Rep. Sonny Bono led the charge in Congress to extend the terms of all existing and future copyrights.

<sup>70</sup> *Eldred v. Ashcroft*, 537 U.S. 136 (2003).

<sup>71</sup> Lessig argued that although the initial trigger for passage of the statute was Disney's expiring copyright on Mickey Mouse, the case was really about the public's ability to use known cultural products to create new works, and about the ways in which innovation would be inhibited by vesting copyright owners with too much control over their work. Lawrence Lessig, *Free Culture: Copyright and the Future of Ideas* (Final Talk), public lecture at Stanford University, Jan. 31, 2008. Podcast available at <http://itunes.stanford.edu>.

The traditional public-scholar approaches represent a knowledge-as-power framework, and they are useful as far as they go. But they work as only an indirect kind of empowerment. They still require a deliberate effort by the audience to integrate and make use of that knowledge. What is needed now, however, is for scholars to broaden and intensify our public roles, to go beyond the transfer of knowledge by acting more aggressively as intermediaries between the government and the media, and between the media and the public. Many scholars resist this, because they fear an erosion of their credibility if they are perceived as advocates. That is a valid concern, but credibility is not endangered by what this essay proposes, which is not for scholars to abandon their neutrality in the exploration of ideas but rather (1) to fearlessly endorse policy proposals, legal standards or ethical practices that they believe are best, whether as matters of empirical evidence, principle, or both, (2) to plainly call out government officials who overreach in their efforts to control the media and, (3) to expose media professionals who do not live up to the commitments they make to their audiences. Certainly a fine line separates the *active* and the *activist*, but better that scholars occasionally step across that line than never approach it in the first place.

Accountability cannot be something that is incidental to what scholars do. It must be a goal they actively pursue as agents of the people in their relationship with the media, and as agents of the media in their relationship with the government.<sup>72</sup> They can do this in part through transference strategies, but also more deliberately through the issues they choose to examine and in the research questions they pose. For some scholars, this might mean deliberately crafting research projects that address questions that are relevant to accountability goals. For others, it might simply mean considering the implications of their research on those questions to ensure they are not overlooked. A media law or ethics scholar who is interested in a historical topic, for example, might not design the project with accountability in mind, but the findings might help contextualize a current conflict.

Scholars can go still further by creating research centers and other organizational entities that serve accountability goals, like the Annenberg Public Policy Center at the University of Pennsylvania, headed by Kathleen Hall Jamieson, which addresses media and public policy,<sup>73</sup> and Free Press, a media reform organization launched by Robert McChesney as an outgrowth of his scholarly work.<sup>74</sup> These kinds of bodies can provide more sustained oversight than individual scholars acting alone, and they can provide scrutiny that is grounded in research-based knowledge—something that is rarely supplied by the proliferating horde of online commentators.

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<sup>72</sup> To say that scholars are “agents” of the public and the media is not to say they take direction from them. It simply means that they are attentive to public and media interests when those interests are threatened.

<sup>73</sup> See <http://www.annenbergpublicpolicycenter.org>.

<sup>74</sup> See <http://www.freepress.net>.

A focus on accountability also requires that scholars make it a priority to address the most pressing questions confronting society. This assertion should be obvious, but scholars often do the opposite. They scatter within their disciplines, staking claims to new areas of inquiry as a way of forging their professional identities.<sup>75</sup> They then reward each other for those efforts by exalting novelty over impact and by keeping alive the enduring conceit that their work's obscurity is somehow a marker of its value. While there is merit in taking a no-stone-unturned approach to scholarship, the current system of rewards tends to diffuse scholarly efforts and to push faculty into areas that may be interesting but that are often removed from the subjects of greatest consequence. Questions like "What is truth in advertising,"<sup>76</sup> "Who is a journalist,"<sup>77</sup> and "How do we define the public interest"<sup>78</sup> are not new, but they are undoubtedly salient and need to be continually reevaluated in changed contexts. Some questions and issues are bigger or more pressing than others, and they should be the focus of scholars' collective efforts, even though some of them will still need to keep exploring the more remote corners of their disciplines.

## V. THE URGENCY OF PUBLIC SCHOLARSHIP IN MEDIA LAW AND ETHICS

Media law and ethics scholars are ahead of many of their academic colleagues in their willingness to engage the public and to find non-traditional outlets for their research and ideas. But there is more that they can do, and more that they must do to protect the

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<sup>75</sup> There are certain theoretical frameworks and methodological approaches around which scholars tend to gravitate, and that clustering is generally useful. But when it comes to particular issues or subject areas, they tend to pull apart from each other.

<sup>76</sup> The current emphasis on clandestine advertising strategies (*e.g.*, guerilla marketing, product integration, buzz marketing) makes this especially salient. Because many of these tactics depend for their success on the audience believing something that is false, they are putting pressure on the traditional conceptions of truth in advertising.

<sup>77</sup> This remains a central question in both ethics and law. The federal courts are deeply conflicted about the existence and scope of the First Amendment reporter's privilege, among other legal protections, and the issue of journalistic identity is at the core of those disputes. That is certainly true in the realm of professional ethics as well where communicators share increasingly divergent conceptions of what kinds of messages are most credible and which media are most worthy of the public's attention.

<sup>78</sup> The Federal Communications Commission still regulates broadcast radio and television, imposing on them a unique obligation to serve the "public interest, convenience and necessity." The traditional justifications for this differential treatment (spectrum scarcity, the pervasiveness of broadcast signals), however, are withering with the proliferation and convergence of media, and lawmakers and judges are still trying to determine what the public ought to be able to expect (as a matter of ethics) and demand (as a matter of law) from mass media.

interests of both media professionals and the public. The problems today are especially acute. The ethical devolution within many quarters of the media professions, the expansion of corporate influence and the intrusion of government officials into media domains make this an especially pressing moment for scholars to reevaluate the aims of their research and other activities.

One area in which scholars have fallen down recently is in checking the excesses of the federal government (although they are certainly not alone in that failure). The powers of the federal government, particularly the executive branch, grew exponentially over the past eight years, and the Bush Administration wasted few opportunities to antagonize its perceived enemies in the press. The Justice Department dogged journalists with federal subpoenas,<sup>79</sup> seized their mail,<sup>80</sup> and searched their phone records.<sup>81</sup> Some federal officials even publicly pondered whether to bring espionage charges against journalists who exposed the government's illegal wiretapping program<sup>82</sup> and its rendition of prisoners to secret CIA prisons.<sup>83</sup> Public and scholarly resistance to these violations

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<sup>79</sup> The prominent target of a federal subpoena was *New York Times* reporter Judith Miller who spent 85 days in jail for refusing to divulge the identity of the anonymous source who leaked to her the identity of undercover CIA agent Valerie (Plame) Wilson. Her attempt to quash the subpoena was denied. In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S.Ct. 2977 (2005). Miller is just one of dozens of reporters who have been subpoenaed in federal cases over the past several years. For an overview of those cases, see Reporters Committee for Freedom of the Press, *Special Report: Shields and Subpoenas in Federal Courts*, last updated June 27, 2008, at [http://www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html).

<sup>80</sup> In 2003, for example, an Associated Press reporter in the Philippines sent a package to a co-worker in the United States that was confiscated by the FBI even though the quarantined documents in that package were from public records. See *FBI Returns Lab Report to News Service*, ASSOC. PRESS, May 11, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=11455>.

<sup>81</sup> U.S. Special Prosecutor Patrick Fitzgerald searched the phone records of two *New York Times* reporters in order to discover the identities of anonymous sources who leaked details of a planned government raid of two Islamic charities. The reporters' challenge to the search was denied in *New York Times v. Gonzalez*, 459 F.3d 160 (2d Cir. 2006).

<sup>82</sup> *New York Times* reporters James Risen and Eric Lichtblau broke the story of the National Security Administration's domestic surveillance program in 2006 and subsequently won the Pulitzer Prize. After later publishing a story about the Treasury Department's anti-terrorism bank-monitoring program, Republican Congressman Peter King of New York urged that the *Times* be investigated for treason. Rani Gupta, *Reporters or Spies?* 30 NEWS MEDIA & THE LAW 4 (Fall 2006).

<sup>83</sup> *Washington Post* reporter Dana Priest won a 2006 Pulitzer Prize for breaking this story. President Bush called Priest's reporting "disgraceful." Michael Tomasky, *Keller Must Stay*, AM. PROSPECT (Web only), June 30, 2006, <http://www.prospect.org/cs/articles?articleId=11689>.

was muted, in part because the government defended itself by raising the specter of security breaches and terrorist attacks.

Many news organizations, meanwhile, have done little to inspire the public's confidence and to position themselves as the victims in these battles. There are many journalists doing exceptional reporting today, but their work is increasingly crowded out by sensational and commercialized material that is of little value to audiences but that yields bigger returns for owners and advertisers who are wresting more control over content choices and are killing professionalism in the process. The public-interest spirit of journalism is slowly giving way to the same ruthless self-focus that pervades much of the rest of corporate America. Not only is there a lack of commitment to serious news, the whole concept of news is being transformed by media owners who treat it as just another commodity that can be crafted and arranged in any way that serves the bottom line. Many mainstream media organizations, in their efforts to accommodate their owners and to maximize profits, have changed news at a molecular level by amalgamating it with commercial content and creating unseemly hybrids that the audience is left to detect.

The same kind of cynical manipulation is now pervasive in advertising and public relations. Professionals in those fields have always worked from a different set of rules than journalists, but they have still embraced some common standards that the public has come to expect and that they have enshrined in professional codes of ethics like those of the Public Relations Society of America<sup>84</sup> and the American Association of Advertising Agencies.<sup>85</sup> Advertising and PR professionals have engaged in a compact with their audiences by virtue of these public pronouncements, and by virtue of the other ground rules of communication that have evolved over time,<sup>86</sup> through which they have confessed their intent to influence us but with a concomitant promise not to deceive. In the past few years, however, many advertising and PR professionals have changed those rules without alerting their audiences and without rescinding the explicit assurances that remain in their ethics codes. The AAAA and PRSA codes clearly prohibit deception and false testimonials, among other things, yet their members routinely disguise commercial messages as news (through payola,<sup>87</sup> video news releases<sup>88</sup> and other arrangements<sup>89</sup>),

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<sup>84</sup> The PRSA Member Code of Ethics was most recently revised in 2000 and is available at [http://www.prsa.org/aboutUs/ethics/preamble\\_en.html](http://www.prsa.org/aboutUs/ethics/preamble_en.html).

<sup>85</sup> The AAAA Standards of Practice was first adopted in 1924. It was most recently revised in 1990 and is available at <http://www2.aaa.org/about/association/Pages/standardspractice.aspx>.

<sup>86</sup> One of these is the allowance we give to advertisers to engage in puffery—harmless exaggerations about their products (*e.g.*, “Sleeping on a Sealy mattress is like sleeping on a cloud”). As long as this hyperbole is obvious to us, we have no standing to claim we have been deceived.

<sup>87</sup> This refers to any payment given to a broadcaster in exchange for airing particular content. Federal law prohibits these pay-for-play deals in broadcasting, but they are still common. The

integrate their products into non-commercial contexts,<sup>90</sup> and employ guerilla marketing tactics in which commercial pitches are camouflaged within ordinary human encounters.<sup>91</sup>

These changes in advertising and public relations are not simple tactical adjustments. They are part of a fundamental reordering of the relationship between these communicators and their audiences. Conventional advertising, as author Malcolm Gladwell notes, has always been about “trying to persuade us, or trying to charm us,” but it hasn’t usually “been about trying to trick us.”<sup>92</sup> Unfortunately, trickery is becoming conventional. And it will continue to be normalized unless scholars and consumers insist on something different.

## VI. CONCLUSION

Clearly there is a role for public scholarship to play in an environment where many advertising and PR communicators unabashedly disregard their promises to their audiences, where news organizations cast aside their public-service commitments, and where government officials aggressively interfere with the newsgathering and watchdog functions of journalists. The public needs allies who can work with them to hold these institutions accountable. Scholars need to answer this call by speaking out in public forums, educating the public, using research to document the excesses of government and the betrayals of media companies, and proposing new normative frameworks to both reorient professional practices and promote the proper balance between freedom and restraint.

Doing those things will involve more than just taking research to the public. It will require a reevaluation of the issues that scholars address and the questions they pose.

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FCC has recently initiated a crackdown on these practices, however. *See* Notice of Apparent Liability for Forfeiture, Comcast Corporation, DA 07-4005, Sept. 21, 2007.

<sup>88</sup> *See supra* note 53.

<sup>89</sup> *Id.*

<sup>90</sup> Product placement is increasingly common in news programming and can include anything from the display of Starbucks coffee mugs on anchor desks to the profiling of particular products in segments on fashion trends or hot gift ideas.

<sup>91</sup> *See* Rob Walker, *The Hidden (In Plain Sight) Persuaders*, N.Y. TIMES MAGAZINE, Dec. 5, 2004, at 68, describing, among other things, a sausage company’s tactic of paying people to act as enthusiastic devotees and to promote their products at neighborhood barbeques and in private conversations.

<sup>92</sup> MORLEY SAFTER, *Undercover Marketing Uncovered*, 60 MINUTES (interview with Malcolm Gladwell), July 25, 2004. Transcript available at <http://www.cbsnews.com/stories/2003/10/23/60minutes/main579657.shtml>.

It will require an attitudinal shift in academia about the intellectual value of public-scholar initiatives. It will require institutional support, particularly by promotion and tenure committees. And it will require that scholars abandon their feckless agnosticism on the most important questions of the day, particularly when their research and reason clearly point to the answers. Scholars do not enhance their credibility by sitting on their hands in the ivory tower; they merely ensure their irrelevance.

# THE POLITICAL ECONOMY OF FREE SPEECH AND NETWORK NEUTRALITY: A CRITICAL ANALYSIS

JEFFREY LAYNE BLEVINS AND SARAH C. BARROW

*The network neutrality debate has been dominated by neoliberal economic arguments and technological theories, while comparatively little attention has been given to normative First Amendment concerns. We expand upon this important line of inquiry by examining the legal issues and relevant case law from the critical vantage point of political economy. Because the medium of communication has determined the allocation of speech rights between media outlets and users, we posit that an equal access provision of the Internet would be in accordance with First Amendment jurisprudence and the participatory democratic nature of the medium.*

**Keywords:** First Amendment, internet, neoliberalism, network neutrality, participatory-democracy, political economy

## I. INTRODUCTION

In perhaps the first significant challenge to regulate speech on the Internet, a U.S. federal district court declared in 1996 that the Internet is the “most participatory form of mass speech yet developed,” and thus “deserves the highest protection from government intrusion.”<sup>1</sup> That case involved the constitutionality of the 1996 Communications Decency Act (CDA), which would have made illegal the transmission of obscene and indecent materials to minors over the Internet. In striking down the CDA, the court took a firm stand against censorship by the government of an important new medium. However, what action would the courts take if the Internet’s valuable democratic and participatory nature were threatened by another form of censorship? The Internet arguably faces such a crisis in the ‘network neutrality’ debate in the U.S. Congress.

Essentially, ‘network neutrality’ is the idea that all Internet content, no matter the type (text, video, audio, etc.) or who created it, should be treated the same in the transfer process. While there is not a consensus on what network neutrality means,

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<sup>1</sup> ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) [hereinafter *Reno I*].

a Congressional Research Service (CRS) report explained that most advocates for regulation in favor of net neutrality believe that “owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use that network; and should not be able to discriminate against content provider access to that network.”<sup>2</sup> Our analysis concerns both aforementioned tenets of net neutrality: the prevention of content restriction and ‘access-tiering.’

One common apprehension caused by the lack of net neutrality legislation is that Internet service providers (ISPs) will suppress content as they see fit, or block applications that compete with their own products and services. For instance, in 2006 Time Warner’s America Online (AOL) allegedly blocked all e-mails that mentioned “www.dearaol.com,” the website of an advocacy campaign opposing the company’s pay-to-send e-mail scheme.<sup>3</sup> Also in 2006, telecommunications company BellSouth purportedly shut down its customers’ access to the popular social network site MySpace.<sup>4</sup> Another example occurred in 2004 when a North Carolina ISP, Madison River, prevented their digital subscriber line (DSL) customers from using a rival’s Web-based phone service.<sup>5</sup> However, such blatant examples are assumed to be rare because ISPs are aware that such practices may result in the loss of customers and potential punitive action by the U.S. Federal Communications Commission (FCC), as occurred in the Madison River case.

However, a mounting concern for proponents of net neutrality is access-tiering, which is the idea that bandwidth priority will be given only to content from users willing or able to pay a fee. By charging an extra fee to prioritize some content, companies or individual webmasters who choose not to pay will essentially be relegated to a ‘slow-lane’ of Internet traffic. Consequently, slow page loading could be the death of even the most successful web pages. In this scenario, ISPs would be censoring content based upon one’s financial wherewithal. Accordingly, without some enforceable equal access provision of the Internet, which addresses both content suppression and access-tiering, “media conglomerates with a vast array of interests in content production and distribution would be clear winners, while more independent producers of content would shrivel

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<sup>2</sup> ANGELE A. GILROY, CONG. RESEARCH SERV. REPORT FOR CONGRESS, ORDER CODE RS22444, NET NEUTRALITY: BACKGROUND AND ISSUES (Updated December 20, 2007), at 1.

<sup>3</sup> See Stefanie Olsen, *AOL charged with blocking opponents’ e-mail*, CNET NEWS.COM, Apr. 13, 2006, available at [http://news.com.com/AOL+charged+with+blocking+opponents+e-mail/2100-1030\\_3-6061089.html](http://news.com.com/AOL+charged+with+blocking+opponents+e-mail/2100-1030_3-6061089.html).

<sup>4</sup> See Mark Hachman, *BellSouth says it’s not blocking MySpace*, PCMAG.COM, Jun. 2, 2006, available at <http://www.pcmag.com/article2/0,1895,1971082,00.asp>.

<sup>5</sup> See Andy Dornan, *Will ISPs Quarantine You From the Internet?* IT ARCHITECT, Jan. 1, 2006, at 14.

without access to the premiere networks.”<sup>6</sup> Perhaps, not surprisingly then, the net neutrality debate generally splits into two general stakeholder groups.

Advocates of net neutrality believe that some form of regulation is necessary that prevents telecommunications companies who provide broadband Internet access (through either cable or DSL) from discriminating against content producers. That is to say, advocates prefer that an equal access provision to the network be made into law. Supporters of net neutrality comprise a diverse group of content producers, including Amazon.com, eBay, Google and Yahoo!, as well as organizations such as the Christian Coalition, Gun Owners of America, and grassroots communities led by the Freepress.net website.<sup>7</sup> Prominent scholars, such as Lawrence Lessig and Timothy Wu, have also supported the idea of net neutrality.<sup>8</sup> Net neutrality proponents’ main argument during a 2006 Senate hearing on the issue was that without some provision, technological innovation and economic growth of the Internet will be drastically impaired and compromise the United States’ position as a global leader in the information age. Lawrence Lessig observed that “the innovation and explosive growth of the Internet is directly linked to its particular architectural design” and without this neutral design, applications ranging from the World Wide Web to HTML-based e-mail would have never been developed.<sup>9</sup> Vint Cerf and Earl Comstock explained that net neutrality regulation would continue to enable growth in technological innovation that would keep the United States at the cutting edge, rather than lagging behind other developed

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<sup>6</sup> Jeffrey Layne Blevins, *Source Diversity after the Telecommunications Act of 1996: Media Oligarchs Begin to Colonize Cyberspace*, 3 TELEVISION & NEW MEDIA 95, 109 (2002). Although, it is impossible to know just how much money the anti-neutrality telecommunication giants would stand to make by metering content providers, it would nonetheless provide another source of revenue, as well as market leverage for those corporations involved in both content production and distribution. For that reason, some of the largest telecommunication companies have spent millions lobbying Congress and funding research in opposition to network neutrality legislation.

For further illustration of these later points, see, Neil Trambe & Eric Warren, *Debate Over Internet Equality is Hardly Neutral*, CAPITALEYE.ORG, Jun. 23, 2006, available at <http://www.capitaleye.org/inside.asp?id=221&format=print>; Bruce Kushnick, *Corporate-funded research designed to influence public policy*, NIEMAN WATCHDOG, Oct. 1, 2007, available at <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00208>.

<sup>7</sup> See Paul Ganley & Ben Allgrove, *Net neutrality: A user’s guide*, 22 COMPUTER LAW AND SECURITY REPORT 454, 455 (2006).

<sup>8</sup> See, *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Lawrence Lessig); Tim Wu, *Network neutrality, broadband discrimination*, 2 J. ON TELECOM. AND HIGH TECH. LAW 141 (2003); Tim Wu, *The broadband debate: A user’s guide*, 3 J. ON TELECOM. AND HIGH TECH. LAW 69 (2004).

<sup>9</sup> Lessig, *supra* note 8.

nations.<sup>10</sup> Furthermore, Gary Bachula claimed that building “economic toll booths” into the Internet would prevent small entrepreneurial start-up companies from growing, or even developing at all.<sup>11</sup>

Opposition to net neutrality primarily comes from the largest players in the telecommunications industry, who assert that regulation could be economically disastrous for both broadband providers and consumers. Telecommunications giants, such as AT&T, Comcast and Verizon have been the “most vocal” on the issue.<sup>12</sup> National Cable and Telecommunications Association (NCTA) President Kyle McSlarrow and academicians Christopher Yoo and Adam Thierer have also expressed opposition to net neutrality regulation, as well as an online advocacy group called Hands Off the Internet (see <http://www.handsoff.org>).<sup>13</sup> The concern expressed by net neutrality’s opponents has neoliberal economic underpinnings, maintaining that regulation would remove any incentive for broadband providers to invest in and innovate the network. Additionally, opponents argue that funds received through access-tiering would prevent individual consumers from “foot[ing] the bill” for the development of the next generation of networks.<sup>14</sup> Some opponents have also maintained that the industry would not dare engage in behavior detrimental to consumer welfare at the risk of losing market share, and therefore regulation at this point would in effect be a solution without a problem.<sup>15</sup>

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<sup>10</sup> See, *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Vint Cerf); *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Earl Comstock).

<sup>11</sup> See, *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Gary Bachula).

<sup>12</sup> *Supra* note 7, at 455.

<sup>13</sup> See, *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Kyle McSlarrow); Christopher S. Yoo, *Beyond network neutrality*, 19 HARV. J. L. & TECH. 1 (2005); Christopher S. Yoo, *Network neutrality and the economics of congestions*, 94 GEO. L. J. 1847 (2006); Adam D. Thierer, *Net neutrality: Digital discrimination or regulatory gamesmanship in cyberspace?* POLICY ANALYSIS FOR THE CATO INSTITUTE, No. 507, Jan. 12, 2004, available at [http://www.cato.org/pub\\_cat\\_display.php?pub\\_cat\\_display.php?pub\\_cat=2](http://www.cato.org/pub_cat_display.php?pub_cat_display.php?pub_cat=2).

<sup>14</sup> See, *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Walter McCormick).

<sup>15</sup> See, *Hearing on Net Neutrality Before the Senate Comm. on Commerce, Science and Transportation*, 109th Cong. (Feb. 7, 2006) (statement of Kyle D. Dixon); McSlarrow, *supra* note 13; Christopher Wolf, *A legal perspective on “net neutrality”: existing remedies and lack of “ripeness” makes regulation perilous*, HANDSOFF.ORG, 2006, available at [http://handsoff.org/hoti\\_docs/studies/wolf.pdf](http://handsoff.org/hoti_docs/studies/wolf.pdf).

While many opponents claim that regulation is premature, several broadband providers have stated outright that they wish to enact access-tiering practices. According to BellSouth Corporation CEO William Smith, broadband providers should be allowed “to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc.”<sup>16</sup> Verizon CEO Ivan Seidenberg told the *Wall Street Journal*: “We have to make sure they [large content providers like Google] don’t sit on our network and chew up our capacity.”<sup>17</sup> In the fall of 2007, telecommunications giant Comcast was accused of blocking user access to many peer-to-peer file sharing websites. While Comcast officially denied that they block user traffic, a company executive speaking on condition of anonymity to a *New York Times* reporter later amended that claim to say that the company was in fact delaying or postponing file transfers using “data management technologies.”<sup>18</sup> Clearly, the incentive and ability for broadband providers to enact discriminatory practices like access-tiering, or differentiating among users based on the amount of downloading that takes place, is a present danger to the previously open nature of the Internet. Accordingly, the need for regulatory clarity is a pressing concern for both opponents and proponents of network neutrality.

However, while the debate over net neutrality has been framed mostly as a technological or economic matter within Congress and in the professional and academic worlds, there has been comparatively little focus on the First Amendment concerns raised by the issue. Works by Barbara Cherry and Bill D. Herman are two examples of legal scholarship that have considered the impact of net neutrality on free speech.<sup>19</sup> Both authors contend that the current lack of net neutrality regulation will erode First Amendment rights previously enjoyed on the Internet. Our analysis will expand upon this important line of inquiry by examining the legal perspectives and relevant U.S. case law from the critical perspective of political economy in order to identify whether the idea of network neutrality complies with or contravenes First Amendment jurisprudence. With a narrowly tailored focus in this analysis, our goal is to inject a normative legal framework into this debate, which heretofore appears to be predominated by neoliberal economic arguments and technological theories. A keen focus on First Amendment

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<sup>16</sup> See Jonathan Krim, *Executive wants to charge for web speed*, WASHINGTON POST, Dec. 1, 2005, at D5.

<sup>17</sup> Dionne Searcey & Amy Schatz, *Phone companies set off a battle over Internet fees*, WALL STREET JOURNAL ONLINE, Jan. 6, 2006, available at [http://online.wsj.com/article\\_print/SB113651664929039412.html](http://online.wsj.com/article_print/SB113651664929039412.html).

<sup>18</sup> Brad Stone, *Comcast: We’re delaying, not blocking, BitTorrent traffic*, NEW YORK TIMES ONLINE, Oct. 22, 2007, available at <http://bits.blogs.nytimes.com/2007/10/22/comcast-were-delaying-not-blocking-bittorrent-traffic>.

<sup>19</sup> See Barbara A. Cherry, *Misusing network neutrality to eliminate common carriage threatens free speech and the postal system*, 22 N. KY. L. REV. 483 (2006); Bill D. Herman, *Opening bottlenecks: On behalf of mandated network neutrality*, 59 FED. COMM. L. J. 107 (2006).

jurisprudence is needed in this case because no matter what economic or technological concerns may exist, any statute created by Congress or enforced by FCC will ultimately have to withstand constitutional scrutiny. We will begin with an explanation of the critical approach to legal analysis used here, followed by a brief summary of U.S. telecommunications policy that has shaped the network neutrality debate thus far, before turning to a deeper examination of the legal arguments and relevant case law. Lastly, we discuss our finding that the courts have applied medium-specific rationales in determining how speech rights are afforded between media outlets and users, which would warrant an equal access provision of the Internet.

## II. A CRITICAL APPROACH TO LEGAL ANALYSIS

As Laura Stein explained, a “critical approach to law recognizes that legal decisions are affected by contemporary politics, economics, and culture, as well as by the ideologies and social structures that the law seeks to protect.”<sup>20</sup> Moreover, an interpretation of the First Amendment that is “in accord with a more comprehensive vision of the role of communication in democratic society” is practical considering that all interpretations of the First Amendment “are grounded, explicitly or implicitly in normative assumptions about political and social life.”<sup>21</sup> The authors of the analysis presented here operate from the moral philosophical outlook described by Eileen Meehan, Vincent Mosco and Janet Wasko<sup>22</sup> in their overview of the political economy academic tradition. This line of political economy “goes beyond technical issues of efficiency to engage with basic moral questions of justice, equity, and the public good.”<sup>23</sup> As was done by Stein, we will examine “judicial interpretations of First Amendment law and policy against a normative definition of speech rights in a democracy.”<sup>24</sup> Accordingly, we will assess *how* the courts have decided past cases relevant to the network neutrality debate in order to formulate a rationale for how they *should* decide future ones.

From our analysis two lines of liberal-democratic theory, which are in opposition to each other, emerge in the net neutrality debate. Neoliberalism is one line of liberal

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<sup>20</sup> LAURA STEIN, *SPEECH RIGHTS IN AMERICA: THE FIRST AMENDMENT, DEMOCRACY, AND THE MEDIA* 6 (2006).

<sup>21</sup> *Id.* at 6.

<sup>22</sup> Eileen R. Meehan, Vincent Mosco, & Janet Wasko, *Rethinking Political Economy: Change and Continuity*, 43 J. OF COMM. 105, 108 (1993).

<sup>23</sup> Peter Golding & Graham Murdock, *Culture, communication, and political economy*, in *MASS MEDIA & SOCIETY* 15, 18-19 (James Curran & Michael Gurevitch eds., 1991).

<sup>24</sup> *Supra* note 20, at 5-6.

philosophy that traces its roots to 18<sup>th</sup> century liberalism,<sup>25</sup> and focuses on the limitation of state power. Instead, neoliberal philosophy prefers to enhance a private sphere that is constituted by free markets and private property. Neoliberal economics is the fundamental belief in “laissez faire capitalism, whereby markets are expected to govern all sectors of society, and government intervention not in line with commercial interests is viewed as inherently suspect.”<sup>26</sup> Brash neoliberal thought, as Robert McChesney put it, has been used to validate “the policies and processes whereby a relative handful of private interests are permitted to control as much as possible of social life in order to maximize their personal profit.”<sup>27</sup> Moreover, McChesney has asserted that neoliberalism has become “the defining political economic paradigm of our time.”<sup>28</sup>

Another line of liberal-democratic thought is participatory-democratic theory. As described by Stein, this philosophy stresses the need for “greater citizen participation in democratic processes,” as well as “an adequate resource base” for citizens to participate because democratic communication requires a form of public sphere in which individuals and speak without constraint.<sup>29</sup> We will find both of these liberal-democratic philosophies (neoliberalism and participatory-democracy) in the net neutrality debate as neoliberal thought provides opposition to government mandated net neutrality, while participatory-democratic principles support the ideas of non-discrimination and equal access.

### III. U.S. TELECOMMUNICATIONS POLICY AND NETWORK NEUTRALITY

To some extent the current debate over net neutrality started taking shape several decades ago when the FCC wrestled with how communication over computer networks should be viewed under the law and initiated a series of “Computer Inquiries” in 1966 to deal with the issue.<sup>30</sup> In this section we will retrace the genealogy of non-discriminatory provisions (pertinent to the ideas of content restriction and access-tiering) manifest in

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<sup>25</sup> *Id.* at 9.

<sup>26</sup> Victor Pickard, *Neoliberal Visions and Revisions in Global Communications Policy from NWICO to WSIS*, 31 J. OF COMM. INQUIRY 118, 121 (2007).

<sup>27</sup> Robert W. McChesney, *Introduction*, in Noam Chomsky, PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER 7 (1999).

<sup>28</sup> *Id.*

<sup>29</sup> *Supra* note 20, at 9.

<sup>30</sup> See Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L. J. 167 (2003).

these inquiries, as well as the Telecommunications Act of 1996 (TCA)<sup>31</sup> and subsequent FCC memorandum and orders pertaining to telecommunication mergers.

#### A. THE COMPUTER INQUIRIES

The FCC in “Computer Inquiry 1” sought to determine the “nature and extent of the regulatory jurisdiction to be applied to data processing services,” as well as to decide “under what circumstances, and subject to what conditions or safeguards, common carriers should be permitted to engage in data processing.”<sup>32</sup> The concern was that communications monopolies (namely AT&T at the time) were using computers not only for basic communications services, but also for newer data processing-like services with the excess capacity in their mainframe computers. The FCC was considering whether to regulate data processing in the same way it regulated communications, and the implications were significant. The FCC decided on a division between computer processing used for pure communications and that used for pure data processing. In cases that looked like a little bit of both types, the FCC created a catch all category called hybrids. The FCC recognized that data processing services were dependent on the use of the underlying communications network, and since data processing was a competitive market and communications was an uncompetitive market, the FCC chose to regulate common carriers (covered under Title II of the Communications Act)<sup>33</sup> that wished to enter the data processing market with safeguards to prevent their monopoly from stifling competition.<sup>34</sup> Computer Inquiry 1’s “maximum separation” safeguard policy required common carriers to set up a fully separate subsistence (including separate bookkeeping, staff, officers, and equipment, for example) if they wanted to enter the data processing market.<sup>35</sup> While there was very little language about non-discriminatory practices, the final decision did include a stipulation that common carriers could not promote the services provided by its subsidiary, nor could the subsidiary use the name and/or brand of the carrier.

In Computer Inquiry 2 in 1976, the FCC found the dichotomy between “pure communications” and “pure data processing” unsustainable, and therefore established a

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<sup>31</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>32</sup> Reg. and Policy Problems Presented by the Interdependence of Computer and Comm. Servs., *Notice of Inquiry*, 7 F.C.C.2d 11, 8 Rad. Reg.2d (P & F) 1567 (1966).

<sup>33</sup> Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (1934).

<sup>34</sup> See Cannon, *supra* note 30.

<sup>35</sup> Reg. and Policy Problems Presented by the Interdependence of Computer and Comm. Servs., *Final Decision and Order*, 28 F.C.C.2d 267, para. 10, 21 Rad. Reg.2d (P & F) 1591 (1971).

new framework separating basic from enhanced services.<sup>36</sup> The FCC now considered basic services to be the simple movement of information or data, and any computer processing (such as data storage) that was done by the network was done “for the benefit of the network, and not for the edge user.”<sup>37</sup> Enhanced services, however, included more extensive computer processing so that the information that entered the network was somehow altered or changed. In this inquiry, the FCC determined that the maximum separation provision called for in Computer Inquiry 1 would only be applied to the largest carriers, such as AT&T and GTE. However, smaller carriers were still seen as having a bottleneck position, and so the FCC required them to provide unbundled services to compete with enhanced service providers.

By Computer Inquiry 3, the FCC still liked the conceptual basis of basic versus enhanced services, but had come to believe that the structural safeguards from Computer Inquiries 1 and 2 had proved to be disincentives to efficiency and innovation and therefore were problematic for public welfare.<sup>38</sup> The new regulatory safeguards developed in Computer Inquiry 3 included a short-term solution, called Comparatively Efficient Interconnection (CEI), and a long-term solution, named Open Network Architecture (ONA). The FCC now required carriers to file a CEI plan for the short-term while they developed ONA plans. The CEI plan would list what provisions and services the carrier was providing to its enhanced services subsidiary, and carriers were required to provide the same provisions to competing carriers. For that reason, carriers could enter the enhanced services market without developing a structurally separate subsidiary, but could integrate such a subsidiary into its existing operations. ONA required carriers to break apart their networks in a manner similar, but not identical to unbundling. This would allow competing enhanced service providers to purchase individual elements and build new services.

After the final order of Computer Inquiry 3, the 9<sup>th</sup> Circuit Court remanded the proceeding back to the FCC because it was unconvinced that ONA requirements would prevent carriers from engaging in discriminatory behavior.<sup>39</sup> The FCC later subsumed the Computer Inquiry 3 proceeding by its Broadband Notice of Proposed Rulemaking,<sup>40</sup> but mandated that CEI plans were still a requirement for telecommunications carriers to

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<sup>36</sup> Second Computer Inquiry, *Final Decision*, 77 F.C.C.2d 384, 47 Rad. Reg.2d (P & F) 669 (1980).

<sup>37</sup> See Cannon, *supra* note 30, at 183.

<sup>38</sup> Amendment of Sections 64.702 of the Comm’n’s Rules and Regs. (Third Computer Inquiry). *Report and Order*, 104 F.C.C.2d 958, para. 3, 60 Rad. Reg.2d (P & F) 603 (1986).

<sup>39</sup> Cal. v. FCC, 39 F.3d 919 (9th Cir. 1994).

<sup>40</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Notice of Proposed Rulemaking*, 17. F.C.C.R. 3019 (2002).

enter the enhanced services market. Near the time of the *California v. FCC*<sup>41</sup> decision, Congress began formulation of what would become the TCA, which would also impact the net neutrality debate that followed. Nonetheless, we can see throughout the Computer Inquiries the clear concern for non-discrimination among carriers. This concern is also spoken to in the TCA.

#### B. THE TELECOMMUNICATIONS ACT OF 1996 AND FCC MERGER CONDITIONS

Although the concerns about content restriction and access-tiering are not addressed explicitly within the TCA, a spirit of non-discrimination is clearly evident. While there are provisions against discriminatory behavior throughout the TCA, two main sections of Title II of the Communications Act (as amended by the TCA) deal with the issue in depth. For instance, Section 202 specifies that common carriers cannot make any “unjust or unreasonable” discrimination in practices, charges, or services; cannot give an unreasonable preference to any particular person or group; and cannot subject any particular person or group to “any unreasonable prejudice or disadvantage.”<sup>42</sup> This would in some way seem to deal with idea of content discrimination, and is congruent with Section 230 of Title II, which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>43</sup> That is, service providers are not responsible for content displayed by other providers due to their common carriage status. Additionally, Section 251 appears relevant to the notion of access-tiering wherein it states that all telecommunications carriers have the duty to provide equal interconnection with other competing telecommunications carriers, including nondiscriminatory rates, terms and conditions.<sup>44</sup>

The ideals presented in the TCA, especially the prevention of access-tiering, are also found in the FCC imposed condition on two high-profile mergers of telecommunications companies. For instance, when Bell Atlantic merged with Nynex in 1997, the FCC required the joined telecommunications company to provide shared transport of competitors’ traffic across its network, to treat that traffic in the same way it would treat its own, and to do so without charging access fees.<sup>45</sup> In a more recent and

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<sup>41</sup> *Supra* note 39.

<sup>42</sup> *Supra* note 31.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> In the applications of NYNEX Corporation, transferor, and Bell Atlantic Corporation, transferee, for consent to transfer control of NYNEX Corporation and its subsidiaries, *Memorandum Opinion and Order*, File No. NSD-L-96-10, 12 F.C.C. Rd. 19985 (1997).

more notable merger between AT&T and BellSouth, the newly formed telecommunications giant agreed to two sets of net neutrality provisions in order to win FCC approval.<sup>46</sup> The company agreed to uphold the FCC's principles on net neutrality, which include the following:

- (1) consumers are entitled to access the lawful Internet content of their choice;
- (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;
- (3) consumers are entitled to connect to their choice of legal devices that do not harm the network; and
- (4) consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>47</sup>

AT&T/BellSouth also agreed to uphold the neutrality of its network and routing system by refusing to provide "service that privileges, degrades or prioritizes any packet . . . based on its source, ownership, or destination" to any Internet service or content providers.<sup>48</sup> However, the agreement came after a contentious stalemate within the FCC, as the agency vote for approval had been deadlocked 2-2 with Commissioner Robert McDowell having recused himself because he used to work for a trade group that opposed the merger.<sup>49</sup> Moreover, after AT&T/Bellsouth made the aforementioned concessions to win the votes of the two holdout commissioners, FCC Chairman Kevin Martin paradoxically issued a statement in which he indicated that those conditions would not be enforced by the agency and avowed that a network neutrality "requirement is not necessary and may impede infrastructure deployment."<sup>50</sup> Martin's statement added a layer of political complexity to an already divisive economic, technological, and legal issue.

Throughout this section we have shown the lineage of non-discriminatory language throughout the computer inquiries, the Telecommunications Act of 1996, and

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<sup>46</sup> *Notice of Written Ex Parte Communications*, In the Matter of Review of AT&T Inc. and BellSouth Corp. Application for Consent to Transfer of Control, WC Docket No. 06-74 (2006).

<sup>47</sup> FCC Policy Statement 05-151 (2005).

<sup>48</sup> *Supra* note 46, at 9.

<sup>49</sup> Leslie Cauley, *AT&T-BellSouth deal called 'breakthrough' for consumers*, USA TODAY ONLINE, Jan. 1, 2007, available at [http://www.usatoday.com/money/industries/telecom/2006-12-28-att-bellsouth\\_x.htm](http://www.usatoday.com/money/industries/telecom/2006-12-28-att-bellsouth_x.htm).

<sup>50</sup> Joint statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (2006).

subsequent FCC conditions on telecommunication mergers. However, without explicit statutory law that more clearly demarcates the rights of ISPs and Internet users, along with fitting FCC enforcement, an important First Amendment debate remains. In the following section, we explore this problem further.

#### IV. TWO FIRST AMENDMENT PERSPECTIVES, ONE INTERNET

Perhaps ironically, both sets of stakeholder groups, advocates and opponents of net neutrality, have invoked the First Amendment to support their positions. In this section we will examine the legal arguments and case law that reinforces each side's standpoint. In doing so, two competing perspectives of liberal-democratic thought emerge about how speech rights should be afforded on the Internet, including neoliberalism and participatory-democratic theory.

##### A. NETWORK NEUTRALITY VIOLATES THE FIRST AMENDMENT RIGHTS OF ISPS

The fundamental tenet of this position is that ISPs should be recognized as speakers, or at least as editors, and therefore have a right to suppress content as they see fit.<sup>51</sup> This line of thinking focuses on jurisprudence in which compelling an entity to convey a message (or messages) it does not wish to express is the same as preventing that entity from conveying messages that it wishes to express. This principle is firmly established in the print medium via the *Miami Herald v. Tornillo* decision, in which the Supreme Court said that compelling speech interfered with the editorial autonomy of newspapers.<sup>52</sup> Similarly, Yoo claimed that broadband providers should be considered editors, adding that Internet users would benefit from "editorial filters" that would manage the "avalanche of content" available and provide some guarantee of content quality and diversity.<sup>53</sup> Therefore, network neutrality provisions would prevent ISPs from restricting access to websites with content that it feels is inappropriate. For instance, certain ISPs may not want to carry speech that in their determination is indecent, pornographic, or related to hate groups or particular religious or political persuasions.

Of course, filtering software applied at the discretion of Internet users would empower individual users (rather than ISPs) to edit content as each person sees fit. The use of filtering software has been a key issue in the Justice Department's repeated

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<sup>51</sup> See Randolph J. May, *Anything but neutral: Freedom of speech rights of broadband internet service providers*, NEW JERSEY LAW JOURNAL, Sep. 4, 2006.

<sup>52</sup> *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

<sup>53</sup> See Yoo, *supra* note 13, at 1907.

attempts to enforce the Child Online Protection Act.<sup>54</sup> In its last ruling on the matter, the Supreme Court said that the government had not demonstrated that legal penalties would effectively deter minors from accessing harmful content as well as the use of filtering software.<sup>55</sup> While the Court was sympathetic to the notion of protecting children from harmful content, it clearly signaled that filtering software installed voluntarily by Internet users is less destructive to the First Amendment rights of those users. In essence, a similar dilemma is presented here, except that ISPs (not the government) are proposing to do the restricting of content. Nonetheless, those telecommunication companies are asserting their right to do so, based on their First Amendment freedoms as speakers and editors. Additionally, they make this assertion premised on their basic property rights in the access they provide to the Internet, which engages the issue of access-tiering.

Thierer supports a property rights perspective in which network access providers have the right to manage access as they wish, noting that such control is often warranted so that providers can offer their customers the best service they can.<sup>56</sup> This outlook would appear supported by FCC rulemaking and the Supreme Court's decision in *NCTA v. Brand X*.<sup>57</sup> In a declaratory ruling, the FCC determined that cable modem service providers should be classified as "information services," as opposed to "telecommunications services," meaning that cable companies who provide broadband Internet access were not governed by Title II of the Communications Act, which regulated common carriers.<sup>58</sup> Without the "common carrier" mantra, cable providers would be allowed to proceed with minimal regulatory obligations in which they do not have to open their networks to competitors' services. While the 9<sup>th</sup> Circuit Court of Appeals used its own construction of the statute to vacate the section of the FCC's declaratory ruling that classified cable as an information service,<sup>59</sup> the Supreme Court reversed the lower court, letting the FCC's decision stand.<sup>60</sup> While this case raises important questions about competition and technology for companies offering similar

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<sup>54</sup> See *ACLU v. Reno*, 217 F.3d 152 (3d. Cir. 2000); *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

<sup>55</sup> *Ashcroft*, 542 U.S. 656.

<sup>56</sup> See Thierer, *supra* note 13.

<sup>57</sup> *NCTA v. Brand X*, 545 U.S. 967 (2005).

<sup>58</sup> Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling: Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002).

<sup>59</sup> See *Brand X v. FCC*, 345 F.3d 1120 (2003).

<sup>60</sup> *Supra* note 57.

services, the Court based its decision primarily on its conclusion that the FCC, not the 9<sup>th</sup> Circuit Court, was the appropriate entity to interpret the Communications Act in its classification of cable as an information service. The FCC later leveled the playing field between cable and DSL service providers with its Wireline Broadband Access Order.<sup>61</sup> However, as Stein explained, the Court in *NCTA v. Brand X* essentially “sanctioned a neoliberal policy approach to broadband services that privileged facilitating marketplace competition and regulatory restraint over free-speech concerns.”<sup>62</sup>

While the Supreme Court did not address any First Amendment issues in its *NCTA v. Brand X* decision, it is likely because they were not raised by the litigating industry concerns. Therefore, the issue of speech rights between ISPs and Internet users is still lacking specific constitutional clarity from the Court. We will continue to elaborate on the First Amendment issues related to net neutrality in the following section.

## B. NETWORK NEUTRALITY FOSTERS THE FIRST AMENDMENT RIGHTS OF INTERNET USERS

Cherry considers the dangers to free speech as a result of the FCC’s policy of deregulation by applying an “essentiality of access” typology to the broadband debate.<sup>63</sup> Cherry defines “essentiality of access” as “historical alignment of access problems to legal principles” and suggests that “differing types of access objectives require reference to distinct legal principles that evolved in response to differing relationships among access recipients to the access providers – as end user customer, competitor, speakers, or audience member.”<sup>64</sup> Since the FCC has chosen not to extend common carriage requirements to broadband service providers, and since such providers can now produce and distribute their own content (thus gaining rights as speakers), Cherry claims that free speech objectives like diversity of voices are no longer sustainable and that the First Amendment rights of individual users are essentially being “sacrificed to serve economic interests of corporate owners of broadband facilities.”<sup>65</sup> Cherry concludes by making an argument for including the consideration of the constitutional rights of individual persons – as opposed to the rights of corporations – in determining future broadband access policy. From this perspective, the idea of net neutrality is a matter of human speech

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<sup>61</sup> In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, CC Docket no. 02-33, *Report and Order and Notice of Proposed Rulemaking*, WL 2347773 (2005).

<sup>62</sup> *Supra* note 20, at 104.

<sup>63</sup> *See* Cherry, *supra* note 19.

<sup>64</sup> *Id* at 484.

<sup>65</sup> *Id* at 507.

rights, rather than that of property rights, and thereby raises the question: should ISPs' rights be put on equal standing with that of Internet users?

Herman has discussed the problems with Yoo's assertion that free speech on the Internet would be best protected if broadband providers were given editorial rights.<sup>66</sup> Herman argues that free speech values are best protected when an emphasis is placed not merely on content diversity, but more importantly, "a diversity of stakeholders who have editorial control over that content."<sup>67</sup> Herman criticizes Yoo's basis for argument by recalling the fact that the CDA does not consider broadband providers to be editors.<sup>68</sup> Herman concludes that giving editorial control to the users of the Internet, rather than providers, best exemplifies the democratic goals inherent in the First Amendment and best provides opportunities for citizens to engage in the procedural democratic process.

Herman's argument is also consistent with the Supreme Court's decision in two landmark cases in which it upheld the constitutionality of must-carry provisions contained in the Cable Television Consumer Protection and Competition Act of 1992<sup>69</sup> that required carriage of local over-the-air broadcast stations on cable systems.<sup>70</sup> In both cases, the Court acknowledged cable service providers' gatekeeper role in controlling video programming that enters consumers home, and sought to preserve consumer access to local over-the-air broadcast stations. Consequently, the Court found the must-carry provisions to merely be a content-neutral restriction of cable operators' speech rights. The Court emphasized in both decisions the extraordinary power of cable service providers to control "most (if not all) of the television programming that is channeled into the subscriber's home," as well as their ability to "silence the voice of competing speakers with a mere flick of a switch."<sup>71</sup> In comparison, the scope and scale of ISPs' power to silence competing voices is greatly magnified considering that they control access to vast expanse of information, entertainment and expression on the Internet. One analysis has already warned that although this "unprecedented communications technology can connect individuals around the planet and prove to be a revolutionary

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<sup>66</sup> See Herman, *supra* note 19.

<sup>67</sup> *Id* at 116.

<sup>68</sup> *Id* at 117 n. 58.

<sup>69</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>70</sup> See *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) [hereinafter, *Turner I*]; *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) [hereinafter, *Turner II*].

<sup>71</sup> See *supra* note 70 (*Turner II* at 197, citing *Turner I* at 656).

force for democratic communication and culture,”<sup>72</sup> as corporate media giants gain more control over Internet access, “[t]he messages of advertisers and corporate hegemony proliferates at an ever-increasing rate, and cyberspace will not likely diffuse them, but rather echo them.”<sup>73</sup> Therefore, the Internet needs some provision that will allow all content providers equal access to the network, so that all users have the ability to freely access any content that they see fit.

Integral to such a participatory and democratic nature of the Internet medium is the end-to-end architecture, initially proposed by J. H. Saltzer, D. P. Reed, and D. D. Clark<sup>74</sup> but perhaps best described by Lessig.<sup>75</sup> According to Lessig, the technological “end-to-end” architecture of the Internet as absolutely essential in the creation of an innovation commons, a place where any user can develop applications and present them to a large market.<sup>76</sup> “End to end”, or “e2e” as Mark Lemley and Lessig explain, is the idea that the intelligent part of the network lies at the ends, where users put information or applications onto the network, and that the “pipes” through which that information flows should be as basic and simple as design allows.<sup>77</sup> For that reason, it would seem imperative that there be an open access provision of the Internet for the democratic and participatory nature of “e2e” to flourish. Moreover, it would also be consistent with an interpretation of the First Amendment that seeks to enlarge speech opportunities in the marketplace of ideas via a user right of access provision.

Interestingly, scholarship has yet to emerge that argues against net neutrality from a purely principled libertarian interpretation of the First Amendment as described by Fredrick Siebert, Theodore Peterson, and Wilbur Schram.<sup>78</sup> Ben Scott has explained this libertarian model of the First Amendment as a “negative freedom,” in that it does not give citizens any freedoms per se, but instead merely puts limitations on governmental

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<sup>72</sup> Jeffrey Layne Blevins, *Counterhegemonic Media: Can Cyberspace Resist Corporate Colonization*, in *CYBERIMPERIALISM? GLOBAL RELATIONS IN THE NEW ELECTRONIC FRONTIER?* 139, 148 (Bosah Ebo, ed., 2001).

<sup>73</sup> *Id.* at 150.

<sup>74</sup> J. H. Saltzer, D. P. Reed, & D. D. Clark, *End-to-end arguments in system design*, 2 *ACM TRANSACTIONS IN COMPUTER SYSTEMS* 277 (1984).

<sup>75</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001).

<sup>76</sup> *Id.*

<sup>77</sup> Mark A. Lemley & Lawrence Lessig, *The end of end-to-end: Preserving the architecture of the Internet in the broadband era*, 48 *UCLA L. REV.* 925 (2001).

<sup>78</sup> FREDRICK SIEBERT, THEODORE PETERSON, & WILBUR SCHRAMM, *FOUR THEORIES OF THE PRESS* (1956).

power.<sup>79</sup> Therefore, according to the libertarian interpretation, the First Amendment only grants “freedom from interference” by the government.<sup>80</sup> However, a significant limitation of this late 18<sup>th</sup> century libertarian ideal is that it rests on the assumption that governments are the only entities capable of censorship, and does not account for “substantial forms of private power” that may also censor.<sup>81</sup>

Accordingly, Jerome Barron’s theory of access to the press can be applied to the net neutrality debate.<sup>82</sup> Barron’s famous 1967 *Harvard Law Review* article first lays out the theory that the mass media enact a form of private censorship that prevents all ideas from reaching the marketplace.<sup>83</sup> While the law has taken steps to protect voices in the marketplace, First Amendment jurisprudence has been fairly indifferent to creating opportunities for more voices to be heard in the media. As Barron argues:

To those who can obtain access to the media of mass communications first amendment case law furnishes considerable help. But what of those whose ideas are too unacceptable to secure access to the media? To them the mass communications industry replies: The first amendment guarantees our freedom to do as we chose with our media. Thus, the constitutional imperative of free expression becomes a rationale for repressing competing ideas.<sup>84</sup>

In effect, the press uses the First Amendment right to a free press and free expression to prevent unappealing ideas from individuals from competing in the marketplace. In the case presented here, ISPs who are opponents of net neutrality may use the First Amendment right to free expression to restrict individual users and content producers

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<sup>79</sup> Ben Scott, *A Broad, Positive View of the First Amendment*, in *THE CASE AGAINST MEDIA CONSOLIDATION* 39, 43 (Mark Cooper ed., 2007).

<sup>80</sup> *Id.*

<sup>81</sup> *Id* at 45.

<sup>82</sup> See, Jerome A. Barron, *Access to the press: A new First Amendment right*, 80 HARV. L. REV. 1641 (1967); JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* (1973); Jerome A. Barron, *Right of access and apply to the media in the United States today*, 25 COMM. AND THE LAW 1 (2003); Jerome A. Barron, *Creating a new First Amendment right*, in *DEFENDING THE FIRST: COMMENTARY ON FIRST AMENDMENT ISSUES AND CASES* (Joseph Russomano, ed., 2005).

<sup>83</sup> Barron, *supra* note 82.

<sup>84</sup> *Id* at 1641-2

from acquiring or inserting ideas in what should be the largest and most dynamic marketplace for expression.

Barron has also lamented the “schizophrenic” nature of the judicial system’s approach to print media versus electronic and briefly examines a number of media cases in which the Supreme Court provided vastly different reasoning based on the type of medium.<sup>85</sup> For instance, the Court struck down a right-of-reply statute in *Miami Herald v. Tornillo*,<sup>86</sup> although it upheld a very similar provision in *Red Lion v. FCC*.<sup>87</sup> The difference was that the *Miami Herald* decision involved the print medium, while the *Red Lion* case was directed at licensed broadcasting. However, this is our point of departure from Barron’s analysis. We will now examine more closely how the Supreme Court has applied medium-specific rationales in such cases, which as we will later argue, supports the idea of an equal access provision of the Internet.

## V. THE MEDIUM DETERMINES THE FREEDOM

Because the Supreme Court has historically fashioned medium-specific rationales for the regulation of media, we suggest the same should be created for the Internet to resolve the First Amendment conflict surround net neutrality. Let us bear in mind how the Court has analyzed different mediums, including print, broadcast, and cable in landmark First Amendment cases before considering the Internet’s distinct qualities that would call for an equal access provision. Each of the cases examined, *Miami Herald v. Tornillo*, *Red Lion v. FCC*, as well as *Turner Broadcasting System v. FCC* in 1994 [hereinafter *Turner I*] and *Turner Broadcasting System v. FCC* in 1997 [hereinafter *Turner II*]<sup>88</sup> are well traversed in legal scholarship. As such, we will not revisit the facts and legal history involved in each case, but rather, will focus on the Court’s First Amendment basis for its ruling.

### A. PRINT

In *Miami Herald v. Tornillo*, the Court afforded newspaper publishers and editors freedom from compelled speech, based upon aspects of the print medium that make it considerably different from broadcast. Namely, that difference involved the virtually unlimited availability of the newspapers. The Court explained that while many newspapers maybe partisan in nature, collectively they present a broad range of opinions

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<sup>85</sup> Barron, *supra* note 82, at 6.

<sup>86</sup> *Miami Herald*, 418 U.S. 241.

<sup>87</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>88</sup> See *Turner I*, c 622.

to readers.<sup>89</sup> Moreover, “Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.”<sup>90</sup> This is to say that in the publishing medium there is (without government intrusion) essentially open access to the means of communication, and thus, a vibrant marketplace of ideas.

## B. BROADCAST

Contrary to what the Court said in *Miami Herald* about compelled speech, in *Red Lion v. FCC* it said that broadcasters have certain obligations to speak, based upon the Fairness Doctrine, reasonable access for political candidates, and the broader public interest, convenience, and necessity. More government intervention is required in the broadcast medium due to the scarce nature of the electromagnetic spectrum, a public resource. In *Red Lion* the Court reasoned that due to the scarcity of broadcast frequencies,

[T]he Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.<sup>91</sup>

The Court favors the rights of audiences over broadcasters because actual access to the medium is limited, and not everyone who desires a broadcast license can obtain one. However, a reasonable proxy is for broadcasters to provide access to a wide a range of viewpoints and perspectives as possible in fulfillment of the purposes of the First Amendment.

## C. CABLE

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<sup>89</sup> *Miami Herald*, 418 U.S. at 248.

<sup>90</sup> *Id.*

<sup>91</sup> *Supra* note 87 at 390.

When the Court upheld must-carry rules for cable operators in *Turner I*, it reiterated that the justification for its “distinct approach to broadcast regulation rests upon the unique physical limitation of the broadcast medium,”<sup>92</sup> and it noted that government action was in the interest of preserving access to over-the-air programming. In dismissing the appellants’ analogy that cable operators should be treated like newspaper editors in *Miami Herald*, the Court further refined its medium-based approach to cable. “When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control” over essentially what is *all* of the programming that enters the subscribers’ home.<sup>93</sup> Moreover, “simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.”<sup>94</sup> Therefore, cable operators are distinct from speakers in other media in that they have a simple, but ultimate power to “silence the voice of competing speakers.”<sup>95</sup>

Three years later in *Turner II* the Court reaffirmed its 1994 decision based upon Congressional evidence regarding cable operators growing market power through vertical and horizontal integration. This suggested that without must-carry rules, cable operators had considerable economic “incentive and ability” through the nature of its medium to “delete, reposition or decline carriage to local broadcasters in attempt to favor affiliated cable programmers.”<sup>96</sup>

## VI. CONCLUSION: AN EQUAL ACCESS PROVISION OF THE INTERNET

In accordance with the Court’s preference for medium specific rationales, we conclude that the Internet has such unique qualities and a momentous democratic nature that it merits its own First Amendment framework informed by participatory-democratic theory. Perhaps the federal court for the Eastern District of Pennsylvania captured the essence of this medium best when it stated that the Internet was the “most participatory form of mass speech yet developed,” before adding that it “deserves the highest protection from government intrusion.”<sup>97</sup> Because it is the most participatory form of

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<sup>92</sup> *Turner I*, 520 U.S. 180 at 637.

<sup>93</sup> *Id* at 656.

<sup>94</sup> *Id*.

<sup>95</sup> *Id*.

<sup>96</sup> *Turner II*, 520 U.S. at 191.

<sup>97</sup> *Reno I*, 929 F. Supp. at 883.

mass speech yet developed, we would simply add that it deserves the highest protection from *any* intrusion, government *or private*. Our position would already fit within the tradition of non-discrimination manifest throughout the Computer Inquiries, the TCA, and subsequent FCC imposed conditions on telecommunications mergers. Moreover, the Supreme Court has clearly recognized the Constitutional authority to protect freedom of speech from infringement by private commercial interests. In *Associated Press v. U.S.* the Court stated:

It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . The Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.<sup>98</sup>

Accordingly, the human speech rights of Internet users should outweigh the property rights of ISPs.

Consider the Internet user's perspective: Customers already pay for broadband Internet access (be it cable or DSL), and thus, should be able to go wherever they want as the medium affords and as part of their First Amendment right as a user. This is end-to-end system is essentially the one that is now in place, and it should stay in place. This freedom is clearly threatened by ISPs that directly suppress content, but also by the potential practice of access-tiering, whereby consumer access to content is restricted by ISPs charging content producers to pay for faster downloads. Rather than the freedom of access to the most vast and vibrant marketplace of ideas ever to exist, users would be limited to the walled-gardens erected by ISPs.<sup>99</sup> ISPs would do well to remember that this approach failed miserably in the case of Disney's Go Network Internet portal as "users seeking a wide array of information and cultural fare online will not be content searching within any walled-gardens of standardized branded fare," and thus, restricting

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<sup>98</sup> *Associated Press v. U.S.*, 326 U.S. 1 (1945).

<sup>99</sup> Patricia Aufderheide, *Competition and Commons: The Public Interest In and After the AOL-Time Warner Merger*, 46 J. OF BROAD. & ELEC. MEDIA 515 (2002).

access to content is “just not good business.”<sup>100</sup> Perhaps the reason why Disney’s portal venture failed is because of the current culture of net neutrality, where there were other portals that were not walled in, and users preferred those with more freedom.

An equal access provision of the Internet based on the principle of nondiscrimination that has evolved throughout U.S. telecommunications policy is necessary to ensure that ISPs remain open to all voices, especially in the age of media conglomeration. The promise of the Internet was that it would be the most expansive and engaging marketplace of ideas. However, as the telecommunications industry becomes more concentrated, ISPs have more economic incentives to act as gatekeepers through direct content suppression, and/or controlling the flow of online traffic, thus determining who has access and for what purpose. In view of this, we should keep in mind that the Supreme Court has said, “[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”<sup>101</sup> The Internet medium is currently open to all, and it should stay that way.

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<sup>100</sup> Jeffrey Layne Blevins, *Battle of the Online Brands: Disney Loses Internet Portal War*, 5 TELEVISION & NEW MEDIA 247, 268 (2004).

<sup>101</sup> *Red Lion Broad. Co.*, 395 U.S. at 392.

## MANAGING CONFLICT OVER ACCESS: A TYPOLOGY OF SUNSHINE LAW DISPUTE RESOLUTION SYSTEMS

DAXTON R. “CHIP” STEWART

*Freedom of information laws struggle to manage disputes over access to government records and meetings in an effective manner. This study applied principles of Conflict Theory and Dispute Systems Design to examine the dispute resolution systems in place in open government laws across the United States. Five models emerged from this study: (1) Multiple Process, in which jurisdictions employ multiple layers of dispute resolution including formal and informal methods, (2) Administrative Facilitation, which includes administrative programs such as mediation, ombuds, or public access counselors to manage disputes, (3) Administrative Adjudication, in which administrative agencies are in place to make rulings on disputes that are brought to them by parties, (4) Advisory, in which attorneys general and other administrative bodies may issue non-binding advisory opinions to disputing parties, and (5) Litigation, in which jurisdictions offer no system outside of the traditional legal process. In this typology, the Multiple Process and Administrative Facilitation models most closely follow the principles of Conflict Theory and Dispute Systems Design, and programs using these models may aid the design of dispute resolution systems in other jurisdictions in the future.*

**Keywords:** dispute resolution, sunshine laws, freedom of information.

Federal and state freedom of information laws, which are in place to ensure that public's business is done in public, struggle to regulate conflict concerning access to government records and meetings in an effective manner. Audits and surveys conducted in nearly every jurisdiction have come to a similar conclusion: Government agencies routinely fail to follow laws mandating disclosure of certain records, frustrating the

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attempts of citizens and journalists who hope to scrutinize government behavior.<sup>1</sup> Hammitt recognized that this frustration has led to the push for methods that are more practical for citizens and small organizations than the reliance on litigation that is prevalent in access laws: "While the courts are respected for their independence, forcing requesters to go to court if they are dissatisfied has prolonged an already arduous process, often adding years to the final resolution. Both the cost and time of litigation has discouraged requesters from litigating."<sup>2</sup> However, despite the presence of numerous informal programs and sunshine-law specific administrative programs in the states, litigation often remains as the primary tool for enforcing these laws. Research on freedom of information also remains largely rooted in legal analysis and advocacy, rather than addressing issues of design that embrace other theories and methodologies.

Decades of court decisions have refined freedom of information law in the United States, and legal scholars have advocated further understanding and reinterpretation of federal and state open records laws during that time. But these focus more on the adjudicative process, considering the law itself than the underlying conflict that the law seeks to regulate. Conflict Theory provides an alternative approach by redirecting the focus to this underlying conflict, allowing consideration of how conflict can be constructively managed. Viewing disputes over access to information as a matter of conflict between competing institutions – government and journalists in particular – with divergent interests could provide new direction in managing this conflict to serve the interests of democracy.

Conflict is an inevitable and omnipresent aspect of human life, and it can have both beneficial and negative consequences.<sup>3</sup> Conflict Theory suggests that more beneficial consequences come as a result of constructive conflict processes, which are embodied in the relationships between conflicting parties and the systems in place to

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<sup>1</sup> An audit in Hawaii found "a pattern of defensiveness and reluctance" when records were requested. Freedom of Information Hawaii, Freedom of Information Compliance Audit (2006), available on-line at [www.hawaii.sj.org/foi/foiaudit.htm](http://www.hawaii.sj.org/foi/foiaudit.htm); Less than half of the 66 metro Atlanta police departments complied with requests for statistics on serious crime. Richard Halicks, *Your Right to Know: Unlock Your Government*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 13, 2005; In Colorado, an audit conducted by 23 newspapers found "obtaining records can be an intimidating and disheartening process." Jon Sarche, *Want a public record? Statewide survey finds wide variety in what officials are willing to hand over*, ASSOCIATED PRESS, Oct. 25, 2006; In New York, an audit conducted by 52 reporters showed that a majority of schools and government bodies cooperated with sunshine law requests, but only 37 percent of police departments gave out requested arrest information. Cara Matthews, *Compliance varies in quest for information*, THE JOURNAL NEWS, Mar. 13, 2005.

<sup>2</sup> Harry Hammitt, *Mediation Without Litigation 2*, THE FOI REPORTS, VOL. 2, NO. 3 (National Freedom of Information Coalition, 2007).

<sup>3</sup> See LEWIS COSER, THE FUNCTIONS OF SOCIAL CONFLICT (The Free Press, 1956).

manage disputes that arise between them.<sup>4</sup> This study seeks to examine the systems in place to regulate conflict regarding access to public records, a primary concern of journalists. The systems in each of the 50 states, the District of Columbia and the federal government will be analyzed to develop a typology of freedom of information dispute systems based in Dispute Systems Design, a framework built on Conflict Theory that calls for developing and analyzing systems that constructively manage disputes.<sup>5</sup> While efforts have been made recently to identify and classify the systems in place to handle disputes that arise in sunshine laws<sup>6</sup>, this research seeks to examine these systems through the lens of conflict theory to advance the conceptual approach to freedom of information in a way that embraces the useful lessons of constructive conflict management.

## I. THEORETICAL FRAMEWORK

This study examines the intersection of three concepts: Conflict Theory, Dispute Systems Design, and Freedom of Information. These concepts are discussed in detail in this section to build a theoretical framework for this study.

### A. CONFLICT THEORY

In Conflict Theory, conflict is conceptualized as the result of the "perceived divergence of interest" between parties, embodied by their "incompatible goals and standards."<sup>7</sup> Because human beings will inevitably hold "conflicting notions of the good," conflict is a natural and unavoidable part of human life.<sup>8</sup>

Conflict theory seeks to understand the conflict process from an interdisciplinary perspective, incorporating a broad body of research from several social sciences, including anthropology, political science, sociology, psychology, history, economics, and

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<sup>4</sup> Morton Deutsch, *Cooperation and Competition*, 24-28, THE HANDBOOK OF CONFLICT RESOLUTION (Morton Deutsch & Peter T. Coleman, eds., Jossey-Bass, 2000).

<sup>5</sup> See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (Jossey-Bass, 1996).

<sup>6</sup> See Hammitt, *supra* note 2; Courtney Anne Barclay, *State-by-State Report: Formal Statutory Mechanisms for FOI Complaints*, Marion Brechner, Citizen Access Project FOI 911 Rapid Response Team (2007), available at <http://www.citizenaccess.org>.

<sup>7</sup> DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT*, 8-9 (3d ed., McGraw-Hill Higher Education, 2004).

<sup>8</sup> CARRIE MENKEL-MEADOW, *DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY*, xii (Ashgate, 2003).

game theory.<sup>9</sup> A model of the conflict process developed by Pruitt and Kim suggests that conflict progresses according to the strategies the parties employ and the tactics they use to achieve these strategies.<sup>10</sup>

In this framework, “conflict” is a neutral term. While the field of sociology long viewed conflict as a “disruptive phenomenon”<sup>11</sup> and from the perspective of “competitive struggle,”<sup>12</sup> and people generally describe conflict in negative terms,<sup>13</sup> conflict theory recognizes the positive side of conflict as well. Coser outlined a number of positive functions of social conflict, including “stabilizing and integrating functions” by permitting resolution of rival claims, allowing for adjustment of social norms to new conditions, building unity and cohesion within groups, and “help(ing) to structure the larger social environment” by drawing and maintaining boundaries between conflicting groups.<sup>14</sup> Conflict can thus lead to needed social change and clarification of differences between disputing parties.<sup>15</sup> At an interpersonal level, conflict can also help to reconcile people’s interests and can help people determine the boundaries of their relationships.<sup>16</sup> Nevertheless, conflict can certainly have negative consequences, including draining time and energy resources, psychological and physical health problems, collective trauma, and in cases of heavy escalation, interpersonal violence and war.<sup>17</sup>

Deutsch, one of the pioneers of empirical research of conflict, described this dual nature of conflict in terms of *constructive* and *destructive* processes.<sup>18</sup> In this conceptualization, destructive conflict is “characterized by a tendency to expand and

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<sup>9</sup> *Id.* at xvi.

<sup>10</sup> Pruitt & Kim, *supra* note 7, at 5-7.

<sup>11</sup> Coser, *supra* note 3, at 26.

<sup>12</sup> Deutsch, *supra* note 4, at 11.

<sup>13</sup> Suzanne McCorkle & Janet L. Mills, *Rowboat in a Hurricane: Metaphors of Interpersonal Conflict Management*, 5 COMM. REPORTS 57 (1992).

<sup>14</sup> Coser, *supra* note 5, at 154-155.

<sup>15</sup> Richard E. Rubenstein, *Sources 55 in CONFLICT: FROM ANALYSIS TO INTERVENTION* (Sandra Cheldelin, Daniel Druckman, & Larissa Fast, eds., Continuum, 2003).

<sup>16</sup> Roxane S. Lulofs & Dudley D. Cahn, *CONFLICT: FROM THEORY TO ACTION* 12 (Allyn and Bacon, 2000).

<sup>17</sup> Pruitt & Kim, *supra* note 7 at 10; Lulofs & Cahn, *supra* note 24 at 11-12.

<sup>18</sup> Morton Deutsch, *An Experimental Study of the Effects of Cooperation and Competition upon Group Processes*, 2 HUMAN RELATIONS 199 (1949).

escalate,"<sup>19</sup> while constructive conflict involves "lively, productive controversies" that can be "mutually rewarding."<sup>20</sup>

Deutsch offers a simple way to distinguish the consequences of destructive and constructive conflicts. Conflict is more destructive "if its participants are dissatisfied with the outcomes and feel they have lost as a result of the conflict," while it is constructive "if the participants are all satisfied with their outcomes and feel that they have gained as a result of the conflict."<sup>21</sup>

Deutsch identified the interplay between *competitive* behavior and *cooperative* behavior as central in determining the processes and consequences of conflict,<sup>22</sup> linking the characteristics of these behaviors to destructive and constructive conflict processes. Thus, under Deutsch's typology, a destructive process of conflict would include:

1. Poor communication between the parties
2. Coercive tactics
3. Suspicion of the other party
4. Perceptions of basic differences in values between the parties
5. Attempts to increase power differences between the parties, and
6. Challenges to the legitimacy of the other party

A constructive process of conflict, on the other hand, would include:

1. Good communication between the parties
2. Less coercive tactics
3. Mutual trust and confidence
4. A perception of similarity in beliefs and values
5. Information sharing between the parties, and
6. Full acceptance of the other party's legitimacy<sup>23</sup>

Deutsch incorporated the above typology into a theory of *conflict resolution* that "equates a constructive process of conflict resolution with an effective cooperative problem-

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<sup>19</sup> Morton Deutsch, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* 351 (Yale University Press, 1973).

<sup>20</sup> *Id.* at 359.

<sup>21</sup> Morton Deutsch, *The Social-Psychological Study of Conflict: Rejoinder to a Critique*, 4 *EUR. J. SOC. PSYCH.* 441, 454 (1974).

<sup>22</sup> Deutsch, *supra* note 4, at 22.

<sup>23</sup> Morton Deutsch, *A Theoretical Perspective on Conflict and Conflict Resolution* 48, in *CONFLICT MANAGEMENT AND PROBLEM SOLVING* (Dennis J.D. Sandole & Ingrid Sandole-Staroste, eds., New York University Press, 1987).

solving process in which the conflict is the mutual problem to be resolved cooperatively."<sup>24</sup>

One practical application of Conflict Theory is using its principles to examine how parties handle conflict between them. In this area, Dispute Systems Design has emerged to provide more focus to conflict management issues, particularly looking at the way systems should be created and maintained.

## B. DISPUTE SYSTEMS DESIGN

Dispute Systems Design includes both principles for creating conflict management systems and guidance for examining existing conflict management systems. In particular, the field looks at managing individual disputes as well as overall conflict, both of which are necessary to manage conflict effectively. Conceptually, "conflict" can thus be distinguished from "dispute" in terms of the scope of the area of concern; conflict is a process, and disputes are a product of that conflict.<sup>25</sup> In this framework, conflict is the broad, overarching term covering issues of divergent interests or incompatible goals between any number of people or groups; disputes are the specific manifestations of these issues.

Dispute Systems Design is not a perfect conceptual fit for research about conflict *between* organizations; much of the research about conflict management system design has been limited to disputes *within* organizations, typically workplaces.<sup>26</sup> However, there is potential for some of the concepts in the literature to inform research on conflict management systems outside of the organizational context to address conflict between organizations.

Ury, Brett & Goldberg recognized the potential breadth of dispute resolution systems design, going beyond organizational import to be of interest to "scholars, researchers, and students concerned with understanding, developing and evaluating alternative dispute resolution systems."<sup>27</sup> In *Getting Disputes Resolved*, these authors focused on three elements of effective dispute management: (1) reconciling parties' interests, (2) determining who is right, and (3) determining who is more powerful.<sup>28</sup> The interrelationships between these areas of concern should be taken into account by dispute

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<sup>24</sup> Deutsch, *supra* note 4, at 30.

<sup>25</sup> Costantino & Merchant, *supra* note 5, at 5.

<sup>26</sup> See John P. Conbere, *Theory Building for Conflict Management System Design*, 19 CONFLICT RESOLUTION Q. 215 (2001).

<sup>27</sup> WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED* xiv (Jossey-Bass, 1988).

<sup>28</sup> *Id.* at 5-8.

resolution system designers; the authors suggest that while systems should be interest-oriented, they must also adequately deal with rights and power to be effective.<sup>29</sup> The authors used these lessons to build a framework of six basic principles of dispute systems design:

1. Putting the focus on interests by creating processes that identify the core concerns of relevant interest groups;
2. Providing "loop-backs" in the process to encourage a return to interest-based methods as a dispute progresses through the system;
3. Providing low-cost alternatives to reach satisfactory resolutions;
4. Encouraging discussion about the nature of disputes and the best ways to resolve them early in the process;
5. Arranging procedures from low-cost to high-cost; and
6. Ensuring that adequate resources are committed to motivate and educate parties so that they can make the system work.<sup>30</sup>

Costantino & Merchant embraced these principles and incorporated lessons from organizational design to build on this framework in the organizational context.<sup>31</sup> These authors suggested addressing in the first instance whether ADR systems are appropriate for the type of conflict at hand, and they encouraged programs that are simple to use, easy to access, and that are narrowly tailored to address particular problems.<sup>32</sup> Further, they encouraged emphasis on the design and review of dispute resolution systems, calling for stakeholder involvement in the design process,<sup>33</sup> training and education of stakeholders,<sup>34</sup> and constant evaluation of whether the program is meeting its intended goals.<sup>35</sup>

The goal of Dispute Systems Design goes beyond effective management of the many disputes that arise. Costantino and Merchant recognized that good systems should do more than "tinker at the edges of conflict," instead seeking to change the culture of conflict in an organization.<sup>36</sup> Slaikeu and Hasson provide the metaphor of "rewiring"

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<sup>29</sup> *Id.* at 15-18.

<sup>30</sup> *Id.* at 42-64.

<sup>31</sup> *See* Costantino & Merchant, *supra* note 5.

<sup>32</sup> *Id.* at 121.

<sup>33</sup> *Id.* at 49.

<sup>34</sup> *Id.* at 134-135.

<sup>35</sup> *Id.* at 168.

<sup>36</sup> *Id.* at 218.

people and organizations to change the way they think about conflict, training stakeholders to understand and approach conflict management in an effective manner.<sup>37</sup>

Conbere has noted that research on conflict management systems design has received much attention from scholars, but that little social science research has been done to help build theory in this area.<sup>38</sup> This study seeks to build theory in Dispute Systems Design by applying many of its central tenets to evaluate and classify systems in place to manage disputes that arise in open government matters.

### C. FREEDOM OF INFORMATION

Accurate information about the way the government conducts its business is essential to the functioning of democracy. While a free press is central to combating abuse of government power, the press needs access to accurate information to perform in its watchdog role.<sup>39</sup> As Walter Lippmann noted in *Public Opinion*, the press cannot scrutinize government completely on its own, but instead can "normally record only what has been recorded for it by the working of institutions."<sup>40</sup>

The centrality of the public's need for information about government, implicit in the freedom of expression guaranteed in the First Amendment, is commonly described as the "right to know."<sup>41</sup> Emerson, in examining the legal foundations of the right, noted that the most important use of the right to know is ensuring the public's ability to obtain information about the government: "The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible."<sup>42</sup> However, despite the legal and philosophical underpinnings of the "right to know" in the United States, the press has historically had difficulty gaining access to government information. As Cross explained in 1953: "No activity of which so much good is justly expected as that of the newspaper press encounters so much legal

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<sup>37</sup> KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT 199 (Jossey-Bass, 1998).

<sup>38</sup> See Conbere, *supra* note 26.

<sup>39</sup> TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA 24 (Iowa State University Press, 1990).

<sup>40</sup> WALTER LIPPMANN, PUBLIC OPINION 228 (1st ed., The Free Press, 1965).

<sup>41</sup> Thomas I. Emerson, *The Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2 (1976).

<sup>42</sup> *Id.* at 14.

complication at the raw material level: access to public records and proceedings, the newspaper's most vital raw material source."<sup>43</sup>

To regulate the legal disputes over access, the federal government and every state have passed some form of freedom of information law, also commonly called "sunshine laws."<sup>44</sup> The purpose of these laws is often clearly stated in ways that mirror Emerson's language on the right to know. For example, West Virginia's Freedom of Information Act says:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people and not the master of them, it is the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.<sup>45</sup>

Yet despite the presence of freedom of information laws rooted in these democratic principles, conflict between journalists and government over access persists. This can partially be explained by the emergence of the "right to privacy" in a series of decisions by the U.S. Supreme Court.<sup>46</sup> The "right to privacy" and the "right to know" often clash, leaving courts to balance "the democratic value of access to the information against the individual value of privacy."<sup>47</sup>

While legal scholars often describe the relationship between public access and privacy interests as a "conflict,"<sup>48</sup> Conflict Theory typically is not applied when

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<sup>43</sup> HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 4 (Columbia University Press, 1953).

