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MASS MEDIA LAW AND REGULATION

By

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Dedicated to my wife, Irene

EDITOR'S FOREWORD

The Watergate matter has taught us many conceptual and factual lessons: the dangers of uncontrolled delegation of authority, the technical steps of the impeachment process, the boundaries of executive privilege and of executive power, the method of presidential resignation and the operation of the 25th amendment, the legal requirements of the crime of obstruction of justice, and many, many more. But foremost among all is the lesson of the demonstrated effectiveness and importance of a free press in a democratic society; and simultaneously, the lesson of the types of pressures that segments of the press are likely to face from opposing political and governmental institutions.

No one can gainsay that "the media" is one of the dominant institutions of our time. The media have grown larger, more complex and more diverse throughout this century, and the law relating to the various facets of media operation has followed a similar course. *Mass Media Law and Regulation* treats this complex yet intensely interesting subject matter in an authoritative, comprehensive manner. The entire scope of the law of this field is presented: press freedom, pornography, reporter privilege, the fairness doctrine, libel, licensing and so on. Important court cases are described in detail and the important court opinions are subject to analysis intelligible to the non-law student. Dissenting opinions are discussed where appropriate and reference back is made to trace the developing threads of judicial analysis on many issues. Summaries are given at the end of the chapters to assist the student in pulling together the rules of the various cases into a coherent fabric of law.

The relative merits of the respective sides in the legal controversies discussed in the text are often not clear cut. There are important competing interests in all important legal issues and in this field compromise has been a fundamental judicial strategy. Prof. Francois effectively presents the differing viewpoints and even though he may often prefer the position of the journalistic profession, he makes it clear that these are not simple good guy-bad guy questions. The issue of whether a reporter can be judicially compelled to produce evidence obtained in the conduct of his reportorial function when that evidence is the critical evidence keeping a guilty man from conviction, or seemingly worse, vice versa, is a case in point.

Any textbook covering legal topics in courses taught outside the law school must deal with the thorny problem of finding the best

method for introducing the student having no previous legal study to the terminology and processes of the law. Professor Francois has handled this problem effectively by providing a basic description of the court system and the appellate decision-making process in an appendix and by providing a comprehensive glossary of relevant legal terms. Because of its interdisciplinary, legalistic subject matter this text is included in the Grid Series in Law. The Series has as a primary purpose satisfying in an innovative manner specific needs for legally related teaching materials in non-law school courses and programs.

The law of mass media is in a state of flux. The number of important case decisions rendered within the last five years attest to the fact. A current text on this subject requires an author who keeps informed on daily developments in the field. Professor Francois who contributes to *Writer's Digest* on the subjects of media and copyright law is such an author. The materials in this text readily attest to that fact. The manner in which this text integrates current materials, journalistic concepts and the law of mass media should make it a definitive work in the field.

Thomas W. Dunfee
University of Pennsylvania

PREFACE

Mass Media Law and Regulation is written for journalism students by a journalist in the hope that it will be readable and enlightening—a textbook which newcomers to the increasingly complex field of mass media law can peruse without foreboding. Toward this end the minutiae of legal technicalities—important, no doubt, to law school students—frequently have been omitted or have received only brief attention. If, in the main, this has helped to give greater emphasis to the principal ideas, issues and cases affecting the media, then the shortcomings caused by such omissions may be tolerable.

To those readers who begin a "law book" with the notion that they are entering a settled realm of quietude or equable monotony, such an idea should be short-lived. Many issues involving the media are volcanic in nature because of the "interests" that are in competition. For the most part, the Bill of Rights represents the consensus of the American people and jurisprudence with perhaps the lone exception being freedom of the press. It, above all others, is still being contested in the public opinion and in the branches of government. Laws are introduced in legislatures which infringe upon that freedom; courts issue injunctions tantamount to prior restraint of the press; officers in the executive branches (federal and state) frequently attack the press or contrive to make it as impotent as possible. The record will show that the press is not entirely free, nor does it remain untrammeled. Injunctions, subpoenas, the jailing of newsmen, "gag" orders, withholding of information, White House "enemies" lists have the effect, intentionally or otherwise, of inhibiting a fearless Fourth Estate. No other Bill of Rights guarantee is so hotly contested or so transparently violated as the "First" freedom.

But the smoke of battle has not blown in one direction only. A momentus decision in 1964 helped straighten the backbone of timorous publishers, columnists or reporters who might otherwise have refrained from caustic criticism of the conduct of government officials; a federal Freedom of Information Act, imperfect though it is, came into existence in 1967; open meeting and open record laws have been and are being enacted in many states; "shield" laws are being passed which provide some protection for journalists against forced disclosure of confidential sources of information. Indeed, without the 1964 Supreme Court decision in *New York Times v. Sullivan* it is hard to imagine how the press, in concert with unidenti-

fied federal government officials, could have brought to the public's attention the Watergate scandal which reached to the very pinnacle of political power in the United States.

The issues and concerns noted above are a part of this book which has been in the "making" for more than three years. Each time it has seemed "completed," events have conspired to "date" portions of the book. No doubt the book will suffer in this regard the moment it is published. Students wishing to remain informed about the major issues, legal and otherwise, confronting the mass media should acquire the habit, if they do not already have it, of regularly examining the media trade journals and a publication, such as *United States Law Week*, that provide up-to-date information on important court and administrative agency decisions and pronouncements.

Before closing with a "thank you" to those who helped in this undertaking, a word or two would be appropriate concerning the author's biases in regard to the issues and conflicts between freedom of press and controls of one kind or another. First, the author is a journalist-turned-teacher who still thrills to the words of the late Supreme Court Justice Hugo L. Black—unequivocal in his championship of press freedom. Second, the author sometimes chafes at the *over*-protectiveness of *some* courts when individual rights, or other interests, are being balanced against press freedom and the public's right to know. Third, the author has tried to present various sides of an issue or case to avoid one-sidedness. He most likely has not fully succeeded.

Finally, this book does not result from the work of the author alone, as the numerous citations of other works amply demonstrate. Moreover, beyond such reliance stands a special group of people who, in various ways, have helped to see this book through to publication. In singling them out by name (at the risk of leaving out someone who merits inclusion), the author pleads "nolo contendere" to the "charge" that he alone bears full responsibility for the quality of the book. Any errors are his alone. With that understanding, I express my heartfelt appreciation:

—For the help and encouragement generously provided by Prof. Thomas W. Dunfee of the University of Pennsylvania, and Prof. Robert Bliss of Drake University.

—For the special assistance given by Gerald J. Thain, former assistant director, National Advertising Division, Bureau of Consumer Protection, Federal Trade Commission, and now on the Law School faculty at the University of Wisconsin; Leonard J. McEnnis Jr., deputy director, Office of Public Information, Federal Trade Com-

mission; William Barnabas McHenry, general counsel, The Reader's Digest Association, Inc.; and Profs. Robert Woodward and Joe Patrick of Drake University.

—For the assistance in manuscript preparation given by Mrs. Pam Allen, Lois Hoffman and Judy Patterson.

—For the various ways in which Drake University has provided assistance, including a campus "environment" which makes teaching and research not only possible, but enjoyable.

William E. Francois
Des Moines, Iowa
March, 1975

TABLE OF CASES

(For the most complete information on a case, readers should first look at the page or pages referred to by italicized page numbers in this index. Except in a few instances, all *court* cases which involved the United States, a federal agency or a state are indexed so that they will not appear as the first name in a listing of that case. If the name of the case is *U.S. v. Caldwell*, the index will list it as Caldwell (U.S. v. ____). Any case disposed of by the Federal Trade Commission (FTC) or Federal Communications Commission (FCC) will carry the parenthetical notation of the agency to distinguish the case from one adjudicated by the courts. Thus, *ITT Continental Baking Co. (FTC)* was a case decided by the Federal Trade Commission.)

CONTENTS

EARLY PRESS CONTROLS AND FIRST AMENDMENT

Through much of history a familiar pattern emerges. Those with political or ecclesiastical power frequently have sought to restrain, shape or combat information and ideas intended for the masses. Efforts of the Romans to suppress Christianity were matched by attempts of the Roman Catholic Church and other religious groups to stamp out heresy and blasphemy in the Middle Ages and beyond. Monarchs, parading under the banner of divine right of kings, sought to restrict the flow of information—especially that which was critical of the institutions of church or state.

In Europe, the invention of movable type and the printing press by Johann Gutenberg in the mid-1400s eventually resulted in revolutions in education, politics, economics, etc. Those in authority did not at first recognize the danger to them of the printing press. When they did, controls of various kinds were instituted. In England, these took three principal forms: licensing, taxation, and seditious libel, the latter making criticism of those in authority a crime.

1.1 Licensing in England.[1] The printing press was introduced into England in 1476 and one of the earliest efforts to control it took the form of a proclamation by Henry VIII in 1529 which banned certain books odious to him or to the clergy who advised him. The following year a licensing system was begun and a book seller was hanged for attempting to sell a proscribed book. From 1538, when a full-blown licensing system was instituted on the theory that printing was a state matter and therefore subject to control by the crown, until 1585, various edicts were issued against printers, subjecting them to harsh penalties if they criticized church or government. The situation worsened in that latter year when the infamous Court of the Star Chamber was created by Royal edict. Consisting of high-ranking members of government who sat behind closed doors in the "starred chamber" at Westminster, the "court" continued until 1641, issuing decrees and ordering any punishment it deemed proper except the death sentence.[2] Fines, press seizures, cutting off of ears, splitting of noses, and imprisonment were penalties meted out by the Star Chamber.

The Star Chamber ceased to exist in 1641, but harassment of printers continued during the Long Parliament (1640–1660) by means of a Board of Licensers or powers conferred upon various parliamentary committees. To demands for freedom of press, Parliament responded in 1649 by making seditious publication a crime of

treason and by limiting printing to the confines of London and several other cities.

With varying intensity, pre-publication controls continued until 1695 when Parliament permitted the Regulation of Printing Act to expire. The result was an end to press censorship in England.[3] But printers did not suddenly find themselves free of punishment if convicted of seditious libel or treason. As late as 1794 two printers were tried for treason, but their acquittal marked the end of this fearsome threat against those who published criticisms of those in power.

1.2 Taxation in England. In 1712, Parliament passed the first stamp act—a tax on newspapers and pamphlets, on advertising, and on the print paper itself. This "tax on knowledge" was enacted as a means of punishing scandalous and licentious publications, of forcing registration of a growing number of publications (thereby making it easier to control them), and of bolstering the treasury. This means of exerting control continued to plague the British press until abolished in 1855.

1.3. Seditious libel in England. Technically, this "crime" against the state did not constitute prior restraint, as did licensing, because it occurred *after* publication; but penalties were so severe that the "chilling effect" on freedom to publish was comparable to prior restraint because printers often were frightened into self-censorship.

Just when the crime of seditious libel began is uncertain, but in the United States it was not until 1964 that such a crime was virtually renounced.[4] Not only is the common-law origin[5] of seditious libel obscure, but so are the distinctions between criminal and civil libel and the historical development of the defense of truth whenever a printer was accused of such a crime.[6] As early as the thirteenth century it had been a crime to spread rumors about the crown and noblemen, but even then truth could be a defense. Yet in a 1606 case, *De Libellis Famosis*, the Star Chamber refused to allow such a defense.[7] Not until the Fox Libel Act in 1792 did a major change occur—when juries were permitted to decide if in fact libel had occurred. Previously, such a determination was the prerogative of judges. The only function of juries had been to ascertain if the accused had published the matter complained of. Under the new legislation, juries also were permitted to ignore a judge's instructions and to return whatever verdict they wished.

Although the Fox Libel Act did not end the crime of seditious libel, convictions became more difficult to obtain. In 1793 there were wholesale arrests of printers—a renewed crackdown that prompted Englishman Robert Hall to write a tract, *An Apology for the Freedom of the Press and for General Liberty*, in which he put

forth a new concept of what the crime of libel should be. Hall argued that only overt acts against the government, not "mere" opinions, should be proscribed, adding: "The law hath amply provided against overt acts of sedition and disorder, and to suppress mere opinions by another method than reason and argument, is the height of tyranny."[8]

In the following years, prosecutions steadily decreased, especially after passage of Lord Campbell's Act of 1843 which established truth as a defense in criminal libel cases—long after it had been used as a defense in the American colonies.[9]

1.4 Licensing and prior restraint in American colonies. Although newspapers in the colonies generally were not required to be licensed, some of the earliest ones followed English precedent by submitting to censorship. Thus, the first continuously published newspaper in America, the Boston *News-Letter* (1704–1776), carried "Published by Authority" under its nameplate, which meant that the colonial governor could disapprove of stories, thereby preventing their publication.[10] Other colonial newspapers had problems "with authority," but by the mid-1700s the idea of prior restraint being the antithesis of press freedom had gained recognition from one of England's foremost legal authorities, Sir William Blackstone. His view of press freedom would be very influential in America:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.[11]

In recent times, licensing generally has not been a news media problem. It occasionally has surfaced in the form of city ordinances which require a permit, license or prior approval of a municipal officer before the "poor people's press"—pamphlets—could be distributed. In one such case, The U.S. Supreme Court in an opinion by Chief Justice Hughes held a municipal ordinance invalid which required that the city manager give approval before literature could be distributed. Speaking for the Court, the Chief Justice said of the ordinance: "Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."[12]

1.5 Taxation in America. British stamp acts also were applied

against printers in the colonies and induced growing resentment. A special British Stamp Act of March, 1765, aroused intense opposition, and most newspapers refused to pay the tax. Inability or unwillingness to enforce the Act led to its repeal after one year.[13]

Following the Revolutionary War, Massachusetts attempted to impose a tax on newspapers, but public reaction was so great that the law was rescinded before it could be put into effect.[14]

A much more recent case involving a discriminatory tax against newspapers began in 1934 when the Louisiana legislature enacted a 2 per cent tax on the gross receipts of newspapers having circulations larger than 20,000 copies per week. The lawmakers acted at the behest of Gov. Huey Long who was feuding with all but one of the 13 largest newspapers in the state. The constitutionality of the statute was challenged and the U.S. Supreme Court unanimously declared it unconstitutional. Justice Sutherland, in giving the Court's opinion, traced the history of such taxation:

> For more than a century prior to the adoption of the [First] Amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of government. The struggle between the proponents of measures to that end and those asserting the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an "Appeal for the Liberty of Unlicensed Printing," assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views "without previous censure;" and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties. The act expired . . . in 1695. It was never renewed; and the liberty of the press thus became . . . merely "a right or liberty to publish without a license what formerly could be published only with one." But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.
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> In 1712, in response to a message from Queen Anne . . . , Parliament imposed a tax upon all newspapers and upon advertisements. . . . That the main purpose . . . was to suppress the publication of comments and

> criticisms objectionable to the Crown does not admit doubt. . . . There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. . . .
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> * * *
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> The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly 80 years and was destined to go on for another 65 years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. * * * It is impossible to concede that by the words "freedom of the press" the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from the English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the . . . taxation already described. . . .[15]

This decision did not rule out nondiscriminatory business taxes against newspapers, as Sutherland pointed out: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one . . . with a long history of hostile misuse against freedom of press."

Similarly, the Supreme Court declared in a 1937 case that the Associated Press was not immune from regulation because it was an agency of the press, saying: "The publisher of a newspaper has no special immunity from the application of general laws. * * * Like others he must pay equitable and nondiscriminatory taxes on his business."[16]

1.6 Seditious libel in America. The famous John Peter Zenger case did not change the common-law crime of seditious libel in the United States, but it marked "a milestone in the fight for the right to criticize government," according to Supreme Court Justice William O. Douglas.[17] The trial provided an historically important precedent that truth could be a defense against a seditious libel charge.

During that 1735 trial in New York, Zenger's attorney, Andrew Hamilton of Philadelphia, recounted that there had only been one other previous indictment for seditious libel in the colonies, involving a clergyman who had criticized a government official.[18] Then, to the surprise of the prosecution, Hamilton admitted that his client had

published the criticisms complained of—an admission tantamount to a plea of guilty in those days since the prosecution only had to show who had published the criticism. But Hamilton turned to the jury and in an eloquent plea argued for the defense of truth. The jury agreed that the criticisms were true and acquitted the defendant.

The Zenger trial was probably the last of its kind conducted before "royal judges," according to Professor Levy of Brandeis University who indicated that not more than six such prosecutions were tried before these judges during the entire colonial period. As Levy wrote:

> Indeed, the maligned judges were virtually angels of self-restraint when compared with the intolerant public—or when compared with the oppressive governors who, acting in a quasi-judicial capacity with their councils, were more dreaded and active instruments of suppression than the common-law courts.
>
> The most suppressive body by far, however, was that acclaimed bastion of the people's liberties, the popularly elected assembly. That the law bore down harshly on verbal crimes in colonial America was the result of the inquisitorial propensities of the governors and legislators, which vied with each other in ferreting out slights upon the government. The law of seditious libel was enforced in America primarily by the provincial assemblies, exercising their power to punish alleged "breaches of parliamentary privilege." Needing no grand jury to indict and no petty jury to convict, the assemblies zealously sought to establish the prerogative of being as immune to criticism as the House of Commons they all emulated. An assembly might summon, interrogate, and fix criminal penalties against anyone who had supposedly libeled its members, its proceedings, or the government generally.[19]

There were many such arrests,[20] including one that provoked great controversy in 1770 when Alexander McDougall, a member of the Sons of Liberty, was arrested on a charge of seditious libel against the New York Assembly. The assemblymen were so sure he would be convicted that they turned him over to a common-law court where bail was set, but McDougall refused to post bail and remained a martyr in prison for 10 weeks. Then, with scores of partisans accompanying him, the defendant was taken before a grand jury which indicted him. A trial was set, but before it could begin a star witness died and a series of postponements resulted. Frustrated,

the Assembly issued its own warrant and ordered the sergeant-at-arms to bring McDougall before it. He appeared, refused to enter a plea, said he had no attorney, and resisted any attempts at questioning. Soon the legislators fell to quarreling among themselves and finally decided to accept an apology in lieu of further action; but McDougall refused to apologize and was jailed for nearly three months until the legislative session ended and the charges against him were dropped.

Whether the adoption of the First Amendment as part of the Bill of Rights on Dec. 15, 1791, was intended to wipe out the crime of seditious libel sparks debate. Professor Chafee of Harvard University believes the First Amendment "was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States. . . ."[21] But Professor Levy contends that the Bill of Rights may only have been "the chance product of political expediency,"[22] and that a broad libertarian theory of freedom of speech and press[23] did not emerge in the United States until the Jeffersonians were forced to defend themselves against the Federalist Sedition Act of 1798.

To understand what Levy meant by "political expediency," it is necessary to go back to when the U.S. Constitution was being written. This drafting process required about four months. Prof. Levy says that not until three days before the convention ended on Sept. 17, 1787, did anyone there urge that basic freedoms be enumerated in the proposed Constitution. The reason lay not in any diminished belief that certain freedoms belonged to the people, but rather, as expressed by Alexander Hamilton, that the federal government was one of delegated powers, and that powers not given to the government were retained by the people. Hamilton argued that a listing of such rights might be dangerous since any right inadvertently omitted might be deemed not to belong to the people. Among those who remained unconvinced were Patrick Henry and Thomas Jefferson. Henry urged his state of Virginia not to ratify the Constitution until basic rights were guaranteed by that document. In fact, five states might not have ratified the Constitution if assurances had not been given that such guarantees would quickly be forthcoming (the "political expediency" referred to by Levy). Even with such assurances, the states of Virginia, New York, North Carolina and Rhode Island shied away from giving their approval until after the ninth state—South Carolina—had ratified the Constitution, thereby making it binding on those states which already had done so. The Constitution went into effect in March, 1789.

Shortly after the First Congress convened in 1789, a number of constitutional amendments were proposed—as promised at the convention by James Madison, the "father" of the Constitution. One of them, as drafted by Madison, provided that the people "shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[24]

In all, 12 proposed amendments were submitted to the states and 10—the Bill of Rights—were adopted and went into effect on Dec. 15, 1791, including the First Amendment which states: "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; the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

To guard against the danger envisioned by Hamilton, Madison also proposed what was to become the Ninth Amendment, which reads, in part: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Professor Levy argues that states' rights was the motivating force behind adoption of the First Amendment and that Madison's pledge to bring forth amendments as quickly as possible—a promise given so delegates would complete work on the Constitution—amounted to political expediency. He holds that broad libertarianism did not emerge until debate began in Congress over enactment of the Alien and Sedition Laws in 1798.