<sup>44</sup> Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 2 (2003).

<sup>45</sup> W.VA. CODE ANN. § 29B-1-1 (LexisNexis 2006).

<sup>46</sup> Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 1 COMM.LAW CONSPECTUS 71, 74-80 (2003).

<sup>47</sup> *Id.* at 82.

<sup>48</sup> "The tension between an individual's right to privacy and the public's right to obtain government-held information represents a conflict between competing but vital democratic values," Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 514, 583 (2006). See also Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters*

considering the relationship between journalists seeking access to public records and government policies against disclosure. Instead, freedom of information scholarship is almost exclusively done from a legal perspective, examining disputes that arise under freedom of information laws and how courts should interpret the law to adjudicate these disputes properly.

For the purpose of this study, freedom of information will be approached from a Conflict Theory perspective rather than a purely legal perspective. In this context, freedom of information is conceptualized as an essential aspect of the American system of democracy to ensure that the public can make informed decisions about government and to ensure that journalists, the proxy of the people, have access to government information to serve as a monitor of the government. This conceptualization will be explored using Conflict Theory and Dispute Systems Design, building on decades of legal research to provide a different way to study what happens when the government and people seeking access disagree over the application of open government laws.

## II. RESEARCH QUESTION

Freedom of information is essential for transparent and effective governance in American democracy, and journalists must have access to public records in order to serve in their watchdog capacity. Conflict Theory proposes that conflict should be constructive rather than destructive to maximize parties’ satisfaction and achievement of their goals. Dispute Systems Design proposes to manage conflict constructively through creation of interest-based systems that rely on problem-solving, allowing resolution of disputes early in the process, with low-cost options available early in the process that may be returned to as the dispute progresses, and with a system in place to educate disputants about both the process and the disputes in general in a way that could help improve constructive management of the underlying conflict between parties.

This study examines the statutory systems in place to resolve disputes arising under freedom of information laws to determine whether they are more representative of a constructive process or a destructive process and whether they follow the aforementioned tenets of Dispute Systems Design. Thus:

RQ1: What types of systems do states employ in their freedom of information laws to resolve disputes that arise?

The results of this research question will be used to provide a framework for classifying the dispute systems into a typology based on the principles of Conflict Theory and Dispute Systems Design.

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*Committee “Central Purpose” Reformulation*, 53 ADMIN. L. REV. 984, 1024 (2002) (noting the “central conflict between transparency and governmental secrecy”).

### III. METHODOLOGY

This study uses legal research to examine and classify the dispute resolution systems in place in the freedom of information laws in the 50 states, the District of Columbia and the federal government. Legal research methodology in mass communication studies can have many purposes, including analyzing the political and social processes that shape the laws of mass communications and providing a better understanding of how the law operates on society.<sup>49</sup> The method uses qualitative analysis of primary sources, such as laws and court decisions interpreting those laws, and secondary sources, such as works of legal scholarship that synthesize legal history, theory, case law and the works of other legal scholars.<sup>50</sup> For the purposes of this study, legal research is used to examine the dispute resolution systems in place in the freedom of information law in each jurisdiction through review of statutes, relevant case law and government policy. While the primary focus is on statutes, the research also considers information provided to the public about access by the relevant government body, such as attorney general offices and administrative agencies charged with handling access disputes.

Additionally, two "white papers" examining alternatives published detailing some of the options available to people seeking access are considered: a publication by the Marion Brechner Citizen Access Project in 2007 detailing the formal statutory mechanisms for dealing with enforcement and compliance of open government laws,<sup>51</sup> and a paper published by the National Freedom of Information Coalition in 2007 that classified state sunshine law dispute resolution systems and examined mediation as an option in particular.<sup>52</sup>

### IV. RESULTS

Multiple models emerged from the examination of state freedom of information laws. While many states do not have an alternative to litigation in place, others provide a special role for attorneys general, administrative agencies, ombuds, or some combination of these to manage disputes that arise over access to public records.

It would have been simple enough to assign systems to categories based on the name of the individual or office in place to serve as an alternative to litigation. For

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<sup>49</sup> Donald M. Gillmor and Everette E. Dennis, *Legal Research in Mass Communication*, 341-342, in *RESEARCH METHODS IN MASS COMMUNICATIONS* (Guido H. Stempel III & Bruce H. Westley, eds., Prentice Hall, 1989).

<sup>50</sup> See CHRISTOPHER G. WREN & JILL ROBINSON WREN, *THE LEGAL RESEARCH MANUAL* (2d ed., Adams & Ambrose Publishing, 1986).

<sup>51</sup> Barclay, *supra* note 6.

<sup>52</sup> Hammitt, *supra* note 2.

example, states that have created ombuds could be placed in one category, while states that funnel disputes to the attorney general could be placed into another category, and states with administrative agencies could be placed into a third category. However, this kind of categorization would fail to handle the multiple layers of dispute processes available in some states. Further, Dispute Systems Design is more about how systems are intended to function, rather than how they are titled. The role of the attorney general in one state may be similar to the role of the ombuds in another; these systems may be more alike, and may approach conflict management from a similar perspective.

Thus, a typology emerged rooted in the dispute processing inherent in each state’s freedom of information laws. Because Dispute Systems Design calls for multiple levels of processing, starting with options that cost less for parties and involve more interest-based problem solving, the states that do this were grouped together in the “Multiple Process” model. States that call on an individual or office to investigate and facilitate disputes, seeking to resolve disputes before they go to court, were placed in the “Administrative Facilitation” model. States that rely on individuals or offices to make determinations and rulings about openness, binding or otherwise, were grouped into the “Administrative Adjudication” model. Similarly, states that opt for this kind of individual or office to perform a more advisory function were placed in the “Advisory” model. Finally, states that contemplate no formal system beyond adjudication in court were grouped together in the “Litigation” model.

An outline of these models and some examples of the states that comprise them are detailed below.

#### A. MODEL 1: MULTIPLE PROCESS

The “Multiple Process” model stands out as the kind of system that most embraces the principles of Conflict Theory and Dispute Systems Design. While none of the jurisdictions embody all of these elements – cooperative rather than competitive approaches, efforts to “rewire” participants into most constructive conflict management, problem-solving orientation, multiple entry points ranging from low-cost to high-cost for disputing parties, “loopbacks” to low-cost alternatives, and a design process incorporating stakeholders – the jurisdictions in this model all appear to have systems in place that allow for a more ideal processing of disputes.

Two characteristics most separate these systems from others. First, following the tenets of Conflict Theory, the emphasis on a cooperative, constructive approach to problem-solving is evident in the jurisdictions’ creation of programs intended to foster discussion and negotiation without reliance on the heavy hand of adjudication, even though administrative adjudication is permitted as a final option before litigation. Second, multiple layers of dispute processing are available to people who feel that their request for access has been improperly handled. These jurisdictions typically call for early facilitation and mediation by government offices specifically aimed to handle open government disputes, while still allowing such an office more investigatory or administrative powers to enforce or resolve disputes. These options are all available as

an early alternative to litigation, though they are not necessarily required before litigation may begin. Additionally, the offices that oversee the disputes are typically called upon to oversee educational programs to help ensure public understanding of open government laws. These programs, which aim both to resolve disputes and to educate potential disputants at low cost, resemble the broad approach to dispute management. This approach has the potential to transform conflict pursuant to the tenets of Dispute Systems Design.

The jurisdictions with systems that fit best into this model were Connecticut, Hawaii and New Jersey. Each is described in further detail below.

### 1. CONNECTICUT

The Connecticut Freedom of Information Commission, which is regarded as "one of the best and most proactive oversight bodies" in the country,<sup>53</sup> was created with the passage of the state's Freedom of Information Act in 1975 and has managed disputes concerning records and meetings in the state in the more than three decades since. The office is made up of 26 full-time staff members and had a budget of about \$1.7 million in 2006-2007.<sup>54</sup>

The commission combines administrative powers with quasi-legal powers to investigate violations of the Freedom of Information Act, to enforce its provisions, and to mediate disputes in an informal manner to seek settlement before a full hearing is conducted. For example, the commission:

- (1) Has the duty to "promptly review" alleged violations of the act;<sup>55</sup>
- (2) Must "issue an order" pertaining to said violations;<sup>56</sup>
- (3) Has the power to investigate alleged violations by holding hearings, administering oaths, subpoenaing and examining witnesses, and receiving testimony and evidence;<sup>57</sup>
- (4) Can apply to the superior court for the judicial district of Hartford to issue orders requiring compliance with subpoenas, which may be punished by contempt of court if not obeyed;<sup>58</sup>

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<sup>53</sup> Freedom of Information Commission and Connecticut Foundation for Open Government, *A Survey of Compliance by Local Agencies with the Freedom of Information Act* 11 (1999).

<sup>54</sup> State of Connecticut Freedom of Information Commission, *Who Are We?*, available at <http://www.state.ct.us/foi/about.htm> (last visited Sept. 9, 2008).

<sup>55</sup> CONN. GEN. STAT. § 1-205(d) (2008).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

- (5) May declare actions taken at a meeting in violation of the Freedom of Information Act null and void;<sup>59</sup>
- (6) May require the "production or copying of any public record" it believes is appropriately open under the Act;<sup>60</sup> and
- (7) May impose civil penalties of between \$20 and \$1,000 against officials and also against persons who frivolously appeals to the commission for the purpose of harassing the agency.<sup>61</sup>

The legal and equitable remedies with which the commission is empowered are comparable to those given to the courts in most other states. Hearings are conducted by members of the commission, called "hearings officers," who have judge-like powers.<sup>62</sup> And while complainants are entitled to contested hearings on matters, the commission appoints a staff member ombudsman who "will attempt to effect a settlement of each appeal" before it reaches a final hearing.<sup>63</sup>

Matters are not required to be resolved by the commission as quickly as is the case in other states that have short turnaround requirements for administrative review or review by the attorney general. On its face, the Freedom of Information Act only requires that appeals be resolved within one year of the filing of the appeal.<sup>64</sup> However, if the commission designates an appeal as "privileged," the case should be resolved by the commission within 90 days – hearings are to be held within 30 days of receipt of the appeal, and commission decisions must be made within 60 days of the hearing.<sup>65</sup> But the commission must expedite matters in the face of a threat to hold a meeting in executive session; in such cases, the commission will hold a preliminary hearing within 72 hours of

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<sup>59</sup> CONN. GEN. STAT. § 1-206(b)(2).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See *Regulations of the Connecticut Freedom of Information Commission* § 1-21j-8, available at <http://www.state.ct.us/foi/Regs/regsIndex.htm> (last visited Sept. 9, 2008).

<sup>63</sup> Freedom of Information Commission, *A Citizen's Guide to the Freedom of Information Commission*, available at <http://www.state.ct.us/foi/1998CITIZENSGUIDE.htm> (last visited Sept. 9, 2008).

<sup>64</sup> CONN. GEN. STAT. § 1-206(b)(1). Before 1987, the statute used to require a hearing within 20 days of the filing of the appeal in any case, and a commission decision within 30 days of the hearing. See former Conn. Gen. Stat. § 1-2i (b), changed by P.A. 86-408 (1986), cited in *Zoning Board of Appeals v. Freedom of Information Commission*, 503 A.2d 1161 (Conn. 1986).

<sup>65</sup> CONN. GEN. STAT. § 1-206(b)(1).

the filing of an appeal to the commission.<sup>66</sup> A finding of probable cause on behalf of the complainant at the preliminary hearing can result in the agency being prohibited from holding the meeting until after the appeal is finally decided.<sup>67</sup> These decisions must be made within five days of the preliminary hearing.<sup>68</sup> The Connecticut Supreme Court has ruled that these time limits are mandatory, not merely directory. If the commission does not hold a hearing and make a ruling in the proper amount of time, the ruling will be invalidated.<sup>69</sup>

Besides being the primary arbiter of freedom of information issues in Connecticut, the commission also serves as the entry point for any disputes over records or meetings. The state requires exhaustion of administrative remedies before a case can proceed to court,<sup>70</sup> and the Freedom of Information Act only authorizes suit upon appeal from an adverse ruling by the commission.<sup>71</sup> In such appeals, the commission has standing as a party to defend its decisions.<sup>72</sup> The commission issues about 200 formal rulings per year, and issued 260 in 2007.<sup>73</sup>

## 2. HAWAII

Hawaii's Office of Information Practices is "intended to be an alternative means for the public to appeal an agency's denial of access to records."<sup>74</sup> The office has the power to review agency denials and to order agency compliance,<sup>75</sup> but also handles

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> "The time requirements were not designed as merely a convenience to complainants under the act. The speedy disposition of complaints is important both to the complainant and to the efficient functioning of the governmental agency involved. Because the time requirements embodied in (the act) advance this purpose, they go to the essence of the act and are, therefore, mandatory." *Zoning Board of Appeals*, 503 A.2d 1161.

<sup>70</sup> CONN. GEN. STAT. § 4-183(a).

<sup>71</sup> CONN. GEN. STAT. § 1-206(d).

<sup>72</sup> *Id.*

<sup>73</sup> Numbers from the Connecticut Freedom of Information Commission, *available at* [http://www.state.ct.us/foi/final\\_decs.htm#Final Decisions](http://www.state.ct.us/foi/final_decs.htm#Final%20Decisions) (last visited Sept. 9, 2008).

<sup>74</sup> Office of Information Practices, *Annual Report 2007 1*, *available at* <http://www.state.hi.us/oip/reports.html> (last visited Sept. 9, 2008).

<sup>75</sup> HAW. REV. STAT. ANN. § 92F-15(a) (LexisNexis 2007).

informal inquiries from the public and from government agencies through its "Attorney-of-the-Day" service.<sup>76</sup> The office also performs educational and training services to government bodies.<sup>77</sup>

In fiscal year 2007, the Office of Information Practices received more than 1,100 inquiries from the public telephone inquiries, received 30 appeals from the public and opened 23 investigations into government bodies alleged to have violated either the Uniform Information Practices Act or the Sunshine Law.<sup>78</sup> In 2007, the office had eight staff members and operated on a budget of about \$400,000.<sup>79</sup>

This combination of informal responses to inquiries at little time or money cost to the public, formal powers to adjudicate and investigate, and duties to educate the public and government about open government laws make Hawaii a natural fit in the Multiple Processes model.

### 3. NEW JERSEY

New Jersey is a relative newcomer to the area of sunshine law-specific administrative bodies. As recently as 2002, New Jersey had a functional open meetings law but a substandard public records law considered in a 1999 audit "by media and public right-to-know advocates as...one of the worst access laws in the nation."<sup>80</sup>

But in 2002, the New Jersey legislature passed the Open Public Records Act, which created the Government Records Council.<sup>81</sup> The five-member council includes one representative each from the Department of Community Affairs and the Department of Education and three members from the public, who are not paid but can be reimbursed for expenses.<sup>82</sup>

An aggrieved party does not have to seek redress from the Government Records Council before going to court.<sup>83</sup> But the council has broad powers to handle public

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<sup>76</sup> Office of Information Practices, *supra* note 74, at 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 3.

<sup>80</sup> Paul D'Ambrosio, *A new right-to-know bill due*, ASBURY PARK PRESS, May 28, 1999.

<sup>81</sup> N.J. STAT. ANN. § 47:1A-7 (West 2008).

<sup>82</sup> *Id.*

<sup>83</sup> N.J. STAT. ANN. § 47:1A-6.

records disputes, including the power to "receive, hear and adjudicate"<sup>84</sup> complaints filed concerning a denial of access to records and the power to order the production of documents and witnesses.<sup>85</sup> The council does not have the power to issue fines or other civil penalties under the act.

New Jersey's mediation program gives parties an opportunity to quickly resolve disputes with the aid of a mediator and without going to court:

Mediation shall enable a person who has been denied access to a government record and the custodian who denied or failed to provide access thereto to attempt to mediate the dispute through a process whereby a neutral mediator, who shall be trained in mediation selected by the council, acts to encourage and facilitate the resolution of the dispute. Mediation shall be an informal, nonadversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement. The mediator shall assist the parties in identifying issues, foster joint problem solving, and explore settlement alternatives.<sup>86</sup>

The program refers all cases that fail to be resolved in mediation back to the council for investigation, moving the case from less formal to more formal with the possibility of a loop-back for more facilitation.<sup>87</sup> The council can make a ruling based on the written complaint and response, or if it is unable to do so on that basis, it may hold a contested hearing on the matter.<sup>88</sup> There is no charge to the complainant for this service.<sup>89</sup>

The council also operates a toll-free helpline and a Web site to aid less formal inquiries about the Open Records Law.<sup>90</sup> The council now has a staff of eight, including four case managers, and one in-house attorney.<sup>91</sup>

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<sup>84</sup> N.J. STAT. ANN. § 47:1A-7(b).

<sup>85</sup> N.J. STAT. ANN. § 47:1A-7(c).

<sup>86</sup> N.J. STAT. ANN. § 47:1A-7(d).

<sup>87</sup> N.J. STAT. ANN. § 47:1A-7(e).

<sup>88</sup> *Id.*

<sup>89</sup> N.J. STAT. ANN. § 47:1A-7(f).

<sup>90</sup> State of New Jersey Government Records Council, *About GRC*, available at <http://www.state.nj.us/grc/about> (last visited Sept. 9, 2008).

<sup>91</sup> State of New Jersey Government Records Council, *GRC Staff*, available at <http://www.state.nj.us/grc/about/staff> (last visited Sept. 9, 2008).

In spite of its improved administrative and enforcement provisions, the law has yet to prove it can be effective in compelling compliance. The *New Jersey Law Journal* reported in 2003 that its experiences indicated that "the system is rife with foot-dragging, bureaucratic browbeating, fee gouging and flat-out noncompliance."<sup>92</sup>

## B. MODEL 2: ADMINISTRATIVE FACILITATION

Sixteen jurisdictions embrace seeking interest-based solutions through informal mediation or facilitation, dispute resolution methods that reflect several of the tenets prevalent in Conflict Theory and Dispute Systems Design. These jurisdictions typically have a person or agency in place to mediate disputes that arise at no cost to the public. There are fewer layers of processing available than programs in the Multiple Process model; instead, these programs serve a way to divert disputes from litigation through a less formal process created by a state's law or policy. But through these informal dispute resolution processes, the jurisdictions embrace interest-based solutions at little or no cost to disputants, seeking to resolve disputes early and to lay the foundation for more cooperative problem-solving between government officials and those seeking access. Several different methods of implementing these kinds of program were evident. Within this model, the analysis of jurisdictions showed two main paths of facilitating disputes over access between the public and government agencies, which are referred to here as the "Mediation" path and the "Ombuds" path. A third path, referred to here as "Other," includes public access counselors and other programs that did not fit easily into either of the other two paths.

### 1. MEDIATION PATH

Perhaps no jurisdiction in the country has been as innovative with mediation as a tool for resolving disputes arising under the Sunshine Law than the Sunshine State. To provide an alternative to litigation, the Attorney General's Office created an informal open government mediation program in the early 1990s. That program was formally codified by the state legislature in 1995, and it has handled hundreds of cases since then. The statute defines "mediation" as:

a process whereby a neutral third person, called the mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a formal, nonadversarial process that has the objective of helping the disputing parties reach a mutually acceptable, voluntary agreement. In mediation, decisionmaking authority rests with the parties. The role of the mediator

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<sup>92</sup> Jim Edwards, *Government Agencies Filter Rays of Open Public Records Act's Sunshine*, NEW JERSEY LAW JOURNAL, March 17, 2003.

includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.<sup>93</sup>

The statute requires the Office of the Attorney General to employ at least one mediator, and that mediator must be a member in good standing with the Florida Bar.<sup>94</sup> The statutory language embraces many of the premises common to mediation: a neutral third party, voluntariness of agreement, identification of issues and problem-solving.

For example, cases referred to the program do not necessarily go before a mediator. Pat Gleason, who oversaw the program until 2005, said many cases are resolved through "a simple phone call" from the Attorney General's Office to a government agency.<sup>95</sup> As such, many disputes are solved quickly, some in less than 24 hours from the time the program is consulted.<sup>96</sup>

Resolving disputes in a timely manner is one of the main goals of the Sunshine Law, which calls for "an immediate hearing, giving the case priority over other pending cases" when an action is filed.<sup>97</sup> Courts have interpreted this to mean that Sunshine Law cases do not necessarily receive top priority, but they must be given priority over more routine matters "to accommodate the legislative desire that an immediate hearing be held."<sup>98</sup> The Office of the Attorney General cites a "three-week goal" in resolving disputes in the open government mediation program.<sup>99</sup>

In 2007, the mediation program handled more than 75 cases, part of the attorney general's efforts to "prevent expensive and time-consuming litigation which is often not an option for a citizen who is merely trying to hold his or her government accountable and responsible for its actions."<sup>100</sup> Participation in the program has dropped in recent years – the program typically handled more than 100 cases annually for years, and

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<sup>93</sup> FLA. STAT. ANN. § 16.60 (1) (LexisNexis 2008).

<sup>94</sup> FLA. STAT. ANN. § 16.60(3)(a).

<sup>95</sup> Pat Gleason, *Mediation Program Resolves Access Disputes, The Brechner Report (March 2000)*, available at <http://www.brechner.org/reports/2000/03mar2000.pdf>.

<sup>96</sup> *Id.*

<sup>97</sup> FLA. STAT. ANN. § 119.11(1).

<sup>98</sup> *Salvador v. Fennelly*, 593 So.2d 1091, 1094 (Fla. Dist. Ct. App. 1992).

<sup>99</sup> Office of Attorney General Charlie Crist, *2005 Year in Review*, 22-23 (May 2006), available at [http://www.myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/\\$file/2005YIR.pdf](http://www.myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/$file/2005YIR.pdf).

<sup>100</sup> Bill McCollum, *Generally Speaking*, vol. 6, no. 11 (March 14, 2008), available at <http://www.myfloridalegal.com/NewsBrie.nsf/OnlineBrief/485F60D5D533B97B8525740C00621BE2>.

handled 125 in 2005 – some of which may be attributable to the former head of the program being moved into a new Office of Open Government created when Charlie Crist became governor in 2007, which will be discussed below.<sup>101</sup>

The open government mediation program is similar to the sunshine-law-specific administrative agencies in other jurisdictions, but it is unique in that it is administered by the attorney general. Further, the general counsel has said that the program has been operated without any additional funds or legislative appropriations.<sup>102</sup> While the program is only statutorily approved to handle public records disputes, it has been used to mediate open meetings issues as well.<sup>103</sup>

The mediation program is “supplemental to...the other powers of the attorney general,” rather than a substitution of those powers.<sup>104</sup> The attorney general has other more formal powers, such as investigating violations in a manner similar to the ombuds path below, and it may issue legal opinions to government agencies, similar to the advisory model below.<sup>105</sup> The opinions are advisory and non-binding, and litigation is an option for parties who do not reach an agreement following such intervention by the Attorney General.

The programs offered by the attorney general are complemented by the Office of Open Government, which was created by executive order in 2007 and resides in the governor’s office.<sup>106</sup> This office is in place to ensure compliance and to provide training across the state on the Sunshine Law, adding more depth to Florida’s commitment to managing conflict through facilitation and education.

Without the same breadth of reach, other jurisdictions offer open government mediation programs as well. Georgia introduced its program in 1997,<sup>107</sup> and Pennsylvania established a mediation program in its newly-created Office of Open

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<sup>101</sup> Aaron Deslatte, *Records-access cases drop, McCollum says*, ORLANDO SENTINEL (March 16, 2008), available at <http://www.orlandosentinel.com/news/local/state/orl-mediate1608mar16,0,5528203.story>.

<sup>102</sup> This statement was made in 1999, almost five years into the program’s formal creation. See Gleason, *supra* note 96.

<sup>103</sup> *Id.*

<sup>104</sup> FLA. STAT. ANN. § 16.60(4).

<sup>105</sup> FLA. STAT. ANN. § 16.01(3).

<sup>106</sup> Office of the Governor of the State of Florida, *Executive Order No. 07-01* (Jan. 2, 2007), available at <http://www.flgov.com/pdfs/orders/07-01-outline.pdf>.

<sup>107</sup> Office of the Attorney General of Georgia, *Open Government Mediation Program*, available at [www.http://law.ga.gov/00/article/0,2086,87670814\\_87670967\\_87996538,00.html](http://www.http://law.ga.gov/00/article/0,2086,87670814_87670967_87996538,00.html) (last visited Sept. 9, 2008).

Records, signed into law in 2008. This office would issue advisory opinions, hear appeals of agency denials, and offer informal mediation, as well as provide training on open government matters to public officials.<sup>108</sup>

## 2. OMBUDS PATH

Six states have programs representative of ombuds,<sup>109</sup> or neutral parties that can investigate and aid in resolving disputes. Ombudspersons or offices can have varying powers and duties, but they typically are able to "fill multiple roles of counselor, investigator, mediator and advisor (at a minimum)," remaining flexible to use whatever resources and tactics disputants may need to reach resolution.<sup>110</sup> However, ombuds also typically have little power to enforce statutes or to impose solutions on disputing parties.<sup>111</sup>

The flexibility inherent in ombuds offices is reflected by the approaches of the states that follow this path in their sunshine laws.

Iowa's Citizens' Aide/Ombudsman is more of an investigator with some facilitation powers. The office is charged with investigating "any administrative action of any agency," either upon complaint or on its own.<sup>112</sup> It serves as an independent investigator with the power to issue subpoenas and to hear testimony,<sup>113</sup> but also as a facilitator that can "work with an agency to attempt to resolve a problem when an investigation shows that the agency has acted contrary to law."<sup>114</sup> The office handled 282 inquiries about public meetings and records issues in 2006, up from 169 just three years before.<sup>115</sup>

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<sup>108</sup> 65 PA. CONS. STAT. § 67.101 (West 2008).

<sup>109</sup> The author prefers "ombuds" to the more common "ombudsman" in the interest of gender-neutral writing.

<sup>110</sup> Tyler R. Harrison and Calvin Morrill, *Ombuds Processes and Disputant Reconciliation*, 32 J. OF APPLIED COMMUNICATION RESEARCH 318, 319 (2004).

<sup>111</sup> *Id.*

<sup>112</sup> IOWA CODE § 2C.9(1) (2008).

<sup>113</sup> IOWA CODE § 2C.9(5).

<sup>114</sup> Office of Citizens' Aide/Ombudsman, *Services We Offer*, available at <http://www.legis.state.ia.us/Ombudsman/services> (last visited Sept. 9, 2008).

<sup>115</sup> Ombudsman's Report 2006, 3 (June 2007), available at [http://www4.legis.state.ia.us/caodocs/Annual\\_Reports/2007/CAWPA000.PDF](http://www4.legis.state.ia.us/caodocs/Annual_Reports/2007/CAWPA000.PDF) (last visited Sept. 9, 2008).

Arizona, on the other hand, leans more toward facilitation. The state revised its public access laws in 2006, calling on the Office of Ombudsman-Citizens' Aide to facilitate disputes between people seeking access and government agencies, investigate complaints and to provide training and education about public access laws.<sup>116</sup> The office, which hired two staff members including one attorney at a cost of \$185,000 to take on its public access duties,<sup>117</sup> views itself as a "neutral dispute resolver" that is supposed to "aid in the resolution of problems in a nonadversarial manner," but with no authority to issue orders or adjudicate disputes.<sup>118</sup> In its first full year serving as ombuds of public access issues, the office received 368 inquiries, more than half of which were from the general public.<sup>119</sup>

Without explicitly referring to any role as an "ombuds," Virginia law requires Virginia's Freedom of Information Advisory Council to "encourage and facilitate compliance with the Freedom of Information Act."<sup>120</sup> In doing so, the council, created in 2000, has taken on an ombuds-like role in managing disputes over access in Virginia. In its annual report in 2007, the council noted: "Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media."<sup>121</sup> The council is required to issue advisory opinions at the request of the public or the government, and it is also charged with conducting educational seminars about access and "views its training mission as its most important duty."<sup>122</sup> In 2007, the 12-member council and its staff of two attorneys handled 1,708 inquiries and wrote 13 formal opinions.<sup>123</sup>

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<sup>116</sup> ARIZ. REV. STAT. § 41-1376.01 (LexisNexis 2008).

<sup>117</sup> Leah Duran, *New option in public records disputes*, THE ARIZONA DAILY STAR (Feb. 2, 2007).

<sup>118</sup> Arizona Ombudsman – Citizens' Aide, *What is an ombudsman?*, available at <http://www.azleg.gov/ombudsman/about.asp> (last visited Sept. 9, 2008).

<sup>119</sup> Paul Davenport, *Business Good for Arizona's Public Records Ombudsman*, ASSOCIATED PRESS, March 15, 2008.

<sup>120</sup> VA. CODE ANN. § 30-178(A) (West 2008).

<sup>121</sup> Report of the Virginia Freedom of Information Advisory Council to the Governor and General Assembly of Virginia, 2 (2007), available at <http://www.dls.state.va.us/groups/foiacouncil/2007ar.pdf> (last visited Sept. 9, 2008).

<sup>122</sup> *Id.* at 6.

<sup>123</sup> *Id.*

Other jurisdictions that fit the "ombuds path" are Alaska,<sup>124</sup> Tennessee,<sup>125</sup> and Washington.<sup>126</sup> In addition, an ombuds office was created in late 2007 to oversee the federal Freedom of Information Act, though there has been conflict over the location of the office. Congress called for the ombuds office to be operated by the National Archives and Records Administration; however, President Bush shifted the office to the Attorney General in a budget request, drawing the ire of legislators who feared that the move would threaten the independence of the office.<sup>127</sup>

### 3. OTHER

Several states also have dispute resolution systems that are facilitative in nature. For example, Kansas has a program operating at the agency level, requiring public information officers in each agency to "be able to assist the public agency and members of the general public to resolve disputes relating to the open records act."<sup>128</sup> Maryland fits into the facilitation model in meetings only,<sup>129</sup> with a three-member Open Meetings Law Compliance Board that can receive and review complaints from the public about potential violations of the Open Meetings Act. The agency can hold informal conferences to handle disputes, and if no agreement is reached, it can issue a written advisory opinion

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<sup>124</sup> Alaska has no formal ombuds program in its open government laws, but a state ombuds office is available to handle citizen complaints about state agencies. *See* ALASKA STAT. § 24.55.010 et seq. (2008).

<sup>125</sup> Tennessee formally created the Office of Open Records Counsel in 2008. TENN. CODE ANN. § 8-4-601 (2008). However, this was an extension of an ombuds program created by Gov. Phil Bredesen in 2007, consisting of two staff members in the state comptroller's office. The office helps to resolve disputes between government agencies and people seeking access to meetings or records. It does not have enforcement powers. *See* Beth Rucker, *Office hoping for co-operation*, ASSOCIATED PRESS, Jan. 1, 2008. The office started a toll-free hotline and informational Web site in 2008. Michael Cass, *State launches open records web site, toll-free number*, THE TENNESSEAN (March 24, 2008).

<sup>126</sup> Washington's ombuds was created by the attorney general in 2005. Washington State Office of The Attorney general, *Open Government Ombudsman*, available at <http://www.atg.wa.gov/OpenGovernment/Ombudsman.aspx#OG1> (last visited Sept. 9, 2008).

<sup>127</sup> Elizabeth Williamson, *Is Ombudsman Already in Jeopardy?*, WASHINGTON POST, A17, Feb. 6, 2008.

<sup>128</sup> KAN .STAT. ANN. § 45-226(b)(2) (2006). Outside of this program, Kansas resembles the "Litigation" model, *infra*.

<sup>129</sup> For records, litigation is the only option. The attorney general may issue advisory opinions, an approach resembling the "Advisory" model, *infra*.

that is not binding on the agency.<sup>130</sup> North Carolina also calls for facilitation in a limited scope with its Information Resource Management Commission, which can mediate issues regarding excessive fees charged for copying public records.<sup>131</sup>

However, larger administrative bodies with broader scope are also available to facilitate disputes, with more duties than open government mediation but without the same investigative duties as an ombuds. Indiana's Public Access Counselor is representative of these bodies.

The Indiana Public Access Counselor office was created in 1999. The counselor is an attorney appointed by the governor<sup>132</sup> and has numerous duties, including training the public and public agencies on open government laws,<sup>133</sup> handling informal inquiries about public access laws,<sup>134</sup> and writing advisory opinions at the request of a member of the public or a public body.<sup>135</sup> The office is staffed with the counselor and one administrative assistant.<sup>136</sup> Complaints may be submitted to and resolved by the counselor,<sup>137</sup> but a person does not have to file a complaint with the counselor before filing suit under the public records or open meetings laws.<sup>138</sup> However, people have one main form of encouragement to seek the aid of the Public Access Counselor before going to court. If a person makes no effort to resolve a dispute through the Public Access Counselor, he or she is barred from having attorney's fees paid by the public body.<sup>139</sup>

In fiscal year 2007, the office received 2,097 inquiries and complaints and reported resolving all but 53 of those. Inquiries can be made by telephone or e-mail. The

<sup>130</sup> MD. CODE ANN. STATE GOV'T § 10-502 et seq. (LexisNexis 2008).

<sup>131</sup> N.C. GEN. STAT. § 132-6.2(b) (2007). Besides this program, North Carolina calls for an informal advisory role for its attorney general, which would place the rest of the program more in the "advisory" model, *infra*.

<sup>132</sup> BURNS IND. CODE ANN. § 5-14-4-6 (2008). The position was created in 1999, and the counselor serves four-year terms. *Id.*

<sup>133</sup> BURNS IND. CODE ANN. § 5-14-4-10(1).

<sup>134</sup> BURNS IND. CODE ANN. § 5-14-4-10(5).

<sup>135</sup> BURNS IND. CODE ANN. § 5-14-4-10(6).

<sup>136</sup> Public Access Counselor, *Annual Report of the Public Access Counselor to the Indiana General Assembly* (2007), available at <http://www.in.gov/pac/pdfs/annual07.pdf> (last visited Sept. 9, 2008).

<sup>137</sup> BURNS IND. CODE ANN. § 5-14-5-6.

<sup>138</sup> BURNS IND. CODE ANN. § 5-14-5-4.

<sup>139</sup> BURNS IND. CODE ANN. § 5-14-3-9.

office also issued 251 written advisory opinions and made 24 educational presentations regarding Indiana's open government laws.<sup>140</sup>

Illinois established a Public Access Counselor in 2004, housed in the Office of the Attorney General with similar duties to its Indiana counterpart. The attorney general's "Public Access Team" responds to citizen complaints, works with agencies to ensure compliance, and can mediate open government disputes.<sup>141</sup>

New York's Committee on Open Government also has similar duties: handling public inquiries, serving as an informal mediator, and issuing written advisory opinions that are not binding on the government.<sup>142</sup> The committee has four employees and, in 2007, it answered more than 6,600 inquiries, wrote more than 800 advisory opinions, and gave 127 presentations to the public and to government officials on the state's open government laws.<sup>143</sup>

### C. MODEL 3: ADMINISTRATIVE ADJUDICATION

The seven states that fit into the Administrative Adjudication model rely less on facilitation, instead serving as an arbiter of disputes in a quasi-judicial manner. This model offers a low-cost alternative to litigation and has potential to allow for more negotiation in a less charged environment, embracing some of the principles of Dispute Systems Design. But rather than seeking interest-based solutions, the states in the Administrative Adjudication model issue orders that can be binding on agencies. Because the model remains more competitive than cooperative in nature, Conflict Theory suggests that these jurisdictions may be sacrificing any chance of transforming the underlying conflict over access in the interest of speedy and cost-effective dispute resolution.

Several of these states give this adjudicative role to the attorney general, while others have other public agencies in place to serve as the arbiter.

Texas and Oregon seek to quickly handle records disputes by requiring the input of their attorneys general before a situation proceeds to court.<sup>144</sup> The attorneys general

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<sup>140</sup> Public Access Counselor, *supra* note 130.

<sup>141</sup> Office of the Attorney General, State of Illinois, *Public Access Counselor Annual Report, An overview of 2007*, 1 (March 2008), available at [http://www.illinoisattorneygeneral.gov/government/PublicAccessCounselorAnnualReport\\_0308.pdf](http://www.illinoisattorneygeneral.gov/government/PublicAccessCounselorAnnualReport_0308.pdf) (last visited Sept. 9, 2008).

<sup>142</sup> N.Y. PUB. OFF. LAW § 89 (Consol. 2008).

<sup>143</sup> Committee on Open Government, *Report to the Governor and State Legislature 2007*, available at <http://www.dos.state.ny.us/coog/2007report.htm> (last visited Sept. 9, 2008).

<sup>144</sup> The Texas and Oregon duties given to the attorney general are for records disputes only. For their public meetings acts, Texas and Oregon do not specify any role for their attorneys general,

take on administrative law powers, becoming almost necessary parts of the process of deciding whether a party should receive access to records.

Attorney general opinions must be sought in Texas by any government agency that seeks to deny access to a public record under one of the exemptions to the Public Information Act.<sup>145</sup> The agency does not have to seek an opinion if the attorney general or a court has addressed the specific issue at hand previously;<sup>146</sup> however, the attorney general cautions public bodies that this exception is “narrow in scope” and does not pertain to records that are “substantially similar” to those closed under previous decisions.<sup>147</sup> Further, the public body is barred from requesting an opinion on closing an issue when a previous opinion has already declared that a record is open, which precludes asking the attorney general to reconsider a previous ruling.<sup>148</sup>

A party may seek declaratory or injunctive relief without necessarily waiting for the attorney general to issue an adverse ruling.<sup>149</sup> However, this route is impractical, both in terms of time and cost, considering the duties placed upon the government bodies to seek attorney general review for any denial.

The review process is relatively quick – the government body must ask for an attorney general opinion within 10 business days of receiving a request,<sup>150</sup> and the attorney general “shall promptly render a decision,” at the most within 45 working days of receiving the request for a decision.<sup>151</sup>

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thus leaving them to their more traditional roles as advisors and chief legal officers for the state without any other administrative duties or enforcement powers.

<sup>145</sup> TEX. CODE ANN. GOV'T § 552.301(a) (Vernon 2008).

<sup>146</sup> *Id.*

<sup>147</sup> Office of the Attorney General, *Public Information Handbook* 34 (2008), available at [http://www.oag.state.tx.us/AG\\_Publications/pdfs/publicinfo\\_hb2008.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf) (last visited Sept. 9, 2008).

<sup>148</sup> TEX. CODE ANN. GOV'T § 552.301(f).

<sup>149</sup> TEX. CODE ANN. GOV'T § 552.3215(b) simply states: “An action for a declaratory judgment or injunctive relief may be brought in accordance with this section against a governmental body that violates this chapters,” without any mention of the role of the attorney general.

<sup>150</sup> TEX. CODE ANN. GOV'T § 552.301(b).

<sup>151</sup> TEX. CODE ANN. GOV'T § 552.306(a). The office of the attorney general can seek to delay its ruling by 10 additional working days if proper notice and reason is given to the parties. *Id.*

This process is being used more and more frequently in Texas. In 2007, the Office of the Attorney General issued more than 17,000 letter rulings, almost double the amount requested in 2003 and nearly six times the amount requested in 1999.<sup>152</sup>

The Oregon attorney general, who is not a mandatory party to the process as in Texas, nevertheless takes on a similar administrative role in records disputes. Rather than requiring agencies to seek attorney general advice, Oregon lets people seeking access ask for review when state agencies deny records.<sup>153</sup> But before the person can take any steps to enforce the Public Records Act, he or she must receive an attorney general order denying the petition for relief.<sup>154</sup> Similarly, if the attorney general orders disclosure of the record, the public body must either comply with the order or issue "a notice of its intention to institute proceedings for injunctive or declaratory relief" in court.<sup>155</sup> The Office of the Attorney General also works expeditiously; it must issue orders within seven days from the day it receives the petition for relief.<sup>156</sup>

Kentucky also gives its attorney general adjudicative powers. Citizens may appeal denials to the attorney general, and after considering the arguments of the requestor and the government body, the attorney general can make decisions that are binding on public bodies and that have the "force and effect of law," requiring an appeal to court to overturn them.<sup>157</sup> Rhode Island<sup>158</sup> and Nebraska also call on the attorney general to enforce the law upon citizen complaints. In Nebraska, citizens can demand that the attorney general sue if a public body refuses to comply with the attorney general's decisions.<sup>159</sup>

An example of a more formal administrative agency that serves an adjudicative role can be found in Utah. The State Records Committee has broad powers to handle disputes, including holding a hearing within 17 days of receiving the notice of appeal,<sup>160</sup>

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<sup>152</sup> In 2007, the office issued 17,106 rulings; in 2003, office issued 9,049 rulings; in 1999, the office issued 3,829 rulings, according to the Office of the Attorney General's Web site, [http://www.oag.state.tx.us/open/index\\_orl.php?ag=50abbott](http://www.oag.state.tx.us/open/index_orl.php?ag=50abbott) (last visited Sept. 9, 2008).

<sup>153</sup> OR. REV. STAT. § 192.450(1) (2008).

<sup>154</sup> OR. REV. STAT. § 192.450(2). It is not enough that a party seek attorney general review; a final order must be made before a person can institute proceedings in court. See *Morse Bros., Inc. v. Or. Dep't of Econ. Dev.*, 798 P.2d 719 (Ore. Ct. App. 1990).

<sup>155</sup> *Id.*

<sup>156</sup> OR. REV. STAT. § 192.450(1).

<sup>157</sup> KY. REV. STAT. ANN. § 61.880 (LexisNexis 2008).

<sup>158</sup> See Hammitt, *supra* note 2, at 16.

<sup>159</sup> NEB. REV. STAT. ANN. § 84-712.03(2) (LexisNexis 2007).

<sup>160</sup> UTAH CODE ANN. § 63-2-403(4) (2008).

issuing subpoenas,<sup>161</sup> ordering disclosure of records<sup>162</sup> and ordering civil penalties of up to \$500 "for each day of continuing noncompliance."<sup>163</sup> Government bodies must comply with orders of the committee.<sup>164</sup> The committee is made up of seven members, including a representative from the media and a citizen member.<sup>165</sup> The attorney general is not part of the committee, but provides counsel to it.<sup>166</sup> However, the committee is not often called upon to use these duties. In 2007, the committee issued just 16 decisions.<sup>167</sup>

Massachusetts has a less formal administrative body, but one that still operates in an adjudicative manner. The Supervisor of Public Records handles formal, written appeals of agency denials of access to records. The supervisor has broader powers to employ "any administrative means available to resolve summarily any appeal."<sup>168</sup> Further, records custodians "shall promptly take such steps as may be necessary to put an order of the Supervisor into effect," giving the supervisor some power to order agencies what to do.<sup>169</sup> However, opinions of the supervisor are non-binding.<sup>170</sup> Massachusetts does, however, have the potential for some facilitation. The Division of Public Records handles informal inquiries through an "Attorney of the Day," a staff member who answers phone calls from the public or the government regarding the public records law. These calls, however, do not typically involve advisory opinions about the public records law.<sup>171</sup>

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<sup>161</sup> UTAH CODE ANN. § 63-2-403(10)(a).

<sup>162</sup> UTAH CODE ANN. § 63-2-403(11)(b).

<sup>163</sup> UTAH CODE ANN. § 63-2-403(14)(b)(i)(A).

<sup>164</sup> UTAH CODE ANN. § 63-2-403(14)(a).

<sup>165</sup> UTAH CODE ANN. § 63-2-501.

<sup>166</sup> UTAH CODE ANN. § 63-2-502(8).

<sup>167</sup> *State Records Committee Appeal Decision Summaries, 2007-2008*, available at <http://www.archives.state.ut.us/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=374> (last visited Sept. 9, 2008).

<sup>168</sup> MASS. GEN.LAWS ch. 66 § 32.08-2-5 (2008).

<sup>169</sup> MASS. GEN.LAWS ch. 66 § 32.09.

<sup>170</sup> Hammitt, *supra* note 2, at 12.

<sup>171</sup> WILLIAM FRANCIS GALVIN, A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW 11, available at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf> (last visited Sept. 9, 2008).

## D. MODEL 4: ADVISORY

Unlike the public bodies described in the Administrative Adjudication model, it is more typical for attorneys general and administrative agencies to have a less formal, advisory role when disputes arise under the Sunshine Law. Eight jurisdictions follow this "Advisory" model, granting attorneys general or other public bodies the ability to issue informal opinions at the request of citizens or public officials, without any affirmative duties to facilitate disputes or to issue binding rulings. Without embracing all of the tenets of Dispute Systems Design, the advisory approach does allow parties a low-cost option that calls for a third party to intervene to try to resolve disputes before they reach court. The informal, non-binding nature of this intervention may allow for more negotiation in a more cooperative and constructive environment, as Conflict Theory recommends.

Five of these jurisdictions – Arkansas, Delaware, Montana, North Dakota and Wisconsin – allow citizens to seek advisory opinions from the attorney general concerning open government matters, typically after a request for access has been denied. In Washington, D.C., requests for review are instead made to the mayor.<sup>172</sup> Wisconsin has a typical provision, saying that "any person may request advice from the attorney general" regarding the public records law, and that the "attorney general may respond to such a request."<sup>173</sup> In Arkansas, the attorney general is only authorized to issue advice to public bodies, but Hammitt noted that sometimes the attorney general will also issue informal opinions to the public as well.<sup>174</sup>

Two states follow the Advisory model through other public bodies. South Dakota's Open Meetings Commission, created in 2004, is in place to handle complaints arising from potential violations of the state's open meetings laws. Complaints are first directed to the attorney general, then forwarded to the commission.<sup>175</sup> The commission can issue written findings of fact and law, which are not necessarily binding on the parties to the dispute.<sup>176</sup> The commission has no further enforcement or facilitation powers outlined in the statute. Minnesota's Commissioner of Administration also offers non-binding advisory opinions at the request of the public, with one minor difference than the above. Such requests cost \$200 if they are made in regards to the open meetings law, making this commission the only one that charges a fee for its advice on access

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<sup>172</sup> D.C. CODE ANN. § 2-537 (LexisNexis 2008).

<sup>173</sup> WIS. STAT. § 19.39 (2007).

<sup>174</sup> Hammitt, *supra* note 2, at 17.

<sup>175</sup> S.D. CODIFIED LAWS § 1-25-6 (2008).

<sup>176</sup> S.D. CODIFIED LAWS § 1-25-7.

issues.<sup>177</sup> The Minnesota attorney general may also issue advisory opinions, which take precedence over commission opinions but are still non-binding.<sup>178</sup>

Jurisdictions following the advisory model have made a commitment to some kind of informal review, providing another layer of processing of disputes before they go to litigation. Depending on the activities of the advisory body at hand, these programs may be representative of the recommendations of Dispute Systems Design. However, the statutes do not clearly require that the advisor behave in a cooperative or facilitative manner, and there is certainly potential that the advisory opinion would simply be another level of administrative adjudication before litigation commences. Much depends on the outlook and approach of the advisory body, details that cannot be gleaned from statutory language alone.

### E. MODEL 5: LITIGATION

Every jurisdiction offers litigation as an option for parties that are displeased with the way a public access issue has been handled. However, more than a third of the jurisdictions in this study – 18 out of 52 – had no reference to dispute resolution systems available to the public outside of litigation mentioned in their open government laws.<sup>179</sup> That does not mean that each of these states has no options besides litigation; rather, it represents that these states do not have formal mechanisms in the statutory schemes that lay out other forms of dispute resolution. States may have informal systems in place. For example, Missouri’s attorney general has been called upon to help members of the public and the media to gain access to records despite no formal requirements of this in the state’s public records law.<sup>180</sup>

Also, this is not to imply that litigation and adjudication is an altogether improper way to resolve disputes. Adjudication is not, in itself, an inadequate way to resolve conflict. Gulliver noted that adjudication is most appropriate when parties’ interests are “totally incompatible” or if facts require an “authoritative third-party ruling.”<sup>181</sup>

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<sup>177</sup> MINN. STAT. § 13.072(b) (2007).

<sup>178</sup> MINN. STAT. § 13.072(b).

<sup>179</sup> These states were: Alabama, California, Colorado, Idaho, Louisiana, Maine, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, South Carolina, Vermont, West Virginia, and Wyoming.

<sup>180</sup> Jean Maneke, *Enforcing the Sunshine Law*, MISSOURI PRESS NEWS (2003), available at [http://www.mopress.com/\\_lib/files/ManLawSUNenforce.pdf](http://www.mopress.com/_lib/files/ManLawSUNenforce.pdf) (last visited Sept. 9, 2008).

<sup>181</sup> P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 13-17 (Academic Press, 1979).

However, he noted, adjudication systems may be "dysfunctional" when a more accommodative or complex solution is needed.<sup>182</sup>

Relying on the "rule of law" through a system that emphasizes litigation and adjudication is just one of many conflict management systems available to parties. However, this system certainly does not on its face embrace the interest-based, problem-solving orientations suggested by Conflict Theory and Dispute Systems Design. As Menkel-Meadow noted, the "law (is) often conflictual, indeterminate and politically contested or manipulable, or so focused on the need for regulation of the aggregate that it cannot always do 'justice' in particular cases."<sup>183</sup> Because this need for justice is so important in the context of open government disputes, and because litigation may have more significant costs of time and money to parties, it appears to be less than ideal as a dispute resolution system.

## V. CONCLUSION

Conflict Theory suggests that the kind of conflict resolution system in place is representative of the social relationship between parties, establishing the context of the conflict that provides "meaning and creates expectations for behavior."<sup>184</sup> As such, a conflict resolution system that focuses on litigation and adjudication, rather than negotiation and problem-solving, would evidence a social relationship that is more competitive and less cooperative. To get beyond litigation and adjudication, conflict management scholars encourage "process pluralism," which calls for the use of methods besides, or in addition to, conventional legal processes to resolve disputes.<sup>185</sup> Sander and Goldberg described this as "fitting the forum to the fuss."<sup>186</sup> These processes, which include negotiation, facilitation, mediation, arbitration, and hybrids of those processes, are often referred to collectively as "alternative dispute resolution."<sup>187</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> Menkel-Meadow, *supra* note 8, at xii.

<sup>184</sup> Lulofs & Cahn, *supra* note 16, at 32.

<sup>185</sup> *Id.* at xiv.

<sup>186</sup> Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

<sup>187</sup> Although conflict resolution and dispute resolution scholars usually cover similar ground in their research, they can be distinguished by the situation of the parties involved. Generally, "conflict" refers to the overarching social relationship between individuals or social groups with divergent interests, while "disputes" are more narrowly focused on the divergent interests at hand, often after they have been reduced to a legal case between individuals. Menkel-Meadow, *supra* note 8, at xvi.

Alternative dispute resolution processes are evident in the freedom of information dispute resolution systems typology developed in this study. Whether through mediation programs, adjudicative processes, ombuds, administrative bodies, informal advisory opinions, or some hybrid of these, the 52 jurisdictions have come up with dozens of approaches to managing conflict effectively. Some of these approaches touch on multiple models. For example, Maryland offers an Open Meetings Commission that is classified here as “Administrative Facilitation,” but this program is for meetings only; records requests are handled in a fashion more resembling the “Advisory” model. Additionally, states that rely on the attorney general or other public bodies to issue rulings that resemble the “Administrative Adjudication” model, also call for these offices to offer some informal advice and training. For example, the Texas attorney general operates a toll-free helpline for informal public inquiries<sup>188</sup> and offers mandatory training to public officials on the open government law.<sup>189</sup>

Considering the principles of Dispute Systems Design and Conflict Theory, the first two models – Multiple Processes and Administrative Facilitation – seem to offer the most promise in dealing with long-term conflict over access while also managing the many disputes that arise along the way. Because of the successes of states such as Florida, with its Open Government Mediation Program, and Connecticut, with its Freedom of Information Commission, it is easy to hold out these two jurisdictions as models for all others. But these two programs are present in states with long-term commitments to freedom of information, and these kinds of programs may not be ideal or cost-effective for other jurisdictions.<sup>190</sup> One commentator suggests that a more cost-effective model for some states may be Indiana’s Public Access Counselor or Minnesota’s Commissioner of Administration,<sup>191</sup> which fall into the Administrative Facilitation and Advisory models, respectively.

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<sup>188</sup> Texas Attorney General, *Complaints & Enforcement*, available at <http://www.oag.state.tx.us/open/enforcement.shtml> (last visited Sept. 9, 2008).

<sup>189</sup> Texas Attorney General, *Open Government Training Information*, available at [http://www.oag.state.tx.us/open/og\\_training.shtml](http://www.oag.state.tx.us/open/og_training.shtml) (last visited Sept. 9, 2008).

<sup>190</sup> The New York Committee on Open Government noted this in a 2007 report: “Connecticut is one-tenth the size of New York, and our population is more than five times as great. The staff of the Committee on Open Government in New York is four; Connecticut’s FOI Commission has twenty employees. The cost of implementing a similar program in New York, with an independent agency having the power to enforce the law, would be many millions of dollars.” New York Committee on Open Government, *Report to the Governor and State Legislature 2007*, available at <http://www.dos.state.ny.us/coog/2007report.htm>.

<sup>191</sup> See Jean Maneke and Jill Barton, *Providing Public Assistance for the Sunshine Law*, 63 J. MO. B. 74, 79 (2007).

However, empirical study of the effectiveness of these dispute systems is lacking. Scholars and the news media have praised the open government laws in Florida<sup>192</sup> and Connecticut.<sup>193</sup> But no independent research has been done to confirm whether the systems in place are meeting the needs of disputants or whether they are effectively diverting cases from litigation or are otherwise meeting the needs of disputants.<sup>194</sup> This is not an issue restricted to research on dispute processing systems in open government; Conbere has noted the lack of empirical research and theory-building in Dispute Systems Design in general and has called for more research into the effectiveness of systems using these approaches.<sup>195</sup> Similarly, Bingham has commented, "[w]e do not have a body of consistently collected observations about dispute resolution and the systems with which it is compared."<sup>196</sup> However, some studies have been conducted that examine the effectiveness of dispute resolution systems. For example, a case study of the Parades Commission in Northern Ireland, which was created in 1997 to mediate and adjudicate disputes over contentious parades conducted by Loyalists and Nationalists in the region, found that public attitudes about the commission were generally more negative than positive.<sup>197</sup> The authors cautioned against placing unrealistic expectations on a single institution," particularly one facing the long-term cultural and political challenges of this conflict.<sup>198</sup> In a different context, interviews of participants in a workplace program found that mediation was considered as an ideal but unrealistic strategy for managing

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<sup>192</sup> See Sandra F. Chance and Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent With Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245 (2008); Harry Hammitt said Florida is considered by many to be the "sunniest" state for public access laws. Christopher Williams, *Maine right-to-know law needs overhaul*, experts say, ASSOCIATED PRESS, Dec. 30, 2002.

<sup>193</sup> "Connecticut doesn't have the nation's strongest Freedom of Information laws, but its FOI Commission is one of the most powerful." Cara Rubinsky, *Connecticut FOI Commission marks 30 years*, ASSOCIATED PRESS, March 12, 2005.

<sup>194</sup> The Florida Attorney General has said that the state's Open Government Mediation Program offers benefits such as "the saving of tax dollars that may otherwise have been used to pay extensive legal fees and costs."

<sup>195</sup> See Conbere, *supra* note 26.

<sup>196</sup> Lisa B. Bingham, *The Next Step: Research on How Dispute System Design Affects Function*, 18 NEGOT. J. 375, 375-376 (2002).

<sup>197</sup> Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute Systems Design and the Mediation of Contested Parades in Northern Ireland*, 22 OHIO ST. J. ON DISP. RESOL. 133 (2006).

<sup>198</sup> *Id.* at 183-184.

workplace conflict; instead, employees reported a preference for direct negotiation without a third party being involved.<sup>199</sup>

Empirical research into the design of dispute resolution systems in open government laws should be done to provide guidance to jurisdictions as they reconsider the ways these laws operate. This study hopes to help inform the creation of new dispute resolution systems or modification of existing dispute resolution systems in open government laws. But this study is only a beginning. Because it examined only formal systems and programs in statutes and government bodies, this study did not look at the informal dispute resolution systems that have emerged to manage relationships between government bodies and people seeking access. These emergent systems, particularly in jurisdictions with no formal alternatives besides litigation, should be explored in more depth to see what lessons can be learned.<sup>200</sup> Further, the manner in which the dispute resolution systems have been created – the design process – could be examined to see how best to implement the needs of the varying stakeholders in legislation regarding open government. Additionally, the models developed by this study should each be evaluated to see how effective they are at meeting the needs of disputing parties.

Conflict Theory and Dispute Systems Design have valuable lessons that can be applied in many contexts. If applied to freedom of information laws, they can help build on a strong foundation of legal research and analysis to lead to a better framework. With an orientation of effective conflict management that emphasizes cooperation rather than competition, particularly allowing practical low-cost solutions throughout the dispute process, freedom of information laws may be able to live up to their lofty goal of ensuring transparent, democratic government.

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<sup>199</sup> Jessica Katz Jameson, *Employee Perceptions of the Availability and Use of Interest-Based, Rights-Based, and Power-Based Conflict Management Strategies*, 19 CONF. RESOL. Q. 163, 185-186 (2001).

<sup>200</sup> The author is currently conducting in-depth interviews with people involved in open government disputes to examine these kinds of informal systems.

# FRIENDS OF THE FIRST AMENDMENT? AMICUS CURIAE BRIEFS IN FREE SPEECH/PRESS CASES DURING THE WARREN AND BURGER COURTS

Minjeong Kim and Lenae Vinson

*This study, relying upon a pre-existing data set compiled by other researchers, quantitatively examines the trends and effect of amicus curiae brief filing in free speech/press cases decided by the U.S. Supreme Court in the years between 1953 and 1986. Out of 4,441 cases analyzed in this study, 181 cases were in the free speech/press topic area, and 124 of them had at least one amicus brief filed. The study findings demonstrate general trends in the filing and outcome of the cases; general trends of amicus curiae brief filing in free speech/press cases; the influence of amicus curiae briefs indicated in the Court opinion and indicated in litigation success; the most active participants of amicus brief filing in free speech/press cases; and the top ten free speech/press cases with the most number of amicus curiae briefs. This study suggests that various media organizations and civil rights groups would be wise to continue to engage in amicus curiae filings in free speech/press cases to defend First Amendment freedoms.*

**Keywords:** Supreme Court, amicus, free speech, free press.

## I. INTRODUCTION

There has been a growing body of research in recent years that focuses on the historical increase of amici filings in the courts, noting a distinct increase of amicus participation in the last half-century.<sup>1</sup> Historically, briefs amicus curiae have had ups and downs in the courts; in fact, there have been times where very few briefs were allowed,

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<sup>1</sup> See Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the influence of Amicus Curiae Briefs*, 60 POL. SCI. Q. 55 (2007); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA L. REV. 743 (2000); Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L. J. 1605 (1999); Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RESEARCH Q. 339 (1993).

but that later changed to more liberally allow the briefs.<sup>2</sup> Now, research shows extensive use of amicus curiae briefs in the Supreme Court; currently, “amicus participation is now present in almost every case heard by the Court.”<sup>3</sup> Further, Caldeira and Wright have illuminated the fact that “a brief amicus curiae serves as a good indicator of the legal, social, and political importance of a case”<sup>4</sup> and other research has suggested this important implication as well.<sup>5</sup>

With this concept in mind, the authors of this study turned to free speech cases to study the role of amici; however, there is very little research that illuminates the amicus curiae brief in relation to free speech cases specifically. Due to the ubiquitous nature of the amicus curiae brief in the Supreme Court, but the limited information about the connection between amici in free speech cases, the authors decided to explore this area of amicus curiae. Thus, the purpose of this study is to examine the trends and effect of amicus curiae brief filing in free speech/press cases.

To this end, the authors of this study identified and located an existing data set containing information regarding cases decided by the U.S. Supreme Court from 1953 to 1986 as well as amicus curiae filings in those cases. The methodology section presents a detailed explanation about the data set and how the authors of this study decided to analyze it. Next, findings from the analysis and the conclusion are given. However, this study begins with a literature review.

## II. LITERATURE REVIEW

Originally intended to provide assistance to the court, many have discussed the transition of amicus curiae becoming a ‘friend of a party’ rather than the intended ‘friend of the court.’<sup>6</sup> Some authors have even described amici as a tool for political advocacy in the courts<sup>7</sup>; in fact, one critic scoffed that “the neutral role of the amicus has been totally

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<sup>2</sup> Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. OF POL. 782 (1990).

<sup>3</sup> Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC’Y REV 807, 829 (2004).

<sup>4</sup> Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC’Y REV 807, 819 (1990).

<sup>5</sup> See Caldeira & Wright, *supra* note 2; Collins, *supra* note 3 for further examples.

<sup>6</sup> Lucas, *supra* note 1; See also Caldeira & Wright, *supra* note 2.

<sup>7</sup> See Caldeira & Wright, *supra* note 2; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963); Samuel Krislov, *The Role of the Attorney General as Amicus Curiae*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 71 (Luther A. Hutson et al. eds., 1968).

forgotten.”<sup>8</sup> On the subject of advocacy in the courts, Epstein and Rowland remarked that “we now know that the majority of Supreme Court cases attract the attention of a multitude of pressure groups.”<sup>9</sup> One segment of those “pressure groups” is found in interest groups; and in fact, one of the most common ways that interest groups are involved in Supreme Court legislation is through the amici.<sup>10</sup>

Several authors have suggested that one possible reason that interest groups often act as amici is due to the fact that they can “participate in Supreme Court adjudication without taking on heavier financial burdens themselves.”<sup>11</sup> While the preparation and filing of an amicus curiae brief is less costly than other methods of litigation, the briefs are certainly not inexpensive per se and are therefore reserved for cases where deemed most beneficial.<sup>12</sup> Through the act of filing amicus curiae briefs in Supreme Court cases, interest groups often assist in molding the agenda for the Supreme Court.<sup>13</sup>

Having highlighted some of the concerns and challenges of the increased use of amici in the courts, it should also be mentioned that the current body of literature regularly outlines the positive aspects of briefs amicus curiae. Several authors reiterate that amicus curiae briefs are indeed beneficial to the courts and do influence the courts’ decisions.<sup>14</sup> It has been determined that the inclusion of an amicus curiae brief in a case often influences the outcome of the case.<sup>15</sup>

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<sup>8</sup> Samuel Krislov, *The Role of the Attorney General as Amicus Curiae*, *supra* note 7.

<sup>9</sup> Lee Epstein & C.K. Rowland, *Debunking the Myth of Interest Group Invincibility in the Courts*, 85 AM. POL. SCI. REV. 205, 205 (1991).

<sup>10</sup> *Id.*; *See also* Collins, *supra* note 3; JUDITH S. McLAUCHLAN, CONGRESSIONAL PARTICIPATION AS AMICUS CURIAE BEFORE THE U.S. SUPREME COURT (2005).

<sup>11</sup> Collins, *supra* note 3, at 825. *See also* Caldeira & Wright, *supra* note 2; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963); Songer & Sheehan, *supra* note 1. *See* Songer and Sheehan, *supra* note 11; Caldeira & Wright, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> *See* Epstein & Rowland, *supra* note 9; Caldeira & Wright, *supra* note 2; McLaughlan, *supra* note 10.

<sup>14</sup> *See* Caldeira & Wright, *supra* note 2; Collins, *supra* note 3; Epstein & Rowland, *supra* note 9; Stefanie A. Lindquist & Rorie S. Solberg, *Judicial Review by the Burger and Rehnquist Courts: Explaining Justices’ Responses to Constitutional Challenges*, 60 POL. RESEARCH Q. 71 (2007); Kevin T. McGuire, *Obscenity, Libertarian Values, and Decision Making in the Supreme Court*, 18 AM. POL. Q. 47 (1990); Songer & Sheehan, *supra* note 11.

<sup>15</sup> *See* Collins, *supra* note 1; Barbara L. Graham, *Explaining Supreme Court Policymaking in Civil Rights: The Influence of the Solicitor General, 1953–2002*, 31 THE POL’Y STUD. J. 253 (2003); Kearney & Merrill, *supra* note 1.

Many studies have focused on determining what factors affect the success of litigation with amici participants; some have found there to be little or no difference in cases where there are interest groups as amici as opposed to cases without the interest groups.<sup>16</sup> When determining aspects of brief success, Kearney and Merrill found that a brief is more likely to be successful when filed by a respondent or a more experienced litigant.<sup>17</sup> One author suggested that this may be because the justices do not want their decisions “overridden, altered, or not enforced by their elected counterparts [therefore] they may have an incentive not to stray too far from public opinion.”<sup>18</sup> Collins goes on to suggest that the justices may decide a case in favor of the side with the most amici, not just because the justice may have been influenced by public opinion, but rather because he or she may want to help shape public opinion through that decision.<sup>19</sup>

Further, several authors have found there to be increased success when the Solicitor General acts as amicus on a case.<sup>20</sup> Segal found that the Solicitor General’s position in a case often depended on the current presidential administration; this may be reflective of the fact that while the President cannot remove justices of the Court, he can remove a solicitor general whose views do not coincide with his own.<sup>21</sup>

Many of the cases in the last half-century that resulted in several amicus briefs being filed in a single case involve controversial “social and political issues such as abortion, affirmative action, *free speech*, church-state relations, and takings of property.”<sup>22</sup> A recent study by Easton examined the degree of participation and success by the mainstream media in U.S. Supreme Court litigation; specifically his study examined 100 cases in which “the mainstream, institutional press played a direct role as party or amicus.”<sup>23</sup> While this study focused on amicus briefs participation, it also

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<sup>16</sup> See Epstein & Rowland, *supra* note 9; Songer & Sheehan, *supra* note 11.

<sup>17</sup> See Kearney & Merrill, *supra* note 1.

<sup>18</sup> Collins, *supra* note 3, at 812.

<sup>19</sup> See Collins, *supra* note 3.

<sup>20</sup> See Collins, *supra* note 1; Collins, *supra* note 3; Epstein & Rowland, *supra* note 9; Graham, *supra* note 15; Kearney & Merrill, *supra* note 1; Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 *POL. RESEARCH Q.* 135 (1998); Steven C. Tauber, *The NAACP Legal Defense Fund and the U.S. Supreme Court’s Racial Discrimination Decision Making*, 80 *SOC. SCI. Q.* 325 (1999).

<sup>21</sup> See Segal, *supra* note 20.

<sup>22</sup> Kearney & Merrill, *supra* note 1, at 755 (emphasis added).

<sup>23</sup> Eric B. Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 *UCLA ENT. L. REV.* 247, 254 (2007).

expanded the scope of cases by including all cases related to the topic of free speech and free press. One study reviewing solely obscenity cases found that, in these cases, “the justices see the degree to which organized interests are willing to commit their resources to a case as an important indicator of the relative merits of the causes which they advance.”<sup>24</sup> However, the current body of literature seems to be lacking in studies with a focus on amici in all free speech cases.

Songer and Sheehan suggested that it would be beneficial to the current body of knowledge to have further research that delves into specific issue areas to determine amici success; this study aims to augment the current research in exactly this way.<sup>25</sup> Previous research studied many of the same aspects that the current study aims to address, however, with one monumental difference: previous studies addressed who participates in briefs amicus curiae and the organizations involved in the cases, but with very little emphasis on free speech cases. The current study will further expand this research by primarily analyzing amicus curiae trends in Supreme Court cases addressing free speech.

### III. METHODOLOGY

This study analyzed an existing data set compiled by other scholars. The data set was obtained from the Inter-University Consortium for Political and Social Research (ICPSR), an institution aiming to promote social science research by developing, archiving and disseminating data and documentation relevant to various disciplines.<sup>26</sup> Among ICPSR data collections, Gibson’s (1997a) *United States Supreme Court Judicial Database, Phase II: 1953-1993* provided information pertaining to the purpose of this study.<sup>27</sup>

According to the description of the database, Gibson’s database consisted of three parts. Part 1, *Supreme Court Database*, contained case attributes from another ICPSR database and the opinions given in the cases. Specifically, it contained 1,899 variables<sup>28</sup> covering the Court’s decision in 7,161 cases. Part 2, *Briefs*, provided

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<sup>24</sup> McGuire, *supra* note 14, at 63.

<sup>25</sup> See Songer & Sheehan, *supra* note 11.

<sup>26</sup> Inter-University Consortium for Political and Social Research (ICPSR), *Mission Statement*, available at <http://www.icpsr.umich.edu/ICPSR/org/mission.html>.

<sup>27</sup> J. L. GIBSON, UNITED STATES SUPREME COURT JUDICIAL DATABASE, PHASE II: 1953-1993 (Inter-university Consortium for Political and Social Research, Ann Arbor, MI [distributor], 1997).

<sup>28</sup> The variables were divided into the following six types: (1) identification variables, (2) background variables, (3) chronological variables, (4) substantive variables, (5) outcome variables, and (6) voting and opinion variables.

information on the filers and co-filers for cases in which amicus curie briefs were filed. This second data set contained 25 variables providing a descriptive look at organized participation before the Supreme Court in 7,347 cases. Part 3, *Groups*, listed the litigants' names.<sup>29</sup> After examining the actual data sets, the authors of this study realized that the data set from the Part 1, *Supreme Court Database*, is indeed the master data set that included not only case attributes but also all variables pertaining to briefs. In other words, all 25 variables included in the *Briefs* data set were also included in the *Supreme Court Database*. Therefore, this study examined the master data set (hereinafter the *Database*).

The *Database* contained the Court's cases that were decided in the years from 1953 through 1986. In that, the *Database* covered the Warren Court (1953 through 1969) and the Burger Court (1969 through 1986). And, *cases* in the *Database* could be analyzed according to two different units of analysis. The *Database* compilers wrote:

When the Supreme Court makes decisions, it frequently joins a group of individual cases together. They are generally decided together and are reported with a single opinion in the U.S. Reports. [We] term this unit the "citation." There are 6,141 citations in the data base.... There is considerable variability in the degree to which the individual cases within a citation are coded the same. To avoid confusion, we refer to these cases as "docket numbers".... There are 7,161 docket numbers in the data base.<sup>30</sup>

The *Database* compilers coded each *opinion* within each docket number. An opinion was defined as "an expression of views by a justice that includes some reasoning and justifications" and the opinions were coded in the order in which they appear in the *U.S. Reports*.<sup>31</sup> The compilers further explained their coding process: "Each opinion was coded independently of the other opinions in the case. Opinions were coded on the basis of their literal content. No inferences are made about the topics and values involved, no matter how obvious the inference."<sup>32</sup> The compilers also noted that not all docket numbers had opinions and that it was possible to have concurrences and dissents without a majority opinion (e.g., dissents from denial of certiorari). As a result, eight different types of opinion were included in the *Database*. They were (1) majority, (2) judgment of the Court, (3) concurrence with opinion, (4) concurrence without opinion, (5) dissent with opinion, (6) dissent without opinion, (7) dissent from a denial of certiorari, and (8) concurring and dissenting (with opinion). According to the *Database* compilers, "With

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<sup>29</sup> J. L. GIBSON, *supra* note 27.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> *Id.* at 16.

one exception, for all cases in which any of the opinions was codeable, a majority opinion was coded.”<sup>33</sup> Cases were coded by the compilers under the opinion type of “judgment of the court” when cases were decided by a fractured majority so that no single opinion was able to attract a clear majority of the justices.

Next, the compilers coded topic of the opinion. As many as six topics were coded for each opinion. To the extent that it was relevant, each opinion was first coded on the threshold and federalism topics, then as many as four additional substantive topics were coded. The compilers wrote “the first substantive topic coded is meant to be the dominant topic in the case, but subsequent topics within the opinion are not necessarily coded in order of importance.”<sup>34</sup>

Because of the complicated nature of the *Database*, it was necessary to decide what to include and what not to include in the current study. First of all, the unit of analysis in this study is *case* represented by the *docket number*, not by the case citation. Secondly, only cases that were formally decided with a full opinion were included in the analysis. Among the 7,161 cases contained in the *Database*, only 4,441 cases were formally decided with a full opinion. Next, the first substantive topic of the first majority opinion was considered as the topic of the case.

Among the numerous *topic choices* used by the *Database* compilers, the following eight topic choices were categorized as the topic of case pertaining to free speech/press (hereinafter, *FS*) issues in this study: (1) protected speech, (2) commercial speech, (3) freedom of the press, (4) libel, (5) religious belief and expression, (6) public access to information about government, (7) obscenity and pornography, and (8) symbolic speech. The Appendix provides the operational definition for each topic choice, as used by the *Database* compilers. Out of the 4,441 cases that were formally decided with a full opinion, a total of 181 cases contained one of the eight topic choices used for this study.

To further facilitate the data analysis according to the topic of the case, the authors of this study recoded the eight topic choices into two *FS* area. This categorization partly follows Easton’s categorization. Easton divided the cases into three categories: cases involving content regulation, cases involving newsgathering, and cases involving simple business regulation.<sup>35</sup> For this study, the new categorization of topics within the *FS* area consists of content regulation and newsgathering. FS1, the *content regulation* category includes the topic choices of protected speech, commercial speech, freedom of the press, libel, religious belief and expression, obscenity and pornography, and symbolic

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<sup>33</sup> *Id.* at 21.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> See Easton, *supra* note 23.

speech. FS2, the *newsgathering* category, contains the topic choice of public access to information about government.<sup>36</sup>

Finally, it is also necessary to explain how the *Database* compilers dealt with variables regarding amicus briefs. They obtained information on the filers of amicus curiae briefs from the *U.S. Reports* and information on the co-signatories from the microfiche records of briefs filed in the cases. The compilers wrote that the indicators of organized participation included in the *Database* were limited to: (1) amicus curiae briefs, not other forms of organized participation such as sponsorship (e.g., when interest group provide legal representation to parties to suits) or intervention (e.g., when interest groups “voluntarily interpose” in suits); (2) amicus curiae briefs in cases formally decided by the Court with a full or *per curiam* opinion, not amicus curiae briefs filed at the jurisdictional or certiorari stages; and (3) amicus briefs filed or cosigned by non-individual interests, not amicus briefs filed or cosigned by individuals.

The same limitations apply to the current analysis of amicus brief participation in this study. Also, the *Database* compilers advised investigators of their intent for the database to *not* differentiate filers from cosigners. This was because their designations of “filer” and “cosigner” were simply artifacts of the way in which the *U.S. Reports* lists amicus briefs (e.g., sometimes groups were listed alphabetically) and, therefore, it would be a mistake to ascribe more significance to those participants coded as “filers” than to those coded as “cosignatories.”

#### IV. FINDINGS AND DISCUSSION

The purpose of this study is to examine the trends and effect of amicus curiae brief filing in *FS* cases. This section first shows general trends in the filing and outcome of the cases and then proceeds to present general trends of amicus curiae brief filing in *FS* cases. Next, it addresses the influence of amicus curiae briefs indicated in the Court opinion and indicated in litigation success. Also identified are the most active participants of amicus brief filing in *FS* cases and the top eight *FS* cases with the most number of amicus curiae briefs. All tables being referred to in this section, due to formatting, are presented in the Tables section at the end.

##### A. GENERAL TRENDS IN FILING AND OUTCOME OF THE CASES

The petitioner in a case was usually a single entity rather than multiple parties jointly filing the case. The majority of cases (65.9%) had one petitioner per case and the overall average number of petitioners per case was 1.34. The number of respondents

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<sup>36</sup> In this study, the topic choice of “radio, TV, and commercial media” was not included as free speech/press cases because cases in this topic choice only address the economic regulation of these entities rather than the speech itself.

showed a similar tendency, with the average being 1.45. The average number of petitioners and respondents barely varied in reference to the topic of the case.

Overall, court decisions more consistently followed the direction of traditional liberalism than traditional conservatism. One variable in the *Database* was labeled as “directionality of policy issue in the case” and was designed to measure what the effect of the Supreme Court’s decision was; in other words, whom the decision favored. For instance, in the context of issues pertaining to criminal procedure, civil rights, and First Amendment rights, “traditional liberalism” meant the decision was in favor of the person accused or convicted of crime; or in favor of civil liberties or the civil rights claimant.

About 54% of all decisions favored “traditional liberalism” while 45.3 % of them favored “traditional conservatism.” Table 1 demonstrates whether the directionality of policy issues changed according to the topic of the case. Petitioners representing traditional liberalism in cases related to content regulation in *FS* issues (58.4%) had been more successful than those who represented traditional liberalism in newsgathering cases (15.0%). Two sets of chi-square tests were run to see whether the percentage differences were statistically significant. All of them were, at the .01 level.

Also, in terms of outcome of cases, more decisions favored petitioners than respondents. About 66% of court decisions produced a favorable outcome for petitioner while 34% of them did not. That is, petitioners won about 66 times out of every 100 cases. This is consistent with previous literature that noted that the Court is more likely to overturn the lower court’s decision.<sup>37</sup> When the petitioner success rate was examined in relation to the topic of case, it was found that petitioners in *FS* cases won about 75 times out of every 100 cases while petitioners in Non-*FS* cases did so about 66 times. The percentage difference was statistically significant at .01 level ( $\chi^2 = 7.019$ ,  $df = 1$ ,  $p = .008$ ).

## B. GENERAL TRENDS IN FILING OF AMICUS CURIAE BRIEFS

Many researchers have studied the number of amicus briefs that have been filed over the years with trends pointing to an increase in amici filings in the last few decades.<sup>38</sup> This study is no different. Out of the 4,441 cases analyzed in this study, 2,088 cases (about 47%) had at least one amicus brief filed. Out of 181 cases in *FS* topic area, 124 of them (about 68.5%) had at least one amicus brief filed. Table 2 shows the total number of cases, the number of cases with amicus briefs, and the percentage of cases with amicus briefs in each year. The table clearly demonstrates that the percentage of cases with amicus briefs has increased over the years. For instance, in 1953, less than 10% of cases filed contained amicus briefs; ten years later, the percentage was 41.9%. After another ten years passed, the percentage went up to 51.9% and in 1983, the

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<sup>37</sup> See Graham, *supra* note 15.

<sup>38</sup> See Collins, *supra* note 1; Kearney & Merrill, *supra* note 1; Lucas, *supra* note 1; Songer & Sheehan, *supra* note 1.

percentage of cases with briefs was 68.8%. As previously mentioned, these findings are consistent with the trends found in other studies.

Among the 2,088 cases that contained at least one amicus brief, about 79% of them had less than five amicus briefs. On average, one case had 1.56 amicus briefs filed. However, as Table 3 shows, cases related to *FS* topics attracted more amicus briefs than cases in *Non-FS* topics. The average number of amicus briefs filed in *FS* cases was 2.24 per case while that of *Non-FS* cases was 1.52. The difference between these two means was found statistically significant at the .01 level, under the independent samples *t*-test ( $t = 3.152$ ,  $df = 4,036$ ,  $p = .002$ ).

The average number of briefs filed in each *FS* topic varied somewhat. Cases related to content regulation had more briefs (2.35 briefs per case), on average, than newsgathering cases (1.35 briefs per case). However, the difference between these two means was not found statistically significant at the .01 level, under the independent samples *t*-test ( $t = 1.312$ ,  $df = 179$ ,  $p = .191$ ). This could be because the independent samples *t*-test was distorted due to the insufficient number of sample size in newsgathering cases. The independent samples *t*-test requires at least 30 cases in each group, but there were only 20 newsgathering cases.