But Professor Berns of the University of Toronto disagrees for the same reason put forth by Levy in arguing that the framers of the First Amendment were *not* motivated by broad libertarianism, but instead acted out of concern for states' rights. Berns contends that states' rights, not libertarianism, prompted opposition to the 1798 legislation.[25]

The Sedition Act provided, in part, "that if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, or uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said Government, or either house of the said Congress, or the said President, or to bring them, or to excite against them . . . the hatred of the good people of the United States . . . shall be punished by a fine not exceeding $2,000 and by imprisonment not exceeding two years."

The law was the work of the Federalists who enacted it shortly after a peace treaty had been signed with Great Britain. The treaty had angered France, then at war with England, and her supporters in America (the Republicans). The result was the seizure of some American ships by French vessels, a demand for "tribute" to end such seizures, followed by passage of the Alien and Sedition laws which could be used against "vocal" French supporters in the United States. After recounting some of the debate during consideration of the sedition legislation, Berns wrote:

> * * * [A]ccording to Leonard Levy, it was only under "the pressure of the Sedition Act . . . [that] writers of the Jeffersonian party were driven to originate so broad a theory of freedom of expression that the concept of seditious libel was, at last, repudiated."[26] Such a theory did not, however, emerge from the debates in the House. Edward Livingston insisted that the bill violated the First Amendment, and Livingston was supported in this view by the next speaker, Nathaniel Macon of North Carolina. But the debates reveal that neither Livingston nor Macon—nor any of their Republican colleagues—adopted a broad "libertarian" understanding of the principle of freedom of expression. The bill "directly violated the letter of the Constitution," Macon said. * * * But he then acknowledged that "persons might be prosecuted for a libel under the State Governments," and questioned the necessity of a federal law. In short, he, like his colleagues during the debate . . ., objected to the Sedition bill on constitutional grounds and, more precisely, on states' rights grounds, but he did not argue that such legislation was objectionable in principle. He made this clear later in the debate . . . when he asserted that liberty of the press was sacred and ought to be left where the Constitution had left it:
>
> "The States have complete power on the subject, and when Congress legislates, it ought to have confidence in the States."
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> * * *

Harrison Otis of Massachusetts had taxed the Republicans with inconsistency by quoting state constitutional provisions respecting the rights of free speech and press, then quoting statutes of the same states making libel a criminal offense and punishing licentiousness and sedition. In accusing them of inconsistency, however, he was to some extent missing the thrust of their argument. They were not

> contending for free speech and press; they were contending for states' rights, for the right of the states to punish seditious libel. The United States for them existed as a form of words, but not as a sovereign nation.[27]

Despite Republican objections, the act became law and about 25 arrests and 10 convictions resulted until it was allowed to lapse in 1801 after Jefferson became president and pardoned those still in jail. Congress eventually voted restitution of the fines, but whether the act was constitutional remained unsettled since the question did not reach the Supreme Court.

At the time of the Alien and Sedition laws, a common-law crime of seditious libel generally was assumed to exist at the federal level; however, in 1812, a divided Supreme Court held that there was no federal common-law crime of sedition.[28]

Between the expiration of the sedition law and the Court's opinion in 1812, a remarkable case occurred in the State of New York involving Harry Croswell, editor of the Federalist newspaper, *The Wasp*, and his printed villification of Jefferson. An indictment had been returned charging him with being a "malicious and seditious man." At his trial in 1804,[29] Croswell sought to use truth as a defense, but the trial judge, a Republican, declared that the truth of the printed accusations was irrelevant. Also, the jury was instructed to decide only whether the defendant had printed the alleged libel, not whether the words were seditious.

Croswell was convicted, appealed, and his principal defense attorney became Alexander Hamilton, leading Federalist at that time. One of the four state supreme court judges hearing the appeal was James Kent whose subsequent opinion "may be said to constitute the foundation on which American law of freedom of the press was subsequently built,"[30] even though his opinion was not controlling because the court split 2-2, thereby leaving the conviction intact. However, an order for a new trial was never carried out, partly because Hamilton was killed shortly thereafter in a duel with Aaron Burr.

During the state supreme court hearing, Hamilton had argued that denial of truth as a defense stemmed from a polluted source, the Star Chamber. Both he and Judge Kent, in the latter's opinion, carried their arguments beyond Blackstonian doctrine. Hamilton argued that liberty of the press "consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or to measures."[31] This was to become basic to the law of libel in most states. Hamilton also argued that a jury should decide the

question of intent because a judge might be swayed by allegiance to government.

During the hearing, a clash of fundamental doctrines emerged. The chief justice of the state court argued, in his opinion, that "truth may be as dangerous to society as falsehood"[32] and may be destructive of government; whereas Hamilton insisted that truth is "all-important to the liberties of the people [and] an ingredient in the eternal order of things."[33]

From this case emerged the defense of truth when published with good motives and justifiable ends. New York enacted this concept into law the following year and included it in the state constitution in 1821.[34] More than 125 years later, Justice Jackson of the U.S. Supreme Court referred to the Croswell case as the "leading state case," and said that the provision in the New York Constitution "states the common sense of American criminal libel law."[35]

1.7 Summary. Besides royal edicts, three major controls were exercised over the press in England beginning in the 16th century. They were licensing, taxation and seditious libel. Of the three, licensing came closest to being a form of prior restraint of the press, although the fear of punishment for seditious libel constituted self-imposed restraint. Chief among the censors during a 250-year period was the Court of the Star Chamber (1585–1641) which met behind closed doors to decide the fate of printers accused of violating edicts of the time.

In America, the Blackstonian doctrine—that liberty of the press consisted of the absence of prior restraint, with the press held accountable for any misdeeds *after* publication—had a profound impact on the conceptualization of the "first freedom." In addition, the John Peter Zenger case (1735) and the *Croswell* trial (1804) helped establish the principle that truth (with good motives and for justifiable ends) could be used as a defense to seditious libel (and eventually in civil libel cases as well).

An attempt to impose a discriminatory tax on newspapers was struck down as unconstitutional in the landmark *Grosjean v. American Press Co.* case in 1936.

As for the intent of the Founding Fathers concerning press freedom, three theories were reviewed. The first (Chafee's) is that the First Amendment was written by libertarians who intended to wipe out forever the crime of seditious libel. The second (Levy's) is that political expediency—not broad libertarianism—accounts for the Bill of Rights being presented to the States for adoption as a means of gaining favorable action on the Constitution itself. Further, argued

Levy, (1) the 1st Amendment was aimed primarily at preventing federal government incursions into the domain of the states; and (2) broad libertarianism did not emerge until Jeffersonian Republicans were forced to defend themselves against the Federalist-enacted Alien and Sedition Act of 1798. But a third theory (Berns') holds that states' rights, not libertarianism, lay behind Republican opposition to the Alien and Sedition laws.

I- Pass in Review

To help you prepare for an examination on the material covered in this chapter, review questions are asked below. If you have trouble answering them, check the answers below.

1. If we report that a school board held a "star-chamber" meeting, we mean:
2. What three kinds of controls were imposed on printers in England and the colonies in the early days of the press?
3. What was seditious libel?
4. Briefly, what is the Blackstonian concept of liberty of press?
5. *Grosjean v. American Press Co.* made it clear that any tax against newspapers was unconstitutional. True or False.
6. The John Peter Zenger trial in 1735 helped to establish what principle in American libel law?
7. Professor Chafee believed that those who wrote the First Amendment were motivated by broad libertarianism. Professor Levy disagreed. Why?
8. How does the concept of states' rights influence interpretation of the First Amendment?
9. The case of Harry Croswell in *People v. Croswell* led the state of New York to do what?
10. Summarize what is protected by the First Amendment.

I- Answers to Review

1. It met in secret session.
2. Licensing, taxation, seditious libel.
3. Printed criticisms of those in authority.
4. No prior restraint against the press, but the press can be held accountable *after* publication.

5. False. Nondiscriminatory business taxes were permissible. The Louisiana tax was declared unconstitutional because it clearly discriminated against newspapers.

6. Truth was a defense to a seditious libel charge.

7. Professor Levy contended that the First Amendment resulted from political expediency—a move to gain delegate support for a draft of the U.S. Constitution so it could be submitted to the states for ratification. Broad libertarianism, he argued, did not emerge until the Jeffersonians were forced to defend themselves against the Sedition Act of 1798.

8. The First Amendment states that *Congress* shall make no law abridging freedom of speech, press, religion, etc. States' righters contended that the states were left free by this prohibition against Congress to deal with the press as they wished.

9. The Croswell case led the state of New York to enact a statute establishing truth as a defense in a criminal libel case. Later, this defense was incorporated into the state constitution.

10. Congress shall make no law concerning establishment of religion, nor abridge freedom of speech, press, the right of assembly, the right to petition government for redress.

[1] For detailed history: Frederick S. Siebert, *Freedom of the Press in England 1476–1776*, Urbana, Ill.: University of Illinois Press, 1952.

[2] It was this court which gave rise to the expression "star-chamber proceeding," which means public affairs being conducted in secret behind closed doors. To counteract secret meetings by government officials in modern times, many states have enacted "open meeting" laws. *See* Chapter VI, pp. 151–53.

[3] Zechariah Chafee Jr., *Free Speech in the United States*, Cambridge, Mass.: Harvard University Press, 1954, p. 18.

[4] Such renunciation occurred in a unanimous U.S. Supreme Court decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. Also, *see* Chapter IV, pp. 67–71.

[5] Common law derived from the customs and usages in ancient England; now called "case law" and based, unlike statutory law, on cases decided by judges. Thus, U.S. Supreme Court decisions have the effect of law—case law—even though no legislative body has specifically enacted such law. The kinds of law which affect mass communications are common law, statutory law and constitutional law, plus governmental regulations (administrative law).

[6] Op. cit., note 1, pp. 117–18.

[7] *Id.*, p. 119.

[8] Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson*, New York, N.Y.: Bobbs-Merrill Company, Inc., 1966, pp. 1xii–lxiii. Cf., "absolutist" view, Chapter II, pp. 22–23.

[9] *See* John Peter Zenger trial (1735), pp. 5–6.

[10] Frank Luther Mott, *American Journalism*, 3rd ed., New York: Macmillan Company, 1962, pp. 13–14.

[11] *Commentaries on the Laws of England*, Book 4, Secs. 151–52, published in London in 1769. The Blackstonian concept of press freedom greatly influence a majority of the U.S. Supreme Court when it ruled in Near v. Minnesota (1931) that with few exceptions prior restraint violates the First Amendment. *See* Chap. III, pp. 36–38.

[12] Lovell v. City of Griffin, Ga., 303 U.S. 444, 451, 58 S. Ct. 666, 669, 82 L.Ed. 949, 953 (1938).

[13] Op. cit., Mott, pp. 71–74.

[14] *Id.*, pp. 143–44.

[15] Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

[16] Associated Press v. National Labor Relations Board, 301 U.S. 103, 132–33, 57 S.Ct. 650, 656, 81 L.Ed. 961 (1937).

[17] *The Right of the People*, Garden City, N.Y.: Doubleday & Company, Inc., 1958, p. 38. Copyright © 1958 by William O. Douglas, reprinted by permission of Doubleday & Company, Inc.

[18] Op. cit., Levy, note 8, p. 57.

[19] *Id.*, pp. xxxiv–xxxv.

[20] *Id.*, p. xxxv, note 50.

[21] Op. cit., p. 21.

[22] *Legacy of Suppression: Freedom of Speech and Press in Early American History*, Cambridge, Mass.: Harvard University Press, 1960, p. vii.

[23] Primarily an 18th Century concept, libertarianism means liberty for the individual against governmental interference. It derives mainly from the belief that man has certain inherent or natural rights—among them the right to pursue truth. A concommitant of such a right is free speech and press which, according to the theory, helps the people to make the wise decisions necessary if self-government is to survive.

[24] 1 Annals of Congress, p. 434.

[25] Walter Berns, "Freedom of the Press and the Alien and Sedition Laws: A Reappraisal," *The Supreme Court Review*, University of Chicago Law School, 1970, pp. 110–111.

[26] Op. cit., Levy, *Legacy of Suppression*, pp. 259–60 in Harper Torchbook edition, 1963.

[27] Op. cit., pp. 120–121.

[28] U.S. v. Hudson and Goodwin, 7 Cranch 32, 34. The fact that the Supreme Court in 1812 found no federal common-law crime of sedition did not preclude Congress passing a law making seditious libel a crime, nor would such a decision have an effect *at that time* on how states might deal with seditious libel. Also, the protections afforded to freedom of press and other freedoms by the Bill of Rights were not held binding on the states until the U.S. Supreme Court so declared in Gitlow v. U.S. (1925). *See* Chap. II, p. 26.

[29] People v. Croswell, 3 Johns. 337.

[30] Op. cit., Berns, p. 151.

[31] *Id.*, p. 153.

[32] *Id.*, p. 155.

[33] *Id.*, p. 156.

[34] *Id.*, p. 158. *See* Chap. IV, pp. 61–62.

[35] *Id.*, p. 159. *See* opinion in Beauharnais v. Illinois, 343 U.S. 250, 295, 297 (1952). Also *see* Chapter IV.

FIRST AMENDMENT THEORY AND PRACTICE

II

In 1774, the First Continental Congress issued a declaration of rights concerning liberty of the person, trial by jury, representative government, and freedom of press. Of the latter, the Congress declared:

> The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.[1]

Such sentiment shows the value placed on the press by those governmental leaders. Yet through the years disagreement has persisted concerning the extent of freedom of speech and press, or the ambit of the First Amendment. Evidence of this is seen in differences of opinion among Supreme Court members as well as in the Chafee-Levy-Berns dispute concerning the time frame for the emergence of libertarianism. One of the major reasons for disagreement pivots on the issue of federal vs. state power; that is, construing the First Amendment as a prohibition against Congress, but not the states, from passing any laws abridging freedom of speech/press. Concern over states' rights generated considerable debate throughout the formative period of the Republic; and, in fact, it was not until the adoption of the 14th Amendment in 1868 and a U.S. Supreme Court decision in 1925[2] that federal constitutional guarantees in the Bill of Rights were extended to include the states.

A different view of what our forefathers intended is provided by Supreme Court Justice Hugo Black who died on Sept. 25, 1971, after having served 34 years as a member of the nation's highest tribunal. Shortly before his death he joined a majority of his brethren on the Court in refusing to permit a further ban on publication of a secret governmental study concerning the United States involvement in the Vietnam War. In examining the origin of the First Amendment, Justice Black said:

> Madison and the other framers of the First Amendment, able men that they were, wrote in language they earnestly

> believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press." Both the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraints.
>
> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.[3]

If Justice Black's view of the First Amendment were an accepted fact, our inquiry into mass media law and regulation would be shortened considerably. Such is not the case. Rather, different free speech-press formulations have emerged as ways of delimiting the scope of the First Amendment. Before enumerating them, some comment about the wondrous ways of the law might prove helpful. The fact that the law changes, that meanings change, should surprise no one; yet when something as fundamental as the Bill of Rights "changes," the result can be perplexion and even dismay. Therefore, the words of Irving R. Kaufman, a U.S. Circuit Court judge who gave the 11th annual James Madison lecture at New York University Law School, are illuminating:

> The First Amendment is basically aimed at regulating the *process* of exchanging ideas and forming opinions; in a word, at facilitating the freest possible use of channels of communication consistent with public order and safety. However, because the amendment is not directed at creating a structure but at encouraging an ideal process, it is by its nature incapable of precise definition. Consistency with the purpose and the concomitants of the ideal process implies that there will be a continual task of re-evaluating the effectiveness of particular structures and particular solutions, not only from generation to generation, but from day to day. Sharp distinctions—you *may* parade; you may *not* picket; speech *is* protected; conduct is *not*—are far easier to apply and understand, but they do not aid in the process of facilitating exchange of messages; they ignore the almost infinite range not only of the media, but of the locations in which they are employed. Hence, when we deal with implementing a process, the best we can hope

> for are lines of analysis, specifications of important interests and perhaps a few—a very few—tentative groping formulations. [Federal Judge] Learned Hand with his characteristic boldness put it this way: "Law has always been unintelligible because it ought to be in words and words are utterly inadequate to deal with the fantastically multiform occasions which come up in human life." There is an agony, no less severe because it is intellectual rather than physical, in dealing with problems that have no neat resolutions, that defy precision, that mock finality. Yet it is an agony that judges cannot lightly forgo. It is born of a deep concern for expanding the horizons of speech. It reflects an abiding faith in the essential wisdom of reaching accommodation through rational discourse.[4]

At the time of the controversy over the inclusion of a Bill of Rights in the Constitution, Alexander Hamilton wrote in one of his *Federalist* papers:

> What is the liberty of the Press? Who can give it any definition which does not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any Constitution respecting it, must altogether depend on public opinion and on the general spirit of the people and of the Government.

With the counsel of Judge Kaufman and Hamilton as guide, let's examine some of the "tentative, groping formulations" which have been used in resolving free speech-free press problems.

The doctrine stated by Blackstone in the 18th Century was one of the earliest conceptualizations of freedom of press; namely, that such freedom consisted of no prior restraints against publication. Once publication occurred, there could be state or private action against the publisher. About a century after the Blackstonian doctrine, an American legal scholar, Judge Thomas M. Cooley, argued that there had to be more to the guarantee of free press than just immunity from prior restraint. He wrote:

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.[5]

Cooley was not an "absolutist," in the sense that Justice Black was. Rather, he believed that publication could result in public or private offenses—the former involving blasphemy, obscenity, or scandalous-type reports; the latter involving libel. Justice Black believed that the First Amendment stands as an absolute bar against any governmental interference with speech/press, either before or after utterance or publication.

A re-examination of the First Continental Congress' declaration on the importance of freedom of press and Judge Cooley's interpretation of the First Amendment reveals an interplay between basic concepts. The traditional theory looked upon the First Amendment as being media-oriented; that is, the guarantee was included in the Bill of Rights to prevent governmental interference with the press. One consequence of such protection would be the Fourth Estate's role as "watchdog" of the governors. Contrast this conceptualization with one that views the First Amendment as being citizen-oriented; that is, the guarantee of freedom so the press can meet its principal obligation of preparing people for their role as citizens.

2.1 "Marketplace of ideas" concept. Among the progenitors of the idea that the First Amendment is a means of citizen preparation was Justice Oliver Wendell Holmes who sat on the Supreme Court bench during and after World War I when dissemination of radical doctrine often led to arrest under criminal anarchy or criminal syndicalism laws. More widely known for his enunciation of the clear and present danger doctrine,[6] Justice Holmes also expounded the "marketplace of ideas" concept in a 1919 dissenting opinion in *Abrams v. U.S.*[7] In that opinion, he said:

> . . . [T]hat 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. . . . That at any rate is the theory of our Constitution. It is an experiment as all life is an experiment.

Somewhat the same conceptualization lies at the heart of a 1943 decision by a federal court which enjoined the Associated Press from enforcing highly restrictive membership practices and from preventing its 1,200 members from communicating news to non-AP members. In a 2-1 decision in that case, Judge Learned Hand wrote:

> However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different

> sources, with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[8]

Unconvinced, the Associated Press appealed the decision in part upon the traditional First Amendment ground that the Sherman Anti-trust Act, when applied to publishers, constituted an abridgment of press freedom. Justice Black, in giving the Court's opinion which affirmed the lower court's enjoinder, said of AP's claim:

> It would be strange indeed however 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 First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That 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-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[9]

Here, then, are the foundation stones of the First Amendment. They include the negative command—the traditional concept—that government shall not impede the free flow of ideas; in addition, there's a positive aspect in that government can and should use its power to ensure a free press toward the goal of providing the widest possible dissemination of information from diverse and antagonistic sources. Clearly, both in this decision and in one 12 years later, the

First Amendment guarantee is "not for the benefit of the press so much as for the benefit of us all."[10]

2.2 Meiklejohn's interpretation. The people-oriented concept of the First Amendment, which is reflected in many court decisions reported later in this book, prompts some important questions. For example, are *all* kinds of speech and press protected by the First Amendment, including that which would be of no discernible value to citizenship? If not, then how can protected speech/press be distinguished from the non-protected kind?

The late Prof. Alexander Meiklejohn attempted to deal with such troublesome questions by first making a critical distinction. He argued that the First Amendment protects those activities of thought and communication by which citizens carry out the self-governing process; furthermore, any thought and communication necessary to such a process is *absolutely* protected by the First Amendment. In fact, this Amendment is not concerned so much with a private right, such as the one advanced by the Associated Press, but with public power related to self-governance.[11]

For Meiklejohn, the central purpose of the First Amendment is "to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[12] Therefore, the First Amendment guarantee is "assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest."[13] Such a limitation—matters of public interest—can be interpreted broadly or narrowly, but obviously not all speech and press would fall within the meaning of that phrase. In essence, what Meiklejohn argued is that all "political" speech/press should be absolutely and unconditionally immunized from punishment—even after utterance or publication. Such immunization, he contended, would assure robust, uninhibited debate on matters of public interest. And his view—extending absolute protection to matters of public interest—would profoundly influence the Supreme Court in its decisions on libel.

One of the difficulties with the Meiklejohn concept concerns the definition of "political speech." If it is interpreted too narrowly, then other kinds of speech might be endangered. Meiklejohn responded to such criticism by saying that the concept is broad enough to include speech that pertains to the sciences, the arts, morality—all of which can be related to the self-governing process and the development of citizenship. Therefore, such speech should unconditionally be protected from governmental interference.

The impact of Meiklejohn's ideas on the Supreme Court is attested to by the unanimous decision in a 1964 landmark case, *New York Times v. Sullivan*, in which Justice William J. Brennan Jr., in his opinion for the Court, wrote that a libel suit against the newspaper had to be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[14] Similarly, in *Red Lion Broadcasting Co. v. FCC*, Justice Byron R. White, in an opinion for a unanimous Supreme Court in 1969, said that what was crucial in resolving the case was "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."[15] It is this right, and not the rights of the broadcaster, which cannot be constitutionally abridged, the Court declared.

2.3 Access to the media. Justice White's opinion in *Red Lion* struck a new note in mass media law at least insofar as the law relates to broadcasting. What the Court did was to uphold the constitutionality of an FCC regulation which gives the public a *limited* right of access to the broadcast medium in the event of a personal attack via a licensee's facilities upon an identifiable person or group, or in the event of political editorializing by a licensee. Personal attack and political editorializing rules are part of the Fairness Doctrine, which is incorporated as Section 315 in the Communications Act of 1934, as amended.[16] Under the Fairness Doctrine, broadcasters are responsible for providing the listening and viewing public with access "to a balanced presentation of information on issues of public importance."[17] The basic principle underlying this responsibility, according to the Federal Communications Commission (FCC), is the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ."[18] Thus, two forms of access are involved in the Fairness Doctrine and Supreme Court rulings concerning the constitutionality of the doctrine: a limited right of access to the broadcast medium in the event of personal attack, political editorializing, or equal time (the latter applicable only to political candidates);[19] and an unabridgable First Amendment right of the *public* to information and ideas on issues of public importance. Concerning this latter right of access, Chief Justice Burger pointed out that no individual or group has a right to command the use of broadcast facilities; rather, the licensee has the obligation to present the information and ideas in whatever manner he chooses so long as he does not shirk this responsibility by refraining from such programming.[20]

Whether *Red Lion* applies only to the broadcast medium is argu-

able. Prof. Jerome Barron of George Washington University Law School believed that *Red Lion*, in which the licensee is compared to a fiduciary or proxy (i.e., holding the license in trust for the public), was a media case; but if so, then only by inference because there is no such direct statement to this effect in Justice White's opinion for the Court, and a Supreme Court decision in 1974 is contrary to such a view.[21] Rather, what is apparent is the emergence of a people-oriented interpretation of the First Amendment; namely, a public right of access to information and ideas on issues of public importance. This is the command of the First Amendment as traceable from the declaration by the First Congress, Judge Cooley, Justice Black, Professor Meiklejohn and others. This is an expansionist view that goes far beyond the limited command that Congress shall make no law abridging freedom of speech or press, or that the First Amendment was solely intended to prevent governmental censorship or to protect the freedom of the publisher to operate in any manner he chooses.

Such First Amendment theory forms the philosophical backdrop against which courts have examined free speech/free press cases. One result has been various freedom formulations, including emergence of the "absolutists' " interpretation of the First Amendment.

2.4 The "absolutists." Professor Meiklejohn has been classified as an "absolutist" in terms of the protection afforded to speech/press by the First Amendment; but the reader should recall an important qualification; i.e., only "political speech" was to be absolutely protected. Even Justice Black, who along with Justice William O. Douglas formed the phalanx of the absolutist movement for many years, made an important distinction. As he said on many occasions: the Federal government "is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct)."[21]

Black would draw the line between speech and illegal or unlawful conduct. He would agree that government has the right to put down rebellion, but it would not have the right to still the *voices* of dissent and rebellion. He would concur with Justice Douglas' view that the First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. "I do not think it permissible," he said, "to draw lines between the 'good' and the 'bad' and be true to the constitutional mandate to let all ideas alone. If our Constitution permitted 'reasonable' regulation of freedom of expression, as do the constitutions of some nations, we would be in a field where the legislative and the judiciary would have much leeway. But under our charter all regulation or control of expression is barred. Govern-

ment does not sit to reveal where the 'truth' is. People are left to pick and choose between competing offerings."[22]

The "absolutist" view has never gained the sustained support of a majority of the U.S. Supreme Court. Nor did it draw favorable consideration from the non-governmental Commission on Freedom of Press which issued a report in 1947 that drew vitriolic comment from many media owners and editors principally because of recommendations that the government should facilitate new ventures in the communications industry and that an independent agency should be established to monitor the performance of the press.[23] Although recognizing the importance of freedom of press to society, the commission said such freedom has "to be balanced against other ideals such as the sound training of youth." Absolute freedom of press, the commission declared, is "neither probable nor desirable."[24]

2.5 Other "freedom formulations." Since the absolutist view has not prevailed, then what formulations or standards have been used in resolving free speech/press issues? Surprisingly, few such cases reached the Supreme Court until World War I brought growing dissent to U.S. involvement in that conflict. One reaction to that dissent was passage of the Espionage Act of 1917 which established three offenses:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States; or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than 20 years, or both.[25]

Since the original act did not punish disloyal words, and because of narrow court interpretations of "willfully obstruct," Congress amended the law in 1918 by inserting "attempt to obstruct," and by adding these additional offenses:

> To say or do anything with intent to obstruct the sale of U.S. bonds; to utter, print, write or publish any disloyal, profane, scurrilous, or obscene language, or language in

> tended to cause contempt, scorn, contumely, or disrepute as regards the form of government of the United States, the Constitution, the flag, including advocating, teaching, defending or suggesting the doing of any of these acts.

Those found guilty were liable to $10,000 fine or 20 years in prison, or both.

The original Espionage Act was still on the books when the United States entered World War II, but the 1918 amendment was repealed in 1921. In referring to the World War I era, Professor Chafee said:

> Never in the history of our country, since the Alien and Sedition Laws of 1798, has the meaning of free speech been the subject of such sharp controversy as during the years since 1917. Over 1,900 prosecutions and other judicial proceedings during [World War I] . . ., involving speeches, newspaper articles, pamphlets, and books, were followed after the armistice by a widespread legislative consideration of bills punishing the advocacy of extreme radicalism. It is becoming increasingly important to determine the true limits of freedom of expression, so that speakers and writers may know how much they can properly say, and governments may be sure how much they can lawfully and wisely suppress.[26]

The "true limits" will always remain elusive and tentative because of the wide range of media and circumstances. For such reasons, none of the "tests" used since World War I has been found acceptable for long periods of time. Somewhat in the order of their emergence, these tests include **liberty vs.** license (also referred to as use-abuse or right vs. wrong speech/press), clear and present **danger,** preferred position, balancing, and **speech vs. non-speech.**[27]

A. Liberty vs. license, use-abuse, or right vs. wrong speech and press. These formulations prevailed before, during and shortly after World War I. They required judges to make distinctions between **so-called "right"** or "good" speech and press, which therefore were protected, and "evil," "licentious," or "bad" speech and press. Among the criteria used in attempting to make such distinctions was the *inherent* or *reasonable tendency* of the speech/press to bring about the feared "evil" or licentiousness.[28] The inflexibility of such standards as right-wrong or good-evil made them unsatisfactory and, as a consequence, different formulas emerged.

B. Clear and present danger. This test was announced in 1919 by Justice Holmes in his opinion for a unanimous Court in *Schenck v. U.S.*[29] Schenck, the secretary of the Socialist Party, and other party

functionaries were convicted of three counts under the Espionage Act, including distribution of circulars which the courts held were intended to obstruct recruitment and to cause insubordination among military personnel. In affirming the convictions, Holmes wrote:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

In another case, Holmes cited a different example: "The First Amendment . . . obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder . . . would be an unconstitutional interference with free speech."[30]

In *Abrams v. U.S.*[31] a majority of the Court held that the publication and distribution of pamphlets during World War I, which criticized the use of American forces in Russia during the Bolshevik revolution and called for a strike of munitions workers, were not protected by the First Amendment. Justices Holmes and Brandeis dissented, in part because there was insufficient evidence that Abrams *intended* to "cripple or hinder the United States in the prosecution of the war."

Concerning the clear and present danger test, Holmes said: "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."

Holmes also said: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"

The clear and present danger test was used sparingly by a majority of the Court during the 1920s, chiefly because there were difficulties in applying the test; e.g., who should make the critical determination

that the danger existed—administrators, lawmakers, judges; and how immediate must the danger be? Must government wait until the moment before its enemies intend to strike? Some of these difficulties are reflected in two important free speech cases.

In the first, *Gitlow v. People of the State of New York*,[32] the U.S. Supreme Court affirmed the conviction of Gitlow, a Socialist Party member who had distributed a pamphlet in alleged violation of the state's criminal anarchy law. The Court, in its 1925 decision, asserted that the state had exercised its police power reasonably and that it was up to the state legislature to determine whether "utterances of a certain kind involve such danger of substantive evil that they may be punished. . . ." If the legislature made a determination that such danger existed, then *reasonable* action could be taken to deal with it. Holmes and Brandeis dissented on the ground that there was no "present danger."

In the second case, *Whitney v. California*,[33] Miss Whitney was convicted under a state law that made it unlawful to advocate, teach, aid or abet the commission of a crime, sabotage, or other unlawful method in order to accomplish a political or industrial ownership change. Her presence at a Communist Labor Party convention was held sufficient for conviction. The Court affirmed the conviction, primarily because the justices believed they should not review questions of fact decided by state courts. Brandeis and Holmes concurred, with Brandeis arguing that when an indefinite standard of constitutionality is being used (such as the clear and present danger test), the courts, and not the legislatures, must decide how near or remote the danger is.

The Holmesian test fell into obscurity in the 1930s and then was revived in the 1940s. Its resurgence is seen in the call by the Commission on Freedom of the Press for "the repeal of legislation prohibiting expressions in favor of revolutionary changes in our institutions where there is no clear and present danger that violence will result from the expressions."[34]

C. Preferred position. This theory holds that the First Amendment has primacy over other rights. In any balancing of rights, the First Amendment must be given preference. The use of "preferred position" was most notable during the 1940s when both Justices Black and Douglas were sitting on the Court and is clearly evidenced in a 1946 case, *Marsh v. Alabama*,[35] in which the Court concluded:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of

> the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men. . . ."

D. Balancing of interests. Although the clear and present danger doctrine still is used occasionally, it has largely been supplanted by other tests, particularly the "balancing of interests" concept during the 1950s and early 1960s. When other rights conflict with the First Amendment—e.g., right of privacy, property rights, the right of government to safeguard citizens from various kinds of dangers or evils—then such rights must be balanced and determinations made as to which shall prevail under given circumstances.

Major criticisms of the balancing test are: it is basically standardless; and it depends heavily on the emphasis given by judges to competing rights. However, from a positive viewpoint, the balancing test does not "dispose of First Amendment issues through the mechanical application of inflexible formula."[36]

As one scholar pointed out:

> None of the tests that have prevailed at different periods during the history of the Amendment has stood the test of time for more than a decade. Furthermore, it has been asserted that the several tests are not as different from one another as they appear to be on the surface—that the difference between "liberty versus license," "clear and present danger," and the current [early 1960s] "balancing of interests" tests is more semantical than real and that they all involve some sort of "balancing."[37]

E. Speech vs. non-speech. During the 1960s, and currently, several formulations have been used which are virtually the same in that they attempt to distinguish between "pure" speech and that which goes beyond speech and therefore is more subject to control. This "beyond speech" behavior has been given several names in various Supreme Court decisions, including non-speech, speech plus, or action speech. An attempt to make such a distinction was evident in the Court's decision in *Yates v. U.S.*[38] This 1957 case virtually ended any further prosecutions under the Alien Registration Act of 1940 (the Smith Act)—the first peace-time sedition law enacted by Congress since 1798. What Congress did was to apply part of the 1917 Espionage Act to peacetime situations, in part because of the spread of Hitlerism and communism abroad and the fear of disloyalty at home. About 100 persons were fined or imprisoned under

the Smith Act until the Court in *Yates* reviewed the convictions of 14 Communist Party leaders on charges of advocating the violent overthrow of the government and either reversed the convictions or ordered new trials. Justice Harlan's opinion for the Court hinged largely on making a distinction between "advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end. . . ." Harlan said the trial judge's instructions to the jury failed to note the "subtlety of these distinctions" between advocacy of doctrine as opposed to advocacy of unlawful action.

Harlan's attempt to distinguish between the two types of advocacy is a precursor of subsequent tests that would be applied. For example, in *U.S. v. O'Brien*[39] a non-speech "action" formula was used. O'Brien had been convicted of burning his draft card on March 31, 1966, while he and three companions stood on the steps of the South Boston Courthouse and spoke against involvement in the Vietnam war. The test applied by Chief Justice Warren in the Court's 1968 decision was that O'Brien's action in burning the draft card was properly subject to government regulation even though the speech was not.

A similar dichotomy was used by a majority of the Court in another case decided that same year. In *Logan Valley Plaza*,[40] the Court in a 6-3 split held that a shopping center could not prevent a labor union from picketing a store, or union members from distributing handbills, on the basis of a claim to private property rights when the property was otherwise opened to the public. In a concurring opinion, Justice Douglas described the picketing as "free speech *plus*." The "plus," he agreed, was subject to regulation under certain circumstances.

The non-speech, "action" speech and speech "plus" formulations are consistent with a theory of the First Amendment advanced by Professor Emerson of Yale University who wants a line drawn between expression and action, with the former fully protected under the First Amendment.[41] The distinction is comparable to the one made by Justice Black between expression and conduct—the former protected against any governmental interference or regulation.[42]

In mid-1969, President Nixon named Warren E. Burger to fill the vacancy created by the retirement of Chief Justice Earl Warren. Mr. Nixon later appointed three other members of the Court: Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist. At best, "labels" are poor ways of delineating legal, political and philosophical beliefs, and so it is with the Nixon appointees. However, *some* of their decisions could be construed as "conservative" on free speech-free press cases.[43]

A difference between the "Warren Court" and the "Burger Court" emerged in the case of *Lloyd Corporation Ltd. v. Tanner et al.*,[44] decided by a 5-4 majority on June 22, 1972. The four Nixon appointees, joined by Justice Byron R. White as the "swing" vote, held that the owners of a shopping center could prevent the peaceful distribution of handbills by an anti-Vietnam war group. Justice Powell made a distinction between the shopping center owned by Lloyd Corporation and the one in Logan Valley Plaza, and between the Lloyd shopping center and the "company town" in *Marsh v. Alabama* (1946) wherein a religious group was refused permission to distribute pamphlets even on "public" (company-owned) sidewalks.

The *Lloyd* decision brought about a change of heart by a majority of the California Supreme Court in *Diamond v. Bland*.[45] Earlier, the court had declared unconstitutional a shopping center's policy which absolutely prohibited all kinds of solicitations in the shopping center's common areas except business promotions and displays. On three separate occasions the U.S. Supreme Court refused to review the California court's decision. But after *Lloyd*, the California Supreme Court reheard the case which involved attempts by plaintiffs to obtain signatures on petitions from persons at the shopping center. The state court ruled that the shopping center could constitutionally prohibit this activity, saying that in this case, as in *Lloyd*, the pickets had *alternative, effective channels of communication.* Customers and employees could be solicited on any public sidewalk, park, or on streets adjacent to the shopping center and in the communities in which such persons reside. Unlike the situations in *Marsh* and *Logan*, said the court, no reason appears why such alternative means of communication would be ineffective; therefore, the shopping center's private property interests outweigh the plaintiffs' First Amendment rights. But in dissent, Justice Mosk did not believe that plaintiffs could successfully obtain signatures from people in automobiles who were entering or leaving the shopping center. For this and other reasons, he doubted the constitutionality of such a policy.

2.6 From theory to practice. As with the other freedom formulations, there are several difficulties with the pure speech-action speech dichotomy. In a 1973 decision,[46] the New Hampshire Supreme Court took note of one difficulty; i.e., no test has yet been established for determining when conduct, or action, becomes such an integral part of expression that the one is inseparable from the other. Under such a circumstance would pure speech fall short of First Amendment protection, or must both expression and action be protected in order to preserve the free speech guarantee? Also, the

pure speech-action speech test has limited application. It can be applied to the pamphleteer, the soapbox orator, and the parader, but is it applicable to the mass media? In fact many of the cases cited thus far—*Schenck*, *Gitlow*, *Abrams*, *Whitney*, *Marsh*, *Yates*, *O'Brien*, *Logan Valley*, etc.—have involved the use of state power against individuals rather than against the mass media. In the Pentagon Papers cases, state power was used against the media, but such instances are far less frequent, though more spectacular, than when the state is pitted against the individual. At the risk of over-simplification, one reason lies in the fact that the mass media, for the most part, are part of the "establishment" and have, among their functions, the task of transmitting the values of the dominant societal groups. For the most part the media are less critical of the "system" because they are part of it, whereas the "poor man's press," the "underground" press, and the alienated soapbox orator generally are opposed to the system. Since our chief concern is with the mass media, much of the remainder of this book will focus upon the law as it affects media owners and practitioners.

By now it should be evident that freedom of speech and press are not absolute. Some generalizations are possible, as summarized below, and it is to these generalizations, in the main, that subsequent chapters are addressed:

1. The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.[47] The publisher has no special immunity from the application of general laws. Thus, he is not exempt from anti-trust statutes,[48] and his newspaper is subject to nondiscriminatory general taxation.[49]

2. Under certain circumstances, prior restraint of the press is constitutionally permissible, although the government faces a heavy burden of showing justification for such restraint.[50] Prior restraint has judicial approval in instances involving movement of troop transports, location of troops when the nation is at war, protection of the vital security interest of the nation and community, maintenance of community "decency," and protection against words which have all the effect of force. Furthermore, Chief Justice Burger believes that there are other exceptions to the general prohibition against prior restraint which "no one has had occasion to describe or discuss."[51]

3. The press cannot with impunity publish everything it wishes. Even when it publishes a matter of public interest, it cannot include knowing or reckless falsehoods that damage a person's reputation.[52]

4. Even when the press publishes a matter of public interest, it

cannot tortiously, or wrongfully, gather information or intrude upon a person's privacy.[53]

5. Even when the press publishes a matter of public interest, it cannot knowingly and recklessly include nondefamatory falsehoods about a person.[54]

6. The use of a person's name or likeness for commercial purposes is actionable if prior permission has not been given.[55]

7. A newspaper or journalist may be punished for contempt of court, in appropriate circumstances.[56]

8. Under the Freedom of Information Act, nine categories of information in federal government files are exempt from forced disclosure.[57]

9. It has generally been held that the First Amendment does not guarantee the press a right of special access to information not available to the public generally. The "right to speak and publish does not carry with it the unrestrained right to gather information."[58]

10. Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, various executive sessions of public bodies, and meetings of private organizations. There is no constitutional right of access to the scene of crimes or disasters where the general public is excluded.[59]

11. Courts can proscribe extrajudicial statements to the press by witnesses, court officials, law enforcement officers, and others; that is, impose restraint upon potential news sources rather than directly upon the press.[60]

12. Except where granted by statute, reporters have no special privilege to shield sources of information or confidential information from grand juries or other legally constituted investigative bodies.[61]

13. Hard-core pornography is not protected by the First Amendment.[62]

14. Commercial speech (advertising) has a weaker claim, if any, to First Amendment protection. However, "advertorials"—information of public importance which appears as advertisement—are conditionally protected by the First Amendment.[63]

15. Radio and television are more subject to governmental regulation than the print medium because of their special characteristics and because of special conditions applicable only to them.[64]

2.7 Summary. The "marketplace of ideas" concept, enunciated by Justice Holmes in 1919, has influenced contemporary thought on the meaning and scope of the First Amendment. Under this theory, the First Amendment provides protection so that ideas may freely

enter the "marketplace" where the public can pick and choose. From this kind of competition, truth will emerge. Whether the procreator of the idea would permit all speech, save that which creates a clear and present danger, to enter the marketplace is not certain. Presumably so.

Such would not be the case under the Meiklejohn theory, which also has been a powerful influence in determining what kinds of speech should be absolutely protected. Political speech, he said. And within that category he would include speech related to the sciences, the arts, morality—any speech that has anything to do with the self-governing process. Meiklejohn's ideas strongly influenced the U.S. Supreme Court's decision in 1964 which greatly enhanced the news media's protection against libel suits (*New York Times vs. Sullivan*).