In addition to the number of amicus briefs filed in a case, additional pieces of information were examined related to the filing of amicus curiae briefs. First, it was ascertained whether an amicus curiae brief was filed solely by the filer or co-signed by someone other than the filer, and second, whether an amicus curiae brief was filed in favor of the petitioner asking the Court to reverse the lower court's decision or in favor of the respondent asking the Court to affirm the lower court's decision.

When a case had only one brief, it was simple to examine whether the amicus curiae brief was filed solely or not and which side the amicus brief favored. However, when a case had more than one amicus curiae brief, answering the same questions was not so simple. The compilers of the *Database* created each set of variables to indicate attributes of each brief. And, they coded up to 53 briefs per case, resulting in the creation of 53 different sets of variables regarding briefs filed in each case. For instance, if there was only one amicus brief filed in the case, the position taken in the first amicus brief was coded and the remaining 52 position variables were coded as missing. If there were three amicus briefs filed in the case, the positions taken in the first, second, and third amicus brief were coded and the remaining 50 position variables were coded as missing. Therefore, the *first* amicus brief meant either the brief was the only brief filed in the case or the brief was the first one among all briefs filed in the case. Accordingly, the position taken in the *first* amicus brief meant either the position of the only brief or the position of the first amicus brief among all briefs filed.

About 21.3% of the *first* amicus briefs were cosigned while 78.7% of them were not. Slightly over 10% of filers of the *first* amicus briefs (11.4%) participated in oral argument. In terms of the position taken in the *first* amicus brief, more briefs were filed in favor of petitioner (45.0%) than in favor of respondent (38.8%); however, the position taken in the remaining 16.2% of the *first* amicus brief position that was unascertainable from the *United States Reports*. Table 4 demonstrates that the percentage of *first* amicus

briefs filed in favor of the petitioner was slightly higher in *FS* cases (46.8%) than Non-*FS* cases (45.5%). However, the percentage difference was not statistically significant at the .05 level ( $\chi^2 = 7.402$ ,  $df = 4$ ,  $p = .116$ ).

### C. THE INFLUENCE OF AMICUS CURIAE BRIEFS INDICATED IN THE COURT OPINION

Whether the Court mentioned amicus briefs in its opinion can be one indication of whether amicus curiae briefs influenced the Court. Kearney and Merrill suggest that briefs cited in the opinion are most likely those that provided “some valued information to the Court beyond that supplied by the briefs of the parties. Thus, briefs that are cited [in the opinion] may be regarded as “high quality” in the relevant sense of supplying valued and nonrepetitive information.”<sup>39</sup> However, Kearney and Merrill join Songer and Sheehan in cautioning that while a brief might be mentioned in the opinion, it may simply be there for support or rationalization of the decision reached by the court, not necessarily as proof of aid in the decision-making itself.<sup>40</sup> Previous studies revealed that the Court cites amicus briefs in its decisions in about 15 to 20% of its cases.<sup>41</sup> In the current study, out of 2,088 cases in which at least one amicus brief was filed, the Court mentioned amicus briefs in 467 opinions (22.4%). Table 5 details how the number of Court opinions that contained references to amicus briefs changed according to the topic of the case. The Court mentioned amicus briefs 12.9 times out of 100 *FS* cases while it did so 23.3 times in Non-*FS* cases. The percentage difference was found statistically significant at the .05 level ( $\chi^2 = 8.480$ ,  $df = 2$ ,  $p = .014$ ).

When further divided within *FS* cases, the percentage of Court’s opinion that mentioned amicus briefs did not vary much. The Court mentioned amicus briefs in 18.2% of its newsgathering cases while it did so in 12.4% of content regulation cases. The percentage difference was not found statistically significant at the .05 level ( $\chi^2 = .299$ ,  $df = 1$ ,  $p = .584$ ).

### D. THE SOLICITOR GENERAL FACTOR

Previous literature on the effect of amicus briefs noted the important role that the Solicitor General’s Office has played in amicus brief filing. As previously mentioned, cases in which the Solicitor General acts as amicus tend to have high success rates in the Court.<sup>42</sup> According to the variable in the *Database* indicating the participation of the

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<sup>39</sup> Kearney & Merrill, *supra* note 1, at 811.

<sup>40</sup> See Songer & Sheehan, *supra* note 1.

<sup>41</sup> Carter G. Phillips, *Was affirmative action saved by its friends?*, in *A YEAR AT THE SUPREME COURT* 113 (Neal Devins & Davison M. Douglas eds., 2004).

<sup>42</sup> See Collins, *supra* note 1; Collins, *supra* note 3; Epstein & Rowland, *supra* note 9; Graham, *supra* note 15; Kearney & Merrill, *supra* note 1; Segal, *supra* note 20; Tauber, *supra* note 20.

Solicitor Generals Office, the Office has filed about 12 amicus briefs in every 100 cases. However, the Solicitor General's Office participation in brief filing was not recorded (either not applicable or not ascertainable) in about 53% of all cases. Also, in another 35% of all cases the Office only participated in oral argument but did not file an amicus brief.

Participation of the Solicitor Generals Office in *FS* cases was even less visible. Out of all 181 cases pertaining to *FS* issues, the Solicitor Generals Office filed an amicus curiae brief in nine cases. Specifically, in five cases the Office only filed an amicus brief and in the other four cases the Office both filed an amicus brief and participated in oral argument. In other words, only 5.0% of *FS* cases had an amicus briefs filed by the Solicitor Generals Office. Due to this lack of participation, the effect of amicus briefs filed by the Solicitor Generals Office on *FS* cases could not be analyzed in any statistically meaningful way.

#### E. THE INFLUENCE OF AMICUS CURIAE BRIEFS INDICATED IN LITIGATION SUCCESS

To quantify what effect, if any, amicus briefs had on litigation success, the outcome of the case was examined in light of the position taken in the amicus briefs. Comparing the litigation success rate of petitioner in cases without amicus briefs to that of cases with amicus briefs supporting the petitioner, and to that of cases with amicus briefs supporting the respondent was expected to indicate the effect of amicus briefs on litigation success.

The *Database* contained an outcome variable indicating whether the final outcome of the case favored the petitioner or not. The *Database* also contained, as mentioned earlier, one variable per each position taken in each amicus brief. When there was only one amicus brief filed in the case, comparing the litigation success rate of petitioner across cases was relatively simple because there were only three types of cases: (1) cases without amicus brief, (2) cases with one brief supporting the petitioner, and (3) cases with one brief supporting the respondent. However, when multiple briefs were filed in one case, there were many different combinations of positions taken in amicus briefs, making the comparison more complicated.

For instance, if three amicus briefs were filed in one case, all possible combinations of the positions taken in the three amicus briefs were (1) all three briefs in favor of the petitioner, (2) two briefs in favor of the petitioner and one brief in favor of the respondent, (3) one brief in favor of the petitioner and two briefs in favor of the respondent, and (4) three briefs in favor of the respondent. And, the litigation success rate of petitioner in cases without amicus briefs had to be compared to these four success rates. Thus, this study compared the success rates in two different ways. First, the success rate in single amicus brief cases was compared to that of cases without any amicus brief because the majority of cases with amicus briefs had only one amicus brief. Secondly, the success rate in multiple amicus briefs cases were compared in terms of the proportions of amicus briefs filed in favor of the petitioner to the total number of amicus briefs filed in the case.

## 1. CASES WITH A SINGLE AMICUS BRIEF

As noted earlier, the overall litigation success rate of petitioner was 65.8% in all 4,441 cases included in the analysis. Among the 4,441 cases, 2,353 cases were not accompanied by any amicus brief. The success rate of petitioner in these 2,353 cases was 65.1%, slightly lower than the overall success but ignorable. Among the remaining 2,088 cases, 768 cases had only one amicus brief filed. Among the 768 cases that had only one amicus brief filed, the success rate of petitioner when the amicus brief supported the petitioner was 74.9%, which is almost 10 % higher than the success rate of petitioner in cases with no amicus brief. The difference between these two success rates of petitioner—65.1% in cases without any amicus brief and 74.9% in cases with a single amicus brief and when the amicus brief supported the petitioner—was statistically significant at the .01 level ( $\chi^2 = 13.986$ ,  $df = 1$ ,  $p = .000$ ).

When the petitioner success rate was examined in relation to the topic of the case, a similar trend was found. Among the 4,441 cases, petitioners in *FS* cases won about 75 times out of every 100 cases while petitioners in *Non-FS* cases did so about 66 times, as explained in the earlier section. Among the 2,353 cases that were not accompanied by any amicus brief, the success rate of petitioners in *FS* cases was 77.2% while that of petitioners in *Non-FS* cases was 65.2%. This difference in percentages was not found statistically significant at the .05 level ( $\chi^2 = 3.540$ ,  $df = 1$ ,  $p = .060$ ). Then, there were 768 cases that had only one amicus brief filed. Table 6 details the petitioner success rate in single amicus brief cases in relation to the topic of case. In these 768 cases, petitioners having the supporting amicus brief in *FS* cases succeeded about 84 times out of every 100 cases, whereas petitioners having the supporting amicus brief in *Non-FS* cases did so 74 times out of every 100 cases. However, the percentage difference was not statistically significant at the .05 level ( $\chi^2 = .999$ ,  $df = 1$ ,  $p = .317$ ) with one cell (25%) having an expected count less than 5.

## 2. CASES WITH MULTIPLE AMICUS BRIEFS

Among 2,088 cases that had amicus briefs filed, 768 cases had only one amicus brief (37.8%), followed by 445 cases with two amicus briefs (21.3%), 253 cases with three amicus briefs (12.1%), and 175 cases with four amicus briefs (8.4%). Even though there was one case where 53 amicus briefs were filed, the majority of cases (about 78.6%) had one to four amicus briefs filed. Thus, in this study, the analysis of the position taken in multiple amicus brief cases was limited to cases with up to four amicus briefs. Further, the position taken in multiple amicus brief cases was evaluated in terms of the proportion of amicus briefs filed in favor of the petitioner to the total number of amicus briefs filed in the case.

Seven different types of proportions were produced to indicate the percent of briefs supporting the petitioner. Zero meant all briefs filed in the case supported the respondent. The proportion of .25 meant one out of four briefs supported the petitioner. The proportion of .33 meant one out of three briefs supported the petitioner. The

proportion of .50 meant the half of the briefs (either one out of two briefs or two out of four briefs) supported the petitioner. The proportion of .67 meant two out of three briefs supported the petitioner. The proportion of .75 meant three out of four briefs supported the petitioner. Lastly, the proportion of 1.00 meant all briefs filed in the case supported the petitioner.

Table 7 shows how the litigation success of the petitioner changed according to the different proportions of amicus briefs filed in favor of the petitioner. The results showed that petitioners were most successful when they had three amicus briefs supporting them and one amicus brief against them, with the success rate being 87.1%. Following that, were cases where all briefs were filed in favor of the petitioner, with a success rate of 73.8%. As noted earlier, the success rate of the petitioner in cases without amicus briefs was 65.1%. When all briefs were filed against the petitioner, the litigation success of petitioner was 62.3%, which is 2.8% lower than average. Therefore, the results clearly show that the petitioner found more success with amicus briefs supporting the petitioner.

Another interesting finding from the varying success rates demonstrated in Table 7 is that having one amicus brief for the petitioner was helpful, even when amicus briefs supporting the respondent outnumbered amicus briefs supporting the petitioner. This is shown by a success rate of 70.5% in cases where the proportion of amicus briefs supporting the petitioner was .33. Also, when the position taken in briefs amicus curiae was a tie, the success rate of the petitioner was 71.3%. These findings demonstrate a clear relationship between amicus brief support and a petitioner's success. It is possible that amicus support contributes to a petitioner's success; and rather clear that amicus support certainly does not hurt.

Table 8 shows the changing success rates according to different proportions of amicus briefs supporting the petitioner in *FS* and *Non-FS* cases. When cases were subdivided by both the proportion of amicus briefs supporting the petitioner and the topic of each case, the number of cases in most subdivisions of *FS* cases became too small to be compared. For example, there were six cells that had only one case; this made meaningful interpretation or comparison of the success rates difficult. However, when there were enough numbers of cases in a cell, petitioners in *FS* cases were more successful than petitioners in *Non-FS* cases. For instance, the success rate of the petitioner in *FS* cases was 70.7% when all amicus briefs were in favor of the respondent and 83.3% when all amicus briefs were in favor of the petitioner, while the corresponding success rates in *Non-FS* cases were 61.1% and 73.1%, respectively.

#### F. OTHER TRENDS IN AMICUS CURIAE BRIEF FILING IN FREE SPEECH/PRESS CASES

Finally, two other descriptive aspects of amicus curiae brief filing in *FS* cases were examined. The first aspect was to study who have been the most active filers of amicus briefs in *FS* cases; the other aspect studied was which *FS* cases have attracted the most number of amicus briefs, as indicated in tables 9 and 10. Table 9 lists the number of times one entity joined amicus curiae briefs as either the filer of the briefs or the co-

signer of the briefs. As noted in the methodology section, the distinction between the filer and the co-signer was not meaningful. Not surprisingly, the American Civil Liberties Union (ACLU) was found to have been the most active in participating in amicus briefs in *FS* cases, filing and/or co-signing 56 amicus briefs. Press organizations such as the National Association of Broadcasters (NAB) and American Society of Newspaper Editors (ASNE) have been also found to be active. Among the top 12 amicus curiae participants, eight participants were also listed among the 16 leading press participants in Easton's examination of 100 cases dating from 1909 through 2004.<sup>43</sup> Table 10 shows eight *FS* cases that attracted the most amicus curiae briefs. A 1986 case involving a cable television franchising issue had 24 amicus briefs filed, and the Court's 1974 decision in *Miami Herald Publication Co. v. Tornillo*<sup>44</sup> attracted 17 amicus briefs. Among the top eight *FS* cases with the most amicus briefs, seven of them were content regulation cases.

## V. CONCLUSIONS

This study, relying upon a pre-existing data set compiled by other researchers, examined the trends and effect of amicus curiae brief filing in free speech/press cases. The data set contained information about U.S. Supreme Court cases decided during the years between 1953 and 1986. Due to the limited period of time that the data set covered, this study was only able to analyze cases from 1953 to 1986, which remains a limitation of this study. It is hoped that future researchers will examine cases decided by the Court after 1986 and compare their findings to the findings of this study. With this limitation noted, this final section will summarize the findings of this study and provide concluding remarks.

First, out of the 4,441 cases analyzed in this study, 2,088 cases (about 47%) had at least one amicus brief filed. Out of 181 cases in *FS* topic area, 124 of them (about 68.5%) had at least one amicus brief filed. As with previous studies, the current study found that the percentage of cases with amicus briefs has increased over the years. For instance, in 1953, less than 10% of cases filed contained amicus briefs but in 1986, the percentage of cases with briefs was 71.8%. Among the 2,088 cases that contained at least one amicus brief, about 79% of them had less than five amicus briefs. On average, each case had 1.56 amicus briefs filed. The average number of amicus briefs filed in *FS* cases was 2.24 per case while that of Non-*FS* cases was 1.52. The difference between these two means was found statistically significant at the .01 level.

Secondly, out of the 2,088 cases in which at least one amicus brief was filed, the Court mentioned amicus briefs in 476 opinions (22.4%). When divided according to the topic area, it was found that the Court mentioned amicus briefs 12.9 times out of 100 *FS* cases while it did so 23.3 times in Non-*FS* cases. The percentage difference was found statistically significant at the .05 level.

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<sup>43</sup> See Easton, *supra* note 23.

<sup>44</sup> 418 U. S. 241 (1974)

Thirdly, to quantify what relationship, if any, amicus briefs had on litigation success, the outcome of the case was examined in light of the position taken in the amicus briefs. The overall litigation success rate of petitioner was 65.8% in all 4,441 cases included in the analysis. Among the 4,441 cases, 2,353 cases were not accompanied by any amicus brief. The success rate of petitioner in these 2,353 cases was 65.1%. Among the remaining 2,088 cases, 768 cases had only one amicus brief filed. In these 768 cases, the success rate of the petitioner when the brief supported the respondent was 63.6%. But more importantly, the success rate of petitioner with the supporting amicus brief was 74.9%, which is almost 10 percentage points higher than the success rate of the petitioner in cases with no amicus brief. The difference was statistically significant at the .01 level and supports the suggestion that amicus briefs play a role in litigation success.

Moreover, petitioners in *FS* cases had a better chance of winning their case than petitioners in cases of other topics. The success rate of petitioner was 75.1% in *FS* cases, while it was 65.6% in *Non-FS* cases. The percentage difference was statistically significant at the .01 level. Moreover, petitioners having the supporting amicus brief in *FS* cases succeeded about 84 times out of every 100 cases, whereas petitioners having the supporting amicus brief in *Non-FS* cases did so 74 times out of every 100 cases.

For analysis of the position taken in cases with multiple amicus briefs, the proportions of amicus briefs filed in favor of the petitioner were compared to the total number of amicus briefs filed in the case; and their effect on the success rate of petitioner. The results clearly demonstrate that the petitioner found more success with the supporting amicus briefs. And, the success rates were even higher in *FS* cases; the success rate of the petitioner in *FS* cases was 70.7% when all amicus briefs were in favor of the respondent and 83.3% when all amicus briefs were in favor of the petitioner, while the corresponding success rates in *Non-FS* cases were 61.1% and 73.1%, respectively.

Lastly, this study found that the American Civil Liberties Union and other leading press organizations have been most active in participating in amicus briefs in *FS* cases. The top three *FS* cases that attracted the most amicus curiae briefs were *Los Angeles v. Preferred Communications, Inc.*,<sup>45</sup> *Miami Herald Pub. Co. v. Tornillo*,<sup>46</sup> and *Bates v. State Bar of Arizona*.<sup>47</sup>

This study is meaningful in that very few empirical studies of the Court's decisions have specifically examined the amicus brief filings in free speech/press cases. Further examination is needed in future research exploring how and why the briefs are useful and what types of briefs are particularly useful. It would also benefit the field to embark on a comparative study between the Warren Court and the Rehnquist Court as the data becomes available. However, the descriptive picture drawn from the findings of this study is clear: having supporting amicus briefs increased the winning chance of petitioners in *FS* cases. With this picture in mind and considering the growing number of

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<sup>45</sup> 476 U.S. 488 (1986).

<sup>46</sup> 418 U. S. 241 (1974).

<sup>47</sup> 433 U. S. 350 (1977).

cases with amicus briefs in recent years, various media organizations and civil rights groups would be wise to continue to engage in amicus curiae filings in *FS* cases to defend First Amendment freedoms.

### APPENDIX: OPERATIONAL DEFINITION OF TOPIC CHOICE

The number preceding each topic choice is the coding value used in the coding process of the *Database*. These numbers and operational definitions are directly taken from the *Database* codebook.

20.1 Protected Speech — This is a broad First Amendment freedom of speech category. It includes challenges that a speech is seditious, likely to incite violence, or that it is obscene. The category also includes the right to travel, both abroad and within the nation. The following are *excluded* from this category: free exercise of religion (coded as #20.6 or #21.3); establishment of religion (coded as #23.1); obscene or pornographic material (coded as #21.5); commercial speech (coded as #20.2); and symbolic speech (coded as #21.6). NOTE: If the disposition of the case is “vacate and remand for further consideration in light of modified statute,” code the value/doctrinal questions as “9”—unknown; not ascertainable.

20.2 Commercial Speech — Likely topics are: disputes over the definition of commercial speech, and over the degree to which some forms of commercial speech are protected by the First Amendment.

20.4 Freedom of the Press — If the issue is libel, it should be coded under #20.5; if it is obscenity or pornography, it should be coded under #21.5.

20.5 Libel — Likely topics are: defamation of public officials and of public and private persons. Topics not included are politically oriented, freedom-of-speech cases (coded under #20.1).

20.6 Religious Belief and Expression — Likely topics are: the right of religious speakers to express their views and to distribute literature in public places, e.g., airports, street corners, etc.

20.7 Public Access to Information about Government — Likely topics are: suits brought under the Freedom of Information Act and related federal statutes.

21.5 Obscenity and Pornography — All disputes concerning obscenity and pornography *must be* coded here.

21.6 Symbolic “Speech” — Likely topics are: non-speech expressions of the First Amendment, e.g., sit-in demonstrations, wearing of black armbands, and draft-card burnings.

## TABLES

Table 1  
*Directionality of Policy Issues in relation to the Topic of Case*

Topic of Case	Directionality			Total
	Traditional Liberalism	Traditional Conservatism	No Direction	
<b>FS (Free speech/press)</b>	<b>97 (53.6%)</b>	<b>84 (46.4%)</b>	<b>0 (0%)</b>	<b>181 (100%)</b>
FS1 (Content Regulation)	94 (58.4%)	67 (41.6%)	0 (0%)	161 (100%)
FS2 (News Gathering)	3 (15.0%)	17 (85.0%)	0 (0%)	20 (100%)
<b>Non-FS (All other topics)</b>	<b>2124 (55.1%)</b>	<b>1721(44.6%)</b>	<b>12(.3%)</b>	<b>3857(100%)</b>
<b>Missing</b>	<b>180 (44.7%)</b>	<b>207 (51.4%)</b>	<b>16(4.0%)</b>	<b>403 (100%)</b>
Total	2401 (54.1%)	2012(45.3%)	28 (.6%)	4441(100%)

**Significance Test 1 (comparing FS, Non-FS, and Missing):  $\chi^2 = 89.701$ ,  $df = 4$ ,  $p = .000$**   
**Significance Test 2 (comparing FS1 and FS2):  $\chi^2 = 13.464$ ,  $df=1$ ,  $p = .000$**

Table 2 (Continued on following page)  
*Number of Cases in Each Year*

Year	Total Number of Cases	Number of Cases with Brief	Percentage of Cases with Briefs
1953	21	2	9.5%
1954	88	12	13.6%
1955	76	19	25.0%
1956	110	20	18.2%
1957	113	21	18.6%
1958	122	27	22.1%
1959	114	29	25.4%
1960	115	16	13.9%
1961	129	35	27.1%

Table 2 *cont.*

1963	124	52	41.9%
1964	133	57	42.9%
1965	105	47	44.8%
1966	130	43	33.1%
1967	125	49	39.2%
1968	152	49	32.2%
1969	118	49	41.5%
1970	97	39	40.2%
1971	137	66	48.2%
1972	135	74	54.8%
1973	162	84	51.9%
1974	168	82	48.8%
1975	126	67	53.2%
1976	165	101	61.2%
1977	152	67	44.1%
1978	159	91	57.2%
1979	149	105	70.5%
1980	162	79	48.8%
1981	146	105	71.9%
1982	165	121	73.3%
1983	173	119	68.8%
1984	174	123	70.7%
1985	165	107	64.8%
1986	149	107	71.8%
Total	4,441	2088	47.0%

Table 3  
*Mean Number of Briefs Filed in relation to the Topic of Case*

Topic of Case	Total Number of Cases	Mean Number of Briefs Filed Per Case
<b>FS (Free speech/press)</b>	<b>181</b>	<b>2.24</b>
FS1 (Content Regulation)	161	2.35
FS2 (Newsgathering)	20	1.35
<b>Non-FS (All other topics)</b>	<b>3,857</b>	<b>1.52</b>
Missing	403	1.55
Total	4441	1.56

**Significance Test 1 (comparing FS and Non-FS):  $t = 3.152$ ,  $df = 4,036$ ,  $p = .002$**

**Significance Test 2 (comparing FS1 and FS2):  $t = 1.312$ ,  $df = 179$ ,  $p = .191$**

Table 4  
*Position Taken in the First Amicus Brief in relation to the Topic of Case*

Topic of Case	Position taken in the <i>first</i> amicus brief			
	For the Petitioner	Against the Petitioner	Not Acertainable	Total
<b>FS (Free speech/press)</b>	<b>58(46.8%)</b>	<b>50(40.3%)</b>	<b>16(12.9%)</b>	<b>124 (100%)</b>
FS1 (Content Regulation)	54 (47.8%)	44 (38.9%)	15 (13.3%)	113 (100%)
FS2 (News Gathering)	4 (36.4%)	6 (54.5%)	1 (9.1%)	11 (100%)
<b>Non-FS (All other topics)</b>	<b>813 (45.5%)</b>	<b>690(38.6%)</b>	<b>283(15.8%)</b>	<b>1786(100%)</b>
<b>Missing</b>	<b>68 (38.2%)</b>	<b>70 (39.3%)</b>	<b>40 (22.5%)</b>	<b>178 (100%)</b>
Total	939(45.0%)	810(38.8%)	339(16.2%)	2088 (100%)

**Significance Test 1 (comparing FS, Non-FS, and Missing):  $\chi^2 = 7.402$ ,  $df = 4$ ,  $p = .116$**

**Significance Test 2 (comparing FS1 and FS2):  $\chi^2 = 1.021$ ,  $df = 2$ ,  $p = .600$**

Table 5  
*Whether Court's Opinion Mentioned Amicus Brief in relation to the Topic of Case*

Topic of Case	Did Court's Opinion Mention Amicus Brief?		
	Yes	No	Total
<b>FS (Free speech/press)</b>	<b>16 (12.9%)</b>	<b>108 (87.1%)</b>	<b>124 (100%)</b>
FS1 (Content Regulation)	14 (12.4%)	99 (87.6%)	113 (100%)
FS2 (Newsgathering)	2 (18.2%)	9 (81.8%)	11 (100%)
<b>Non-FS (All other topics)</b>	<b>417 (23.3%)</b>	<b>1369 (76.7%)</b>	<b>1786 (100%)</b>
<b>Missing</b>	<b>34 (19.1%)</b>	<b>144 (80.9%)</b>	<b>178 (100%)</b>
Total	467 (22.4%)	1621(77.6%)	2088 (100%)

**Significance Test 1 (comparing FS, Non-FS, and Missing):  $\chi^2 = 8.480$ ,  $df = 2$ ,  $p = .014$**   
**Significance Test 2 (comparing FS1 and FS2):  $\chi^2 = .299$ ,  $df = 1$ ,  $p = .584$**  \*1 cells (25.0%) have expected count less than 5.

Table 6 (Continued on following page)  
*Petitioner Success Rate Cases with a Single Amicus Brief in relation to the Topic of Case*

Topic of case		Position Taken in the Amicus Brief			
FS (Free speech/press)		For Petitioner	Against Petitioner	Not Ascertainable	Total
Outcome					
For Petitioner		16 (84.2%)	12 (75.0%)	3 (60.0%)	31 (77.5%)
Against Petitioner		3 (15.8%)	4 (25.0%)	2 (40.0%)	9 (22.5%)
Total		19 (100%)	16 (100%)	5 (100%)	40 (100%)
Non-FS (All other topics)		For Petitioner	Against Petitioner	Not Ascertainable	Total
Outcome					
For Petitioner		241(73.9%)	141(62.9%)	70 (64.2%)	452 (68.6%)
Against Petitioner		85 (26.1%)	83 (37.1%)	39 (35.8%)	207 (31.4%)
Total		326 (100%)	224 (100%)	109(100%)	659 (100%)

Table 6 *continued*  
Missing

Outcome	Position Taken in the Amicus Brief			Total
	For Petitioner	Against Petitioner	Not Ascertainable	
For Petitioner	21 (80.8%)	15 (62.5%)	12 (63.2%)	48 (69.6%)
Against Petitioner	5 (19.2%)	9 (37.5%)	7 (36.8%)	21 (30.4%)
Total	26 (100%)	24 (100%)	19 (100%)	69 (100%)

Total

Outcome	Position Taken in the Amicus Brief			Total
	For Petitioner	Against Petitioner	Not Ascertainable	
For Petitioner	278 (74.9%)	168 (63.6%)	85 (63.9%)	531(69.1%)
Against Petitioner	93 (25.1%)	96 (36.4%)	48 (36.1%)	237(30.9%)
Total	371 (100%)	264 (100%)	133 (100%)	768 (100%)

Table 7  
*Petitioner Success Rate in Cases with Multiple Amicus Briefs in relation to the Topic of Case*

Proportions of Amicus Briefs Supporting Petitioner	Outcome		
	For Petitioner	Against Petitioner	Total
0	412 (62.3%)	249 (37.7%)	661 (100%)
0.25	33 (66.0%)	17 (34.0%)	50 (100%)
0.33	55 (70.5%)	23 (29.5%)	78 (100%)
0.50	164 (71.3%)	66 (28.7%)	230 (100%)
0.67	44 (72.1%)	17 (27.9%)	61 (100%)
0.75	27 (87.1%)	4 (12.9%)	31 (100%)
1.00	391 (73.8%)	139 (26.2%)	530 (100%)
Total	1,126 (68.6%)	515 (31.4%)	1,641 (100%)

$\chi^2 = 25.004, df = 6, p = .000$

Table 8  
*Petitioner Success Rate in Cases with Multiple Amicus Briefs in relation to the Topic of Case*

Proportions of Amicus Briefs Supporting Petitioner	Free speech/press topics		All other topics	
	Outcome		Outcome	
	For Petitioner	Against Petitioner	For Petitioner	Against Petitioner
0	29 (70.7%)	12 (29.3%)	338 (61.1%)	215 (38.9%)
0.25	1 (50.0%)	1 (50.0%)	29 (67.4%)	14 (32.6%)
0.33	2(100.0%)	0 (0%)	48 (68.6%)	22 (31.4%)
0.50	11(91.7%)	1 (8.3%)	139 (69.8%)	60 (30.2%)
0.67	3 (75.0%)	1 (25.0%)	36 (70.6%)	15 (29.4%)
0.75	1 (50.0%)	1 (50.0%)	25 (92.6%)	2 (7.4%)
1.00	30(83.3%)	6 (16.7%)	332 (73.1%)	122 (26.9%)

- To simplify the table, neither cases of which topic is missing nor columns demonstrating total frequencies are not included.
- Statistical significance test cannot be applied due to too many cells containing less than five cases.

Table 9 (Continued on following page)  
*The Most Active Amicus Curiae Filers/Co-Signers in Free Speech/Press Cases*

Number of Times the filer/co-signer filed/co-signed briefs	Name of Amicus Curiae Filer/Co-Signer
56	American Civil Liberties Union
23	ACLU local branches and affiliates*
13	American Society of Newspaper Editors
13	American Newspaper Publishers Association
12	National Association of Broadcasters
11	American Federation of Labor-cio
11	Reporters Committee for Freedom of the Press
10	National Newspapers Association
9	Columbia Broadcasting Company, Inc
9	Radio-Television News Directors Association
8	United States
8	National Broadcasting Company, Inc

\* ACLU local branches and affiliates and their number of participation as indicated in the parenthesis are as follows: ACUL Foundation of Southern California (1), ACLU of

Georgia (1), ACLU of Pennsylvania (2), ACLU of Southern California (4), ACLU of the National Capitol Area (1), ACLU of Washington State (1), ACLU – Detroit Branch (1), ACLU – Illinois Div. (1), ACLU Foundation (1), ACLU Foundation of Southern California (1), ACLU Fund of the National Capitol (1), ACLU of Louisiana (1), ACLU  
 Table 9 *Continued*

of New Jersey (2), ACLU of Northern California (1), ACLU of Ohio Foundation, Inc. (1), ACLU of Southern California(1), and ACLU – Northern California (2).

Table 10

*Top Eight Free Speech/Press Cases with the Most Amicus Briefs*

Number of Briefs Filed in the Case	Case	Topic Area
24	Los Angeles v. Preferred Comm., 476 U.S. 488 (1986)	FS1
17	Miami Herald Pub. Co. v. Tornillo, 418 U. S. 241 (1974)	FS1
13	Bates v. State Bar of Arizona, 433 U. S. 350 (1977)	FS1
11	Con. Edison Co. v. Public Svc. Comm'n, 447 U. S. 530 (1980)	FS1
11	Widmar v. Vincent, 454 U. S. 263 (1981)	FS1
11	Roberts v. United States Jaycees, 468 U. S. 609 (1984)	FS1
9	Pittsburgh Press v. Human Rel. Comm'n, 413 U.S. 376 (1973)	FS1
9	Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	FS2

- FS1: Content Regulation
- FS2: Newsgathering

# SUFFER THE VIRTUAL LITTLE CHILDREN: THE EUROPEAN UNION, THE UNITED STATES, AND INTERNATIONAL REGULATION OF ONLINE CHILD PORNOGRAPHY

LYOMBE EKO

*Several international law enforcement operations demonstrate that online child pornography is an international problem and that the Internet has become its principal vector and propagator. This article compares and contrasts the differential regulation of child pornography under International, European Union, and American jurisprudence. The paper demonstrates that virtual child pornography poses difficult moral and legal conflicts between freedom of speech and human rights that the European Union, the United Nations and the United States resolve within the framework of their different politico-cultural, historical, and diplomatic realities.*

**Keywords:** child pornography, international law, comparative law, Internet.

## I. INTRODUCTION

The Internet is a global network of interconnected networks, which grew out of the network security projects of the Advanced Research Projects Agency (ARPA) of the United States Department of Defense.<sup>1</sup> The development of the World Wide Web at the European Center for Particle Physics (CERN) in the early 1990s, and of popular graphical browsers like Mosaic, gave the Internet an unprecedented global reach. The new, multi-communication space soon became the distribution platform of choice of the commercial pornographer and

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<sup>1</sup> See DEFENSE ADVANCED PROJECTS AGENCY, TECHNOLOGY TRANSITION 12 (1997) (ARPA was created in 1958 during the space race between the United States and the Soviet Union).

the pedopornographer or child pornographer. Several international law enforcement operations demonstrate that online pedopornography is an international problem<sup>2</sup> and that the Internet had become its principal vector and propagator.

According to the United States Federal Bureau of Investigation (FBI), computer and Internet telecommunications are the most common media platforms used by pedophiles and pedopornographers to exchange, buy, and sell sexually explicit images of minors and to lure children into illicit sexual relationships.<sup>3</sup> The number of child pornography cases opened by the FBI under its Innocent Images National Initiative (IINI), reached 15,556 in 2005, resulting in 4,822 convictions or pretrial diversions.<sup>4</sup> Additionally, during the same period, 6,154 arrests, locates and summonses were made or issued.<sup>5</sup> In 2004, the FBI globalized its Innocent Images National Initiative by creating the Innocent Images International Task Force, under whose framework law enforcement officers from over 20 countries and Europol, the European police organization, cooperate to enforce laws against the sexual exploitation of children and the circulation or exchange of images of such exploitation on the Internet. Under this program, the FBI trains police officers from countries around the world to combat online child pornography in its Innocent Images unit.<sup>6</sup>

As early as 1997, the European Union recognized that the Internet was becoming the new platform for the storage, dissimulation, and transmission of child pornography, and passed one of the earliest international resolutions against online pornography, which

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<sup>2</sup> The terms child pornography and pedopornography are used interchangeably in this article. This is the practice in the international press and the law review articles on the subject. *See generally* Eko, *supra* note 8.

<sup>3</sup> *See* Federal Bureau of Investigation, *Online Child Pornography: Innocent Images National Initiative (IINI)*, available at <http://www.fbi.gov/hq/cid/cid/cac/innocent.htm> (last visited May 15, 2007) (the IINI is a multi-agency investigative initiative aimed at combating child pornography and child sexual exploitation facilitated by computers connected to the Internet. Its scope requires the participation of local, state, national and international law enforcement agencies); *see also* Federal Bureau of Investigation, *Operation Candyman, (Phase 1)*, available at <http://www.fbi.gov/pressrel/candyman/candymanhome.htm> (last visited May 30, 2007) (reporting that when the FBI infiltrated the Candyman child pornography electronic group, it had a membership of 7,000 e-mail subscribers of which 2400 addresses were located outside the United States. Hundreds of searches were executed and more than 100 individuals were charged in 26 states. Many of the individuals, whose professions ranged from a school bus driver to members of the clergy, admitted to prior molestation of children).

<sup>4</sup> *See* Federal Bureau of Investigation, *Innocent Images National Initiative*, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> *See* FBI, *Innocent Images: Looking Back Over the Years-And Overseas* (2006), available at <http://www.fbi.gov/page2/feb06/innocentimages10years2.htm>.

was described as “illegal and harmful content on the Internet.”<sup>7</sup> As the Internet has continued to evolve, and with it the ability of child pornographers to encrypt and dissimulate their illegal content, eradication of online child pornography has continued to be a priority of the European Union. Since child protection is a substantial humanitarian interest, the international community and individual countries around the world have amended and expanded the scope of their child protection regulations to cover the new online menace. The primordial rationale for child protection has been the physical and psychological well-being as well as the dignity of children and minors, who are the most vulnerable group in society.

The regulation of mass mediated child pornography in the 1980s, as well as computer-generated and online child pornography in the 1990s, illustrates the impact of new information and communication technologies on international and domestic law. It also illustrates how the new legal regimes occasioned by technological evolution have been re-presented, instituted, and managed under different politico-cultural systems.

Due to its extensive reach and prevalence, a global communication and legal phenomenon like child pornography can best be understood if it is studied across jurisdictions, legal traditions, and political cultures. As William Twining suggests, globalization has made it mandatory for scholars to analyze legal phenomena at the global, international, transnational, regional, and municipal levels.<sup>8</sup>

This article will compare and contrast the differential regulation of child pornography under International, European Union, and American jurisprudence. The unit of comparison was the legal postures and initiatives of the three entities towards international multilateral attempts to regulate child pornography. The questions that guided the study were as follows:

1. How has virtual or online child pornography been conceptualized, re-presented and regulated under International human rights law?
2. How has the European Union re-presented and regulated virtual or online child pornography?
3. What is the posture of the United States toward the international human rights regime in general and the UN Convention on the Rights of the Child?

The position of this paper is that virtual child pornography poses difficult moral and legal conflicts between freedom of speech and human rights that the European Union, the United Nations and the United States resolve within the framework of their different politico-cultural, historical, and diplomatic realities. The first section will discuss the

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<sup>7</sup> See Resolution of the Council and of the Representatives of the Governments of the Member States, meeting with the Council of 17 February 1997 on Illegal and Harmful Content on the Internet, 1997 O.J. (C 70) 1. See also Alain Hazan, *L'Europe et la lutte contre la pédopornographie sur l'Internet* [Europe and the struggle against pedopornography on the Internet], LE MONDE INTERACTIF, January 26, 2000, at IV.

<sup>8</sup> See WILLIAM TWINING, *GLOBALISATION & LEGAL THEORY* 252 (2000).

regulation of child pornography under international human rights law. The second section will survey the ideological underpinnings of child pornography regulation in the European Union and the United States. The third section will discuss regulation of child pornography under European law, while the fourth will discuss comparable regulation under United States Law. The fifth section will compare European and United States law with respect to child pornography in general and virtual child pornography in particular.

I will show that the universalistic, moral-philosophical posture of the European Union ensures that its legislation dovetails harmoniously with international child protection instruments and initiatives while the ideological posture of the United States does not enable such harmonization.

This article does not aim to suggest an ideal child pornography regulatory regime; its goal is to compare and contrast international and national child pornography regulatory regimes within the framework of international human rights law in order to have a global view of this very global problem and maintain what William Twining calls “a sense of scale and proportion; avoiding the dangers of [jurisprudential] parochialism...”<sup>9</sup> After all, we live in a planetary plaza where the convergence of the traditional mass media and information and communication technologies have made pedopornography a shared, international problem whose eradication can only come about if the problem is approached in a concerted fashion. The confluence of diverse, international and national approaches to the problem, as well cooperation among law enforcement agencies from diverse jurisdictions is crucial to the control of child pornography. Consequently, comparisons of the philosophical, legal, and ideological specificities of key players in the fight are important for the improvement of international understanding and cooperation in promoting the human rights of children.

As information and communication technologies have evolved and became the locus of the creation, transmission, and dissimulation – through encryption – of child pornography, diplomats at the United Nations, legislators and leaders in the European Union and the United States have responded to the new challenges by presenting anew the problem of child pornography in stark ethical, psychological, legal, and human rights terms to their different constituencies. The perspective of re-presentation or presenting evolving realities anew in the light of changing technologies and circumstances, is an apt conceptualization of the dynamics of re-framing – in the form of findings of fact, grounds for legislation, and other justifications – of the problem of child pornography and child sexual exploitation. The international community, led by the United Nations, re-presented the problem within the framework of its post-World War II internationalist human rights regime. The European Union also re-presented the problem as a human rights and human dignity issue within its supra-national jurisdiction. Thereafter, legislation was enacted in the different jurisdictions to address the problem.

The situation in the United States was more complex. The American Congress re-presented the problem of online and computer-generated child pornography as a matter of child health and welfare, as well as law enforcement, in a series of findings of fact.

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<sup>9</sup> *Id.* at 184.

Legislators found that online child pornography was detrimental to the physical and psychological well-being of children, and complicated the task of law enforcement officials. Congress subsequently passed legislation banning the creation, transmission, and possession of child pornography—including computer-generated child pornography, in the United States. However, this legislation was challenged in court by organized interest groups, notably the adult pornography industry, under the country's First Amendment. In the subsequent trials, American courts and specifically the Supreme Court of the United States, re-presented the problem of child pornography as an illegal exception to free speech under the First Amendment, which accords little or no importance to metaphysical issues like human dignity or morality in matters of speech and expression, as is the posture of the UN and the European Union. Since the fundamental principles underlying the regulation of online and computer-generated child pornography under the United Nations humanitarian law regime and the European Union's moral-philosophical approach are different from the American approach, the result is that there is no global consensus on what exactly illegal child pornography is or is not.

I suggest that the posture of the United States towards international human rights treaties, coupled with the United States Supreme Court's zealous application of First Amendment standards designed for the traditional media to online electronic communication, make the United States the weakest link in international efforts to eradicate all forms of online pedopornography, and the child sexual exploitation that feeds it.

## II. CHILD PORNOGRAPHY UNDER INTERNATIONAL HUMAN RIGHTS LAW

The regulation of child pornography represents a conflict of legal and moral rights: the right to produce, store, and disseminate sexual material involving children, and the determination whether it is right for society to permit the exercise of that right, which has detrimental physical and psychological effects on the weakest members of society. The international community, led by the United Nations, has always considered the protection of children, and the elimination of their sexual exploitation to be a universal moral obligation and a global interest of paramount importance.<sup>10</sup> This was the case long before the advent of television or the Internet. The justification for universal rejection of pedopornography is moral-philosophical. The international community recognized that

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<sup>10</sup> See Convention on the Rights of the Child, art. I, 1989, A/RES/44/25 (entered into force September 2, 1990). (A child is defined as a human being under the age of 18 unless majority is attained earlier under the law applicable to that child). See also Optional Protocols to The Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, annex. II, art. (2)(c), 2000, A/RES/54/263 (entered into force on January 18, 2002)(the Optional Protocol defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes").

children were, to borrow the expression of Kukathas, part of the “global moral community.” As such they have universally recognized rights that all countries – despite their different ethical and moral values, and their cultural attitudes regarding children and sex – were bound to recognize and respect under international law.<sup>11</sup>

The building blocks of the framework for child protection legislation at the international level were put in place early in the 20<sup>th</sup> Century.<sup>12</sup> The rest of the edifice of international children’s rights was put in place in the 1990s in response to developments in the fields of information and communication technology, as well as convergence of the heretofore discrete media – film, digital video, and computer technology – that made it easier to manufacture, encrypt, transmit, and store illegal child pornography. In the last 80 years, the international child protection regime has been updated to keep abreast of new communication technologies, especially the multi-communication platform that is the Internet.

#### A. THE UN CONVENTION ON THE RIGHTS OF THE CHILD

Despite the diversity of their cultures, political systems, and ethical values, members of the international community, led by the United Nations, have always considered the protection of children, and the elimination of their sexual exploitation, a universal moral obligation and a substantial global interest of paramount importance.<sup>13</sup> The first of the international “anti-child exploitation” conventions, the 1924 Geneva Declaration on the Rights of the Child, which recognized the moral personhood and human sanctity of children,<sup>14</sup> was ratified under the auspices of the ill-fated League of Nations. World War II-era atrocities and crimes against humanity, of which millions of children were victims, raised some fundamental existential questions about the sanctity of life and universal respect for human personhood. This led to the emergence of an international human rights regime grounded in a “basket” of moral-philosophical traditions, which lay emphasis on human dignity and the sanctity of human life – the right to life – and the right to protection under the law.

The establishment of the United Nations International Children’s Emergency Fund (UNICEF) in 1946 was a concrete measure aimed at addressing the pressing issues of children in dire circumstances. Child protection thus became one of the first building

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<sup>11</sup> See Chandran Kukathas, Moral Universalism and Cultural Difference, in *THE OXFORD HANDBOOK OF POLITICAL THEORY* 581, 582 (John Dryzek, Bonnie Honig & Anne Phillips eds. 2006).

<sup>12</sup> See *LEAGUE OF NATIONS O.J.*, SUPP. NO. 21 at 43 (1924).

<sup>13</sup> See *supra* note 10.

<sup>14</sup> See *supra* note 12.

blocks of a new, post-World War II international humanitarian law regime.<sup>15</sup> Today, UNICEF ensures special protection for child victims of war, disasters, extreme poverty, violence and exploitation, as well as children with disabilities.

Though early international child welfare conventions recognized the humanity and moral sanctity of children, and provided them certain protections befitting their status as moral beings, these conventions did not have provisions against the rising menace of mass mediated child pornography. In the 1980s, due to the overt commercial sexual exploitation of children in the form of pornography featuring minors, child welfare and law enforcement officials re-presented child pornography to the international community as a vice that had dangerous psychological and physiological effects on children. This re-presentation was embodied in the 1989 United Nations Convention on the Rights of the Child.<sup>16</sup> The convention reiterated the human rights of children set forth in the Universal Declaration of Human Rights, and raised children's rights to the level of specific rights at par with other human rights.<sup>17</sup> The UN convention also addressed the new dangers facing children in the age of global communication, namely, commercial sexual exploitation. In this convention, member countries of the United Nations expressly undertook to protect children from all forms of sexual violence, exploitation, and abuse. The Convention states in part:

State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse...[and] take all appropriate national, bilateral and multilateral measures to prevent (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; [and] (c) The exploitative use of children in pornographic performances and materials.<sup>18</sup>

Furthermore, the Convention made prevention of the physical and sexual abuse, as well as the exploitation and transfer of children across national borders for purposes of sexual exploitation,<sup>19</sup> a substantial interest of the international community.<sup>20</sup> The United

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<sup>15</sup> See JOHN O'BRIEN, INTERNATIONAL LAW 55 (2001) (the emerging human rights system was aimed at setting up internationally agreed minimum human rights stands).

<sup>16</sup> See *supra* note 10.

<sup>17</sup> *Id.* at pmb1. (reiterating the dignity of all members of the human family).

<sup>18</sup> See *supra* note 10.

<sup>19</sup> *Id.* at art. 11.

<sup>20</sup> *Id.* at pmb1. ¶ 9, art. 19.

Nations has stated that the Convention on the Rights of the Child prohibits taking photographs and videos of children having sex with adults or with other children.<sup>21</sup>

B. THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN,  
CHILD PROSTITUTION, AND CHILD PORNOGRAPHY

Illegal child pornography continued to exist in the margins of the traditional media for decades until the invention of the Internet and the World Wide Web in the early 1990s, gave the vice a new platform. The advent of this global multi-communication platform, led to the migration of digitized, commercial pornography to its borderless recesses. In effect, as soon as the virtual world of the Internet was created, pedophiles and pedopornographers moved en masse into its vast, borderless territory, colonized it, and transformed parts of it into sleazy, child pornography enclaves. This transformed child pornography from a problem that was confined to specific nation-states into a global problem. Additionally, the Internet made control of pedopornography more difficult to detect and eliminate. Child welfare advocates proceeded to re-present the problem to the international community in order to keep international law abreast of technological innovation and media convergence. At the United Nations, the Commission on Human rights re-presented child pornography as a virulent virus that violated the dignity and humanity of children around the globe from its new, transnational online platform. This led the UN General Assembly to adopt the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.<sup>22</sup> The Optional Protocol was presented as an extension of the measures countries needed to take to prevent the sale of children, child prostitution and child pornography.<sup>23</sup> In the Optional Protocol, the re-presentation of the problem of child sexual exploitation – international traffic in children, sale of children, sex tourism, and online child pornography – takes place in a series of preambular paragraphs. The preamble expressed grave concern over the “significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and child pornography.” The Optional Protocol further stated that member states of the United Nations were “concerned about the growing availability of child pornography on the Internet and other evolving technologies...”<sup>24</sup> The preamble restated the call of the International Conference on Combating Child Pornography on the Internet for the

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<sup>21</sup> See Sale of Children, Child Prostitution and Child Pornography, Report of the Special Rapporteur of the Commission on Human Rights, 2000, A/RES/55/297.

<sup>22</sup>54 U.N. GAOR Supp No. 49 at Annex II, arts. 1-3,A/RES/54/263 (2000).

<sup>23</sup> *Id.* at pmb. ¶ 1.

<sup>24</sup> *Id.* at pmb. ¶ 6.

“worldwide criminalization of the production, distribution, exportation, transmission, importation and intentional possession and advertising of child pornography...”<sup>25</sup>

The Optional Protocol essentially brought the Internet within the ambit of the Convention on the Rights of the Child. This re-presentation was successful because the international community showed the political will to combat child pornography despite the fact that Internet infrastructural and content regulation at the international level is diverse, complex, and problematic. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography calls on all countries of the world to criminalize the production, distribution, dissemination, importation, exportation, offering, selling or possession of child pornography.<sup>26</sup> A Protocol of the United Nations Convention Against Transnational Organized Crime also strengthened existing international laws against the transnational trafficking of women and children by organized crime syndicates.<sup>27</sup> By framing child pornography as a global ethical and human rights issue, the United Nations succeeded in rallying the international community against the global production, storage, and dissemination of evidence of the unethical exploitation of children in both the traditional media and on the Internet. By galvanizing the global community of nations against the violation of children’s rights, the United Nations lived up to the lofty ideals of the Universal Declaration of Human Rights. Ironically, for reasons of internal politics and national ideology, the United States is one of only two countries – the other is the collapsed state of Somalia – that have not ratified the UN Convention on the Rights of the Child.<sup>28</sup> The United States has nevertheless signaled its intention to ratify the convention by formally signing it. The United States has however signed and ratified the Optional Protocol to the Convention on Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

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<sup>25</sup> *Id.*

<sup>26</sup> See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 86, at arts. 1-3.

<sup>27</sup> See Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2001,A/RES/55/25, Annex II.

<sup>28</sup> See UNICEF, Convention on the Rights of the Child, *FAQ*, available at [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) (last visited February 1, 2009) (The United States has not ratified the Convention because the country carefully examines all treaties in order to ensure their compliance with the Constitution as well as all federal and state laws before they are ratified. This process is still on-going).

## C. INTERNATIONAL CONGRESSES ON CHILD PORNOGRAPHY

Internet infrastructural and content regulation at the international level is complicated and problematic because of the complex mosaic of political, socio-cultural, and judicial traditions that have to grapple with this new multi-communication platform. Serious differences of opinion and interpretation on contentious issues like freedom of speech and of the press are evident everywhere.<sup>29</sup> Nevertheless, most nations of the world consider child pornography – sexual or sexualized material that features children or knowingly lures children into sexual activity for the sexual gratification of adults with prurient tastes – to be outside the ambit of protected freedom of expression. Due to near-universal condemnation of this kind of material, consensus on a multilateral solution to the problem of child pornography on the Internet was not difficult to arrive at.

Several international congresses and declarations strengthen the international edifice of anti-child pornography regulation. International congresses have included the “Stockholm Declaration and Agenda for Action,” that came out of the First World Congress against the Commercial Sexual Exploitation of Children,<sup>30</sup> the “Vienna Declaration and Programme of Action” adopted by the World Conference of Human Rights,<sup>31</sup> the Vienna International Conference on Combating Child Pornography on the Internet,<sup>32</sup> the 1999 United Nations Resolution on the Rights of the Child, which called on countries to enact and enforce, review and revise laws to protect children from commercial sexual exploitation, pedophilia, and especially the dissemination of child pornography on the Internet,<sup>33</sup> and the “Yokohama Global Commitment” of the 2<sup>nd</sup> World Congress Against the Commercial Sexual Exploitation of Children.<sup>34</sup>

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<sup>29</sup> See WILLIAM VAN ALSTYNE, *FIRST AMENDMENT 5* (2d. ed., 1995) (Constitutional provisions for freedom of speech and of the press is “significantly qualified” or balanced away in virtually all constitutions of the world).

<sup>30</sup> See Stockholm Declaration and Agenda for Action, 1st World Congress against the Commercial Sexual Exploitation of Children (1996), available at <http://www.ilo.org/public/english/comp/child/standards/resolution/stockholm.htm> (last visited February 1, 2009).

<sup>31</sup> See Vienna Declaration and Programme of Action, World Conference on Human Rights, A/CONF.157/24 (pt. I) ch. III (1993) (states that national and international mechanisms and programs for the defense of children including measures to combat child prostitution and child pornography should be strengthened), available at <http://www.un-documents.net/ac157-23.htm> (last visited February 1, 2009).

<sup>32</sup> See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 10, pmbl. (this conference called for worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography).

<sup>33</sup> See A/RES/53/128 (2000).

Additionally, several multilateral and United Nations agencies have launched campaigns against pedopornography on the Internet. The International Labour Organization (ILO), fights against child pornography on the Internet under the Worst Forms of Child Labour Convention C.182 of 1999.<sup>35</sup> At the United Nations Educational, Scientific and Cultural Organization (UNESCO), some measures have been put in place to fight against child pornography on the Internet. These include a UNESCO Declaration on the Abuse of Children, Child Pornography and Pedophilia on the Internet,<sup>36</sup> an Action Plan to fight pornography and pedophilia,<sup>37</sup> as well as the “Innocence in Danger” program, which was launched to ensure coordinated follow-up of the anti-child pornography Action Plan.<sup>38</sup>

The United Nations and the international community thus view child pornography in the traditional media and on the Internet as a violation of the human rights of children. International conventions make no distinction between real and computer-generated children. Furthermore, pedopornography is viewed as a moral-philosophical or human rights problem. It has never been viewed as “speech” under international law. If anything, it is viewed as an abuse of the right of freedom of expression.

### III. DIFFERENCES IN AMERICAN AND EUROPEAN WORLDVIEWS AND REGULATORY FRAMEWORKS

Although the United States and the European Union share a commitment to the principles of the market economy and constitutional democracy, the expression of these

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<sup>34</sup> See Yokohama Global Commitment of the 2nd World Congress against the Sexual Exploitation of Children (2001), available at <http://www.unicef.org/events/yokohama/outcome.html> (last visited February 1, 2009).

<sup>35</sup> See Convention No. C.182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst forms of Child Labour Convention of 1999), art. 3(b), available at <http://www.ilo.org/ilolex/cgi/convde.pl?C182> (last visited February 1, 2009) (this convention, which entered into force on November 19, 2000, defines the worst forms of child labor to include the use, procuring or offering of a child for prostitution or for the production of pornography).

<sup>36</sup> See UNESCO Declaration on the Abuse of children, child pornography and paedophilia on the Internet, available at [http://cis-sacp.government.bg/sacp/CIS/content\\_en/law/item07.htm](http://cis-sacp.government.bg/sacp/CIS/content_en/law/item07.htm) (last visited January 31, 2009).

<sup>37</sup> *Id.* The UNESCO Action Plan calls on governments, international agencies, non-governmental organizations, industry, parents, educators, law enforcement agencies and the mass media to participate in the fight against paedophilia on the Internet.

<sup>38</sup> See *Innocence In Danger!*, available at <http://www.unesco.org/webworld/innocence/index.html> (last visited October 2007).

commitments take different forms in the different contexts of both sides of the Atlantic. In the United States the idea of the market takes the particularistic form of the marketplace of ideas, *laissez-faire* economics, free trade, and the free flow of ideas, information, and discourse. The First Amendment is a uniquely American phenomenon.<sup>39</sup> By way of contrast, in the European Union, emphasis is on the concept of the “social market” underpinned by supposedly universalistic and “European” ethical values.<sup>40</sup> According to Chalmer et al., the triumph of global capitalism – and its European variants – exacerbated social tensions in Europe’s class-based societies, leading to a rather jaundiced view of free markets. This differential evaluation of politics and markets explains Europeans’ trust in the civilizing power of the state and their expectations that it is the job of governments to correct market failures.

There are many explanations for these different postures. Robert Kagan states that when it comes to international issues, Europeans have different perspectives and worldviews than Americans. In his view, Europeans have a Kantian, moral-philosophical worldview of perpetual peace, while Americans have a Hobbesian view of the world marked by skepticism and distrust of international laws and rules.<sup>41</sup> There are several reasons for the European posture. Long, fratricidal wars, the Holocaust, and other historical controversies give European politics a heavy moralistic tone and “a heightened sensitivity to injuries to personal and bodily integrity,” to use Kagan’s expression.<sup>42</sup>

Kantian ethics is known for its emphasis on human dignity and autonomy. The fundamental principle of Kantian ethics is that human beings are rational beings who should never be treated as a means to an end. These politico-ethical principles that are intended to guide human actions are set forth in the two variants of Kant’s categorical imperative (practical principle),<sup>43</sup> which spell out how rational human beings who have the will – the autonomous capacity to act in accordance with laws – ought to behave towards each other:

Act only on a maxim by which you can will that it, at the same time,  
should become a general law...

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<sup>39</sup> See *Abrams v. U. S.*, 250 U.S. 616 (1919); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); See also Lyombe Eko, *Many Spiders, One World Wide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL’Y 445, 465 (2001).

<sup>40</sup> See DAMIAN CHALMER, CHRISTOS HADJEMMANUIL, GIORGIO MONTI, & ADAM TOMKINS, *EUROPEAN UNION LAW: TEXT AND MATERIALS 1* (2006).

<sup>41</sup> See Robert Kagan, *Power and Weakness*, 113 POL’Y REV. (2002), available at <http://www.hoover.org/publications/policyreview/3413481.html>.

<sup>42</sup> *Id.*

<sup>43</sup> See JENS TIMMERMANN, *KANT’S GROUNDWORK FOF THE METAPHYSICS OF MORALS: A COMMENTARY* 92 (2007).

Act so as to treat man, in your own person as well as in that of any one else, always as an end, never merely as a means.<sup>44</sup>

Additionally, Kantian ethics has a pronounced teleological bent. In *Conjectures on the Beginning of Human History*, Kant advances the notion that sexual instincts should be governed by reason and rational control if sex is to rise above the animalistic level: “the first incentive for man’s development as a moral being came from his *sense of decency*, his inclination to inspire respect in others by good manners...”<sup>45</sup> Thus, the main tenet of Kantian ethics is that human beings progress from creatures governed by their base sensual perceptions and animalistic instincts to creatures of reason and morality. Morality is therefore the height, the logical progression, of human progress.<sup>46</sup> From a Kantian perspective, child pornography represents a morally deplorable regression to the state of bestial instincts from which rational human beings are supposed to have evolved. The result is that at the United Nations and the European Union perceive child pornography as a universal “ethico-political problem,” to borrow the expression of Byron Kaldis,<sup>47</sup> not just a purely politico-legal problem, as is the case in the United States.

#### A. THE PROBLEM OF HUMAN DIGNITY

Human dignity is a metaphysical problem. By that I mean that the concept of human dignity cannot be subjected to the scientific process and quantitatively or qualitatively measured. Nevertheless, it is one of the foundational principles of international human rights law. The preamble of the Universal Declaration of Human Rights declares that recognition of the “inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”<sup>48</sup> Human dignity is also a fundamental pillar of the European human rights edifice. The European Union Charter of Fundamental Rights declares that: “Human dignity is inviolable. It must be respected and protected.”<sup>49</sup> Under the EU Charter, human

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<sup>44</sup> See THE PHILOSOPHY OF IMMANUEL KANT 170, 178 (Carl Friedrich ed., 1949).

<sup>45</sup> See Immanuel Kant, *Conjectures on the Beginning of Human History*, in POL. WRITINGS 224 (Hans Reiss, ed., H.B. Nisbet, trans., Cambridge Univ. Press 1991) (emphasis in the original).

<sup>46</sup> *Id.* at 221.

<sup>47</sup> See Byron Kaldis, *World Justice, Global Politics and Nation States: Three Ethico-Political Problems*, 7 THE EUR. LEGACY 188 (2002).

<sup>48</sup> Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III).

<sup>49</sup> European Union Charter of Fundamental Rights, art.1, 2000, OJ C364/01, available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) (last visited April 21, 2008).

dignity has the following components: right to life, right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, as well as prohibition of slavery and forced labor.<sup>50</sup> The rights of children also figure prominently in the European Charter of Fundamental Rights.<sup>51</sup> Additionally, the European Convention on Human Rights and Biomedicine ensures that biology and medicine do not lead to acts that endanger human dignity.<sup>52</sup> The European Court of Human Rights has put its imprimatur on, and validated the concept of human dignity, autonomy, and worth at the international level.<sup>53</sup> It reiterated this posture in *Hachette Filipacchi Associés v. France*<sup>54</sup> (discussed in detail below).

While international and European Union regulation of child pornography is premised on the vague, metaphysical Kantian notion of the intrinsic worth, priceless value, and autonomy of human beings that stems from their capacity to be rational beings different from other creatures, as well as on the progressive moral improvement of mankind, that is not the case with the United States. Though the Bill of Rights protects what contemporary Europeans would consider “dignity” – the Fifth Amendment stipulates that Americans may not be “deprived of life, liberty or property without due process of law,” and the Eight Amendment forbids the infliction of “cruel and unusual punishment” – these constitutional provisions are “rights” grounded in an ethic of individual liberty and fundamental fairness.<sup>55</sup> Jeremy Rabkin asserts that the framers of the American Constitution had a highly circumscribed view of human dignity and worth.

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<sup>50</sup> *Id.* arts. 2-5.

<sup>51</sup> European Union Charter of Fundamental Rights. art.24, 2000OJ C364/01, available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) (last visited April 21, 2008).

<sup>52</sup> See Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, 4. IV.1997, ETS 164, in BLACKSTONE’S INTERNATIONAL HUMAN RIGHTS DOCUMENTS (P.R. Ghandi ed., 4th ed. 2004).

<sup>53</sup> See *Streletz v. Germany*, App. Nos. 34044/96, 35532/97 & 44801/98.49 ILM 811 (2001), and *K.H.W. v. Germany*. App. No. 37201/97. 49 ILM 773 (2001) (holding that the conviction and imprisonment of the last president and two former senior officials of the defunct German Democratic Republic for being responsible for the deaths of GDR citizens who sought to escape from East Germany was not a violation of the European Convention on Human Rights because their actions as leaders of the GDR violated national and international standards of human rights and human dignity).

<sup>54</sup> *Hachette Filipacchi Associés v. France*, decision no. 71111/01, § 58 ECHR 2007, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=818892&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited February 1, 2009).

<sup>55</sup> U.S. CONST. amends. V, VII.

To them, human dignity could not be bestowed by government or by law. Under the American system, Rabkin suggests, dignity and rights are not linked concepts. Dignity is also not equality.<sup>56</sup> That is because philosophical concepts like “human dignity” and “morality” are culture-specific, malleable, and elastic. These contrasting legal and philosophical views of human dignity and morality are reflected in the regulation of child pornography under the United Nations, the European Union, and the United States.

## B. EUROPEAN UNION FREE SPEECH JURISPRUDENCE

In order to understand the European Union’s anti-child pornography regime, a brief discussion of EU legislative and political institutions, as well as EU freedom of expression jurisprudence, is necessary. The European Union has been described as a multi-layered entity,<sup>57</sup> a technocratic “body politic in search of democracy... [and] democratic legitimacy.”<sup>58</sup> Three political institutions make up the executive and legislative power of the EU. The Council of the European Union, which is the voice of national governments or member states, is the principal decision-making institution in the European Union. It shares with the European Parliament, which represents the citizens of EU member countries, the responsibility for passing laws and making policy decisions. The Council is responsible for EU action on some justice and freedom issues. The Commission of the European Communities, which is the executive arm of the Union, represents the collective European interest. The Commission is responsible for drafting all the laws and policies of the European Union.<sup>59</sup> The European Union has also been described as a supranational organization which has checks and balances (institutional balance) but no real separation of powers.<sup>60</sup> The three major EU institutions and the European Court of Human Rights have been involved in the regulation of child pornography.

Compared to the United States, where the constitutional regime has a high presumption against governmental infringement of the rights of citizens, and an older

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<sup>56</sup> See Jeremy Rabkin, *What we can Learn About Human Dignity From International Law*, 27 HARV. J. L. & PUB. POL’Y 146 (2003).

<sup>57</sup> Dierdre Curtin & Ige Dekker, *The EU as a “Layered” International Organization: Institutional Unity in Disguise*, in THE EVOLUTION OF EU LAW 83 (1999).

<sup>58</sup> See WALTER VAN GERVEN, THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES 39, 234 (2005).

<sup>59</sup> *European Panorama*, available at [http://europa.eu/abc/panorama/index\\_en.htm](http://europa.eu/abc/panorama/index_en.htm) (last visited April 18, 2008).

<sup>60</sup> VAN GERVEN, *supra* note58, at 14.

tradition of protecting citizens against governmental abuses,<sup>61</sup> the European Union has a relatively recent – less than half a century – and much smaller body of case law regarding protection of constitutional rights like freedom of expression.<sup>62</sup> Therefore, in order to achieve meaningful comparability between the European Union and the United States on matters of freedom of expression, one needs to look, as van Gerven suggests, at national constitutional court decisions as well as the case law of the European Court of Human Rights (ECtHR).<sup>63</sup> Since a survey of national laws is beyond the scope of this paper, I will focus on a few landmark decisions of the ECtHR.

The European Court of Human Rights is a supranational court that was established in 1959 by the Council of Europe, a supranational organization separate from the European Union, as a mechanism for the collective enforcement of certain of the rights and obligations set forth in the Universal Declaration of Human Rights of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.<sup>64</sup> Legal actions against member countries of the Council of Europe for human rights violations are entertained from both member-states and from individuals.<sup>65</sup> Decisions of great importance are usually handed down by a 17-member Grand Chamber of the court. It should be noted that in keeping with the multilateral nature of the court, all its decisions are essentially recommendations to member-states and are therefore implemented at the sole discretion of the respondent or concerned states.<sup>66</sup>

The cornerstone of freedom of expression in Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,<sup>67</sup> which followed in the wake of the United Nations Universal Declaration of Human Rights of 1948. The European Convention on Human Rights and Fundamental Freedoms protects freedom of speech and of the press, and balances freedom of expression against other

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<sup>61</sup> See *Gitlow v. N.Y.*, 268 U.S. 652 (1925) (holding that the First Amendment is applicable to the states through the due process clause of the 14th Amendment); see also *Near v. Minn.*, 283 U.S. 697 (1931) (holding that the First Amendment was designed to prevent prior restraints).

<sup>62</sup> VAN GERVEN, *supra* note 58, at 131.

<sup>63</sup> *Id.*

<sup>64</sup> See European Court of Human Rights, *Historical Background*, available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited April 18, 2008).

<sup>65</sup> VAN GERVEN, *supra* note 58, at 11.

<sup>66</sup> See European Court of Human Rights, *How the Execution of Judgments works*, available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgm+ents+works/> (last visited April 19, 2008).

<sup>67</sup> European Court of Human Rights, *supra* note 33.

rights, freedoms, and governmental interests like health and morality. Article 10 of the Convention declares:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others...<sup>68</sup>

This balance between rights and responsibilities – expressed as a laundry list of exceptions – in matters of freedom of speech and expression creates what van Gerven calls a European Union “marketplace *for* ideas.”<sup>69</sup> This contrasts markedly with the American First Amendment jurisprudence under which the United States is considered “a marketplace *of* ideas.”<sup>70</sup> The differences are more than semantic. Under the near-absolutist American marketplace of ideas theory, the First Amendment does not demand that the government take affirmative steps to promote acceptable speech, as is the case in the European Union where governments create content-based spheres of democratic communication. The First Amendment forbids the government from injecting itself into the public speech arena<sup>71</sup> and discriminating against or interfering with content that it finds politically or socially objectionable.<sup>72</sup>

The European Court of Human Rights (ECtHR), which is charged with enforcing the European Convention on Human Rights, serves as the court of last resort when national legal remedies have been exhausted. The ECtHR, which makes up the fourth

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<sup>68</sup> Article 10, European Convention on Human Rights, CETS No. 194 (1950).

<sup>69</sup> VAN GERVEN, *supra* note 27, at 242.

<sup>70</sup> See *Abrams*, 250 U.S. 616; *Terminiello*, 337 U.S. 1 (holding that a function of free speech is to invite dispute or even stir people to anger).

<sup>71</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 745-746 (holding that “...the fact that society may find speech offensive is not a sufficient reason for suppressing it...For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas”).

<sup>72</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“[The] First Amendment generally prevents government from proscribing speech. . .because of disapproval of the ideas expressed.”) (citation omitted).

and fifth legs<sup>73</sup> of the European judicial review hierarchy – compared to the three-tiered hierarchy in the United States – has developed an extensive body of Article 10 (freedom of expression) case law in the last 25 years. The court has held that European national legal authorities have the primary role of making determinations about the necessity of curtailing or interfering with the exercise of freedom of expression. However, on appeal, the court reviews selected cases to ensure that European national authorities – including Russia and Turkey – apply legal standards that are in conformity with the European Convention on Human Rights. The court has said that “what they (European countries) may do in this connection is, however, subject to European supervision embracing both the legislation and the decisions applying it, even where they have been given by an independent court.”<sup>74</sup>

In order to decide whether European states have violated Article 10, the court first makes a determination whether the right of freedom of expression has been restricted by national governments. Thereafter, it makes a determination whether the restrictions pass European human rights muster; that is to say, whether they are “prescribed by law,” are carried out in pursuit of one or more of the legitimate aims set out in Article 10-2 of the European Convention on Human Rights, and are “necessary in a democratic society.”<sup>75</sup> The record of the ECtHR shows that for more than a decade, the court has liberalized media law and reaffirmed the right of freedom of expression against various governmental attempts to stifle the press. By so doing, it has influenced human rights law in general and media law in particular, throughout Europe. A few landmark cases are illustrative.

In *The Observer and Guardian v. the United Kingdom*,<sup>76</sup> the court held that the United Kingdom had violated the right of freedom of expression of the press in the UK, when it permanently restrained all British media outlets from publishing and distributing, in whole or in the form of excerpts, *Spycatcher*, the memoirs of a former British Security Service (M15) employee that had been published in the United States and Australia. The

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<sup>73</sup> Hachette Filipacchi Associés, *supra* note 54 (press release, Chamber Judgment: stating that “Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, ... in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.”

<sup>74</sup> See *Prager v. Austria*, judgment of 26 April 1995, Series A, no. 313, 17-18, ¶¶ 34-35).

<sup>75</sup> See *The Observer v. United Kingdom*, judgment of 26 November 1991, Series A no. 216, 22, ¶ 49).

<sup>76</sup> *Id.* at 22, ¶ 49.

injunction had also barred publication of information derived from or attributed to Peter Wright, the author of the book. The European Court of Human Rights held that the restraint constituted interference that was not necessary in a democratic society, in as much as *Spycatcher* had been published in the United States and was barred from being imported into the United Kingdom. The court said in part:

Freedom of expression constitutes one of the essential foundations of a democratic society;...[it] is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established...Whilst it [the press] must not overstep the bounds set, *inter alia*, in the “interests of national security” or for “maintaining the authority of the judiciary”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest...Were it otherwise, the press would be unable to play its vital role of “public watchdog”...Article 10 (art. 10) of the Convention does not... prohibit the imposition of prior restraints on publication...On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.<sup>77</sup>

In *Castells v. Spain*,<sup>78</sup> Spanish authorities arrested and convicted Miguel Castells, a Basque nationalist senator, for insulting the government and public officials in a magazine article. His defense of truth (*exceptio veritatis*) argument was rejected. After exhausting all national remedies, Castells appealed to the European Court of Human Rights, claiming that Spain had violated his right of freedom of expression by convicting him of making statements that were true. The issue before the ECtHR was whether Spain had violated Castells’ right of freedom of expression guaranteed under the European Convention on Human Rights and Fundamental Freedoms. The court held that Spain had in fact violated Castells’ right of free expression. The rationale of the court was that:

The freedom of expression, enshrined in paragraph 1 of Article 10... is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”... The freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain “restrictions” or “penalties”, but it is for the Court to

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<sup>77</sup> *Id.* at 25-26, ¶59, 60.

<sup>78</sup> *Castells v. Spain*, Publ. Court Series A-236 (1992) (citation omitted), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (last visited April 23, 2008).

give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Article 10.<sup>79</sup>

In *Castells*, the ECtHR, stated clearly that a politician's freedom of expression may outweigh a government's interest in protecting the honor of its institutions and of public officials. However, despite this ruling, many European countries still have laws against insulting the president, the government and government officials.<sup>80</sup> The fact that defendants in governmental libel suits must first exhaust all national remedies before they can avail themselves of the services of the ECtHR, leaves most European "insult" laws intact.<sup>81</sup>

The case of *De Haes and Gijssels v. Belgium*,<sup>82</sup> presented another example of ground-breaking legal developments spearheaded by the ECtHR. In this case the court quashed the defamation and "punishable insults" conviction of two Belgian investigative journalists who had virulently criticized judges of the Antwerp Court of Appeal for awarding child custody to a father who had been accused by his former wife of sexually abusing their children. The court held that the conviction of the investigative journalists amounted to interference with the freedom of expression of the journalists and was not necessary for maintaining the authority and integrity of the judiciary. The court held that:

[T]he press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to the functioning of the judiciary...journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation...it must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."<sup>83</sup>

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<sup>79</sup> *Id.* at ¶ 42, 46.

<sup>80</sup> See French Law on Freedom of the Press of July 30, 1881, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881., art. 30-31.

<sup>81</sup> See Reporters Sans Frontières [Reporters Without Borders], *Lois en matière de diffamation et d'offense: Quel moyens mettre en oeuvre pour dépenaliser la diffamation et abroger les lois sur l'offense? [Laws on defamation and Offense: What are the ways of de-penalizing defamation and repealing laws on Offense?]*, available at [http://www.rsf.org/imprimer.php3?id\\_article=8605](http://www.rsf.org/imprimer.php3?id_article=8605).

<sup>82</sup> *De Haes v. Belgium*, Reports of Judgments and Decisions 1997-I (1997).

<sup>83</sup> *Id.* at §§ 37, 46, 48.

It is interesting to contrast *Castells* and *De Haes* with American First Amendment jurisprudence under which the government and its institutions are not permitted to bring defamation actions. Additionally, in the United States truth is a defense in libel, and cases turn on the attitude of media defendants towards the truth not toward the plaintiff. Therefore, public officials who bring actions for defamation in connection with their official duties have the virtually insurmountable task of meeting the stringent *New York Times* actual malice standard.<sup>84</sup>

The European Court of Human Rights has nevertheless issued decisions that have alarmed journalists and other media practitioners. One such decision was *Hachette Filipacchi Associés v. France*,<sup>85</sup> a case in which the court held that French domestic court sanctions against a newsmagazine for publishing a photograph depicting the uncovered body of a murdered French public official as he lay in the street, did not violate the right of freedom of expression under the European Convention on Human Rights. The French Court of Appeal had ruled that the picture showed disregard for human dignity and that its publication without the consent of the deceased official's family was illegal.<sup>86</sup> The Coordination of European Picture Agencies (CEPIC), a non-profit European Economic Interest group representing the interests of over 1000 picture associations, agencies and libraries in Europe, expressed alarm at the censorious implications of the *Hachette Filipacchi* decision and the negative impact it would have on editorial independence.<sup>87</sup>

The European Court of Human Rights has also dealt with issues of obscenity and morality. In *Handyside v. the United Kingdom*,<sup>88</sup> the court ruled that conviction of the publisher of *The Little Red Schoolbook*, an irreverent sex education book that was freely available in a number of other European countries, as well as the seizure and destruction of the matrix and hundreds of copies of the book under the Obscene Publications Acts of 1959 and 1964, did not constitute a violation of the freedom of expression guaranteed under Article 10 of the European Convention on Human Rights. The court held while the conviction and seizures constituted interference with freedom of expression, the restriction of "obscene" publications, "defined by their tendency to 'deprave and

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<sup>84</sup> See *Sullivan*, 376 U.S. at 281 (holding that public officials and public figures who sue for libel must show that in order to collect damages for defamatory falsehoods related to the exercise of their official duties, public officials and public figures must show that "the statement was made with "actual malice"— that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

<sup>85</sup> *Hachette Filipacchi Associés*, *supra* note 54.

<sup>86</sup> *Id.* at ¶ 58.

<sup>87</sup> See Coordination of European Picture Agencies, *Affaire Hachette Filipacchi c. France*, available at [http://www.cepic.org/english/information/legal\\_issues/paris\\_match\\_v\\_france.php](http://www.cepic.org/english/information/legal_issues/paris_match_v_france.php) (last visited April 25, 2008).

<sup>88</sup> *Handyside v. United Kingdom*, (1976)1 E.H.H.R. 737.

corrupt,” was intended to protect morals in a democratic society. The issue before the court was therefore “whether the protection of morals in a democratic society necessitated the various measures taken against the applicant and the *Schoolbook* [the banned book] under the 1959/1964 Acts.”<sup>89</sup> The European court stated that “the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights,” and that in matters of morality, states were given a “margin of appreciation” of national politico-cultural realities because there was no “uniform European conception of morals.” Therefore, states were in a better position to make decisions about moral requirements, the “demands of the protection of morals in a democratic society,” and to fashion their approaches to issues of morality in the light of their specific realities.<sup>90</sup>

In *Handyside*, though the court stated that nationally determined protection of morals in a democratic society is a justifiable reason for interference with freedom of expression, the court did not venture into definitions and normative evaluations of relative concepts like morality and obscenity. There is therefore a presumption that obscenity is protected by the European Convention on Human Rights and Fundamental freedoms except in states where it is considered an interference with the protection of public morality.

This decision can be contrasted with the United States Supreme Court decision in *Papish v. University of Missouri Curators*, in which the Court held that cartoons of police officers raping the Statue of Liberty and the Goddess of Justice were protected by the First Amendment, and so could not be curtailed in the name alone of “conventions of decency.”<sup>91</sup> Additionally, in Europe, “obscenity” can be curtailed for moral-philosophical rather than strictly legal reasons.<sup>92</sup> The European approach to obscenity is different from the American approach where obscenity is a narrowly defined class of material that is not protected by the First Amendment.<sup>93</sup>

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<sup>89</sup> *Id.* at ¶ 47.

<sup>90</sup> *Id.* at ¶ 48.

<sup>91</sup> 410 U.S. 667 (1973) (holding that displaying indecent cartoons on a university campus was protected speech).

<sup>92</sup> See e.g., European Social Charter, pt.1 (7), (1965), 529 U.N.T.S. 89 (stating that “Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed”).