Meiklejohn stopped short of the "absolutists" who, like Justice Black, contend that all speech, without exception, should be absolutely protected from governmental interference. The absolutists have rarely mustered majority support in the Supreme Court which, in its efforts to distinguish protected speech from that which lies outside the First Amendment, has resorted to various formulations since the turn of the century. These include liberty vs. license, reasonable tendency, clear and present danger, preferred position, balancing, and speech vs. non-speech (or pure speech vs. action speech, speech vs. speech-plus). Under certain conditions, non-speech elements are subject to regulation and when pure speech co-mingles so the two are inseparable, then speech itself may be subject to control.

With the exception of absolutism, however, a distillation remains no matter which formula is used; that is, some kinds of speech and press can be controlled under some kinds of conditions.

II–Pass in Review

1. The 14th Amendment and *Gitlow v. State of New York* had what major effect?

2. Prof. Meiklejohn asserted that the First Amendment should unconditionally protect speech and press which related, directly or indirectly, to certain matters, namely _____. In effect, Meiklejohn urged that _____ speech be fully immunized by the First Amendment.

3. Although Justice Black was an "absolutist" in regard to First Amendment protection for speech and press, he made a distinction

between such speech and press and _____, the latter being regulatable.

4. The clear and present danger doctrine was enunciated in *Schenck v. U.S.* by _____.

5. What is the Holmesian "marketplace of ideas" concept?

6. The burning of a draft card in *U.S. v. O'Brien* was held not to be protected by the First Amendment. Why?

7. Name as many First Amendment formulations as you can recall, *e.g.*, liberty v. license, clear and present danger, etc.

II–Answers to Review

1. Extended Bill of Rights guarantees to states.
2. Matters of public interest. Political speech.
3. Unlawful conduct.
4. Justice Oliver Wendell Holmes.
5. The "marketplace" concept states that the best test of truth is the power of thought to get itself accepted in competition of the marketplace. This idea can be related to poet-writer John Milton who wanted to let truth and falsehood "grapple." Whoever heard of truth being put to the worst, Milton asked, in such competition.
6. The draft-card burning was held to be non-speech or "action speech," as distinct from pure speech.
7. Preferred position, balancing of interests, speech v. non-speech or speech "plus," and absolutism.

[1] Journal of the Continental Congress, I, 57 (1800 ed.).

[2] Gitlow v. State of New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138. As Justice Sanford said for a majority of the Court: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the States."

[3] The Pentagon Papers cases: New York Times Co. v. U.S. and U.S. v. Washington Post Co., 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed. 2d 822. (1971). For fuller discussion, *see* Chap. III, pp. 38–51.

[4] Lecture given on March 18, 1970, entitled "The Medium, the Message and the First Amendment," as reprinted in *New York University Law Review*, Vol. 45, No. 4, October, 1970, pp. 783–84. Consider, for example, the problems associated with applying the First Amendment to a prison newspaper published by inmates, or the question of freedom of speech/press when applied to students in state or private schools.

[5] *Constitutional Limitations* (6th ed.), Boston: Little, Brown and Co., 1890, p. 518.

[6] *See* this chapter, pp. 24–26.

[7] 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173.

[8] U.S. v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y.).

[9] Associated Press et al. v. U.S., 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). Justices Roberts and Murphy dissented, and Justice Jackson took no part in the decision.

[10] Time, Inc. v. Hill, 385 U.S. 374, 389, 87 S.Ct. 534, 543, 17 L.Ed.2d 456, 468 (1967).

[11] Meiklejohn, "The First Amendment Is an Absolute," 1961 *Supreme Court Review*, 245, 255.

[12] *Political Freedom: The Constitutional Powers of the People* (1965), New York: Harper & Row Publishers, Inc., 1960, p. 75.

[13] *Id.*, p. 79. The phrase, "matters of public interest," has become the key one in development of both the law of libel and invasion of privacy as these relate to the mass media. *See* Chap. IV, pp. 74–78, and Chap. V, pp. 113–16.

[14] *See* Chap. IV, pp. 68–71.

[15] *See* Chap. XII, pp. 345–46.

[16] *See* Chap. XII, pp. 341–45.

[17] Opinion by Chief Justice Warren E. Burger for a majority of the Court in Columbia Broadcasting System, Inc. v. Democratic National Committee, and FCC v. Business Executives' Move for Vietnam Peace et al., 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772, 789 (1973).

[18] Report on Editorializing, 13 FCC 1246, 1249 (1949).

[19] *See* Chap. XII, pp. 324-25 and 341-45.

[20] Op. cit., note 17, at 2091.

[21] For a fuller exposition of the controversy over access to the media and the Supreme Court's important decision on this matter, *see* Chap. XIII, pp. 353+.

[21] Dissenting opinion in Ginzburg et al. v. U.S., 383 U.S. 463, 476, 86 S.Ct. 942, 950, 16 L.Ed.2d 31, 41 (1966).

[22] Dissenting opinion in Ginzburg et al. v. U.S. and Mishkin v. State of New York, 383 U.S. at 491, 86 S.Ct. at 974, 16 L.Ed.2d at 50.

[23] The 13-member commission, which included no journalists (an omission that drew considerable criticism from the Fourth Estate), operated under grants from Time, Inc., and Encyclopedia Britannica, Inc., to the University of Chicago. The commission issued a book-length report entitled *A Free and Responsible Press*, and was chairmaned by Robert M. Hutchins, then chancellor of the University of Chicago, with Professor Chafee as vice-chairman. Not until May, 1973, did a national "watchdog" group, the National News Council—composed of nine public members and six representatives from the media—emerge under the aegis of a non-profit research foundation, the Twentieth Century Fund.

[24] Zechariah Chafee Jr., *Government and Mass Communications*, Hamden, Conn.: Archon Books, 1965, pp. 6, 801–02.

[25] 50 U.S. Code 33.

[26] Op. cit., *Free Speech in the United States*, p. 3.

[27] The tests of whether material is obscene or pornographic and therefore not protected by the Constitution are omitted from this chapter but reviewed in detail in Chap. IX. Similarly, the "public interest" formulation, as applied to libel and privacy cases, is reviewed in Chaps. IV and V.

[28] *See* Edward G. Hudon's *Freedom of Speech and Press in America*, Washington, D.C.: Public Affairs Press, 1963, pp. 57, 66–68. In a 1941 decision, the Supreme Court said that neither "inherent tendency" nor "reasonable tendency" was enough to justify a restriction of free expression.

[29] 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470.

[30] Frohwerk v. U.S., 249 U.S. 204, 206, 39 S.Ct. 249, 250, 63 L.Ed. 561, 564 (1919).

[31] Op. cit., note 7.

[32] Op. cit., note 2.

[33] 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

[34] Op. cit., note 3, Chap. I, p. 801.

[35] 326 U.S. 501, 509, 66 S.Ct. 276, 280, 90 L.Ed. 265, 270.
[36] Notes, "The First Amendment and Regulation of Television News," *Columbia Law Review*, Vol. 72, No. 4. April, 1972, pp. 759–60.
[37] Op. cit., note 28, pp. 172–73.
[38] 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d, 1356.
[39] 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672.
[40] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603.
[41] Thomas I. Emerson, "Toward a General Theory of the First Amendment," 72 *Yale Law Journal* 877, 917–18 (1963).
[42] Op. cit., note 21.
[43] *See* Pentagon Papers opinions, Chap. III, pp. 38–51, and Court ruling on "privilege" for reporters in the Caldwell, Branzburg, Pappas case, Chap. VIII, pp. 199–205.
[44] 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131.
[45] 42 *Law Week* 2582, May 21, 1974.
[46] State v. James A. Cline, 305 A.2d 673.
[47] Combined cases of U.S. v. Caldwell, Branzburg v. Hayes, In the Matter of Paul Pappas, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), in which Justice White listed many of the limitations on free press contained in the summarization above. *See* Chap. VIII, pp. 203–05.
[48] Op. cit., Associated Press et al. v. U.S., note 9.
[49] Op. cit., Grosjean v. American Press Co., Chap. I, note 15.
[50] *See* Chap. III, pp. 36–37.
[51] *See* Chap. III, p. 48.
[52] *See* Chap. IV, p. 68.
[53] *See* Chap. V, pp. 108–09.
[54] *See* Chap. V, pp. 113–15.
[55] *See* Chap. V, pp. 124–25.
[56] Craig v. Harney, 331 U.S. 367, 377–78, 67 S.Ct. 1249, 1255–56, 91 L.Ed 1547, 1553 (1947). Also *see* Chap. VII, pp. 172–78.
[57] *See* Chap. VI, p. 174.
[58] Zemel v. Rusk, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179, 190 (1965).
[59] In general, Sheppard v. Maxwell, Estes v. Texas and Rideau v. Louisiana, reported in Chap. VII.
[60] *See* Chap. VII, p. 163.
[61] *See*Chap. VIII, pp. 203–04.
[62] *See* Chap. IX, p. 235.
[63] *See* Chap. IV, pp. 69–70, and Chap. X, pp. 256–57.
[64] *See* Chap. XI, pp. 290–93.

INJUNCTIONS - PRIOR RESTRAINT

III

Most of the First Amendment cases mentioned previously were of the type that involved the so-called "poor man's press"--pamphlets, loudspeakers, meetings of radical groups. The established news media generally were not directly involved. This is particularly true of prior restraint cases. On occasion, however, the ghost from an earlier period of suppression returns as a reminder to the "establishment" press of the vulnerability of free press principles.

The two classic cases are *Near v. Minnesota* in 1931 and the Pentagon Papers case in 1971. Both began with issuance of injunctions to halt publication of a newspaper, in the *Near* case, and a series of articles in the combined cases of *New York Times Co. v. U.S.* and *U.S. v. Washington Post*. The use of injunctions[1] is increasingly evident in mass communications cases and, in fact, may become the weapon of the future against the media.

3.1 Near v. Minnesota.[2] This landmark case resulted from enactment of a state law, dubbed the Minnesota "Gag Law," which permitted abatement, as a nuisance, of any "malicious, scandalous, and defamatory" publication, or one judged to be obscene, by means of court-issued injunctions. The Hennepin County attorney sought an injunction against the *Saturday Press* and its manager, J. M. Near, claiming the newspaper had published "malicious, scandalous and defamatory" statements about Minneapolis city officials. The lower court judge agreed and permanently enjoined the *Saturday Press*, an action upheld by the state Supreme Court.

On June 1, 1931, the U.S. Supreme Court held the Minnesota law in violation of the First Amendment. The 5-4 majority decision was written by Chief Justice Hughes who cited Justice Holmes' admonition in *Schenck v. U.S.* "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

Hughes then enumerated those situations which would permit prior restraint:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. . . . On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life

may be protected against incitement to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force". . . . Gompers v. Bucks Stove & Range Co., 221 U.S. 418. . . . These limitations are not applicable here.

. . . As was said by Chief Justice Parker, in Commonwealth v. Blanding, 3 Pick. 304, 313, 15 Am. Dec. 214, with respect to the Constitution of Massachusetts, ". . . The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse."

The fact that for approximately 150 years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. * * *

The importance of this immunity has not lessened.

In a dissenting opinion, Justice Butler wrote:

> The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the *previous restraints* referred to by him subjected the press to the arbitrary will of an administrative officer. He describes the practice (Book IV, p. 152): "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the [1688] revolution is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."

Butler argued that no one was seeking to place prior restraints against the press, saying:

> It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this [Minnesota] statute to prevent *further* publication of malicious, scandalous, and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone. . . .
>
> * * *
>
> In this case there was previous publication made in the

> course of the business of regularly producing malicious, scandalous, and defamatory periodicals. * * * There is no question of the power of the state to denounce such transgressions.

But the Chief Justice prevailed and the precedent was established that there could be prior restraint in a few situations: troop movements during wartime, obstruction to recruitment efforts, cases of obscenity, incitement to acts of violence, overthrow by force of orderly government. And, said Hughes, the freedom from prior restraint does not depend upon the truth of the allegations made against public officials, although he agreed that the media could be held accountable *after* publication.

3.2 Pentagon Papers case. Forty years would pass before another major attempt was made to block publication of information by newspapers. The famous 1971 case was to prove one of the most dramatic and suspenseful confrontations yet to occur between press and government. It involved multiple injunctions to stop various newspapers from publishing a secret war study; it led to unprecedented speed on the part of the nation's highest tribunal to resolve the constitutional dilemma; and it badly divided the Court, thereby leaving a residue of uncertainty in both press *and* government circles.

The case resulted from a study authorized by Defense Secretary McNamara in 1967 concerning United States involvement in the Vietnam war. The period 1945–1968 was examined and the results—labeled "top secret"—were contained in 47 volumes collectively entitled *History of the United States Decision-Making Process on Vietnam Policy.*

Early in 1971, a copy of the report amounting to some 7,000 pages was obtained by Neil Sheehan, a *New York Times* reporter. What followed led to a Pulitzer Prize being awarded in 1972 to the newspaper.

A four-month hush-hush project ensued with some 75 *Times* employes being housed in a New York hotel where the massive report was read, discussed, and ultimately digested into a planned 10-article series. The *Times* even brought in a cryptographic expert to help guard against any American codes being compromised by publication.[3]

The first article appeared June 13, 1971. A second was published the following day at which time U.S. Atty. Gen. John Mitchell sought to halt publication because it was "directly prohibited" by the Espionage Act. Another article appeared before a temporary injunction could be obtained from Judge Murray Gurfein of U.S. District Court for the Southern District of New York. The judge

ordered the temporary ban after the government argued that publication would result in "irreparable injury" to the national defense and seriously interfere with the conduct of foreign affairs. Newspaper attorneys contended that the government's attempt to restrain further publication was "classic censorship," and that the injunction, even though temporary, would constitute the first time in the nation's history that a judge had ordered a newspaper not to print something.

The government soon discovered that it would have to cope with more than one newspaper. The *Washington Post* had succeeded in obtaining about 4,000 copied pages of the study and, after a 12-hour debate among newspaper editors, reporters and lawyers, the publisher gave the go-ahead to print a condensation beginning in the June 17 main edition.[4] On June 18, the attorney general asked the *Post* to halt publication, but the newspaper declined to do so. A temporary injunction was sought; but Judge Gerhard Gesell of the District of Columbia, unlike his counterpart in New York, refused to issue such a ban, saying: "What is presented is a raw question of preserving the freedom of the press as it confronts the efforts of the government to impose prior restraint on publication of essentially historical data." He also said government attorneys had failed to show that publication would cause "serious injury to the United States."

On June 19, a three-judge panel of the U.S. Court of Appeals[5] in Washington issued the temporary injunction in a split 2-1 decision and ordered reconsideration by Judge Gesell.

Simultaneously, Judge Gurfein in New York dissolved the temporary injunction and issued his ruling—largely based on the proposition that prior restraint would be unconstitutional—which permitted the *Times* to resume publication. Major precedents were *Near v. Minnesota* and *Grosjean v. American Press Co., Inc.* Both cases provided powerful arguments for the judge, who said:

> Fortunately upon the facts adduced in this case there is no sharp clash such as might have appeared between the vital security interest of the Nation and the compelling Constitutional doctrine against prior restraint. If there be some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach, we must learn to live with it. The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve

> the even greater values of freedom of expression and the right of the people to know.[6]

Although Judge Gurfein decided that no sharp clash existed between the nation's vital security interest and the First Amendment—a judgment later contested by some U.S. Supreme Court members—the temporary restraining order was not dissolved. The U.S. Court of Appeals (Second Circuit) intervened to prevent further publication before the issues could be reviewed. Faced with the prospect of additional delay, the *Times* appealed to the U.S. Supreme Court. Meanwhile, the U.S. Court of Appeals in Washington, D.C., had voted 7-2 to permit the *Post* to resume publication and so it became the government's turn to appeal to the highest tribunal. Thus, the stage was set for the denouement.

On June 25, the Supreme Court voted 5-4 to temporarily halt further publication of any copies of the Pentagon Papers which had become available to various newspapers. Though temporary, this **was the first such ban ever imposed by the highest court in the land.** Justices Black, Douglas, Brennan and Marshall voted against the ban; Chief Justice Burger and Justices Stewart, White, Harlan and Blackmun favored it.

Oral arguments took place the next day. The U.S. Solicitor General argued that publication of additional secret information would affect the lives of Americans fighting in Vietnam and pose a grave and immediate threat to national security. Attorneys for the two newspapers contended the government had made broad claims but offered little proof about the dangers that would result from publication. In an amicus curiae (friend of the court) brief filed by the American Civil Liberties Union, the Court was reminded that 19 federal judges had been involved in the proceedings up to that point and that 12 had rejected the government's position. The other seven had believed further proceedings were desirable or necessary before reaching a decision. "Not a single federal judge has so far stated his agreement with the Government's claim," the brief noted. "Surely, this is a weighty evidence as to the 'sensitivity' of the documents."[7]

With unprecedented speed—five days from the time of oral arguments until a decision was reached—the Court decided 6-3 to uphold the decisions of the District Courts in New York and Washington, thereby permitting resumption of publication of the Pentagon Papers. In the majority were Justices Black, Douglas, Brennan, Marshall (the four who had opposed temporary restraints), Stewart and White. Opposed where Chief Justice Burger and Justices Harlan and Blackmun; but their dissent should not be construed as support of prior restraint vis-a-vis the facts in these cases. Rather, they indicated

that the ban against publication should be continued while "orderly" proceedings were undertaken in the lower courts. And they deplored the "frenetic haste" which accompanied their deliberations—five days in these cases, five months in *Near v. Minnesota.*

The brief per curiam[8] decision of the Court (all nine members wrote separate opinions) stated:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the enforcement of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The District Court for the Southern District of New York . . . and . . . for the District of Columbia . . . held that the Government had not met that burden.
>
> We agree.[9]

Before proceeding to the individual opinions, let's examine two of the precedents cited in the per curiam decision.

In *Bantam Books* (1963), Justice Brennan gave the opinion of the Court which reversed a ruling by the Rhode Island Supreme Court. The state court had upheld the constitutionality of the operations of the state Commission to Encourage Morality in Youth, but reversed a lower court decision that had enjoined various book and magazine distributors from selling, distributing or displaying publications believed by the commission to be unfit for youths under the age of 18. For example, the commission notified one distributor of its objections to such publications as *Peyton Place* and *The Bramble Bush* (the latter published by Bantam Books, Inc.), and such magazines as *Playboy* and *Rogue*. The commission threatened action by the state's attorney general if distributors failed to "cooperate."

Justice Brennan wrote, in part:

> What Rhode Island has done, in fact, has been to subject the distributor of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. * * * We have tolerated such a system only where it

> operated under judicial superintendence and assured an almost immediate judicial determination of the validity of restraint. * * * The system at bar includes no such saving feature.

In Organization for a Better Austin (OBA),[10] petitioners already had been under a *temporary* injunction for more than three years (!) before the Supreme Court acted. Illinois courts had enjoined OBA from "passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the city of Westchester, Illinois." OBA, through the use of "poor man's press" techniques, had been publicly protesting against alleged "panic peddling" or "blockbusting" activities of a real estate broker in a racially integrated area during September and October, 1967. The broker brought an invasion of privacy action and sought to enjoin OBA. The Cook County Circuit Court issued a temporary injunction and, on appeal, this action was affirmed by the Appellate Court of Illinois.

Chief Justice Burger delivered the opinion of the Supreme Court which reversed the Illinois Appellate Court and ordered the injunction vacated. He wrote:

> The Appellate Court appears to have viewed the alleged activities as coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. * * *
>
> It is elementary . . . that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under Near v. Minnesota . . ., the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature "of any kind" in a city of 18,000.
>
> This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.
>
> * * * Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968); Bantam Books, Inc. v. Sullivan. . . . Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not

met that burden. No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.

A. Separate opinions of justices. The main Pentagon Papers arguments of the Court members are summarized below with the exception of Justice Black's. His concurring opinion is reproduced in full because of its strong defense of freedom of press and also because it is one of his last statements about the relationship of press and government. He died three months later.

1. Justice Black (joined by Justice Douglas) concurring.

I adhere to the view that the Government's case against The Washington Post should have been dismissed and that the injunction against The New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible and continuing violation of the First Amendment. Furthermore, after oral arguments, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my brothers Douglas and Brennan. In my view it is unfortunate that some of my brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the Federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the executive branch seems

to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no bill of rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The amendments were offered to curtail and restrict the general powers granted to the executive, legislative and judicial branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion and assembly.

Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees the Bill of Rights adopted later. I can imagine no greater perversion of history.

Madison and the other framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom of the press." Both the history and language of the First Amendment support the view that the press must be left free to publish the news, whatever the source, without censorship, injunctions or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.

The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

In my view, quite far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice [Black], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that 'no law,' and I would seek to persuade the Court that that is true . . . [t]here are other parts of the Constitution that grant power and responsibilities to the executive and . . . the First Amendment was not intended to make it impossible for the executive to function or to protect the security of the United States."

And the Government argues in its brief that in spite of the First Amendment, "the authority of the executive department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander in Chief."

In other words, we are asked to hold that despite the First Amendment's emphatic command, the executive branch, the Congress and the judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on acts of

Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, Presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. See concurring opinion of Mr. Justice Douglas.

To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

The framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

2. Justice Douglas (joined by Black) concurring. *Near v. Minne-*

sota refutes the government's contention that it has "inherent powers," in the absence of congressional approval through statute, "to go into court and obtain an injunction to protect national interest." Also, the First Amendment prohibits "the widespread practice of governmental suppression of embarrassing information."

3. Justice Brennan concurring. The error from the start was granting any injunctive relief whatsoever. Under the circumstances presented by these cases, the First Amendment "stands as an absolute bar to the imposition of judicial restraints." The only exception would be for the government to prove that the publication would "directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea. . . ." Brennan's example of when prior restraint might be constitutional is even more narrowly drawn than the one used by Chief Justice Hughes in *Near*. Justice Brennan added the additional requirement that the troop transport must be at sea!

4. Justice Marshall concurring. His opinion is devoted almost exclusively to the concept of separation of powers between the legislative, executive and judicial branches of the federal government. As noted by Douglas, Congress had not specifically made newspaper publication of "secret" government documents a crime, either under the Espionage Act or in related legislation. The issue, therefore, was whether the executive branch had the authority to invoke the jurisdiction of the courts to protect what it believed to be the national interest. Marshall decided that it would be "utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress specifically has declined to prevent."

5. Justice Stewart (joined by Justice White) concurring. The test is whether the disclosure of any of the secret information will "surely result" in direct, immediate and irreparable damage to the nation or its people. Stewart said he could not be sure of such a result; therefore the First Amendment permitted only one possible judicial resolution of the issues presented. However, he took note of the government's argument that publication of the material would not be in the national interest; and, in fact, he agreed that this would be so "with respect to some of the documents involved." Any ambivalence, however, was overcome by the test he applied.

6. Justice White (joined by Stewart) concurring. The publication of documents characterized by the government as the "most sensitive and destructive" will do substantial damage to the public interest, White said. In spite of such an unqualified view, he nonetheless held that the government "has not satisfied the very heavy burden it must

meet to warrant an injunction against publication. . . ." However, he did not rule out the possibility that criminal proceedings might be initiated *after* publication.

7. Chief Justice Burger dissenting. The lack of facts and "frenetic" haste were laments of the Chief Justice. He would like to have seen the status quo maintained long enough for the lower courts to consider the issues in "judicial calm," and he scolded the *Times* for not doing what any citizen should do when "stolen property" is found; i.e., report the discovery "forthwith" to proper authorities.

Burger also did not rule out the possibility of criminal action being filed after publication. And he made it clear that he did not hold with any "absolutist" view, saying:

> . . . [T]he First Amendment right . . . is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout fire in a crowded theater. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in Near v. Minnesota. . . . There are no doubt other exceptions no one has had occasion to describe or discuss.

The Chief Justice's apparent willingness to engraft additional exceptions onto the *Near* prohibition against most forms of prior restraint should be compared with Brennan's obvious reluctance to do so.

8. Justice Blackmun dissenting. He, too, argued against the "absolutist" view and expressed the fear that the nation already might have been harmed by publication. If so, he wanted the public to know that the responsibility rested with the newspapers.

9. Justice Harlan (joined by the Chief Justice and Blackmun) dissenting. Unlike the opinions of Douglas and Marshall, Harlan argued that the judiciary has a narrow role to play once the executive branch has made certain determinations about national security and foreign affairs—two areas in which the President is given broad powers. Harlan also criticized the "frenzied train of events" and raised a number of issues:

—Whether the First Amendment permits the federal courts to enjoin such publication if the stories present a serious threat to national security.

—Whether the mere "threat" to publish is sufficient to justify an injunction.

—Whether the newspapers are entitled to retain and use stolen documents.

—Whether disclosure would, in fact, seriously impair national security.

Such questions would have to be considered in light of the "strong First Amendment policy against prior restraints" and in view of the fact that some dissemination already had occurred. As Harlan said, "These are difficult questions of fact, of law and of judgment; the potential consequences of erroneous decision are enormous."

B. Discussion. The importance of the Pentagon Papers decision will be argued long into the future. Viewed in one way, the outcome was a victory for the press in that prior restraint was dissolved and an old principle vindicated; and yet the press had little to celebrate. First, the press underwent court-imposed restraints for 15 days while the issues were being scrutinized. Second, the per curiam decision by the majority allows the government to try again whenever it thinks it can meet the "heavy burden" to show *justification* for such restraint. Certainly the door is left open for the attorney general—perhaps at the behest of a chief executive who might be angered by "unfriendly" newspapers—to try again.

Let's assume that another attempt will be made by the federal government to prevent publication of information classified as secret or top secret. What yardstick will be used by the judiciary to determine if there is justification for restraint? Does "irreparable damage" or "substantial damage" to the national or public interest meet the test? Which one, since they may not be the same. And is national and public interest the same? This latter question is not offered facetiously since the public's right to know is basic to our system of government. The 47 volumes of *history* dealt with the decision-making process by which the United States entered the Vietnam war and became increasingly involved. Surely the public had a right to be informed of these historical developments. Or did it?

The per curiam decision shows that six justices could only agree on an ambivalent statement: a "preferred position" doctrine on the one hand (any prior restraint bears a heavy presumption against its constitutionality), and a "balancing" theory (weighing the justification shown by the government) on the other. If the individual opinions of the majority are examined, there is additional concern about the outcome of future confrontations between press and government. Justices White and Stewart based their positions on the government not having met its burden to justify restraint. What about the next time?

In summarizing the results of the Pentagon Papers case, the Twentieth Century Fund's Task Force on Government and the Press said that "while basic issues were posed, basic issues were not resolved." The Task Force—consisting of 12 members drawn mostly from the ranks of journalism (three of the members were from the legal profession)—made this observation:

> The outcome [i.e., basic issues were not resolved] should not be considered a criticism of the Supreme Court. There is good reason to believe that the ends of justice are frequently best served when decisions are made on the narrowest possible grounds, and that sweeping questions of policy are best determined in other arenas. But whatever merit there may be to this view, the fact remains that there is as yet no authoritative concept of whether publication boundaries exist.[11]

The Task Force did not identify the "other arenas;" and the thought that the "political arena" might be the place to resolve free press issues is enough to fill a strict constitutionalist with fear of what might happen to that cherished document. The implication that the decision was a "narrow" one can be argued. The difficulty lies not in the narrowness of the decision, but in its uncertainty.

C. Related issues. Other issues were generated by the combined cases, most of them beyond the scope of this textbook. They include:

1. How "secret" are the secrets? The question of why 47 volumes of a governmental study should be classified is a bothersome one. Was it classified, as some suggest, to prevent embarrassment to high government officials? And if the 47 volumes were so secret, how could someone copy 7,000 pages and not be detected, either while in the act of copying them or while transporting the copies or the original to another location?

In commenting on some ludicrous situations which have developed, the Washington bureau chief of the *New York Times* had this to say:

> For practically everything that our government does, plans, thinks, hears, and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same government, by the Congress, and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.
>
> * * * Presidents make "secret" decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct "secret" research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a congressman or the favor of a contractor.[12]

The issue of the right to know vs. bureaucracy's penchant for secrecy drew this comment from Norman Dorsen, general counsel for the American Civil Liberties Union, when he appeared before a congressional committee:

> Given our experience in many thousand cases on these problems, we suggest that any review of the Government's classification system must be based on the constitutional premise that the paramount guarantee of the First Amendment is the public's right to know what the Government is doing, and so long as the information relates to the conduct of government, no matter how embarrassing, deceitful, or dishonest that conduct may be, the people have a right to know about it, and the Congress, no less than the press, has a duty to insure that the public is so informed. * * * . . . [W]e feel that there is a constitutional presumption, not merely a policy presumption, against any system of classification which results in the withholding, from the American public, of information concerning its Government.[13]

2. Why "serialize" publication? A one-time publication of the information would have made unlikely the confrontation which developed. When asked why this was not done, the *New York Times* managing editor said he "did not think it was proper to print it all at once" because the material was hard to digest and there would have been no opportunity "for anybody to comment on it" if published all at one time. In addition, he said he did not believe "in editing or publishing out of fear of what the Government might do."[14]

Endless pages of type are not attractive typographically, but the information would be as easily comprehended in that form as spread through 10 different issues. And certainly no one would be compelled to read the entire digest at one sitting, had it been published all at once. Concerning the desire to permit comment, such reasoning is difficult to follow since considerable reaction would be likely one way or the other.

3. Complexity of the issues. Support for the dissenting judges' opinions can be found in a case which was decided nearly six months after the Pentagon Papers decision—a case which also demonstrates the complexity of the issues facing the judiciary.

Four of the 47 volumes of the secret study were not available to the *Times* or other newspapers. Believing that the public should know the contents of these remaining volumes, forced-disclosure lawsuits were brought by two congressmen, Reps. John E. Moss of California and Ogden Reid of New York, both leaders in the fight for

freedom-of-information legislation, and by Paul Fisher of the Freedom of Information Center. Judge Gesell, who earlier had refused to issue a temporary injunction against the *Post*, ruled that the four volumes were exempt from forced disclosure under the Freedom of Information Act of 1967. In commenting on the difficulty which would confront the judiciary in making decisions on the issues raised by the lawsuits, the judge said:

> The determination of the interests of national defense or foreign policy cannot be made by applying some simple litmus test to a document presented, particularly in a case where good faith is not in issue. The court, with no experience or background in such matters, would require detailed . . . background briefing even to make a tentative judgment. . . .[15]

This case highlights a major problem facing the judiciary when called upon to resolve complex issues involving national defense, foreign affairs, economics, or other complicated matters.

3.3 Injunctive power. In *Near* and Pentagon Papers, the courts became the censors even though the newspapers in both instances were eventually permitted to resume publication. The use of this injunctive power is very much of a threat in communication situations.

The power to issue injunctions or restraining orders dates back to medieval England and the emergence of the concept of "equity." If the law could not protect or compensate a person who had suffered some kind of damage or injury to property, that person could go into a court of equity and seek relief in the form of a judge's order forbidding or commanding that something either be stopped or done. The Judiciary Act of 1789 gave federal judges this power, and most of the states followed suit either by statute or by court decisions. Injunctions have been used to prevent a multiplicity of suits; whenever there would be difficulty in ascertaining compensatory damages, such as in invasion of privacy situations, and when a damage remedy would be meaningless, such as insolvency on the part of a defendant. As a law review article pointed out:

> In some areas, . . . assertions of free speech have prevented neither substitutional nor injunctive relief. The right to privacy, for example, has been protected by injunctions alone. Similarly, no reluctance to enjoin is apparent in the few cases granting relief against false advertising. And trade secrets are generally protected by injunction,

> although it has been asserted that "the public interest in free access to useful information suggests that, if at all possible, damages should be favored over equitable relief. . . ."
>
> In yet . . . [another] group of cases, however, courts have granted damage relief against commercial disparagement, business defamation, and person defamation, but have refused on free speech grounds, to enjoin the same kinds of conduct, invoking the venerable rule that equity will not enjoin a libel or slander. This maxim enjoys continuing vitality in most American jurisdictions, although long rejected in England. American courts . . . have generally held that injunctive relief against defamation would infringe unduly upon the defendant's and the community's interests in free speech. . . .[16]

As noted in Chapter IV, libel suits have become increasingly difficult to win against the news media and, as one consequence, more invasion of privacy suits have resulted. One effect has been the increasing use of injunctions. As another law review article pointed out:

> . . . [A]s far as injunctions against speech and writing are concerned, the prior restraint doctrine has not even been consistently applied. For there are certain lines of cases, existing side by side with those refusing injunctive relief in the defamation-privacy area, where injunctions against speech and writing have come to be freely granted. These cases, no less than those involving defamation and privacy, constitute prior restraints on expression. Thus, they demonstrate that the sweeping statements . . . that equity will never enjoin expression, must be taken with a very large grain of salt indeed.[17]

That very large grain of salt was evident in the willingness of Illinois courts to *temporarily* enjoin the distribution of leaflets in a community of 18,000 for about three years, and in a Rhode Island court's enjoinder against the sale, distribution or display of certain books and magazines which might fall into the hands of youths. In both instances, these courts were reversed, but not until they had succeeded in imposing unconstitutional prior restraints.

The continuing use of this court power can be seen in the complicated case of *Spahn v. Julian Messner, Inc., et al.*[18] Spahn, a famous baseball pitcher, complained that a purported biography of his life

was both unauthorized and fictionalized, thereby violating a New York law. On Sept. 3, 1964, an injunction was issued by a county court preventing publication of the book, *The Warren Spahn Story*, and awarding $10,000 in damages to Spahn. The New York Court of Appeals, in a 7-0 decision, affirmed the judgment, stating:

> . . . [T]he free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter.[19]

The publishing company appealed and the U.S. Supreme Court ordered the New York Appeals Court to reconsider its decision. The state court did so and reiterated substantially the same decision. Again Messner asked for a review. In a memorandum decision,[20] the Supreme Court directed a new line of inquiry to the state court: did not the injunctive relief constitute an unconstitutional restraint against publication? Before this question could be resolved, an out-of-court settlement was reported.[21]

Book and magazine publishers, underground newspapers, film producers and distributors and, to a lesser extent, the "establishment" news media, have been the targets of injunction-seekers. The underground newspapers have been special targets. In 1966, for example, three such newspapers were hit with enjoinders, including a permanent injunction against *Kiss*, a New York publication specializing in sex. The issuance of an injunction against the *Los Angeles Free Press* in 1969, preventing that paper from continuing with the publication of the names, addresses and phone numbers of state narcotics agents, was condemned by the California Freedom of Information Committee as "almost unheard of" judicial censorship.[22]

No chapter on prior restraint and the growing use of the injunctive power would be complete, however, without mention of a notable example of a judge's refusal to countenance such censorship.

The daughter of a deceased Pennsylvania industrialist sought to enjoin further publication of a book about her father because of unflattering remarks concerning him. In ruling against an injunction, Judge Weidner of the Cumberland County Court of Common Pleas said, in part:

> . . . Miss Helen C. Frick seeks to enjoin publication and distribution of the book, *Pennsylvania: Birthplace of a Nation*, in its present form because she does not believe

> certain statements about her father.... She admits she knows nothing of his business dealings, but claims they must be untrue because of the character of his personal relations with her as his daughter.
>
> By analogy, Miss Frick might as well try to enjoin publication and distribution of the Holy Bible because, being a descendant of Eve, she does not believe Eve gave Adam the forbidden fruit in the Garden of Eden, and because her senses are offended by such a statement about an ancestor of hers.[23]

The judge concluded that there had been no wrong done by the defendant and that the plaintiff, Miss Frick, had suffered no injury. Therefore, there was no remedy at law or in equity that need be applied.

3.4 Summary. The two classic attempts at prior restraint of the press thus far are *Near v. Minnesota* (1931) and Pentagon Papers (1971). In both instances the Supreme Court rejected attempts to impose such restraint although in the Pentagon Papers case the Court itself imposed a temporary restraint on newspapers wishing to publish the classified government report on Vietnam.

In *Near*, the Court held that not all attempts at prior restraint would be unconstitutional. Singled out as examples of what would be constitutionally sanctioned were prior restraint of (1) attempts to obstruct armed forces' recruitment; (2) sailing dates of troop transports; (3) number and location of troops; (4) obscenity; (5) speech or press which threatened the security of community life; and (6) utterances which have all the effect of force.

In the Pentagon Papers case, a Court majority agreed that (1) any system of prior restraint bears a heavy presumption against it being constitutional; and (2) the government must meet a heavy burden of showing justification for such restraint. Beyond this brief statement lay widely divergent views, scattered like seeds of doubt should the government again test the widely held doctrine that prior restraint is the antithesis of freedom of press.

These two cases have overshadowed repeated instances of court-imposed prior restraints. Injunctive power, wielded freely by some judges, has been used against the underground press, pamphleteers, book publishers, and in many different situations.

III—Pass in Review

1. The landmark decision in *Near v. Minnesota* ruled unconstitu-

tional the prior restraint of the *Saturday Press.* But the Court majority would have permitted such restraint under such circumstances as:

2. What was a major reason given by U.S. District Court Judge Gerhard Gesell of the District of Columbia for refusing to issue at the outset any injunction against publication of the Pentagon Papers?

3. The per curiam decision of the U.S. Supreme Court in the Pentagon Papers case relied on two principal ideas in refusing to continue the ban against publication. What were they:

4. Justice Brennan said there was an original error in the Pentagon Papers case. What was it, in his opinion:

5. The Washington bureau chief of the *New York Times* decried the secrecy label placed on the 47 volumes of the Pentagon Papers and said the bureaucrat's penchant for secrecy was ludicrous because _____.

6. There have been many instances of prior restraint against the press, some quite recently. The legal weapon used to accomplish such restraint is the _____.

III—Answers to Review

1. To prevent obstruction of recruiting, publication of sailing dates of transports or location and number of troops, obscenity, incitement to violence, and overthrow of orderly government.

2. The data was historical.

3. Any system of prior restraint carries a heavy presumption against its constitutionality; and government carries a heavy burden to show justification for such restraint. It did not do so in the Pentagon Papers case.

4. Granting any injunctive relief whatsoever. Had that been the case, then obviously the government's bid to halt publication would have ended in the face of *fait accompli.* Also, any prior restraint issue would have dissolved once publication was completed.

5. Max Frankel argued that government officials first make things secret and then, when it suits their purpose, make the secret information public.

6. Injunction.

[1] An injunction is a mandatory or prohibitive order issued by a court which either requires a person to do something or to abstain from, or cease doing, something. The injunction may be permanent, as in the *Near* case, or temporary, as in the Pentagon Papers situation.

[2] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.

[3] A.M. Rosenthal, "Why We Published," *Columbia Journalism Review,* Vol. 10, No. 3, Sept./Oct., 1971, p. 19.

[4] Ben H. Bagdikian, "What Did We Learn," *Columbia Journalism Review*, Vol. 10, No. 3, Sept./Oct., 1971, p. 48.
[5] *See* Appendix A for explanation of federal and state court structure and procedures.
[6] Opinion reported in the June 20, 1971, issue of *The New York Times*. © by the New York Times Company. Reprinted by permission.
[7] *U.S. Government Information Policies and Practices—the Pentagon Papers*, Part 3; hearings before the House Subcommittee of the Committee on Government Operations, 92nd Congress, 1st Session, June 30–July 7, 1971, p. 839.
[8] Per curiam means that no identifiable member of the Court wrote the opinion.
[9] Op. cit. Chap. 2, note 3; 403 U.S. at 714, 91 S.Ct. at 2141, 29 L.Ed.2d at 824–25.
[10] 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971).
[11] *Press Freedom Under Pressure*, New York: The Twentieth Century Fund, 1972, pp. 39–40.
[12] Max Frankel, "The 'State Secrets' Myth," *Columbia Journalism Review*, Vol. 10, No. 3, Sept./Oct., 1971, pp. 22–23.
[13] Op. cit., note 7, pp. 811–12.
[14] Op. cit., note 3, p. 17.
[15] Unreported opinion by District Court Judge Gesell in Moss, et al. v. Melvin Laird, Secretary of Defense, and Paul Fisher v. Department of Defense, et al., decided Dec. 7, 1971. It should be noted that these lawsuits were brought under the Freedom of Information Act (*see* Chap. VI), which specifically permits the federal government to withhold classified information on national defense and foreign affairs. The Pentagon Papers case concerned prior restraint of publication in that the newspapers already had the information. The complexity may be the same in both cases, but not the issues.
[16] "Developments in the Law," *Harvard Law Review*, Vol. 78, No. 5, March, 1965, pp. 996, 1008–09. Copyright 1965 by the Harvard Law Review Association.
[17] William O. Bertlesman, "Injunctions Against Speech and Writing: A Re-evaluation," *Kentucky Law Journal*, Vol. 59, No. 2, 1970–71, pp. 324–25.
[18] 274 N.Y.S.2d 877, 18 N.Y.2d 324, 221 N.E.2d 543. Also *see* further discussion of case, Chapter V, pp. 114–15.
[19] 274 N.Y.S.2d at 880, 18 N.Y.2d at 329, 221 N.E.2d at 546.
[20] 393 U.S. 818, 89 S.Ct. 80 (1968).
[21] 393 U.S. 1046, 89 S.Ct. 676 (1969).
[22] *FoI Digest*, Vol. 11, No. 3, September–October, 1969, p. 1.
[23] Frick v. Stevens, 43 D & C 2d 6. Also, *FoI Digest*, Vol. 8, No. 7, May–June, 1967.