<sup>93</sup> See *Miller v. Cal.*, 413 U.S. 15 (1973) (setting forth the Miller test which states that in order to declare material obscene, the trier of fact (jury) must ascertain: 1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2. Whether the work depicts/describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law, 3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

As these illustrative cases show, the European Court of Human Rights has essentially standardized and harmonized the principles of freedom of expression – and their exceptions – set forth in the European Convention on Human Rights, across the wide spectrum of European speech traditions that range from the centuries-old British model to the newer models of Spain, a country that emerged from dictatorship in 1978.

### C. AMERICAN FIRST AMENDMENT THEORY

The European human right and human dignity posture can be contrasted with the American neo-mercantilist free speech ideology. The United States has a “negative” free speech posture. Under this system, the government is perceived as the greatest danger to free speech. As a result the First Amendment expressly forbids Congress – and by extension federal, state and local governments – from infringing on the right of freedom of speech, press and religion: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and petition the Government for a redress of grievances.”<sup>94</sup>

The words “speech” and “press” are highly elastic legal terms. Freedom of speech involves symbolic, non-verbal, communicative activity like wearing arm bands as protest against war,<sup>95</sup> “expressive conduct” like burning the American flag in protest at governmental policies,<sup>96</sup> and “expressive association” like getting together with like-minded individuals to express religious or ethnic pride in public places while excluding people whose conduct expressed undesirable speech.<sup>97</sup> Free speech also includes freedom from forced speech – the right to speak and the right not to speak.”<sup>98</sup> The word “press” is an elastic term that covers all kinds of “publications” that provide information to the general public and comment on all matters of “public interest.”<sup>99</sup> It also includes the traditional electronic media – broadcasting, cable-casting, satellite communication – and the Internet, which has the same level of free speech protection as the traditional print media.<sup>100</sup> While free speech is not absolute – it is subject to time, place and manner regulations, a principle under which the government can regulate where, when and how

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<sup>94</sup> U.S. CONST. amend. I.

<sup>95</sup> *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969).

<sup>96</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>97</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

<sup>98</sup> *Id.*

<sup>99</sup> *See Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>100</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

the right of free speech is exercised rather than the content of the speech<sup>101</sup> – American public policy is generally hostile towards all kinds of governmental regulation of, or interference with, mass media and Internet content. Under the negative, Biblical-style, “thou shalt not” prohibitions imposed on the government, there is a legal presumption against all governmental attempts to impose prior restraints on speech. That is, all attempts by the government to censor speech before it has been uttered or published are illegal.<sup>102</sup> The rationale for this posture is that the United States has a market-based religious, media, and Internet regulatory regime, which combines several libertarian principles: the marketplace of ideas, *laissez-faire* economics, free trade, and the free flow of ideas, information, and discourse.<sup>103</sup> This ideological edifice is underpinned by an ancient theory of free speech, namely, faith that good ideas will ultimately prevail over bad ones if the government creates a level playing field in public spaces of discourse, such that there is a free uninhibited exchange of ideas. The Supreme Court of the United States has analogized faith in the salubrious power of free and open social discourse to a “marketplace of ideas”:

... the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death...<sup>104</sup>

Consequently, the Supreme Court of the United States has ruled that the government has an obligation to maintain a non-discriminatory, content-neutral regulatory posture in all matters appertaining to speech and expression – in the widest sense of the word – especially if the intent of the regulation is to suppress objectionable speech or expressive conduct.<sup>105</sup> The Supreme Court of the United States has also held that all content-based regulations<sup>106</sup> are subject to greater scrutiny than content-neutral

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<sup>101</sup> Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288 (1984).

<sup>102</sup> N.Y. Times v. U.S., 403 U.S. 713 (1971).

<sup>103</sup> See *Abrams*, 250 U.S. 616 ; *Terminiello*, 337 U.S. 1.

<sup>104</sup> *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting).

<sup>105</sup> See *United States v. O’Brien*, 391 U.S. 367 (1968).

<sup>106</sup> Content-based regulations are regulations that approve of certain kinds of speech and frown on others based on the ideas, opinions or viewpoints expressed by the speakers. (*Turner Broad. Sys. v. The FCC*, 512 U.S. 622 (1994). See also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

regulations.<sup>107</sup> That is, content-based regulations must pass the exacting “strict scrutiny” test, which essentially requires that in order to justify content-based regulations, states must show that “the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”<sup>108</sup>

Generally speaking, both the European Court of Human Rights and the United States Supreme Court use balancing tests to arrive at decisions on matters of freedom of speech and expression. However, there is no complete agreement on the similarities and difference in the adjudicating styles of the European Court of Human Rights and the Supreme Court of the United States. The differences between the two systems can be defined in terms of their specific types of scrutiny. The European Court of Human Rights has a macro-scrutiny or proportionality system designed to ensure that interference with freedom of expression enshrined in the European Convention on Human Rights is set forth in national law and that such interference does not go beyond what is “necessary in a democratic society.” This proportionality posture, which Schauer describes as an “open-ended discretionary”<sup>109</sup> approach, is based on “tacit assumptions,” to borrow the expression of Melville Nimmer,<sup>110</sup> about the court’s discretion as well as national discretion in the application of the provisions of the Convention to specific national, politico-cultural realities. In *Handyside* for example, the ECtHR granted European nations the discretion to define and apply national standards of morality. The European approach can be contrasted with the rule-based, micro-scrutiny of the United States Supreme Court that is grounded in “articulated premises,” to borrow the expression of Nimmer,<sup>111</sup> that ensure state and federal governmental conformity with the provisions of the First Amendment.

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<sup>107</sup> These are regulations that are applicable to all speakers irrespective of their point of view. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (statute banning all picketing, except labor picketing was unconstitutional content-based regulation subject to First Amendment strict scrutiny).

<sup>108</sup> See *Simon & Schuster, Inc. v. N. Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (quoting *Arkansas Writers’ Project Inc. v. Ragland*, 481 U.S. 221 (1987)) (finding that a regulation is content-based and subjecting it to strict scrutiny).

<sup>109</sup> See Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29, 55 (Micheal Ignatieff ed., 2005).

<sup>110</sup> See Melville B. Nimmer, *Does Copyright Abridge the First Amendment guarantees of Free Speech and Press?*, 17 *UCLA L. Rev.* 1180, 1182 (1970).

<sup>111</sup> *Id.*

#### IV. EUROPEAN UNION REGULATION OF CHILD PORNOGRAPHY

As a result of the bloody fratricidal wars and the extensive human rights violations that took place in Europe between 1914 and 1945, the Europeans put in place the foundations of a regional human rights regime a few years after the end of the war. This regime was grounded in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which effectively set up a human rights and child protection regime that strengthens the Post-World War II international human rights regime. Prevention of child sexual exploitation and pedopornography are an important plank of this human rights regime. The convention's prohibition against slavery and forced or compulsory labor bans exploitation of all kinds, including child sexual exploitation.<sup>112</sup> In 1997, the Council of the European Union, meeting jointly with representatives of the member states of the Union, passed a resolution providing guidance for a content-based system of regulating harmful and illegal online content, notably, child pornography.<sup>113</sup> The following year, the European Council passed a Recommendation enumerating the European Union's posture towards the production and transmission of Internet content that "violates human dignity."<sup>114</sup> In this Recommendation, the European Union declared, consistent with established policies, that it approached the issue of online child pornography and other forms of online hardcore pornography from a moral-philosophical, human rights perspective. Child pornography was classified as material whose production, storage, transmission, and dissemination to both adults and children, victimizes and violates the sanctity and morals of both child victims and children exposed to it.

Additionally, the European Union child protection standards enacted as part of the multilateral "Television Without Frontiers Directive" (renamed Audio-Visual Media Services Directive in 2007),<sup>115</sup> were extended to include pornographic material available on the Internet.<sup>116</sup> In effect, under the Television Without Borders Directive, television programming content, and especially violent and pornographic programs, which can seriously compromise the physical, mental, or moral development of minors, is not

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<sup>112</sup> European Convention on Human Rights, art. 4, 1950, CETS No. 194.

<sup>113</sup> See Resolution of the Council and of the Representatives of the Governments of Member States, Meeting within the Council of 17 February 1997 on Illegal and Harmful Content on the Internet, 1997 O.J. (C 70) 1.

<sup>114</sup> See Council Recommendation 98/560/CE, 1998 O.J. (L 270) 48 at art. 4, Annex 22.2 (a-c).

<sup>115</sup> See Council Directive 89/552/EEC, 1989 O. J. (L 298) 23 at arts. 22, 22a (as amended by Council Directive 97/36/EC, 1997 O. J. (L202) 60 at art. 22, 22a).

<sup>116</sup> See *supra* note 114, at art. 4.

allowed on European Union airwaves, unless such programming is screened during safe periods – from midnight to 5 a.m. – or is encrypted to make it inaccessible to minors.

By 2000 pornography of all kinds was a booming, multi-billion dollar industry on the Internet. In that year, the European Union passed legislation aimed at combating pedophilia and eradicating pedopornography on the Internet.<sup>117</sup> This decision covered the production, processing, possession and online distribution of child pornography. The established principle of the European Union on matters of child pornography is that content that is illegal off line should also be illegal online. Two classes of speech that fall under this principle are “racist statements and information inciting violence, and child pornography.”<sup>118</sup> In 2003, the Council of the European Union adopted a Framework for Combating the Sexual Exploitation of Children and Child Pornography.<sup>119</sup> The framework calls on member countries of the European Union to criminalize depictions of “a real person *appearing* to be a child involved or engaged in” child pornography unless that person is 18 years of age or older.<sup>120</sup> Furthermore, the Council called on all its member-states to criminalize virtual or computer-generated child pornography, which includes “realistic images of a *non-existent child* involved or engaged in sexually explicit conduct...”<sup>121</sup>

The Council of the European Union gives the following definitions:

(b) "child pornography" shall mean pornographic material that visually depicts or represents:

(i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or

(ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or

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<sup>117</sup> See Council Decision 2000/375/JHA, 2000 O.J. (L 138) June 9, 2000 at 1.

<sup>118</sup> See *Internet Regulation*, available at [www.Europa.eu.int/erulex/lexuriserv/lexuriserv.do?uri=52000DC0890:EN:HTML](http://www.Europa.eu.int/erulex/lexuriserv/lexuriserv.do?uri=52000DC0890:EN:HTML) (last visited April 4, 2008).

<sup>119</sup> European Council Framework Decision 2004/68/JHA, On Combating the Sexual Exploitation of Children and Child Pornography, 2003 O.J. (L.13/44), art. 1.

<sup>120</sup> *Id.* (defining illegal child pornography to include ‘realistic images of a *non-existent child* involved or engaged in’ child pornography) (emphasis added).

<sup>121</sup> *Id.*

(iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i)...<sup>122</sup>

Computer-generated child pornography is clearly criminalized under the framework. Criminal liability may only be avoided in situations where it is established that the computer-generated pornographic material was produced and possessed by the producer solely for his or her own private use and as long as real children or a real person appearing to be a child was not used for the purpose of its production, and as long as “the act involves no risk for the dissemination of the material.”<sup>123</sup>

In other words, pornographers who make and distribute computer-generated or virtual child pornography risk prosecution in the European Union. In the United States, production and dissemination of computer-generated material is legal. The European Union framework balances several substantial interests: privacy of personal communication, data protection, access to, and dissemination of information, and criminal prosecution of child pornography. Most European Union member countries have enacted child protection legislation that mirrors EU legislation. For example, as a result of aggressive French legislative action on matters of child protection, the European Union has declared that the country is essentially in compliance with EU Directives and Decisions on the protection of minors.<sup>124</sup>

One of the latest European Union online child pornography prevention initiatives is the Safer Internet Plus (2005-2008).<sup>125</sup> Actions undertaken under this program include fighting illegal and harmful Internet content at the source, that is, at the level of the nodes of Internet Service Providers. This involves the creation of EU-funded Internet monitoring hotlines that are used to report illegal content to Internet Service Providers, law enforcement officials, and specialized centers or clearing houses. Experts in these centers provide guidance to Internet Service Providers regarding what constitutes illegal Internet content under European Union law. Other measures undertaken by the European Union include funding the dissemination of information about Internet filtering

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at art. 3 (2)(c).

<sup>124</sup> See Florence Amalou and Joseph Barroso, *Pornographie: Bruxelles estime la loi française suffisante en terme de protection des mineurs* [Pornography: Brussels determines that French law sufficiently Protects Minors], LE MONDE, October 17, 2002, at 21.

<sup>125</sup> See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Creating a safer information society by improving the security of information infrastructures and combating computer-related crime [COM(2000) 890 final - not published in the Official Journal], Doc. No. 52000DC0890., available at [http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2000&nu\\_doc=890](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2000&nu_doc=890) (last visited February 1, 2009).

techniques and software, as well as the use of Internet labeling and rating. Non-legislative measures include cooperation among European and international law enforcement agencies in the fight against online pedophile rings. The thread that runs through the European Union's child protection and anti-child pornography legislation is prevention. The European Union emphasizes measures – including content-based measures – in order to avoid the need to resort to criminal prosecution and other coercive law enforcement measures that may be damaging to the right to personal communication, individual privacy, and data protection, as well as the right to disseminate legal, non-prejudicial information.<sup>126</sup> In general, the rather paternalistic and moralistic regulatory edifice of the European Union is consonant with the human rights and child protection initiatives of the United Nations. Both entities regulate the production, storage, and dissemination of online child pornography as an activity that is prejudicial to the sanctity, morality, and human rights of children. As such, it constitutes an abuse of the right of freedom of expression.

## V. UNITED STATES REGULATION OF CHILD PORNOGRAPHY

### A. GENERAL OBSERVATIONS

The United Nations and the European Union regulate online pedopornography within the framework of international humanitarian law. That is to say, from an ethical or moral-philosophical perspective that lays emphasis on values like protection of the innocence, morality and human dignity of children. For its part, the United States regulates Internet content in general, and online child pornography in particular, within the framework of its First Amendment free speech jurisprudence. This is because the mass media are the major platforms for the production, dissemination, and storage of child pornography. Under First Amendment free speech jurisprudence, “free speech” – in the widest sense of the term – takes precedence over metaphysical issues like morality and human dignity. The tension between international and American perspectives has resulted in an international conflict of laws and legal disharmony that is prejudicial to the global fight against online child pornography.

The irony is that the United States probably has the most elaborate panoply of anti-child pornography regulation in the world. Actually, the United States has a comprehensive federal and state legislative arsenal against child pornography that dwarfs United Nations conventions and European Union legislation combined.<sup>127</sup> However, no matter how well-intentioned and responsible they might be, all anti-child pornography laws are required to pass First Amendment muster.

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<sup>126</sup> See *Internet Regulation*, *supra* note 118.

<sup>127</sup> See 50 AM. JUR. 2d §§ 28 - 29 (1995) (list of child pornography possession laws in the United States).

The American child pornography regulatory regime is a pragmatic, health-based system whose focus is different from the European-style paternalistic, moralistic stance that is based on human rights and the human dignity of children. The Supreme Court of the United States has held that even though child pornography involving real children may not be legally obscene, that is, it may not present human sexual and toilet functions in a highly offensive manner, and may have literary, artistic, scientific, or political value,<sup>128</sup> it is not protected by the First Amendment.<sup>129</sup> The rationale for child pornography regulation under American law is: 1) protection of the physical and psychological well-being of minors by eliminating the record of child sexual abuse, and 2) suppression of the market for the exploitative use of children by penalizing those who possess and view the offending materials.<sup>130</sup>

#### B. AMERICAN EXCEPTIONALISM

Due to globalization, the collectivist or communitarian moral-philosophical posture of the United Nations and the European Union was bound to clash with the libertarian and individualistic ideology, messianic geo-political vision, and “free speech above all” posture of the United States.<sup>131</sup> As a global hegemon, the United States has been the predominant power in the United Nations since the founding of the organization in 1948. Today the United States finds itself in the contradictory position of being the prime mover that has the ability to set and steer the agenda of the United Nations – and effectively use the organization and its ancillary agencies as vehicles for international cooperation – while at the same time openly exhibiting distrust and skepticism towards the organization.<sup>132</sup> This contradictory posture may be due to the UN’s discursive construction of global issues that is often at variance with American views and interests.<sup>133</sup> However, this posture may also be due to American exceptionalism, the view that the United States is so different from the rest of the world that it is simultaneously an

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<sup>128</sup> *Miller*, 413 U.S. 15 (1973) (The trier of fact must determine whether the work, taken as a whole, appeals to the prurient interest [in sex]; and is patently offensive, and contains no serious literary, artistic, political, or scientific value).

<sup>129</sup> *Osborne v. Ohio*, 495 U.S. 103 (1990).

<sup>130</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>131</sup> See Schauer, *supra* note 109 (suggesting that in the United States, issues of civility and respect are subservient to the “paramount constitutional concerns with freedom of speech and of the press”).

<sup>132</sup> See Richard Higgott, *International Organizations*, in *THE HANDBOOK OF POLITICAL INSTITUTIONS* 612, (R.A.W Rhodes, Sarah Bender and Bert Rockman eds. 2006).

<sup>133</sup> *Id.*

international leader and “outlier” in matters of human rights, specifically in the area of freedom of speech and expression.<sup>134</sup> The relationship between the United States and the United Nations has always been a contradictory mix of cooperation in areas of American self-interest, and distrust, contempt, and tension in almost all other areas.<sup>135</sup>

The posture of the United States towards the United Nations human rights system, of which it was the main architect, has always been, at best, ambivalent. Eleanor Roosevelt, Chairwoman of the United Nations Commission on Human Rights and representative of the United States to the UN General Assembly, stated that the fundamental human rights document of the United Nations, the Universal Declaration of Human Rights, was neither a treaty nor an international agreement. As such, she added, it was not “a statement of law or of legal obligation.”<sup>136</sup> This was consistent with the traditional international posture of the United States. In effect, the Universal Declaration of Human Rights flew in the face of the institutionalized racism and racial segregation that was in force in the United States at the time the declaration was signed.<sup>137</sup> The preamble of the Universal Declaration of Human Rights recognized the inherent dignity, equality, and inalienable rights of all members of the human family.<sup>138</sup> Roosevelt’s qualified endorsement was no doubt aimed at placating racial segregationists in the United States who were hostile to the United Nations and its pronouncements on human dignity and equality. Despite the glaring contradictions between the lofty declarations of the U.S. Constitution and the realities of life in the United States for oppressed blacks and other minorities, American foreign policy was then, and is now, premised on the debatable theory that the Constitution of the United States provides a higher level of freedom than international human rights treaties, which recognize the equality, humanity, and dignity of all human beings. It is therefore American public policy that international treaties are subject to constitutional limitations such as the prohibitions against the establishment of religions and imposition of censorship set forth in the Bill of Rights.<sup>139</sup>

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<sup>134</sup> See Michael Ignatieff, *American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, MICHAEL IGNATIEFF 2 (Michael Ignatieff ed.2005). See also Schauer, *supra* note 78; SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996).

<sup>135</sup> See Higgott, *supra* note 132.

<sup>136</sup> Quoted in CHRISTOPHER BLAKESLEY, EDWIN FIRMAGE, RICHARD SCOTT & SHARON WILLIAMS, THE INTERNATIONAL LEGAL SYSTEM 698 (2001).

<sup>137</sup> See GREG IVERS, AMERICAN CONSTITUTIONAL LAW (Vol. II) 567 (2002) (discussing “Jim Crow” laws that imposed legal and social segregation of the races in the Southern states).

<sup>138</sup> See Universal Declaration of Human Rights, A/RES/217 A (III), pmb. ¶ 1(1948).

<sup>139</sup> Reid v. Covert, 354 U.S. 1, 16-17 (1957) (holding that international treaties are subject to constitutional limitations). See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S.

In effect, in matters of international human rights law, the United States has carved out for itself, a sort of *exception dispensationnelle* (dispensational exception), rooted in the “exceptionalist” principles of the Founding Fathers of the American republic who saw their nation – and the stars in the American flag symbolize this – as a new republican constellation in the of 18th century “sky” of divine-right kings and absolute monarchs. Additionally, the foreign policy of the United States has always had a religious undertone. The deistic Founding Fathers also considered the new American republic the Biblical “Salt for all mankind... the Light of the World...and the City on a Hill” that cannot be hid. This exceptionalist posture became the ideological underpinning of American foreign policy after the defeat of Nazi Germany, Fascist Italy, and Japan in World War II. After the war, the Truman and Eisenhower administrations believed that Providence had thrust the United States in a position to lead the free world and that “American ideals were universal ideals, to be adopted, embraced, and enjoyed by all peoples.”<sup>140</sup> William Inboden calls this posture “the ‘real’ Truman Doctrine.” The political manifestation of American exceptionalism is “Americanism,” an ideology that is expressed in terms of “anti-statism, individualism, populism, and egalitarianism.”

The main tenet of America’s dispensational exception is that American laws and democratic system are unique and unparalleled in human history.<sup>141</sup> President Theodore Roosevelt, who had a universal, messianic view of the role of the United States in global affairs, said:

We, here in America, hold in our hands the hope of the world, the fate of the coming years; and shame and disgrace will be ours if in our eyes the light of high resolve is dimmed, if we trail in the dust the golden hopes of men... The worth of our great experiment depends upon its being in good faith an experiment - the first that has ever been tried - in true democracy on the scale of a continent, on a scale as vast as that of the mightiest empires of the Old World...<sup>142</sup>

Since the end of the Second World War, American foreign policy has taken on a markedly exceptionalist hue in matters of international human rights. The United States

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CONSTITUTION 185, 262 (2d. ed., 1996) (suggesting that all international law to which the United States adheres must conform to domestic law).

<sup>140</sup> See WILLIAM INBODEN, *RELIGION AND AMERICAN FOREIGN POLICY, 1945-1960* 113 (Cambridge Univ. Press 2008).

<sup>141</sup> See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION*. See also Ronald J. Schmidt, Jr., *In the Beginning, All the world was America: American Exceptionalism in New Contexts*, in OXFORD HANDBOOK OF POLITICAL THEORY 281-296 (2006).

<sup>142</sup> See THEODORE ROOSEVELT, *LETTERS AND SPEECHES XXX* (2004) Address at Carnegie Hall, March 30, 1912.

has led the world in promoting human rights by negotiating international human rights conventions and treaties only to exempt itself from their provisions by either expressing reservations regarding specific provisions, not ratifying the treaties, or not complying with them by suggesting that American constitutional values – which do not affirmatively advance moral, social, or community rights – are qualitatively superior to international human rights values.<sup>143</sup> This posture has made the United States the odd-man out, the nation which Frederick Schauer calls the “recalcitrant outlier” of international human rights, and which he suggests, has made values of health, privacy, safety, civility, respect, and dignity subservient to “the paramount constitutional concerns with freedom of speech and freedom of the press.”<sup>144</sup>

Former Secretary of State Henry Kissinger summarized America’s foreign policy ideology as a policy which reflected the “uniqueness of America’s mission as an exemplar of liberty ... the moral superiority of democratic foreign policy...”<sup>145</sup> Indeed, the United States has always believed that it had been blessed with a “unique and ultimately superior dispensation” that precludes it from entangling itself lightly in international treaties.<sup>146</sup> America’s dispensational foreign policy is therefore viewed as without compare<sup>147</sup> and morally superior to both the United Nations’ human rights regime, of which child protection is an important component, as well as the European Union’s human rights regime, which puts a premium on child protection. Today, the United States sees itself as the “leader of the free world,” whose exceptional mission is to spread freedom and democracy to all parts of the world.<sup>148</sup> Michael Hunt ascribes a nationalistic underpinning to America’s foreign policy ideology when he describes it as “the quest for greatness coupled with the promotion of liberty.”<sup>149</sup> This ideological posture is reflected in the “messianic” tone of the foreign policy of the United States.<sup>150</sup>

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<sup>143</sup> See Ignatieff *supra* note 134, at 6.

<sup>144</sup> See Schauer, *supra* note 109, at 30.

<sup>145</sup> See HENRY KISSINGER, *DIPLOMACY* 372 (1994) (suggesting that the United States has historically viewed itself as the very picture of freedom. As such, the country did not want to embrace the morally inferior international system).

<sup>146</sup> *Id.* at 376.

<sup>147</sup> See e.g., KENNETH THOMPSON, *AMERICAN DIPLOMACY AND EMERGENT PATTERNS* 102 (1962) (suggesting that the uniqueness of American diplomatic professionalism springs from the richness and diversity of the country).

<sup>148</sup> ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS* (2005).

<sup>149</sup> See MICHAEL HUNT, *IDEOLOGY AND U.S. FOREIGN POLICY* 17, 42 (1987).

<sup>150</sup> See Arthur Schlesinger, *A Democrat looks at Foreign Policy*, in *THE AM. POLITY READER* 690, 693 (1990) (suggesting that under Ronald Reagan’s “messianic foreign policy, the United States

Several explanations have been advanced for American exceptionalism in international human rights issues. There are claims that exceptionalism is a manifestation of a concerted American attempt to minimize international human rights constraints on its sovereignty, the desire for a “messianic” moral leadership of the world, the existence of politico-legal institutions designed by the Founding Fathers to insulate citizens from governmental and foreign treaty encroachments on their liberties – the United States has a rights tradition that is more protective of speakers’ rights than any other legal tradition – and strong domestic political constituencies opposed to international human rights law on issues of family and sexual morality. Schauer suggests that differences between the United States and the European Union in matters of freedom of speech – such as child pornography regulation – may simply reflect different stages in the development of the constitutional rights and the legal trappings of the right of freedom of speech.<sup>151</sup> For his part, Michael Ignatieff suggests that the United States has maintained an exceptionalist human rights posture because exceptionalism ensures that as the world’s sole hegemon, the United States can engage with the international human rights system on its own terms.<sup>152</sup>

John Shattuck suggests that one of the consequences of American exceptionalism in foreign policy is that the United States has tended to minimize international human rights law,<sup>153</sup> including child pornography regulation. The difference between the United States and the rest of the world on the child pornography issue was evident during the debates leading up to the passage of the United Nations Convention on the Rights of the Child in 1989. Indeed, the United States has still not acceded to the UN Convention on the Rights of the Child.<sup>154</sup> The country’s failure to ratify the United Nations Convention

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[viewed itself] as the redeemer nation commissioned by the Almighty to rescue fallen humanity...”).

<sup>151</sup> See Schauer, *supra* note 109.

<sup>152</sup> See Ignatieff *supra* note 134, at 12-22.

<sup>153</sup> See JOHN SHATTUCK, FREEDOM ON FIRE: HUMAN RIGHTS WARS AND AMERICA’S RESPONSE 309 (2003) (suggesting that Americans tend to downplay or reject international human rights law because of American exceptionalism); see also Gareth Evans, Josef Braml & Jennifer Windsor, *U.S. Bully or Benefactor*, 27 FLETCHER F. OF WORLD AFFAIRS 99, 102 (2003) (suggesting that the United States under the Bush administration has taken an even more negative approach toward the negotiation of multilateral treaties than the lackluster approach of past administrations).

<sup>154</sup> See *supra* note 28.

<sup>154</sup> See Stockholm Declaration and Agenda for Action, 1st World Congress against the Sexual Exploitation of Children (1996), available at <http://www.ilo.org/public/english/comp/child/standards/resolution/stockholm.htm> (last visited February 1, 2009).

on the Rights of the Child suggests that the United States believes that its domestic child protection regime and its child pornography regulations under the First Amendment are superior to the international child protection regime. Actually, America's traditional judicial wariness about laws from the United Nations and other jurisdictions is still evident in domestic law.<sup>155</sup>

Additionally, the Convention has internationalist language that would not necessarily be well received in the United States. It was concerned in part with the "living conditions of children in every country, in particular in the developing countries..."<sup>156</sup> The reporting requirements and other methods of enforcing international treaties might also be too much for the world's sole Superpower to swallow,<sup>157</sup> given the slight loss of sovereignty and the international scrutiny they might entail.<sup>158</sup>

The result is that the United States has been reluctant to accede to several international human rights treaties.<sup>159</sup> Though the United States signed and ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in 2002, the recognition and enforceability, in the United States, of this additional protocol is highly questionable. Indeed, the constitutional hurdles are virtually insurmountable: The United States has not acceded to the

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<sup>155</sup> See e.g., *Lawrence v. Texas*, 539 U.S. 55 (2003).; See also *Printz v. United States*, 521 U.S. 898, 935 (1997) (Scalia, J) dissenting; *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc.67, 80 N.Y.S.3d 575 (Sup.Ct.1948), *aff'd*, 275 App. Div. 695, 87 N.Y. S.2d 430 (1949) (holding that *droit moral* or Moral rights is an international intellectual property doctrine that holds that authors and composers own certain rights over their works over and above their economic or contractual rights. The doctrine is not recognized in the United States).

<sup>156</sup> U.N.GAOR. 44th Sess., Supp. No 49, pmb. ¶ 13 U.N. Doc. A/44/49 (1989) (entered into force September 2, 1990).

<sup>157</sup> *Id.* art. 44. Governments which ratify the Convention of the Rights of the Child are required to submit regular reports on the status of children in their respective countries to the Geneva, Switzerland-based Committee on the Rights of the Child, which monitors implementation of the Convention as well as its Optional Protocols. See also JOHN O'BRIEN, INTERNATIONAL LAW 483 (2001)(Treaty enforcement methods include individual complaints at the international level, the possibility of inter-state complaints, reporting obligations to the United Nations, and possible investigations by external bodies).

<sup>158</sup> See CHRISTOF HEYNS AND FRANS VILJOEN, THE IMPACT OF UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL 11-14 (2002)(stating that some countries refuse to ratify international human rights treaties because they fear these treaties would subject them to international reporting and scrutiny, loss of sovereignty and loss of national judicial independence).

<sup>159</sup> See Shattuck, *supra* note 153, at 363 (suggesting that United States posture towards international human rights is influenced by three traditional principles: exceptionalism, isolationism, and unilateralism).

Convention proper. Optional protocols are not enforceable in and of themselves, and human rights treaties are considered non-self executing under American law.<sup>160</sup> It therefore appears that signature and ratification of the Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was nothing more than an exercise in public diplomacy.<sup>161</sup>

## VI. COMPARISON OF THE CHILD PORNOGRAPHY REGULATORY POSTURES OF THE EUROPEAN UNION AND THE UNITED STATES

### A. GENERAL OBSERVATIONS

The child pornography regulatory regimes of the European Union and the United States represent two political and cultural approaches to the problem of mass mediated child sexual exploitation. This is because the European Union and the United States have different, sometimes contrasting values regarding the nature of the Internet, freedom of speech and of the press, invasion of privacy, hate speech, and the depiction of human sexual activity.<sup>162</sup> At the European Union, child pornography is viewed as a violation of human rights, an affront to human dignity, and an abuse of the right of freedom of expression. The European Union has a humanistic, moral-philosophical worldview. One of the characteristics of this highly moralistic system is that governments actively intervene in public discourse in order to punish and eliminate content that is considered abusive of the right of freedom of expression. This is particularly true of expression that is deemed prejudicial to human rights and human dignity. In the European Union, most states actively seek to create “democratic free speech environments.” They also seek to protect victims of misuse of the right of freedom of expression.<sup>163</sup>

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<sup>160</sup> See Christopher Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond*, J. CRIM. L. & CRIMINOLOGY 1 (2001)(stating that treaties that condemn conduct as criminal are non-self executing, that is, they need an act of Congress to take effect upon ratification).

<sup>161</sup> See CHRISTOF HEYNS & FRANS VILJOEN, *THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* 9 (2002)(suggesting that many states ratify international human rights treaties for reasons of public diplomacy).

<sup>162</sup> See Lyombe Eko, *New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French and American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet*, 28 LOY. OF L.A. INT’L & COMP. L. REV. 69, 100 (2006). See also LICRA & UEJF v. Yahoo! France & Yahoo! Inc. Tribunal De Grande Instance de Paris [T.G.I.] 23May. 21, 2000, Receil Le Dalloz No. 23, 2000, 172 (reporting that Yahoo!’s display of Nazi and Third Reich Memorabilia on Yahoo! Auctions violated French law).

<sup>163</sup> See Caroline Uyttendaele & Joseph Dumortier, *Free Speech on the Information Superhighway: European Perspectives*, 16 J. MARSHALL J. COMPUTER & INFO. L. 905 (1998).

Consequently, under the European Union's humanistic law, all kinds of child pornography – real or computer generated – are illegal and have very little or no constitutional protection.

In the United States, where speech is regulated under First Amendment jurisprudence, the right of free speech has systemic and individualistic functions. The United States is conceptualized as a market-place of ideas where speech is considered fundamental to the maintenance of the integrity of the system, as well as the humanity and respect of American citizens.<sup>164</sup> The First Amendment essentially puts the brakes on unnecessary governmental intervention in the marketplace of ideas.

A conflict of laws and values developed between the United State and the European Union when the United States decided to open up the Internet to private enterprise and electronic commerce, and commercial pornography quickly made the new medium its electronic abode of choice. In the United States, Congress passed the Communications Decency Act (CDA)<sup>165</sup> as part of the Telecommunications Act of 1996.<sup>166</sup> Several organized interest groups, including adult pornography companies, challenged the CDA. In 1997, the Supreme Court of the United States ruled in *Reno v. ACLU*<sup>167</sup> that two provisions of the Communications Decency Act that criminalized the knowing transmission of Internet-based pornography to minors were unconstitutionally vague and overbroad. Given the global nature of the Internet, the Court essentially applied the First Amendment to the whole world.<sup>168</sup> Though the ruling in *Reno* authorized the American government to enforce laws against obscenity and child pornography on the Internet, reaction from Europe was swift. The French Secretary of State for Industry, Christian Pierret, suggested that the content-neutral principles of American First Amendment jurisprudence, which had been globalized by the ruling in *Reno*, were unacceptable to Europeans. Pierret said the European Union had to “take up the torch...and put forth a (more acceptable) international framework for the regulation of the illicit content of the Internet.”<sup>169</sup>

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<sup>164</sup> See JEFFRIE MURPHY & JULES COLEMAN, *PHILOSOPHY OF LAW* 88 (1990).

<sup>165</sup> 47 U.S.C. § 223 (2001).

<sup>166</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>167</sup> 521 U.S. 844, 874 (1997).

<sup>168</sup> See Douglas W. Vick, *Exporting the First Amendment to Cyberspace: The Internet and State Sovereignty*, in *MEDIA AND GLOBALIZATION* 3 (2001)(suggesting that the U.S. Supreme Court decision in *Reno v. A.C.L.U.* essentially globalized the First Amendment).

<sup>169</sup> See Michel Alberganti and Francis Pisani, *La technologie devient l'unique recours des Américains pour filtrer le contenu d'Internet* [Technology has become the only recourse Americans have to filter the Internet content] *LE MONDE*, July 4, 1997 at 21.

Pierret's statement reflected the philosophical differences between the United States and the European Union in matters of media content regulation. The European Union has generally taken a radically different approach from that of the United States. In the European Union, governments act virtually *in loco parentis* in matters related to the exposure of children to violent pornographic content, as well as pornography involving children. Indeed, it is a widely recognized principle that governments have a duty to shield children from sexual and violent content for psychological and moral reasons.

This reality stands in sharp contrast with the situation in the United States where federal and state governments are barred from regulating speech on the basis of its content. As a result, all governmental regulation of speech is subject to the exacting strict scrutiny test. This constitutional doctrine requires that in order to justify content-based regulation, state and federal governments must show that the "regulation is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end."<sup>170</sup> Therefore, the law gives parents the responsibility of monitoring the content their children are exposed to, even if they do not have enough information to assess available media content. Additionally, under the American system, a speaker's right of free speech – in the broadest sense of the term – generally takes precedence over ethical and other considerations regarding the negative impact of speech on the subject of the speech as well as those to whom the speech is directed.<sup>171</sup> The exception is child pornography involving real children. These principles apply to computer-generated, video game and Internet content.

#### B. THE COMPUTER-GENERATED CHILD PORNOGRAPHY EXAMPLE

As the foregoing discussion shows, child sexual exploitation through traditional mass mediated representations – film, video, and printed material – has been criminalized under international human rights law, European Union law and American jurisprudence. However, the relentless march of information and communication technologies has spawned new products that have enabled child sexual exploitation to stay one step ahead of the law. One of the new battlefields of child protection is computer-generated or virtual child pornography. This kind of pedopornography is made of images that are produced or modified through computer-imaging technology, digital graphics, artificial intelligence and video animation. Virtual child pornography may or may not use actual

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<sup>170</sup> *Simon & Schuster, Inc.*, 502 U.S. at 118 (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

<sup>171</sup> *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (holding that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection"); *see also Terminiello*, 337 U.S. 1 (holding that: a "heckler's" veto is illegal and that "a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

children. The major problem is that it has become virtually impossible to determine whether or not real children or photographic models of real children are the basis of computer-generated child pornography.<sup>172</sup> This section compares regulation of computer-generated child pornography under international, European Union and American jurisprudence.

In matters of child pornography, the international community makes no distinction between real and virtual or “video game” children. International treaties, conventions, and declarations are silent on the issue because computer-generated child pornography and the graphics, animation and artificial intelligence technology that drives it are relatively new and evolving rapidly. The presumption is that child pornography of all kinds is illegal. Inasmuch as such material can lead to a loss of innocence among children or can be used to entice children to engage in sexual activities, they violate the human rights standards of the Convention on the Rights of the Child.

The European Union makes no distinction between real and virtual child pornography. In December 2003, the European Council created a regulatory framework for child pornography which calls on member countries of the European Union to criminalize depictions of “a real person *appearing* to be a child involved or engaged in” child pornography unless that person is 18 years of age or older.<sup>173</sup> Furthermore, the Council called on all its member-states to criminalize virtual or computer-generated child pornography, which includes “realistic images of a *non-existent child* involved or engaged in sexually explicit conduct...”<sup>174</sup> The European Union, in keeping with the Kantian, moral-philosophical perspective, views production and dissemination of both kinds of pornography as detrimental to the dignity and welfare of children.

The European Union’s posture contrasts with American law, which regulates child pornography under the country’s First Amendment free speech jurisprudence. In a surprising development, the Supreme Court of the United States decided in 2003 that only child pornography that utilizes real children was illegal under the First Amendment. The Court said in *Ashcroft v. Free Speech Coalition* that non-obscene,<sup>175</sup> computer-

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<sup>172</sup> See Barnabás Takács and Bernadette Kiss, *The Virtual Human Interface: A Photorealistic Digital Human*, 23 IEEE COMP. GRAPHICS & APPLICATIONS 38 (2003).

<sup>173</sup> See Council Framework Decision 2004/68/JHA, On Combating the Sexual Exploitation of Children and Child Pornography, art. 1, 2003 O.J. (L.13) 44 (defining illegal child pornography to include ‘realistic images of a *non-existent child* involved or engaged in’ child pornography) (emphasis added).

<sup>174</sup> *Id.*

<sup>175</sup> In *Miller*, 413 U.S. at 24-25, the Supreme Court of the United States stated that for material to be declared obscene, and therefore not protected by the First Amendment, juries must ascertain “whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts/describes, in a patently offensive way, sexual conduct or excretory functions [2] specifically defined by

generated pedopornography or “video game” images and animations of children engaging in sexual acts with adults or with other children were protected by the First Amendment. This stunning decision essentially decriminalized realistic “video game-style” child pornography that does not involve real children and essentially nullified United States support, and participation in global law enforcement activities against computer-generated child pornography. This is the case because, under American law, international treaties are subject to the provisions of the Bill of Rights.<sup>176</sup>

In *Ashcroft v. Free Speech Coalition*,<sup>177</sup> the Supreme Court of the United States applied the child pornography regulatory regime of the 1980s to the digital and online media of the 21<sup>st</sup> century. In this case, the Court struck down the Child Pornography Prevention Act of 1996 (CPPA), which had, inter alia, criminalized virtual or computer-generated child pornography that did not involve the use of real children. The issue before the Court was whether the CPPA violated free speech under the First Amendment. The Court ruled that the Child Pornography Protection Act of 1996 was unconstitutional because it forbade a wide universe of discourse that was neither obscene under the test set forth in *Miller v. California*,<sup>178</sup> nor illegal child pornography produced using real children contrary to *New York v. Ferber*.<sup>179</sup>

The Court recapitulated the fundamental principles of the American child pornography regulatory regime: “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”<sup>180</sup> However, despite this heightened solicitude for the physiological, emotional, and mental health and of welfare of children, virtual or computer-generated child pornography was not illegal because it had “no underlying crime at all.”<sup>181</sup> In other words, it was not “intrinsically related to the sexual abuse of children.”<sup>182</sup> The Court recalled the precedent in *Ferber* where it had suggested that “Simulation outside of the prohibition of the [child

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applicable state law, whether the work, taken as a whole, lacks serious literary, artistic, political, and scientific value.”

<sup>176</sup> Under *Reid*, 354 U.S. at 16-17, treaties are subject to the Bill of Rights. The Court’s decision in *Ashcroft* extending First Amendment protection to non-obscene computer-generated child pornography that does not involve real children therefore nullifies the Optional Protocols.

<sup>177</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>178</sup> 413 U.S. 15 (1973).

<sup>179</sup> *Ferber*, 458 U.S. 747.

<sup>180</sup> *Id.* (citing *Prince v. Mass.*, 321 U.S. 158, 168 (1944)).

<sup>181</sup> *Ashcroft*, 535 U.S. at 254.

<sup>182</sup> *Id.*

pornography] statute could provide another alternative” to child pornography using real children.<sup>183</sup> Thus, under *Ferber*, the content of child pornography is not illegal *per se* under the First Amendment; what is illegal is the use of real children in the production of that content. Therefore, as long as virtual child porn did not have “a proximate link to the crime from which it came,” it was protected under the First Amendment.<sup>184</sup> The rationale is that computer-generated or virtual children cannot suffer physical or psychological damage and so cannot seek remedies. This posture is different from the European moral-philosophical view under which the dissemination and display of child pornography is criminalized for reasons of morality and human debasement. The American regulatory approach also stands in stark contrast to the moral-philosophical, humanitarian approach of international law.

The problem with the American mental and physical damage-based approach to the regulation of child pornography is that it creates a major loophole that can be exploited by online child pornographers. Digital technology has blurred the lines between real and computer-generated children to the point where they are practically indistinguishable. Additionally, pedophiles can use images of artificial children indulging in sexual acts with adults to entice real children to participate in sexual acts. Another problem with the *Ashcroft v. Free Speech Coalition* decision is that the combination of realistic, high quality graphics and artificial intelligence has resulted in the increasing use of computers to morph or modify images of real children so as to generate images of “virtual” children that are virtually indistinguishable from real children.<sup>185</sup>

## VII. CONCLUSION

This paper has discussed the differential conceptualizations, formulations, reformulations and regulation of the problem of online pedopornography by the international community – led by the United Nations – the European Union, and the United States. Figure 1 summarizes the regulatory postures of the United Nations the European Union and the United States with respect to online child pornography.

The edifice of child pornography regulation at the level of the United Nations, the European Union, and the United States can therefore be compared within the framework of Einstein’s “what *is*...what *should be*” formulation.<sup>186</sup> From this perspective, international and European child pornography regulations turn on idealistic

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 250 (2002).

<sup>185</sup> See Jennifer Stewart, *Is this the Global Community, We must be on the Bad side of Town: International Policing of Child Pornography on the Internet*, 20 HOU. J. INT’L L. 205 (1997).

<sup>186</sup> See ALBERT EINSTEIN, *OUT OF MY LATER LIFE* 25 (1955) (stating that “science ascertains what *is*, but not what *should be*.”).

Kantian moral norms<sup>187</sup> of human rights and human dignity that seek to ascertain “what should be” without regard to free speech and global politico-cultural diversity, while the more pragmatic American system operates on a particularistic and legalistic ascertainment of “what *is*.” In as much as “speech” is considered more important than ethical values and issues like decency, human dignity and morality, the America market-oriented approach has an inbuilt asymmetry between ethical standards and legal rules. This posture is prejudicial to the international struggle against pedopornography.

<b>Regulation of Child Pornography under UN, EU and American Jurisprudence</b>			
	United Nations	European Union	United States
Philosophical postures	Human Rights/ Moral-philosophical	Human Rights/ Moral-philosophical	First Amendment Jurisprudence
Convention on Rights of the Child	General Assembly Resolution	Member Countries Ratified Convention	Has Not Ratified Convention
Optional Additional Protocol to Convention	General Assembly Resolution	Member Countries Support Additional Protocol	Has Ratified Optional Ad- ditional Protocol

Figure I. Comparison of UN, EU, and American Regulatory Postures towards child pornography.

This article has shown that at the international level, multilateral treaties, conferences, and declarations aimed at suppressing child pornography and the sexual exploitation of children re-presented the problem as a human rights and dignity issue that required concerted international action. All countries of the world, except the United States and the failed state of Somalia, have signed and ratified the United Nations Convention on the Rights of the Child,<sup>188</sup> as well as the Optional Protocol to the Convention on the Rights of the Child On the Sale of Children, Child Prostitution and Child Pornography in 2002.<sup>189</sup> This instrument brought online child pornography within the ambit of international humanitarian law and made eradication of all child pornography without distinction, a substantial interest of the international community.

<sup>187</sup> See Kaldis, *supra* note 47, at 182.

<sup>188</sup> U.N. GAOR, 44th Sess., Supp. No 49, U.N. Doc. A/44/49 (1989); 28 I.L.M. 1448 (entered into force Sept. 2. 1990).

<sup>189</sup> U.N. GAOR, 54th Sess., U.N. Doc A/54/L. 84 (Annex 2) (2000) (entered into force January 18, 2002).

For its part, the European Union's legislative regime conceptualizes children as dignified beings whose sanctity should not be compromised by the content of communication; specifically, computer-generated "video game" child pornography. The European Union's position thus dovetails harmoniously with the post World War II international human rights and child protection regime of the United Nations.

By way of contrast, the United States is skeptical of the very international human rights infrastructure of which it was one of the primary architects. American reticence to embrace the international human rights regime is due in part to American exceptionalism, the ideology whose main tenet is the uniqueness and moral superiority of the American way of life and foreign policy. The American First Amendment posture, which conceptualizes human beings as communicative beings whose right to transmit and receive information should not be infringed unless in exceptional and extreme cases, springs from this exceptionalism, and stands in stark contrast against the moral-philosophical, international and European Union human rights ideologies.

Additionally, while the European Union bans all pedopornography – including computer-generated child pornography – on grounds of dignity and morality, the United States bans only child pornography that uses real children, on physical and psychological health grounds. The European Union framework for combating child pornography seems to be an attempt to close the loophole created in international child pornography law enforcement by the United States Supreme Court when it decriminalized the production, possession and transmission of virtual or "video game" child pornography.

Despite these philosophical and ideological differences, the fact remains that the struggle to eradicate child pornography is a global one. The virtual child pornography exception of *Ashcroft* goes against the grain of international efforts to eradicate child pornography and creates a loophole through which virtual or computer-generated child pornography can be legally manufactured and disseminated around the world. The decision in *Ashcroft*, which pits free speech and morality, coupled with America's non-ratification of the United Nations Convention on the Rights of the Child, unfortunately reinforce perceptions of American unilateralism in matters that need to be handled in a concerted, multilateral fashion.



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# JOURNAL OF MEDIA LAW & ETHICS

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## Articles

- 155    AMY KRISTIN SANDERS  
*Defining Defamation: Plaintiff Status in the Age of the Internet*
- 186    JASON M. SHEPARD  
*Bloggers After the Shield: Defining Journalism in Privilege Law*
- 217    AIMEE EDMONDSON  
*Packing Heat: A Gun Battle Between Privacy and Access*
- 241    JASON A. MARTIN  
*Return to the Marketplace: Balancing Anonymous Online Speech and Defamation*
- 265    MICHAEL TODD  
*Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany*

# DEFINING DEFAMATION: PLAINTIFF STATUS IN THE AGE OF THE INTERNET

AMY KRISTIN SANDERS

**Keywords:** defamation, libel, public figure, private figure, Internet

*The public person/private person dichotomy plays an important role in modern defamation litigation. Courts often use a plaintiff's status to make several determinations critical to the litigation. First, the evaluation of the plaintiff's status determines the level of fault he or she must prove to succeed in a defamation action. Second, courts may look to the plaintiff's status to determine his or her proper community. Finally, courts may again turn to the plaintiff's status to evaluate the proper level of damages. In any case, the courts must determine the plaintiff's status before such important decisions can be made. Beginning with *Times v. Sullivan* in 1964, the U.S. Supreme Court has provided guidelines to help lower courts categorize defamation plaintiffs as public officials, public figures or private persons. But the rise of the Internet as Average Joe's mode of mass communication complicated this by providing him unprecedented access to a mass medium. Recently, several lower courts have used reliance on the Internet to conclude a plaintiff was a public figure, which runs afoul of the Supreme Court's earlier jurisprudence and raises First Amendment concerns. This growing reliance on the Internet as a form of mass communication has the potential to transform Average Joe from a private person who need only prove negligence in many instances into a public figure who must establish actual malice to succeed in a defamation case.*

## I. INTRODUCTION

In many ways, the very existence of the Internet challenges our notions of privacy. Whether it is the collection and storage of personal information or the unobtrusive monitoring of online activity, new technologies have the potential to greatly impact our public and private lives. In the same vein, the growing view of the Internet as the mass communication medium of the masses has the potential to reduce the Average Joe's ability to protect his reputation from defamatory statements. With a growing

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number of Web sites, including RateMyProfessors.com and DontDateHimGirl.com, providing forums in which anonymous parties can trash others' reputations, the Internet arguably exposes the Average Joe to an unprecedented level of criticism. In addition, the federal courts' perception of the Internet as a modern-day marketplace of ideas, grounded in the Supreme Court's 1997 *Reno v. ACLU*<sup>1</sup> opinion, has the potential to dramatically shape the law of defamation.

As a part of the constitutional framework for American defamation law, the Supreme Court, beginning in its 1964 *New York Times v. Sullivan*<sup>2</sup> decision, drew a distinction between public officials and private people who decide to sue based on injury to their reputations. This public person/private person dichotomy plays an important role in modern defamation litigation. Courts often use a plaintiff's status to make several determinations critical to the litigation. First, the evaluation of the plaintiff's status determines the level of fault<sup>3</sup> he must prove to succeed in a defamation action. Second, courts may look to the plaintiff's status to determine his proper community. Finally, courts may again turn to the plaintiff's status to evaluate the proper level of damages. In any case, the courts must determine the plaintiff's status before such important decisions can be made. Given the Supreme Court's jurisprudence in the area, the growing reliance on the Internet as a form of mass communication has the potential to transform Average Joe from a private person who need only prove negligence in many instances into a public figure who must establish actual malice to succeed in a defamation case.

This article examines federal and state defamation jurisprudence<sup>4</sup> to compare the factors courts have used to determine plaintiff status in both traditional print and broadcast cases with the factors used in more recent Internet defamation cases. It begins

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<sup>1</sup> 521 U.S. 844 (1997). "The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id.* at 885.

<sup>2</sup> 376 U.S. 254 (holding that a public official must prove actual malice to prevail in a defamation lawsuit).

<sup>3</sup> This refers to whether a plaintiff must prove actual malice, which is the case with most public officials and public figures, or negligence, which is the standard for some private-person plaintiffs. Black's Law Dictionary defines fault as "The intentional or negligent failure to maintain some standard of conduct when that failure results in harm to another person." *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>4</sup> To obtain relevant state and federal cases for this article, the author used a number of keyword searches in two LexisNexis databases: "Federal Court Cases, Combined" and "State Court Cases, Combined." The relevant keyword searches, designed to unearth all state and federal defamation cases with references to plaintiff status, included: "defamation & public figure," "libel & public figure" as well "slander & public figure." In addition, the terms "private person" and "public official" were also substituted for "public figure" in each relevant keyword search. The author then located the highlighted discussions of plaintiff status within the opinions to sort out the cases in which the discussion of plaintiff status was not relevant.

with an examination of plaintiff status determinations in traditional print and broadcast defamation cases and examines later determinations in cases involving the Internet, which may suggest an alternate approach to categorizing plaintiffs. It evaluates a number of the factors that courts have used and suggests possible difficulties with the models that courts have employed to determine plaintiff status in recent Internet defamation cases.

## II. THE COURTS LOOK AT PLAINTIFF STATUS: PRINT AND BROADCAST DEFAMATION

Although the U.S. Supreme Court has addressed plaintiff status on numerous occasions,<sup>5</sup> its jurisprudence provides only overarching themes that serve as guidance for the lower federal courts. In its opinions, the Court has broken plaintiff status into three categories: public officials, public figures and private persons. As a result of these distinctions, plaintiffs may be required to prove defendants acted with varying levels of fault to succeed in their defamation lawsuits. Although the Court created three categories of plaintiffs, it has never provided bright-line rules for determining which plaintiffs should be placed in which categories. Thus, the notions of plaintiff status discussed by the Supreme Court merely serve as a starting point from which the lower courts have begun their analyses.

### A. U.S. SUPREME COURT

The body of Supreme Court precedent on plaintiff status is a well-developed one, crafted by the Court in a series of six major cases. Although the Court initially constructed the public official category, which it linked with the actual malice standard of fault in *New York Times v. Sullivan*, the justices went on to carve out a public figure category as well as the remaining private person category. Through the years, the public figure category has grown to encompass three subcategories of public figures: all-purpose, or general; limited purpose, or vortex; and involuntary public figures. All three types of public figures can be held to the actual malice fault standard in specific instances. The remaining category, the Court noted, contained private persons, whom the justices said must prove negligence at a minimum. Although the Supreme Court carved out the categories in six major cases, the lower courts continue to flesh out the specifics of membership within the categories of plaintiff status.

#### 1. *New York Times v. Sullivan*: Public Officials and Actual Malice

In 1964, the U.S. Supreme Court brought defamation within the parameters of First Amendment protection in its landmark *New York Times v. Sullivan* ruling, in which the Court held that public officials would be required to prove actual malice to succeed in a

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<sup>5</sup> See, e.g., *Sullivan*, 376 U.S. at 264; *Curtis Publ'g v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia*, 403 U.S. 129 (1971); *Gertz v. Welch*, 418 U.S. 323 (1974).

defamation action.<sup>6</sup> The Supreme Court ruled 9-0 that L.B. Sullivan – an elected city commissioner in Montgomery – could not rely on Alabama’s strict liability libel statute to prevail in a civil lawsuit against the New York Times Company for a political advertisement that ran in the newspaper.<sup>7</sup> The state law, requiring no proof of fault or falsity, did not provide the protection the First Amendment required, according to Justice William Brennan’s majority opinion.<sup>8</sup> Noting that democracy requires citizens to be able to discuss political and social issues, Brennan wrote:

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>9</sup>

Brennan noted that criticism of government officials cannot lose its protection merely because it may endanger the officials’ reputations.<sup>10</sup> Instead, Brennan wrote, criticism of public officials is at the very heart of American government.<sup>11</sup> Noting the immunity that states provide to their highest officials engaged in critical commentary, Brennan wrote that it would be only logical to extend such protection to citizens who take the role of government critic.<sup>12</sup> Thus, public officials would be required under the Constitution to prove actual malice to recover damages for defamation – the presumption of malice, or reckless disregard for the truth,<sup>13</sup> would not be constitutional under the First Amendment.<sup>14</sup>

With its ruling in *Sullivan*, the Supreme Court dramatically changed the law of defamation in the United States, indicating that in the future, public officials would be required to prove fault and falsity to prevail in a defamation action against media defendants.<sup>15</sup> Once the Court raised the burden on public official plaintiffs in libel cases,

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<sup>6</sup> For a thorough analysis of *New York Times v. Sullivan*, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1992).

<sup>7</sup> To see a copy of the advertisement, see LEWIS, *supra* note 6.

<sup>8</sup> *Sullivan*, 376 U.S. at 264. “We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.” *Id.*

<sup>9</sup> *Id.* at 270.

<sup>10</sup> *Id.* at 273.

<sup>11</sup> *Id.* at 274.

<sup>12</sup> *Id.* at 283.

<sup>13</sup> Black’s Law Dictionary defines “actual malice” as “Knowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true.” See BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>14</sup> *Sullivan*, 376 U.S. at 284.

<sup>15</sup> *Id.* at 279-280. “The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct

it would only be a short time before it commented on libel plaintiffs who were not considered public officials but who had ascertained a certain level of societal prominence.

## 2. *Curtis Publishing v. Butts*: A Standard for Public Figures

Within three years of *Sullivan*, public figures would also essentially be required to prove actual malice in situations dealing with matters of public concern. In the companion cases of *Curtis Publishing v. Butts* and *Associated Press v. Walker*,<sup>16</sup> the Supreme Court recognized a second set of defendants who would be required to prove actual malice to succeed in a libel case. These public figures, as the Court termed them, would be treated much like *Sullivan*'s public officials. The Court noted that by extension, the privilege announced in *Sullivan* could be expanded to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."<sup>17</sup> Thus, the public figure was born.

Public figures, the court said, play as important a role in shaping society as public officials.<sup>18</sup> As a result, the Court was unwilling to differentiate between such situations on the "assumption that criticism of private citizens who seek to lead in the determination of policy will be less important to the public interest than will criticism of government officials."<sup>19</sup> Quoting the Declaration of Independence, the justices noted that communicating information of a public concern was an "unalienable right."<sup>20</sup> Libel actions involving public figures are far more akin to those involving public officials than they are to those pursued by private people, and as a result, the Court extended the constitutional protections of actual malice to those being sued by public figures as well.<sup>21</sup>

A plaintiff cannot become a public figure, however, based on the actions of the defendant, who would, in essence, be creating her own defense. In *Hutchinson v. Proxmire*, the U.S. Supreme Court found Ronald Hutchinson, a university professor, to be a private person despite the amount of publicity he received after William Proxmire, a

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unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

<sup>16</sup> 388 U.S. 130 (1967) (holding that the U.S. Constitution requires a public figure prove recklessness to succeed in a defamation action regarding a matter of public concern).

<sup>17</sup> *Id.* at 164.

<sup>18</sup> *Id.* at 145. "In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government." *Id.*

<sup>19</sup> *Id.* at 148 (quoting *Pauling v. Globe-Democrat Publ'g Co.*, 362 F.2d 188, 196 (8th Cir. 1966)).

<sup>20</sup> *Curtis Publ'g*, 388 U.S. at 149.

<sup>21</sup> *Id.* at 150. "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.*

Wisconsin senator, awarded him a “Golden Fleece” award.<sup>22</sup> After publishing a statement in the *Congressional Record*, Proxmire also included mention of the “Golden Fleece” in his newsletter and press release.<sup>23</sup> Proxmire even discussed Hutchinson’s grant-funded research on television, although he did not mention Hutchinson’s name.<sup>24</sup> Both the U.S. District Court for the District of Wisconsin and the Seventh Circuit decided that Hutchinson was a public figure.<sup>25</sup> Hutchinson appealed, and the U.S. Supreme Court granted certiorari.<sup>26</sup>

Before the Supreme Court, Proxmire’s attorney argued that Hutchinson was a limited-purpose public figure<sup>27</sup> with regard to the public research money he received.<sup>28</sup> He noted that local newspapers reported on Hutchinson’s successful application for funds and that Hutchinson had access to the media to respond to the “Golden Fleece” announcement.<sup>29</sup> However, the Court was not persuaded that those two factors alone transformed Hutchinson from a private person into a limited-purpose public figure:

On this record, Hutchinson’s activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.<sup>30</sup>

The Court noted that instead of pointing to a specific controversy, the defendants claimed the generic interest in overseeing the expenditure of public money – a subject on which Hutchinson sought no notoriety.<sup>31</sup> If that alone were enough to raise someone to the level of a public figure, the Court reasoned, an unlimited number of researchers and professors would qualify.<sup>32</sup> Furthermore, the Court noted that Hutchinson’s access to the media was limited to responses about the “Golden Fleece” and that he did not have the type of

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<sup>22</sup> 443 U.S. 111, 114 (1979) (holding that a university professor was not a public figure in a defamation action based on the press interest in the case or because of an interest in public spending of taxpayers’ money to fund his grant).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 431 F. Supp. 1311, 1327 (D.Wis.1977); 579 F.2d 1027 (7th Cir. 1978).

<sup>26</sup> *Hutchinson*, 443 U.S. at 122.

<sup>27</sup> A limited-purpose public figure is “a person who, having become involved in a particular public issue, has achieved fame or notoriety only in relation to that particular issue.” *See* BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>28</sup> *Hutchinson*, 443 U.S. at 134-135.

<sup>29</sup> *Id.* at 135.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

extended and continuous access that is “one of the accoutrements of having become a public figure.”<sup>33</sup>

### 3. *Rosenbloom v. Metromedia* and *Gertz v. Welch*: The Standard for Private Persons

The next logical step following *Sullivan* and *Butts* was to address the application of actual malice to private persons. Initially, the Supreme Court attempted to apply that standard of fault in some cases involving private persons when it ruled in *Rosenbloom v. Metromedia*.<sup>34</sup> The case involved a magazine publisher who sued a radio station after the station repeatedly broadcast that the petitioner was arrested for possession of obscene literature, which the police had seized from his business.<sup>35</sup>

The plaintiff in *Rosenbloom* was neither a public official nor public figure, which would have required a showing of actual malice.<sup>36</sup> Instead, the defamatory remarks made about him occurred in the discussion of a subject he conceded to be of public interest.<sup>37</sup> In holding that private plaintiffs must, by clear and convincing evidence, prove actual malice, in cases where the matter is once of public importance, a plurality<sup>38</sup> of the Court applied the *New York Times* standard to private plaintiffs in a limited set of circumstances.<sup>39</sup>

The *Rosenbloom* plurality believed some issues were important enough to the public that a showing of actual malice would be justified to ensure that speech on such subjects would not be chilled by the imposition of a lesser fault standard. These issues of public importance, or matters of public concern, were at the core of speech protected by the First Amendment.<sup>40</sup> The Court returned to *Thornhill v. Alabama*<sup>41</sup> to support its decision. There, it noted:

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate

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<sup>33</sup> *Id.* at 136.

<sup>34</sup> *Rosenbloom*, 403 U.S. at 29 (holding that private persons must prove actual malice by clear and convincing evidence in defamation actions concerning matters of public importance).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 40.

<sup>37</sup> *Id.*

<sup>38</sup> Justice Brennan authored an opinion in which Justices Blackmun and Burger joined. Justices Black and White also concurred in judgment, completing a majority of the Court for the judgment but not for the reasoning. Justice Harlan authored a dissenting opinion and Justice Marshall authored a dissenting opinion in which Justice Stewart joined. Justice Douglas took no part in the case.

<sup>39</sup> *Id.* at 29.

<sup>40</sup> *Id.* at 41. “Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government.” *Id.*

<sup>41</sup> 310 U.S. 88 (1940).

to enable the members of society to cope with the exigencies of their period.<sup>42</sup>

Justice Brennan, writing for the plurality, foresaw the difficulties that may arise in determining whether a person was public or private, instead wishing to rely on whether the discussion involved a matter of public concern, as envisioned in *Thornhill*.<sup>43</sup> This view, Brennan concluded, required that myriad issues be considered of public concern, pointing to the Court's decisions in *Butts* and *Walker* as two cases that concerned dramatically different matters of public concern: rigging a sporting event and leading a charge against federal agents.<sup>44</sup> Thus, he wrote:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.<sup>45</sup>

*Rosenbloom*'s plurality opinion was short-lived, however, and the Court quickly re-visited the private person issue during its 1973-1974 term, when the justices decided *Gertz v. Welch*. Relying on *Sullivan* and *Rosenbloom v. Metromedia*, the Seventh Circuit affirmed the district court's ruling based on a finding that Gertz had not shown sufficient evidence of any actual malice on the part of the editors of *American Opinion*.<sup>46</sup>

The Supreme Court granted certiorari and voted 5-4 to reverse the Seventh Circuit, whose opinion was written by then-Judge John Paul Stevens.<sup>47</sup> In doing so, the Court concluded that private persons, such as Elmer Gertz, need not prove actual malice as established in *Sullivan*, *Butts* and *Rosenbloom*.<sup>48</sup> Justice Powell, writing for the majority, rebutted Justice Brennan's assertion that deciding whether a matter was of public concern was easier than deciding whether a plaintiff was a public person. Powell wrote for the Court:

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<sup>42</sup> *Thornhill*, 310 U.S. at 102 (holding unconstitutional an Alabama law that made picketing a criminal offense). In the case, Bryon Thornhill had been convicted of loitering and picketing in Tuscaloosa County, Alabama. The Supreme Court, finding no clear and present danger arising from his activity, overturned his conviction.

<sup>43</sup> *Rosenbloom*, 403 U.S. at 42. "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.* at 43.

<sup>44</sup> *Id.* at 42.

<sup>45</sup> *Id.* at 43.

<sup>46</sup> *Gertz*, 418 U.S. at 331-332.

<sup>47</sup> *Id.* at 333.

<sup>48</sup> *Id.* at 351-352.

But this approach [in *Rosenbloom*] would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.<sup>49</sup>

In providing more protection for private persons, Justice Powell asserted that private persons, unlike public officials and public figures, don't have the same means of redress to counteract damage to reputation.<sup>50</sup> Public officials and public figures have greater access to the media and have opened themselves up to criticism based on the highly public nature of their lifestyles.<sup>51</sup> In the case of private persons, however, the state has a much greater interest in protecting them from reputational injury.<sup>52</sup> To do so, states may rely on any standard of fault that rises above strict liability.<sup>53</sup> The *Gertz* majority did leave open the possibility that individual states could constitutionally require even private plaintiffs to prove actual malice.<sup>54</sup> Under *Gertz*, though, actual malice must still be proven for a private person to recover punitive damages.<sup>55</sup>

*Gertz* left unanswered the question of the appropriate fault standard for private persons defamed during the discussion of a private matter. That question, presented squarely to the Court in *Dun & Bradstreet v. Greenmoss Builders*,<sup>56</sup> was answered in a manner that provided more protection to private plaintiffs seeking to protect their reputations on private matters. In ruling that a private person need not prove actual malice to recover in a lawsuit over a purely private matter, Justice Louis Powell reasoned the same balance used in *Gertz* – the state's interest in protecting reputation versus the First Amendment interest in protecting expression – would be appropriate in *Dun & Bradstreet*.<sup>57</sup> In balancing those interests, the Court concluded the state's interest was "strong and legitimate."<sup>58</sup> However, in *Dun & Bradstreet*, the First Amendment interest was found to be substantially lower than in *Gertz* given the private nature of the speech.<sup>59</sup> As a result, the common law rule allowing the award of presumed and punitive damages

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<sup>49</sup> *Id.* at 343-344.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 343-345.

<sup>52</sup> *Id.* at 344.

<sup>53</sup> *Id.* at 347-348.

<sup>54</sup> *Id.* at 348-350.

<sup>55</sup> *Id.*

<sup>56</sup> See *Dun & Bradstreet*, 472 U.S. 749 (1985) (holding that a private person need not prove actual malice to recover presumed or punitive damages in a defamation action involving purely private matters).

<sup>57</sup> *Id.* at 757.

<sup>58</sup> *Id.* (quoting *Gertz*, 418 U.S. at 348).

<sup>59</sup> *Dun & Bradstreet*, 472 U.S. at 757-761.

without a showing of actual malice was upheld in private plaintiff/private matter defamation cases.<sup>60</sup>

After *Dun & Bradstreet*, the Supreme Court established one more hurdle for private plaintiffs, requiring them to prove falsity in addition to fault in lawsuits against media defendants where the matter was an issue of public concern.<sup>61</sup> In *Philadelphia Newspapers v. Hepps*, the Court heard a case in which Maurice Hepps, a private person sued after the newspaper reported Hepps had links to organized crime.<sup>62</sup> On appeal to the Pennsylvania Supreme Court, the court interpreted *Gertz* to mean that although Hepps must prove fault, he need not prove falsity to recover.<sup>63</sup> The newspaper appealed, and the U.S. Supreme Court granted certiorari to decide if the Constitution required a showing of fault by private plaintiffs defamed during the discussion of matters of public concern.<sup>64</sup>

The Supreme Court reversed the state supreme court's decision, holding the private plaintiff was required to show falsity to recover damages in a defamation suit against a media defendant where the issue is a matter of public concern.<sup>65</sup> The Court reasoned that such a decision would protect important speech on public issues as mandated by the requirements of the First Amendment.<sup>66</sup> Allocation of such a burden to the plaintiff is justified, the Court said, to prevent a chilling effect on speech.<sup>67</sup> Such a burden is not unreasonable given that a private plaintiff must already prove actual malice in cases involving matters of public concern.<sup>68</sup> As a result of *Gertz* and *Hepps*, private plaintiffs suing for defamation stemming from matters of public concern must prove both fault and falsity.

The Supreme Court framework for defamation has taken on a complex structure.<sup>69</sup>

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<sup>60</sup> *Id.* at 761.

<sup>61</sup> See *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767 (1986) (holding that private figures must prove falsity to recover from a media defendant if the defamatory statement stemmed from an issue of public concern).

<sup>62</sup> *Id.* at 769.

<sup>63</sup> 485 A.2d 374, 379 (Penn. 1984).

<sup>64</sup> *Hepps*, 475 U.S. at 769.

<sup>65</sup> *Id.* at 776-777.

<sup>66</sup> *Id.* "To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.*

<sup>67</sup> *Id.* at 778.

<sup>68</sup> *Id.*

<sup>69</sup> The Court summarized the structure in *Hepps*. "When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.* at 775.

As it stands today, public officials and public figures, as well as private plaintiffs seeking punitive damages, must prove actual malice to recover in a defamation action. Private plaintiffs who merely seek to recover actual and compensatory damages need prove only the level of fault established by state law, which can range from actual malice to any level of fault greater than strict liability.<sup>70</sup> Such a setup has created both a constitutional framework and state-law framework in which defamation lawsuits must be litigated.

## B. THE LOWER COURTS AND PLAINTIFF STATUS

Although the Supreme Court has provided much of the framework needed to determine plaintiff status, lower courts have been left to the day-to-day decisions. Thus, the determinations of which plaintiffs fall into the categories of public official, public figure and private person are hashed out regularly in cases across the country. Similarly, the determination of which matters are of public concern and which are not is routinely made as cases come up for trial. Although these issues can be resolved by stipulation in some cases, they are often issues central to the litigation in other cases. Thus, the role of the lower courts in setting such precedent is an important one.

### 1. Public Officials

Determining whether a plaintiff is a public official is likely the simplest inquiry for the courts. Guided by the Supreme Court's general discussion in *Sullivan* that judges, government officials and elected commissioners fall within such a category,<sup>71</sup> the lower courts have gone on to address the issue dealing with government employees at all levels, including international officers, national officers, state officers and even municipal employees.<sup>72</sup> As a result, the category of public official has grown somewhat based on determination by lower courts that certain plaintiffs have taken on the role of public officials and therefore should be subject to the actual malice standards.

Officials in public education are often considered to be public figures.<sup>73</sup> Members of local school boards have been held to be public officials.<sup>74</sup> Despite the board

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<sup>70</sup> Some courts have even held that a strict liability standard may be imposed where a private plaintiff sues a non-media defendant regarding a matter of private concern. *See, e.g., Cox v. Hatch*, 761 P.2d 556, 559-560 (Utah 1988).

<sup>71</sup> *Sullivan*, 376 U.S. at 273. "If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners." *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

<sup>72</sup> *See, e.g., Varanese v. Gall*, 518 N.E.2d 1177 (Ohio 1988) (applying the actual malice standard of *New York Times Co. v. Sullivan* to an Ohio public official's state-law defamation claim); *Sullivan*, 376 U.S. at 264 (ruling that a municipal public official must prove actual malice to succeed in a defamation claim).

<sup>73</sup> *Cf., e.g., Kumaran v. Brotman*, 617 N.E.2d 191, 200 (Ill. App. 1993) (holding that a frequent substitute teacher was a private person for a defamation lawsuit); *Nodar v. Galbreath*, 462 So.2d 803, 808 (Fla. 1984) (holding that a high school English teacher was not a public official for the purposes of a slander lawsuit).

members' various arguments, including that they were not school employees, did not get paid and were merely local, a federal appellate court found they qualified as public officials.<sup>75</sup> Citing a long list of cases in which court had found elected officials to be public officials, the court noted that public education is "of the utmost importance to a community, and school board policies are often carefully scrutinized by residents."<sup>76</sup> Additionally, the court noted that the public has a strong interest in evaluating their job performance, which weighs in favor of considering them to be public officials.<sup>77</sup>

Similarly, the U.S. District Court for the District of Minnesota held an elementary school principal to be a public official.<sup>78</sup> The district court, interpreting Minnesota law, noted the state supreme court's intention to define public figures broadly.<sup>79</sup> In *Hirman v. Rogers*,<sup>80</sup> the Minnesota Supreme Court wrote that any government employees who "perform governmental duties, directly related to the public interest, are public officials."<sup>81</sup> Because the issue was one of first impression in Minnesota, the district court looked to other jurisdictions for guidance, noting a distinct split.<sup>82</sup> Because Minnesota courts had ruled that education was a matter of public importance, the district court, noting the favored position to broadly construe public official designations, ruled that an elementary school principal was a public official under Minnesota law.<sup>83</sup>

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<sup>74</sup> See *Garcia v. Board of Education of Socorro Consolidated School District*, 777 F.2d 1403 (11th Cir. 1985) (holding that school board members suing the school superintendent for defamation were public officials and, as a result, must prove actual malice to recover on their claims). The Eleventh Circuit cited the U.S. Supreme Court, saying that the "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 1408 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

<sup>75</sup> *Garcia*, 777 F.2d at 1408.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *Johnson v. Robbinsdale Ind. Sch. Dist.*, 872 F. Supp. 1439 (D. Minn. 1993).

<sup>79</sup> *Id.* at 1442.

<sup>80</sup> 257 N.W.2d 563, 566 (Minn. 1977).

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., *Palmer v. Bennington School District, Inc.*, 615 A.2d 498, 501 (Vt. 1992) (elementary school principal is a public official); *Kapiloff v. Dunn*, 343 A.2d 251, 258 (Md. 1975) (high school principal is a public official), *cert. denied*, 426 U.S. 907 (1976); *State v. Defley*, 395 So.2d 759, 761 (La. 1981) (school supervisor is a public official); *Reaves v. Foster*, 200 So.2d 453, 456 (Miss.1967) (high school principal is a public official); *Junior-Spence v. Keenan*, 1990 WL 17241, \*4 (Tenn. Ct. App.1990) (high school principal is a public official). Cf. *Kumaran*, 617 N.E.2d at 200 (frequent substitute teacher was a private person); *Nodar*, 462 So.2d at 808 (high school English teacher was not a public official), *Ellerbee v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992) (high school principal is not a public official), *cert. denied*, 507 U.S. 1025 (1993); *McCutcheon v. Moran*, 425 N.E.2d 1130, 1131 (Ill. App. 1981) (public school principal's relationship to conduct of government is too remote to justify public official designation).

<sup>83</sup> *Johnson*, 872 F. Supp. at 1443. "Thus, the court holds that public school principals criticized for their official conduct are public officials for purposes of defamation law. A contrary holding would stifle public debate about important local issues." *Id.*

The courts have considered some professors at the university level to be public officials as well.<sup>84</sup> In *Grossman v. Smart*, the U.S. District Court for the Central District of Illinois held that a professor of law who chaired a search committee, along with the Graduate College's vice chancellor of research, who served as a grievance officer as well, were public officials.<sup>85</sup> In making such a decision, the judge ruled that one does not have to be at the top of the bureaucracy to have the authority necessary to impact government action.<sup>86</sup> Along those lines, however, the court found that an assistant professor of law, who had no role in making decisions before or after his hiring at the University of Illinois, was not a public official.<sup>87</sup> Thus, it seems members of a university faculty may not automatically attain public official status.<sup>88</sup>

Members of law enforcement have often been considered public officials by the courts.<sup>89</sup> The U.S. District Court for the District of Columbia held a Secret Service agent charged with the protection of former president Gerald Ford to be a public figure.<sup>90</sup> Larry Buendorf sued National Public Radio after a newscaster erroneously implied that he was homosexual.<sup>91</sup> Citing the Seventh Circuit's decision in *Meiners v. Moriarty*,<sup>92</sup> the district court ruled that Buendorf was a public official based on his authority to use force as a federal law enforcement officer.<sup>93</sup>

Municipal law enforcement officers have also been found to be public officials. The Tenth Circuit found a municipal policeman in a small Wyoming town to be a public official for the purposes of a defamation action.<sup>94</sup> In *Coughlin v. Westinghouse Broadcast & Cable*, the Third Circuit ruled that a police officer in a major metropolitan area was a

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<sup>84</sup> See e.g., *Grossman v. Smart*, 807 F. Supp. 1404 (C.D. Ill. 1992) (holding that a vice chancellor of research and a professor of agriculture law were public officials while an assistant professor of law was not).

<sup>85</sup> *Id.* at 1408.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See also *Woodruff v. Ohman*, 29 Fed. Appx. 337 (6th Cir. 2002) (holding that a post-doctoral research assistant was not a public official). "Since a post-doctoral research assistant does not affect the lives, liberty, and property of citizens, and since Woodruff did not control government affairs and was instead in one of the countless public positions that have little direct impact on citizens' lives, the district court's determination that Woodruff was a public official is erroneous." *Id.* at 348.

<sup>89</sup> See, e.g., *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *St. Amant*, 390 U.S. at 730; *Henry v. Collins*, 380 U.S. 356 (1965); *Cibenko v. Worth Publishers*, 510 F. Supp. 761, 765 (D. N.J. 1981); *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A.2d 6, 16 (Pa. Super. Ct. 1982).

<sup>90</sup> *Buendorf v. National Public Radio, Inc.*, 822 F. Supp. 6 (D. D.C. 1993).

<sup>91</sup> *Id.* at 7-9.

<sup>92</sup> 563 F.2d 34, (7th Cir. 1977) (holding that federal agents were public officials for defamation purposes).

<sup>93</sup> *Buendorf*, 822 F. Supp at 10-11. "Mr. Buendorf's qualifications and performance are of interest to the public in an important and special way-because his assigned duties could affect an individual's personal freedom." *Id.*

<sup>94</sup> *Gray v. Udevitz*, 656 F.2d 588 (10th Cir. 1981).

public figure for the purposes of a defamation action.<sup>95</sup> To support its ruling affirming the district court's finding that Coughlin was a public official, the appellate court referred specifically to the lower court ruling.<sup>96</sup> Citing a string of cases, the district court held that police officers have consistently been found to be public officials because of their position of authority:

The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.<sup>97</sup>

Using that reasoning, the Tenth Circuit held that a retired FBI agent could be considered a public official.<sup>98</sup> In *Revell v. Hoffman*, the former Associate Deputy Director of the FBI, who had spent 30 years with the agency, sued David Hoffman, an author whose books contained statements about Revell's employment with the agency.<sup>99</sup> Looking to its 1981 decision in *Gray v. Udevitz*,<sup>100</sup> the appellate court concluded that Revell retained his status as a public official,<sup>101</sup> noting:

That the person defamed no longer holds the same position does not by itself strip him of his status as a public official for constitutional purposes. If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times*.<sup>102</sup>

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<sup>95</sup> 780 F.2d 340 (1986).

<sup>96</sup> *Id.* at 324.