LIBEL

IV

Previous chapters examined the struggle for freedom of press and the emergence of constitutional safeguards; but as demonstrated by the Blackstonian doctrine and decisions in *Near v. Minnesota* and the Pentagon Papers cases, the news media can be held accountable after publication. Any examination of accountability should start with libel and proceed to invasion of privacy since these two torts, or wrongs, in the civil law have been the principal dangers confronting the news media once publication or broadcast occurs. Although such dangers have been greatly reduced by the U.S. Supreme Court, they have not been eliminated; hence the need to examine applicable law.

Libel, unlike the concept of privacy, is rooted in the common law of England and goes back beyond the time when men drew swords to defend good names and reputations. In part the common law of libel developed to halt such violence. By the 1800s, the law of libel was fairly well established in both England and the United States.

In America, development of such law took place at the state level since libelous matter was not, for many years, deemed protected by the First Amendment. Thus, prior to 1964 and the U.S. Supreme Court's ruling in *New York Times v. Sullivan*,[1] state laws, and the defenses permitted by such laws, controlled the outcome of libel actions. Thus, there are 51 different jurisdictions—the 50 states plus the District of Columbia—which deal with the complexities of libel. For reasons that will be apparent later, these state laws still require attention from mass communicators in the various jurisdictions even though a conditional constitutional privilege extends to much of what the public news media report.

First, some definitions.

4.1 Definition of libel. A libel is a printed defamation. In Latin, defamation means to spread a bad report about someone. A libel is a printed defamation (unlike slander which is an oral defamation) that injures a person's good name or reputation. But the definition is not yet complete. To make it so would require examination of the law in each state and the District of Columbia. Fortunately, the laws have much in common so that from a few states we can deduce the general characteristics of libel in the others.

The Missouri statute, for example, defines libel as a malicious defamation of a person made public by any printing, writing, sign, representation or effigy, tending to provoke that person to wrath or expose him to public hatred, contempt or ridicule, or to deprive him

of public confidence and social intercourse.[2] A Missouri Court of Appeals said in a 1973 decision that to defame is to speak evil of one maliciously, to dishonor, to render infamous; and that defamation includes the idea of calumny, as by lying—injuring someone's reputation in that way.[3]

In New York, libel has been defined as "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society."[4]

In Oregon, a defamatory communication is defined as one which subjects a person to hatred, contempt or ridicule, or tends to diminish the esteem, respect, goodwill or confidence in which that person is held, or to excite adverse, derogatory or unpleasant feelings or opinions against that person.[5]

A libel, according to a Pennsylvania court decision, is a maliciously written or printed publication which tends to blacken a person's reputation or expose him to public hatred, contempt or ridicule, or which injures him in his business or profession.[6]

And in Wisconsin, a communication is defamatory if it is capable of a meaning which tends to harm the reputation of a person such as to lower that person in the estimation of the community or to deter third persons from associating or dealing with him.[7]

Note the repeated use of the word *malicious* in definitions of libel. The concept of malice is a legal boobytrap for the unwary. Malice usually denotes ill will, spite, hatred or evil motives, but such a definition requires knowledge or proof of what was in someone's mind. How could a plaintiff prove what a publisher or reporter had in mind? Such an impossibility led to *presumed malice* or *malice in law*, which is the kind of malice referred to in most state definitions of libel. Even though the publisher or reporter intended no harm or ill will, errors resulted; therefore, malice is presumed.

A. Libel *per se*. Under civil law, as differentiated from criminal law, two kinds of libel are recognized: libel *per se* and libel *per quod*. Libel *per se* means libel on the face of it; that is, the words clearly are libelous.

For writing to be libelous *per se*, according to a Colorado Court of Appeals decision in 1973, it must contain defamatory words directed at the person claiming injury, and the words, on their face and without the aid of extrinsic proof, must be immediately recognized as injurious.[8]

A Missouri Court of Appeals said that if the words used come

within the meaning of the libel statute without the aid of extrinsic facts, they constitute libel *per se* and are actionable on a mere allegation of general damages.[9]

Usually a judge will decide if the words are libelous *per se* while the question of damages is left to the jury; however, if reasonable men might differ as to the fact of defamation, then that question may be left for the jury.[10]

B. Libel *per quod*. This means that defamation occurred because of special circumstances, that the words are not libelous on their face. Here, extrinsic facts make the difference. For example, there's nothing wrong with publishing a brief news item that Mrs. Barbara Jones gave birth to a seven-pound son. Not on the face of it. But if this Mrs. Jones has only been married three weeks, and if, because of a hospital mixup in identification, she's not the Mrs. Jones who gave birth to a son, then the news report may have injured her. Generally libel *per quod* lawsuits will not be successful without proof of special damages. For example, a Colorado appeals court held that an allegation that a person was mentally ill did not constitute an imputation that the person had a loathsome disease, which would have constituted libel *per se*; therefore, unless the plaintiff could show special damages, a claim of libel *per quod* could not be sustained.[11]

In determining whether a publication is libelous, the language used must be construed in the way that persons of ordinary intelligence might reasonably understand it. And the published article alone must be considered—stripped of innuendo, insinuation, colloquim and explanatory circumstances. In such interpretations, the intent of the speaker, author, or even the plaintiff is not considered, since defamation consists solely in the effect produced upon the minds of third parties.[12]

Although the law is not the same in all jurisdictions, some states require that an allegedly defamatory article must be read as a whole and the words therein given their natural and obvious meaning, rather than the plaintiff seizing upon one word, or even a headline surmounting a story, as the basis for a libel suit.[13]

4.2 Publication, identification, defamation. These three elements are necessary to a successful libel suit.

Publication, as it pertains to the public news media, is self-explanatory.

An identifiable person must be libeled, otherwise no injury results. Partial identifications, however, can meet the criteria of legal identification. Thus, if someone wrote: the 13-year-old red-haired girl who lives on West Fifth Avenue—then this might constitute identification if there was only one red-haired girl living on West Fifth Avenue.

False or faulty identification is a primary cause of libel suits, particularly in crime stories.

4.3 Group libel. If an individual is a member of a group which has been libeled, the size of the group will determine if identification of the individual is legally possible. The larger the group the less likelihood of establishing individual identification and/or injury. Thus, a member of a labor union, political party, race or nationality would not be able to show identification and/or injury and therefore would not be able to bring a successful civil lawsuit; however, words which might provoke the anger of a group could be dealt with under a state's criminal libel law.[14]

4.4 Corporation, product libel. It is possible to damage a corporation or its product through words that injure the corporation's reputation, reduce its credit standing, or otherwise harm its ability to carry on business. Similarly, a product's reputation can be injured such that a loss of business can be established. In such instances, damage suits can result.

4.5 Defenses to libel actions. Every day the news media publish or broadcast stories which are defamatory but which do not result in successful libel actions. The reason lies in the defenses to libel permitted by all of the states; i.e., truth, qualified privilege, and fair comment and criticism.

A. Truth. Truth is a complete defense, but in more than half the states there's an additional requirement: truth with good motives for justifiable ends.

This defense goes back to the John Peter Zenger trial in 1735 and to the *State v. Croswell* case in 1804 in which Alexander Hamilton and Judge Kent argued for a defense of truth with good motives and for justifiable ends. New York subsequently amended its Constitution to permit such a defense.[15] Other states which permit a similar defense are Alaska, Arizona, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Washington, Wisconsin and Wyoming. There's also the District of Columbia.

Truth alone is a complete defense in Colorado, Indiana, Missouri, Nebraska, New Mexico, North Carolina, South Carolina and Vermont.

Alabama, Delaware, Kentucky, Maine, New Hampshire, Pennsylvania, Tennessee and Texas allow the defense of truth more readily when official conduct of public officials is involved.

The burden of proving truth falls upon the defendant media, and the truth must be provable in court. Hearsay won't do. A reporter

might know that a politician is crooked, but can he prove it? Generally it is not necessary to prove that every word is true. If the statement is "substantially true," that will suffice in the state of Wisconsin, according to a state Supreme Court decision in 1973.[16]

B (1). Absolute privilege. This kind of privilege is conferred by statute or constitution on public officials and certain kinds of public records. When the President of the United States, governors, congressmen, legislators, judges speak or act in their official capacity, what they say or do is absolutely protected from slander or libel suits. The theory behind such privilege is that it is in the public interest to have public officials make disclosures on matters within the scope of their public duties.[17] Such a privilege generally extends to all legislative proceedings, including investigations by committees, and to the acts of executive and administrative officials of the national, state or municipal governments, including their official reports and communications.[18]

Privilege, which had its origin in the common law, generally is conferred by statute in most states, and it is to such statutes that the journalist must look. For example, California, Idaho, South Carolina, Utah and Texas extend privilege to all public meetings.

But in Wisconsin, the Supreme Court held that school board members "do not fall within the category of high ranking executive officials of government whose defamatory acts should be accorded absolute privilege."[19] Thus, there are pitfalls awaiting unsuspecting journalists. Fortunately, however, the U.S. Supreme Court's decisions commencing in 1964 have made the need for some of the above distinctions academic.

B (2). Qualified or conditional privilege. If journalists give a fair and accurate report of judicial, legislative and most other public and official proceedings, then these reports are qualifiedly privileged. Even though they contain defamatory falsehoods, successful lawsuits cannot result. The news media lose the privilege if their reports of that which is absolutely privileged are inaccurate, include extraneous material, or are motivated by malice.[20]

Several problems are apparent with the assertion of qualified privilege. What is a public or official proceeding? What is a fair and accurate report or, as sometimes alluded to, a good-faith effort? Concerning the latter, a good-faith effort requires both accuracy and fairness; therefore, should those being criticized—even in privileged situations—be given a reasonable opportunity to reply so long as the response is relevant to the criticism?

As for what constitutes a public or official proceeding, judges will decide. Most clearly, privilege extends to those proceedings which

involve the exercise of a judicial or legislative function. Discussing judicial proceedings, the Wisconsin Supreme Court said:

> . . . [I]t is true that defamatory words published or spoken by parties, witnesses and counsel in judicial proceedings are thus privileged when the statements bear a proper relationship to the issues. And such absolute privilege has been extended to quasi-judicial proceedings, including petition to a governor for removal of a sheriff, town board proceedings concerning a tavern license, a complaint to the state real estate brokers' board. Also it is true that there seems to be "no clear definition" of what constitutes a quasi-judicial proceeding before a quasi-judicial body.[21]

Another danger in judicial proceedings involves the status of pleadings or depositions which are addressed to the courts and not to the public at a time when there has been no adjudication; consequently they may contain false allegations. The trend, however, is to extend privilege to such filings regardless of what stage the proceedings have reached.

Generally, the best rule to follow is not to expect the protection of privilege if records are not open to public inspection. Thus, sealed court records, such as those pertaining to most juvenile court proceedings and, in some states, divorce and matrimonial cases, would not be privileged. Whenever there's doubt about the status of a report or a statement, such as a congressman making a libelous statement while waiting to board an airplane, the police "blotter" or daily log of police activity, the filing of legal papers in the office of the court clerk, or the status of a justice of the peace court, the journalist should seek expert advice; e.g., from the company's attorney.

In a booklet entitled *The Dangers of Libel*, the Associated Press advises its staffers to take three steps in evaluating whether a story is legally safe: 1. Is it libelous? 2. If so, are the facts provably true? 3. If not, does the story have the protection of qualified privilege? If the story is libelous, and the answers to questions 2 and 3 are "no," then the AP advice is: kill the story!

The privilege accorded to print journalists also extends to broadcast journalism. However, the broadcast medium is exempt from liability while fulfilling certain requirements under the equal time provision of Section 315 of the Communications Act of 1934 since, by law, they cannot censor what a political candidate wishes to say when using a broadcast facility under the equal time requirement.[22]

However, the equal time proviso does not apply to news and news-type programs; therefore, the broadcaster, like the print journalist, must guard against the candidate making libelous statements under such circumstances.

Finally, in connection with what has been said about the relationship of privilege to public or official proceedings, it follows that what is said or done at private meetings and conventions is not privileged.

C. Fair comment and criticism. This defense can be used when public officials and public figures file libel suits. It was intended to encourage the news media to report and comment on matters of public interest, but the difficulty of using such a defense stems from its inexactness. What is fair comment? When does comment go beyond fairness?

A famous case involving such a defense occurred in 1901 when a trio of entertainers, known as the Cherry sisters, filed a libel action against the *Des Moines Leader* which had reprinted a review written by Bill Hamilton of the *Odebolt Chronicle*. Hamilton had written:

> Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns and sounds like the wailing of damned souls issued therefrom. They pranced around the stage . . . strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broomhandle.

After viewing the sisters' performance, the Polk County District Court judge directed a verdict for the newspaper. On appeal, the Iowa Supreme Court held:

> . . . [T]he editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other *matter of public interest*, and such publication falls within the class of privileged communication for which no action will lie without proof of *actual malice* (personal spite or ill will or culpable recklessness or negligence). Surely, if one makes himself ridiculous in his public appearances, he may be ridiculed by those whose duty or right it is to inform the public

regarding the character of the performance. . . .[23] [Italics added.]

The italicized language above anticipated by many years key words that would be used by the U.S. Supreme Court to strengthen press freedom against libel and invasion of privacy actions.

4.6 Damages. If news media are unsuccessful in defending against lawsuits, three kinds of damage can be awarded:

1. General or compensatory—for the intangible damage to good name and reputation.
2. Special—for tangible damage, such as loss of job, clientele or business.
3. Punitive or exemplary—for gross carelessness or malice.

As Justice Thurgood Marshall pointed out:

> The concept of punitive or exemplary damages was first articulated in Huckle v. Money . . . (1763). . . . There Lord Camden found that the power to award such damages was inherent in the jury's exercise of uncontrolled discretion in the awarding of damages. . . . Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. . . .[24]

One way to lessen the danger of punitive damages is to print a retraction or correction if a mistake is made. In some states—and California law is very favorable in this regard—publication of a retraction will prevent recovery of all but special damages.

There are, however, conflicting views on publication of corrections. The Associated Press warns that publication of a correction is no safeguard against legal action. On the contrary, it may "seriously complicate" defending against the lawsuit.[25] Therefore, the wire service advises staffers to initially handle the matter of corrections by mail so that pertinent information may be gathered and more time gained in which to make a decision on whether to issue a retraction or correction.

The Society of Professional Journalists' Code of Ethics declares: "It is the duty of the news media to make prompt and complete correction of their errors." Some state laws help the media to decide on a course of action. A Florida statute (770.02 F.S.A.) only permits recovery of actual damages if a "fair correction, apology and retraction" is published within 10 days after the media is notified of the error. The correction-apology-retraction must be published in the same or corresponding editions of the newspaper or periodical in which the libelous matter appeared, and in as conspicuous a place and comparable type as the libelous article.

Section 48a of the California Civil Code requires a libeled person,

within 20 days of learning of the publication, to advise the publisher specifically what statements he claims to be libelous and to request that the statements be corrected. Recovery of general damage is possible only if this section is complied with and if the publisher fails to correct the libelous statement.

Section 895.05(2) of the Wisconsin Statutes (1961) provides that a reasonable opportunity (seven days) must be given to allow for a correction, and further: "A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them."

4.7 Criminal libel. With the exception of obscenity, state laws which punish "word crimes" are rarely invoked, yet they remain on the statute books in most states. These include prohibitions against seditious libel, criminal libel and blasphemy.

Seditious libel—as one aspect of criminal libel—has not been used against the media and, in essence, was virtually done away with by the *Times-Sullivan* decision in 1964. Criminal libel is directed at words which presumably could cause a breach of the peace. The prevention of such disorder was seen as constitutionally permissible by Justice Hughes in *Near v. Minnesota* even if prior restraint resulted. Criminal libel usually involves two elements: the threat to public order and malice. Thus the belief that you can't libel a dead person may be true insofar as civil libel is concerned, but such a libel might be punishable under the criminal law on the theory that the dead person's relatives and friends might be provoked to violence against the publisher, thereby endangering public order. Similarly, malicious libels against living persons might be dealt with under the criminal statute on the same theory.

The elements involved in criminal libel do not differ substantially from those involved in civil libel. In fact, the Missouri statute is the same for both civil and criminal libel.[26] New York's penal law defines libel as a "malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in their business or occupation."

Since malice is difficult to define, and because it usually involves intent, there have been few criminal libel prosecutions in recent

years. One such case did occur under an Illinois statute enacted in 1949 which made it a crime to disseminate or exhibit in a public place anything which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion." Under this statute, a Chicagoan was accused of distributing racist literature. He was convicted and the U.S. Supreme Court, in a 5-4 decision, upheld the conviction.[27]

In giving the Court's opinion, Justice Felix Frankfurter said that the legislature's action was a reasonable way "to curb false and malicious defamation of racial and religious groups." Justices Black and Douglas dissented principally on the ground that no group should be protected at the expense of free speech. Twelve years later, in the Court's unanimous decision in *Times-Sullivan*, Justice Brennan seemed to go out of his way to stress that the stifling of the Chicagoan's (Beauharnais) freedom was an exception to the usual rule that freedom of speech/press should prevail. Brennan wrote:

> In Beauharnais v. Illinois, . . . the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel". . . .[28]

In mid-1973, a criminal libel charge was dismissed against Joseph Weston, the editor of the weekly *The Sharp Citizen* of Cave City, Ark., by Circuit Court Judge Henry Britt.[29] Weston had been charged on Sept. 26, 1972, with "tending to blacken the memory of one who is dead," but Judge Britt said the Arkansas libel statute was too vague to interpret with reasonable certainty and that the editor, even though he had not created any respect for freedom of the press by publication of such an article, nonetheless was entitled to First Amendment protection.

Obscenity, and its relationship to the crime of blasphemy, is discussed in Chap. IX.

First Amendment and Libel

4.8 The malice rule and public officials. In [redacted] the U.S. Supreme Court drastically altered the law of libel as it pertains to public officials in the performance of their public or official duties. In effect, a "malice" test was substituted for the defenses of truth and fair comment-criticism. However, the traditional pre-1964 de-

fenses can still be used by the media conjointly with the new standards laid down by the Supreme Court.

The first in a series of landmark decisions was written by Justice Brennan and it reversed an award of $500,000 in damages to a public official against the *New York Times*. All nine Court members agreed in *Times-Sullivan* that the damages should not have been awarded and that greater protection was needed by the news media against libel suits brought by public officials. In fact, three of the justices argued that Brennan's opinion for the Court did not go far enough in insulating the press from the dangers of libel.

What emerged from this case was the *Times-Sullivan* "actual malice" rule or standard which states that a public official can only succeed with a libel action if he can show that a "defamatory falsehood relating to his official conduct . . . was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Times-Sullivan stemmed from civil rights demonstrations in the South. On March 29, 1960, a full page advertisement was published in the *New York Times*, co-sponsored by 64 prominent persons. The advertisement listed some grievances against Montgomery, Ala., police, and several of the statements were erroneous. L.B. Sullivan, one of three city commissioners at the time, brought suit even though he was not identified by name in the advertisement. He contended that false statements concerning the Montgomery police defamed him because he had supervisory power over the police. When the case went to the jury in Alabama, the judge instructed the jurors that the false statements were libelous *per se*. The result was the large damage award. On appeal, the Alabama Supreme Court upheld the lower court. The *Times*, already sued for $2,500,000 by the two other city commissioners and by the state governor, appealed and the stage was set for the historic U.S. Supreme Court action.

Significantly, the nation's highest tribunal could easily have sidestepped this case. It was a civil lawsuit between private parties. Government was not pitted against a newspaper. Also, the entire tradition of libel law up to this time was against interference by a federal court in what was considered to be a matter for state laws to resolve since libel previously had been held to be beyond the protection of the First Amendment. And lastly, the libelous words were contained in an advertisement and "commercial expression" generally did not have the full protection of the First Amendment if, indeed, it had any at all. For all of these reasons, plus the emotionalism attached to the civil rights struggle, the Court could have ducked *Times-Sullivan*. It chose not to and the result has been a chain

reaction of decisions which now make it possible for the news media to report *matters of public interest* concerning *public officials* and *public figures* without fear of successful libel suits, so long as they do so without "actual malice" as defined in *Times-Sullivan*.

In his opinion for the Court, Justice Brennan first had to dispose of basic arguments against the Court even considering the case. He responded:

> We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "the Fourteenth Amendment is directed against state actions and not private actions." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law . . . to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which the state power has been applied but . . . whether such power has in fact been exercised.

As for an advertisement not being protected by the Constitution, Brennan said:

> The publication here was not a "commercial" advertisement. . . . It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest *public interest and concern* [italics added]. . . . That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. . . . Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. . . . The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources". . . . To avoid placing such a

> handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

A more difficult obstacle for the Court to overcome was the "principle" that publication of defamatory words meant loss of First Amendment protection. Since the advertisement contained defamatory falsehoods, how could the Court impose First Amendment protection? Justice Brennan wrote with great forcefulness:

> . . . [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, . . . and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Foremost among the commands of that amendment—which clearly is given a "preferred position" in this case—is the need for freedom of expression for public questions and issues in order to facilitate public discussion. Such public discussion is basic to the American system of government and must not be stifled (the Meiklejohn concept). Brennan thereupon applied the rhetoric of broad libertarianism by saying: "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."

Such wide open debate inevitably will result in false or erroneous expression, but even that kind of speech or press must be protected if freedoms of expression are to have the "breathing space" they need to survive. Therefore, any rule which compels a critic of official conduct to guarantee the truth of all factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to self-censorship; and such censorship would be inconsistent with the First Amendment. By such logic, Brennan reached the point where he stated the new standard that emerged from this case:

> 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 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.[30]

What this "malice rule" establishes is a conditional or qualified constitutional privilege, to wit: the press can vehemently, caustically, and even *falsely* comment on the public conduct of public officials. The condition is that any falsehoods not result from malice; that is, knowingly publishing falsehoods or reckless disregard of the truth. The significance of this First Amendment protection, compared with the pre-1964 defenses of truth and fair comment-criticism, as permitted under state laws, should be evident.

In separate, but concurring, opinions, Justices Black (joined by Douglas) and Goldberg argued for an absolute, unconditional privilege to criticize—even falsely—public officials as part of the unqualified right of the people, and therefore the press, to discuss public affairs with complete immunity. Such a privilege is comparable to the Meiklejohn concept; i.e., that "public speech" should be absolutely protected by the First Amendment. However, the majority of the Court limited the privilege to the discussion of the official conduct of public officials provided that such discussion was not the result of "actual malice."

Unlike Black and Douglas, Justice Goldberg believed that protection should remain for the private side of a public official's life, as did Justice Brennan and those who sided with his opinion. But making a distinction between the public and private "lives" of officials obviously poses problems. At what point does a public official regain the protection of privacy?

Times-Sullivan also produced other uncertainties, among them:

1. Are all public officials included in the conditional privilege? If not, who would be excluded? Policemen and firemen? Custodians?
2. Are prominent persons who move in and out of government as consultants to be treated as public officials?
3. At what point do defamatory falsehoods become "reckless disregard" of the truth?

Subsequent court rulings either have attempted to come to grips with such questions or have made them passé.

4.9 Extreme departure rule and public figures. Another major advance in reducing the threat of libel took place when a modified malice rule was applied to public figures. This happened in 1967 when two cases—*Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*[31] —were combined into one decision by the U.S. Supreme Court.

The first case involved a $5,000,000 libel suit filed by Wally Butts, University of Georgia athletic director, following publication of an article, "The Story of a College Football Fix," in the March 23, 1963, issue of *Saturday Evening Post*. The article accused Butts of giving football secrets to Bear Bryant, University of Alabama football coach. Bryant also filed suit for $5,000,000 damages and, following the decision in the Butts case, received an out-of-court settlement reportedly totaling $300,000.

Butts was awarded $60,000 in special damages and $400,000 in punitive damages following a trial at which Curtis Publishing Co. attorneys had to rely on the only defense available to them at the time—truth. Unable to prove the accusations, the company appealed the award of damages. By a 5-4 decision, the U.S. Supreme Court upheld the award of damages; but in so doing, the majority extended First Amendment protection to news stories dealing with *public figures*. As Justice Harlan wrote for the majority:

> . . . [The] similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, . . . lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguards, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. 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 ordinarily adhered to by responsible publishers.* (Italics added.)

After laying down the "extreme departure" test—which is a modified "actual malice" test, particularly that part which refers to reckless disregard of the truth—Harlan proceeded to make a distinction between "hot news" and other kinds of news, the latter requiring more diligence on the part of journalists. He wrote:

> The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored.
>
> * * *

> The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful exposé might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Chief Justice Warren disagreed that a new test should be established, although he joined the majority in upholding the award of damages. He argued:

> I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.
>
> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between government and private sectors are blurred.
>
> . . . [I]t is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. . . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials. . . ."

Warren urged the Court to adhere to the *Times* standard even though libel suits were filed by public figures.

Justices Douglas and Black dissented, expressing the view that in matters of public interest the press should be completely free from the danger of libel actions. Such freedom, they argued, would eliminate self-imposed censorship that results from fear of large damage awards.

A companion case involved Edwin Walker, a former U.S. Army major general who had involved himself in demonstrations during a Negro's attempt to enroll in the University of Mississippi. A Texas jury awarded Walker, then a candidate for public office, $500,000 in general damages and $300,000 in punitive damages based on an

Associated Press story about Walker's activities during the demonstration. The trial judge ruled there was no evidence of malice and therefore eliminated punitive damages—an action upheld by the Texas Supreme Court. But the U.S. Supreme Court reversed any award of damages because, in the opinion written by Harlan:

> In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. . . . Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards.

Chief Justice Warren identified the major problem associated with the *Butts* and *Walker* majority opinion: i.e., establishment of a separate standard for stories about public figures. Such a standard implies consensus concerning "accepted publishing standards." Even if consensus exists, a further difficulty results when the "hot news" criterion is applied. Just why the First Amendment should be more protective of "hot news" than "cold news" is not altogether clear. If such a standard were to gain widespread use, then one might ask if any magazine, including news-type magazines, could qualify for the conditional constitutional protection against libel suits?

In a 1971 invasion of privacy suit involving a monthly magazine,[32] the California Supreme Court decided that "hot news" items of possible immediate public concern or interest are "particularly deserving of First Amendment protection," but that identification of someone involved in a crime some years past—even though such identification is a matter of police record and therefore seemingly privileged under state libel laws—may not be so deserving. In reversing a lower court, the state tribunal did not rule on the merits of the case, but allowed further consideration of the invasion of privacy claim. In so doing, the court tacked onto the *Times* standard such codicils as "hot news," recency of events, and a concept of "newsworthiness" which included the "social value" of published facts. It is precisely because of such complicating factors that Justice Black argued in *Times-Sullivan* for an absolute privilege to discuss public affairs. Without question, the magazine article which prompted the California case would fall within a definition of public affairs since it dealt with the crime of truck hijacking.

4.10 Malice rule and private individuals—beginning of the "public concern" test. What began in 1964 as a rule or standard applied to public officials underwent significant change in mid-1971 when a plurality of the U.S. Supreme Court (Justices Brennan, Blackmun

and Chief Justice Burger) said that the conditional privilege as extended to public figures in 1967 should encompass all persons, public and private, who become involved in events of "public or general concern." In this case, *Rosenbloom v. Metromedia*,[33] Justices Black and White concurred in the results, but filed separate opinions. Justices Harlan, Marshall and Stewart dissented. Douglas took no part. If he had, the split would have been 6-3 to affirm a U.S. Court of Appeals which reversed a sizable damage award made to private citizen Rosenbloom.

The events leading to this case began on Oct. 1, 1963, when Philadelphia police arrested a number of distributors of allegedly obscene magazines and books, among them George A. Rosenbloom. Three days later, police searched his home and a building he rented, seizing magazines and books and filing a second charge against him. The Metromedia-owned radio station, WIP, broadcast substantially the same news item twice—that police had confiscated 3,000 obscene books from Rosenbloom. No qualifying word, such as *allegedly* obscene books, was used.

Rosenbloom was acquitted of the criminal obscenity charge after the trial judge declared that the nudist magazines distributed by the defendant were not obscene. Thus, WIP could not succeed with a defense of truth, nor could it convince a jury that qualified privilege (a police officer's statement made to the press) protected the broadcast. The district court judge added to WIP's plight by informing the jurors that if they found the publication to be untrue, punitive damages could be awarded. The result was an award of $25,000 in general damages and $725,000 in punitive damages, although the trial judge reduced the latter to $250,000.

Metromedia appealed and it was the position taken by the U.S. Court of Appeals (Third Circuit) which Brennan adopted in his opinion. The appellate court had concluded that "the fact that the plaintiff was not a public figure cannot be accorded decisive significance if the recognized important guarantees of the First Amendment are to be adequately implemented." Holding that the *Times* standard applied to this case, the Circuit Court reversed the trial court and Rosenbloom's attorneys appealed.

Justice Brennan wrote for the Supreme Court plurality:

> Although the limitations upon civil libel actions, first held in *New York Times* to be required by the First Amendment, were applied in that case in the context of defamatory falsehoods about the official conduct of a public official, later decisions have disclosed the artificial-

ity, in terms of the public's interest, of a simple distinction between "public" and "private" individuals or institutions.

This crucial distinction then was made by Brennan:

> 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.
>
> * * * . . . [W]e think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases.

Perhaps from some misgiving about the broad reach of the language being used, Brennan added this suggestion to lawmakers:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[34]

The plurality opinion concluded with a restatement of the *Times* rule as applied to private citizens:

> Our independent analysis of the record leads us to agree with the Court of Appeals that none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not.

Although agreeing with the plurality opinion result, Justice Black wrote a separate opinion in which he again urged the Court to abandon the conditional privilege in favor of an absolute one. This absolutist view subsequently drew support from Professor Emerson of Yale University Law School, a First Amendment scholar who said during an interview:[35]

> I think that even the "actual malice" restriction is too broad; I agree with Justices Black and Douglas that leaving the issue of malice up to a jury reopens the whole question and deprives the press of a great deal of protection which

> it otherwise would have. Nevertheless, as applied so far the rule has been a major protection. Even the newest Supreme Court appointees [Burger and Blackmun] went along in extending the *Times* doctrine to public issues.

On the dissenting side, Justices Harlan, Marshall and Stewart objected to the dissolution of the distinction between public officials-public figures and individuals who wish to live their lives "in obscurity."

Justice Marshall, joined by Stewart, wrote:

> Here, unlike the other cases involving the *New York Times* doctrine, we are dealing with an individual who held no public office, who had not taken part in any public controversy, and who had lived an obscure private life. George Rosenbloom, before the events and reports of the events involved here, was just one of the millions of Americans who live their lives in obscurity.
>
> The protection of the reputation of such anonymous persons "from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966). But the concept of a citizenry informed by a free and unfettered press is also basic to our system of ordered liberty. Here these two essentials and fundamental values conflict.
>
> The plurality has attempted to resolve the conflict by creating a conditional constitutional privilege for defamation published in connection with an event that is found to be of "public or general concern." The condition for the privilege is that the defamation must not be "published with knowledge that it was false or with reckless disregard of whether it was false or not." I believe that this approach offers inadequate protection for both of the basic values that are at stake.

Marshall rejected the malice test when applied to libel cases brought by private individuals. Instead, he would permit such a defamed person to establish *negligence* on the part of the publisher in ascertaining the truth. But Marshall, Stewart and Harlan would limit recovery to "actual damages," thereby eliminating some of the largest awards which had been made under the banner of "punitive" damages. The plurality, however, objected to the use of a negligence

standard in the belief that it allowed insufficient breathing room for First Amendment values.

In a separate, but concurring, opinion, Justice White objected to the displacement of more state libel law than he believed necessary, particularly as such law applied to private citizens. As he said: ". . . [I] would not nullify a major part of state libel law until we have given the matter the most thorough consideration and can articulate some solid First Amendment grounds based on experience and our present condition."

Justice Harlan shared this concern: "I, too, think that when dealing with private libel, the States should be free to define for themselves the applicable standard of care so long as they do not impose liability without fault; that a showing of actual damage should be a requisite to recovery for libel. . . ."

Summarized, the significance of the plurality opinion was the *potential*—potential because this was not a majority holding by the Court—extension of the malice rule to private citizens and a shifting of the conditional privilege from the kind of people involved to whether news reports concerned matters of "public or general concern." This key phrase was used as long ago as 1890 in a law review article that has been credited with stimulating much of the development of the law of privacy in the United States. The authors of that article would have excluded from the right of privacy matters of "public or general interest."[36] Therefore, with the 1971 plurality opinion, the phrase "public or general interest" or "public or general concern" became the hinge for merging the First Amendment with libel and privacy laws as they apply to the news media.

The principal questions left unanswered by the plurality opinion in *Rosenbloom* were:

1. Would the plurality opinion become "law" in the sense that majority opinions do?

2. What would be the reach of the phrase "public or general concern"? Would that phrase, for example, encompass everything the media wished to report? Obviously not. But what would be included in the ambit of that phrase?

Prior to *Rosenbloom*, a number of "lower" courts had anticipated the Brennan opinion—the move toward the "public interest" factor. For example, the Court in *Rosenbloom* upheld the Third Circuit court's application of a "public interest" test. But the Fifth Circuit also had anticipated the plurality opinion in a number of pre-*Rosenbloom* decisions:

1. In 1969, the Fifth Circuit held that "the constitutional privilege extends to discussions by specific individuals not associated with

any government, if those individuals are involved in matters of important public concern."[37]

2. In 1970, the Fifth Circuit applied the *Times* "actual malice" standard "to publications concerning matters of great public interest."[38]

3. In another 1970 case, the same court held "that the First Amendment privilege extends to discussions of specific individuals, not associated with any government, if those individuals are involved in matters of important public concern."[39]

Some legal commentators also had predicted that the nature of the event would replace the pre-*Rosenbloom* emphasis given to the status of the participants in the event.[40] As a *Harvard Law Review* article pointed out:

> Indeed, this shift seemed the inevitable consequence of *Time, Inc. v. Hill*,[41] a right of privacy case where the Court held the defendant [Time, Inc.] to have the *Times* privilege because its report involved an event of public interest; it would have been anomalous to protect a defendant against liability for invasion of privacy in such circumstances but not against the liability for defamation. It is, however, premature to conclude that a rule such as that proposed by Justice Brennan in *Rosenbloom* would be long lasting. It seems more likely that the momentum generated by its adoption would continue until as a practical matter it resulted in as absolute a claim by the media to immunity as Justice Black would grant.[42]

Although journalists might wish that absolute immunity from defamation suits might be what the future holds in store, some judges and lawyers sharply disagreed as to the significance of the *Rosenbloom* plurality opinion. For example, Judge Barnes of the Maryland Court of Appeals wrote, in a 1972 dissenting opinion:

> In the first place, *Rosenbloom* does not *hold* anything. There is no majority opinion. There is a *plurality* opinion. . . . If one considers the concurring opinion of Mr. Justice Black—who concurred *in the judgment* . . . —to be an oblique ratification of the new Brennan view, even here there would be the concurrence of only four justices and not the necessary five for a *holding* by the Supreme Court. The Brennan view . . . has not become a new federal rule broadening *New York Times* and *Curtis Publishing Co.*[43]

Judge Barnes clearly was in the minority—at least until mid-

1974—as more and more courts—federal and state—applied the plurality opinion in *Rosenbloom* to *both* defamation and a certain type of invasion of privacy suits. The following cases show such application and indicate the judiciary's efforts to "delineate" the term "public or general concern":

1. Shortly before *Rosenbloom*, the U.S. District Court for the Middle District of North Carolina ruled that a professional basketball player who had retired in 1966 to become a college basketball coach was not a public figure and therefore did not have to show actual malice to recover damages for libel as the result of an article in *Sports Illustrated*. The judge also held that the article failed to meet the "public interest" criterion. The parent company, Time, Inc., appealed and the U.S. Court of Appeals for the Fourth Circuit reversed the lower court in August, 1971—shortly after *Rosenbloom*. The appellate court said:

> It is the plaintiff's position that he had, at the time of publication, shed his character of "public figure" and that the New York Times standard was, therefore, inapplicable. . . . The District Court accepted the plaintiff's view. In so doing, it erred. ". . . To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the New York Times rule." This, however, is not such a case. . . .
>
> * * *
>
> *Rosenbloom*, it is true, did not attempt to delineate the exact limits of the phrase, "matters of public or general interest," as used in the plurality opinion, choosing to leave that task . . . "to future cases." It did declare that the term was not "to be limited to matters bearing broadly on issues of responsible government." . . . Such a test clearly is sufficient to cover sports and sports figures, whose "public interest" character is amply demonstrated by the elaborate sports sections in every daily newspaper. . . .[44]

2. In *Goldman v. Time, Inc.*, decided in October, 1971, the U.S. District Court in Northern California equated public interest and newsworthiness.

Two Americans traveling abroad had been interviewed and photographed for a *Life* magazine article which they claimed invaded their privacy by putting them in a false light by ascribing to them a "despicable set of beliefs, attitudes and ideas and a mode of living

which would cause each plaintiff to be shunned and avoided by normal members of society." The District Court judge ruled that the article was newsworthy and therefore a recovery for invasion of privacy was barred unless the plaintiffs showed actual malice on the part of *Life*. In tracing the major cases to *Rosenbloom*, the judge concluded:

> It is now unquestioned that the New York Times rule, requiring the plaintiff in a libel-type action to show actual malice, includes matters of newsworthiness or public interest, even where the plaintiff is not a public official or public figure. * * *
>
> Plaintiffs take the position that only concrete, specific events can constitute the basis of a story entitled to the protection of newsworthiness. Here, they continue, *Life* magazine merely "manufactured" a story . . . to bolster a preconceived idea about youth abroad. Youth, claim the plaintiffs, is simply too broad an issue to qualify as being newsworthy. . . .
>
> We disagree. Certainly discrete events of current interest are entitled to the protection of newsworthiness, but so are matters of more general scope, such as unemployment, the problems of the aged, hospital care, and . . . organized crime.[45]

The judge concluded that the media must necessarily be afforded "a great deal of latitude . . . in its [sic] selection and presentation of news" because of the importance of the public's right to know.

3. An attempt by grand jurors to protect themselves against newspaper criticism by claiming the status of private citizens failed to convince either a lower state court or, on appeal, the Minnesota Supreme Court which declared:

> The [U.S. Supreme] Court in *Rosenbloom* announced that the determinative factor in applying the First Amendment to state libel actions is whether the utterances in question involve an issue of public or general concern. In the instant case, even if grand jurors were deemed to be private individuals rather than public officials or public figures, actual malice would have to be shown because their actions or failure to act as grand jurors are a matter of public or general concern.[46]

4. In *Vinci v. Gannett Co., Inc.*,[47] the New York Supreme Court

for Monroe County dismissed a libel suit brought against two Gannett-owned newspapers by a private citizen. In dismissing the suit, Judge Marshall Livingston went directly to Brennan's language in *Rosenbloom* to declare:

> . . . I hold that the arrest of the plaintiff for what ultimately resulted in a plea of passing a bad check was of public or general interest. The news articles linking him in a burglary ring, although false and libelous, are not claimed to have been activated by actual malice or "in terms of knowing or reckless falsity." . . . Therefore, the claim of negligence, which produced the "malice implied by law," is insufficient to support this action.

5. On Jan. 21, 1972, the Maryland Court of Appeals used *Rosenbloom* to uphold a directed verdict for the Herald-Mail Co. of Hagerstown. Two company-owned newspapers were sued by a landlord who falsely was reported to have sent an eviction notice to a wounded Vietnam war veteran. The Maryland court decided that public housing and substandard housing were matters of general public interest and concern; therefore, the landlord had to show malice to sustain a successful action.[48]

6. On April 20, 1972, the U.S. Court of Appeals, Fifth Circuit, reversed a judgment of $30,000 made in favor of Mary Alice Firestone, estranged wife of tire heir Russell Firestone. She had filed libel and invasion of privacy suits against *Life* following publication of an article about electronic eavesdropping in divorce cases. Whether Mrs. Firestone was a private individual rather than a public figure is arguable, but the court treated her as a private citizen in applying *Rosenbloom* and holding that the article fell within the scope of public or general concern. But one member of the three-judge panel felt it necessary to warn that "there are areas of a person's activities that fall outside the scope of public or general interest," although he agreed that the subject matter dealt with in the *Life* article "was within the . . . [*Rosenbloom*] phraseology."[49]

7. The Fifth Circuit court also ruled in favor of True Detective Publishing Corp. in a libel suit brought by Randall Mistrot.[50] The January, 1970, issue of *Master Detective* had carried a free-lance article about a double murder in Florida. According to the court, the article described the murders as having been committed in the presence of Mistrot. Mistrot, said the court, admitted he aided the person convicted of the crime in disposing of the bodies, but he argued that the story "by innuendo, implication, and otherwise" falsely stated that he had "in fact helped . . . murder the two persons."