<sup>97</sup> *Coughlin v. Westinghouse Broad. & Cable*, 607 F. Supp. 377, 385-386 (E.D. Pa. 1985) (quoting *Gray*, 656 F.2d, at 591).

<sup>98</sup> The U.S. District Court for the District of Minnesota has also held that an FBI agent was a public official. *See Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988) (holding that an FBI agent who sued a publisher for a book discussing the conduct of FBI agents in investigating the murder of Native Americans was a public official required to prove actual malice).

<sup>99</sup> 309 F.3d 1228 (10th Cir. 2002).

<sup>100</sup> 656 F.2d 588 (10th Cir. 1981) (holding that a police officer in a town of 30,000 people was a public official).

<sup>101</sup> *Cf. Ryder v. Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976) (holding that a former public official and candidate for public office was no longer a public official for defamation purposes). "It is true that plaintiff had been a public official for a time and had been a candidate for public office. Yet these public activities had nothing to do with the reference to Richard Ryder in the essay and, in any case, those activities were no longer engaged in by plaintiff." *Id.* at 826.

<sup>102</sup> *Id.* at 1232-1233 (quoting *Gray*, 656 F.2d at 591).

Thus, even a law enforcement officer no longer active in law enforcement maintains his public official status related to that employment for an undetermined amount of time so long as the matter remains in the public's interest.

Similarly, in *Hatfill v. New York Times Co.*, the U.S. District Court for the Eastern District of Virginia ruled that a former government employee who was now in the private sector could still be considered a public official with regard to activities associated with the government.<sup>103</sup> Relying on the notion that a person can be a public official if he has "substantial responsibility for or control over the government affairs," the judge reasoned that someone need not be an official government employee to be considered a public official.<sup>104</sup> In making that decision, the court noted Hatfill's close connection to the government:

Plaintiff's participation in government training and decisionmaking placed him in a position of public trust. The public had an independent interest in Plaintiff's qualifications and performance given the highly sensitive nature of his work and its importance to national defense.<sup>105</sup>

Even a civilian employee of the Armed Services has been considered a public official. In *Rusack v. Harsha*, the U.S. District Court for the Middle District of Pennsylvania ruled that a civilian employee who worked as a supervisory contract negotiator at a naval purchasing office in Mechanicsburg, Pennsylvania, was a public official.<sup>106</sup> The judge reasoned that the plaintiff was in a position of public trust and authorized to expend public funds, making him a public official:

Assuming that plaintiff is not involved with the administration of the contracts, it is nevertheless evident that he is intimately involved in the expenditures of public funds, a matter of great importance so that there is an interest in his qualifications and performance beyond the interest which might be with any governmental employee.<sup>107</sup>

Further, the judge reasoned that such responsibility gave the plaintiff significant control of the way government does business regardless of the fact that he was a civilian employee. As a result, the court held Rusack to be a public official required to prove actual malice under *New York Times v. Sullivan*.<sup>108</sup>

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<sup>103</sup> 2007 WL 404856 (E.D. Va. 2007).

<sup>104</sup> *Id.* at \*5 (quoting *Baumback v. American Broad. Co.*, 1998 U.S. App. LEXIS 18770, at \*13-14 (4th Cir. 1998)).

<sup>105</sup> *Hatfill*, 2007 WL 404856, at \*5.

<sup>106</sup> 470 F. Supp. 285, 293 (M.D. Pa. 1978).

<sup>107</sup> *Id.* at 298-299.

<sup>108</sup> *Id.* at 298.

## 2. Public Figures

The courts have created three categories of public figures to classify plaintiffs who do not fit into the public official category, but who have attained some public prominence. First labeled by the Court in *Gertz*, the all-purpose public figure category discussed in *Curtis Publishing* was designed for plaintiffs with widespread notoriety.<sup>109</sup> There, the Court said that “[s]ome occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>110</sup> Since that time, many courts have mentioned all-purpose public figures, but few have found plaintiffs that fit the bill.<sup>111</sup>

One of the most substantial discussions of all-purpose public figures came in a case involving Johnny Carson and his wife.<sup>112</sup> In *Carson v. Alliance News Co.*, both Carson and his wife admitted they were public figures and Carson’s brief describes him as “a preeminent entertainer and show business personality.”<sup>113</sup> The Seventh Circuit reiterated the *Gertz* dicta about all-purpose public figures.<sup>114</sup> The appellate court further explained that because Carson had made his livelihood on television and enjoyed a worldwide reputation based on that work, he fit the *Gertz* definition of an all-purpose public figure.<sup>115</sup>

In the same year, the Second Circuit found journalist William Buckley Jr. to be an all-purpose public figure in his defamation lawsuit against an author.<sup>116</sup> Noting that Buckley’s syndicated column ran three times per week in hundreds of U.S. newspapers, the Second Circuit reasoned that he was just the type of person for whom the *Gertz* court envisioned the all-purpose public figure category:

He may fairly be described as perhaps the leading advocate, ideologue [sic] or theoretician of conservative political beliefs and ideas. He is, in short, a public figure for all purposes and in the classic sense of the Supreme Court cases.<sup>117</sup>

Ruling that some of the author’s book was defamatory and some was not, the Second Circuit reduced the punitive damages awarded to Buckley from \$7,500 to \$1,000.

In 1998, the Ninth Circuit, in *Newcombe v. Adolf Coors Co.*, was not required to determine whether the plaintiff, a former major league pitcher, was an all-purpose public

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<sup>109</sup> *Gertz*, 418 U.S. at 345.

<sup>110</sup> *Id.*

<sup>111</sup> A February 1, 2010, Westlaw search of “all-purpose public figure” in the database containing all federal cases turned up 37 hits. The same search in the database containing all state cases turned up 72 cases that included the phrase.

<sup>112</sup> *Carson v. Alliance News Co.*, 529 F.2d 206 (7th Cir. 1976).

<sup>113</sup> *Id.* at 210.

<sup>114</sup> *Id.* at 209.

<sup>115</sup> *Id.* at 209-210.

<sup>116</sup> *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976).

<sup>117</sup> *Id.* at 886.

figure<sup>118</sup> for the purposes of his defamation suit against a beer company.<sup>119</sup> However, in a footnote, the court stated that there was a “strong argument [he] is subject to the more rigorous constitutional standard because he is ... an all-purpose public figure based on his baseball fame.”<sup>120</sup> But because there was not evidence to prove defamation even if he were categorized as a private person, the appellate court did not decide the issue.<sup>121</sup>

In a number of cases, the courts have determined that a plaintiff who does not have the celebrity status and notoriety to qualify as an all-purpose public figure may be considered a limited-purpose public figure instead. Often when limited-public figure status is conferred, it is based on an event or issue that captures the public’s attention and creates discussion. For example, the children of Julius and Ethel Rosenberg sued the publisher of a book about their parents’ trial, claiming statements in the book defamed them.<sup>122</sup> In *Meerpol v. Nizer*, the Second Circuit Court of Appeals ruled that the Rosenbergs’ children were public figures with respect to their defamation action against a publisher. The appellate court agreed with the district court’s findings that the trial of the Rosenbergs had captured the public’s attention, propelling the Rosenbergs and their children into the public spotlight.<sup>123</sup> As a result, the plaintiffs were required as public figures to show actual malice to succeed against the publishers.

In *Waldbaum v. Fairchild Publications*,<sup>124</sup> the U.S. Court of Appeals for the D.C. Circuit fleshed out a test used to determine if a plaintiff is a limited-purpose public figure after deciding that Eric Waldbaum, president and CEO of Greenbelt Consumer Services, did not rise to all-purpose status. Waldbaum sued after a Fairchild Publications’ trade journal, *Supermarket News*, ran an article about his ouster.<sup>125</sup> The appellate court quickly determined that Waldbaum was not an all-purpose public figure, given that he was not “a ‘celebrity,’ whose name was a ‘household word,’ whose ideas and actions the public in fact follows with great interest.”<sup>126</sup> Instead, noting that few would meet such an all-purpose test, the court went on to discuss whether he would constitute a limited-purpose public figure, which the court defined as:

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<sup>118</sup> In *Cepeda v. Cowles Magazines & Broadcasting*, the Ninth Circuit, hearing a case involving major league player Orlando Cepeda, referred to him throughout as a “public figure.” Although the court never called him an “all-purpose” public figure in this pre-Gertz decision, the court mentioned “Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.” 392 F.2d 417, 419 (9th Cir 1968).

<sup>119</sup> 157 F.3d 686, 695 (9th Cir. 1998).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Meerpol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).

<sup>123</sup> *Id.* at 1066. “In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became ‘public figures’ under the Gertz standards.” *Id.*

<sup>124</sup> 627 F.2d 1287 (D.C. Cir. 1980) (holding that the well-known operator of a large consumer cooperative was a limited-purpose public figure for defamation purposes).

<sup>125</sup> *Id.* at 1290.

<sup>126</sup> *Id.* at 1292.

a person [who] is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.<sup>127</sup>

To determine whether a plaintiff would then be considered a limited-purpose public figure, the *Waldbaum* court established a three-part test.<sup>128</sup> First, the court isolated the purported public controversy in which the plaintiff was involved.<sup>129</sup> Such a controversy must not be contrived, but should be a major issue of public concern in which the plaintiff is a significant stakeholder.<sup>130</sup> The mere fact that an issue received media coverage is not enough, standing alone, to create such a controversy.<sup>131</sup> Such a determination can be made by judging whether members of the public were actually discussing the purported controversy. “If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.”<sup>132</sup>

After ascertaining the extent of the controversy, the court must focus on the plaintiff’s role in such a controversy to determine whether he qualifies as a limited-purpose public figure.<sup>133</sup> Further, the court must consider the plaintiff’s role in the controversy and whether he has affected its outcome. “Those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye.”<sup>134</sup> Past conduct, press coverage and public reaction can all be used to evaluate the plaintiff’s role in a public controversy.<sup>135</sup> If the defamation relates to the controversy, then it merits the *New York Times* protection. If not, the plaintiff qualifies as a private person.

While hearing a case involving a once-prominent couple – a former singer and professional athlete – who had stepped out of the public’s eye, the Fifth Circuit had to decide whether the husband and wife were all-purpose or limited-purpose public figures.<sup>136</sup> Anita Brewer filed suit after the *Memphis Commercial Appeal* published a “People” item in the paper implying that Brewer, who had once dated Elvis Presley,

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<sup>127</sup> *Id.*

<sup>128</sup> See e.g., *Avins v. White*, 627 F.2d 637 (3d Cir. 1980) (holding that a law school dean was a limited-purpose public figure in the context of law school accreditation);

<sup>129</sup> *Id.* at 1296.

<sup>130</sup> *Id.* “A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.” *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1297.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1298.

<sup>135</sup> *Id.* at 1297.

<sup>136</sup> *Brewer v. Memphis Publ’g Co.*, 626 F.2d 1238 (5th Cir. 1980) (holding that former singer who maintained celebrity relationship with Elvis Presley and then went on to marry NFL star was a public figure).

stopped in at his last show for a “reunion” of sorts.<sup>137</sup> The item went on to say that Elvis had recently filed for divorce and that Anita Brewer was divorced from her football star husband Johnny Brewer.<sup>138</sup>

Relying on *Gertz*, the Fifth Circuit concluded that, at the very least, the Brewers had been public figures at some point.<sup>139</sup> The tougher question, the Court acknowledged was whether they retained that public figure status. “We therefore focus instead on plaintiffs' actions in seeking publicity or voluntarily engaging in activities that necessarily involve the risk of increased exposure and injury to reputation.”<sup>140</sup> In doing so, the appellate court noted that both Anita and Johnny Brewer made their livings in fields that required them to be in the spotlight, appearing before the media and public audiences.<sup>141</sup> Further, the court reasoned, the article pertained to Anita’s former and possibly current relationship with Elvis Presley, which had advanced her career and promoted her celebrity status in the beginning.<sup>142</sup> As a result, the appellate court determined Anita Brewer remained a public figure, at least as the article applied to the basis of her former fame.<sup>143</sup> But, noting that the couple had never acquired the pervasive notoriety of someone like Johnny Carson, the court concluded that neither Anita nor Johnny Brewer was an all-purpose public figure.<sup>144</sup>

Like the Third Circuit, the Fourth Circuit developed a test to provide guidance on public figure determinations.<sup>145</sup> This five-part test was originated in *Fitzgerald v. Penthouse International*.<sup>146</sup> The plaintiff sued after the magazine ran an article detailing his role in the military’s use of trained dolphins.<sup>147</sup> To determine that Fitzgerald qualified as a limited-purpose public figure, the appellate court looked at five factors:

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<sup>137</sup> *Id.* at 1240.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1253. “The evidence in this case shows that both plaintiffs at one time or another vigorously and successfully sought the public's attention or gained notoriety for their own achievements. Both achieved ‘pervasive fame or notoriety,’ at least regionally; whether it was ‘such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts’ is a more difficult question.” *Id.*

<sup>140</sup> *Id.* at 1254.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1257. “It might be that during the ‘active’ public figure period a wider range of articles, including those only peripherally related to the basis of the public figure's fame, are protected by the malice standard and that the passage of time or intentional retreat narrows the range of articles so protected to those directly related to the basis for fame.” *Id.*

<sup>143</sup> *Id.* at 1257-1258.

<sup>144</sup> *Id.* at 1251. “The Brewers’ power and influence never were as pervasive [as Johnny Carson’s].” *Id.*

<sup>145</sup> See, e.g., *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991) (using the *Fitzgerald* factors to determine that a research scientist who blew the whistle on the potential carcinogenicity of malathion, an insecticide); *Jenoff v. Hearst Corp.*, 644 F.2d. 1004 (4th Cir. 1981) (using similar factors to determine that a police undercover informant was a private figure and had not obtained even limited-purpose public figure status).

<sup>146</sup> 691 F.2d 666 (4th Cir. 1982).

<sup>147</sup> *Id.* at 668.

(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.<sup>148</sup>

When applying the test to Fitzgerald, the appellate court found he clearly met the standard enunciated. First, the national press had covered the military's use of dolphins in Vietnam for at least two years.<sup>149</sup> Next the plaintiff had lectured publicly on the topic, written articles and even appeared on national television programs.<sup>150</sup> Because Fitzgerald sought to capitalize financially on this knowledge, the court found that he had thrust himself into the controversy, which existed before and lasted long after the publication by Penthouse.<sup>151</sup> Even after the Penthouse article, Fitzgerald's opinion was still sought out on the topic, which added to his public figure status.<sup>152</sup>

In 1980, the Sixth Circuit also tried to decide how to determine if a plaintiff had risen to the level of a limited-purpose public figure.<sup>153</sup> In *Street v. National Broadcasting Co.*, the appellate court attempted to determine whether a public controversy existed during the Scottsboro rape trial.<sup>154</sup> To do so, the court looked at whether the trial was the "focus of major debate" and "generated widespread press and attracted public attention for several years."<sup>155</sup> After determining that the event was a public controversy, the court examined the plaintiff's role in the controversy. Because the plaintiff was the sole witness in the trial of nine black youths, the court determined she was a prominent figure in the controversy.<sup>156</sup> Noting that the media devoured the trial, longing for interviews with the plaintiff, the court concluded she had the necessary "access to the media."<sup>157</sup> However, the court struggled with the notion that she had not voluntarily injected herself into the controversy.<sup>158</sup> Given that the voluntariness hinged on whether her accusations of rape were truthful, the court determined it would normally be appropriate to leave the voluntariness prong out of its inquiry.<sup>159</sup> However, the court found that the plaintiff spoke

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 669.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Street v. National Broad. Co.*, 645 F.2d 1227 (6th Cir. 1980) (holding that the primary prosecution witness from a decades-old rape trial was a limited-purpose public figure).

<sup>154</sup> *Id.* at 1234.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1235. "If there were no evidence of voluntariness other than that turning on the issue of truth, we would not consider the fact of voluntariness. In such a case, the other factors prominence

freely with the media and “aggressively promoted her version of the case outside of her actual court room testimony.”<sup>160</sup>

Even though the plaintiff was a public figure at the time, the *Street* court had to decide whether she continued to be a limited-purpose public figure years after the trial. The court, noting that *Wolston* left the question open, held that once a person becomes a public figure on a matter, she remained a public figure with regard to that matter.<sup>161</sup> Citing *Meerpol* and *Brewer*, the Sixth Circuit noted broad support for this notion that a person retained their earlier-found status despite the passage of time.<sup>162</sup> As a result, the Scottsboro plaintiff would have to prove actual malice to recover against NBC, despite the fact that 40 years had passed since the original rape trial.

Courts have gone as far as to consider companies to be public figures. In *Schiavone Construction Co. v. Time, Inc.*, the Third Circuit ruled that a construction company and its controlling individual were public figures in a defamation action against *Time* magazine.<sup>163</sup> The suit was filed after the magazine reported that the name “Schiavone” was found in FBI documents about missing labor leader Jimmy Hoffa, who had ties to organized crime.<sup>164</sup> The appellate court noted that Schiavone and the construction company invited public figure status by seeking out the press and actively participating in the controversy that led *Time* to write the story in question. “Schiavone thrust himself into the controversy surrounding Donovan and his company by letter campaigns and his active investigation into the private lives of the committee members investigating Donovan.”<sup>165</sup> As a result, the appellate court found both the company and Schiavone to have obtained limited-purpose public figure status as it related to the Jimmy Hoffa/Raymond Donovan incident.

The final category of public figure plaintiff envisioned in *Gertz* was the involuntary public figure, which the *Gertz* court said “must be exceedingly rare.”<sup>166</sup> The D.C. Circuit found just such an instance in *Dameron v. Washington Magazine, Inc.*<sup>167</sup> Merle Dameron, an air traffic controller, sued *Washington Magazine* after it published an article detailing the crash of Flight 90, which occurred while he was the only controller

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and access to media alone would determine public figure status. But in this case, there is evidence of voluntariness not bound up with the issue of truth.” *Id.*

<sup>160</sup> *Id.* “In the context of a widely-reported, intense public controversy concerning the fairness of our criminal justice system, plaintiff was a public figure under *Gertz* because she played a major role, had effective access to the media and encouraged public interest in herself.” *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> 847 F.2d 1069 (3d Cir. 1988).

<sup>164</sup> *Id.* at 1072.

<sup>165</sup> *Id.* at 1079.

<sup>166</sup> *Gertz*, 418 U.S. at 345.

<sup>167</sup> 779 F.2d 736 (D.C. Cir. 1985) (holding that an air traffic controller was a limited-purpose public figure for a defamation case arising from an accident that occurred while he was working).

on duty at Washington Dulles International Airport.<sup>168</sup> Although the appellate court agreed with the district court that Dameron had not injected himself into the controversy, the judges noted that there were additional ways for a plaintiff to become a public figure. “Persons can become involved in public controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person.”<sup>169</sup>

The court turned back to the three-part test established in *Waldbaum*, an opinion in which the D.C. Circuit found *Waldbaum* to be a limited-purpose public figure, to determine Dameron’s status. First, it acknowledged that the Flight 90 crash was a public controversy.<sup>170</sup> Then, it modified the second prong of the *Waldbaum* test by taking into account that a plaintiff’s action may involuntarily embroil him in a public controversy.<sup>171</sup> Turning to *Gertz*, the appellate court notes, “Nevertheless, the Supreme Court has recognized that it is possible, although difficult and rare, to become a limited-purpose public figure *involuntarily*.”<sup>172</sup> Finally, the court concluded that the defamation at issue was clearly connected to the public controversy, making him one of a very limited number of involuntary limited-purpose public figures.<sup>173</sup>

In 2001, the Georgia Court of Appeals ruled that a security guard present at the Centennial Olympic Park bombing was an involuntary public figure in his case against the *Atlanta Journal-Constitution*.<sup>174</sup> Jewell sued the newspaper after it ran an article naming him as a suspect in the case.<sup>175</sup> Initially dubbed a hero for saving lives, Jewell then became the focus of the federal inquiry in the 1996 blast.<sup>176</sup> The trial court found Jewell was a limited-purpose public figure based on his extensive role in the media regarding the bombing. “During interviews, he discussed his participation in the events, his previous training, the training and reactions of other law enforcement personnel on the scene, and urged the public to show the bomber that this type of activity would not be tolerated.”<sup>177</sup> Citing *Dameron*, the Georgia appellate court ruled that, at the very least, Jewell was an involuntary public figure even if he did not rise to the level of limited-purpose public figure. “Whether he liked it or not, Jewell became a central figure in the

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<sup>168</sup> *Id.* at 738. “Dameron asserts that *The Washingtonian's* statement that he was partly to blame for the death of 92 people libels him, that the statement is false, brings him into disrepute, and has caused him humiliation and mental anguish.” *Id.*

<sup>169</sup> *Id.* at 741.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 741-742.

<sup>173</sup> *Id.* at 742. “Paradoxically, the magazine article never mentions Dameron’s name or other identifying characteristics. If Dameron had not been previously linked with accounts of the tragedy, no magazine reader could tie the alleged defamation to Dameron. Indeed, it was partly *because* of the defendant’s public notoriety that he was identifiable at all from the oblique reference in *The Washingtonian*.” *Id.*

<sup>174</sup> *Jewell*, 555 S.E.2d at 175.

<sup>175</sup> *Id.* at 178.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 185.

specific public controversy with respect to which he was allegedly defamed: the controversy over park safety.”<sup>178</sup>

### 3. Private Persons

Although courts frequently find defamation plaintiffs to be public figures, there are instances where individual and corporate plaintiffs have been found to be private persons. As a result, these plaintiffs often need only show negligence and the defendants cannot rely on the constitutional protections of *New York Times v. Sullivan*. Plaintiffs found to be private persons often fail to meet one, two or even all of the criteria needed to be considered limited-purpose public figures.

A prime example of a plaintiff, initially considered to be a public figure but then determined to be a private person, arose in the Fourth Circuit case of *Jenoff v. Hearst Corp.*<sup>179</sup> In the case, the Fourth Circuit decided that an undercover police informant, held by the lower courts to be either a public official or a public figure, had been improperly classified.<sup>180</sup> Citing both his lack of formal government employment along with the fact that he did not occupy a position that would invite public scrutiny, the court held he was not a public official.<sup>181</sup> However, using a test similar to the one established in *Fitzgerald*, the appellate court also ruled that he was not a public figure – limited-purpose or otherwise.<sup>182</sup> *Jenoff*, they noted, had no special access to the media, nor did he seek attention from his undercover pursuits.<sup>183</sup> Further, the court added that *Jenoff* did not seek, through his undercover work, to “influence the resolution of any public issue.”<sup>184</sup> As a result, the appellate court held he rightfully should be classified as a private person.

Even business managers and owners have been held to be private persons in some cases. For example, the publisher of a business newsletter was held to be a private figure by the Eleventh Circuit despite his prominence in the business community.<sup>185</sup> Likening the case to a classic *Gertz* situation, the appellate court concluded in *Straw v. Revel* that despite J.F. Straw’s notoriety among business circles as the publisher of *Business Opportunity Digest*, this was not enough to bring him within the ambit of a public figure.<sup>186</sup> In fact, his notoriety was quite limited given the circulation of his magazine was small. He was well known in some circles, and publishes in a particular field; but not

<sup>178</sup> *Id.* at 186. “Jewell was an ordinary citizen who was unknown to the public before the Olympic Park bombing, never sought to capitalize on the fame he achieved through his actions in events surrounding the bombing, and never acquired any notoriety apart from the bombing and the investigation which followed. However, there is no question that Jewell played a central, albeit possibly involuntary, role in the controversy over Olympic Park safety.” *Id.*

<sup>179</sup> *Jenoff*, 644 F.2d. at 1004.

<sup>180</sup> *Id.* at 1006.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1007.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Straw v. Revel*, 813 F.2d 356 (11th Cir. 1987).

<sup>186</sup> *Id.* at 361.

every publisher is automatically a public figure by virtue of his access to a printing press.”<sup>187</sup> Additionally, the court noted that simply reporting something in his publication was not enough to say that Straw injected himself into a public controversy.<sup>188</sup> As a result, the appellate court ruled the trial court had properly categorized him as a private plaintiff instead of a limited-purpose public figure.<sup>189</sup>

Corporations have been found to be private persons under defamation law in some instances. In *Bruno & Stillman Inc. v. Globe Newspaper Co.*,<sup>190</sup> the First Circuit was asked to determine whether a Delaware corporation engaged in the manufacture of commercial fishing vessels was rightfully categorized as a public figure for the purposes of a defamation lawsuit. Bruno & Stillman sued after the *Boston Globe* published a series of articles detailing defects in the plaintiff’s crafts.<sup>191</sup> The appellate court found Bruno & Stillman was not a public figure, and it declined to adopt a rule that would automatically treat corporations as public figures. The appellate court noted that it could not find evidence of any public controversy with regard to the faulty boats.<sup>192</sup> Further, the court found that Bruno & Stillman had done nothing to inject the corporation into any such controversy or limelight.<sup>193</sup> The court contrasted the actions of Bruno & Stillman with those of other companies found to be public figures and noted the dramatic difference.<sup>194</sup> As a result, the appellate court ruled that, without more evidence, Bruno & Stillman could not be considered a public figure.<sup>195</sup>

Similarly, in *U.S. Healthcare Inc. v. Blue Cross of Greater Philadelphia*, the Third Circuit refused to consider either party a limited-purpose public figure.<sup>196</sup> The lawsuit arose over defamatory speech contained within a comparative advertising war between the two companies initiated after Blue Cross lost some clients to U.S. Healthcare.<sup>197</sup> The appellate court refused to consider either party a limited-purpose public figure, noting that such commercial speech likely would not be chilled by the negligence standard and was not the type of speech that *New York Times v. Sullivan* sought to protect:

The express analysis in *Gertz* is not helpful in the context of a comparative advertising war. Most products can be linked to a public issue. And most advertisers — including both claimants here seek out the media. Thus, it will always be true that such advertisers have voluntarily placed

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> 633 F.2d 583 (1st Cir. 1980).

<sup>191</sup> *Id.* at 585.

<sup>192</sup> *Id.* at 591.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 592. “This record is to be contrasted with the concentrated ‘advertising blitz’ which the Third Circuit held ‘invited public attention, comment, and criticism’ in *Steaks Unlimited*.” *Id.* (quoting *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980)).

<sup>195</sup> *Bruno*, 633 F.2d at 592.

<sup>196</sup> 898 F.2d 914 (3d Cir. 1990).

<sup>197</sup> *Id.* at 917-920.

themselves in the public eye. It will be equally true that such advertisers have access to the media.<sup>198</sup>

Instead, the appellate court concluded the speech was not worthy of the heightened constitutional protections provided under actual malice, and declared both corporations to be private figures for the purpose of the defamation action.<sup>199</sup> The appellate court provided three reasons for providing less protection to the speech. First, it said commercial speech does not make the same level of contribution to the “exposition of ideas” as political and social speech.<sup>200</sup> Second, it said because of their economic self-interest, commercial speakers are less likely to be chilled if they are not protected by the actual malice standard.<sup>201</sup> Finally, because of their high level of knowledge about their market and their consumers, commercial speakers are better equipped to evaluate the truthfulness of any speech that enters the market.<sup>202</sup>

Courts have found plaintiffs to be private persons in situations in which the plaintiff might appear to be a limited-purpose public figure. Usually, however, this is because at least one prong of the public-figure test that the court applied had not been fulfilled, leaving the plaintiff free to pursue the defamation action as a private person. As a result, defendants are typically not allowed to rely on the protections of *New York Times v. Sullivan*, and plaintiffs oftentimes need only prove negligence to succeed.

### III. THE COURTS LOOK AT PLAINTIFF STATUS: ONLINE DEFAMATION

To make determinations of plaintiff status in online defamation cases, the most frequent focus thus far has been the plaintiffs’ use of the media. A handful of courts – both federal and state – have examined the role of Internet usage in online defamation cases when deciding whether a plaintiff is a private person or a limited-purpose public figure. For the most part, the courts have relied on the *Waldbaum* test<sup>203</sup> with some minor modifications to account for the importance of any Internet communications that occurred in the cases.

In 2002, the Georgia Supreme Court addressed plaintiff status in an online defamation case involving the director of a solid-waste management authority.<sup>204</sup> In *Mathis v. Cannon*, the court considered whether the plaintiff was a public figure for the purposes of a defamation action arising out of comments posted on an electronic message board.<sup>205</sup> The state supreme court, referencing the federal appellate court decision in *Waldbaum*, applied the same test for plaintiff status used in traditional print and broadcast

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<sup>198</sup> *Id.* at 939.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 934.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See infra.*

<sup>204</sup> *Mathis v. Cannon*, 573 S.E.2d 376 (Ga. 2002).

<sup>205</sup> *Id.* at 377-378.

defamation cases.<sup>206</sup> Thus, it focused its inquiry on defining the public controversy, uncovering the plaintiff's role in the identified controversy and deciding whether the communication was relevant to the plaintiff's role in the controversy.<sup>207</sup> The state supreme court, noting the public controversy surrounding the operation of the solid-waste and recycling facilities, cited three ways in which the director was involved:

First, [Cannon] was a crucial actor in helping the authority obtain the commitments from other county and city governments in south Georgia to provide solid waste for the authority's facility. ... Second, Cannon represented the authority in a variety of ways that far exceeded the terms of TransWaste's contract to collect and haul solid waste to Crisp County. ... Third, Cannon precipitated the financial crisis in November 1999 by filing a lawsuit against the authority and then temporarily halting deliveries to the solid waste recovery plant.<sup>208</sup>

Observing that the determining factor is not the mass interest in a specific controversy, but is instead whether such a controversy generates "discussion, debate and dissent in the relevant community," the supreme court found the comments posted by the defendant to be germane to the plaintiff's role in the solid-waste controversy.<sup>209</sup> Because all three prongs of the *Waldbaum* test were met, the supreme court found the plaintiff to be a limited-purpose public figure for the purposes of the online defamation case.<sup>210</sup>

Three years after *Mathis*, the Georgia Court of Appeals addressed the same issue in *Atlanta Humane Society v. Mills*.<sup>211</sup> After Kathi Mills posted comments on an Internet bulletin board about the Atlanta Humane Society's animal control work in Fulton County, Georgia, the AHS and its director, Bill Garrett, filed suit for defamation.<sup>212</sup> The Georgia Court of Appeals held that Garrett was properly classified as a limited-purpose public figure.<sup>213</sup> In making such a determination, the court noted that Garrett had given many interviews and issued numerous press releases pertaining to AHS's work in Fulton County.<sup>214</sup> Further, the court noted, he specifically spoke to an Atlanta TV station that was doing an investigative piece that led to the public outcry surrounding AHS's work.<sup>215</sup>

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<sup>206</sup> *Id.* at 381. "Under this analysis, a court 'must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy.'" *Id.* (quoting *Jewell*, 555 S.E.2d at 175 (adopting the test used in *Waldbaum*, 627 F.2d at 1296-1298)).

<sup>207</sup> *Mathis*, 573 S.E.2d at 381.

<sup>208</sup> *Id.* at 382.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 383.

<sup>211</sup> 618 S.E.2d 18 (Ga. Ct. App. 2005).

<sup>212</sup> *Id.* at 23.

<sup>213</sup> *Id.* at 24.

<sup>214</sup> *Id.* at 23.

<sup>215</sup> *Id.*

In addition, he sent a letter to county government officials to voice support for AHS.<sup>216</sup> Even if those actions alone would not be enough to establish that Garrett voluntarily participated in influencing the outcome of a public controversy, the court noted that he may be one of the limited number of plaintiffs rightly classified as involuntary public figures.<sup>217</sup> Citing *Atlanta Journal-Constitution v. Jewell*,<sup>218</sup> the court said his position as director may place him in a role that would be expected to affect the outcome of a controversy:

[O]ccasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has ‘invited comment’ relating to the issue at hand.<sup>219</sup>

As a result, the court while deciding an online defamation case, turned to one of the key elements used to determine plaintiff status in print and broadcast defamation cases: access to the media.

Not long after the second online defamation case in Georgia addressed the issue of plaintiff status, a case arose in California as well. In *Ampex Corporation v. Cargle*,<sup>220</sup> a California appellate court ruled that Ampex, a corporation that was suing a former employee for posting defamatory statements online, was a limited-purpose public figure.<sup>221</sup> In making this determination, the court noted that the fact there were a number of postings on Yahoo! Message boards regarding Ampex’s decision to discontinue one of its technology projects was evidence of a public controversy likely to impact nonparticipants.<sup>222</sup> Ampex, the court noted, was a publicly traded company with more than 59,000 outstanding shares of stock, the prices of which would be affected by Ampex’s decision to discontinue one of its projects. As evidence that Ampex voluntarily sought to influence public opinion about its technology project, the court pointed to the press releases and letters, which Ampex posted on its Web site, touting the potential of the project for the company’s future.<sup>223</sup> When determining that the alleged defamatory comment pertained to the controversy, the court reasoned that the former employee’s comments provided a contrast to those of Ampex, pointing to management issues with the project as opposed to trouble in the technology market.<sup>224</sup> All of those factors, including the company’s use of its own Web site to communicate,<sup>225</sup> provided enough

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See infra.*

<sup>219</sup> *Id.* (quoting *Jewell*, 555 S.E.2d at 193).

<sup>220</sup> 27 Cal.Rptr.3d 863 (Cal. App. 4th, 2005).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 870.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See also* *Bieter v. Fetzer*, 2005 WL 89484 (Minn. Ct. App.). In *Bieter*, the Minnesota Court of Appeals noted, in ruling that plaintiff Bieter was a limited-purpose public figure, that he had

evidence to support the finding that Ampex was a limited-purpose public figure for the purpose of its online defamation case against Cargle, the former employee.<sup>226</sup>

The Tennessee Court of Appeals heard a similar case involving a businessman who modified Jet Skis.<sup>227</sup> In *Hibdon v. Grabowski*, the businessman sued for defamation after Grabowski, a personal watercraft user, made statements on an Internet news group and a competitor's Web site questioning whether Hibdon's watercraft performed as he had claimed.<sup>228</sup> In ruling that Hibdon was a limited-purpose public figure, the court noted that he had availed himself of the media resources available by boasting on a Internet news group, agreeing to interviews for magazine articles (including a cover story) about his Jet Skis and fielding worldwide phone inquiries about his products.<sup>229</sup> The court found that a public controversy existed as to Hibdon's Jet Ski modifications arising out of his Internet news group posting well before the defamatory statements were made.<sup>230</sup> One of the reasons the court cited for finding the issue was a public controversy was the wide reach of the Internet news group, which allowed people who were not direct participants to obtain information about the discussion:

The dispute as to the accuracy of Hibdon's claimed successes with modifying jet skis to achieve record-breaking speeds received public attention because its ramifications would be felt by persons who are not direct participants, those persons being individuals in the jet ski modification business, as well as recreational jet ski enthusiasts and purchasers of jet skis. This group includes individuals within the United States and many foreign countries.<sup>231</sup>

The court further found that Hibdon's extensive use of the Internet and a magazine to counter the alleged defamatory statements, which occurred as a result of the controversy surrounding Hibdon, placed him into the category of those speakers who voluntarily inject themselves into a public controversy with the intent of shaping the outcome.<sup>232</sup> Thus, the very nature of the discussion, arising out of the Internet news groups, helped to propel Hibdon to his status as a limited-purpose public figure in the eyes of the court.

In the same year, the U.S. District Court for the District of Columbia ruled on a motion for summary judgment in which the defendants asserted the plaintiffs were public figures.<sup>233</sup> In *OAO Alfa Bank v. Center for Public Integrity*, the Center for Public

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started an Internet chatroom dedicated to the refutation of defendant Fetzer's speech. Further, the court opined that he presented his experience as a prosecutor in a manner that cast him as an expert to discredit Fetzer's communications. *Id.* at 3.

<sup>226</sup> *Id.*

<sup>227</sup> *Hibdon v. Grabowski*, 195 S.W.3d 48 (Tenn. Ct. App. 2005).

<sup>228</sup> *Id.* at 55.

<sup>229</sup> *Id.* at 59.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 60.

<sup>232</sup> *Id.* at 62.

<sup>233</sup> *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp.2d 20 (D. D.C. 2005).

Integrity argued that OAO Alfa Bank should be considered a public figure, in which case it would be required to prove actual malice in its online defamation lawsuit.<sup>234</sup> The case stemmed from an online report published by the Center for Public Integrity that alleged the plaintiffs and OAO Alfa Bank had ties to organized crime and the drug trade.<sup>235</sup> Relying, like the state courts in their respective cases, on the D.C. Circuit's *Waldbaum* decision, the federal district court found the plaintiffs to be limited-purpose public figures.<sup>236</sup>

In its decision, the D.C. trial court noted that *Waldbaum* requires that a limited-purpose public figure have the "necessary degree of notoriety ... where the defamation was published."<sup>237</sup> In this case, the defamatory statements were published on the Internet, and the court reasoned:

[t]he audience for the CPI article is not confined to the United States merely because that is where the authors of the piece choose to work, and it is not immediately apparent why the limited public figure inquiry should be so confined.<sup>238</sup>

Further, the court looked at the plaintiffs' access to media on a worldwide scale to bolster its assertion that the plaintiffs were limited-purpose public figures.<sup>239</sup> In its analysis, the district court appeared to be recognizing special circumstances created by the use of the Internet.

By 2006, federal courts, as well as state courts, appeared to rely primarily on the traditional *Waldbaum* test of access to the media, with some modifications to examine the role of the Internet, to determine plaintiff status in online defamation cases. In *World Wide Association of Specialty Programs v. Pure Inc.*,<sup>240</sup> the Tenth Circuit used a modified *Waldbaum* analysis to uphold a district court decision. In the case, it ruled that an association of residential treatment programs for at-risk teens was a limited-purpose public figure in a defamation case that stemmed from comments pseudonymously posted on the Internet by a competitor.<sup>241</sup> The court, identifying the public controversy as "how to deal with troubled teens," noted that the plaintiff's employees had been interviewed numerous times by large-scale, national media entities for the purpose of commenting on the issue.<sup>242</sup> Further, the plaintiff's business was designed to promote the techniques used by its member schools as a means of treating troubled teens, which placed World Wide

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<sup>234</sup> *Id.* at 42.

<sup>235</sup> *Id.* at 43-46.

<sup>236</sup> *Id.* at 47. "Simply put, [the plaintiffs] are players on the world stage; hence, they are limited public figures not only in Russia, but in the United States as well." *Id.*

<sup>237</sup> *Id.* (quoting *Waldbaum*, 627 F.2d at 1295 n. 22).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> 450 F.3d 1132 (10th Cir. 2006).

<sup>241</sup> *Id.* at 1137.

<sup>242</sup> *Id.*

squarely in the middle of the controversy.<sup>243</sup> The court repeatedly mentioned World Wide's use of the media to promote its clients as a justification for its limited-purpose public figure status in much the same way that the Georgia and Tennessee courts used that rationale in earlier online defamation cases.

#### IV. CONCLUSION

The Supreme Court has created a complex framework for evaluating plaintiff status, a decision that determines whether a plaintiff will be required to prove actual malice or negligence to succeed in defamation action. Although it has outlined three major categories of plaintiffs in defamation actions: public officials, public figures and private persons, no bright-line rules have been constructed to guide lower courts, leaving the plaintiff status jurisprudence in disarray. Add to that the increased reliance on the Internet as a means of mass communication, and it is no wonder American courts have struggled to develop a uniform standard for determining plaintiff status in online defamation cases.

To make determinations of plaintiff status in online defamation cases, the most frequent focus thus far has been the plaintiffs' use of the media. A handful of courts – both federal and state – have examined the role of Internet usage in online defamation cases when deciding whether a plaintiff is a private person or a limited-purpose public figure. For the most part, the courts have relied on the *Waldbaum* test with some minor modifications to account for the importance of any Internet communications that occurred in the cases. In some of these cases, the courts seem to imply that the plaintiffs' extensive reliance on the Internet has pushed them into the public figure category.

Basing a plaintiff status determination on a plaintiff's reliance on the Internet raises significant issues. First, the Average Joe's reliance on the Internet to counteract speech cannot be equated with a public official or public figure's ability to use the traditional media to rebut a defamatory message. Having the ability to post a message via Twitter, Facebook or a blog can hardly be expected to serve as an equally effective countermeasure to having a major media organization carry a rebuttal message. Until the balance of power between speech on the Internet and speech carried by the institutional press equalizes, the courts must still protect the private person's interest in his or her reputation. At this point, any attempt to suggest that access to the Internet alone can remedy defamatory speech seems short-sighted given the continued incumbency of powerful traditional media speakers. Further, the transient nature of the Internet and its users makes it difficult to direct rebuttal speech at the original audience.

Second, the ease with which a plaintiff can easily access the Internet creates a situation in which plaintiffs may enter into a discussion without the intent to thrust themselves into a controversy. The anonymity and seemingly isolated nature of Internet conversations create an environment in which a plaintiff may not realize he or she is communicating on a global stage. E-mail, for example, illustrates this point with striking

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<sup>243</sup> *Id.* "As the marketing arm for the various programs that it promotes, World Wide 'chose to place itself in the national spotlight advocating this method.'" *Id.*

clarity. Although it seems akin to a traditional form of intrapersonal communication, e-mail can be mass transmitted (by either the original sender or a zealous forwarder) with the click of a button. It can hardly be said that plaintiffs who seek out interviews with newspaper reporters, television stations and other traditional mass media communicators could mistake their soon-to-be mass message with a seemingly interpersonal one. Until Average Joe's knowledge base catches up to the technological advances of the Internet, it hardly seems just to presume a simple e-mail or blog posting constitutes an affirmative attempt to embroil himself in a controversial situation. A similar claim made about the use of the traditional mass media at this point in time seems disingenuous at most. As a result, it seems any attempts by the courts to use a plaintiff's reliance on the Internet to determine status as a public figure are a bit premature. The considerations outlined by the Supreme Court in *Hutchinson v. Proxmire* and *Gertz v. Welch* still seem to ring true despite any technological advances attributable to the Internet.

At this juncture, it would appear that courts must continue to protect Average Joe from being considered a public figure of any type based solely on his Internet usage. Certainly, it is easy to imagine a situation in which Internet usage forms the basis for a public figure's status: take Matt Drudge or other bloggers who rise to the level of prominence intended by the justices in *Curtis Publishing, Hutchinson* and *Gertz*. However, the courts must avoid a large-scale reliance on the involuntary public figure category in defamation cases involving the Internet. Applied haphazardly to these cases, the involuntary public figure doctrine may become the exception that swallowed the rule – all but obliterating the state's interest in protecting private persons.

# BLOGGERS AFTER THE SHIELD: DEFINING JOURNALISM IN PRIVILEGE LAW

JASON M. SHEPARD

*Josh Wolf claims to be the longest jailed journalist in American history after courts rejected his journalist's privilege claims and he spent 226 days in prison. But was the blogger really a journalist entitled to invoke privilege protections? Academics, journalists, lawyers, judges and lawmakers have struggled to articulate legal definitions of journalism as bloggers increasingly seek newsgathering protections. This article evaluates controversies in state statutory interpretation, federal shield law proposals and federal common-law development. The article argues that the analytical evolution in federal and state case law supports expanding privilege protection to bloggers whose purposes, processes and products are similar to professional journalists' historical practices and values.*

**Keywords:** journalist's privilege, newsgathering, bloggers, journalism

## I. INTRODUCTION

When blogger Josh Wolf left federal prison in April 2007 after being incarcerated for 226 days, he boasted he was the "longest jailed journalist in U.S. history for committing journalism."<sup>1</sup> A year earlier, Judith Miller of the *New York Times* spent 85 days in jail until she agreed to testify about her confidential interviews with the chief of staff to the Vice President of the United States.<sup>2</sup> And in 2001, an aspiring writer

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<sup>1</sup> The statement was featured on his Web site, available at <http://www.joshwolf.net/freejosh/> (item dated Nov. 21, 2006; last visited Sept. 6, 2008).

<sup>2</sup> In Re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005). For an overview of the Miller case, See Marie Brenner, *Lies and Consequences: Sixteen Words That Changed the World*, VANITY FAIR, April 2006, at 204. See also Lynn Duke, *The Reporter's Last Take*, WASHINGTON POST, Nov. 10, 2005; Don Van Natta, Jr., *The Miller Case: A Notebook, A Cause, A Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005; Judith Miller, *My Four Hours Testifying in the Federal Grand Jury Room*, N.Y. TIMES, Oct. 16, 2005; David Johnson and Richard W. Stevenson, *Cheney Aide Charged With Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005; Statement of Patrick J. Fitzgerald, *He Wasn't Looking for 'a First Amendment Showdown,' Leak Prosecutor Says*, N.Y. TIMES, Oct. 29, 2005; FLOYD ABRAMS, *SPEAKING FREELY*, 289-304 (2006 ed.).

named Vanessa Leggett spent 168 days in prison for her refusal to turn over notes and testify about a murder investigation.<sup>3</sup>

Jail sentences for journalists who refuse to turn over newsgathering material to federal law enforcement investigators have become longer and more frequent in recent years.<sup>4</sup> This is partly a result of the law's state of flux in federal courts because of differing interpretations of the United States Supreme Court's 1972 decision in *Branzburg v. Hayes*.<sup>5</sup> As a result of these and other high-profile journalist's privilege cases, the 111<sup>th</sup> Congress came close to passing a federal journalist's privilege statute, which at the time of this writing had passed the U.S. House of Representatives and was reported out of committee in the U.S. Senate.<sup>6</sup> In the 110<sup>th</sup> Congress, a bill won approval in the House of Representatives on a vote of 398-21 but died in the Senate when the Congress adjourned in January 2009.<sup>7</sup>

One of the sticking points in the congressional debate was whether statutory protections should extend to bloggers, the 21<sup>st</sup> century's embodiment of the lonely, colonial pamphleteer.<sup>8</sup> The question of who is a journalist for the purpose of privilege protection has been one of the most perplexing problems in the common law, constitutional and public policy debates over a journalist's privilege. In its only decision on the First Amendment and the journalist's privilege, the Supreme Court in *Branzburg* noted that defining who qualifies for protection "would present practical and conceptual difficulties of a high order."<sup>9</sup> Since that 1972 decision, academics, lawyers, judges, journalists, and members of Congress have struggled to articulate the best definition of

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<sup>3</sup> On Vanessa Leggett, See Daniel Scardino, *Vanessa Leggett Serves Maximum Jail Time, First-Amendment-Based Reporter's Privilege Under Siege*, FINDLAW, June 25, 2003, available at <http://library.findlaw.com/2003/Jun/25/132831.html> (last visited Sept. 6, 2008).

<sup>4</sup> See Bree Nordenson, *The Shield Bearer*, COLUMBIA JOURNALISM REVIEW, May/June 2007, at 4; Douglas McCollam, *The End of Ambiguity*, COLUMBIA JOURNALISM REVIEW, July/August 2006, at 21; Rachel Smolkin, *Waivering*, AMERICAN JOURNALISM REVIEW, February/March 2006, at 32; and Lori Robertson, *Kind of Confidential*, AMERICAN JOURNALISM REVIEW, June/July 2007, at 26.

<sup>5</sup> See Len Neihoff, *The Constitutional Privilege After Branzburg: An Historical Overview* in Media Law Resource Center Bulletin, *White Paper on the Reporter's Privilege* (2004).

<sup>6</sup> Reporters Committee for Freedom of the Press, *Federal Shield Bill Passes Senate Judiciary Committee*, Dec. 21, 2009, available at: <http://www.rcfp.org/newsitems/index.php?i=11167> (last visited Dec. 23, 2009).

<sup>7</sup> H.R. 2102, 110<sup>th</sup> Cong. (2007) and S. 2035, 110<sup>th</sup> Cong. (2007). For a comparison of the major bills in the 109<sup>th</sup> and 110<sup>th</sup> Congress, see *Journalist's Privilege: Overview of the Law and Legislation in the 109<sup>th</sup> and 110<sup>th</sup> Congress*, C.R.S. Report for Congress, (July 29, 2008), available at <http://www.fas.org/sgp/crs/secretary/RL34193.pdf> (last visited Sept. 20, 2008). See also Lindsay Kalter, *Trying Again*, AMERICAN JOURNALISM REVIEW, October/November 2008, available at [http://www.ajr.org/article\\_printable.asp?id=4633](http://www.ajr.org/article_printable.asp?id=4633) (last visited Feb. 2, 2009).

<sup>8</sup> See Declan McCullagh, *Senator: Bloggers will "probably not" be deemed journalists*, CNET NEWS.COM, Oct. 10, 2005, and Joe Strupp, *Shield Law's Definition, National Security Exemption Raises Concerns*, EDITOR & PUBLISHER, Oct. 5, 2007.

<sup>9</sup> *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

“journalist” for purpose of the journalist’s privilege.<sup>10</sup> During congressional debates over “newsmen’s privilege” bills in the 1970s, some definitional proposals sought to include experienced freelance reporters and investigative book authors; sponsors argued that their work was indistinguishable in substance from mainstream newspaper reporters.<sup>11</sup>

Some scholars and judges, beginning with Justice Byron White in the *Branzburg* majority, have argued that the difficulties in defining journalists render the entire concept of a journalist’s privilege suspect. The development and rapid explosion of the blogosphere has exacerbated these concerns. If Josh Wolf can be considered a journalist, couldn’t anybody?<sup>12</sup> Appellate Judge David Sentelle emphasized the practical and theoretical definitional problems with the privilege in rejecting the First Amendment-based journalist’s privilege claim from the *New York Times*’ Judith Miller, suggesting no distinction could be drawn between professional journalists and the “stereotypical ‘blogger’ sitting in his pajamas at his personal computer.”<sup>13</sup> During the 2007 and 2008

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<sup>10</sup> See generally Scott Neinas, *A Skinny Shield is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute That Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225 (2008); Mary Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2006); Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. PUB. POL. 751 (2006); Stephanie J. Frazee, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAN. J. ENT. & TECH. L. 609 (2005); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97 (2002); Clay Calvert, *And You Call Yourself a Journalist? Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, (1999); Daniel A. Swartwout, *In Re Madden: The Threat to New Journalism*, 60 OHIO ST. L.J. 1589 (1999); Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist’s Privilege*, 69 WASH. L. REV. 739 (1994).

<sup>11</sup> For a discussion of the 1970s hearings in the U.S. House of Representatives, see Jason M. Shepard, *After the First Amendment Fails: The Newsmen’s Privilege Hearings of the 1970s*, 14 COMM. L. & POL’Y. 373 (2009). Seymour Hersh, for example, won a Pulitzer Prize for his reporting about the 1968 killings of Vietnam civilians in the so-called My Lai Massacre. Hersh was a freelance reporter working for an upstart wire service. See Seymour Hersh, *CHAIN OF COMMAND: THE ROAD FROM 9/1 TO ABU GHRAIB*, ix-xi (2004).

<sup>12</sup> Alex Koppelman, *First Amendment martyr?* SALON.COM, April 13, 2007, available at [http://www.salon.com/news/feature/2007/04/13/josh\\_wolf](http://www.salon.com/news/feature/2007/04/13/josh_wolf) (last visited July 8, 2007). Wolf worked on his high school and college newspapers and had an internship at an alternative newsweekly in Santa Barbara, California. See Bob Egelko, *Freelancer doesn’t want mainstream job*, SAN FRANCISCO CHRONICLE, Aug. 2, 2006.

<sup>13</sup> *In Re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). As it relates to bloggers, Judge Sentelle wrote: “Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? ... (D)oes the privilege also protect the proprietor of a web log: the stereotypical ‘blogger’ sitting in his pajamas at his

debates over a statutory privilege, officials with the United States Department of Justice argued that “(d)efining who is entitled to invoke a ‘reporter’s privilege’ is a very difficult, if not intractable, problem,” and predicted “bloggers and MySpace users” would flood the courts with journalistic claims to avoid subpoenas if Congress passed a law.<sup>14</sup> In recent congressional debates, several lawmakers expressed worry about the lack of accountability for bloggers who do not report to editors and executives of news organizations.<sup>15</sup> And professor Randall D. Eliason, a former federal prosecutor, has argued that “rapid technological changes in both the nature and quantity of information regularly made available to the public suggest that a reporter’s privilege may soon have to be considered a relic of a simpler era – a relic that now is neither workable or necessary.”<sup>16</sup>

This article refutes these claims and argues that definitional problems are not an insurmountable obstacle to the preservation of journalist’s privilege as a legal doctrine. Based on this research into federal and state case law documenting a long legal history of journalists’ privilege claims by non-traditional journalists, I argue that the emergence of bloggers-as-journalists does not present a wholly new legal question, nor should definitional problems render the privilege doctrine unworkable.

Still, the cataclysmic changes to journalism and information dissemination brought by the Internet make it likely that bloggers will increasingly challenge both federal and state privilege interpretations. Because of worries expressed by both judges and scholars that bloggers may present intractable problems to the privilege, a coherent theoretical framework would be beneficial to the preservation of the privilege. Such a framework is particularly relevant to the future development of the federal common law privilege and the privilege as it develops in states with broad definitional clauses. It is

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personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court’s vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?”

<sup>14</sup> Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Rep. Lamar S. Smith (July 31, 2007), *available at* <http://www.usdoj.gov/opa/mediashield/odni-view-ltr-hr2102-092707.pdf> (last visited Sept. 5, 2008).

<sup>15</sup> Declan McCullagh, *So Who Should You Call a Journalist?* CNET NEWS.COM, Oct. 24, 2005, *available at* [http://news.cnet.com/2010-1025\\_3-5907336.html](http://news.cnet.com/2010-1025_3-5907336.html) (last visited Sept. 8, 2008) (quoting Senator Richard Lugar, R-Ind., a leading author of a Senate bill, saying bloggers will “probably not” be deemed journalists under the law and Sen. John Cornyn, R-Tex., as saying, “The relative anonymity afforded to bloggers, coupled with a certain lack of accountability, as they are not your traditional brick-and-mortar reporters who answer to an editor or publisher, also has the risk of creating a certain irresponsibility when it comes to accurately reporting information.”)

<sup>16</sup> Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter’s Privilege*, 24 CARDOZO ARTS & ENT. L.J. 386 (2006).

also relevant to public policy debates that are likely to continue in Congress,<sup>17</sup> as well as states that might enact statutes or revise current ones.<sup>18</sup>

First, this article provides a brief history of legal claims by bloggers seeking newsgathering protections. Second, it examines three decades of case law in which federal and state court judges explored the legal dilemmas raised by asking who is a journalist and synthesizes the essential elements of journalism that judges have used to answer this question. Finally, this article evaluates legal and scholarly definitional proposals and finds that the best proposals require the individual seeking privilege protection to adhere to basic journalistic ethical standards based on traditional notions of newsgathering, drawing from historical practices and modern journalism ethics codes. I offer what I call a “comprehensive functional analysis” as one solution to the definitional problem. This analytical framework may help resolve definitional questions that will continue to arise in statutory, constitutional and common law development and interpretation.

I argue that the body of judicial decisions examining the definitional question suggests that the adherence to journalism ethics is an important component of the calculus as to whether an individual is entitled to invoke the privilege. In case after case in which judges are presented with the definitional question, this research finds that judges have implicitly examined the purposes, practices and product of individuals seeking journalistic protection and have extended protection to individuals whose principles and practices were similar to traditional notions of newsgathering. While judges have not explicitly framed their analysis in terms of ethical decision-making, this article concludes that journalism ethics should be one component to constructing the boundaries of who qualifies for protection.<sup>19</sup> In viewing the definitional question through a framework of journalism ethics, this approach supports the application of the privilege to bloggers and “citizen journalists” who practice journalism in a new medium, but excludes protection for online publishers whose practices and purposes are not fundamentally journalistic in nature.

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<sup>17</sup> The Free Flow of Information Act of 2009 was introduced in the House of Representatives at the start of the 111<sup>th</sup> Congress and was identical to the bill passed in the previous term. See Reporters Committee For Freedom of the Press, News Media Update, *Shield Law Re-Introduced in House*, Feb. 11, 2009, available at <http://www.rcfp.org/newsitems/index.php?i=9946> (last visited Feb. 13, 2009).

<sup>18</sup> For example, the Kansas state Legislature has spent several recent terms debating a reporter’s privilege statute. See Reporters Committee for Freedom of the Press, *Kansas legislature holds hearing on shield law*, Feb. 13, 2009, available at <http://www.rcfp.org/newsitems/index.php?i=9950> (last visited Feb. 14, 2009). A privilege bill died in the Massachusetts legislature in 2008. See Reporters Committee for Freedom of the Press, *Slim chance of a Mass. shield law this year*, July 30, 2008, available at <http://www.rcfp.org/newsitems/index.php?i=6888> (last visited Feb. 14, 2009).

<sup>19</sup> See also David Abramowicz, *Calculating the Public Interest in Protecting Journalists’ Confidential Sources*, 108 Colum. L. R. 1949 (2008) (arguing that journalistic values and ethical codes should be legally relevant to public interest balancing in privilege cases).

## II. BLOGGERS AND NEWSGATHERING LAW CLAIMS

The Internet continues to profoundly change the nature of the news business.<sup>20</sup> Traditional newspapers are fighting for financial viability while shifting diminishing resources to the Web in order to capture readership and thwart steep revenue declines.<sup>21</sup> The Internet has also given rise to entirely Web-based news organizations, such as *Salon* and *Politico*, and hybrid news gathering/aggregator sites like the *Huffington Post*. The Internet has also allowed individuals to launch Web sites, post content, and have potential access to huge audiences. These bloggers write about a wide range of topics, the vast majority of which have little to do with journalism. But while a survey of the brief history of the blogosphere reveals that not all bloggers are journalists, some bloggers practice journalism some of the time.

One archetype of these journalist-bloggers is Matt Drudge, who beginning in 1995 has posted news and news-related links to his Web site, now known as the *Drudge Report*.<sup>22</sup> Today, he boasts 680 million hits a month to his Web site, making it one of the most visited news sites in the world.<sup>23</sup> Drudge was the first to publish details about President Bill Clinton's affair with Monica Lewinsky and is the first blogger to be sued by a public official demanding the blogger's sources.<sup>24</sup> While the case was dismissed on other grounds, a district judge noted that Drudge would not qualify for a "news gathering exception" to jurisdictional laws because "Drudge is not a reporter, a journalist or a newsgatherer."<sup>25</sup> The determination never made it to an appeals court for review, although it seems suspect today given Drudge's decade-long history as a provider of news.

Since the *Drudge* case, several other bloggers have asserted journalist's privilege claims. One of the most extensive judicial treatments thus far of the definitional question as it relates to bloggers came in May 2006 in *O'Grady v. Superior Court*, in which a California appeals court overturned a lower court's ruling that three bloggers had to

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<sup>20</sup> See generally SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE (2007) and NEIL HENRY, AMERICAN CARNIVAL: JOURNALISM UNDER SIEGE IN AN AGE OF NEW MEDIA (2007).

<sup>21</sup> Some print newspapers, including the *Christian Science Monitor* and *The Capital Times* in Madison, Wis., have stopped printing altogether and instead rely on the Web as their primary mode of distribution. See generally Walter Issacson, *How to Save Your Newspaper*, TIME, Feb. 5, 2009, available at [http://www.ajr.org/article\\_printable.asp?id=4633](http://www.ajr.org/article_printable.asp?id=4633) (last visited Feb. 13, 2009), and PHILIP MEYER, THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE (2004).

<sup>22</sup> For Drudge's account of the rise of his Web site, see MATT DRUDGE, DRUDGE MANIFESTO (2000).

<sup>23</sup> Statistics listed on Drudge's Web Site, <http://www.drudgereport.com> (last visited Sept. 9, 2008).

<sup>24</sup> For an overview of the legal issues in the Drudge case, see generally Robert M. O'Neil, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 WASH. L. REV. 623 (1998).

<sup>25</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998).

reveal their sources.<sup>26</sup> The appeals court determined that the bloggers who regularly reported about Apple Computer, Inc., qualified for protection under the state shield law because they were involved in the “gathering and disseminating of news.”<sup>27</sup> Apple had sought the identity of individuals who leaked to the bloggers information about unreleased Apple products. Relying on the statutory language that protects a person “connected with or employed” by a “newspaper, magazine or other periodical publication,” the court distinguished the bloggers from anonymous Web posters by determining that their Web sites “reflect a kind and degree of editorial control that makes them resemble a newspaper or magazine far more closely” than other online web sites.<sup>28</sup> The court also distinguished the blogs from paid advertisements and said “in no relevant respect do they appear to differ from a reporter or editor for a traditional business-oriented periodical.”<sup>29</sup> The essential element of distinction was the degree to which the bloggers employed traditional journalistic methods and values in their work. The decision was the first decisive victory for bloggers invoking the journalist’s privilege.<sup>30</sup>

Other cases suggest that individuals who post information to the Web in a variety of formats may describe themselves as “bloggers” and also “journalists” for purposes of legal protections. In September 2006, Target Corp. filed a federal lawsuit against an anonymous blogger, seeking his identity from several Internet Service Providers after he posted details of Target’s shoplifting policies on a Web site. The lawsuit was dropped without the blogger revealing his sources.<sup>31</sup> In September 2008, a Montana judge ruled that a newspaper did not have to reveal the identities of two anonymous posters to its Web site. The judge determined that anonymous “bloggers” to the Web site were protected under a state statutory privilege that protected “any person connected with or employed by a [news organization] for the purpose of gathering, writing, editing or disseminating news,” but made no attempt to distinguish the anonymous posters from

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<sup>26</sup> O’Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), *overturning* Apple Computer, Inc. v. Doe, No. 1-04-CV-032178 (Cal. Super. Ct., Mar. 1, 2005). See Matthew Bloom, *Subpoenaed Sources and the Internet: A Test for When Bloggers Should Reveal Who Misappropriated a Trade Secret*, 24 YALE L. & POL’Y REV. 471 (2006); *Protecting the New Media: Application of the Journalist’s Privilege to Bloggers*, 120 HARV. L. REV. 996 (2007).

<sup>27</sup> *Id.* at 70.

<sup>28</sup> *Id.* at 49.

<sup>29</sup> *Id.* at 70.

<sup>30</sup> While the *O’Grady* case was a victory for online journalists, an earlier Apple lawsuit resulted in a settlement in which Apple dropped its attempts to identify a blogger’s sources in exchange for the blogger’s agreement to stop publishing the Web site. Apple Computer, Inc. v. Nick DePlume. No. 1-05-CV-033341 (Cal. Super. Ct. Complaint filed Jan. 18, 2005). See also Reporters Committee for Freedom of the Press News Media Update, *Apple strong-arms Web site into going dark*, Dec. 20, 2007, available at <http://www.rcfp.org/newsitems/index.php?i=149> (last visited Sept. 9, 2008).

<sup>31</sup> Justin Rubner, *Suit: Blogger posted Target trade secrets*, MSNBC.COM, Sept. 19 2006. The case involved the Web site <http://targetcorpsucks.blogspot.com>. (last visited Sept. 9, 2008).

journalists or reporters and instead relied on the commonalities between confidential sources and anonymous posters.<sup>32</sup>

As a matter of law, judges sometimes skirt the definitional question and assume without analysis that bloggers qualify for protection. This is because most jurisdictions provide for a qualified, rather than absolute, privilege, so judges have ruled that the individual is indeed a journalist for purposes of the law but nonetheless must reveal sources or provide testimony. That is what happened with Josh Wolf. In 2005, then 23-year-old Wolf attended and videotaped an anarchist street protest in San Francisco where a police officer was injured and a squad car set on fire. He sold footage to a local television station and posted some on his blog. Later, a federal grand jury subpoenaed Wolf for his testimony and video as part of its investigation into the protest.

Despite Wolf's declaration that his video showed nothing helpful to the police investigation, he refused to comply with the subpoena on the grounds that the First Amendment protected him from compelled disclosure.<sup>33</sup> A district judge found him in contempt, and the Ninth Circuit Court of Appeals rejected Wolf's appeal. As Wolf went to jail, the case became a cause célèbre of journalists, who had suffered a number of recent high-profile defeats in privilege cases.<sup>34</sup> Wolf was named "journalist of the year" by the Northern California chapter of the Society of Professional Journalists, and dozens of press organizations signed onto amicus briefs and editorialized for his release.<sup>35</sup> "He may not have the clout or journalism credentials of some of the other government targets, but Josh Wolf is no less entitled to First Amendment protection," the *San Francisco Chronicle* wrote in an editorial headlined, "Free Josh Wolf."<sup>36</sup> The Reporters Committee for Freedom of the Press, which was founded in the *Branzburg* era in part as a reaction to the threatened jailings of a number of newspaper reporters, helped pay for Wolf's legal defense.<sup>37</sup>

Wolf's case helped intensify the effort in 2007 and 2008 for the passage of a federal shield statute by the U.S. Congress, and bloggers watched closely as policy-makers debated various proposals.<sup>38</sup> The bill passed by the U.S. House would not have covered many bloggers. It would have protected "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes news or information that concerns local, national or international events or other matters of public

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<sup>32</sup> Reporters Committee for Freedom of the Press News Media Update, *Anonymous bloggers protected by shield law, judge finds*, Sept. 4, 2008, available at <http://www.rcfp.org/newsitems/index.php?i=6964> (last visited Sept. 9, 2008).

<sup>33</sup> Bob Egelko, *Cameraman jailed for not yielding tape*, SAN FRANCISCO CHRONICLE, Aug. 2, 2006.

<sup>34</sup> See *supra* note 4.

<sup>35</sup> *Free Josh Wolf*, SAN FRANCISCO CHRONICLE, August 3, 2006, at B6.

<sup>36</sup> *Id.*

<sup>37</sup> Dana Hull, *Lone Wolf*, AMERICAN JOURNALISM REVIEW, April/May 2007.

<sup>38</sup> Walter Pincus, *Senate Panel Freezes Bill on Legal Protections for Reporters*, THE WASHINGTON POST, Sept. 24, 2006. For an analysis of prior federal attempts, see Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006).

interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person."<sup>39</sup> Bills advanced in the Senate did not include the requirement that a person be financially supported by his or her work and therefore were likely to protect more bloggers. As the 2007-08 Congress came to a close, the bill languished in the Senate after President Bush's advisors said they would recommend a presidential veto.<sup>40</sup>

This brief review of legal cases suggest that bloggers will increasingly assert legal rights as journalists if they receive subpoenas for confidential sources or unpublished materials.<sup>41</sup> How, then, should the law make distinctions between bloggers and traditional journalists? An analysis of case law involving claims by other non-traditional journalists, discussed below, suggests that the purposes, processes and products of the individual are important components of the answer.

### III. LEGAL FOUNDATIONS OF THE JOURNALIST'S PRIVILEGE

Cases involving blogger claims represent the latest chapter in what has always been a controversial and crucial component to journalist's privilege protections. A significant body of case law has developed in the federal courts in the 37 years since *Branzburg v. Hayes* focusing on the question of who qualifies for protection. Courts have been asked to extend the privilege to freelance writers,<sup>42</sup> professors and academic researchers,<sup>43</sup> book authors,<sup>44</sup> student-newspaper reporters,<sup>45</sup> a professional wrestling

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<sup>39</sup> H.R. 2102, 110<sup>th</sup> Cong. (2007). For a comparison of the major bills in the 109<sup>th</sup> and 110<sup>th</sup> Congress, see *Journalist's Privilege: Overview of the Law and Legislation in the 109<sup>th</sup> and 110<sup>th</sup> Congress*, C.R.S. Report for Congress, (July 29, 2008), available at <http://www.fas.org/sgp/crs/secretary/RL34193.pdf> (last visited Sept. 20, 2008).

<sup>40</sup> Press Release, *Shield law loses out on procedural vote, but hope remains*, Reporters Committee for Freedom of the Press, July 30, 2008, available at <http://www.rcfp.org/news/releases/20080730-shieldlaw1.html> (last visited Sept. 10, 2008).

<sup>41</sup> Some media law scholars believe it will be increasingly difficult for courts to avoid making distinctions in this area of law. See SCOTT GANT, *WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF LAW IN THE INTERNET AGE* 135 (2007) ("Although courts have largely ducked, and legislatures ignored, hard questions about who is a journalist, such evasion will be difficult in the years to come").

<sup>42</sup> *Playboy Enterprises v. Los Angeles County*, 154 Cal. App. 3d 14, (C.A. Ct. App. 1984); *People v. Von Villas*, 10 Cal. App. 4<sup>th</sup> 201, (C.A. Ct. App. 1992); *Northside Sanitary Landfill, Inc. v. Bradley*, 462 N.E.2d 1321, (Ind. App. Ct. 1984).

<sup>43</sup> *U.S. v. Doe (In the matter of Richard Falk)* 332 F. Supp. 938 (D. Mass. 1971); *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982); *In re: Grand Jury Subpoena*, 583 F. Supp. 991 (E.D.N.Y. 1984); *In re: Grand Jury Proceedings (Scarce v. U.S.)*, 5 F.3d 397 (9<sup>th</sup> Cir. 1993); *Cusumano v. Microsoft*, 162 F.3d 708 (1<sup>st</sup> Cir. 1998).

<sup>44</sup> *Shoen v. Shoen*, 5 F.3d 1289 (9<sup>th</sup> Cir. 1993); *Florida v. Trepal*, 24 Med. L. Rptr 2595 (Fla. Cir. Ct. 1996); *People v. Le Grand*, 67 A.D.2d 446 (N.Y. App. Ct. 1979); *Matera v. Superior Court*, 825 P.2d 971 (Ariz. App. Ct. 1992).

commentator,<sup>46</sup> employees of specialized trade publications,<sup>47</sup> political advocacy groups,<sup>48</sup> a television news helicopter pilot,<sup>49</sup> a radio station owner,<sup>50</sup> a public relations firm,<sup>51</sup> and a film producer.<sup>52</sup>

A close reading of these cases demonstrates that bloggers are simply another type of communicator claiming to be eligible for the journalist's privilege and do not represent a fundamentally new problem in journalist's privilege law. This research finds that in many difficult cases, judges have turned to the philosophical rationale for a journalist's privilege, assessed the rationale's relevance in the case at hand, and applied modified legal tests that have generally protected the type of journalistic-like work the privilege was intended to protect.<sup>53</sup> At the same time, the tests have been applied to deny the privilege to those on the periphery of journalistic work.<sup>54</sup> These tests demonstrate that judges have long used an analysis of traditional journalistic methods, standards and values to determine the law's applicability to non-traditional journalists.

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<sup>45</sup> *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993); *New York v. Hennessey*, 13 Med. L. Rptr 1109 (N.Y. Dist. Ct. 1986).

<sup>46</sup> *In re: Madden (Titan Sports v. Turner Broadcasting)*, 151 F.3d 125 (3<sup>rd</sup> Cir. 1998).

<sup>47</sup> *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *In Re: Scott Paper*, 145 F.R.D. 366 (E.D. Penn. 1992); *Summit Tech., Inc. v. Healthcare Capitol Group Inc.*, 141 F.R.D. 381 (D. Mass. 1992); *PPM America v. Marriot Corp.*, 152 F.R.D. 32 (S.D.N.Y. 1993); *Commodity Futures Trading Commission v. The McGraw-Hill Companies*, 390 F. Supp. 2d 27 (D. D.C. 2005); *In the Matter of the Petition of Burnett*, 269 N.J. Super. 493 (N.J. Super. Ct. 1993); *Cukier v. American Medical Association*, 259 Ill. App. 3d 159 (Ill. App. Ct. 1994).

<sup>48</sup> *Builders Assoc. of Greater Chicago v. County of Cook*, 1998 U.S. Dist. LEXIS 2991 (N.D. Ill. 1998); *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163 (D. Col. 1999); *Anti-Defamation League v. San Francisco* 67 Cal. App. 4<sup>th</sup> 1072 (Cal. Ct. App. 1998).

<sup>49</sup> *Henderson v. Colorado*, 879 P.2d 383 (Col. 1994).

<sup>50</sup> *In re: Gordon v. Boyles*, 9 P.3d 1106 (Col. 2000).

<sup>51</sup> *In Re Napp Technologies, Inc.*, 338 N.J. Super. 176 (N.J. Super. Ct. 2000).

<sup>52</sup> *Silkwood v. Kerr-McGee*, 563 F.2 433 (10<sup>th</sup> Cir. 1997).

<sup>53</sup> *See, e.g., Von Bulow*, 811 F.2d at 142 (articulating "certain principles" to use in determining whether "one is a member of the class entitled to claim the privilege); *Shoen*, 5 F.3d at 1293 (citing *Von Bulow* in saying "the critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for the dissemination to the public" and "[whether] such intent existed at the inception of the newsgathering process") and *Madden*, 151 F.3d at 129-130 (emphasizing the *Von Bulow* test "requiring an intent at the inception of the newsgathering process to disseminate investigative news to the public. As we see it, the privilege is only available to persons whose purposes are those traditionally inherent to the press; persons gathering news for publication").

<sup>54</sup> *Von Bulow*, 811 F. 2d at 145 (determining that an "intimate friend" and "steady companion" of a man accused of attempted murder could not invoke the privilege despite some evidence of previous press credentials. Central to the court's determination was "at the time" of the information gathering, the woman "did not intend ... to disseminate information to the public."). *See also Madden*, 151 F.3d at 130 (concluding that a professional wrestling commentator's "primary goal is to provide advertisement and entertainment – not to gather news or disseminate information.")

The legal history of journalist's privilege claims date back to colonial times.<sup>55</sup> In 1950, a scholar noted that reporters refuse to reveal confidential sources based on a "canon of journalistic ethics to which, the cases prove, newsmen almost unwaveringly adhere."<sup>56</sup> But the first court case to reach a federal appeals court invoking First Amendment claims came in 1957 after actress Judy Garland sued newspaper columnist Marie Torre, demanding to know a source's identity who claimed, among other things, that Garland was worried about weight gain.<sup>57</sup> As several cases gained notoriety in the early 1970s, scholars and professionals honed privilege arguments by drawing upon First Amendment arguments such as the "checking value" theory of the press, exemplified by the work of Professor Vincent Blasi, and the self-governance theory of philosopher Alexander Meiklejohn that postulates that citizens must be fully informed about public matters in order to engage in democratic decision-making.<sup>58</sup> The privilege had also developed in state statutes; by 1972, 17 states had passed shield laws.<sup>59</sup>

The U.S. Supreme Court has only once ruled on a First Amendment-based journalist's privilege, in the 1972 case of *Branzburg v. Hayes*, and its precedent has been subjected to great debate in the ensuing decades.<sup>60</sup> In *Branzburg*, the Supreme Court

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<sup>55</sup> See Charles D. Tobin, *From John Peter Zenger to Paul Branzburg: The Early Development of Journalist's Privilege*, in Media Law Resource Center Bulletin, *White Paper on the Reporter's Privilege* (2004); Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971-1972); Stephen Bates, *The Reporter's Privilege, Then and Now*, Research Paper R-23, The Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University, April 2000, available at [http://www.hks.harvard.edu/presspol/publications/papers/research\\_papers/r23\\_bates.pdf](http://www.hks.harvard.edu/presspol/publications/papers/research_papers/r23_bates.pdf) (last visited Jan. 15, 2009).

<sup>56</sup> *The Right of a Newsmen to Refrain from Divulging the Sources of His Information*, 36 VIRG. L.R. 61, 62 (1950).

<sup>57</sup> The Second Circuit Court of Appeals' decision is still cited as evidence of First Amendment interests involved in privilege cases. The court agreed with the premise that "compulsory disclosure of a journalist's confidential sources of information entail an abridgment of press freedom by imposing some limitation upon the availability of news." But the court went on to note the First Amendment is not absolute, and summarized the competing societal interests: "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of the press." The court ruled in favor of Garland. *Garland v. Torre*, 259 F.2d 545, 548 (2<sup>nd</sup> Cir., 1958), *cert. denied*, 358 U.S. 910.

<sup>58</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*. 1977 A.B.F.RES.J. 521 (1977) and ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 57 (1960) (This book contains the text of Meiklejohn's 1948 version of *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*).

<sup>59</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 689 (1972).

<sup>60</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972). The 1972 case consolidated four appeals court cases involving three journalists who had been subpoenaed by grand juries to testify about their observations of potential criminal activity. Judges in three of the cases ordered the journalists to testify, while in the fourth case the Ninth Circuit Court of Appeals ruled that First Amendment interests outweighed the interests in the reporter's compelled testimony. *Branzburg v. Pound*, 461 S.W. 2d 345 (Ken. App. Ct. 1970); *Branzburg v. Meigs*, 503 S.W.2d 748, (Ken. App. Ct. 1971); *In re Pappas*, 266 N.E. 2d 297, (Mass. 1971); *Caldwell v. U.S.*, 434 F.2d 1081 (9<sup>th</sup> Cir. 1970).

ruled 5-4 that the First Amendment did not provide a privilege for journalists to evade grand jury subpoenas. Justice Powell joined the majority, but his concurring opinion emphasized what he called the case's "limited holding" and said that "newsmen" aren't without constitutional protection for newsgathering.<sup>61</sup> Over the years, many courts and scholars have interpreted Powell's concurrence to provide a qualified privilege in non-grand jury cases that requires a balancing of interests.<sup>62</sup> Dissents by Justices Douglas and Stewart said the majority's decision threatened to undermine the independence of the press. Justice Stewart's articulation of a three-prong test that must be overcome in order to subpoena journalists was subsequently adopted by several lower courts.<sup>63</sup> Stewart's test required that the information sought must be clearly relevant to a violation of law, unavailable by other means, and the interest in the information must be compelling and overriding.<sup>64</sup>

The majority's decision in *Branzburg* was prescient regarding the issues bloggers would raise more than 30 years later. In rejecting the privilege, Justice White said the First Amendment generally does not guarantee the press "special rights" in part because "the press" comprises a broad spectrum of communication. A journalist's privilege would inevitably give rise to "practical and conceptual difficulties of the highest order" because "sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege."<sup>65</sup> That definitional determination would become a constitutionally-questionable procedure, the court noted, because of the expansive interpretation of the "press" in First Amendment doctrines.<sup>66</sup> "The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers and dramatists," White wrote.<sup>67</sup>

If a Supreme Court decision is supposed to provide finality and clear legal standards for future application, the *Branzburg* case could be characterized as a failure. Since 1972, dozens of lower courts have used Powell's concurrence to support a qualified journalist's privilege, and many have adopted Stewart's test as the approved standard, requiring exhaustion of all other means of obtaining the information and proof that the

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<sup>61</sup> *Branzburg*, 408 U.S. at 709.

<sup>62</sup> See generally Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002); Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1983-1984); and David Joseph Onorato, *A Press Privilege for the Worst of Times*, 75 GEO. L.J. 361 (1986).

<sup>63</sup> *Branzburg*, 408 U.S. at 743.

<sup>64</sup> *Branzburg*, 408 U.S. at 743.

<sup>65</sup> *Branzburg*, 408 U.S. at 704.

<sup>66</sup> *Id.* at 704, quoting *Lovell v. Griffin*, 303 U.S. 444 (1938), in which the court ruled that "freedom of the press" was a "fundamental personal right" that was granted to "every sort of publication which affords a vehicle of information and opinion," at 450, 452.

<sup>67</sup> *Branzburg*, 408 U.S. at 705.

information sought goes to the heart of the legal dispute.<sup>68</sup> Today, the state of the federal privilege remains in flux, but most states offer some form of a journalist's privilege.<sup>69</sup> The law's foundation in most state jurisdictions is statutory, while most federal circuits have adopted a qualified privilege that requires a balancing of the public's interest in "everyman's evidence" in court proceedings against the public's interest in an unfettered press.<sup>70</sup> Some jurisdictions, both in states and federal circuits, have different standards for confidential and non-confidential information.<sup>71</sup> Journalists often have better luck in civil cases, although the privilege generally is weak when the journalist is a party to the lawsuit.<sup>72</sup> Federal courts have generally been less willing to give a broad privilege in criminal proceedings and have the most difficulty in grand jury investigations.<sup>73</sup>

Because of the law's distinct foundations in federal and state jurisdictions, the following discussion on definitional questions will treat separately the case law in federal and state courts.

#### IV. NON-TRADITIONAL JOURNALISTS IN FEDERAL PRIVILEGE CASES

A survey of federal court cases assessing the strength of the qualified privilege in federal common and constitutional law shows that a number of so-called "information disseminators" have claimed to be journalists for the purpose of the privilege. The earliest appellate case cited extensively in subsequent definition cases involved the question of whether a documentary film maker could invoke a qualified privilege to avoid providing testimony and documents in a civil action.<sup>74</sup> The 1977 case of *Silkwood v. Kerr-McGee* stemmed from a lawsuit filed by the family of Karen Silkwood against the Kerr-McGee Corporation, alleging that the company conspired against Silkwood to prevent her from forming a labor union and filing complaints against the company under the Atomic Energy Act.<sup>75</sup> As part of pre-trial discovery, Kerr-McGee subpoenaed Arthur "Buzz" Hirsch, who investigated Silkwood's death for a documentary film. Hirsch answered

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<sup>68</sup> See Len Neihoff, *The Constitutional Privilege After Branzburg: An Historical Overview* in Media Law Resource Center Bulletin, *White Paper on the Reporter's Privilege* (2004). For the early history of the common-law development, see James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1974).

<sup>69</sup> REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. THE REPORTER'S PRIVILEGE. 2002. Available at <http://www.rcfp.org/privilege/index.html>.

<sup>70</sup> *Id.*

<sup>71</sup> See generally Anthony L. Fargo, *Reconsidering the Federal Journalist's Privilege for Non-Confidential Information: Gonzales v. NBC*, 19 CARDOZO ARTS & ENT. L.J. 355 (2001); Heather Stamp, *McKevitt v. Pallasch: How the Ghosts of the Branzburg Decision Are Haunting Journalists in the Seventh Circuit*, 14 DEPAUL-LCA J. ART & ENT. L. 363 (2004); and Julie M. Zampa, *Journalist's Privilege: When Deprivation is a Benefit*, 108 YALE L.J. 1449 (1998-1999).

<sup>72</sup> See Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1983-1984)

<sup>73</sup> *Id.*

<sup>74</sup> *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10<sup>th</sup> Cir. 1977).

<sup>75</sup> *Id.* at 434.

some questions, but refused to testify or provide documents about information he obtained with promises of confidentiality.

In overruling the lower court that ordered Hirsch to answer the questions and turn over documents, the Tenth Circuit Court of Appeals concluded Hirsch was sufficiently like a journalist to be able to invoke the privilege, even though he was not a “regular newsman.”<sup>76</sup> The court noted Hirsch’s previous work experience as a freelance reporter. Then, the court analyzed Hirsch’s work activities in making the film about Silkwood. “His mission in this case was to carry out investigative reporting”; he spent “considerable time and effort in obtaining facts and information”; and he had planned “to make use of this in preparation of the film.”<sup>77</sup> Citing the Supreme Court’s language in *Lovell v. City of Griffin* that defines “the press” as “different kinds of publications which communicate to the public information and opinion,” the court determined that Hirsch should be allowed to invoke the journalist’s privilege even if he “is not a salaried newspaper reporter.”<sup>78</sup> Once the court determined that Hirsch could invoke the privilege, it declined to order his testimony after applying a test articulated in *Garland v. Torre*,<sup>79</sup> and put forth by Justice Stewart in his *Branzburg* dissent, requiring that the party seeking the information attempt to obtain the information elsewhere, that the information go to the heart of the matter and that the information be of certain relevance.<sup>80</sup>

Using a similar approach of comparing the methods and values of non-traditional privilege claimants to newspaper reporters, the Ninth Circuit Court of Appeals in 1993 ruled that an investigative book author could invoke the privilege. In *Shoen v. Shoen*,<sup>81</sup> the court ruled in favor of Ronald Watkins, an author of two previous investigative books. Watkins was subpoenaed to testify in a civil defamation case about his interviews for a book he was working on about the conflicts among members of the Shoen family who were battling for control of the U-Haul moving-van company.<sup>82</sup> An Arizona state appeals court ruled that the state reporter’s shield statute explicitly excluded investigative book authors such as Watkins,<sup>83</sup> so Watkins sought protection under the qualified First Amendment privilege in federal law.

The federal appeals court ruled that the “journalist’s privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public.”<sup>84</sup> The court mentioned the famous investigative reporter Bob Woodward, noting that it would “unthinkable” to say as a matter of law that Woodward would be allowed to invoke the privilege in his capacity as a newspaper reporter but not as a book author. The court said investigative book authors have historically played a vital role in bringing to light “newsworthy facts on topical and controversial matters of great public

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<sup>76</sup> *Id.* at 436.

<sup>77</sup> *Id.* at 436-437.

<sup>78</sup> *Id.* at 437, quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1935)

<sup>79</sup> *Garland v. Torre*, 259 F.2d 545 (2<sup>nd</sup> Cir. 1958).

<sup>80</sup> *Silkwood*, 563 F.2d at 438.

<sup>81</sup> *Shoen v. Shoen*, 5 F.3d 1289 (9<sup>th</sup> Cir. 1993).

<sup>82</sup> *Id.* at 1290.

<sup>83</sup> *Matera v. Superior Court*, 170 Ariz. 446 (Ariz. Ct. App. 1992).

<sup>84</sup> *Shoen*, 5 F. 3d at 1293.

importance.”<sup>85</sup> The court saw “no principled basis” for excluding Watkins from protection, noting, “What makes journalism journalism is not its format but its content.”<sup>86</sup> The court said the key question was whether an individual is “gathering news for dissemination to the public.”<sup>87</sup> The appropriate test, the court said, was the one first articulated by the Second Circuit Court of Appeals in *Von Bulow v. Von Bulow* (discussed below), requiring that an individual have an intent to disseminate information prior to a newsgathering process. The court interestingly stressed that the privilege was intended to protect the dissemination of “news,” and the court acknowledged it was leaving unanswered the question of whether authors of history would be covered under its definition, since a historian’s intent is not the dissemination of “news.”<sup>88</sup>

The *Silkwood* and *Shoen* decisions show that documentary film-makers and investigative book authors used sufficiently similar methods and had similar purposes to traditional newspaper reporters so as to be eligible for a journalist’s privilege. What about professors, graduate-student researchers and student journalists? Four courts have issued disparate rulings.

In 1998, the First Circuit Court of Appeals in *Cusumano v. Microsoft* ruled that two professors working on a book about the Internet browser wars between Microsoft and Netscape were entitled to journalist-privilege protection.<sup>89</sup> Microsoft subpoenaed two professors from Massachusetts Institute of Technology and Harvard Business School for details of their research in the context of an anti-trust case. The court found the research process for the professors was indistinguishable from that of traditional reporters. In concluding that “academics engaged in pre-publication research should be accorded protection commensurate to that which the law provides to journalists,” the court determined that academic researchers would face the same “chilling effects” of compelled disclosure as traditional journalists, and therefore there would be corresponding damage to the First Amendment value of free flow of information to the public from expert researchers.<sup>90</sup> The court wrote:

As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protections for journalists and academic researchers.<sup>91</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1294.

<sup>89</sup> *Cusumano v. Microsoft*, 162 F.3d 708 (1<sup>st</sup> Cir. 1998).

<sup>90</sup> *Id.* at 714.

<sup>91</sup> *Id.* at 714.

Two cases involving Ph.D. students resulted in different rulings. In 1984, a federal judge in New York ruled that a Ph.D. student did not have to turn over a journal in which he kept notes for his dissertation when they were sought in the context of a police investigation into a fire at a restaurant the student was observing.<sup>92</sup> The judge concluded that the public policy reasons for a journalist's privilege cannot be distinguished from those of scholars who collect data for subsequent publication and that "serious scholars are entitled to no less protection than journalists."<sup>93</sup> The judge briefly discussed academic freedom and the importance of field notes to scholars, particularly social scientists. Concluding scholars are entitled to invoke a qualified privilege as it had been developed in the common law, the judge said the government had made "no showing of any substantial government need" for the journal and therefore dismissed the subpoena.<sup>94</sup> The Ninth Circuit Court of Appeals in 1993, however, ruled in *Scarce v. U.S.* that a Ph.D. student was required to provide testimony to a federal grand jury despite invoking a journalist's privilege.<sup>95</sup> The student, who studied and participated in the animal rights movement, had a personal relationship with a suspect in the vandalism of an animal research facility, and his testimony was sought about his knowledge of the crime. In mostly skirting the definitional questions, the appeals court ruled that even if a journalist's privilege was present in common law, it did not apply to federal grand juries given the *Branzburg* holding.<sup>96</sup>

In 1993, a federal judge in New York allowed a college student to invoke the privilege under federal law even though the state statute protected only "professional journalists."<sup>97</sup> The case involved a student journalist at the State University of New York at Buffalo who was subpoenaed to provide a tape recording of an interview with an associate dean conducted in connection with a story the student wrote in the college newspaper. The dean was being sued by a former professor over a job dispute. The judge analyzed the student's actions and concluded they were sufficiently similar to those of traditional journalists to warrant the privilege.<sup>98</sup>

Additional district court cases demonstrate that judges have used broad definitions of "newsgathering," the "press" and "journalism" when considering the journalist's privilege. Three district court cases involved privilege claims by individuals reporting on the financial industry. In 1992, a federal judge in Pennsylvania determined that a credit-reporting agency was entitled to invoke a privilege because its publications had "all the attributes" that the Supreme Court has said is "indicative of the press": a regular circulation to a general population, a history of creating its own editorial analysis, and independent control over form and content.<sup>99</sup> The subpoena came in the context of a class-action suit alleging securities fraud against a paper-manufacturing company, and

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<sup>92</sup> In Re Grand Jury Subpoena, 583 F. Supp. 991 (E.D. N.Y. 1984)

<sup>93</sup> *Id.* at 993.

<sup>94</sup> *Id.* at 995.

<sup>95</sup> In Re Grand Jury Proceedings, *Scarce v. U.S.*, 5 F.3d 397 (9<sup>th</sup> Cir. 1993).

<sup>96</sup> *Id.*

<sup>97</sup> *Blum*, 150 F.R.D. at 43.

<sup>98</sup> *Id.* at 45.

<sup>99</sup> In Re: Scott Paper, 145 F.R.D. at 369.

the plaintiffs were seeking information that the company executives provided about its finances to Standard & Poor's Corporation. The central question, the judge asked, was whether "a journalist's privilege" extended to S&P. The judge said he could make no content distinction between publishers of corporate financial information and publishers of other types of news.<sup>100</sup> The judge ruled that S&P could invoke a qualified privilege and found that the plaintiffs had not met the threshold burden necessary for disclosure.

A financial analyst could invoke the privilege, a federal judge in Massachusetts ruled in 1992, because he was "engaged in the dissemination of investigative information to the investing business community" on matters of public concern.<sup>101</sup> The analyst had written a report questioning a medical-laser system based in part on anonymous sources and distributed the report to potential investors. A medical-supply company claimed to have suffered financial losses because of the report and wanted the identity of the sources for a civil lawsuit.<sup>102</sup> The court ruled that the analysts' need for confidential sources in order to do his job as an independent analyst outweighed the company's need for the information.<sup>103</sup> Important to the judge's analysis was the analyst's claim that confidential sources were crucial to his job and that current and future sources would likely dry up if he were forced to reveal their identities, to the detriment of the public good to be had from his analyses.

On the other hand, a federal judge in New York ruled in 1993 that both federal and state law precluded a financial newsletter from invoking the privilege.<sup>104</sup> The case involved a dispute between Marriott Corporation and its shareholders, and Marriott sought the deposition of individuals working for a small newsletter called *Daily Insights*. The judge ruled that the information sought was central to the dispute and the plaintiffs had overcome a qualified privilege had one existed. However, the judge ruled that the newsletter did not qualify for protection and said the newsletter "has not born its burden of demonstrating" that its employees are "professional journalists."<sup>105</sup> In ruling that the newsletter was not "journalistic," the judge said the newsletter had limited distribution, a small subscriber base of "far less" than 100 people, and no staff member designated as a reporter, editor, or journalist.<sup>106</sup>

The financial publication cases suggest that a line may indeed be hard to articulate for which public communicators should and should not receive protection. However, other cases in which judges have excluded privilege protection provide evidence that journalistic values and practices are an important component in the analysis.

*Von Bulow v. Von Bulow*, a 1987 case before the Second Circuit of Appeals, provides some key elements of the limits of privilege application to claimants.<sup>107</sup> The

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<sup>100</sup> *Id.* at 368-369.

<sup>101</sup> *Summit*, 141 F.R.D. at 384.

<sup>102</sup> *Id.* at 383.

<sup>103</sup> *Id.* at 385.

<sup>104</sup> *PPM America v. Marriot Corp.*, 152 F.R.D. 32 (S.D.N.Y. 1993).

<sup>105</sup> *Id.* at 35.

<sup>106</sup> *Id.*

<sup>107</sup> *Von Bulow v. Von Bulow*, 811 F.2d 136 (2<sup>nd</sup> Cir. 1987).

case involved a civil action filed by the children of Martha von Bulow against her husband Claus von Bulow, the underlying allegation being that Claus von Bulow had poisoned their mother, leaving her in a permanent coma. Andrea Reynolds, whom the court described as an “intimate friend” and “steady companion” of Claus von Bulow, was ordered to turn over investigative reports she commissioned on the lifestyles of the von Bulow children, notes she took during the criminal trial of von Bulow, and a manuscript of a book she had written about the von Bulow prosecution. She argued that these were protected by a journalist’s privilege.<sup>108</sup>

In rejecting Reynolds’ claim, the Second Circuit Court of Appeals articulated “certain principles” to govern definitional questions of the journalist’s privilege. These included the importance of “the process of newsgathering” as a First Amendment value. In determining who qualifies for protection, courts should ask “whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation.”<sup>109</sup> The person must be “involved in activities traditionally associated with the gathering and dissemination of news.”<sup>110</sup> Courts must conduct an intent-based factual inquiry into assertions of the privilege and cannot simply rule out non-traditional newsgatherers. The burden, however, is on the person seeking the privilege.<sup>111</sup> Reynolds failed to meet these standards, the court ruled, despite having written an unpublished manuscript and having received press passes from several news organizations in the past, in part because she admittedly sought the information “for my own peace of mind” and that her primary motivation in compiling her information was for the vindication of Claus von Bulow.<sup>112</sup> Her promises of confidentiality, the court concluded, were not given out of “journalistic necessity.”<sup>113</sup>

The basis of the court’s determination that Reynolds was not engaged in traditional newsgathering was based on the same rationale used by the First Circuit Court of Appeals in the 1988 case *In Re Jeffrey Steinberg*.<sup>114</sup> The court refused to allow campaign workers to invoke a journalist’s privilege to keep secret notebooks they created during the campaign, ruling that they made no showing that the material was part of a “journalistic endeavor.”<sup>115</sup> The notebooks were wanted in the context of a grand jury probe into fundraising fraud.

Other cases involving material of political organizations have provoked more complex considerations. Two district courts have also found that political organizations and advocacy groups could invoke the privilege. In *Builders Association of Greater Chicago v. County of Cook*,<sup>116</sup> a judge allowed the Chicago Urban League to withhold

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<sup>108</sup> *Id.* at 138-139.

<sup>109</sup> *Id.* at 143.

<sup>110</sup> *Id.* at 142.

<sup>111</sup> *Id.* at 144.

<sup>112</sup> *Id.* at 145.

<sup>113</sup> *Id.* at 146.

<sup>114</sup> *In Re Jeffrey Steinberg*, 837 F.2d 527 (1<sup>st</sup> Cir. 1988).

<sup>115</sup> *Id.* at 528.

<sup>116</sup> *Builders Association of Greater Chicago v. County of Cook*, 1998 U.S. Dist. LEXIS 2991 (N.D. Ill. 1998).

details of a confidential survey under the privilege because it was information gathered with the intent to disseminate to public. The judge noted it would be content-based discrimination to exclude the group simply because it was political in purpose.<sup>117</sup> A federal judge in Colorado used a different approach to arrive at the same conclusion in *Quigley v. Rosenthal*,<sup>118</sup> a case in which the Anti-Defamation League was subpoenaed to reveal confidential information in a defamation suit. Because the organization “publishes numerous periodicals, books and pamphlets and regularly engages in newsgathering activities,” it qualifies as a “newsperson” under the law and thus was able to invoke the privilege.<sup>119</sup>

While the standards adopted by several circuits over the years provide wider latitude for non-traditional journalists, the case of *In re: Madden (Titan Sports v. Turner Broadcasting)* provides additional guidance as to where courts may draw lines.<sup>120</sup> Mark Madden, an employee of World Championship Wrestling (WCW), a professional wrestling and entertainment company, recorded commentaries for a 900-number hotline in which he made allegedly false and misleading statements about wrestlers from the World Wrestling Federation (WWF), a competing organization. In a lawsuit between the WWF and WCW, the WWF subpoenaed Madden to reveal his sources of the information. Madden invoked a journalist’s privilege under Pennsylvania law and federal common law. A federal district court ruled Madden was a “journalist” because he intended to disseminate information to the public.<sup>121</sup> But the Third Circuit Court of Appeals overturned the lower court decision, saying it did not correctly analyze the content of the information being disseminated. The person claiming the privilege, the appeals court said, “must be engaged in the process of ‘investigative reporting’ or ‘news gathering.’”<sup>122</sup>

The court said its decision in *Madden* was rooted in the *Von Bulow* and *Shoen* analyses. “This test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public. As we see it, the privilege is only available to persons whose purposes are those traditionally inherent to the press; persons gathering news for publication.”<sup>123</sup> Madden, the court argued, was simply passing along information from his employer with a “primary goal” of “advertisement and entertainment – not to gather news or disseminate information.”<sup>124</sup> The court went on,

(A)s an author of entertaining fiction, he lacked the intent at the beginning of the research process to disseminate information to the public. He, like other creators of fictional works, intends at the beginning

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<sup>117</sup> *Id.* at 16.

<sup>118</sup> *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163 (D.C. Col. 1999).

<sup>119</sup> *Id.* at 1173.

<sup>120</sup> *In Re: Madden (Titan Sports v. Turner Broadcasting)*, 151 F.3d 125 (3<sup>rd</sup> Cir. 1998).

<sup>121</sup> *Id.* at 127.

<sup>122</sup> *Id.* at 130.

<sup>123</sup> *Id.* at 129-130.

<sup>124</sup> *Id.* at 130.

of the process to create a piece of art or entertainment. Fiction or entertainment writers are permitted to view facts selectively, change the emphasis or chronology of events or even fill factual gaps with fictitious events – license a journalist does not have. Because Madden is not a journalist, it follows that he cannot conceal his information with the shadow of the journalist’s privilege.”<sup>125</sup>

This review of relevant federal case law offers guidance for determining who qualifies for the privilege in federal law, beginning with the tests articulated in *Silkwood* and *Von Bulow* and expanded in detail in *Shoen* and *Madden*. The tests aim to protect those people traditionally associated with journalism who set out at the beginning of a process to collect information and then present it to the public, regardless of whether the person is employed by a newspaper or a similar “traditional” media company.

This review also suggests that journalistic ethics and values have been relevant to judicial decision-making, albeit implicitly. In rejecting Madden’s claims, for example, the Third Circuit Court of Appeals emphasized Madden’s failure to be ethically bound by traditional newsgathering conventions and a pursuit of the truth. In rejecting Andrea Reynolds’ claims, the Second Circuit Court of Appeals emphasized her personal relationships with the principal actors and her lack of intent to publicly disseminate as important factors. On the other hand, judges extending the privilege to non-traditional journalists have emphasized an individual’s mission of disseminating news in the public interest, the importance of investigative reporting and seeking facts, the significance of editorial judgment and independence, and the value in “activities traditionally associated with the gathering and dissemination of news.”<sup>126</sup>

## V. NON-TRADITIONAL JOURNALISTS IN JOURNALIST’S PRIVILEGE STATE LAWS

Cases arising in state courts differ significantly from their federal court counterparts because state statutes often provide definitional clauses for who qualifies for the privilege, and judicial decisions in definitional cases are often simply a matter of statutory interpretation. Many states specifically confine the privilege to traditional journalists or news organizations. Thirty-one states have statutory protections.<sup>127</sup> Eighteen other states have some constitutional or common-law protection. Only Wyoming has no recognized protection.<sup>128</sup>

Some statutes provide broad definitions. The District of Columbia’s shield law defines “news media” as “newspapers, magazines, journals, press associations, news agencies, wire services, radio, television, or any printed, photographic, mechanical, or

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<sup>125</sup> *Id.* at 130.

<sup>126</sup> *Von Bulow*, 811 F.2d at 147.

<sup>127</sup> REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. THE REPORTER’S PRIVILEGE. 2002, available at <http://www.rcfp.org/privilege/index.html>.

<sup>128</sup> See Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL’Y 35 (2006).

electronic means of disseminating news and information to the public.”<sup>129</sup> Maryland’s law lists eight types of media protected, and adds as a ninth, “any printed, photographed, mechanical, or electronic means of disseminating news and information to the public.”<sup>130</sup> Nebraska’s law, similar to New Jersey’s law, covers those engaged in “gathering, receiving, or processing of information for any medium of communication to the public,” and states “medium of communication shall include, but not be limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.”<sup>131</sup> Oregon protects anyone “connected with, employed by or engaged in any medium of communication.”<sup>132</sup>

Other states have narrower or more specific laws. Georgia’s law covers only those whose material is disseminated “through a newspaper, book, magazine, or radio or television broadcast.”<sup>133</sup> Illinois requires a newspaper or periodical, including electronic, to have a general circulation and be published at regular intervals.<sup>134</sup> Kentucky protects only those employed by or connected to a newspaper, radio, or television station.<sup>135</sup> Oklahoma’s law protects only those “regularly engaged” in gathering and preparing news “for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service.”<sup>136</sup>

Especially in states with more narrow definitions that emphasize the status, rather than function, of the class of people qualifying for protection, statutes are sometimes construed strictly to deny news gatherers the privilege. In 1986, a district court in New York ruled that student journalists working on the student newspaper at Hofstra University could not invoke the privilege because the New York shield law is “limited to protecting the class of professional journalists, who, for gain or livelihood are engaged in preparing or editing news for a newspaper.”<sup>137</sup> The court also cited case law defining a newspaper as having a “paid circulation” and “entered at the United States post office as a Second Class matter.”<sup>138</sup> In 1987, the Sixth Circuit Court of Appeals upheld lower court rulings in both state and federal courts that ruled that a television reporter was not eligible to invoke Michigan journalist’s privilege because it covered only “reporters of newspapers or other publications.”<sup>139</sup>

The Arizona statutory privilege could not be invoked by an investigative book author, the Arizona court of appeals court ruled in 1992 in *Matera v. Superior Court*,

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<sup>129</sup> D.C. Code §16-4701.

<sup>130</sup> Md. Cts & Jud. Proc. Code Ann. §9-112.

<sup>131</sup> Neb. Rev. Stat. § 20-144; N.J. Stat. Ann. Tit. 2A, ch. 84A, 21a.

<sup>132</sup> Or. Rev. Stat. § 44.620, 44.510.

<sup>133</sup> Ga. Code Ann. § 24-9-30.

<sup>134</sup> 735 Ill. Comp. Stat. Ann 5/8-901.

<sup>135</sup> Ky. Rev. Stat. Ann. § 421.100.

<sup>136</sup> Okla. Stat. tit. 12, § 2506.

<sup>137</sup> *New York v. Hennessey*, 13 Med. L. Rptr 1109 (N.Y. Dist. Ct. 1986).

<sup>138</sup> *Id.* at 1110.

<sup>139</sup> *In Re Grand Jury Proceedings, Storer Communications, Inc. v Wayne County*, 810 F. 3d 580 (6<sup>th</sup> Cir., 1987).

because Arizona's statute, adopted in 1937, is "limited to persons engaged in the gathering and dissemination of news to the public on a regular basis."<sup>140</sup> The law was intended only to apply to those who gather news on an ongoing basis as "part of the organized, traditional, mass media."<sup>141</sup> The court observed that "the statute was not designed to protect the information gathered, but rather was designed to aid a specific class of persons – members of the media – in performing their jobs free from the inconvenience of being used as surrogate investigators."<sup>142</sup> A book author was not part of the organized, traditional media as defined by the Legislature, the court ruled.

A fourth example of narrow statutory interpretation is found in *Price v. Time*, case involving a libel lawsuit filed by an Alabama football coach against *Sports Illustrated* and reporter Don Yaeger.<sup>143</sup> In 2005, the Eleventh Circuit Court of Appeals upheld a determination by a district judge that the Alabama statutory privilege did not cover a magazine reporter because the Alabama statute covered only employees of "any newspaper, radio broadcasting station or television station."<sup>144</sup> The court ruled that the plain language of the statute and the Legislature's intent excluded magazines from protection. While hewing to narrow statutory interpretation, the appeals court ruled that the reporter had a qualified First Amendment privilege and required that the coach overcome the federal common law's three-prong test, based on Justice Stewart's *Branzburg* dissent, before ordering the reporter's disclosure of confidential sources.<sup>145</sup> The two parties settled the lawsuit without the public disclosure of the confidential sources.<sup>146</sup>

In one unusual case, the Colorado Supreme Court held that a news helicopter pilot could invoke the privilege and refuse to give testimony in a pre-trial criminal proceeding.<sup>147</sup> The news station had entered into an agreement with the police that allowed the police to use the news helicopter to conduct a search of a suspected drug dealer with the understanding that the television station could later report on it. While it was questionable whether the news station inappropriately became an agent of the police, the court ruled that the helicopter operator was acting in his capacity as a journalist at the time, and thus could be prevented from testifying.<sup>148</sup> The state statute in question defined "newsperson" as any member of the mass media or any employee who is employed to "gather, receive, observe, process, prepare, write, or edit news information."<sup>149</sup>

Other cases show even more unusual entities attempting to invoke the privilege. In a 1995 New Jersey case, a public-relations company attempted to invoke the privilege

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<sup>140</sup> *Matera v. Superior Court*, 170 Ariz. 446 (Ariz. App. Ct. 1992).

<sup>141</sup> *Id.* at 448.

<sup>142</sup> *Id.* at 448.

<sup>143</sup> *Price v. Time*, 416 F. 3d 1327 (11<sup>th</sup> Cir. 2005).

<sup>144</sup> Alabama Code 12-21-142 (1975).

<sup>145</sup> *Price v. Time*, 416 F.3d at 1334-35.

<sup>146</sup> Alicia A. Caldwell, *Publisher settles defamation suit by ex-WSU coach Price*, THE (SPOKANE) SPOKESMAN-REVIEW, Oct. 10, 2005.

<sup>147</sup> *Henderson v. Colorado*, 879 P.2d 383 (Col. 1994).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 393.

in order to avoid providing testimony and documents about a client it represented.<sup>150</sup> The firm was subpoenaed in a civil lawsuit between two companies to provide documents it created when developing a strategy to respond to an explosion at a chemical plant. The firm argued that because it “regularly disseminates information to the public regarding newsworthy events,” and because the information it obtained was provided after promises of confidentiality, it should be able to invoke the privilege.<sup>151</sup> The New Jersey statute broadly defines news media to include “printed ... means of disseminating information to the general public.” However, the court rejected the argument, saying public-relations firms are “neither part of the traditional or nontraditional news media.”<sup>152</sup> The court said the firm was more “part of the news” rather than a member of the news media reporting news.<sup>153</sup>

The state cases show that judicial decisions use widely different standards in evaluating non-traditional cases based on whether the state statute defines a covered individual using based on status or functional tests. The next section will explore implications of these two approaches as they relates to bloggers.

## VI. IMPLICATIONS: BLOGGERS AND THE PRECEDENTS OF NON-TRADITIONAL JOURNALIST CASES

The preceding discussion of federal and state case law documents a long legal history of journalist’s privilege claims by non-traditional journalists and suggests that the emergence of bloggers-as-journalists does not present a wholly new legal question. Still, the cataclysmic changes to journalism and information dissemination brought by the Internet make it likely that bloggers will increasingly challenge both federal and state privilege interpretations. Because of worries expressed by both judges and scholars that bloggers may present intractable problems to the privilege, a coherent theoretical framework would be beneficial to the preservation of the privilege. These discussions are particularly relevant to the future development of the federal common law privilege and the privilege as it develops in states with broad definitional clauses. It is also relevant to public policy debates that are likely to continue in Congress,<sup>154</sup> as well as states that might enact statutes or revise current ones.<sup>155</sup> Part of this framework, I argue, should

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<sup>150</sup> In *Re Napp Technologies*, 338 N.J. Super. 176 (N.J. Sup. Ct. 2000).

<sup>151</sup> *Id.* at 181-182.

<sup>152</sup> *Id.* at 187.

<sup>153</sup> *Id.* at 187.

<sup>154</sup> The Free Flow of Information Act of 2009 was introduced in the House of Representatives at the start of the 111<sup>th</sup> Congress and was identical to the bill passed in the previous term. See Reporters Committee For Freedom of the Press, News Media Update, *Shield Law Re-Introduced in House*, Feb. 11, 2009, available at <http://www.rcfp.org/newsitems/index.php?i=9946> (last visited Feb. 13, 2009).

<sup>155</sup> For example, the Kansas state Legislature has spent several recent terms debating a reporter’s privilege statute. See Reporters Committee for Freedom of the Press, *Kansas legislature holds hearing on shield law*, Feb. 13, 2009, available at <http://www.rcfp.org/newsitems/index.php?i=9950> (last visited Feb. 14, 2009). A privilege bill died in the Massachusetts

include an examination of journalistic values and ethics as part of what I call a “comprehensive functional analysis” to the definitional problem.

This article necessarily adopts the premise that definitional problems are not significant enough to render the privilege doctrine unworkable, embracing an argument made by First Amendment attorney Floyd Abrams in 1978 as several newsgathering rights claims were being evaluated by scholars and judges:

[I]t is difficult to comprehend why the difficulties in defining ‘press’ should lead to the conclusion that no uniquely ‘press’ protections may be afforded. Nor are the definitional difficulties insurmountable ... [I]t is simply unacceptable to say that because a word in the Constitution is difficult to define, it should be afforded no meaning at all.<sup>156</sup>

The elements that make journalism distinct from other forms of communication are clearly distilled in Bill Kovach and Tom Rosenstiel’s *Elements of Journalism: What Newspeople Should Know and The Public Should Expect*:

Perhaps, some suggest, the definition of journalism has been exploded by technology, so now anything is seen as journalism. But on closer examination ... the purpose of journalism is not defined by technology, or by journalists or the techniques they employ ... [T]he principles and purposes of journalism are defined by something more basic – the function news plays in the lives of people.

For all that the face of journalism has changed, indeed, its purpose has remained remarkably constant, if not always well served, since the notion of “a press” first evolved more than three hundred years ago. And for all that the speed, techniques, and character of news delivery have changed, there already exists a clear theory and philosophy of journalism that flows out of the function of news. The primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.<sup>157</sup>

In their book, Kovach and Rosenstiel attempted to articulate the values and responsibilities of journalists in American democracy. Over two years, the authors studied how journalism was different from other forms of communication. They held 21 public forums, received testimony from more than 300 journalists, partnered with

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legislature in 2008. See Reporters Committee for Freedom of the Press, *Slim chance of a Mass. shield law this year*, July 30, 2008, available at <http://www.rcfp.org/newsitems/index.php?i=6888> (last visited Feb. 14, 2009).

<sup>156</sup> Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 564, at 581 (1978-1979).

<sup>157</sup> Bill Kovach and Tom Rosenstiel, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 17 (2001).

university researchers who conducted more than 100 detailed interviews, conducted two surveys of journalists, and conducted nearly a dozen content studies of news reporting.<sup>158</sup> The result is a descriptive analysis citing nine characteristics of journalism: (1) journalism's first obligation is to the truth; (2) journalists' first loyalty is to citizens; (3) journalism's essence is a discipline of verification; (4) journalists must maintain an independence from those they cover; (5) journalists are an independent monitor of power; (6) journalism provides a forum for public criticism and compromise; (7) journalists strive to make the "significant interesting and relevant"; (8) journalism keeps the news comprehensive and proportional; and (9) journalists must be allowed to exercise their personal conscience.<sup>159</sup>

The starting point for a definition of "journalist" for purposes of legal protections is a focus on the underlying rationale for free press protections in the first place. The premise of my argument is that individuals who serve the public information and checking value functions of the traditional press, evidenced by their purposes, process and product, should be afforded membership into the club that is "the press" when it comes to evaluating access to special press rights generally and the journalist's privilege specifically. Some people may be more "press" than others, and as with any legal definitions, judges will invariably be confronted with difficult cases. But the press should be defined, for purposes of a journalist's privilege, by analyzing the purposes, process and product of anyone seeking press protections.

This "comprehensive functional analysis" builds on the "functional" tests articulated in the federal case law that can be contrasted with many of the "status" tests adopted by state statutes. Status tests, such as affiliation with newspapers or broadcast news organizations, may be attractive for their clarity, but they are relics of an earlier era. Many of them do not account for the dramatic technological developments that have transformed journalism's delivery. The effects of the comprehensive functional analysis should leave intact the privilege for journalists who need it most while necessarily extending the privilege to others in cases where rationales for the privilege is indistinguishable from cases involving traditional journalists.

The comprehensive functional analysis emphasizes consideration of three factors that provide guidance to determine when an individual should qualify for a journalist's privilege:

**Purpose.** Individuals seeking to invoke a journalist's privilege must be able to demonstrate they intended at the beginning of any newsgathering process to disseminate their findings to a public audience. Their purpose must be related to the public information or checking value functions that underlie the philosophical rationales of a free press. Evidence of intention to disseminate could include statements to others, contracts with traditional news organizations or track records of publication.

**Process.** Individuals must be regularly engaged in traditional newsgathering behavior, perhaps best defined as a search for "journalistic truth." As Professor Thomas Goldstein noted in his brief in the Apple bloggers case, journalists "gather, sift, analyze,

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<sup>158</sup> *Id.* at 12.

<sup>159</sup> *Id.* at 12-13.

verify, prepare and present information to an audience.”<sup>160</sup> The process involves collecting “unorganized and fragmented bits of data, information and observation.”<sup>161</sup> The process of newsgathering also involves the exercise and deliberation of editorial judgment, defined by Professor Randall Bezanson as a process of judgment that is “independent, audience oriented, and grounded in a reasoned effort to publish information (typically current or currently relevant) judged useful and important for the maintenance of freedom in a self-governing society.”<sup>162</sup>

**Product.** The product of communication must be important to a public audience and the content at issue must be news, broadly defined as being of the public interest or provoking debate about public issues.<sup>163</sup> Because the privilege is rooted in the press’s roles as public informers or watchdogs, the content must be factual in nature. Matters of fiction or pure entertainment would not qualify, as they are characteristics that separate journalists from other writers.<sup>164</sup> This is consistent with several cases in which courts granted the privilege to non-traditional journalists based on the newsworthiness of the information.<sup>165</sup> Also, readers should have a clear ability to judge the credibility of the final product.

In deciding whether an individual is producing “journalism,” it is relevant to ask whether they are in fact “journalists,” broadly speaking. Education, training, associations, and values are all relevant, if not determinative. But also critical to the analysis is a discussion of ethical standards, journalistic values and accountability. These have been implicit in decades of case law discussed in this article. For example, Mark Madden, the professional wrestling commentator, was excluded from protection in part because he

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<sup>160</sup> Declaration of Professor Thomas Goldstein, *Apple Computer, Inc. v. Nick DePlume*, No. 1-05-CV-033341 (Cal. Super. Ct).

<sup>161</sup> *Id.*

<sup>162</sup> Randall Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 760 (1999).

<sup>163</sup> See Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?* 9 DEPAUL-LCA J. ART & ENT. L 2, (1998-1999) (showing how courts have occasionally fashioned tests around the idea of matters of public concern in areas of public-employee speech and libel). See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>164</sup> See, e.g., *Madden*, 151 F.3d at 130 (“He was not gathering or investigating ‘news,’ ... As a creative fiction author, Madden’s primary goal is to provide advertisement and entertainment – not to gather news or disseminate information. It is clear from the record that Mr. Madden was not investigation ‘news,’ even were we to apply a generous definition of the word. ... Fiction or entertainment writers are permitted to view facts selectively, change the emphasis or chronology of events or even fill in factual gaps with fictitious events – license a journalist does not have”).

<sup>165</sup> See, e.g., *Von Bulow*, 811 F.2d at 142 (upholding a district court’s ruling that the privilege extends only to those “involved actively in the gathering and dissemination of news” and to who practice “investigative reporting”); *Shoen v. Shoen*, 5 F.3d 1289 at 1293 (saying the privilege protects those who “have historically played a vital role in bringing to light ‘newsworthy’ facts on topical and controversial matters of great public importance” and that the “critical question for deciding whether a person may invoke the journalist’s privilege is whether she is gathering news for dissemination to the public”).

lacked independence from his sources, he was not committed to the pursuit of truth, and there was no transparency in his interactions with his bosses who supplied him with the material. Andrea Reynolds, likewise, was not allowed to invoke the privilege in part because of her personal connections with the individuals, and her failure to intend to publish newsgathering information.

Certainly, there are problems with suggesting that journalism ethical canons should dictate legal protection.<sup>166</sup> But the legal tests emerging in common law and the values embraced by different statutory definitions suggest that standards of journalism have long been relevant in determining when bloggers may invoke a journalist's privilege, and one cannot separate definitions of journalism from conceptions of appropriate journalistic standards. Bloggers who toil in the realm of advertising, politics, entertainment, public relations or who gather information for personal reasons would not be able to claim the privilege without demonstrating that their purposes, processes and product are "traditionally inherent to the press" – the sum of the tests articulated in *Von Bulow, Shoen, and Madden*.

This proposal builds on the work of several scholars who have supported functional tests to the definitional question in line with the doctrine and outcomes that have emerged in the federal court cases discussed above. Generally, these proposals support the proposition that individuals serving a "press function" are deserving of protection. For the most part, these scholars' proposals are simply restatements or distillations of the federal common law doctrine. They claim to extend the privilege to bloggers who practice traditional journalism in a new medium, but have barriers so not every Internet writer can claim privilege protection.

Professor Laurence B. Alexander uses the federal case law to develop a model statutory definition essentially embracing the three-part test from *Von Bulow, Shoen and Madden*.<sup>167</sup> Alexander's model statute defines "journalist" as "any person who is engaged in gathering news for public presentation or dissemination by the news media" and defines "news media" as "newspapers, magazines, television and radio stations, online news services, or any other regularly published news outlet used for the public dissemination of news."<sup>168</sup> Similarly, attorney Kraig L. Baker argues that the *Von Bulow* test is sufficient guidance to the definitional problem, and suggests that difficult cases may be resolved not by excluding questionable claimants from protection but by the subsequent analysis over the qualified nature of the privilege.<sup>169</sup> In analyzing whether the burden has been met to overcome the qualified privilege, Baker argues that judges analyze the "public concern" of the material, in part based on the nature of the

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<sup>166</sup> See, e.g., Jeff Storey, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467 (2001) and Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449 (1984).

<sup>167</sup> Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 130 (2002).

<sup>168</sup> *Id.* at 130.

<sup>169</sup> Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739 (1994).

claimant.<sup>170</sup> He argues that matters of entertainment, hobby, sport, or advertisement are not matters of public concern and therefore would not be protected by the qualified privilege.

Scholars taking a broader approach include Professor Linda L. Berger, who emphasizes that the privilege should protect “the work process of journalism” and identifies the “key components of the process of journalism,” such as the reporter’s past record of publication, the presence of internal verification measures, and the availability of information from which readers can judge the independence of the reporter or publisher.<sup>171</sup> Stephanie J. Frazee criticizes Berger’s emphasis on past track record and instead focuses on the “effects” of the underlying speech that signaled the privilege claim, arguing that the privilege should be extended to a speaker “if information enhances freedom of individual opinions and beliefs and contributes to the free flow of opinion and reporting.”<sup>172</sup>

Other scholars have offered proposals running the spectrum of protection. Provocatively, Professor Mary-Rose Papandrea proposes eliminating the concept of “reporter” from the journalist’s privilege and argues that anyone who communicates publicly, regardless of function or status, has a qualified privilege from subpoenas seeking information about sources of information. She argues that to “continue to limit the reporter’s privilege to traditional media outlets and professional journalists would unrealistically ignore how the public obtains its information today.”<sup>173</sup> Daniel Swartwout critiques the implications of the outcome of the *Madden* case and argues that it invites judges to make legal decisions on the basis of content, which he argues is unconstitutional.<sup>174</sup> And Clay Calvert has argued that in an age of media consolidation and the mixing of entertainment and news, the *Madden* test could prove impossibly ambiguous given the changing standards of news and entertainment.<sup>175</sup>

On the other end of the spectrum, Scott Neinas proposes a provision that a blogger could qualify for privilege protection only if he or she “receives a substantial amount of his or her income by reporting or writing for a news medium that publishes regularly and has minimal ethical and accountability standards.”<sup>176</sup> This approach retains a functional element but adds something a “status” test, and this blend of functional and

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<sup>170</sup> *Id.* at 757-758.

<sup>171</sup> Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1412 (2003).

<sup>172</sup> Stephanie J. Frazee, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAN. J. ENT. & TECH. L. 609, 639 (2005-2006).

<sup>173</sup> Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 590-591 (2006-2007).

<sup>174</sup> Daniel A. Swartwout, *In Re Madden: The Threat to New Journalism*, 60 OHIO ST. L.J. 1589 (1999).

<sup>175</sup> Clay Calvert, *And You Call Yourself a Journalist? Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999).

<sup>176</sup> Scott Neinas, *A Skinny Shield is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute That Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225 (2008).

status approaches has emerged in the evolution of the definitional provisions of various federal shield law bills debated in Congress between 2005 and 2008.

An analysis of recent congressional bills shows that the definitional provisions have generally narrowed over time. The first bills were problematically broad, which contributed to concerns that almost anyone could qualify for protection. For example, a leading House bill in 2005 defined a covered person as “any entity that disseminates information by print, broadcast, cable, mechanical, photography, electronic or other means.”<sup>177</sup> Revised bills continued to narrow the definitional provision. By 2007, bills were limited to an individual “engaged in journalism ... who regularly gathers ... or publishes news ... for a substantial portion of the person’s livelihood or for substantial financial gain.”<sup>178</sup> The provisions that a blogger must regularly engage in newsgathering for livelihood or financial gain are aimed to address concerns of accountability and oversight – or put another way, to require the maintenance of basic journalistic ethics and values that generally come from being accountable to editors, readers, or advertisers. As a matter of securing enough votes among lawmakers who worry about overly broad definitions, this hybrid functional/status test emerged in the 110<sup>th</sup> Congress as the best compromise.

How might the comprehensive functional analysis apply in recent blogger cases? In the most significant judicial analysis to date on the blogger-as-journalist question, the California Court of Appeals in May 2006 conducted a functional analysis in determining that the bloggers reporting on Apple products were entitled to privilege protection under California’s shield law, overruling a lower court’s decision. The court framed the question as whether the blogs were functional equivalents of newspapers or broadcast news organizations. The court found no distinctions in the purpose, process, or product prongs between the bloggers and traditional trade publications. Among the criteria used was a commitment to accuracy, editorial oversight, transparency, authority, readership, intent, and past publication record:

[W]e can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contradiction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience ... If their activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.<sup>179</sup>

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<sup>177</sup> H.R. 581, 109<sup>th</sup> Cong. (2005).

<sup>178</sup> H.R. 2102, 110<sup>th</sup> Cong. (2007).

<sup>179</sup> O’Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), *overturning* Apple Computer, Inc. v. Doe, No. 1-04-CV-032178 (Cal. Super. Ct., Mar. 1, 2005).

The Josh Wolf case presents a more difficult set of facts, and his claim to be a journalist split the journalism community. While the Reporters Committee for Freedom of the Press paid part of Wolf's legal bills, Debra Saunders, a columnist for the *San Francisco Chronicle*, wrote, "I do not understand why newspapers – including *The Chronicle* – refer to him as the 'longest-imprisoned journalist in America ... [A] camera and a Web site do not a journalist make, any more than shooting a criminal makes a vigilante a cop."<sup>180</sup>

Applying the purpose, process and product tests to Josh Wolf's case, one can see that judgments need to be made that raise issues of journalistic ethics, norms and practices. Wolf's stated purpose in attending the protest was to "document and cover a demonstration that would have been neglected by the mainstream press" and post it on his blog, where he wrote commentary at least weekly and posted videos about once a month.<sup>181</sup> His intention to disseminate information to the public, before he started videotaping, distinguishes him to some degree from the individual who just happens to videotape an event that turns out to have news value.

Wolf's processes and product, however, make it less obvious that he was behaving as a traditional journalist. Wolf described himself on his blog as an "artist, an activist, an anarchist and an archivist" and was something of a participant-observer in the local anarchist movement. To evaluate whether an individual's processes and product are the same as traditional journalists, courts have used prior work and work habits as a guide.<sup>182</sup> They have evaluated whether an individual was a participant in activities or if he "involved in activities traditionally associated with the gathering and disseminating of news."<sup>183</sup> One appeals court specifically used notions of "investigative reporting" as the standard.<sup>184</sup> Wolf's process could hardly be characterized as being similar to a detached investigative reporter. The most analogous case might be *In Re Jeffrey Steinberg*, the case in which an appeals court rejected the claim by a political operative that his journals were protected from disclosure. The court simply determined that journaling was not a "journalistic endeavor."<sup>185</sup> On the other hand, if Wolf made a showing that his regular reporting on the local anarchist community was followed by a reader base and that he had established himself as a regular chronicler of events, the scales arguably tip in his favor.

The Wolf case also suggests that the definitional questions, while important, are not determinative. Wolf's subpoena was for non-confidential information and from a federal grand jury – two facts that make his claim more difficult to win regardless of whether he was a journalist or not. In fact, the legal system's treatment of his case – in ruling that even if Wolf was considered a journalist the qualified privilege had been overcome – shows that the definitional question, while important, is not the end of the inquiry. In fact, the Wolf case is a clear example of why blogger claims can be

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<sup>180</sup> Debra J. Saunders, *Josh Wolf – blogger – has no press pass*, S.F. CHRONICLE, Feb. 27, 2007.

<sup>181</sup> Alex Koppelman, *First Amendment martyr?* SALON.COM, Apr. 13, 2007.

<sup>182</sup> *Silkwood*, 563 F.3d at 436-437.

<sup>183</sup> *Von Bulow*, 811 F.2d at 143.

<sup>184</sup> *Shoen*, 5 F.3d at 1293.

<sup>185</sup> *In Re Jeffrey Steinberg*, 837 F.2d at 528.

adequately handled by the legal system and do not present insurmountable problems to the future of the privilege.

## VII. CONCLUSION

This analysis of case law involving non-traditional journalists supports the argument that some bloggers are deserving of journalist's privilege protection based on their similarities to traditional journalists. The Apple bloggers, for example, seem more analogous to book authors, freelance writers, employees of niche trade publications, or student journalists than they are to public relations firms or professional wrestling commentators. Using the "comprehensive functional analysis" proposed in this article, the bloggers' work purposes, processes and product seem to fit well into the growing expanse of non-traditional journalists who deserve similar protections. Granting them the right to invoke the privilege falls squarely within the legal trend of the past 37 years since *Branzburg* to grant a journalist's privilege to those people whose work is traditionally associated with the press.

Additionally, granting them the right to the privilege doesn't open the floodgates for all bloggers anymore than it guarantees they will win even if granted the privilege. Following the doctrinal line of these cases, standards exist to evaluate bloggers whose purpose and work is far removed from newsgathering and journalism. Further research in this area might construct further ethical and practical standards that might be used to evaluate newsgathering claims by bloggers that are rooted in the philosophical underpinnings of the journalist's privilege. Not every case will be easy, but bloggers do not present insurmountable legal challenges to a journalist's privilege.

## **PACKING HEAT: A GUN BATTLE BETWEEN PRIVACY AND ACCESS**

**AIMEE EDMONDSON**

*State lawmakers have been closing their concealed carry gun permit databases with haste in recent years, according to this paper's study of all 50 states' statutes. The trend began well before the high-profile campus shootings at Virginia Tech and Northern Illinois, and it is still too early to tell how the incidents will affect each state's sunshine law relating to gun permits, if at all. This article outlines the arguments for disclosure of information about permit holders as the guns-on-campus debate continues. In addition, it explores the conflicting assertion that the privacy rights of gun carriers outweigh the public interest in access to the records. This study provides a brief overview of the changes to concealed carry laws that have given rise to the public records debate in the years leading up to the campus shootings. Of particular interest to journalists and other advocates of openness is the increasing number of state legislatures that are simultaneously closing the records as they start handing out more permits. This study also outlines how the courts have addressed the open records question in the handful of cases on the books so far.*

**Keywords:** open records, sunshine laws, privacy, campus violence, gun permits

### **I. INTRODUCTION**

After the Virginia Tech massacre, university students across the country strapped on empty gun holsters and wore them to class for a week to protest school policies prohibiting students from carrying concealed weapons on campus.<sup>1</sup> If a gunman bursts into one of their classrooms, they said, they want to be able to shoot back. Masterminding the nationwide demonstration was an online organization called Students for Concealed

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<sup>1</sup> The deadliest shooting in United States history occurred on April 16, 2007, in two separate attacks that killed 32 people and wounded many more at Virginia Polytechnic Institute and State University in Blacksburg, Virginia. The killer, Seung-Hui Cho, shot his first two victims in a residence hall. Two hours later he took his two guns, a .22 caliber handgun and a Glock 9 mm, along with almost 400 rounds of ammunition, to a classroom building. By the end of his multiple classroom attack, which lasted almost 10 minutes after the initial 911 call, Cho had fired at least 174 rounds, killing 30 and wounding 17 before killing himself.

Carry on Campus, which saw 20,000 students swell their membership roster over just a 10-month period after 32 people were shot on the Blacksburg, Virginia, campus.<sup>2</sup> Driving a continued public interest in carrying guns on university property was the bloody rampage at Northern Illinois University in February 2008 where five people were killed and another 15 wounded.

State lawmakers also have responded. Since January 2007, at least 17 state legislatures have introduced bills to relax concealed carry statutes to allow guns on campuses.<sup>3</sup> While 48 states allow adults to carry concealed weapons, almost all prohibit carrying on K-12 school grounds as well as university campuses.<sup>4</sup> Any way you look at it, the carrying of concealed weapons has become a major public issue. Vital to an informed national discussion on concealed carry permits is the question of whether such documents are open records.

The purpose of this article is to analyze the status of gun permit data in state sunshine laws and within the concealed carry statutes themselves. State lawmakers have been closing their concealed carry permit databases with haste in recent years, according to an analysis of all 50 states' statutes. The trend began well before the high-profile campus shootings, and it is still too early to tell how the incidents will affect each state's sunshine laws relating to gun permits, if at all. This article also will outline the arguments for disclosure of information about permit holders as the guns-on-campus debate continues. In addition, it will explore the conflicting assertion that the privacy rights of gun carriers outweigh the public interest in access to the records.

Part II of this article provides a brief overview of the changes to concealed carry laws that have given rise to the public records debate in the years leading up to the campus shootings. Of particular interest to journalists and other advocates of openness is the increasing number of state legislatures that are simultaneously closing the records as they start handing out more permits. Part III of this article outlines the major debate regarding closure and the emotion that surrounds it. Part IV contains the author's state-by-state analysis and discussion of the sunshine and gun laws themselves. Part V outlines how the courts have addressed the open records question in the handful of cases on the books so far.

Proponents of access assert that it is impossible to tell how public safety officials are doing their jobs in determining eligibility and issuance of concealed carry permits without access to the records, or whether concealed carry laws increase gun crimes. It also would be difficult to determine if convicted felons had been improperly awarded permits. A domestic violence victim would have no way of knowing if an estranged

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<sup>2</sup> See [www.concealedcampus.org](http://www.concealedcampus.org).

<sup>3</sup> Thomas L. Harnisch, *Concealed Weapons on State College Campuses: In Pursuit of Individual Liberty and Collective Security*, Higher Educ. Pol'y Br. for the Am. Ass'n of State Coll. and Univ. (2008), available at <http://www.aascu.org/media/pm/pdf/pmdec08.pdf>. Those states are Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Ohio, Oklahoma, South Dakota, South Carolina, Tennessee, Virginia and Washington.

<sup>4</sup> *Id.* Utah is the only state that prohibits public colleges from barring guns. Two states, Wisconsin and Illinois, have general bans on the carrying of concealed weapons.

partner has a permit. A college student would not know if her roommate does. Additionally, proponents of access point out that other license data traditionally has been public in nature, such as hunting licenses, as transparency is deemed essential to evaluate the overall licensing process and to allow for policy change if needed. The license, which formalizes a relationship between the licensee and the state, is the only means of public scrutiny of the system.

Proponents of closure argue first that gun permit holders have a right to privacy. No one has the right to know they have a weapon. Two lines of argument emanate from this proposition: first, that they could be harassed if it were known that they carry a handgun; second, that secrecy prevents criminals from knowing the names and addresses of gun owners. And this is a good thing, proponents of closure insist. If a newspaper published a roster of gun permit holders in its community, it could provide a shopping list for thieves.

This article does not focus on a citizen's right to carry a concealed weapon or whether students should be allowed to carry guns on campus. Rather, what is of great interest to journalists, students of the First Amendment, and other open records advocates is this question: If and when concealed carry laws are passed and gun permit rosters are created, does the public have a legal right to access that information? Battles on this issue had been cropping up in many states well before the college mass shootings, driven in part by a wave of state legislation beginning with Florida in 1987 that allows residents to obtain concealed carry permits for their handguns.<sup>5</sup> Now thousands of Floridians are carrying weapons in public legally, and there is no public oversight. The state legislature closed the records in 2006.

There has been little scholarly study of state sunshine laws relating to concealed carry records.<sup>6</sup> There also has been no thorough analysis of related court cases where journalists and others have turned to the legal system in the quest for access to permit records. This paper attempts to fill that void. This study is especially timely given the increasing discussion of college students' carrying concealed weapons on their campuses. Additionally, open records advocates might do well to monitor the continued flurry of activity on the part of state legislatures in closing these records over the past decade.

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<sup>5</sup> For an excellent overview of concealed carry laws, see Clayton E. Cramer & David Kopel, *'Shall Issue': The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679-757 (1995).

<sup>6</sup> See Steven W. Kranz, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?* 29 HAMLINE L. REV. 637-707 (2006). This is a thorough look at state-by-state concealed carry laws, including minimum age requirements, whether one may have a weapon in his vehicle without a permit, if safety training, fingerprinting and a background check is required, and exclusionary areas such as schools, courthouses, domestic violence shelters, and places where alcohol is served. Kranz addresses the public records issue as part of his valuable study, but there is very little discussion on this particular point.

## II. BACKGROUND: THE RISE OF CONCEALED CARRY

Florida led the concealed carry wave beginning in 1987. Before then, only seven states allowed citizens to carry handguns, and most of those laws had long been on the books.<sup>7</sup> Concealed carry statutes generally liberalize handgun possession and reduce discretion given to local law enforcement officials regarding who gets a permit and who is denied. In modern vernacular, Florida became a “shall-issue” state, where local officials must issue permits to any resident who meets basic requirements put forth in the statute.<sup>8</sup> The shall-issue language typically replaces “may-issue” language in early state laws, which gave law enforcement officials more discretion in accepting or rejecting permit applications. In most states, the laws mark the first time in modern history that residents could legally carry concealed handguns.<sup>9</sup> In the decade after Florida’s enactment of a shall-issue law, 21 other states followed suit.<sup>10</sup> Another wave came between 2001 and 2004, with at least five more states enacting shall-issue legislation.<sup>11</sup> At least four states began allowing concealed carry in 2006 alone.<sup>12</sup> Gun control scholars attribute the increasing passage of such laws to the lobbying efforts of the National Rifle Association,<sup>13</sup> as well as the controversial reports of researcher and economist John Lott, who argued that concealed carry laws may help reduce crime.<sup>14</sup>

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<sup>7</sup> GREGG LEE CARTER, *GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND THE LAW* (2002). Shall-issue laws prior to Florida were: Indiana, Maine, New Hampshire, North Dakota, South Dakota, Vermont and Washington. Vermont does not actually require residents to obtain a written permit before they may legally carry a weapon. In *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903), the state Supreme Court ruled that any restrictions on a citizen’s right to carry a concealed weapon violates the Vermont Constitution; therefore, permits are not needed.

<sup>8</sup> HARRY HENDERSON, *GUN CONTROL* (2000). The author defines shall-issue as a policy where local officials “must give a gun-carrying permit to any adult applicant who doesn’t have a criminal or mental health record.”

<sup>9</sup> Currently, 48 states allow adults to carry concealed weapons. Thirty nine of these are “shall-issue,” which means officials may not use their own discretion or deny applications arbitrarily. The rest have “may-issue” statutes, which give local law enforcement more discretion in issuing permits. For a complete state-by-state listing of gun laws, see the National Rifle Association’s website, <http://www.nraila.org/GunLaws/>, as well as that of the Legal Community Against Violence, [www.lcav.org](http://www.lcav.org).

<sup>10</sup> States enacting shall-issue laws between 1987 and 1997: Alaska, Arizona, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.

<sup>11</sup> These states are Colorado, Michigan, Minnesota, New Mexico and Ohio.

<sup>12</sup> These states are Florida, Kansas, Kentucky and Nebraska.

<sup>13</sup> WILLIAM J. VIZZARD, *SHOTS IN THE DARK: THE POLICY, POLITICS AND SYMBOLISM OF GUN CONTROL* 146 (2000).

<sup>14</sup> JOHN LOTT, *MORE GUNS, LESS CRIME* (1998). For criticism of Lott’s work, see, e.g., FRANKLIN ZIMRING & GORDON HAWKINS, *THE RESEARCH ON CONCEALED WEAPONS IS FLAWED*, in *GUNS AND CRIME* 33-44 (Bruno Leone ed., 2000). Here researchers argue that Lott compared crime

It is important to note here the difference between owning a gun and obtaining a permit to carry one concealed in public. Generally, individuals do not have to register their guns for merely possessing them with the exception of a handful of states and some urban enclaves with restrictive gun possession laws.<sup>15</sup> Concealed carry laws, on the other hand, require the gun owner to fill out a separate application, thus creating a host of new potentially public records as law enforcement officials began issuing carry permits and documenting information about their permit holders. As reporters and other members of the public have sought access to these records, lawsuits have been filed in several states, and legislatures have moved with haste to exempt concealed carry permit records from their open records laws. In an early article on the modern wave of concealed carry laws, Cramer and Kopel underscored the need for checks and balances in the permit system.<sup>16</sup> They charged “rampant abuse in many jurisdictions” as law enforcement officials approved or rejected permit applications.<sup>17</sup> Their laundry list of those denied and those granted permits in various instances appeared to be capricious and arbitrary. Examples include a Los Angeles detective denied a permit because of her gender,<sup>18</sup> and socially and politically affluent New York City residents issued permits<sup>19</sup> while cab drivers were consistently denied.<sup>20</sup> The concealed carry of firearms by citizens raises a host of oversight issues, not the least of which surround who gets a permit and why, and who gets turned down and why.

Less than a year after Florida’s 1987 law went into effect (and before the legislature closed the records in 2006), reporters conducted background checks on 1,981 gun permit applicants in the Tampa Bay area, cross-checking names against felony,

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statistics before and after shall-issue laws were implemented without controlling for other variables that influence the crime rate.

<sup>15</sup> Portions of one of the most restrictive set of gun control laws in the country, those of Washington, D.C., were struck down by the United States Supreme Court in June 2008 in *District of Columbia v. Heller*, No. 07-290, 128 S. Ct. 2783; 171 L. Ed. 2d 637; 2008 U.S. LEXIS 5268. This case marked the first time since 1939 that the high court has addressed the meaning of the Second Amendment. The court deemed that the law provided an undue burden to citizens. Namely, all handguns were banned and all legal firearms (e.g., rifles and shotguns) had to be kept unloaded, disassembled or trigger-locked. The court said D.C. can still require registration, but must now permit the registration of handguns (not just rifles and shotguns) and allow citizens to keep guns loaded.

<sup>16</sup> Cramer and Kopel, *supra* note 5.

<sup>17</sup> *Id.*, at 679.

<sup>18</sup> For additional information on that case, see Paul Blackman, *Carrying Handguns for Personal Protection: Issues of Research and Public Policy*, paper presented at annual meeting of the American Society of Criminology, San Diego, Nov. 13-16, 1985, at 9.

<sup>19</sup> More information can be found at the following: *Colum Lynch, Elite in NYC are Packing Heat*, BOSTON GLOBE, Jan. 8, 1993; and William Bastone, *Born to Gun: 65 Big Shots With Licenses to Carry*, VILLAGE VOICE, Sept. 29, 1987, at 11; and Susan Lehman, *If Punch Sulzbergerr’s Packing Heat, Screw Mogul Fumes, Why Not Me?* NEW YORK OBSERVER, Dec. 21, 1992.

<sup>20</sup> *Slatky v. Murphy*, NEW YORK LAW JOURNAL, Oct. 14, 1971, at 10.

misdeemeanor and probate records.<sup>21</sup> They found 68 of the permit holders had been arrested or charged with criminal acts, yet many of those people were issued concealed weapons permits through various loopholes in the law.<sup>22</sup> Four lawyers working for the state were responsible for reviewing and updating Florida's records, revoking permits of newly minted felons, for example. Policy observers might argue that those four lawyers might be replaced with, say, eight skilled workers without law degrees who could be paid less. Such a change might be worth public discussion once it comes to light that the current system is not working very well.

One of the primary features common in concealed carry laws is the inclusion of a background check requirement and participation in a gun safety course, though details vary from state to state.<sup>23</sup> State laws also typically prohibit the carrying of guns in courthouses and other public buildings, places of worship, jails, any business where alcohol is served and any business where the owner has posted a "no guns" notice. Typically, licensees must be over 21. Almost all public colleges and universities ban possession of concealed firearms on campus through state statute or university regulations. Most of the states prohibit guns on their college campuses, including those students who have licenses to carry. Only Utah prohibits its state schools from barring guns on campus.<sup>24</sup> The rest of the states allow university administrators to decide for themselves, and nearly all have chosen to be gun-free.<sup>25</sup>

This environment, however, appears to be changing. In the wake of the killings at Virginia Tech and Northern Illinois, some legislatures discussed whether they should require state universities to allow students to carry guns on campus. For example, the South Dakota House of Representatives voted on such a bill in 2008, which was sponsored by GOP state Rep. Tom Brunner. The bill died in the state senate, but Brunner said he will reintroduce it. "It's not an issue that's going to go away," he said. "We feel pretty passionate [that] students and teachers should have a right to defend themselves, and weapons on campus should be a part of the plan."<sup>26</sup> With at least 17 states considering relaxing campus weapon laws in 2008, observers expected this to be a controversial topic in statehouses around the country in 2009-10.<sup>27</sup>

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<sup>21</sup> Stephen Koff & Bob Port, *Gun permits soar through loopholes*, ST. PETERSBURG TIMES, January 17, 1988, at 1A.

<sup>22</sup> See, e.g., Editorial, *Public Records*, SOUTH FLORIDA SUN-SENTINEL, May 13, 2006; Editorial, *Gun permits shouldn't be secret*, ST. PETERSBURG TIMES, May 10, 2006 at 12A; and Thomas W. Krause, *Concealed Guns Get New Wrap*, TAMPA TRIBUNE, June 9, 2006, at 1.

<sup>23</sup> Kranz, *supra* note 6.

<sup>24</sup> Harnisch, *supra* note 3, at 2.

<sup>25</sup> *Id.* Harnisch notes that Colorado State University is an exception.

<sup>26</sup> Suzanne Smalley, *More Guns on Campus?* Newsweek, Feb. 15, 2008, available at <http://www.newsweek.com/id/112174>.

<sup>27</sup> Harnisch, *supra* note 3.

### III. A PERMIT AS A PUBLIC RECORD? A FIERY DEBATE

Emotion threatens to subsume policy whenever the Second Amendment is involved, making the public records issue doubly difficult, as evidenced by the guns-on-campus debate. A quick internet search of newspaper coverage shows the obvious: people are talking about concealed weapons and whether carrying a gun will help protect them from a potential mass murderer in a university lecture hall. Scores of student newspapers have published stories about the issue, including articles on the empty holster demonstrations across the country.<sup>28</sup> Some demonstrators from the Students for Concealed Carry on Campus group said they wanted to spread their belief that university warning systems and campus police cannot protect them from a killer's rampage. "The purpose of the protest is not to scare anyone or disrupt the daily function of college life but rather to educate people," said Stephen Feltoon, one of the group's national organizers.<sup>29</sup> "We want people to approach us and say 'Hey, what's with the holster?' giving us a chance to explain that licensed individuals, depending on the state, can carry in restaurants, supermarkets, parks, movie theaters, but for some reason they cannot be trusted to carry on campus."

The openness of gun permit records has been an explosive issue for years. Consider the case of the *News & Record* in Greensboro, North Carolina, which began publishing the concealed carry lists in 1994.<sup>30</sup> The names of permit holders ran without comment, like marriage licenses and divorce proceedings. The listings garnered attention from other media and brought many letters to the editor, Patrick Yack, who explained the newspaper's decision to run the lists in an editorial:

Why should the public know? Because guns are an issue. Guns were used in many of the murders in Greensboro last year. School children are routinely expelled for bringing guns to school. [Concern about] violent crime regularly ranks at the top of public opinion polls...One role of the newspaper is to help its readers understand their community. By telling you who may own a handgun we think we do that.<sup>31</sup>

Responses to his editorial reflect the major arguments of the gun permit debate. Among the readers' many objections, the newspaper created a "yellow pages" for

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<sup>28</sup> See, e.g., THE INDEPENDENT FLORIDA ALLIGATOR, available at [www.alligator.org/articles/2007/10/26/news/campus/holsters.txt](http://www.alligator.org/articles/2007/10/26/news/campus/holsters.txt)

<sup>29</sup> THE OKLAHOMA STATE DAILY COLLEGIAN, available at <http://ocolly.com/2007/10/22/students-protest-ban-of-campus-concealed-carry/>.

<sup>30</sup> Patrick A. Yack, *Why the N&R Publishes Gun Permits*, NEWS & RECORD (Greensboro, NC), Mar. 27, 1994, at F3.

<sup>31</sup> *Id.*

burglars.<sup>32</sup> Critics complained that the newspaper was trying to harass, embarrass or frighten people out of applying for permits, and some cancelled their subscriptions to the newspaper.<sup>33</sup> Still others asserted that the space would be better used for publishing the names of “convicted drunk drivers” or “bad check convictions.”<sup>34</sup>

This debate played out across the country before the Virginia Tech and Northern Illinois shootings as journalists have long sought to bring a little sunshine to the issue and the records. After the (Cleveland) *Plain Dealer* published a list of concealed carry holders in its readership area in 2004, a lobbying group called Ohioans for Concealed Carry posted newspaper editor Doug Clifton’s name, home phone number, address and map to his home on its website.<sup>35</sup> It also reported that he paid \$550,000 for his house in 1999, that his wife’s name is Peg, and that he has two children and two grandchildren. His home was flooded with calls, and because Clifton was at work, his wife answered them. “One apologized to her and told her it was ‘just your moron husband’ he had a problem with. A few, predictably, were ugly.”<sup>36</sup>

Ohio’s concealed carry law is unique in that it allows journalists access to the list of licensees, but not the general public.<sup>37</sup> Most news organizations in the state, including the *Plain Dealer*, publicly opposed the media-only provision. Clifton responded to Ohioans for Concealed Carry in a July 2004 column:

Want to know if a sex offender lives next door? The state will send you an email. Want to know if your co-worker has a prison record? You can look it up. Want to know how much my house cost? Ditto. Want to know who has a fishing license – indeed, virtually any license? Correct, you can look it up. It’s all public record. License to carry a gun? Nope. The average Joe has only the slim reed of the news media to help him on that count.<sup>38</sup>

And even in states with open access laws, there is the classic problem of enforcement. For example, when *Des Moines Register* reporter John McCormick asked to inspect gun permit records in Knoxville, Iowa, a sheriff’s deputy informed him, “None of

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<sup>32</sup> Jack Parker, *A Bad Idea: The Newspaper’s Gun Permits List Provides A ‘Yellow Pages’ for Criminals*, NEWS & RECORD (Greensboro, NC) Mar. 21, 1994, at A6.

<sup>33</sup> David R. Redden, *Gun Permit List Doesn’t Make Sense*, NEWS & RECORD, Apr. 5, 1994, at A6; Tony Bundros, *Readers Don’t Want Gun Permit List*, NEWS & RECORD, Apr. 7, 1994, at A10; and Judy Williams, *Printing Permit List Violates Privacy*, NEWS & RECORD, Oct. 21, 1994, at A14.

<sup>34</sup> Clyde Watson, *List of Drunken Drivers Would Be More Helpful*, NEWS & RECORD, Apr. 3, 1994.

<sup>35</sup> Doug Clifton, *Why we printed the list; The media are the public’s only access to concealed-carry records*, PLAIN DEALER, July 30, 2004 at B9.

<sup>36</sup> *Id.*

<sup>37</sup> OHIO REV. CODE ANN. 2923.13(A) (LexisNexis 2008).

<sup>38</sup> *Id.*

the sheriff's department records are public."<sup>39</sup> The Decatur County, Iowa, sheriff threatened to arrest another reporter, Thomas O'Donnell, who requested gun permit data, if he did not leave the courthouse. The sheriff asked to see O'Donnell's driver's license and included that information when he sent an advisory to other law enforcement officials alerting them that the reporter was seeking permit records.<sup>40</sup>

#### IV. THE MANY RECENT CHANGES IN THE SUNSHINE LAW

At least four states closed gun permit records in 2006 alone. Among the states where the data were explicitly exempted are Florida,<sup>41</sup> Kansas,<sup>42</sup> Kentucky<sup>43</sup> and Nebraska.<sup>44</sup> Texas closed its records in 2007 after similar bills failed in previous sessions.<sup>45</sup> Bill sponsor Rep. Patrick Rose, a Democrat from Dripping Springs, said the bill was needed because "the steps that law-abiding Texans take to protect themselves and their families should be issues of private concern."<sup>46</sup> South Carolina closed its records in 2008,<sup>47</sup> and several more states considered it, including Tennessee, Virginia and West Virginia.<sup>48</sup> Florida legislators reacted to a single incident, exempting the records during the 2006 session after an Orlando television station uploaded a searchable database of permit holders on its website.<sup>49</sup> Before this, the names of permit holders were not retrievable online. Rather, requesters received the list on a compact disc that cost \$200.<sup>50</sup>

Kansas lawmakers overrode Gov. Kathleen Sebelius's veto of a bill to close gun permit records in 2006.<sup>51</sup> The issue did not receive a committee hearing because it was included in a House-Senate conference committee report where legislators had to accept

<sup>39</sup> Charles Layton, *The Information Squeeze*, AMERICAN JOURNALISM REVIEW, September 2002, at 20.

<sup>40</sup> *Id.*

<sup>41</sup> FLA. STAT. ANN. § 790.0601 (LexisNexis 2008).

<sup>42</sup> KAN. STAT. ANN. § 75-7c06(b) (LexisNexis 2007). However, records of a person whose license has been suspended or revoked is subject to public inspection.

<sup>43</sup> KY. REV. STAT. ANN § 237.110(10)(LexisNexis 2008).

<sup>44</sup> NEB. REV. STAT. § 69-2444 (LexisNexis 2008).

<sup>45</sup> TEX. GOV'T CODE § 411.192 (LexisNexis 2007).

<sup>46</sup> *Texas Handgun License records sealed*, ASSOCIATED PRESS, May 25, 2007, available at the HOUSTON CHRONICLE website, <http://www.chron.com/disp/story.mpl/news/4834803.html>.

<sup>47</sup> S.C. CODE ANN. § 23-31-215(I). The law, signed by Gov. Mark Sanford on April 16, 2008, went into effect immediately and exempted the identities of the state's more than 61,3000 permit holders.

<sup>48</sup> Ron Barnett, *States act to shield gun holders*, USA TODAY, Apr. 24, 2008, available at [http://www.usatoday.com/news/nation/2008-04-24-gunpermitrecords\\_N.htm](http://www.usatoday.com/news/nation/2008-04-24-gunpermitrecords_N.htm).

<sup>49</sup> Alex Leary, *Six NRA-backed bills signed into law by Bush*, ST. PETERSBURG TIMES, June 8, 2006, at 5B.

<sup>50</sup> *Id.*

<sup>51</sup> Carl Manning, *Governor signs bill closing records of concealed gun permits*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, May 25, 2006.

or reject the concealed gun law as a whole.<sup>52</sup> In an unusual twist, lawmakers made public only the names of people who have had their permits revoked. “Records relating to persons issued licenses, applicants for licenses, or persons denied licenses are confidential and shall not be disclosed in a manner which enables identification of any such person. However, records of a person whose license has been suspended or revoked are subject to public inspection.”<sup>53</sup> In Kentucky, the public can no longer receive lists of permit holders. They can only find out whether a specific person has a permit by submitting the name and request to state police.<sup>54</sup>

In January 2006, Wisconsin’s General Assembly failed by two votes to override the governor’s veto of a concealed carry bill. That bill would have repealed the state’s century-old ban on carrying concealed weapons.<sup>55</sup> The bill’s co-sponsor Rep. Scott Gunderson (R-Waterford) told the *Milwaukee Journal Sentinel* that keeping the permit holders’ names secret was an integral part of the legislation when it was passed in December 2005. “It’s silly to think we should have a list of permit holders available to the public. The beauty of the bill is that the criminal will not know who is or who is not carrying a weapon.”<sup>56</sup>

Several states amended their statutes to close the records in 2005. Minnesota classified all firearms records as “private.”<sup>57</sup> Washington state closed its records as well.<sup>58</sup> In South Dakota, state officials may not even possess or keep a list or registry of concealed permit holders.<sup>59</sup> Officials may not “knowingly keep or cause to be kept any list, record, or registry of holders of permits to carry a concealed handgun.”<sup>60</sup> In 2004, the Missouri general assembly closed such records, overriding Gov. Bob Holden’s veto. The law even makes it a misdemeanor for a sheriff to release the information.<sup>61</sup>

As mentioned, Ohio stands alone with its journalistic privilege to access of concealed carry permits. Members of the media argued that the information should be available to the public. Reporters have insisted that they *are* the public, and that any distinction between the two is absurd.<sup>62</sup> Lawmakers tried to exempt permit data when the carry law was passed in 2003, but Gov. Bob Taft threatened to veto. A compromise came in the form of partial openness – for journalists only.<sup>63</sup> “Upon a written request made to a

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<sup>52</sup> Conference Comm. Report, HB 2118, available at <http://www.kslegislature.org>.

<sup>53</sup> *Supra* note 42.

<sup>54</sup> *Supra* note 43.

<sup>55</sup> State legislative update, available at <http://www.uwsa.edu/govrel/update/2006/u060203.htm>.

<sup>56</sup> Mike Johnson, *Gun-permit secrecy attacked; Bill precludes oversight, foes say; backers aim to surprise criminals*, MILWAUKEE JOURNAL SENTINEL, Dec. 10, 2005, at 1A.

<sup>57</sup> MINN. STAT. § 13.87(2) (LexisNexis 2008).

<sup>58</sup> WASH. REV. CODE § 42.56.240(4) (LexisNexis 2008).

<sup>59</sup> S.D. CODIFIED LAWS § 23-7-8.6 (2009).

<sup>60</sup> *Id.*

<sup>61</sup> MO. REV. STAT. § 571.094.9 (LexisNexis 2008).

<sup>62</sup> Jim Underwood, *Jefferson would embrace records access that Moyer finds disturbing*, THE COLUMBUS DISPATCH Apr. 3, 2008, at A9.

<sup>63</sup> Alan Johnson and Jim Siegal, *Exemptions for public records expanding*, THE COLUMBUS DISPATCH, Oct. 23, 2005, at 1B.

sheriff, and signed by a journalist, the sheriff must disclose whether he or she has issued or renewed a license to the individual named in the request. The journalist must specify his or her credentials and must state that disclosure of such information would be in the public interest.”<sup>64</sup> Critics of this exemption argued that in this new media age, it is impossible to distinguish who is a journalist and who isn’t.<sup>65</sup> First Amendment experts believe that the media-only provision would likely not pass constitutional muster.<sup>66</sup>

Another unusual element of the Ohio sunshine law, which was added in 2007 allows reporters to review permit lists, which include the permit holder’s name, date of birth and home county, but they may not write down or record in any way the information they view.<sup>67</sup> They may publish only what they can recall from memory. Ohio also made it a felony to release copies of any permit records, an unusually stiff penalty. When a county sheriff sought clarification for this odd law in late 2007, it was reviewed by Ohio Attorney General Marc Dann.<sup>68</sup> Dann said a sheriff “may exercise his discretion in determining a reasonable manner by which a journalist may view, but not copy, the information...”<sup>69</sup>

Other states that have explicitly closed records identifying concealed carry permit holders include: Alaska,<sup>70</sup> Arizona,<sup>71</sup> Connecticut,<sup>72</sup> Delaware,<sup>73</sup> Georgia,<sup>74</sup> Hawaii,<sup>75</sup> Louisiana,<sup>76</sup> Massachusetts,<sup>77</sup> Michigan,<sup>78</sup> Nevada,<sup>79</sup> New Jersey,<sup>80</sup> New Mexico,<sup>81</sup> Oklahoma,<sup>82</sup> Pennsylvania,<sup>83</sup> Rhode Island,<sup>84</sup> Utah,<sup>85</sup> and Wyoming.<sup>86</sup> In addition to

<sup>64</sup> OHIO REV. CODE ANN. § 2923.129(B)(2) (LexisNexis 2008).

<sup>65</sup> John Caniglia, *Gun-permit case raises issue: Who is a journalist?* THE PLAIN DEALER, March 20, 2007, at B4.

<sup>66</sup> Jim Provan, *Dann backs limits on Ohio gun-permit data; Reporters may view, not record information*, THE TOLEDO BLADE, Nov. 21, 2007, available at <http://toledoblade.com/apps/pbcs.dll/article?AID=/20071121/NEWS24/711210368/-1/NEWS>.

<sup>67</sup> *Supra* note 64.

<sup>68</sup> The attorney general’s opinion, No. 2007-039, was issued Nov. 9, 2007.

<sup>69</sup> *Id.* at 8.

<sup>70</sup> ALASKA STAT. § 18.65.770 (LexisNexis 2008).

<sup>71</sup> ARIZ. REV. STAT. § 13-3112(J) (LexisNexis 2008).

<sup>72</sup> CONN. GEN. STAT. § 29-28(d) (LexisNexis 2008).

<sup>73</sup> DEL. CODE ANN. tit. 29, § 10002(g)(11) (LexisNexis 2008).

<sup>74</sup> GA. CODE ANN. § 50-18-72(d) related to 16-11-129 (LexisNexis 2008).

<sup>75</sup> HAW. REV. STAT. ANN. § 134-14 (LexisNexis 2008). Hawaii’s firearms law holds that names be kept confidential under the sunshine law, § 92F-13(4). The state’s Office of Information Practices (OIP) also opined that the identities of such licensees are exempt, OIP Op. Ltr. No 07-01 (2007).

<sup>76</sup> LA. REV. STAT. § 40:1379.3(A)(2) (LexisNexis 2008).

<sup>77</sup> MASS. GEN. LAWS § 4-7-26(j) (LexisNexis 2008).

<sup>78</sup> MICH. COMP. LAWS § 15.231 to 15.246 (LexisNexis 2008). See also *Mager v. Dep’t of State Police*, 460 Mich. 134, 595 N.W. 2d 142(1999).

<sup>79</sup> NEV. REV. STAT. § 202.3665 (LexisNexis 2008).

<sup>80</sup> N.J. ADMIN. CODE § 13:54-1.15 (LexisNexis 2008).

<sup>81</sup> N.M. STAT. ANN. § 29-19-6(B) (LexisNexis 2008).

<sup>82</sup> OKLA. STAT. tit. 21, § 1290.13 (LexisNexis 2008).

<sup>83</sup> 18 PA. STAT. ANN. § 6111(h)(4)(i) (LexisNexis 2008).

each state's sunshine laws, an analysis of each state's gun laws was conducted. Some states have closed the data in the latter rather than in the traditional open records law, likely obfuscating the closure to all but the most alert observers of open records laws.

On the opposite side of the coin, only a handful of states explicitly say that the names of permit holders are public records. They include: California,<sup>87</sup> Iowa,<sup>88</sup> Maine,<sup>89</sup> Mississippi,<sup>90</sup> and New York.<sup>91</sup> However, a California attorney general's opinion includes a disclaimer that gives officials some leeway: "The application and record of a permit for a concealed weapon are public documents unless they contain information by which the county sheriff or municipal police chief can demonstrate that the public interest served by not making such records public clearly outweighs the public interest in their disclosure."<sup>92</sup>

Yet, in a number of other states, there is no mention of whether concealed weapons permit data are exempt. When no stated exemption is present, it is generally considered that the information is public. These states include: Alabama,<sup>93</sup> Arkansas,<sup>94</sup> Colorado,<sup>95</sup> Idaho,<sup>96</sup> Indiana,<sup>97</sup> Maryland,<sup>98</sup> Montana,<sup>99</sup> New Hampshire,<sup>100</sup> North

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<sup>84</sup> R.I. GEN. LAWS 11-47-11(b) (LexisNexis 2008).

<sup>85</sup> UTAH ADMIN. CODE § 53-5-708 (LexisNexis 2008).

<sup>86</sup> WYO. STAT. ANN. 6-8-104(bb) (LexisNexis 2008).

<sup>87</sup> CAL. PENAL CODE § 6255 (LexisNexis 2008).

<sup>88</sup> IOWA CODE ANN. § 724.23 (LexisNexis 2008). *See Clark v. Banks*, 515 N.W.2d 5, 1994 Iowa sup LEXIS 85 (Iowa 1994).

<sup>89</sup> ME. REV. STAT. ANN. 25-5-252-2006, § (LexisNexis 2008).

<sup>90</sup> MISS. CODE ANN. § 45-9-101(8) (LexisNexis 2008). However, Mississippi is unique in that records are exempt from the open records act for a period of 45 days from date of issuance or denial of permit.

<sup>91</sup> N.Y. PENAL LAW § 400.00(5)(LexisNexis 2008).

<sup>92</sup> 62 Ops. Cal. Atty. Gen. 595.

<sup>93</sup> ALA. CODE § 13A-11-75 (LexisNexis 2008) allows for the issuance of a license to carry a pistol. A 2002 Alabama attorney general's opinion held that pistol permits, which must stored in the sheriffs' offices for six years, are public record. Op. Att'y Gen. Ala. No. 2002-227, May 8, 2002.

<sup>94</sup> ARK. CODE ANN. § 5-73-307(a) (LexisNexis 2008). The statute specifies that an automated listing of license holders be available on-line at all times to law enforcement agencies through the Arkansas Crime Information Center. However, § 5-73-307(b) holds that "the records of the department relating to applications for licenses to carry concealed handguns and records relating to license holders shall be exempt from the provisions of the Freedom of Information Act, s 25-19-101 et seq., for a period of forty-five (45) days from the date of the issuance of the license or the final denial of an application."

<sup>95</sup> COLO. REV. STAT. § 18-12-206(3)(a) (LexisNexis 2008). The statute governing concealed carry permits requires local sheriffs to keep a list of permit holders. Criminal justice records are open to inspection unless the custodian persuades a court that discloser is contrary to the public interest. Also, law enforcement statewide database of permit holders is searchable only by name.

<sup>96</sup> IDAHO CODE ANN. § 9-340A(2) (LexisNexis 2008).

<sup>97</sup> IND. CODE § 35-47-2-1 (LexisNexis 2008).

<sup>98</sup> MD. CODE ANN. § 5-303 (LexisNexis 2008).

<sup>99</sup> MONT. CODE ANN. 44-5-302 (LexisNexis 2007) requires that the background check data of permit holders not be disseminated to the public, but there is no mention of withholding the names

Carolina,<sup>101</sup> North Dakota,<sup>102</sup> Oregon,<sup>103</sup> Tennessee,<sup>104</sup> Virginia,<sup>105</sup> Washington, D.C.<sup>106</sup> and West Virginia.<sup>107</sup>

Vermont allows residents to carry a weapon as a fundamental right, with no permit needed, so there are no permit records to close.<sup>108</sup> Similarly, there are no concealed carry permit provisions in Wisconsin since it is illegal to carry weapons in this state.<sup>109</sup> Also, Illinois prohibits its citizens from carrying a firearm, so no permit records exist in that state.<sup>110</sup> In short, at least 28 states explicitly closed the records and five explicitly allow access. The other states do not mention access in their statutes, therefore it is presumed that the information is public record in those states.

## V. CONFLICTING CASE LAW

Courts have divided on whether gun permit data should be closed for privacy reasons or open to the public, with decisions in Michigan<sup>111</sup> and New Jersey<sup>112</sup> restricting any access, and decisions in Pennsylvania<sup>113</sup> adding some restrictions, while courts in

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of permit holders. There is also language in the statute, however, that says criminal justice records are open unless the demands of individual privacy clearly exceed the merits of public disclosure.

<sup>100</sup> N.H. REV. STAT. ANN. § 159-A is New Hampshire's firearm's law and § 91-A is its Sunshine law (LexisNexis 2008).

<sup>101</sup> N.C. GEN. STAT. § 14-415.17 (LexisNexis 2008) states that the sheriff must maintain a list of permit holders which must be available to state and local law enforcement officials, as well as clerks of court statewide.

<sup>102</sup> N.D. CENT CODE § 62.1-04-03(4) (LexisNexis 2008) requires law enforcement officials to keep a copy of all licenses for six years.

<sup>103</sup> OR. REV. STAT. § 166.292(5) (LexisNexis 2007) requires the sheriff to keep a record of each license issued or renewed.

<sup>104</sup> TENN. CODE ANN. § 39-17-1351(s)(1) (LexisNexis 2008) requires law enforcement officials to provide statistical reports upon request. Recent efforts to close concealed weapons records have failed in the state legislature.

<sup>105</sup> VA. CODE ANN. § 18.2-308(D) (LexisNexis 2008) allows circuit court clerks to withhold the social security number only.

<sup>106</sup> D.C. CODE § 22-4504 (LexisNexis 2008) is the District of Columbia's "may-issue" law. It is illegal to carry a weapon in the District. It is unusual in that it requires a registration certificate for every gun that is possessed, D.C. CODE § 7-25-2.01, 7-2502.06.

<sup>107</sup> W.VA. CODE § 61-7-4 (LexisNexis 2008) specifies that each issuing sheriff must furnish a certified list of all licenses issued in the county to the state superintendent, who in turn shall maintain a statewide registry.

<sup>108</sup> Chapter I, Article 16 of the Vermont Constitution illustrates the state's liberal stance on gun-related issues.

<sup>109</sup> Article I, § 25 of the Wisconsin Constitution simply reads: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

<sup>110</sup> 720 ILL. COMP. STAT. 5/24-1(a)(4) (LexisNexis 2009).

<sup>111</sup> *Mager v. State of Michigan*, 595 N.W. 2d 142 (Mich. 1999).

<sup>112</sup> *Southern New Jersey Newspapers v. Mount Lauren*, 660 A. 2d 1173 (N.J. 1995).

<sup>113</sup> *Times Publishing Co. Inc. v Michel*, 14 Pa. D. & C.4<sup>th</sup> 655 (1992).

Connecticut,<sup>114</sup> Iowa<sup>115</sup> and Oregon<sup>116</sup> ruled in favor of openness. This article has shown that some legislatures are placing exemptions within states' gun permit statutes rather than listing them within their sunshine laws. The courts, however, continue to study the wording of the sunshine laws for guidance in determining the status of gun permit data.

**Table One \***

<b>Gun Permit Exemptions in State Statutes</b>		
<b>CLOSED</b>	<b>OPEN</b>	<b>PRESUMED OPEN</b>
Alaska	California	Alabama
Arizona	Iowa	Arkansas
Connecticut	Maine	Colorado
Delaware	Mississippi	Idaho
Florida	New York	Indiana
Georgia		Maryland
Hawaii		Montana
Kansas		New Hampshire
Kentucky		North Carolina
Louisiana		North Dakota
Massachusetts		Oregon
Michigan		Tennessee
Minnesota		Virginia
Missouri		Washington, D.C.
Nebraska		West Virginia
Nevada		
New Jersey		
New Mexico		
Ohio		
Oklahoma		
Pennsylvania		
Rhode Island		
South Carolina		
South Dakota		
Texas		
Utah		
Washington		
Wyoming		

<sup>114</sup> Supt. of Police of the City of Bridgeport v. FOIC, 621 A.2d 998 (Conn. 1992).

<sup>115</sup> Des Moines Register v. Wilbur T. Hildreth, 181 N.W.2d 216 (Iowa 1970).

<sup>116</sup> Mail Tribune v. Winters, No. 07-4147-E-2 (Jackson Cnty., Or., Cir. Ct., April 25, 2008).

*\*Conducted by the author in 2007 and updated in January 2009. (Vermont does not address the issue in its sunshine law because the state considers gun possession a fundamental right, as it does the right to carry. It does not issue permits and therefore has no records. Illinois and Wisconsin do not have concealed carry laws because it is illegal to carry in these states. Therefore, there are no records to close.)*

The privacy standards used by the courts vary widely, creating a hodgepodge of rules depending on the state where one is carrying a gun. States, of course, generally have sunshine laws that mirror the federal Freedom of Information Act.<sup>117</sup> The federal access law's exemption 6 and 7(C) relate to privacy of individuals. At least half of all refused FOIA requests from 1999 to 2003 were rejected for privacy reasons, and FOIA experts have issued scathing critiques of recent court decisions that have restricted access to government documents using exemptions 6 and 7(C).<sup>118</sup> Exemption 6 has three requirements: First, the documents must be personnel, medical or similar files; second, disclosure of the documents must constitute an invasion of personal privacy; and third, the personal privacy invasion must be clearly unwarranted.<sup>119</sup> Exemption 7(C) closes investigative records compiled by law enforcement officials which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>120</sup>

The first case to be discussed here was tried in Michigan, a state that is unusual in that it requires citizens to register their guns and obtain safety certificates as a prerequisite for ownership – not just to carry.<sup>121</sup> In 1996, gun owner Fred Mager asked the state for the names and addresses of those who held registered permits, seeking to recruit other gun owners to his causes. The state police denied the request, citing Michigan's privacy exemption.<sup>122</sup> The circuit court had held that the requested names and addresses are "information of a personal nature," and disclosure amounted to "a clearly unwarranted invasion of privacy."<sup>123</sup> The Court of Appeals reversed the decision and opened the records.<sup>124</sup> But the state Supreme Court ruled in 1999 that the information

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<sup>117</sup> 5 U.S.C. § 552(b) (1)-(9). There are nine exemptions to the Freedom of Information Act. The FOIA does not apply to matters that fall under the categories of (1) classified information and national security, (2) internal agency personnel information, (3) information exempted by other statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions and (9) geological and geophysical information.

<sup>118</sup> See, e.g., Martin E. Halstuk and Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee "Central Purpose" Reformulation*. 54 ADMIN. L. REV. 983 (2002); and Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*. 11 COMM. L. & POL'Y 511 (2006).

<sup>119</sup> 5 U.S.C. § 552(b)(6).

<sup>120</sup> 5 U.S.C. § 552(b)(7)(C).

<sup>121</sup> MICH. COMP. LAWS § 28.422, where a person "shall not purchase, carry or transport a pistol in this state without first having obtained a license for the pistol."

<sup>122</sup> MICH. COMP. LAWS § 15.231 to 15.246.

<sup>123</sup> *Mager*, 460 Mich. 134.

<sup>124</sup> Unpublished opinion per curiam, issued December 12, 1997, (Docket No. 197222).

reveals intimate details of a person's private life and is potentially embarrassing.<sup>125</sup> So *Mager v. State of Michigan* took the privacy interests of gun owners a step further than most states by upholding the statutory requirement that any handgun registration information – not just concealed carry – be exempt from the state's sunshine laws.<sup>126</sup> The court ruled that weapon registration permits are not public records under a two-part test, where the information is exempt if it is of a "personal nature" and that disclosure would constitute a "clearly unwarranted invasion of privacy."<sup>127</sup> Officials argued before the court that disclosure would create "a virtual shopping list for anyone bent on the theft of handguns" and "thus endanger its occupants."<sup>128</sup>

The court relied in part on a controversial 1989 United States Supreme Court opinion, *United States Department of Justice v. Reporters Committee for Freedom of the Press*,<sup>129</sup> which public records experts have argued presents a growing challenge regarding the presumption of openness put forth in the federal access law.<sup>130</sup> Michigan's high court pointed out that *Reporters Committee* established that requests of information on private citizens would be an unwarranted invasion of privacy when the "central purpose" of FOIA "is to ensure that the government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed."<sup>131</sup> The court reasoned that when a citizen is trying to find out information about another citizen from an agency that has possession of the records, releasing the records would not shed light on the government agency or officials.<sup>132</sup> Yet, this logic cannot hold given that the best way to ascertain the effectiveness of the policy – and how public officials are carrying it out – is to gain access to the information.<sup>133</sup>

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<sup>125</sup> The Supreme Court referred to *Bradley v. Saranac Community Schools Board of Educ.*, 565 N.W. 2d. 650, 655 (Mich. 1997), where it held that "information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life." This case involved the father of a public school student who unsuccessfully sought access to the personnel files of his child's teacher.

<sup>126</sup> MICH. COMP. LAWS § 28.429.

<sup>127</sup> *Bradley*, 565 N.W. 2d. at 654.

<sup>128</sup> *Id.*

<sup>129</sup> 489 U.S. 749 (1989). In *Reporters Comm.*, a CBS reporter and others sought an electronic FBI rap sheet on a private citizen whose family business had defense contracts. The man was suspected by state officials of having links to organized crime. The U.S. Supreme Court held that the FBI was not required to disclose the information, compiled in database form from several police jurisdictions, because the invasion of privacy was unwarranted.

<sup>130</sup> Halstuk and Davis, *supra* note 118, at 985.

<sup>131</sup> *Reporters Comm.*, 489 U.S. at 774.

<sup>132</sup> *Id.*

<sup>133</sup> *Reporters Comm.* was not completely without precedent. In *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994), the Supreme Court held that the core purpose of FOIA was to contribute "significantly to public understanding of the operations or activities of the government."

Like Michigan, New Jersey is unusual in that it requires citizens to apply for a permit to purchase a firearm, not just carry it concealed.<sup>134</sup> So the following New Jersey case also addresses whether gun registration information is public, rather than just concealed carry information. However, like *Mager*, it has been cited in cases where only the concealed carry record is at issue, so it is being discussed briefly in this article. A Mt. Laurel *Courier-Post* reporter requested access to firearms permits in 1989. After being denied the information by city officials, the newspaper expanded its request to include the underlying applications for the permits and then filed suit.<sup>135</sup> The trial court sided with the city, and the newspaper appealed. The appeals court remanded the case and directed the trial court to create a new balancing test for privacy and the right to know. As a side note, the state legislature exempted all documents related to the issuance of gun permits in 1991, a year after the newspaper filed suit.<sup>136</sup> The Supreme Court of New Jersey did, however, consider the issue. Questions raised by the court: Would public disclosure discourage citizens from providing information to the government agency? Did the citizen give information believing it would not be disclosed? Would the decision on whether to issue the permit be affected by public disclosure?<sup>137</sup> The court concluded that the newspaper's interest in access did not outweigh the state's interest in keeping records confidential. New Jersey's gun records remain closed.<sup>138</sup>

However, the Supreme Court of Connecticut ruled in favor of disclosure in 1992, ordering Bridgeport officials to release the names of permit holders to the Fairfield County *Advocate*.<sup>139</sup> Reporter Edward Ericson had requested each permit holder's name, birth date, address, telephone number, occupation, gender and the date of permit issuance. Bridgeport officials initially said the information was not computerized and that it would take some time to produce. Ericson called the city repeatedly over six weeks before city officials declared that these were closed records. The newspaper appealed to the state's Freedom of Information Commission for an administrative decision. The FOIC concluded that the name, address, date of birth, occupation and gender were open, along with the date of permit issuance and types of weapons registered to carry. The FOIC said this information should not be considered a "medical, personnel or similar file," which are exempt, and that issuance did not constitute an invasion of personal privacy.<sup>140</sup>

The city appealed the FOIC's decision to Superior Court, which ruled the files could be withheld under the "similar" exemption.<sup>141</sup> But the state's Supreme Court reversed, ruling that the city failed to prove the release of the information was an invasion of privacy as a "similar file," that unlike a personnel or medical file, a permit to carry a

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<sup>134</sup> N.J. STAT. §2C:58-3 (LexisNexis 2008).

<sup>135</sup> *Southern New Jersey Newspapers*, 141 N.J. 56.

<sup>136</sup> N.J. ADMIN. CODE. §13:54-1.5 (LexisNexis 2008).

<sup>137</sup> *Southern New Jersey Newspapers*, 157 N.J. at 73.

<sup>138</sup> *Supt. of Police*, 609 A.2d 998.

<sup>139</sup> *Id.*

<sup>140</sup> CONN. GEN. STAT. § 1--19(b)(2).

<sup>141</sup> *Supt. of Police*, 609 A.2d. 998.

pistol does not include detailed information about one's personal life or capabilities.<sup>142</sup> Two years later, however, the Connecticut legislature closed the records.<sup>143</sup>

The Supreme Court of Iowa also ruled in favor of openness when the *Des Moines Register* sought permit records.<sup>144</sup> The court ruled the names and addresses of permit holders were public record. It also held that the lower court erred in closing a hearing at the request of the plaintiff based in part on testimony of several permit holders who expressed privacy concerns. The *Register* had argued that the law requires the sheriff to keep a record of the names and addresses of all permit holders,<sup>145</sup> and that Polk County Sheriff Wilbur T. Hildreth stored them in his office. Hildreth argued that the information was private and that opening the records "would not be in the public interest and would substantially and irreparably injure the permit holders."<sup>146</sup> In making the argument, the defendant had five witnesses testify in a closed hearing about how disclosure of their permits would harm them. The witnesses included a physician, a minister, a real estate agent, a mechanical contractor and a lawyer. If anyone knew they were carrying a gun it would be detrimental to their work and standing in the community, they said. They also worried that would-be robbers would target them. The Supreme Court ruled that their testimony at trial should not have been closed. "The desires of witnesses to testify or refrain from testifying have no place in the determination of a court to conduct a trial publicly or as a closed hearing," the court wrote.<sup>147</sup> It held that the permit records were public and should be released.

Though the question of openness was settled by the Supreme Court of Iowa in this case in 1970, access to the concealed carry records came up again in 1994 in *Clark v. Banks*.<sup>148</sup> After a father and son were denied access and sued to examine Appanoose County records, the district court ordered Sheriff Gerald Banks to release the documents. He did so for one week before changing his policy on record storage. He began returning the forms to the permit applicant after ruling on the application. With no records, there was nothing for the sheriff to release to the public. Plaintiffs Robert and Donald Clark asked the court to hold the sheriff in contempt for placing public records with nongovernmental bodies as a way to prevent public release. They also asked the court to order Banks to recover the records and make them available. Banks countered that he had no duty to maintain the records, and the district court agreed with him. Since Iowa law does not specifically require local sheriffs to store the documents, he did not have to keep them, and therefore they were not public records when in the applicants' hands. The Clarks appealed. Iowa's high court affirmed the lower court's decision, noting that Iowa law only required the state commissioner of public safety to maintain a permanent record of all valid permits to carry weapons and of current permit revocations and make them

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<sup>142</sup> *Id.* at 1001.

<sup>143</sup> *Supra* note 72.

<sup>144</sup> *Des Moines Register*, 181 N.W.2d 216.

<sup>145</sup> IOWA CODE § 695.16 (1966).

<sup>146</sup> *Des Moines Register*, 181 N.W.2d at 218.

<sup>147</sup> *Id.* at 220.

<sup>148</sup> 515 N.W.2d 5 (Iowa 1994).

available for examination and copying.<sup>149</sup> Prior to 1978, each county's sheriff was assigned this duty.

Iowa law does require sheriffs to issue and revoke firearm permits.<sup>150</sup> It is a "may issue" state, so their discretion is considerable. Applicants must complete a form to "reasonably justify going armed" before the sheriff may issue a permit.<sup>151</sup> The court pointed out that the justification that the sheriff considers when issuing a permit is on the form and available at the commissioner's office, so the public is "provided with an avenue of scrutinizing the conduct of those charged with issuing firearm permits."<sup>152</sup> As a footnote, the court declined to express an opinion "on the wisdom" of the sheriff's new policy of returning the forms to the applicants.<sup>153</sup>

In this case, the court sidestepped the open records question, ruling instead on a fairly straightforward aspect of the law. It clearly states that the commissioner is responsible for storing the records and making them available to the public. So rather than viewing the documents at the local courthouse, requesters must use a central repository in the commissioner's office in Des Moines. The issue here is that of convenience. But one wonders if an editor at a small newspaper several hours' drive from the state capital will actually spend the time and money to allow a reporter to examine the records in Des Moines. There was no discussion in the 1994 court documents regarding whether the information was electronic or downloadable from the web.

In Oregon, a Jackson County Circuit Court judge ordered the sheriff to release a list of all concealed carry permits issued in the county in 2006 and 2007 per the request of the *Mail Tribune*.<sup>154</sup> The sheriff had pointed to an exemption for records that might "identify security measures, or weaknesses or potential weaknesses in security measures, taken or recommended to be taken to protect an individual."<sup>155</sup> But Judge G. Philip Arnold said that nothing in the handgun statute requires an applicant to assert that the weapon is part of a security measure. "A person may apply for and receive a concealed handgun license for any personal reason, or no reason at all."<sup>156</sup> The judge also rejected the *Mager* test, where information can be withheld if it is of a personal nature. He wrote: "Under Michigan law the public body may assert the privacy claim for individuals. However, Oregon law is clear; the 'individual' must assert his/her own claim of a privacy exemption."<sup>157</sup>

The Jackson County sheriff has appealed the case. And in response to the ruling, several Oregon sheriffs sent out mass mailings to their permit holders in the fall of 2008,

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<sup>149</sup> *Id.*, at 6.

<sup>150</sup> IOWA CODE ANN. § 331.653(59) (LexisNexis 2008).

<sup>151</sup> IOWA CODE ANN. § 724.7 (LexisNexis 2008).

<sup>152</sup> *Clark*, 515 N.W.2d at 7.

<sup>153</sup> *Id.* at 6.

<sup>154</sup> *Mail Tribune*, No. 07-4147-E-2.

<sup>155</sup> OR. REV. STAT. § 192.410-192.505 (LexisNexis 2007).

<sup>156</sup> *Mail Tribune*, No. 07-4147-E-2, at 3.

<sup>157</sup> *Id.* at 5, citing *Guard Publishing Company v. Lane County School District*, 310 Or 32 (1990), where the Oregon Public Records Act must be broadly construed in favor of disclosure of public records and exemptions are to be narrowly construed.

asking them to make a formal, written request that the records be closed. They also recommended to the licensees that they say the main reason they got their permits had to do with a concern for personal safety.<sup>158</sup> “I think the more responsible people we have handling guns, the safer we are,” said Wallowa County Sheriff Fred Steen.

Pennsylvania courts also have weighed in on the matter, declaring that gun permit data are public. In 1992, the Commonwealth Court in Pittsburgh ruled that a gun permit applicant’s name, race, reason for requesting the license, personal references and answers to background questions were open.<sup>159</sup> The background questions include the applicant’s arrest and conviction record, citizenship and military history, among other things. However, for the first time, the court restricted access to the applicant’s home address, telephone and social security number.

When Erie County sheriff Robert N. Michel refused the request of a *Morning News* reporter for permit information, the Times Publishing Co. filed suit in 1992.<sup>160</sup> The sheriff relied on the New Jersey case of *Southern New Jersey Newspapers Inc. v. Township of Mount Laurel*, which denied the newspaper access to gun permit files.<sup>161</sup> The sheriff argued that making the applications public would “hamper his investigation by potentially inhibiting an applicant’s candor and chilling their truthfulness.”<sup>162</sup> The court rejected the claim that these were investigatory documents, reasoning that the newspaper requested the information after the decision was made to grant a permit, not while the sheriff was considering it. Further, the court ruled that permit documents were not generated by government officials – the citizens chose to supply the information when they filled out the application. The sheriff also argued that the documents are exempt since the information “would operate to the prejudice or impairment of a person’s reputation or personal security.”<sup>163</sup> The records would give criminals a list of homes with weapons, he said. Yet the court ruled that the public’s right to know trumped privacy concerns in this case, pointing out that “citizens, of their own accord choose to make application for such licenses.”<sup>164</sup>

Regarding the personal security argument, the court said in order for the records to be closed, their release would have to be “intrinsically harmful, and not merely capable of being used for a harmful purpose.”<sup>165</sup> The plaintiffs were asking for access to applications relating to *issued* permits, so any embarrassing facts (like a mental health or substance abuse problem) would not reach the public since those applicants were not issued a permit, the court reasoned. The court also said the release of the permit holder’s

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<sup>158</sup> Kathleen Ellyn, Sheriff: Keep gun permits private, WALLOWA COUNTY CHIEFTAIN, December 24, 2008, available at <http://www.wallowa.com/Main.asp?SectionID=9&ArticleID=17717>.

<sup>159</sup> *Times Publishing*, 14 Pa. D. & C.4<sup>th</sup> 655.

<sup>160</sup> *Id.*

<sup>161</sup> *Southern New Jersey Newspapers*, 157 N.J. 647.

<sup>162</sup> *Times Publishing*, 14 Pa. D. & C.4<sup>th</sup> at 660.

<sup>163</sup> *Id.* at 659.

<sup>164</sup> *Id.* at 660.

<sup>165</sup> The court relied on *Mergenthaler v. Commonwealth, State Employees Retirement Board*, 372 A. 2d 944 (Pa. Commw. 1993), which granted disclosure of retired state employees’ names and addresses.

name, race, references and reason for requesting a permit were not intrinsically harmful and therefore must be disclosed. However, in exempting permit holders' addresses, the court explained its reasoning:

...an individual's very life could be placed at risk. Take for example a party in hiding from an abusive spouse or ex-spouse. Such a party has a legitimate reason to apply for a permit to carry a gun. To disclose such a person's name, reason and prior history poses no harm. To disclose an address could sign a death warrant. The court could not bear this on its conscience.<sup>166</sup>

On appeal, the court reversed the decision to release permit holders' names retroactively and upheld the remainder of lower court's decision.<sup>167</sup> However, the legislature closed all information related to concealed permits as part of the Pennsylvania Uniform Firearms Act of 1995.<sup>168</sup>

Action taken by courts and especially legislatures in these five rulings on the matter have been quite different from one another in terms of privacy standards. The Michigan Supreme Court even used the fact that possessing a permit is "embarrassing" as justification for closure.<sup>169</sup> This is hardly in the spirit of openness traditionally put forth in the sunshine laws. On the other end of the spectrum was the Oregon court ruling that the state may not assert the privacy claim on the part of an individual.<sup>170</sup> And in two of the cases listed above where state supreme courts ruled in favor of openness, Pennsylvania and Connecticut, the legislatures opted to close the records anyway.

In Virginia, the attorney general has also weighed in the issue, and ironically, this was just days before the Virginia Tech murders. After a columnist for *The Roanoke Times* highlighted the fact that the list of Virginians licensed to carry concealed weapons was available to the public, a state legislator asked Attorney General Bob McDonnell for his opinion on the status of the records. McDonnell ruled the information should be off limits to the public.<sup>171</sup> The columnist, Christian Trejbal, had caused a firestorm when he suggested readers should look up who in their community was "packing heat."<sup>172</sup> The newspaper linked to a database that included names of more than 135,000 Virginia concealed carry permit holders. The newspaper removed the database from its website

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<sup>166</sup> *Times Publishing*, 14 Pa. D. & C.4<sup>th</sup> at 665.

<sup>167</sup> *Times Publishing Co. v. Michel*, 633 A.2d 1233 (Pa. Commw. 1993).

<sup>168</sup> 18 PA. CODE STAT. § 6111(h)(4)(i) (LexisNexis 2008) is the gun law. This is not to be confused with 65 PA. CODE STAT. § 67.101-67.3104, the state's sunshine law. Long considered one of the nation's weakest public-access laws, the act was overhauled in 2008 and put into effect January 1, 2009. This, however, did not change the status of the permits under the Uniform Firearms Act.

<sup>169</sup> *Mager*, 460 Mich. 134.

<sup>170</sup> *Mail Tribune*, No. 07-4147-E-2.

<sup>171</sup> Laurence Hammack, *The attorney general said the list contained sensitive info*, THE ROANOKE TIMES, April 7, 2007, available at [www.roanoke.com/news/roanoke/wb/112135](http://www.roanoke.com/news/roanoke/wb/112135).

<sup>172</sup> Christian Trejbal, *Shedding light on concealed handguns*, THE ROANOKE TIMES, March 11, 2007, available at <http://www.roanoke.com/editorials/trejbal/wb/wb/xp-108160>.

after receiving hundreds of complaints. Following this, several legislators promised to introduce bills to close the permit rosters to the public. McDonnell opined that the records should be private, in part because the list is compiled only for police to use in their investigations. It also includes names of crime victims and witnesses who might be harmed if their names are released. Yet it was unclear from McDonnell's opinion, dated April 6, 2007, how or why those people might be harmed by the inclusion of their names on a gun permit list.<sup>173</sup>

After the opinion was released, state police announced they would no longer give out the information. During the two previous years, they had complied with 17 FOIA requests by the media, political organizations and gun-rights groups.<sup>174</sup> Typically, gun-rights groups and political organizations seek the lists to identify potential members or those interested in gun-related issues or legislation. Virginia lawmakers introduced two bills during the 2008 session that would close permit records. One bill would prohibit the state police and circuit court clerks from releasing permit information. Another bill would allow applicants to request that their information be withheld from the public. Those bills ended the legislative session in committee.<sup>175</sup>

## VI. CONCLUSION

Gun permit closures are just the latest assault on open access in the name of privacy and represent a vast departure from the spirit of the states' sunshine laws. The trend favoring privacy, punctuated by the federal FOIA case, *Reporters Committee*, continues to cast its long shadow over the public's right to know.<sup>176</sup> More and more information is being blocked from public scrutiny using the "central purpose" test and continuing to contribute to a culture of closure.<sup>177</sup> In this case, the court crafted a huge exception to FOIA where access to electronic data are concerned. In balancing privacy interests with the public's right to know, the requester must show that a government record will shed light on the government's performance or operations.<sup>178</sup> Since *Reporters Committee* narrows the scope of the types of records made available through FOIA, scores of journalists have been hampered in their news gathering efforts as the

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<sup>173</sup> The complete opinion may be downloaded as a pdf file from [www.roanoke.com/news/roanoke/wb/112135](http://www.roanoke.com/news/roanoke/wb/112135).

<sup>174</sup> Harnisch, *supra* note 3.

<sup>175</sup> Virginia Coalition for Open Government 2008 Legislative Roundup, *available at* <http://www.opengovva.org/content/view/937/162/>.

<sup>176</sup> The Supreme Court first recognized invasion of privacy as a potential barrier to disclosure under FOIA in *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Here, the Court established a balancing test between personal privacy and the value of public disclosure when weighing whether information should be disclosed. Exemptions must be narrowly construed, and any exemption should not "obscure the basic policy that disclosure, not secrecy, is the dominant object of the Act." *Id.* at 361.

<sup>177</sup> Halstuk and Davis, *supra* note 118.

<sup>178</sup> *Reporters Comm.*, 489 U.S. at 774.

scales tip toward privacy.<sup>179</sup> Furthermore, while some courts are ruling in favor of openness, legislatures continue to accept the culture of closure at an increasing pace, this article shows.

One of the most common arguments in favor of closure asserts that revealing the names or addresses of permit holders will give thieves a shopping list. Police have discounted the assertion that would-be burglars will be reading the newspaper or requesting lists of gun permit holders, shopping for targets.<sup>180</sup> Indeed, the *Raleigh News & Observer* reported that it ran the permit lists for years, periodically checking with police to see whether there was a connection with any burglaries that occur.<sup>181</sup> The police said there is no indication of such.<sup>182</sup> Proponents of closure also have argued that they could be harassed if it were widely known that they carried a gun. However, there are no documented trends of this occurring in states with open permit records.<sup>183</sup> This concern could be addressed by exempting permit holders who are being stalked and represents just one way state legislatures could narrowly tailor exemptions and maintain the spirit of the sunshine act.

In arguing for the enactment of concealed carry laws, some gun owners have asserted that openness is a good thing because if would-be criminals knew who had weapons, it could actually be a deterrent to crime. Even the leader of Colorado's largest gun lobby, Rocky Mountain Gun Owners, believes permit records should be public. Dudley Brown told the *Rocky Mountain News*: "I'm not an attorney, but our assumption has always been that anytime you ask for a permit from government, at least some portion of that permit will be public. We're in a weird position. Many of our members believe it should be private. But philosophically, to be consistent, I don't know how they can be private."<sup>184</sup>

Discussion of whether permits should be open to public scrutiny seems to provoke a knee-jerk reaction in defense of one's Second Amendment right to bear arms. However, openness of permit records does not affect citizen's right to own guns, merely that the permit required to carry that gun in public places is in fact public. Additionally, proponents of openness point out that virtually all other types of licenses issued by the government are public records, from marriage to hunting licenses, from licenses to drive school buses or even to cut our hair. And perhaps more importantly, it is virtually impossible to ascertain whether the law is working as intended or study how officials are implementing it without viewing the documents. It would be impossible to determine if

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<sup>179</sup> Reporters Comm. for Freedom of the Press, *Report on Responses and non-Responses of the Executive and Judicial Branches to Congress's Finding that the FOI Act Serves 'Any Purpose,'* as cited in Halstuk and Davis at 995.

<sup>180</sup> Yack, *supra* note 30.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Gun Permits Shouldn't be Secret*, ST. PETERSBURG TIMES, May 10, 2006, available at [http://www.sptimes.com/2006/05/10/Opinion/Gun\\_permits\\_shouldn\\_t.shtml](http://www.sptimes.com/2006/05/10/Opinion/Gun_permits_shouldn_t.shtml).

<sup>184</sup> Kevin Vaughan, *Concealed gun permits often Secret, Officials disagree on whether lists of permit holders must be made available to public*, ROCKY MOUNTAIN NEWS, November 19, 2000, at 7A.

any convicted felons are licensed by the state to carry firearms or whether local sheriffs are applying consistent standards to applicants.

In the Virginia and Illinois university campus mass murders, neither shooter had a concealed carry permit, giving credence to the maxim that laws are only for the law abiding. So the issue that has been up for so much debate lately has been whether students have the right to legally arm themselves in preparation of the unlikely event that a killer opens fire on their campus. Students and faculty members have discussed in blogs and newspapers across the country the fact that at Virginia Tech, the gunman methodically killed 32 people over more than two hours. Witnesses said the killer, identified earlier as an emotionally disturbed student, paused to reload his guns while people huddled defenseless in their classrooms.

Rock guitarist and notorious gun activist Ted Nugent, also a member of the board of the NRA, has been widely quoted on issue of concealed carry in the wake of the Virginia Tech and Northern Illinois murders: "Americans had best wake up real fast that the brain-dead celebration of unarmed helplessness will get you killed every time."<sup>185</sup> Regardless of whether one agrees with Nugent, the issue of packing heat is hot. In order to insure a continued robust debate, discussants and policymakers need all of the information they can get. And this information includes the permit records.

Judging by the wave of new laws allowing a citizen to legally carry a firearm and the accompanying records closures, privacy is outweighing public interest with increasing frequency. In a growing number of states, the public will not know who applied for a permit or why, who was accepted or rejected by public safety officials and why. More people will be carrying guns legally, but the people they will be walking and living among will know little about it.

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<sup>185</sup> Nugent: *Gun-free zones are recipe for disaster*, CNN, downloaded March 6, 2008, and available at <http://www.cnn.com/2007/US/04/19/commentary.nugent/index.html>

# RETURN TO THE MARKETPLACE: BALANCING ANONYMOUS ONLINE SPEECH AND DEFAMATION

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*This article examines how courts have used the marketplace of ideas theory as a basis for ruling on cases involving the clash of anonymous online speech and defamation claims. In recent years, federal and state courts have developed various speech-protective standards for determining how plaintiffs may proceed with defamation cases against anonymous defendants. These standards generally involve a summary judgment or prima facie test; however, courts are in disagreement about the extent to which explicit requirements for balancing these rights is necessary. Both types of summary judgment standards have been protective of First Amendment rights of anonymous online speakers, but standards that include more precise balancing tests are more likely to preserve a marketplace of ideas in a climate in which plaintiffs increasingly file lawsuits as a means of chilling speech.*

**Keywords:** marketplace, anonymous, online, speech, defamation

## I. INTRODUCTION

The robust tradition of anonymous speech in the United States has helped enrich how Americans think about economic, social and political issues.<sup>1</sup> From the *Federalist Papers* to today's Internet message boards, anonymous commentary has been central to the nation's development as a means of exchanging ideas. The difference is that today's anonymous conversations come not from Publius<sup>2</sup> but `publius%99@yahoo.com`. And the speech is usually not printed and distributed to a relatively small audience, but produced electronically and available for all to read worldwide at their leisure. In this manner, the Internet has provided for a rebirth in the popularity of anonymous speech and a reinterpretation for how the courts handle anonymous commentary. The amount of public

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<sup>1</sup> See, e.g., Ryan M. Martin, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. Cin. L. Rev. 1217 (2007) for analysis of the subject in general.

<sup>2</sup> *McIntyre v. Ohio Elections*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring)(referencing the tradition of Federalists and their opponents to use pseudonyms such as "Publius" when engaging in political arguments).

participation in anonymous speech online surely surpasses the relatively few hearty commentators of revolutionary times. Indeed, the pamphleteer is lonely no longer; he or she has plenty of company online.

Federal and state courts have argued repeatedly that anonymous speech is essential in the democratic process as a means of airing unpopular views that otherwise would remain unspoken.<sup>3</sup> Some have offered the opinion that “anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind”<sup>4</sup> due to the benefit of having important ideas shared through anonymity. And the United States Supreme Court has repeatedly upheld protections for anonymous speech in many formats.<sup>5</sup> In *McIntyre v. Ohio Elections Commission*<sup>6</sup> and *Watchtower Bible v. Village of Stratton*,<sup>7</sup> the Court sided with anonymous speakers who would have been restricted from physically distributing their viewpoints on political and religious issues.

However, anonymous speech that takes place online brings about another set of legal questions and problems. In some ways, message boards offer a return to the 18<sup>th</sup> Century town square, where ideas and speech were traded in public view. The Court drew that exact comparison in *Reno v. ACLU*: “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages ... the same individual can become a pamphleteer.”<sup>8</sup> In this way, the Internet has been described as “a true marketplace of ideas.”<sup>9</sup>

In many cases, the Court has consistently, although sometimes only implicitly, used the marketplace theory of the First Amendment in its defense of anonymous speech, preferring the position that more speech, even if anonymously spoken, was preferred over government’s stifling unidentified speech. Internet message boards build on Justice Holmes’s notion of “competition of the market”<sup>10</sup> by providing a space for debate in a cyber-marketplace.

Recent state court decisions have developed various summary judgment standards for determining how plaintiffs may proceed with defamation cases against anonymous defendants whose speech originated online. In *Dendrite International v. Doe*,<sup>11</sup> the New Jersey Superior Court, Appellate Division, developed a four-part summary judgment standard that included a balancing test for handling defamation cases involving anonymous online speech. In the years since, three other state appellate courts have referred to the *Dendrite* test as a basis for how to balance rights in similar cases. In

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<sup>3</sup> *McIntyre*, 514 U.S. at 342.

<sup>4</sup> *Talley v. California*, 362 U.S. 60, 64 (1960).

<sup>5</sup> *See id.*; *McIntyre*, 514 U.S. 334; *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>6</sup> 514 U.S. 334 (1995).

<sup>7</sup> 536 U.S. 150 (2002).

<sup>8</sup> 521 U.S. 844, 870 (1997).

<sup>9</sup> Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POLICY 405 (2003) at 407.

<sup>10</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>11</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

*Doe v. Cahill*,<sup>12</sup> the Supreme Court of Delaware refined the *Dendrite* test down to two parts, relying heavily on the summary judgment standard but discarding the balancing requirement. In *Mobilisa, Inc. v. John Doe 1*,<sup>13</sup> the Arizona Court of Appeals melded the procedural safeguards of *Cahill* with balancing requirements even more protective than *Dendrite*. In 2009, in *Independent Newspapers v. Brodie*,<sup>14</sup> the Maryland Court of Appeals bypassed mid-level appellate courts and upheld anonymous speech protections using the four-part *Dendrite* test as precedent. And most recently, in *Solers v. Doe*, the District of Columbia Court of Appeals also applied the summary judgment standard, but disagreed with the *Cahill*, *Mobilisa*, and *Brodie* courts about the necessity for a balancing test.<sup>15</sup>

While all of these summary judgment standards have been generally protective of First Amendment rights of anonymous online speakers, some have argued that the courts would be better served to ensure the protection of anonymous speech through the explicit procedural safeguards of a balancing requirement. This article examines the origin and history of the development of these balancing standards and the arguments surrounding the differing approaches. With anonymous speech regaining popularity through online expression, the courts have returned repeatedly to the marketplace of ideas roots of First Amendment theory to determine how to balance speech and defamation rights, even if different jurisdictions disagree slightly on how to apply that speech-protective foundation.

## II. THE MARKETPLACE OF IDEAS AND ANONYMOUS SPEECH

The marketplace of ideas theory of freedom of speech under the First Amendment has a storied tradition that even predates the Bill of Rights. The marketplace interpretation asserts that a competition of ideas, even those submitted anonymously, leads to truth or at least a better understanding, perspective, or solution for societal problems.<sup>16</sup> Its origins can be traced back to English philosophers Milton in 1644<sup>17</sup> and Mill in 1859.<sup>18</sup> Classic marketplace theory posits that truth is discovered through competition with falsity and rejects governmental intervention in the competition of ideas because of the danger of erroneous influence.<sup>19</sup>

In particular, Mill argued that censorship may interfere with the market's truth seeking. If the censored opinion contained truth, its silencing would dampen the chance of truth's discovery. And if conflicting opinions each contained parts of truth, the clash

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<sup>12</sup> 884 A.2d 451 (Del. 2005).

<sup>13</sup> *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007).

<sup>14</sup> *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009).

<sup>15</sup> *Solers, Inc. v. Doe*, No. 07-CV-159 (D.C. Aug. 13, 2009), available at [http://www.dccourts.gov/dccourts/appeals/pdf/07CV159\\_MTD.PDF](http://www.dccourts.gov/dccourts/appeals/pdf/07CV159_MTD.PDF) (last visited Aug. 21, 2009).

<sup>16</sup> Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARVARD L. REV. 932 (1919).

<sup>17</sup> JOHN MILTON, *AREOPAGITICA* (George H. Sabine, ed., 1987).

<sup>18</sup> JOHN STUART MILL, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (R.B. McCallum, ed., 1947).

<sup>19</sup> *Id.* at 13-48. See also MILTON, *supra* note 17, at 548-568.

between them is the best method for discovering the contribution of each to the whole truth.<sup>20</sup> Also, Mill felt that an accepted opinion must be available for testing even by a false opinion so that truth is not relegated to the status of stale dogma.<sup>21</sup>

Justice Holmes introduced the market concept of speech freedoms to American jurisprudence in his dissent in *Abrams v. United States* in 1919.<sup>22</sup> Although he never personally labeled the theory, he came close in writing that “the best test of truth is the power of thought to get itself accepted in the competition of the market.”<sup>23</sup> The Court later amplified Holmes’s position in *Gertz v. Welch* when it stated that “under the First Amendment, there is no such thing as a false idea.”<sup>24</sup>

Holmes’s reasoning has been used on numerous occasions by scholars and jurists alike.<sup>25</sup> Even alternate interpretations of First Amendment speech freedoms, such as Alexander Meiklejohn’s self-government theory<sup>26</sup> and Thomas Emerson’s freedom of expression theory,<sup>27</sup> have used the marketplace of ideas as a basis. In fact, the Court’s interpretation of the First Amendment using the marketplace of ideas theory developed into a position that the quality of ideas exchanged in the market bolstered the relative quality of the democracy. Therefore, freedoms of press and speech (together commonly called the freedom of expression<sup>28</sup>) have been given a preferred position within the Court’s construction of the Constitution.<sup>29</sup>

Critics of the marketplace of ideas argue objective truth is an unrealistic goal, power relations distort the practical application of the market, and government intervention is inevitable and paradoxical to the theory’s laissez-faire roots.<sup>30</sup> Some First Amendment scholars counter with the argument that preliminary results produced by the marketplace of ideas are inherently messy and similar to preliminary results sometimes yielded by the scientific method. The marketplace is a metaphor for allowing a free exchange of ideas that “promotes a process of continual reflection upon, and

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<sup>20</sup> See MILL, *supra* note 18, at 46-47.

<sup>21</sup> *Id.*

<sup>22</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>23</sup> *Id.*

<sup>24</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

<sup>25</sup> The marketplace of ideas is used frequently by the Court in cases involving First Amendment rights. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1975), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and *Buckley v. Valeo*, 424 U.S. 1 (1976). For a more complete listing, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984), at 2-3, n 2.

<sup>26</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>27</sup> THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966).

<sup>28</sup> THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

<sup>29</sup> See *Jones v. Opelika*, 316 U.S. 584, 608 (1942), vacated, 319 U.S. 103 (1943) (Justice Stone, dissenting).

<sup>30</sup> See Ingber, *supra* note 25, at 5.

readjustment of, political, cultural, scientific, and other ideas.”<sup>31</sup> Regardless of the scholarly debate about the theory’s validity and applicability, the marketplace of ideas has appealed to the Court as its basis for First Amendment decision-making more than any other free speech theory.<sup>32</sup> And the courts continue to use the marketplace of ideas as speech rights cases arise from instances of anonymous speech on the Internet.

Although in early cases in the country’s formation the Court upheld disclosure requirements for anonymous speakers,<sup>33</sup> the tide began to change in the 1950s and 1960s with the fallout from Senator Joseph McCarthy’s investigations into alleged Communist Party members<sup>34</sup> and the emergence of the Civil Rights movement.<sup>35</sup> With the shift in the political climate regarding identity and group membership, the Court in some ways returned to the founders’ original thinking. It found broader protection under the First Amendment in general and anonymous speech in particular, specifically when the Court decided that the content of the speech was political in nature. Three cases that provided precedent for how the courts handle online anonymous speech arose from instances of personal distribution of printed handbills, campaign literature, and religious texts.

***Talley v. California.*** In *Talley v. California*,<sup>36</sup> Manuel Talley was arrested under a Los Angeles ordinance that prohibited the distribution of any handbill that did not include the name and address of the author on the cover.<sup>37</sup> Talley’s handbills solicited support for carrying out a boycott against unnamed businesses that carried products of “manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals.”<sup>38</sup> The bill also included a signature line where people could enroll as members of the National Consumers Mobilization.<sup>39</sup> Talley was convicted in Municipal Court because the handbills did not meet the ordinance requirements and fined \$10.<sup>40</sup> His conviction was affirmed by the Appellate Department of the Superior Court of the County of Los Angeles.<sup>41</sup>

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<sup>31</sup> MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 94 (2001). Bunker also quotes Richard Posner in drawing the comparison of the marketplace of ideas theory to the scientific method.

<sup>32</sup> See Ingber, *supra* note 25, at 2-3, n 2.

<sup>33</sup> See, e.g., *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).

<sup>34</sup> See CHARLES SELLERS & HENRY MAY, A SYNOPSIS OF AMERICAN HISTORY 402-403 (1963).

<sup>35</sup> See *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

<sup>36</sup> 362 U.S. 60 (1960).

<sup>37</sup> Municipal Code of the City of Los Angeles, §28.06, which stated: “No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following: (a) The person who printed, wrote, compiled or manufactured the same. (b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon.” Quoted in *Talley*, 362 U.S. at 60-61.

<sup>38</sup> *Talley*, 362 U.S. at 60.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 62.

Talley appealed to the United States Supreme Court, arguing that the municipal ordinance was unconstitutional because it “invaded his freedom of speech and press in violation of the Fourteenth and First Amendments to the Federal Constitution.”<sup>42</sup> The Court reversed the conviction and found the ordinance unconstitutional.<sup>43</sup> The Court reasoned that the law, which barred any anonymous handbill under any circumstance, was too broad and unconstitutional based on precedent.<sup>44</sup> Furthermore, the Court said the prohibition against anonymous handbills “would tend to restrict freedom to distribute information and thereby freedom of expression.”<sup>45</sup>

The Court also used the *Talley* decision to extol the benefits of anonymous political speech. The Court said anonymous speech allows persecuted groups to criticize government oppression and therefore aids political progress.<sup>46</sup> It also drew a comparison between the Los Angeles handbill ordinance and press licensing and sedition laws imposed on the colonies before the Revolution.<sup>47</sup> In citing the similar cases of *Bates v. Little Rock*<sup>48</sup> and *NAACP v. Alabama*,<sup>49</sup> the Court pointed out that laws that may lead to a fear of identification and reprisal for the speaker only serve to deter “perfectly peaceful discussions of public matters of importance.”<sup>50</sup>

***McIntyre v. Ohio Elections Commission.*** Thirty-five years after *Talley*, the Court again considered an ordinance against the distribution of anonymous political speech. In *McIntyre v. Ohio Elections Commission*,<sup>51</sup> an Ohio state ordinance was more narrowly tailored to prohibit only campaign literature that did not contain the author’s name and address. Margaret McIntyre distributed leaflets opposing a proposed school tax levy. Some of the leaflets had her name, while others were signed only by “concerned parents and tax payers.”<sup>52</sup> The Ohio Elections Commission fined McIntyre \$100 for violating the statute.<sup>53</sup> The Ohio Supreme Court found that the statute was valid because any burden on free speech was outweighed by the state’s interest in providing voters with a means for evaluation of the source of political messages.<sup>54</sup>

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<sup>42</sup> *Id.* at 61-62.

<sup>43</sup> *Id.* at 63-64.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 64.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 64-65.

<sup>48</sup> 361 U.S. 516 (1960).

<sup>49</sup> 357 U.S. 449, 462 (1958).

<sup>50</sup> *Talley*, 362 U.S. at 65.

<sup>51</sup> 514 U.S. 334 (1995).

<sup>52</sup> *Id.* at 337. Only the anonymous leaflets were at issue in the case.

<sup>53</sup> *Id.* at 338. McIntyre was found in violation of §3599.09(A) of the Ohio Code, which specifically outlined requirements for printed campaign materials. Section 3599.09(B) contained similar prohibitions against unidentified broadcast communications on radio or television, but was not applicable in this case.

<sup>54</sup> *McIntyre*, 514 U.S. at 340.

On appeal, the U.S. Supreme Court struck down the Ohio law as unconstitutional despite the concession that the statute in question was much narrower than the ordinance in *Talley*. Justice Stevens wrote that “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”<sup>55</sup> The Court reasoned that political expression, even when anonymous, should be afforded the broadest First Amendment freedom because “protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>56</sup>

Further, the Court described McIntyre’s leaflets as “core political speech,” and held that any law prohibiting such speech would be upheld only if the statute was narrowly tailored to serve an overriding state interest.<sup>57</sup> In unambiguous terms, the Court said that “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”<sup>58</sup> This decision established the Court’s current framework for assessing anonymous speech.<sup>59</sup>

Even when the state of Ohio argued that the statute was necessary to prevent anonymous speech being used for libel or fraud, the Court dismissed such a notion under the “exacting scrutiny” standard established in *Buckley v. Valeo*.<sup>60</sup> The Court upheld anonymous pamphleteering as an “honorable tradition of advocacy and of dissent.”<sup>61</sup> “In general, our society accords greater weight to the value of free speech than to the dangers of its misuse,” Justice Stevens wrote.<sup>62</sup>

Justice Thomas concurred, agreeing with the decision to strike down the law but not the reasoning behind the protection and respect for tradition of anonymous speech.<sup>63</sup> Instead, Thomas’s writing focused on the origins of the freedom of speech and press clauses in the First Amendment. Justice Thomas said that the Framers’ original intention was to include those freedoms expressly for political leafleting, since that form of communication was so prevalent during their time, and quite frequently was performed anonymously.<sup>64</sup> He concluded that the Framers’ inclusion of the free speech and press clause was specifically designed to protect anonymous speech.<sup>65</sup> Finally, he reasoned that

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<sup>55</sup> *Id.* at 342.

<sup>56</sup> *Id.* at 347 (quoting *Roth v. United States*, 345 U.S. 476, 484 (1957)).

<sup>57</sup> *McIntyre*, 514 U.S. at 347.

<sup>58</sup> *Id.* at 342.

<sup>59</sup> See Jennifer B. Wieland, *Death of Publius: Toward a World Without Anonymous Speech*, 17 *J.L. & POLITICS* 589, 599 (2001) (analyzing *McIntyre*).

<sup>60</sup> *McIntyre*, 514 U.S. at 348. For discussion of establishment of the standard, see *Buckley v. Valeo*, 424 U.S. 1 (1976) at 16, citing *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Buckley*, the Court applied the idea of political expression as speech to campaign contribution limits, and held that direct government restrictions on expression-as-speech violated the First Amendment.

<sup>61</sup> *McIntyre*, 514 U.S. at 357.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 358-371.

<sup>64</sup> *Id.* at 367.

<sup>65</sup> *Id.* at 370.

anonymous political speech should receive the highest protection the Constitution affords.<sup>66</sup>

***Watchtower Bible v. Village of Stratton.*** One of the more recent affirmations of the Court's support for anonymous speech protections came in the 2002 case of *Watchtower Bible v. Village of Stratton*.<sup>67</sup> A Jehovah's Witnesses congregation in Stratton, Ohio, sued the village seeking an injunction against multiple local ordinances that placed restrictions on door-to-door solicitation.<sup>68</sup> Local laws required individuals to obtain a permit from the mayor's office before approaching private residential property for the purpose of promoting any cause. Although the permit was free, application required the completion of a detailed form.<sup>69</sup> The congregation claimed such laws violated their First Amendment rights of religion, speech, and press.<sup>70</sup> The village countered that the law was narrowly tailored to protect residents from crimes such as fraud and invasion of privacy.<sup>71</sup>

The restrictions were upheld by the U.S. District Court, and affirmed by the Court of Appeals for the Sixth Circuit using intermediate scrutiny to find that the laws were content neutral and of general applicability.<sup>72</sup> The U.S. Supreme Court, however, ruled 7-2 in the opposite direction, stating that the law did not meet its stated intention. The Court said that the ordinances covered so much speech that constitutional concerns were raised. And again, Justice Stevens spent part of the majority opinion covering the historical tradition of anonymous pamphleteering and expressed concern that the required application amounted to a forfeiture of anonymity that could preclude people from canvassing for unpopular causes.<sup>73</sup> The *Watchtower* decision's affirmation of *McIntyre* may have guaranteed an individual's First Amendment rights to anonymous speech in cases of personal and printed speech such as handbills and campaign literature as that type of case has not been revisited.<sup>74</sup>

### III. ANONYMOUS SPEECH IN THE VIRTUAL MARKETPLACE

As speech on the Internet in general has become more popular through message boards, chat rooms and blogs, so, too, the market for anonymous speech has expanded. These developments have created new problems for courts because of the practical matter that the speech is usually made possible through a business relationship in which the

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<sup>66</sup> *Id.* at 360.

<sup>67</sup> 536 U.S. 150 (2002).

<sup>68</sup> *Id.* at 153-154. The congregation objected to several sections of Ordinance No. 1998-5. The Court specifically focused on the objections to §§116.01, 116.03, 116.04 and 116.06. See *id.* at 156.

<sup>69</sup> See *Watchtower Bible*, 536 U.S. at 156 (outlining the form requirements in §116.03).

<sup>70</sup> *Id.* at 154.

<sup>71</sup> *Id.* at 158.

<sup>72</sup> *Id.* at 158-159.

<sup>73</sup> *Id.* at 159-167.

<sup>74</sup> See Martin, *supra* note 1, at 1225.

speaker is a customer of any one of several Internet Service Providers. This unique problem of online speech compounds matters by introducing a third party into the equation between speaker and recipient. It also raises questions about whether First Amendment rights of printed materials are transferable to the Internet.

*Reno v. ACLU* was a groundbreaking case in this area in that it established conclusively that the right to speak anonymously extended to speech on the Internet.<sup>75</sup> In it, the Court ruled that portions of the Communications Decency Act of 1996 that sought to regulate the Internet, ostensibly designed to protect children, were overbroad and would have applied to much more content than previous similar restrictions on commercial speech. The Court's reasoning centered on the features of the technology, rejecting the idea that the Internet could be regulated like broadcasting, based on notions of scarcity that underlay the Court's decision in *FCC v. Pacifica*.<sup>76</sup> Justice Stevens directly drew the link between the town crier or pamphleteer of early American history and the modern blogger as ideological equals.<sup>77</sup> He wrote that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet.<sup>78</sup>

The *Reno* decision pleased legal scholars who believed that attempts to limit or condemn association or anonymity on the Internet would have been met with resistance from First Amendment advocates.<sup>79</sup> Others argued that Internet technology rendered regulation and identification of anonymous online activity difficult at best and perhaps too onerous for the courts given the difficulties in decoding technology designed specifically to mask the speaker's identity.<sup>80</sup>

In the decade after the *Reno* case, the courts upheld staunch speech freedoms for anonymous Internet communication. However, a section of the Communications Decency Act that survived *Reno* immunizes Internet Service Providers from defamation suits for content they did not originate,<sup>81</sup> meaning that defamation plaintiffs can only sue the anonymous speakers if they want to recover damages. Therefore, the courts have faced a rising number of subpoenas in defamation cases in which the plaintiffs' goal appears to be to unmask the identity of the speakers, often solely to silence them.<sup>82</sup> Many of these actions are brought against defendants who post critical comments on message boards or in chat rooms related to business and investing.<sup>83</sup> The goal of the plaintiffs,

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<sup>75</sup> 521 U.S. 844 (1997).

<sup>76</sup> 438 U.S. 726 (1978).

<sup>77</sup> *Reno*, 521 U.S. at 870.

<sup>78</sup> *Id.*

<sup>79</sup> See Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POLICY 405, 413-16 (2003), for detailed discussion and summary of the scholarly community's range of positions on anonymous Internet speech.

<sup>80</sup> See, e.g., Noah Levine, Note: *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526 (1996).

<sup>81</sup> Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C. § 230 (c) (Lexis 2008).

<sup>82</sup> Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

<sup>83</sup> *Id.*

often companies that feel offended, is not to recover damages. Instead, many of these lawsuits are part of a concerted effort to guard against negative statements that might drive down stock prices.<sup>84</sup>

These lawsuits are also called “Strategic Lawsuits Against Public Participation,” or SLAPP suits, and are opposed by an array of activist groups who see such suits as attempts to silence opposition and chill free speech.<sup>85</sup> Compliance by Internet Service Providers has varied, with some, such as America Online, notifying subscribers when civil subpoenas are received in time to challenge the process, and others, such as Yahoo!, complying immediately without offering customers notice so they might quash the subpoenas or ask the courts to evaluate the requests for identifying information.<sup>86</sup>

Of course, the courts have never viewed speech, even anonymous political speech, as absolutely protected by the First Amendment. And protection of citizens from defamation is an interest that frequently must be balanced against speech rights. The Court has explicitly determined that, in many cases, defamatory speech, whether anonymous or not, is not protected.<sup>87</sup> The reasoning in these cases is that defamatory utterances are not always essential to the expression of ideas and therefore are of such insignificant social value as to be outweighed by society’s interests in order and morality.<sup>88</sup> Protection against defamation has been tempered, most famously in *New York Times Co. v. Sullivan*<sup>89</sup> and its progeny, but the balancing question has not been definitively resolved with respect to identifying anonymous libel defendants.

This tension between the First Amendment rights of anonymous online speakers and defamation suits that might or might not be motivated expressly by the desire to silence the speakers creates an interesting topic for legal analysis. In a series of cases in recent years, some state courts have grappled with developing balancing tests for speech versus defamation. For the most part, their reasoning has followed the *McIntyre* line of decisions and frequently has melded the marketplace of ideas theory into their application of First Amendment freedoms.

Another interesting development involving online anonymous speech is the emergence of cases that combine consideration of state journalist’s shield laws with

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<sup>84</sup> *Id.* at 876-77. For further discussion of SLAPP suits, see Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 Duq. L. Rev. 607 (2006) and Sarah Mayhew Schlosser, *The High Price of (Criticizing) Coffee: The Chilling Effect of the Federal Trademark Dilution Act on Corporate Parody*, 43 ARIZ. L. REV. 931 (2001)

<sup>85</sup> Twenty-six states, plus the territory of Guam, have anti-SLAPP statutes: Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington. In addition, Colorado and West Virginia have judicial doctrine against SLAPP suits, but no legislative statutes. California Anti-SLAPP Project, <http://www.casp.net> (visited Aug. 17, 2009).

<sup>86</sup> David Sobel, *The Process that “John Doe” Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, 14 (2000).

<sup>87</sup> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>88</sup> *Id.* at 572.

<sup>89</sup> 376 U.S. 254 (1964).

constitutional protections of anonymous free speech. In 2008, cases arose in Montana, Oregon, and Illinois that showed that various state courts were amenable to protecting the identities of anonymous posters to news organization web sites.

In Montana, an unsuccessful candidate for statewide office sued the winner for defamation over campaign allegations about his qualifications to hold office.<sup>90</sup> The plaintiff subpoenaed *The Billings Gazette* to learn the identities of anonymous commenters, which he suspected included the defendant, despite the defendant's denial.<sup>91</sup> However, the trial judge quashed the subpoena and found that the identities of the posters were protected by the Montana Media Confidentiality Act.<sup>92</sup>

In Oregon, a businessman who believed he was defamed in a blog posting about a local election race failed to win his case to force a Portland newspaper to identify the poster.<sup>93</sup> The judge determined that the identity of the commentator fell within the definition of "information" protected by the Oregon shield law.<sup>94</sup> The judge also said that the information fell within the definition of information gathered in the course of newsgathering and was related to the topic of the blog.<sup>95</sup> He hinted that information not related to newsgathering could be protected under the broad language of the shield law, but his comments also suggested that a direct connection between a blog post and newsgathering is helpful.<sup>96</sup>

In a third similar case, an Illinois newspaper, the *Belleville News-Democrat*, argued that the Illinois shield law should protect the identities of anonymous posters who commented on a newspaper blog.<sup>97</sup> The state attorney general sought the names, addresses, and IP addresses of five different posters in connection with a grand jury murder investigation.<sup>98</sup> At this writing, a judge had not yet ruled on the newspaper's motion to quash, which was based on the paper's interpretation of the Illinois shield law.<sup>99</sup>

#### IV. BALANCING ANONYMOUS INTERNET SPEECH AND DEFAMATION

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<sup>90</sup> Jeffrey D. Neuberger, *Judges Rule Anonymous Commenters Protected by State Shield Laws*, MEDIASHIFT (PBS), Oct. 30, 2008, available at <http://www.pbs.org/mediashift/2008/10/judges-rule-anonymous-commenters-protected-by-state-shield-laws304.html> (last visited Jan. 19, 2009).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see MONT. CODE ANN. §§ 26-1-902 (2003). The judge also questioned whether anonymous comments had enough credibility to support a defamation claim.

<sup>93</sup> Samantha Frederickson, *Oregon Blogger Can Remain Anonymous, Judge Holds*, NEWS MEDIA UPDATE, Oct. 3, 2008, available at [www.rcfp.org/newsitems/index.php?i=7059](http://www.rcfp.org/newsitems/index.php?i=7059) (last visited Jan. 17, 2009).

<sup>94</sup> *Id.*; see OR. REV. STAT. ANN. §§ 44.520 (2003).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Samantha Frederickson, *Another Paper Uses State Shield Law to Protect Online Commenters*, NEWS MEDIA UPDATE, Oct. 17, 2008, available at <http://www.rcfp.org/newsitems/index.php?i=7086> (last visited Jan. 17, 2009).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; see 735 ILL. COMP. STAT. ANN. § 5/8-902 (West 2003, Supp. 2004).

Although no cases involving anonymous online speakers and defamation have reached the U.S. Supreme Court, a handful of relevant federal and state court decisions have widespread implications. Also, these lower courts have developed varying standards for balancing these conflicting legal rights, including a summary judgment balancing standard that recently has gained traction among state appeals courts.

***Basis for Balancing.*** One of the first significant cases to emerge in this area was *Columbia Insurance Company v. Seescandy.com*.<sup>100</sup> A California court was asked to consider a lawsuit regarding trademark infringement between Columbia, which owned See's Candy, and the "cybersquatter," or anonymous Internet user who registered multiple domain names similar to seescandy.com in the hopes of selling those rights to the trademarked candy manufacturer.<sup>101</sup>

Despite finding for the plaintiff with respect to his trademark interests, the court identified the need for balancing those interests with "the right to participate in online forums anonymously and pseudonymously."<sup>102</sup> Judge Jensen wrote that the ability to speak freely online without the burden of potential receivers knowing all the facts about the speaker's identity "can foster open communication and robust debate" and permit people to obtain information of a sensitive or intimate nature without anxiety about embarrassment.<sup>103</sup> In a note of caution against plaintiffs who might be tempted to file suit frivolously in order to simply unmask, harass or embarrass anonymous parties, Judge Jensen warned that the court should not accede to such action unless a wrong clearly has been committed.<sup>104</sup>

Although seemingly a one-sided case because of the anonymous cybersquatter's trademark infringement, Judge Jensen's opinion formed a rudimentary foundation for other courts' attempts to develop a balancing test for defamation and anonymous online speech.

***"Good Faith" Standard.*** In *In re Subpoena Duces Tecum to America Online, Inc.*,<sup>105</sup> a Circuit Court in Virginia tried to develop a standard for unmasking anonymous online speakers based on "good faith."<sup>106</sup> An anonymous corporation using the pseudonym Anonymous Publicly Traded Company ("APTC") sued five anonymous defendants for allegedly publishing defamation that involved factual misrepresentations and other confidential information in a chat room hosted by America Online. APTC obtained an order requiring American Online to turn over all information regarding the

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<sup>100</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>101</sup> *Id.* at 575-76.

<sup>102</sup> *Id.* at 578.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> No. (Misc. Law) 40570, 2000 Va. Cir. LEXIS 220 (Va. Cir. Ct. Jan. 31, 2000).

<sup>106</sup> *Id.* at \*24.

defendants.<sup>107</sup> America Online refused to comply and filed a motion to quash the subpoena.<sup>108</sup> Although the court recognized the speakers' rights to remain anonymous, it tried to label the Internet as a qualified venue for speech freedom because of the potential dangers of misuse.<sup>109</sup> The Virginia court concluded that APTC had a "legitimate, good faith basis" to unmask the speakers,<sup>110</sup> and its decision was viewed as extremely deferential to the plaintiffs.<sup>111</sup>

The court's decision, and concomitantly the "good faith" balancing standard, was reversed about a month later on appeal in *America Online v. Anonymous Publicly Traded Company*.<sup>112</sup> Ironically, in reversing the decision to quash the subpoena and keep the defendants' identities secret, the appellate court found no valid reason why APTC should not disclose its real company name in the suit against anonymous speech to follow proper procedure in a defamation case.<sup>113</sup> And it questioned the change of venue in the suit, which was moved from Indiana, a state which had anti-SLAPP legislation in place, to Virginia, which did not have such a law, on the grounds of judicial comity.<sup>114</sup>

"Good faith" standards similar to *In re Subpoena Duces Tecum* have been applied in other similar cases,<sup>115</sup> but generally are viewed by the judiciary as insufficiently protective of anonymity.<sup>116</sup>

**"Motion to Dismiss" Standard.** In *Rocker Management v. John Does 1-20*,<sup>117</sup> a U.S. District court quashed a subpoena against one defendant identified only as "harry3866," whose lawyers gave oral arguments while concealing his identity.<sup>118</sup> Rocker Management had sued fifteen anonymous defendants who posted allegedly libelous

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<sup>107</sup> *Id.* at \*1.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*6. This reasoning also is at odds with *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>110</sup> *In re Subpoena*, 2000 Va. Cir. LEXIS 220 at \*24 (America Online).

<sup>111</sup> See Martin, *supra* note 1, at 1228.

<sup>112</sup> 542 S.E. 2d 377 (Va. 2001).

<sup>113</sup> *Id.* at 361-62.

<sup>114</sup> *Id.* at 359-363.

<sup>115</sup> See, e.g., *Virologic, Inc., v. Doe*, No. A101571, A102811, 2004 Cal. App. Unpub. LEXIS 8070 (Cal. Ct. App. Sept. 1, 2004), in which Virologic sought identities of three anonymous Yahoo! message board users who posted alleged confidential and propriety business information. The California Court of Appeals for the First Appellate Division used a "good cause" reasoning for considering whether to grant discovery to an anti-SLAPP motion to strike. See also *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wa. 2001), in which the U.S. District Court for the Western District of Washington used a "good faith" standard to determine that the unmasking of a group of anonymous stock/business message board posters was not material to 2TheMart's primary case.

<sup>116</sup> See the District of Columbia Court of Appeals' labeling of the "good faith" standard as "insufficiently" protective of speech rights in *Solers, Inc. v. Doe*, No. 07-CV-159 (D.C. Aug. 13, 2009) at 20, available at [http://www.dccourts.gov/dccourts/appeals/pdf/07CV159\\_MTD.PDF](http://www.dccourts.gov/dccourts/appeals/pdf/07CV159_MTD.PDF) (last visited Aug. 21, 2009).

<sup>117</sup> No. MISC 03-003 3 CRB, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. May 29, 2003).

<sup>118</sup> *Id.* at \*1.

statements on an Internet message board and served Yahoo! with a subpoena seeking disclosure of harry3866 and another poster's identity.<sup>119</sup>

In its opinion, the court assessed a "totality of the circumstances"<sup>120</sup> and determined that the context surrounding the statements made their opinions immune from defamation suits because the First Amendment protects "pure opinions" that do not imply facts capable of being proven true or false.<sup>121</sup> The court also pointed out that in addition to the opinion, part of the context that made the anonymous comments immune from defamation were nonsensical names of posters, repeated grammar and spelling errors, and a lack of decorum that destroyed the site's credibility as a place for factual commentary as assessed by a reasonable reader.<sup>122</sup>

In focusing on the opinion aspect of speech, the court in *Rocker Management* used a "motion to dismiss" standard. The U.S. District Court for the Northern District of Ohio applied this same standard in *SPX Corp. v. Doe*, in which the standard again hinged on hyperbolic and figurative language used by anonymous defendants that the court viewed as opinion, which invalidated the plaintiff's claim of defamation.<sup>123</sup>

Like the "good faith" standard, however, the "motion to dismiss" standard is seen by the courts as relatively lenient in its protection of the First Amendment rights of anonymous Internet speech.<sup>124</sup> Also, it is narrowly confined mostly to cases in which the facts of the anonymous statements are at issue.

***Third Parties in Anonymous Defamation Cases.*** *Matrixx Initiatives v. John Doe*<sup>125</sup> offered another chance for the courts to refine their standards for cases involving anonymous online commentary about private businesses. Matrixx, a pharmaceutical products company, sued several people for defamation after they posted critical statements on Internet message boards.<sup>126</sup> Unable to identify two anonymous posters, Matrixx sought a discovery order, which was granted by the California Superior Court, to compel Barbary Coast Capital Management to unmask the anonymous posters.<sup>127</sup>

Barbary Coast appealed on the grounds that Matrixx "failed to demonstrate a sufficient basis for disregarding the First Amendment right to speak anonymously on the Internet."<sup>128</sup> Matrixx argued that Barbary Coast did not have standing to fight the discovery order because it was a third party in the case. The California Court of Appeals

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at \*4 (citing and quoting *Rodriguez v. Panayiotou*, 314 F.3d 979, 986 (9th Cir. 2002)).

<sup>121</sup> *Rocker Management*, 2003 U.S. Dist. LEXIS 16277 at \*3-4 (citing and quoting *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1101 (N.D. Cal. 1999) (citing *Partington v. Bugliosi*, 56 F.3d 1147, 1153 n.10 (9th Cir. 1995))).

<sup>122</sup> *Rocker Management*, 2003 U.S. Dist. LEXIS 16277 at \*3.

<sup>123</sup> 253 F. Supp. 2d 974, 982 (N.D. Ohio 2003).

<sup>124</sup> *Solers, Inc. v. Doe*, No. 07-CV-159 (D.C. Aug. 13, 2009) at 20.

<sup>125</sup> 138 Cal. App. 4th 872 (Cal. Ct. App. 2006).

<sup>126</sup> *Id.* at 875.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

agreed and upheld the discovery motion.<sup>129</sup> The court cited previous cases in which the anonymous party stepped forward to oppose the disclosure of identity, and not the Internet provider or other third party.<sup>130</sup> The court suggested it might have ruled differently if the anonymous defendant had filed the appeal instead.<sup>131</sup>

The most important contribution of the *Matrixx* decision to the problem of balancing anonymous online speech against defamation is that the courts are more deferential to an anonymous defendant's First Amendment rights when that defendant personally protests being unmasked. The courts are less likely to keep posters anonymous when a third party tries to make the same case for them.

**Summary Judgment Standards.** Despite attempts to balance First Amendment rights in defamation suits made by courts in cases such as *Columbia Insurance, Rocker Management* and *Matrixx*, those various standards largely left the courts unsatisfied and seeking a test that could be applied more broadly to such cases. The courts took a large step forward in resolving this issue with the introduction of the *Dendrite* summary judgment or prima facie standard.

In *Dendrite International v. Doe*,<sup>132</sup> critical anonymous commentary about a business on a Yahoo! message board was again at the center of the case. The Appellate Division of the New Jersey Superior Court considered anonymous online criticism of a quarterly report for Dendrite International.<sup>133</sup> Dendrite claimed these statements constituted materially false assertions.<sup>134</sup>

On Doe's motion to quash a subpoena to reveal his identity, the court developed a four-part standard it hoped would balance the First Amendment rights of anonymous online speakers and the rights of defamation plaintiffs not to have their reputations harmed.<sup>135</sup>

In developing its standard, the *Dendrite* court cited the tradition of First Amendment protection for anonymous speech<sup>136</sup> and its application to anonymous speech online.<sup>137</sup> The appellate court also relied directly on the balancing standard established in *Columbia Insurance Company v. Seescandy.com*<sup>138</sup> as a basis for developing its test. Although *Columbia Insurance* did not directly address First Amendment rights, its treatment of the topic was useful because the speech rights of anonymous Internet posters were directly in question in this case.

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 879 (citing *Rocker Management*, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. May 29, 2003); Cahill, 884 A.2d 451; Doe v. 2themart.com, 140 F.Supp.2d 1088 (W.D. Wash. 2001)).

<sup>131</sup> *Matrixx Initiatives*, 138 Cal. App. 4<sup>th</sup> at 879.

<sup>132</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>133</sup> *Id.* at 761.

<sup>134</sup> *Id.* at 763-64.

<sup>135</sup> *Id.* at 760.

<sup>136</sup> *Id.* at 765 (citing Buckley v. American Constitutional Law Foundation, 525 U.S. 182; McIntyre v. Ohio Elections Commission, 514 U.S. 334; Talley v. California, 362 U.S. 60).

<sup>137</sup> *Dendrite*, 775 A.2d at 765 (citing Reno v. ACLU, 521 U.S. 844).

<sup>138</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

The first part of the *Dendrite* standard requires plaintiffs to notify the anonymous posters that they are the subject of a subpoena or an application for an order to disclose their identities so that the defendants will have a reasonable opportunity to fight such a motion.<sup>139</sup>

Second, the plaintiffs must identify the exact statements they believe to be defamatory.<sup>140</sup> Third, the plaintiffs must produce prima facie evidence to support every element of their cause of action prior to the court order to disclose the defendant's identity.<sup>141</sup> And finally, if the first three requirements are met, the court should balance the necessity of disclosing the identity with the First Amendment rights of the defendant to speak anonymously.<sup>142</sup>

Using this standard, the court determined that although *Dendrite* had established that the anonymous defendants had published statements that could be viewed as both false and defamatory, the company had failed to provide sufficient evidence that the criticism impaired its reputation, which failed the third prong of the test.<sup>143</sup>

At the time, the *Dendrite* test's four-part summary judgment standard was the most comprehensive judicial test articulated by a state's intermediate appellate court, and it has served as the touchstone for other courts grappling with the balancing of defamation and online anonymity speech rights on a summary judgment basis.

Four years after *Dendrite*, the Supreme Court of Delaware considered what standard should apply to the potential unmasking of anonymous online speakers who allegedly commit defamatory political speech. *Doe v. Cahill*<sup>144</sup> offered an opportunity to analyze a court's handling of the most basic of First Amendment speech rights as they apply to this type of Internet speech.

Patrick Cahill, a city councilman in Smyrna, Delaware, sued four anonymous plaintiffs for both defamation and invasion of privacy for making critical comments on an Internet blog.<sup>145</sup> Cahill sought to unmask John Doe's identity and asked the trial court to force the Internet Service Provider, Comcast, to turn over the IP address of the blog's owner, thereby surrendering his anonymity. The trial court favored the "good faith" standard that had been overruled in *In re Subpoena Duces Tecum to America Online*<sup>146</sup> over the *Dendrite* standard that allowed for greater First Amendment protection for anonymous defendants.

The Delaware Supreme Court found the trial court's reliance on the "good faith" standard "insufficiently protective" of Doe's First Amendment right to speak

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<sup>139</sup> *Dendrite*, 775 A.2d 760.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 760-61.

<sup>143</sup> *Id.* at 771.

<sup>144</sup> 884 A.2d 451 (Del. 2005).

<sup>145</sup> *Id.* at 454. The blog in question was called Independent Newspapers, and the section in question was on the "Smyrna/Cahill Issues Blog." The anonymous speakers criticized Cahill's leadership skills, energy, character, and enthusiasm for his elected position.

<sup>146</sup> No. (Misc. Law) 40570, 2000 Va. Cir. LEXIS 220 (Va. Cir. Ct., Jan. 31, 2000).

anonymously.<sup>147</sup> The court reversed the judgment calling for Comcast to unmask the anonymous speaker and instructed the trial court to dismiss the case.<sup>148</sup>

In its reasoning, the court explicitly addressed how the Internet played a role in enhancing public discourse and bolstering the marketplace of ideas. The court wrote that the Internet allows “more and diverse people to engage in public debate” as opposed to previous eras when the power to speak was controlled by relatively few and there were greater inequalities in access based on finances or status.<sup>149</sup> Quoting *Reno v. ACLU*, the court again drew the comparison of the anonymous online commenter or blogger as a powerful soapbox orator, engaging audiences “larger and more diverse than any of the Framers could have imagined.”<sup>150</sup>

Next, the court reiterated protections for anonymous online speech as entitled to the same First Amendment protections as other media of expression. Blogs or chat rooms, the court wrote, “can become the modern equivalent of political pamphleteering,”<sup>151</sup> which was upheld as “an honorable tradition of advocacy and dissent” by the U.S. Supreme Court.<sup>152</sup>

The Delaware Supreme Court also pointed out the need to balance the degrees of protected anonymous speech against defamatory speech,<sup>153</sup> but cautioned against setting the balancing standard too low so as not to “chill potential posters from exercising their First Amendment right to speak anonymously.”<sup>154</sup> The court therefore rejected the “good faith” standard in favor of the *Dendrite* summary judgment standard, but not without amending that standard.<sup>155</sup>

In reviewing the four prongs of the *Dendrite* standard, the Delaware Supreme Court adopted and strengthened the New Jersey intermediate appellate court’s opinion. The *Cahill* court upheld the first prong, which called for plaintiffs to withhold action until the anonymous defendant is allowed a “reasonable opportunity” to file and serve opposition to a discovery request.<sup>156</sup> The court also agreed with that portion of the notification prong that called for the plaintiff to post a message notifying the anonymous defendant of the discovery request on the same message board where the alleged defamatory statement(s) occurred.<sup>157</sup> The court reasoned that the notification provision imposed very little burden on the plaintiff while also giving the anonymous defendant the opportunity to respond.

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<sup>147</sup> *Cahill*, 884 A.2d 454.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 455

<sup>150</sup> *Id.* at 455-56 (quoting *Reno v. ACLU*, 521 U.S. 844, 897-97 (1997)).

<sup>151</sup> *Id.* at 456.

<sup>152</sup> *Cahill*, 884 A.2d at 456 (quoting *McIntyre v. Ohio Elections Commission*, 514 U.S. 357 (1995)).

<sup>153</sup> *Cahill*, 884 A.2d at 456 (citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)).

<sup>154</sup> *Id.* at 457.

<sup>155</sup> *Id.* at 460-61.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 461.

While the Delaware Supreme Court also advocated using the *prima facie*, or summary judgment standard, or the third prong of the *Dendrite* standard, it did not consider the second and fourth prongs necessary.<sup>158</sup> The court said the second requirement for the plaintiff to set forth the exact statements in question was subsumed in the summary judgment inquiry and made redundant by the need to quote the alleged offending text in the motion. And the court said the fourth *Dendrite* prong, which asked the trial court to balance the defendant's First Amendment rights against the strength of the plaintiff's *prima facie* case, was also unnecessary.<sup>159</sup> The court said the fourth requirement added no protection beyond the summary judgment analysis, and therefore only complicated judicial analysis.<sup>160</sup>

After refining the *Dendrite* standard, the Delaware Supreme Court used the revised two-prong summary judgment standard and found that Cahill had not met his *prima facie* burden because he could not show that the defendant's statements were factual and capable of a defamatory meaning.<sup>161</sup>

The court also pointed out that the blog was specifically designed to carry opinions about issues in Smyrna, and that the alleged defamatory remarks included numerous typographical errors, including misspelling Cahill's name.<sup>162</sup> This rationale is rooted in the "motion to dismiss" standard from *Rocker Management*.<sup>163</sup>

The *Cahill* balancing standard has been cited and followed by U.S. district courts in the Ninth Circuit, followed by at least six other state courts, and cited in at least two dissenting state appeals court opinions.<sup>164</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 467.

<sup>162</sup> *Id.*

<sup>163</sup> No. MISC 03-003 3 CRB, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. May 29, 2003)

<sup>164</sup> *See, e.g.*, *Krinsky v. Doe* 6, 159 Cal. App. 4<sup>th</sup> 1154 (Cal. App. 2008) (overturning a trial court decision to unmask an anonymous speaker critical of a corporate officer on the basis that the comments were opinion and not fact-based); *Ottinger v. Non-Party the Journal News*, No. 08-03892, 2008 N.Y. Misc. LEXIS 4579 (N.Y. Sup. Ct. June 27, 2008) (directly applying the *Cahill* standard and ordering the newspaper to reveal any identifying information of anonymous blog commenters); *Doe v. Individuals*, 561 F.Supp.2d 249 (D. Conn. 2008) (denying a motion by anonymous defendants to quash subpoena and proceed anonymously in a case of defamatory online message board comments); *Best Western International v. Doe*, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. 2006) (denying hotel chain the right to unmask anonymous speakers who made allegedly defamatory statements on an Internet message board, and extending the *Cahill* test from purely political anonymous online speech to a wider range of critical anonymous online commentary); *Quixtar v. Signature Management Team*, 566 F. Supp. 2d 1205 (D. Nev. 2008) (using *Cahill* test and directly citing the legacy of *McIntyre*, *Dendrite* and *Matrixx* in rejecting a retailer's request to unmask unidentified critics who created multiple web sites, blogs and user-made videos to denigrate the company); *Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006) (upholding speech rights of anonymous political mailing). *See also Reunion Indus., Inc. v. Doe*, No. GD06-007965, 2007 Pa. Dist. & Cnty. Dec. LEXIS 20 (Pa. Ct. Comm. Pl. Mar. 5, 2007) in which the court approved of both *Dendrite* and *Cahill* and adopted a summary judgment

In *Mobilisa, Inc. v. John Doe 1*,<sup>165</sup> the Arizona Court of Appeals used the summary judgment and notification requirements from the *Cahill* standard, but reapplied the balancing component of the *Dendrite* standard as a means of handling the array of defamation cases likely to involve anonymous speech.<sup>166</sup> In *Mobilisa*, a chief executive officer's e-mail was intercepted and sent to management. The Arizona trial court adopted the *Cahill* standard and ordered the Internet Service Provider to unmask the person responsible. The Arizona Court of Appeals remanded the case with its own standard in place that included a speech-protective third prong added to the *Cahill* standard.

The *Mobilisa* court disagreed with the *Cahill* court that the balancing test in *Dendrite* was subsumed in the summary judgment requirement. The *Mobilisa* court pointed out that a "broader range of competing interests" may need to be balanced in certain cases.<sup>167</sup> The court supposed that cases may arise in which circumstances not directly related to the anonymity/defamation balance enter consideration, such as the revelation of non-party witnesses who only have information previously known by identified witnesses.<sup>168</sup> Also, the *Mobilisa* court said balancing was required because there is no adequate remedy for erroneous unmasking of an anonymous speaker.<sup>169</sup> And finally, the *Mobilisa* court returned to a theoretical argument similar to the marketplace of ideas when it justified its speech-protective test as a safeguard consistent with "Arizona's broad protection given to free speech and individual privacy."<sup>170</sup>

In February 2009, the Maryland Court of Appeals renewed focus on and added its support to the summary judgment standard when it bypassed the intermediate appellate court and upheld anonymous speech protections on the Internet in the case of *Independent Newspapers v. Brodie*.<sup>171</sup>

In this case, Brodie, a businessman, sued a local newspaper company that hosted a online community forum where several people pseudonymously disparaged his restaurant.<sup>172</sup> When a Maryland circuit court ruled that the newspaper should unmask

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standard to determine whether an anonymous speaker's identity would be revealed. *See In Re: Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007). *But see McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006) in which the court, while deciding the case on jurisdictional grounds, criticized the *Cahill* decision on two main grounds. First, the court felt that actual malice proofs presented a paradoxical situation in that dispensing of the need to lay bare proof allowed public figures to unmask identities without meeting a crucial element of the law while at the same time requiring such a proof would "mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the earth." *Id.* at 267. Second the *McMann* court questioned how detailed a plaintiff's factual allegations could ever be when it is required to submit proofs before discovery has occurred. *Id.*

<sup>165</sup> 170 P.3d 712 (Ariz. Ct. App. 2007).

<sup>166</sup> *Id.* at 720.

<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.* at 721.

<sup>170</sup> *Id.*

<sup>171</sup> 966 A.2d 432 (Md. 2009).

<sup>172</sup> *Id.* at 432-434.

three participants who had made the derogatory comments, the Maryland Court of Appeals granted certiorari on its own initiative expressly to provide guidance to trial courts in such cases.<sup>173</sup> The appeals court dismissed the case on procedural grounds because Brodie had failed to sue within the statute of limitations for defamation,<sup>174</sup> but used the case as an opportunity to establish precedent in anonymous speech and online defamation cases. After a review of other state court standards, the Maryland Court of Appeals overturned the lower court and adopted the *Dendrite* four-part summary judgment and balancing standard for future similar cases.<sup>175</sup>

Per the standard, Maryland courts should require the plaintiff to notify anonymous defendants of legal action on the message board and allow for a reasonable window of response, require the plaintiff to identify and present the actionable passage of speech, require the plaintiff make out a prima facie defamation case, and balance First Amendment speech rights of the potential unmasking of the anonymous defendant against the strength of the defamation claim.<sup>176</sup>

The Maryland Court of Appeals was not unanimous in its support of adopting the *Dendrite* standard, and three judges issued a concurrence expressing concern about the complicated matter of the balancing test.<sup>177</sup> Judge Adkins wrote that a broader application of the *Dendrite* balancing standard would create an “Internet superlaw” that potentially could trump long-established defamation common law and other instances of qualified privilege.<sup>178</sup> Also, the concurring opinion pointed out that the majority was not clear on whether the summary judgment showing should come by affidavit, deposition, other statement under oath, or some other set of allegations of fact.<sup>179</sup>

The summary judgment standard developed in *Dendrite* and echoed to varying extents in *Cahill*, *Mobilisa*, and *Brodie* gained even more authority in August 2009 when the District of Columbia Court of Appeals used that reasoning to develop its own balancing standard in *Solers v. Doe*.<sup>180</sup>

In that case, the question of anonymity did not hinge on a message board post, but instead on a submission on an online reporting form to a company concerned with preventing Internet software piracy.<sup>181</sup> The anonymous individual reported to a software industry trade association web site that Solers, a software development corporation, was engaged in illegal activity. This report led to accusations of copyright infringement, and a suit by Solers for defamation that included the request to unmask the anonymous

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<sup>173</sup> *Id.* at 443.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 454-455.

<sup>176</sup> *Id.* at 456.

<sup>177</sup> *Id.* at 457.

<sup>178</sup> *Id.* at 460.

<sup>179</sup> *Id.* at 457.

<sup>180</sup> No. 07-CV-159 (D.C. Aug. 13, 2009), available at [http://www.dcappeals.gov/dccourts/appeals/pdf/07CV159\\_MTD.PDF](http://www.dcappeals.gov/dccourts/appeals/pdf/07CV159_MTD.PDF) (last visited Aug. 21, 2009).

<sup>181</sup> *Id.* at 2-3.

reporter.<sup>182</sup> The trial court ruled against Solers because it did not present evidence to support its allegations of damage.<sup>183</sup>

The *Solers* court used the *Dendrite* summary judgment standard as a basis for its own standard, but followed the *Cahill* court in excluding an explicit balancing test. The *Solers* court endorsed the concurrence in *Brodie* that disagreed with the need for an explicit balancing requirement.<sup>184</sup>

Cautioning that “one size does not necessarily fit all,” the *Solers* court formulated what it called a “general framework” for balancing anonymous comment with defamation.<sup>185</sup> It applied a five-part standard that closely followed the one in *Cahill*, but stopped short of using the specific “summary judgment” label.<sup>186</sup> In considering whether to unmask defendants in such cases, the *Solers* court directed that trial courts should require the plaintiff to adequately plead all elements of the claim, require “reasonable efforts” to notify the anonymous defendant, delay action until the defendant has time to respond, require the plaintiff to show evidence within its control of each element of the defamation claim, and make a prima facie judgment on whether the lawsuit should proceed.<sup>187</sup> The *Solers* court remanded the case to the trial court with instructions to apply its five-part balancing test.<sup>188</sup>

***Standards Rooted in the Marketplace of Ideas.*** As the Internet has grown in popularity, the courts have responded to the challenge of applying existing judicial doctrine to a new sphere of communication and also forging new tests and standards for disputes that involve constitutional rights. The line of cases involving anonymous speech has shown that the balancing of First Amendment protections against other personal rights such as harm to reputation can be complicated.

In addition to the interesting issues that have arisen from anonymous online speakers making critical remarks in message boards and blogs, the courts’ reliance on the marketplace of ideas theory of free speech and public debate has been noteworthy. In general, the courts have taken the approach favored so many years ago by Milton, Mill, and judicial advocates such as Justice Brandeis that the answer to bad speech is more speech. In refining the standards for balancing free speech and defamation, the courts have looked to the Framers’ attitudes toward a market where ideas compete, even anonymously.

The Court’s comparison of the modern message board poster or blogger to the town crier or pamphleteer of Revolutionary times in *Reno v. ACLU*<sup>189</sup> is cited frequently in these types of cases, and that association provides a direct link between the courts’ treatments of anonymous online speech and the marketplace of ideas theory of the First

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 34.

<sup>184</sup> *Id.* at 22, 28.

<sup>185</sup> *Id.* at 19.

<sup>186</sup> *Id.* at 23.

<sup>187</sup> *Id.* at 24.

<sup>188</sup> *Id.* at 34.

<sup>189</sup> 521 U.S. 844 (1997) at 870.

Amendment. The Delaware Supreme Court used it directly in establishing the *Cahill* standard, arguing that anonymous speech is essential for enhancing the “public debate.”<sup>190</sup> The bond between this judicial issue and its theoretical grounding is strengthened by the Court’s quoting of Mill in *McIntyre*,<sup>191</sup> and can be traced all the way back to its roots in Justice Holmes’s famous dissent in *Abrams* that introduced the marketplace of ideas concept.<sup>192</sup>

Along with the basis for the courts’ reasoning, the decisions themselves have led to an array of opinions and discussion points for First Amendment scholars to speculate how this electronic marketplace will continue to develop. Although some legal scholars put forth a pessimistic view of the future of anonymous speech earlier this decade,<sup>193</sup> the trend in recent years appears to be otherwise as the First Amendment rights of anonymous speakers on the Internet have been upheld and even strengthened by summary judgment balancing standards. In fact, the past two years have seen a rise in concern from corporations who are fearful that the developing speech-protective standards make it too easy for them to be victims of “cybersmear” by anonymous online posters with grudges.<sup>194</sup>

Another position on the development of the summary judgment balancing standard is that the courts are carving out protections for online anonymous speech in a fashion similar to the journalistic privilege that some have interpreted from *Branzburg v. Hayes*.<sup>195</sup> While the comparison is interesting and logical, specific court opinions have nonetheless verged on affording anonymous speech an even higher degree of protection than the one afforded journalists based on First Amendment guarantees.<sup>196</sup> In fact, recent cases in three states have shown that cases of balancing anonymous speech and defamation have begun to converge with issues of state journalist’s shield laws.<sup>197</sup>

Yet another path of analysis of judicial balancing of anonymous online speech and defamation has been the examination of whether the courts should afford different

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<sup>190</sup> *Doe v. Cahill*, 884 A.2d 451, 455 (2005).

<sup>191</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 357 (1995).

<sup>192</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>193</sup> See Wieland, *supra* note 60, at 589.

<sup>194</sup> See Charles B. Vincent, *Cybersmear II: Blogging and the Corporate Rematch Against John Doe Version 2.006*, 31 Del. J. Corp. L. 987 (2006).

<sup>195</sup> 408 U.S. 665 (1972). For discussion of the comparison of journalist privilege to the development of privilege for anonymous online speech, see Ekstrand, *supra* note 10, at 425-27; Michael S. Vogel, *Unmasking John Doe Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795 (2004); Megan M. Sunkel, *And the I(SP)s have it ... but How Does One Get it? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1213-18 (2003).

<sup>196</sup> See *Roth v. United States*, 345 U.S. 476, 484 (1957), cited by various court opinions for its discussion of the protection of political expression even in cases of anonymity. Also see *McKinley v. Ohio Elections Commission*, 514 U.S. 334 (1995), for Justice Stevens’ majority opinion detailing the history of anonymous speech in America’s political development.

<sup>197</sup> See Neuberger, *supra* note 91; Frederickson, *supra* note 94; and Frederickson, *supra* note 98.

protection for various categories of anonymous Internet posts. One position is that the “one-size-fits-all” summary judgment standard does not afford sufficient protection for anonymous political speech, which might be jeopardized by non-political speech.<sup>198</sup> The *Cahill* standard has been recommended<sup>199</sup> for non-political speech with the amendment of the test to require that plaintiffs show proof of actual malice similar to the libel standard established in *Times v. Sullivan*.<sup>200</sup> The *Solers* court also was concerned with an overly broad standard, and wrote its standard with specific instructions that trial courts should adjust the balancing components to the specific facts of their cases.<sup>201</sup>

Additionally, First Amendment scholars Lyrissa Barnett Lidsky and Thomas Cotter have argued that the summary judgment balancing standard should go one step further and establish a privilege for anonymous online speech.<sup>202</sup> The authors advocate an additional prong for the *Cahill* test by including a balancing component similar to the one suggested by the Arizona appeals court in *Mobilisa*.<sup>203</sup> However, the authors’ reasoning for the balancing test differs from the Arizona court. Lidsky and Cotter would use the balancing prong to allow the defendant the opportunity to convince a judge, *in camera*, that the magnitude of harm faced by a potential unmasking outweighs the plaintiff’s need for knowing that identity.<sup>204</sup> The authors suggest that the balancing component serves as a “final piece of insurance” in securing that the right to speak anonymously is not easily compromised.<sup>205</sup> Their balancing standard idea also reconciles concerns from Judge Adkins’ concurrence in *Brodie* and the *Solers* court that the summary judgment standards are not defined as specifically as necessary.

#### IV. CONCLUSION

As Justice Stevens wrote in *Reno v. ACLU*, the Internet revolution affords the opportunity for a market of public discourse unimagined by the Framers or the original free speech philosophers. The courts, aware of these developments and the theoretical lineage of these types of cases, should build on the successful summary judgment standard developed in the line of cases beginning with *Dendrite* and extending from *Cahill* to *Brodie* through to *Solers*. Given the choice, courts should consider explicating a balancing component that is flexible, yet firm in its protection of speech. Recent cases have demonstrated that, increasingly, defamation plaintiffs are challenging anonymous

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<sup>198</sup> See Martin, *supra* note 1, at 1241-43.

<sup>199</sup> *Id.* at 1242-43.

<sup>200</sup> 376 U.S. 254 (1964).

<sup>201</sup> *Solers, Inc. v. Doe*, No. 07-CV-159 (D.C. Aug. 13, 2009) at 25, available at [http://www.dccourts.gov/dccourts/appeals/pdf/07CV159\\_MTD.PDF](http://www.dccourts.gov/dccourts/appeals/pdf/07CV159_MTD.PDF) (last visited Aug. 21, 2009).

<sup>202</sup> Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007).

<sup>203</sup> 170 P.3d. 712 (2007).

<sup>204</sup> Lidsky & Cotter, *supra* note 202, at 1601.

<sup>205</sup> *Id.* at 1601-02.

speech, not so much to preserve reputation, but for the purpose of chilling speech. The Maryland Court of Appeals' initiative and adoption of the *Dendrite* standard in *Brodie* is a positive sign that courts are open to affording greater protection to qualified types of anonymous online expression, even if the *Dendrite* standard may need additional fine-tuning and a better explication of its balancing test as pointed out in the *Brodie* concurrence.<sup>206</sup>

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<sup>206</sup> *Brodie*, 966 A.2d at 457-458 (Adkins, J., concurring).

**DO WE STILL NEED HUMAN DIGNITY:  
A COMPARATIVE ANALYSIS OF THE TREATMENT OF HATE SPEECH  
IN THE UNITED STATES AND GERMANY**

MICHAEL TODD

*This article is an effort to better understand hate speech law in the United States and in Germany. From this examination, it seems clear that the main distinction between the two nations' regulation of hate speech is centered in the viewpoint-based approach to restricting speech. In the United States, viewpoint restrictions are generally unconstitutional while in Germany certain viewpoint restrictions, such as those restricting pro-Nazi and anti-Semitic expressions, are generally acceptable. History demonstrates that Germany's viewpoint based restrictions, founded in the protection of human dignity and the development of personality, were most likely necessary at the time of the creation of the Basic Law in order to demonstrate the new republic's reformation despite the large Nazi population in powerful positions throughout the new government's structure.*

**Keywords:** hate speech, First Amendment, Germany, comparative law

**I. INTRODUCTION**

Although much of the Western world generally enjoys varying degrees of free-speech protections, there are startling differences among nations on the finer points of free expression law when the speech at issue is questionable or controversial. "Hate speech" is one such questionable form of expression. Though legal definitions of hate speech tend to have difficulty passing constitutional muster, a general definition is, "[E]xpression that abuses or degrades others on account of their racial, ethnic, or religious identity."<sup>1</sup> This article also considers other forms of degrading or defamatory speech.

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<sup>1</sup> STEVEN J. HEYMAN, HATE SPEECH AND THE CONSTITUTION: THE DEVELOPMENT OF THE HATE SPEECH DEBATE FROM GROUP LIBEL TO CAMPUS SPEECH CODES ix § 1 (Paul Finkelman ed., 1996). See also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The United States is among a small group of countries that afford hate speech a great deal of protection; Canada and Germany, as well as the rest of the European Union, generally do not protect hate speech.<sup>2</sup> These approaches to hate speech can be classified as the “American approach” (e.g., hate speech is protected) and the “German approach” (e.g., hate speech is not protected).<sup>3</sup>

This paper compares the laws regarding hate speech in the United States with those in Germany. The existing body of research comparing German and U.S. law concerning free expression is limited, generally summarizing the history and current state of German free expression. This paper simultaneously compares the American and German approaches to free expression in order to better evaluate the need for possible changes in German hate speech law. This research is important today because it addresses questions concerning the creation of laws that abridge human rights in order to serve government interests. Arguably, these questions are never irrelevant; the current political climate in the United States created by the “War on Terror” has forced such issues to the forefront. The history of Germany as the starting point for both world wars, as well as the country’s past and current treatments of hate speech, make Germany an appropriate choice for comparison. If there is a valid argument endorsing hate-speech laws, certainly it can be found in the case of Germany and German history.<sup>4</sup>

The German Constitutional Court decisions used to examine the treatment of hate speech are presented in two sections. First, the Constitutional Court’s balancing of free expression against the protection of human dignity is examined using the landmark court opinions in *Mephisto*,<sup>5</sup> *Soraya*,<sup>6</sup> *Lebach*,<sup>7</sup> *Böll*,<sup>8</sup> and *Strauß* (pronounced Strauss).<sup>9</sup> Second, the Constitutional Court’s balancing of free expression against the protection of

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<sup>2</sup>Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 3 GERMAN L. J. 2 (2002).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup> *Mephisto*, 30 BVerfGE 173 (1971). The human dignity of a deceased actor, protected under Article 1 of the Basic Rights, is privileged over the free artistic expression of a living author, protected under Article 5(3) of the Basic Rights.

<sup>6</sup> *Soraya*, 34 BVerfGE 269 (1973). The free development of personality of Princess Soraya, protected under Article 2 of the Basic Rights, is privileged over the free expression of a journalist, protected under Article 5 of the Basic Rights.

<sup>7</sup> *Lebach*, 35 BVerfGE 202 (1973). A convict’s rights to human dignity and to free development of personality, protected under Articles 1 and 2 of the Basic Rights, trump the right of free expression, protected under Article 5 of the Basic Rights.

<sup>8</sup> *Böll*, 54 BVerfGE 208 (1980). A politically-active public figure’s rights to human dignity, protected under Article 1 of the Basic Rights, and to free development of personality, protected under Article 2 of the Basic Rights, are privileged over the right of free expression in the form of televised political commentary, protected under Article 5 of the Basic Rights.

<sup>9</sup> *Strauß*, 75 BVerfGE 369 (1987). The protections of human dignity afforded to Bavaria’s Prime Minister, protected under Article 1 of the Basic Rights, trump the artistic free expression of a political cartoonist, protected under Article 5(3) of the Basic Rights.

the democratic order is examined in key rulings in *Socialist Reich Party*,<sup>10</sup> *Communist Party*,<sup>11</sup> *Lüth*,<sup>12</sup> *Nazi Symbols*,<sup>13</sup> and *Auschwitz Lie*.<sup>14</sup>

Generally speaking, both sets of opinions demonstrate the German Constitutional Court's approach to balancing protected freedoms; the Constitutional Court tends to champion the right of human dignity, the right of free development of personality, and the protections of the democratic order over the right of free expression. Specifically, in the *Mephisto* line of decisions, the Constitutional Court upholds the protections afforded to human dignity<sup>15</sup> and the free development of personality<sup>16</sup> at the expense of the right to freedom of expression.<sup>17</sup> In the *Socialist Reich Party* series of decisions, the

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<sup>10</sup> *Socialist Reich Party*, 2 BVerfGE 1 (1952). The protections afforded by the Basic Laws to the rights of association, provided for in Article 9, and the establishment of political parties, provided for in Article 21, are limited to associations and political parties that support the democratic principles of the Federal Republic of Germany.

<sup>11</sup> *Communist Party*, 5 BVerfGE 85 (1956). *Communist Party* further refined the Constitutional Court's interpretation of Article 21(2). This case established that an anti-democratic political party must have a fixed plan of action with the purpose of combating the free democratic order in order for that political party to be invalidated under Article 21(2) of the Basic Law.

<sup>12</sup> *Lüth*, 7 BVerfGE 198 (1958). A peace activist's right of expression, protected under Article 5 of the Basic Rights, invalidated a court order seeking to block the activist's ability to organize a boycott of a film directed by a known anti-Semite. This case established three important doctrines of German law: (1) The Basic Rights require balancing against one another, (2) Basic Laws apply to both public and private matters, and (3) The "freedom of the human being to develop in society" is the central value of the Basic Law.

<sup>13</sup> *Nazi Symbols*, 1 BVerfGE 82 (1990). Displays of Nazi symbols are protected expressions despite the fact that the Nazi party has been declared as an unconstitutional party by the German Constitutional Court. The Constitutional Court's decision to protect the display of the Nazi symbols hinges on the determination that the symbols were used to ridicule Hitler.

<sup>14</sup> *Auschwitz Lie*, 241 BVerfGE 90 (1994). The German government has determined that the Holocaust is an undeniable fact; therefore statements denying the Holocaust do not add anything to public debate and are not protected under Article 5 of the Basic Rights.

<sup>15</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001). Article 1 of the Basic Law states that, "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."

<sup>16</sup> Article 2 of the Basic Law states that, "(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

<sup>17</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany 15 (German Bundestag 2001). Article 5 of the German Basic Law states that, "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2)

Constitutional Court demonstrates a viewpoint-based approach to balancing the protections of the democratic order<sup>18</sup> against the protections provided to freedom of expression. The Constitutional Court's choices when weighing these protections reflect deference to anti-Nazi, pro-Semitic, and pro-democratic expressions.

The presentation of each series of opinions is followed by a corresponding example of United States Supreme Court decisions that provide a context to the German approach.

## II. GERMAN BASIC LAW

### A. AN OVERVIEW

In order to understand the German Constitutional Court's rulings concerning hate speech, a brief overview of German Basic Law is helpful. This overview of the Basic Law will cover a brief history, the negative and positive functions of law, the treatment of public and private law, and prior restraint.

In 1949, a two-thirds majority of the German Länder (i.e., German States) passed the German Basic Law (i.e., a document similar to the U.S. Constitution) that begins with the Basic Rights (i.e., a portion of the Basic Law that is similar to the U.S. Bill of Rights).<sup>19</sup> While both the United States Constitution and the German Basic Law have a negative (i.e., defensive) function of protecting individual rights from the state, the Basic Law also has been held to have a positive function as well.<sup>20</sup> This means that the Basic Law goes beyond the mere defense of rights from infringement by the state, but also imposes a "variety of affirmative duties on the state to protect one citizen against another

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These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

<sup>18</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001). Article 18 of the Basic Law states, "Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court."

Article 20 of the Basic Law states, "(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."

<sup>19</sup> DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 10 (1994)

<sup>20</sup> *Id.* at 13.

and even on occasion to overcome organizational, technical, or financial obstacles to the exercise of a fundamental right.”<sup>21</sup>

Among the more controversial results of the affirmative function of the Basic Law, is the requirement that abortion be declared a crime in most instances.<sup>22</sup> However, a result that may be more pertinent to this examination is the requirement under Article 5(1) that “the state establish a legal framework in which all significant interests can make themselves heard,” resulting in a comprehensive public broadcast system controlled by a variety of interests.<sup>23</sup>

Another distinction between the U.S. and German approach to law is that public and private law<sup>24</sup> in Germany have been virtually collapsed into one category as a result of the secondary effects doctrine.<sup>25</sup> Under this doctrine, when a civil law issue between private parties enters the civil court system, that entry initiates a state action that in turn activates the protections provided for under the Basic Law.<sup>26</sup> This doctrine allows the Constitutional Court to apply the same standard of review to private and public disputes.<sup>27</sup>

[A] number of significant basic constitutional rights are meant not only as guarantees of freedom vis-à-vis state authority but also as organizing principles for the entire society, which to an extent to be determined from the nature of each right have immediate significance for the legal relations of citizens with one another... The basic right to free expression of opinion... would be rendered [largely] ineffective... if... individuals and others with economic and social power... were in a position by virtue of that power to restrict this right at will....<sup>28</sup>

Under the Basic Law, an injunction is not considered a prior restraint. This is important to note because although the German legal system has a standard of legal

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 13 and 229-230.

<sup>24</sup> Protections provided by the Bill of Rights in the United States only apply to state and federal actions and laws (i.e., public action and law). In Germany, the protections provided by the Basic Rights apply to federal actions as well as the actions of the Länder (i.e., the German equivalent of a state) and those of private parties (i.e., individuals or parties who are acting independently of a government agency or government agencies).

<sup>25</sup> Ronald J. Krotoszynski, *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Values in Germany*, 78 TUL. L. REV. 1549, 1562 (2004); CURRIE, *supra* note 19, at 187. See also Lüth, 7 BVerfGE 198.

<sup>26</sup> Krotoszynski, *supra* note 25, at 1562; CURRIE, *supra* note 19, at 187.

<sup>27</sup> *Id.*

<sup>28</sup> CURRIE, *supra* note 19, at 182 (quoting a decision of the Federal Labor Court, 1 BArbGE 185, 192-94 (1954)).

review that is similar to strict scrutiny,<sup>29</sup> German injunctions are not subject to that standard because they are not considered a prior restraint.<sup>30</sup> In the United States, an injunction is considered a prior restraint and is therefore evaluated using strict scrutiny.<sup>31</sup> The basis for this difference concerning injunctions rests in the understanding of the differences between the two countries' collateral bar rules.<sup>32</sup>

Under the U.S. rule, all court orders are generally required to be obeyed until they are set aside by a formal reversal.<sup>33</sup> For this reason, the Supreme Court considers injunctions as particularly dangerous to free expression as they can potentially prohibit constitutionally protected conduct for extended periods of time until the injunction is overturned on appeal.<sup>34</sup> Under German law, however, the German courts will not impose sanctions for violations of illegal injunctions, and therefore they are not considered a form of prior restraint; rather, injunctions are considered to merely clarify the limits of future speech.<sup>35</sup> This approach has been demonstrated in German Constitutional Court decisions in which penalties imposed due to a violation of an injunction were set aside along with the injunction itself.<sup>36</sup>

## B. FREE EXPRESSION AND LIMITATIONS

Freedom of expression is protected under Article 5 of the German Basic Law,<sup>37</sup> but suffers from limitations placed upon it by paragraph 5(2) of the article, as well as from the hierarchical nature of the Basic Law protections; some protections are generally afforded greater respect by the Federal Constitutional Court.<sup>38</sup>

There is some disagreement among scholars on whether there is a clear hierarchy of freedoms protected by the Basic Law. Though Currie contends that early decisions of

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<sup>29</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 833-834 (Foundation Press 2nd ed. 1988). *See also* *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

<sup>30</sup> CURRIE, *supra* note 19, at 199-201.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 200.

<sup>36</sup> *Id.* at 199-201.

<sup>37</sup> GERMAN BUNDESTAG, *Basic Law for the Federal Republic of Germany* 15 (German Bundestag 2001). Article 5 of the German Basic Law states that, "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

<sup>38</sup> *Lüth*, 7 BVerfGE 198 (translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF DEUTSCHLAND* (Duke University Press 1989)).

the Constitutional Court championed free expression over other protections under the Basic Law, by 1971, the Constitutional Court clearly preferred several other articles over free expression.<sup>39</sup> In particular, Articles 1 and 2 of the Basic Law<sup>40</sup> have been held in higher esteem by judges than Article 5 in several notable Constitutional Court decisions.<sup>41</sup> Currie's arguments that freedom of expression is again taking a prized place in the contemporary Constitutional Court does not appear to hold true for certain expressions concerning anti-Semitic speech.<sup>42</sup>

Free expression is also limited by paragraph 2 of Article 21 in that citizens who are the enemies of freedom are not entitled to the freedoms they wish to abolish.<sup>43</sup> The Constitutional Court has used Article 21(2) to prohibit free expression to those political parties deemed unworthy based on their viewpoint. The Constitutional Court has applied this same viewpoint restriction to the right of association, provided for in Article 9,<sup>44</sup> as well as the right to peaceably assemble, provided for in Article 8.<sup>45</sup>

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<sup>39</sup> *Mephisto*, 30 BVerfGE 173.

<sup>40</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001). Article 1 of the Basic Law states that, "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."

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<sup>41</sup> *Mephisto*, 30 BVerfGE 173; *Soraya*, 34 BVerfGE 269; *Lebach*, 35 BVerfGE 202; *Strauß*, 75 BVerfGE 369.

<sup>42</sup> Krotoszynski, *supra* note 25, at 1581.

<sup>43</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001). Article 21 of the Basic Law states that, "(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds. (2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality. (3) Details shall be regulated by federal laws."

<sup>44</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany Article 9 (German Bundestag 2001). Article 9 of the Basic Law states that, "(1) All Germans shall have the right to form corporations and other associations. (2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited. (3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against

The following discussion of the U.S. and German approaches to hate speech are divided into two main groups: opinions concerning the protection of human dignity followed by opinions concerning the preservation of the democratic order.<sup>46</sup> These two main groupings are further subdivided into U.S. decisions and German decisions. Generally, the opinions used in this analysis are from the highest court in each country.

## II. HATE SPEECH AND DIGNITY

### A. GERMANY

In 1971, a split 3-3 Constitutional Court decided in *Mephisto* that the Article 1 protections provided to the human dignity of a dead man trumped the free expression protections of the living.<sup>47</sup> The details of the case involved a novel in which the central figure was modeled after the actor, Gustaf Gründgens, who had benefited greatly over the course of his career from playing the role of Mephisto in Goethe's *Faust*.<sup>48</sup> In the novel, the character based on Gründgens "betrayed his own political convictions and cast off ethical and humanitarian restraints to further his career by making a pact with the possessors of power in Nazi Germany."<sup>49</sup>

The author of the novel, Klaus Mann stated that, "Gründgens personified 'the traitor par excellence, the macabre embodiment of corruption and cynicism... who prostitutes his talent for the sake of some tawdry fame and transitory wealth.'"<sup>50</sup> Despite the fact that Mann did not claim to be representing Gründgens accurately, three Constitutional Court Justices upheld lower court rulings that the discrepancies between the fictitious character and Gründgens "defamed the memory of the deceased actor by making him appear more disreputable than he had actually been."<sup>51</sup> Because *Mephisto* is an example of artistic expression, it was evaluated under Article 5(3) of the Basic Law.<sup>52</sup> A reading of Article 5(3) suggests that indeed there should not be a restriction of expression. Article 5(3) states, "Art and scholarship, research, and teaching shall be free." However, the Constitutional Court decided in favor of human dignity when it balanced Article 1, the protection of human dignity, against Article 5(3).<sup>53</sup> This result

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industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions."

<sup>45</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001).

<sup>46</sup> Krotoszynski uses a similar organization. See Krotoszynski, *supra* note 25.

<sup>47</sup> *Mephisto*, 30 BVerfGE 173. There are eight judges on the German Federal Constitutional Court. In *Mephisto*, two judges did not participate.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> KOMMERS, *supra* note 18, at 309.

<sup>51</sup> CURRIE, *supra* note 19, at 193.

<sup>52</sup> *Mephisto*, 30 BVerfGE 173.

<sup>53</sup> *Id.*

speaks to the hierarchical nature of the Basic Laws as well as the privileged position of human dignity over artistic free expression.

Later, in 1973, the Constitutional Court balanced free expression against another basic right, the right to free development of personality.<sup>54</sup> In *Soraya*, as in *Mephisto*, the alternative basic right trumped free expression.<sup>55</sup>

In this case, *Die Welt*, a German periodical, published a fictional interview with Princess Soraya, the ex-wife of the Shah of Iran.<sup>56</sup> The interview revealed guarded details of Soraya's private life.<sup>57</sup> It is not directly clear from the available translations of the opinion how much of the information in the article, if any, was factually accurate; however, scholarly commentary suggests that the entire interview was fictional in that it was a "false presentation of her private life."<sup>58</sup> Soraya sued *Die Welt* for invasion of privacy, but due to legal restrictions on the collection of damages, a decision was ultimately reached that Soraya's free development of personality, provided for under Article 2, had been violated by the *Die Welt* article.<sup>59</sup>

The Constitutional Court wrote in its opinion that "[a]n imaginary interview adds nothing to the formation of real public opinion. As against press utterances of this sort, the protection of privacy takes unconditional priority."<sup>60</sup> "The personality and dignity of an individual, to be freely enjoyed and developed within a societal and communal framework, stand at the center of the value order reflected in the fundamental rights protected by the Constitution."<sup>61</sup> In other words, the protections to personality and dignity take precedence over other protected fundamental rights.

From *Mephisto* and *Soraya* we see the beginning of a decidedly non-American trend in the Constitutional Court's decisions in balancing the right of free expression against other basic rights; in these rulings, the right to the protection of human dignity and the right to the free development of personality trump free expression.<sup>62</sup> The striking differences between these decisions and pertinent precedent-setting United States Supreme Court opinions become even more apparent in consideration of the fact that defaming the dead in the United States is a legal impossibility,<sup>63</sup> and that in *Soraya*, the

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<sup>54</sup> *Soraya*, 34 BVerfGE 269.

<sup>55</sup> *Id.* GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany Article 2 (German Bundestag 2001).

<sup>56</sup> *Soraya*, 34 BVerfGE 269.

<sup>57</sup> *Id.*

<sup>58</sup> RONALD J. KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE : A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (New York University Press 2006).

<sup>59</sup> *Soraya*, 34 BVerfGE 269 (translated in KOMMERS, *supra* note 18, at 132).

<sup>60</sup> *Soraya*, 34 BVerfGE 269 (translated in CURRIE, *supra* note 19, at 198).

<sup>61</sup> *Soraya*, 34 BVerfGE 269 (translated in KROTOSZYNSKI, *supra* note 58).

<sup>62</sup> *Mephisto*, 30 BVerfGE 173; *Soraya*, 34 BVerfGE 269 (both translated in KOMMERS, *supra* note 18).

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS § 560.

princess, though she was a public figure, did not have to show proof of actual malice to receive a favorable judgment.<sup>64</sup>

The German Constitutional Court continued the trend of decisions in opposition of the United States precedent with *Lebach*. In 1973, a factually true account of Lebach's participation in an armed robbery, during which several people were killed or wounded, was to be televised months before his release from prison. In the docudrama, the television station planned to describe his participation in the crime, as well as use his image, his name, and to release details about his homosexual activities.<sup>65</sup> Lebach filed a complaint under Article 2 of the Basic Law arguing that his right of personality was being infringed upon.<sup>66</sup>

The Constitutional Court held that both the right of personality, protected under Article 2, along with the right of human dignity, protected under Article 1, were in conflict with the right to free expression, protected under Article 5.<sup>67</sup> The Constitutional Court stated that none of these rights automatically have superiority over the others and that a balancing of interests is necessary to resolve the conflict. In this decision, the Constitutional Court found in favor of Lebach stating:

In any case, a televised report concerning a serious crime that is no longer justified by the public's interest in receiving information about current events may not be rebroadcast if it endangers the social rehabilitation of the criminal. The criminal's vital interest in being reintegrated into society and the interest of the community in restoring him to his social position must generally have precedence over the public's interest in a further discussion of the crime....<sup>68</sup>

Though the court wrote in its opinion that it balances the protections of human dignity, development of personality, and free expression, it seems that free expression is consistently found to be the weaker protection.

In direct contrast, the United States Supreme Court ruled in *Cox Broadcasting Corp v. Cohn* that the media can report information contained in records of an open court proceeding regardless of the privacy concerns of either the perpetrator or the victim:

The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of Government.... [A]

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<sup>64</sup> *Soraya*, 34 BVerfGE 269 (translated KOMMERS, *supra* note 18). See *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Masson v. New Yorker*, 501 U.S. 496 (1991) (deliberate falsification may not sufficiently demonstrate the required knowledge of falsity).

<sup>65</sup> *Lebach*, 35 BVerfGE 202 (translated by KOMMERS, *supra* note 18).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Lebach*, 35 BVerfGE 202 (translated by KOMMERS, *supra* note 18, at 417).

public benefit is performed by the reporting of the true contents of the records by the media.<sup>69</sup>

In *Böll*, a 1980 decision similar to *Soraya*, a prominent author who was critical of the German government was harshly characterized in a televised editorial concerning the murder of the president of the Berlin Court of Appeals. The commentator argued that the author, Heinrich Böll, had “laid the groundwork of political terrorism,”<sup>70</sup> and quoted Böll as having described the German state as a “dung heap defended by ratlike rage by the remnants of rotten power.”<sup>71</sup> Böll denied ever having made such comments and argued that even if he had made such comments, they were so removed from their original context that they presented a completely alternative meaning to their original intention.<sup>72</sup> Böll ultimately filed a complaint with the Constitutional Court, arguing that the misquotations damaged his honor and therefore were subject to prohibitions under Article 1 and Article 2 of the Basic Law.<sup>73</sup> The Constitutional Court found that Böll’s complaint was valid, stating:

[O]ne may not allow criticism to seep into one’s citation so as to distort the content of what the speaker actually said. To do so is a violation of the speaker’s right to his own words and the [correlative] right to determine how he will present himself to another person or to the public.... ..Because value judgments are so much at issue in public discussion, freedom of speech must be allowed in the interest of furthering the formation of public opinion and without regard to the content of individual judgments [citing the *Lüth* case]. ...But neither democracy nor the task of forming public opinion will suffer if the media is required to quote [someone] correctly.<sup>74</sup>

In other words, quotations made as political commentary are not protected if they are not accurate or if they are taking the original quote out of context. The question of whether the individual being quoted is a public figure does not seem to matter in this instance. *Böll* is yet another example in which the protections afforded to human dignity and the free development of personality overcome the protection afforded to free expression. What is noteworthy in this decision is that the speech in question is political in nature, a type of speech that is generally afforded the highest protection in the U.S. courts.<sup>75</sup> In addition, Böll was a public figure who would have been required to prove actual malice in a U.S. defamation case.<sup>76</sup> Lastly, the Supreme Court ruled in *Masson v. New Yorker*

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<sup>69</sup> 420 U.S. 469, 492-95 (1975).

<sup>70</sup> KOMMERS, *supra* note 18, at 419.

<sup>71</sup> *Böll*, 54 BVerfGE 208 (translated in KOMMERS, *supra* note 18, at 419).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (translated in KOMMERS, *supra* note 18, at 420).

<sup>75</sup> TRIBE, *supra* note 29.

<sup>76</sup> *Sullivan*, 376 U.S. 254; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, (1974).

*Magazine Inc.*, a similar case to *Böll*, that a writer may not have achieved a requisite level of “knowing falsehood” even if the writer knowingly changed words within quotation marks.<sup>77</sup>

In 1987, in a decision concerning political satire, the German Constitutional Court found that a drawing depicting Franz Josef Strauß (pronounced Strauss), Bavaria’s Prime Minister, as a copulating pig was too great a burden for Article 5(3), the protection of artistic freedom. The Constitutional Court found that the images were in fact correctly classified as art and therefore were deserving of protection under Article 5(3).<sup>78</sup> However, the protections provided by Articles 5(1) and 5(3) collapsed under the weight of Article 1, the protection of human dignity.<sup>79</sup>

The Constitutional Court found, that the depictions “far overstepped the boundary”<sup>80</sup> of political satire which will “characterize[ ] or exaggerate[ ] particular traits or physiognomy of a person by choosing the form of an animal...”<sup>81</sup> “[W]hat was plainly intended was an attack on the personal dignity of the person caricatured.”<sup>82</sup>

## B. THE UNITED STATES

In 1952, the Supreme Court gave a unique ruling in *Beauharnais v. Illinois*, deciding that an Illinois statute prohibiting group libel was constitutional.<sup>83</sup> In that case, a man was convicted of criminal publication of materials that portrayed a religious or racial group as “deprav[ed], criminal[ ], unchast[e], or lack[ing] of virtue... [bringing] contempt, derision... breach of peace or [ ] riots.”<sup>84</sup> The Court ruled in a 5-4 decision stating that:

It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in

<sup>77</sup> *Masson*, 501 U.S. at 517.

<sup>78</sup> *Strauß*, 75 BVerfGE 369 (translated in Krotoszynski, *supra* note 25, at 1576).

<sup>79</sup> Krotoszynski, *supra* note 25, at 1576.

<sup>80</sup> *Strauß*, 75 BVerfGE 369 (translated in CURRIE, *supra* note 19, at 206).

<sup>81</sup> *Id.* (translated in Krotoszynski, *supra* note 25, at 1576).

<sup>82</sup> *Id.*

<sup>83</sup> 343 U.S. 250 (1952).

<sup>84</sup> *Id.* at 252.

society the affiliated individual may be inextricably involved.<sup>85</sup>

The language of the Court's opinion is like that found in many of the previously mentioned German Constitutional Court opinions. However, unlike the German Constitutional Court decisions, *Beauharnais* is arguably an anomaly in the Supreme Court's rulings on state statutes that target hate speech.<sup>86</sup>

*Hustler v. Falwell*, is an example of a more typical response of the Supreme Court to hate speech. In *Hustler*, *Hustler* magazine ran a parody of a liquor advertisement in which the Reverend Jerry Falwell recounted his first sexual encounter that, according to the fictitious interview contained in the advertisement, was with his mother in an outhouse.<sup>87</sup> Falwell unsuccessfully sued for libel, invasion of privacy, and intentional infliction of emotional distress.<sup>88</sup>

The Court ruled that the advertisement's outrageous nature made the parody beyond believability and therefore was not libelous as it could not be considered a false statement of fact.<sup>89</sup> In addition, the Court ruled that an award for intentional infliction of emotional distress could stand only if Falwell, as a public figure, showed that the publication contained false statements and that the statements were made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true."<sup>90</sup> However, since the ad was devoid of statements of fact due to its unbelievable nature, as determined by the Court, it therefore could not contain false statements of fact. Clarifying the need to protect parody, the court said:

The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events- an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words: 'The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters.'"<sup>91</sup>

*Hustler* establishes that the United States Supreme Court privileges expression when it balances free speech in the form of parody against the emotional distress caused by that speech on public persons. The *Hustler* decision is strikingly different from the

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<sup>85</sup> *Id.* at 263.

<sup>86</sup> *See R.A.V.*, 505 U.S. 377.

<sup>87</sup> *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 52.

<sup>90</sup> *Id.* at 57.

<sup>91</sup> *Id.* at 54.

German Constitutional Court's treatment of parody concerning public figures exemplified in *Strauß*.<sup>92</sup>

### III. HATE SPEECH AND DEMOCRACY

#### A. GERMANY

In 1958, Erich Lüth, a peace activist working to “heal the wound between Christians and Jews,” organized a boycott of Veit Harlan’s film *Immortal Lover*.<sup>93</sup> The boycott was organized because of Harlan’s past work as a popular director of anti-Semitic films during the Nazi regime.<sup>94</sup> Although Lüth was, at the time, Hamburg’s director of information, he acted as a private citizen when organizing the boycott.<sup>95</sup> Harlan filed a civil complaint against Lüth, and the civil court found Lüth’s actions to be in violation of civil code and enjoined Lüth from continuing the boycott.<sup>96</sup> Lüth eventually filed a complaint with the Constitutional Court arguing that his freedom of expression, protected under Article 5(1), had been abridged.<sup>97</sup> The Court decided in favor of Lüth, and in their opinion, established three important doctrines of German Basic Law. First, concerning the Basic Law, the Court established an “objective order of values” which require balancing.<sup>98</sup> Second, the Court established that Basic Laws apply to all legal disputes both public and private.<sup>99</sup> Finally, the Court established the position of speech rights in relation to other legally protected concerns.<sup>100</sup> These doctrines are clearly indicated in the Court opinion:

[T]he Basic Law is not a value-neutral document [citations from numerous decisions]. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law [public and private]. Thus it is clear that basic rights also influence [the development of] private law. Every provision of private

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<sup>92</sup> *Strauß*, 75 BVerfGE 369.

<sup>93</sup> *Lüth*, 7 BVerfGE 198 (translated in KOMMERS, *supra* note 18, at 368); IMMORTAL LOVER (1950).

<sup>94</sup> *Id.*

<sup>95</sup> Krotoszynski, *supra* note 25).

<sup>96</sup> *Id.* at 1585.

<sup>97</sup> KOMMERS, *supra* note 18, at 368.

<sup>98</sup> *Id.*; Krotoszynski, *supra* note 25, at 1586.

<sup>99</sup> Krotoszynski, *supra* note 25, at 1585.

<sup>100</sup> KOMMERS, *supra* note 18, at 368.

law must be compatible with this system of values, and every such provision must be interpreted in its spirit.<sup>101</sup>

Other language in the *Lüth* opinion pertains to the high value the Constitutional Court places on free expression despite the considerable limitations placed upon it because of other basic rights:

The basic right to freedom of opinion is the most immediate expression of the human personality [living] in society and, as such, one of the noblest of human rights....It is absolutely basic to a liberal-democratic constitutional order because it alone makes possible the constant intellectual exchange and the contest among opinions that form the lifeblood of such an order; [indeed,] it is “the matrix, the indispensable condition of nearly every other form of freedom” [Cardozo, quoted in English].<sup>102</sup>

It is important to understand that many of the judges in Germany in the 1950s were in fact ‘rehabilitated’ Nazis themselves and had a very personal interest in this decision.<sup>103</sup> *Lüth* is different from other decisions attacking public figures and indicates the viewpoint based restrictions placed on speech under the Basic Law;<sup>104</sup> expression

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<sup>101</sup> *Lüth*, 7 BVerfGE 198 (translated in KOMMERS, *supra* note 18, at 370).

<sup>102</sup> *Lüth*, 7 BVerfGE at 208 (translated in KOMMERS, *supra* note 18, at 372). The BVerfGE quoted Cardozo in the *Lüth* opinion. The Cardozo quotation is originally from *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

<sup>103</sup> JÜRGEN WEBER, GERMANY, 1945-1990: A PARALLEL HISTORY 6-7 (Central European University Press 2004). “In the American occupation zone alone some 13 million people were obliged to fill in a questionnaire; 3.6 million of these theoretically required denazification, but only 1 per cent was actually punished. In Nordrhein-Westfalen, the most populous part of the British zone, only 90 persons were categorised as heavily incriminated or incriminated. Some critics have therefore condemned the western denazification policy as little more than a ‘production process for fellow-travelers’ (‘Mitläuferfabrik’—Lutz Niethammer). ‘Purge’ and ‘rehabilitation’ gradually became almost indistinguishable in a process that continued up to 1948. Many considered themselves unjustly treated, since the minor Nazis were the first to be brought to justice, and were treated with considerable severity, while the more important ones who gave the orders were generally dealt with later, and usually more mildly. Besides which, many of those who had formerly been convinced Nazis occupying high positions succeeded in concealing their past and evading the arm of the law by accommodating themselves smoothly to the new dispensation—a form of unfinished business that was later to be a serious burden on the fledgling Bundesrepublik.” “The political price for this integration policy, which was nevertheless probably inevitable in view of the many millions of Nazi party members and sympathizers, was the recurrent uncovering of scandals regarding the Nazi past of individual members of the government, or of high officials such as Hans Globke,... head of the Bundeskanzleramt (office of the Federal Chancellery), who nevertheless retained his position to the end of his legal term, ignoring all criticism.”

<sup>104</sup> Krotoszynski, *supra* note 25, at 1589.

that criticizes “undesirable” groups (e.g., the Nazi party) is protected, while expression that promotes “undesirable” groups is prohibited.

In 1952, the Constitutional Court clarified the meaning of Article 21(2),<sup>105</sup> and its relationship with Article 9(2),<sup>106</sup> by closely examining the limits these articles place on the freedom of association and the establishment of political parties.<sup>107</sup> Specifically, this relationship was decided on in the *Socialist Reich Party* decision<sup>108</sup> and in the *Communist Party Case*.<sup>109</sup> In the *Socialist Reich Party* opinion, the Constitutional Court stated that though political parties are “associations” and therefore subject to the restrictions under Article 9, political parties also have additional entitlements granted under Article 21 which must be considered.<sup>110</sup> As such, the Constitutional Court dissolved the Socialist Reich Party (hereafter referred to as the SRP) under Article 21(2) and thus carried out the expressed purpose of the article, which was to prevent the country from repeating the mistakes made by the Weimar Republic (i.e., giving freedom to the enemies of freedom).<sup>111</sup> In the portion of its opinion concerning Article 21(2), the Constitutional Court declared:

[A] party may be eliminated from the political process only if it rejects the supreme principles of a free democracy. If a party’s internal organization does not correspond to democratic principles, [one] may

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<sup>105</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001). Article 21 of the Basic Law states that, “(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds. (2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality. (3) Details shall be regulated by federal laws.”

<sup>106</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany Article 9 (German Bundestag 2001). Article 9 of the Basic Law states that, “(1) All Germans shall have the right to form corporations and other associations. (2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited. (3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.”

<sup>107</sup> KOMMERS, *supra* note 18, at 222. GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany Article 9(2) and 21(2) (German Bundestag 2001).

<sup>108</sup> *Socialist Reich Party Case*, 2 BVerfGE 1 (translated in KOMMERS *supra* note 18, at 224).

<sup>109</sup> *Communist Party Case*, 5 BVerfGE 85 (translated in KOMMERS, *supra* note 18, at 228).

<sup>110</sup> *Socialist Reich Party Case*, 2 BVerfGE 1 (translated by KOMMERS, *supra* note 18, at 224).

<sup>111</sup> KOMMERS, *supra* note 18, at 222.

generally conclude that the party seeks to impose upon the state the structural principles that it has implemented within its own organization.... Whether or not this conclusion is justified must be determined in each individual case....<sup>112</sup>

By closely examining party documents and correspondence, the Constitutional Court determined that the majority of the SRP leadership were, in fact, Nazis from Hitler's Party (i.e., National Socialist German Workers' Party) and were recruiting other former Nazis.<sup>113</sup> The party's intent was not "to gain positive forces for democracy but to preserve and propagate National Socialist ideas...."<sup>114</sup> The Court determined that a political party is in keeping with democratic principles if it has a bottom up structure and allows individuals to freely join and leave the party.<sup>115</sup> The Court found that the SRP party structure was from the top down and that they would bar membership from those who fought against the Nazi party during World War II.<sup>116</sup> In addition, the Court ruled that information contained in official party documents demonstrated that the SRP was organized on the notion of absolute obedience and that the party was committed to the revival of the Reich as well as "the revival of a vicious anti-Semitism where 'murderers are represented as innocent victims and the surviving relatives of the victims as criminals against humanity.'"<sup>117</sup> The Court ruled that the SRP be dissolved under Article 21(2).<sup>118</sup>

In the *Communist Party Case*, reviewed in 1951 and decided in 1956, the Constitutional Court followed the same line of reasoning of that used in the SRP opinion; however, there was a five-year delay between the government's filing of the case and the Court's decision.<sup>119</sup> Kommers argues that the delay was a demonstration of the Court's reluctance to declare the party unconstitutional and that the justices would have preferred to let the party implode on its own through the established political process.<sup>120</sup> The Court refined the interpretation of Article 21(2) by holding that the party in question must do more than advocate a political position; rather it must have a "fixed purpose constantly and resolutely to combat the free democratic basic order" and must demonstrate this purpose "in political action according to a fixed plan [of action]."<sup>121</sup> The Court ruled that the manifestation of such a plan would be found in the "party's program, its official declarations, the statements of its leaders, and its educational materials."<sup>122</sup> In the opinion, the Court further explained the purpose of Article 21(2) in the context of Germany's recent history:

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<sup>112</sup> *Socialist Reich Party Case*, 2 BVerfGE 1 (translated in KOMMERS, *supra* note 18, at 224).

<sup>113</sup> KOMMERS, *supra* note 18, at 225.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 224-27.

<sup>116</sup> *Id.* at 225-26.

<sup>117</sup> *Id.* at 226-27.

<sup>118</sup> *Id.* at 227.

<sup>119</sup> *Communist Party Case*, 5 BverfGE 85 (translated in KOMMERS, *supra* note 18, at 228).

<sup>120</sup> KOMMERS, *supra* note 18, at 227.

<sup>121</sup> *Communist Party Case*, 5 BverfGE 85 (translated by KOMMERS, *supra* note 18, at 228).

<sup>122</sup> KOMMERS, *supra* note 18, at 228.

The Basic Law represents a conscious effort to achieve a synthesis between the principle of tolerance with respect to all political ideas and certain inalienable values of the political system. Article 21(2) does not contradict any basic principle of the Constitution; it expresses the conviction of the [founding fathers], based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties.<sup>123</sup>

About 40 years after the *Communist Party Case* was decided,<sup>124</sup> the Constitutional Court declared, in 1994, that denying the Holocaust was not protected under Article 5 of the Basic Law.<sup>125</sup> In the *Auschwitz Lie*,<sup>126</sup> the Constitutional Court upheld a lower court decision to abridge free speech of a known Holocaust denier, David Irving, who was to be the keynote speaker at a National Democratic Party function.<sup>127</sup> The Constitutional Court determined that in order for Irving to find protection under Article 5 of the Basic Law, he would have to be making a statement of opinion or fact that adds something of value to public debate.<sup>128</sup> The Constitutional Court's decision was based on the premise that statements that can be proven true or false are statements of fact and not statements of opinion, and as such, false statements of fact concerning the Holocaust do not add to the public debate and therefore do not rise to a level of value worthy of protection.<sup>129</sup>

It is clear from the *Auschwitz Lie* that the Constitutional Court supports viewpoint based restrictions on speech.<sup>130</sup> A viewpoint based approach is also apparent in a 1990 decision concerning two T-shirts; one T-shirt displayed a caricature of Hitler dominating Europe on his 1939-1945 "European Tour."<sup>131</sup> The second T-shirt depicted Hitler as the "European Yo-Yo Champion 1939-1945."<sup>132</sup> The lower court ruled under German criminal code that the shirts displayed the symbols of an unconstitutional political party and therefore the producers of the shirts were subject to penalties.<sup>133</sup> The Constitutional Court ruled in favor of the T-shirt makers stating that the images were obviously ridiculing Hitler and therefore were protected under Article 5(3) as artistic expression.<sup>134</sup> Interestingly, the images were not interpreted as political speech by the Constitutional Court.

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<sup>123</sup> *Communist Party Case*, 5 BVerfGE 85, 141-42 (translated in KOMMERS, *supra* note 18, at 228).

<sup>124</sup> *Communist Party Case*, 5 BVerfGE 85.

<sup>125</sup> Krotoszynski, *supra* note 25, at 1593-94.

<sup>126</sup> *Auschwitz Lie*, 90 BVerfGE 241.

<sup>127</sup> Krotoszynski, *supra* note 25, at 1593-94.

<sup>128</sup> *Id.*

<sup>129</sup> *Auschwitz Lie*, 90 BVerfGE 241 (translated in Krotoszynski, *supra* note 25).

<sup>130</sup> *Auschwitz Lie*, 90 BVerfGE 24.

<sup>131</sup> *Nazi Symbols*, 1 BVerfGE 82.

<sup>132</sup> *Id.*

<sup>133</sup> *Nazi Symbols*, 1 BVerfGE 82 (translated in Krotoszynski, *supra* note 25, at 1596).

<sup>134</sup> *Id.*

In light of earlier decisions, such as *Mephisto* and *Strauß*, it would seem that the images ridiculing Hitler would be deemed unconstitutional under the need to protect human dignity as guaranteed in Article 1 of the Basic Law.<sup>135</sup> Recall that in *Mephisto*, a dead man's right to human dignity trumped the political free expression of the living, and that in *Strauß*, political parody or satire was not privileged over the politician's right to human dignity.<sup>136</sup> Prior rulings suggest that the German Constitutional Court would have suppressed further production of the T-shirts. Perhaps the court chose to allow the artistic expression because it agreed with the expressed viewpoint.

## B. THE UNITED STATES

In the 1978 *Skokie* rulings, members of the National Socialist Party of America, or "Nazi party," were prohibited from marching in front of the Skokie Village Hall on the basis of a village ordinance that was later found unconstitutional by the United States District Court for the Northern District of Illinois. The Seventh Circuit Court of Appeals upheld the lower court ruling, allowing the Nazi party to demonstrate as they desired.<sup>137</sup> The ordinance was found unconstitutional because it was viewpoint based in that it prohibited "dissemination of materials which would promote hatred toward persons on basis of their heritage..." prohibited "members of political part[ies] from assembling while wearing military-style uniform[s]..." and required "certain persons seeking to parade or assemble in the village to obtain liability insurance... and property damage insurance... applied [in order] to prohibit proposed demonstration[s]."<sup>138</sup>

Ultimately, the Nazi party chose not to demonstrate in the predominantly Jewish village of Skokie, as they feared a possible violent retaliation from the more than 40,000 Jewish residents living there.<sup>139</sup> Despite the party's decision to not exercise its constitutionally protected rights of expression and assembly, these lower court opinions are indicative of the Supreme Court's stance on viewpoint based discrimination. This lack of tolerance for viewpoint based laws is quite contrary to the German Constitutional Court's approach to similar speech.

In *R.A.V. v. City of St. Paul*, a 1992 decision, a minor allegedly burned a cross in a black family's yard in Minnesota.<sup>140</sup> Though this act was in violation of several Minnesota statutes, the minor was charged with a misdemeanor for violating St. Paul's Bias Motivated Crime Ordinance.<sup>141</sup> The statute prohibited the placement of "a symbol,

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<sup>135</sup> *Mephisto*, 30 BVerfGE 173; *Strauß*, 75 BVerfGE 369.

<sup>136</sup> *Id.*

<sup>137</sup> *Collin v. Smith*, 578 F.2d 1197, 1197-1199 (7th Cir. 1978); *Smith v. Collin*, 436 U.S. 953, (1978).

<sup>138</sup> *Collin*, 578 F.2d at 1197.

<sup>139</sup> Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States*, 83 U. Det. Mercy L. Rev. 163, 170 (2006). According to the court record, approximately 40,500 of the 70,000 Skokie residents were Jewish. At least several thousand of those Jewish residents were Holocaust survivors. *Collin*, 578 F.2d at 1199.

<sup>140</sup> *R.A.V.*, 505 U.S. 377.

<sup>141</sup> *Id.*

object, appellation, characterization or graffiti...” on public or private property “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender....”<sup>142</sup>

The Court found the statute to be viewpoint based and as such was unconstitutional.<sup>143</sup> Content based and viewpoint based restrictions are generally considered unconstitutional with exceptions for speech “in a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”<sup>144</sup> This decision is similar in wording to the *Auschwitz Lie*, but different in outcome.<sup>145</sup>

At this point, it is interesting to note the difference in the types of speech that the Supreme Court deems worthy of protection in comparison with the German Constitutional Court. In *RAV*, we see that the Supreme Court does in fact deem speech that will “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender...,” as rising to the level of social value that deserves protection under the First Amendment.<sup>146</sup> It remains to be seen whether the German Constitutional Court will allow for expression of this type. In light of the Constitutional Court’s championing of the right to human dignity over free expression, it would seem that court would not deem expression like that demonstrated in *RAV* to be worthy of protection.

In another 1992 ruling, *Dawson v. Delaware*, the Supreme Court reversed a lower court ruling that took into account evidence of the defendant’s membership in the Aryan Brotherhood during the defendant’s sentencing.<sup>147</sup> The lower court convicted the defendant of first-degree murder and sentenced him to death.<sup>148</sup> The Court determined that admission of the evidence was in violation of the defendant’s right of association, not because evidence of association is inadmissible on the whole, but because it was not pertinent in this case:

A defendant’s membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury’s inquiry into whether a defendant will be dangerous in the future. Other evidence concerning a defendant’s associations might be relevant in proving other aggravating circumstances.... [O]n the present record, one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible....<sup>149</sup>

In *Mitchell*, a 1993 decision that is a clear successor of *Dawson*, Todd Mitchell was found guilty of aggravated battery. The increased sentence for Todd Mitchell, due to

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<sup>142</sup> *R.A.V.*, 505 U.S. at 380.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Auschwitz Lie*, BVerfGE 90, 241.

<sup>146</sup> *R.A.V.*, 505 U.S. at 380.

<sup>147</sup> *Dawson v. Delaware*, 503 U.S. 159 (1992).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 167.

his speech indicating the selection of his victim based on race, was upheld by the Court.<sup>150</sup> The admission of this evidence into the lower court proceedings was not found unconstitutional as it spoke directly to the nature of the crime:

[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example[,] bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, 'it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.'"<sup>151</sup>

From both *Dawson* and *Mitchell*, it appears that the Supreme Court does not consider a person's association or prior speech admissible when deciding guilt or sentencing unless the political association is somehow directly related to the illegal act itself. It is important to understand that the Court does recognize the chilling influence the *Mitchell* ruling has on speech. However, arguments concerning the overbreadth of the Wisconsin statute, and statutes like it, were rejected by the Court, as the only speech that might be chilled would be speech by an individual who either planned to, or was likely to later commit a crime.<sup>152</sup> This interpretation of the limitations on free expression may support the German Constitutional Court's approach to free speech.

In the 1989 and 1991 rulings, *Doe v. University of Michigan* and *UWM Post, Inc. v. Board of Regents of University of Wisconsin* respectively, speech codes prohibiting on-campus hate-speech were declared unconstitutional by the Court.<sup>153</sup> Generally, codes written in this fashion were found to be vague, overbroad, content-based, or viewpoint based, or some combination thereof.<sup>154</sup>

In a 2003 opinion, *Virginia v. Black*, two separate cross burning incidents were considered by the Court.<sup>155</sup> The first incident involved a Ku Klux Klan rally in which a KKK member, Barry Black, led about 30 individuals onto private property in the vicinity of both a highway and about ten houses.<sup>156</sup> During the rally, members burned a 30-foot

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<sup>150</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>151</sup> *Id.* at 485. Chief Justice Rhenquist is quoting British jurist Sir William Blackstone from his *Commentaries on the Laws of England*.

<sup>152</sup> *Mitchell*, 508 U.S. 476.

<sup>153</sup> *Doe v. University of Michigan*, 721 F. Supp 852 (E.D. Mich. 1989); *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>154</sup> JON B. GOULD, *SPEAK NO EVIL : THE TRIUMPH OF HATE SPEECH REGULATION* 123-28 (University of Chicago Press 2005).

<sup>155</sup> *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>156</sup> *Id.*

cross. The second incident involved three people, Richard Elliott, Jonathan O'Mara, and a third unidentified person, who allegedly burned a 20-foot cross in the yard of an African American male in retaliation for his complaints about gunshots fired by his neighbor.<sup>157</sup> A Virginia cross burning statute made it illegal for "any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."<sup>158</sup> Black, Elliott, and O'Mara were all found guilty of violating the statute and were penalized with fines.<sup>159</sup> Elliott and O'Mara were sentenced to jail time.<sup>160</sup> The Supreme Court upheld the Virginia statute because the statements and actions made by the defendants were considered "true threats, which encompass statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>161</sup> Drawing on precedent in *R.A.V.* and *Watts v. United States*, the Court further expounded on this point:

The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.<sup>162</sup>

The Court ruled that the Virginia statute could be upheld under the First Amendment because it was not content based or viewpoint based, unlike the statute in *R.A.V.*, which the Court found to be viewpoint based.<sup>163</sup> However, the Court found that the statute was overbroad because of a provision that said "[a]ny such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons."<sup>164</sup> The Court determined that these instructions so "enhanced [the] probability of prosecution under the statute [that it] chills the expression of protected speech," and therefore rendered the statute as overbroad.<sup>165</sup>

#### IV. DISCUSSION AND CONCLUSION

The Weimar Republic existed from 1918 to 1933. Though the Weimar Constitution included protection of speech in a bill of rights at the end of the document,

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 348.

<sup>159</sup> *Black*, 538 U.S. 343.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 344.

<sup>162</sup> *Id.*; *R.A.V.*, 505 U.S. 377; *Watts v. United States*, 394 U.S. 705, (1969).

<sup>163</sup> *Black*, 538 U.S. 343; *R.A.V.*, 505 U.S. 377.

<sup>164</sup> *Black*, 538 U.S. at 348.

<sup>165</sup> *Id.* at 351.

the document did not contain guaranteed rights to human dignity, of development of personality, or protections and limitations of the formation and conduct of political parties.<sup>166</sup> In addition, many of the rights listed in the “Basic Rights and Obligations” section of the Weimar document, including the right of free expression, were limited by Reich law.<sup>167</sup> Shortly after World War II, the Allies drafted the Frankfurt Documents, authorizing the prime ministers of the eleven German states within the Allies’ influence to hold a constitutional convention; approval of a constitution was contingent on these conditions:

The constituent assembly will draft a democratic constitution which will establish for the participating states a governmental structure of federal type which is best adapted to the eventual re-establishment of German unity..., and which will protect the rights of the participating states, provide adequate central authority, and contain guarantees of individual rights and freedoms.<sup>168</sup>

In 1948, under the mandate of the Frankfurt Documents, an assembly of German representatives<sup>169</sup> drafted a Basic Law beginning with the listing of nineteen articles concerning the Basic Rights of German citizens.<sup>170</sup> The Basic Rights included the supreme right of human dignity with the intent that this protection, in addition to other basic protections, would help avoid the atrocities of the past.<sup>171</sup> This need to ensure a governmental structure with the ability to protect basic rights was especially important because the country had not been purged of the Nazi presence left over from World War II.<sup>172</sup> Indeed, fears of another uprising would not have been misplaced as many of the leaders of the new Republic were former leaders in the Nazi Party:

[M]any of those who had formerly been convinced Nazis occupying high positions succeeded in concealing their past and in evading the arm of the law by accommodating themselves smoothly to the new dispensation.... Right from the beginning, two phenomena ran parallel: uncompromising public condemnation of the Nazi regime and its crimes delivered by politicians, in the media, academe and education was

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<sup>166</sup> CURRIE, *supra* note 19, at 5 n. 37. Weimar Constitution.

<sup>167</sup> Weimar Constitution

<sup>168</sup> CURRIE, *supra* note 19, at 9.

<sup>169</sup> MICHAEL H. BERNHARD, INSTITUTIONS AND THE FATE OF DEMOCRACY : GERMANY AND POLAND IN THE TWENTIETH CENTURY 133 (University of Pittsburgh Press. 2005). Bernhard states that, “The assembly was to be composed of the representatives of each state in proportion to their populations. These representatives were to be chosen by mechanisms determined by the state parliaments. The draft constitution would also require the ratification of the military governors and was to be approved by popular vote in at least two-thirds of the states.”

<sup>170</sup> CURRIE, *supra* note 19.

<sup>171</sup> CURRIE, *supra* note 19, at 11.

<sup>172</sup> WEBER, *supra* note 103, at 45-47; *Socialist Reich Party Case*, 2 BVerfGE 1.

coupled with what was in practice an indulgence of the “brown” past of many who were active in precisely these areas of activity.... However, the incorporation of such people, who had been part of the Nazi leadership and who now suddenly discovered their loyalty to the Bonn democracy, while it helped to stabilise the young Federal Republic, was morally dubious....<sup>173</sup>

It may be obvious that the fledgling German government needed to prove to itself, its own people, and the rest of the world that history would not repeat itself. In light of the number of ex-Nazis running the Federal Republic of Germany, it appears that, at the time, the laws explicitly protecting human dignity and the development of personality as well as the prohibition of anti-democratic parties were necessary to allow Germany and the rest of the world to rest easier after the horrors of World Wars I and II.

In consideration of the new republic’s fragile existence both politically and economically, the fact that more than 150,000 rehabilitated Nazis still lived in Germany, combined with the desire of the new republic to prove to the world that Germany had indeed changed for the better, it can hardly be argued that the legal right to human dignity and development of personality was always unnecessary; the question is whether those basic rights remain necessary today. However, under Article 79(3) of the current Basic Law, Article 1 of the Basic Law is not amendable.<sup>174</sup> Therefore, the only recourse of the German Constitutional Court would be to modify the preferred position that human dignity and the right of personality hold in comparison with free speech and expression.<sup>175</sup>

To determine intent and whether this change in the balancing of the Basic Law is advisable, one must examine the purposes of including the rights of human dignity and of free development of personality. The argument has been made by some researchers that these laws were a reactionary measure to ensure the atrocities under the Nazi party were not repeated.<sup>176</sup> This line of reasoning mistakenly places free expression at the center of the political disease that allowed the Nazi party to gain power; however, hate speech was not the disease itself, but rather a symptom of several other political failures. The Nazi regime did not rise to power because of its free expression rights. In fact, the Nazi press did not become successful until after Hitler took power in 1933.<sup>177</sup> Recent research indicates that the Nazi party rose to power as a result of its opportunistic exploitation of the Weimar’s dysfunctional government and economic failure:<sup>178</sup>

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<sup>173</sup> *Id.* at 45-46.

<sup>174</sup> GERMAN BUNDESTAG, Basic Law for the Federal Republic of Germany (German Bundestag 2001). Article 79(3) states, “Amendments of this Basic Law affecting the division of the Federation into Länder, the participation in principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20 shall be inadmissible.”

<sup>175</sup> *Lüth*, 7 BVerfGE 198.

<sup>176</sup> *See, e.g.*, CURRIE, *supra* note 19.

<sup>177</sup> PETER J. HUMPHREYS, MEDIA AND MEDIA POLICY IN GERMANY: THE PRESS AND BROADCASTING SINCE 1945 20 (Berg Publishing 2nd ed. 1994).

<sup>178</sup> BERNHARD, *supra* note 169.

The theory which Hitler had evolved in his vagabond days in Vienna and never forgotten—that the way to power for a revolutionary movement was to ally itself with some of the powerful institutions in the State—had now worked out in practice pretty much as he had calculated. The President, backed by the Army and the conservatives, had made him Chancellor.<sup>179</sup>

Protections provided by a bill of rights can be maintained only in a properly functioning democratic government system. If the system collapses, the bill of rights is void and therefore protections of human dignity and development of personality become nullified as well. Given the manner and conditions under which Hitler came to power, it is likely that guaranteed rights to human dignity and free development would not have changed history. In fact, assuming that the basic laws could have been enforced, it would appear that, of the basic laws addressed in this analysis, the only basic law that may have been effective in stopping Hitler's rise to power would have been the restriction in Article 21 on non-democratic parties. If Article 21 had existed, the Nazi party might never have been allowed to organize in the first place.

This analysis is an arguably simplistic examination of the current needs for hate speech restrictions in Germany today. This article is an effort to better understand hate speech law in the United States and in Germany. In this examination, it seems clear that the main departure between the two nations' regulation of hate speech is centered in the viewpoint-based approach to restricting speech. In the United States, viewpoint restrictions are generally unconstitutional<sup>180</sup> while in Germany certain viewpoint restrictions, such as those restricting pro-Nazi and anti-Semitic expressions, are generally acceptable. History demonstrates that Germany's viewpoint based restrictions, founded in the protection of human dignity and the development of personality, were most likely necessary at the time of the creation of the Basic Law in order to demonstrate the new republic's reformation despite the large Nazi population in powerful positions throughout the new government's structure.

It is not apparent that the protection of these rights would have changed the political trajectory of the Weimar Republic. In fact, evidence suggests that the right to human dignity and the right to free development of personality would not have stopped Hitler's rise to power. Granted, this evidence ignores the existence of other anti-Semitic and anti-democratic publications in circulation at the time of Hitler's rise.<sup>181</sup> However, from this analysis, the likely key to avoiding Hitler's ascension would have been a functioning democratic government, a viable economy, and lastly the preservation of the democratic order as deemed by the German Constitutional Court as provided for in Article 21 of the current Basic law.

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<sup>179</sup> WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 263 (Fawcett World Library, 1960).

<sup>180</sup> *TRIBE*, *supra* note 29, at 790. *See also R.A.V.*, 505 U.S. at 380.

<sup>181</sup> *HUMPHREYS*, *supra* note 177, at 19.

The limitations of this study include the brevity with which the topic was addressed. This particular topic merits further detailed examination and in-depth analysis. In addition, future research should consider the power of the United Nations and the European Union to influence Germany's treatment of hate speech.