The Circuit Court responded:

> . . . [W]e are unable to see how the commission of a double murder is less a matter "of public or general concern" than a police campaign against pornography [*Rosenbloom*]. Similarly, we do not read . . . [*Rosenbloom*] as limiting the protection of the First Amendment to "hot news" that is uttered moments after the event of public or general concern occurs. The freedom to publish, whatever its qualifications, is not subject to a stopwatch brake. Nor do we think that . . . [*Rosenbloom*] requires greater investigation by the publisher into the accuracy of the story than that which here admittedly took place.

This latter reference pertains to the publisher's requirement that the free-lance writer of the article submit a list of sources used in researching the story. The court noted that the author had listed specific court records, other official records, newspaper accounts, and interviews with law enforcement personnel and with the murderer's cousin. The court said that even if "reliance on the statement of sources was negligent, appellant's case is not strengthened" because negligence "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

The Circuit Court also declined to limit the constitutional privilege to "hot news"—a decision which strengthens the claim by magazine and book publishers to the protection of the conditional privilege.

8. On a rehearing in a libel suit brought by Ernest Francis against the Lake Charles American Press,[51] the Louisiana Supreme Court on June 29, 1972, awarded $8,000 to the plaintiff even though the majority held that Francis was a private citizen and that *Rosenbloom* applied. Why, then, should damages be awarded? The critical distinction was that the plaintiff was *not* involved in an event of public or general interest. Francis had signed a surety bond so that another person accused of a misdemeanor could be released from custody pending arraignment. When bond was forfeited because of the nonappearance of the person accused of the misdemeanor, a reporter erroneously wrote that Francis had failed to appear for arraignment. The newspaper argued that the mistake had not resulted from "actual malice," and the state Supreme Court would have agreed; however, it held that the posting of a surety bond was not a matter of public interest: "The only event of general concern here was the failure of the charged defendant to appear in court for his arraignment. The plaintiff was in no way involved in this dereliction."

Therefore, the erroneous linking of Francis to a public interest

event was a "purely artificial connection" which precluded application of the "actual malice" test.

9. Another not-in-the-public-interest distinction involved an allegedly false and defamatory credit report by Dun and Bradstreet, Inc. The U.S. Court of Appeals, Seventh Circuit, decided 2-1 on April 5, 1972, that such a report was not a matter of public interest.[52] The majority, noting a U.S. Supreme Court warning against "blind application" of the "actual malice" rule, said: "We are not persuaded that the credit rating . . . was entitled to the same treatment that the Supreme Court has afforded newspapers and magazines, but, assuming *arguendo* that the credit rating was entitled to that protection, we fail to see how giving the protection in this case brought by a private person upon a matter not of public interest can be justified."

10. On Nov. 27, 1972, the Virginia Supreme Court upheld the award of $55,000 in damages to each of three non-union letter carriers.[53] The awards resulted from comments published in a monthly newsletter issued by the Richmond branch of the National Association of Letter Carriers. Under the heading, "List of Scabs," the newsletter carried the names of the three carriers, and one issue contained the comment that a "SCAB is a traitor to his God, his country, his family, and his class." The state's highest court said that the "fact that plaintiffs elected not to join the union was only a private matter and an issue of general or public interest was not involved." Since no conditional privilege existed in this instance, the state's "insulting words" statute applied.

But the U.S. Supreme Court, in a 6-3 decision on June 25, 1974, reversed the Virginia courts, holding that relevant sections of the National Labor Relations Act and Executive Order 11491 (the latter effective Jan. 1, 1970, dealing with federal government-union relationships) required uninhibited, robust, and wide-open debate in labor disputes and organizational attempts by unions; further, that state libel laws could not apply to federal labor laws unless *Times-Sullivan* "actual malice" could be shown.[54]

11. In a decision on Dec. 20, 1972, the Florida Supreme Court disagreed with a lower court's conclusion that an item in *Time* magazine's "Milestones" column concerned an event of "great public interest."[55] The news item reported the divorce of Russell and Mary Alice Firestone, with the magazine erroneously stating that the divorce had been granted on grounds of adultery. The state Supreme Court said the news item did not relate to matters of public or general concern and it returned the case to the lower court to be tried in accordance with Florida's common law on libel.

In this case, the state's highest court made a distinction between the public being "titillated or intrigued" by the 17-month divorce trial and "real public or general *concern*," the court holding that the divorce action unquestionably was newsworthy, but not of real public concern.

U.S. Supreme Court's Retreat from *Rosenbloom*

Just as it appeared that the *Rosenbloom* plurality opinion was taking hold, a majority of the U.S. Supreme Court decided otherwise in a mid-1974 opinion. During the three-year interval between *Rosenbloom* and *Elmer Gertz v. Robert Welch, Inc.*,[56] decided by the Supreme Court on June 25,1974, at least 17 states and several U.S. Courts of Appeal had adopted the *Rosenbloom* plurality opinion as governing libel actions by private citizens.[57] But with the *Gertz* decision, a majority of the Court decided to increase the news media's vulnerability to libel actions brought by private individuals.

The *Gertz* case indirectly stemmed from the slaying in 1968 of a Chicago youth by a policeman, Richard Nuccio, who later was convicted of second-degree murder. The family of the slain youth later retained Attorney Gertz to represent them in civil litigation against Nuccio.

The John Birch Society's monthly magazine, *American Opinion*, commissioned a regular contributor to do an article which appeared in the March, 1969, issue. In that article, Gertz was falsely accused of having a criminal record, of being a "Communist-fronter," and of being the "architect" of a "frame-up" of the Chicago policeman. A U.S. District Court judge ruled that the article was libelous *per se* and a jury awarded Gertz $50,000 in damages. But the judge (prior to the Supreme Court's *Rosenbloom* decision) reconsidered the applicability of the "actual malice" test to a defamation suit brought by a private citizen and decided that Gertz would have to show "actual malice" in accordance with the *New York Times* standard. The judge thereupon entered a judgment for Welch and the Seventh Circuit Court of Appeals sustained the district judge's action. Gertz appealed.

Justice Powell delivered the Court's opinion which drew concurrence from Justices Marshall, Stewart, Blackmun and Rehnquist. Justice White would have gone further than the majority in returning the development of libel law as it pertains to private citizens to the states where, he contended, it rightfully belongs. Chief Justice Burger and Justices Brennan and Douglas dissented.

Powell began his opinion for the Court in this way: "This Court

has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. . . ."

In reviewing *Rosenbloom*, Powell pointed to the five separate opinions from among the eight Justices who participated (Douglas did not) and said that none of the opinions had commanded more than three votes. He then gave this rationale for leaving the conditional constitutional privilege intact insofar as public officials and public figures are concerned, but rejecting such a privilege in connection with private individuals: Public officials and public figures have greater access to the mass media channels to counteract false statements about them, therefore, they need less libel law protection. Not so private citizens who are more vulnerable to injury. The state's interest in protecting such persons therefore is correspondingly greater. Further, those who run for office or who become public figures voluntarily expose themselves to an increased risk of injury from defamatory falsehoods. Thus, private citizens not only are more vulnerable to injury than public officials and public figures, they're more deserving of recovery of damages.

Concerning private individuals, Powell declared for the Court that the states may define for themselves appropriate standards of liability for publishers and broadcasters as long as they do not impose "liability without fault"—the same idea as put forth by Harlan in his *Rosenbloom* dissent. The majority also tacked on three other requirements which may reduce the threat of an avalanche of libel suits by private persons:

1. A state cannot adopt a standard which permits liability for a mere factual misstatement; rather, the substance of the defamatory statement must warn a "reasonably prudent editor or broadcaster" of its defamatory potential. Phrased another way, such a statement must make "substantial danger to reputation apparent."

2. A state can only permit recovery of damages for "actual injury." However, "actual injury," according to Powell, includes not only out-of-pocket losses, but also impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

3. Punitive damages—which, from a publisher's standpoint, often have been the most fearsome aspect of libel suits since they are awarded not for actual injury but to punish a publisher for carelessness—can only be awarded on a showing of actual malice (as defined in the *Times-Sullivan* decision).

Justice Powell concluded the Court's opinion by saying that since

the *Gertz* jury had been allowed to impose liability without proof of fault and to presume damages without proof of injury, a new trial was necessary. Therefore, the Court reversed the lower courts and remanded the case back to the District Court for further proceedings in accordance with the Court's decision.

In a strongly worded dissenting opinion, Justice White said that proving a defendant's culpability beyond the act of publishing the defamatory material places a heavy burden on the person bringing the suit. If the plaintiff succeeds in proving intentional or reckless falsehoods, or negligence, on the part of the publisher, then he must prove actual injury.

"Plainly," said White, "with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for . . . the plaintiff to vindicate his reputation interest by securing a judgment for nominal damages. . . ."

Furthermore, he said, the states now must struggle to discern the meaning of such ill-defined concepts as "liability without fault" and to fashion novel rules for recovery of damages.

The Chief Justice's principal reason for dissent concerned the apparent re-institution of a negligence standard for punishing defamatory falsehoods about private persons. Burger said he did not know the parameters of a "negligence" test, but he agreed with Justices Brennan and Douglas that such a test would inhibit some editors. He also expressed agreement with Justice White's concern that the orderly development of libel law, insofar as private citizens are concerned, would best take place in the states.

Justice Brennan, still adhering closely to his views as expressed in *Rosenbloom*, argued that the *Gertz* decision will result in self-censorship on the part of editors and writers, contrary to the command of the First Amendment that debate on public issues be uninhibited, robust and wide open. Further, he contended that the concept of a *private citizen* was a difficult one to operationalize since all persons are, to some degree, "public" figures. Brennan also raised the spectre of juries punishing the news media for expressing unpopular views despite the majority's *caveat* that there could be no liability without fault and no recovery of damages (absent "actual malice") without actual injury.

Concerning such "stipulations" by the majority, Justice Douglas warned:

> It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are

> virtually unreviewable. * * * The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Not only is there uncertainty as to the standard(s) that can be imposed by the state, but there also has been a narrowing of what kind of people fall into the "public figure" category. Stated another way, the Court has enlarged that class of people known as "private citizens." As Powell said for the Court:

> Hypothetically it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Thus, anyone who is not a public official or who has not taken "purposeful action" to thrust himself into the public limelight or otherwise involve himself in public issues remains a private individual who (1) on a showing of liability because of fault (whatever that means) and (2) a showing of actual injury (personal humiliation is hard to "price") can recover damages for defamatory falsehoods. Prior to *Gertz*, the movement had been toward requiring such persons to show "actual malice."

Despite the presumed safeguards for the media, the Court's retreat from *Rosenbloom* may prove a costly one for the news media and the public in general.

Hardly before the ink was dry on the *Gertz* decision, its impact was being felt. On July 8, 1974, the Court vacated the judgment of the Ninth Circuit U.S. Court of Appeals in *Gregory L. Porter vs.*

Guam Publications, Inc., et al.[58] and remanded the case to the appellate court for consideration in light of *Gertz*.

Porter's libel action arose out of a newspaper article describing his arrest in the theft of a cash box.[59] In fact, the warrantless arrest stemmed from an unsworn and assertedly false complaint that Porter had stolen an automobile.[60] The U.S. District Court for the Territory of Guam had concluded that the publication was privileged and granted defendants' motion for summary judgment. Porter, in attempting to overcome the defense of privilege, had cited Guam's Civil Code, Sec. 47, which provides, in part: "A privileged communication is one made . . . by a fair and true report, without malice, in a public journal, of . . . a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued."[61]

The Court of Appeals held that the summary judgment was properly granted because Porter's allegations failed to raise a "genuine, triable issue" of whether the publication was privileged. In citing *Times-Sullivan* and *Rosenbloom*, Circuit Judge Ely said that the newspaper account was constitutionally privileged and that "damages would be available against the appellees only if the falsity of the news report were attributable to reckless or calculated conduct." The judge continued: "As manifest in *St. Amant v. Thompson*, . . . this standard of malice would be satisfied only if the publisher 'in fact entertained serious doubts as to the truth of his publication.'[62] There is nothing in . . . [Porter's] allegations that raise, with adequate factual specificity, a genuine triable issue in this respect."[63]

After the remand, the Ninth Circuit Court of Appeals was left with the task of deciding if Porter were a private citizen (not a public figure), if a "reasonably prudent" editor would have been warned by the newspaper report of "substantial danger" to reputation, if Porter had suffered "actual injury" and, if so, could he prove the injury. Or a jury could be asked to consider the answer to some of these questions.

4.11 Summary. Libel—a printed defamation which injures a person's good name, reputation, etc.—developed out of the common law of England as subsequently refined by case law or statute in the various states. Until 1964, and the U.S. Supreme Court's unanimous decision in *Times-Sullivan*, libel had been held to be beyond the protection of the First Amendment; but with that decision the news media were given a conditional constitutional privilege to publish falsehoods about public officials—the condition being that such false-

hoods not be the result of "actual malice." And "actual malice" was defined as knowingly publishing falsehoods or reckless disregard of the truth. With the adoption of the *Times-Sullivan* rule, the burden of proving "actual malice" fell upon the plaintiff, rather than the defendant publication (unlike the libel laws of the various states which put the burden of defense on the news media).

Times-Sullivan was extended to public figures in 1967, and to private citizens in 1971 when the conditional constitutional privilege was shifted to the nature of the event (public interest or general public concern) rather than to the type of individual involved. But the 1971 development—an outgrowth of a plurality opinion in *Rosenbloom*—proved of short duration. The *Gertz* decision in 1974 increased the news media's vulnerability to libel suits brought by private individuals, although the Supreme Court expressly continued the conditional constitutional privilege for news media when faced with libel actions brought by public officials and public figures.

The *Gertz* ruling provides greater protection for the news media from suits by private citizens than existed prior to the *Rosenbloom* case, but it clearly envisions a return of this type of case to the governing state law *if* that law provides the following safeguards for the news media:

1. The substance of the defamatory report must warn a "reasonably prudent" editor or publisher that there would be a "substantial danger" to reputation if publication occurs.
2. Damages can only be recovered for "actual injury."

Although actual injury or damage is not limited to out-of-pocket losses (since impairment *of* reputation, loss of standing in the community, mental anguish, and personal humiliation can be included in such injury or damage), the plaintiff must *prove* the injury or damage. It cannot be implied or assumed.

3. Punitive damages can only be awarded if "actual malice" is shown by the plaintiff.

Just what standard will be used for judging news media culpability vis-a-vis private citizens is not yet clear, although several Supreme Court members have suggested that states might use a "negligence" test—the parameters of which, according to Chief Justice Burger, are not clear. Additionally, definitional problems are apparent in the interpretation of "reasonably prudent," "substantial danger," and "actual injury." Such problems also exist in relation to the conditional constitutional privilege; namely, defining "reckless disregard" or deciding who is a public figure or public official. The *Gertz* decision has broadened the private citizen category by limiting much more narrowly those who can be classified as a public figure.

The Court has given some guidance for interpretation of the

"reckless disregard" portion of the "actual malice" test, stating in *St. Amant v. Thompson*[64] that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. Rather, "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

News media practitioners can take precautions to avoid both the "actual malice" pitfall and those posed by the *Gertz* decision. These safeguards include what should be routine checks for accuracy by means of standard reference books, newspaper clippings filed in the "morgue" or library, perusal of official records, and interviews with or comments obtained from persons involved in the news reports, including those who are being put in a "bad light." The precautions should be increased when what is about to be published or broadcast makes "substantial danger" to the reputation of private individuals apparent. In such instances, as in others, too, truth or qualified privilege ought to be the goal of writers and editors alike.

Such precautions will help to fend off lawsuits which, even though unsuccessful, can prove costly to the media.

Look magazine published an article on Sept. 23, 1969, entitled "The Web that Links San Francisco Mayor Joseph Alioto and the Mafia." Alioto sought $12.5 million in libel damages and the first trial ended in a hung jury. *Look* then filed an affadavit with the U.S. District Court in an unsuccessful effort to ward off a new trial. The affadavit showed that up to July 1, 1971, $75,000 had been spent for legal services which did not include attorney fees. Attorneys estimated that *Look* might end up paying as much as $360,000 to defend against the suit. This cost may have accounted in part for the announcement on Sept. 15, 1971, that *Look* was ceasing publication, although the principal reasons were increases in second class mailing costs and declining advertising revenue. Even though the magazine disappeared, Alioto's libel suit did not. A second trial also ended in a hung jury on Oct. 27, 1972, and Alioto wanted a third trial. At that point the District Court dismissed the case—a decision appealed by Mayor Alioto and not yet finally resolved.

Compare the *Look* situation with one involving the mayor of St. Louis and now defunct *Life* magazine. That magazine obtained a summary judgment (before a trial could be held) following publication of an article in May, 1970, entitled "The Mayor, the Mob and the Lawyer." Mayor Alfonso Cervantes filed suit for $2,000,000 in compensatory and $10,000,000 in punitive damages.

Life and article writer Denny Walsh relied on the defenses of truth

and the *Times-Sullivan* privilege. And when Cervantes undertook pre-trial discovery, seeking to force Walsh to reveal confidential sources of information within the FBI and U.S. Department of Justice, the U.S. District Court entered summary judgment for *Life* and the writer on the grounds that neither one entertained serious doubts as to the truth of any statement in the article, that neither had knowledge of falsity, and that neither had acted with reckless disregard of the truth.[65] On appeal, the U.S. Court of Appeals affirmed the summary judgment, stating:

> Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, . . . there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources.[66] Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment.[67]

The Circuit Court further observed: " . . . [W]e believe that in his preoccupation with the identity of *Life's* news sources, the mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowledge of reckless disregard of the truth."

Cervantes shows the value of efforts to be accurate: A quick termination of lawsuits when the conditional constitutional privilege applies.

Despite safeguards against *successful* libel suits, the risks are still considerable, as Arthur B. Hanson, general counsel for the American Newspaper Publishers Association (ANPA), pointed out when he spoke at the annual convention of the Pennsylvania Newspapers Publishers Association several months after the *Gertz* decision. Referring to that case, he said that the libel law "has taken a turn for the worse from a newspaper standpoint."[68] He continued, "Today, we are appealing judgments of $750,000 and $214,000. There is no guarantee of success, for they are in the state courts. We have paid

out more than $100,000 each in defense costs in two suits successfully defended. . . ." It is incomprehensible to him, he said, why any publisher would not take out insurance against the huge libel risk, and he pointed out that in 1963 Mutual Insurance Company Ltd. in Bermuda offered libel insurance to all ANPA members. Since then, and up to Sept. 20, 1974, the company had processed more than 1,218 lawsuits and paid out more than $2 million in defense costs, settlements and judgments.

The pre-*Gertz* optimism of publishers in warding off successful libel actions has been dealt a blow and once again some publishers will have to re-examine their insurance to see how much protection is provided. For, as Justice Powell pointed out in his opinion for the Court in *Gertz*, the proper accommodation is still being sought between the law of defamation and private individuals, on the one hand, and freedom of press, on the other.

IV–Pass in Review

1. Define *libel*:

2. There are two kinds of libel. Name them and tell what each one means:

3. Three conditions must be met by plaintiff before a successful libel action can result. The three conditions are:

4. Criminal libel has most often been directed at words which, in the judgment of public officials, would cause or result in:

5. The mass media defenses to pre-1964 libel cases and to those cases which do not fall within the conditional constitutional privilege are:

6. What is the "actual malice" rule or standard as stated in *Times-Sullivan*:

7. Meiklejohn's ideas on free press are reflected in Justice Brennan's opinion in *Times-Sullivan*. Can you recall the way Brennan phrased the Meiklejohnian concept?

8. Justice Harlan made a critical distinction between two kinds of news or information involved in *Walker v. AP* and *Butts*. This distinction was:

9. What kind of news reports will be protected by the conditional constitutional privilege and what is the "condition" that underlies such a privilege?

10. Describe the effect of the *Gertz* decision on the law of libel and constitutional law.

11. Name three safeguards for the news media in the *Gertz* decision of the Supreme Court.

IV—Answers to Review

1. Libel is a printed defamation which injures a person's good name or reputation, which causes that person to be shunned by friends and neighbors, damages that person in his business or profession, attributes to that person some loathsome disease.

2. Libel *per se*—libel on the face of it. Libel *per quod*—libelous because of special circumstances.

3. Defamation, publication, identification.

4. A breach of the peace, a public disturbance, immorality or indency in public.

5. Truth, qualified privilege, fair comment-criticism. More than half the states append an additional requirement to truth: Truth with *good motives and for justifiable ends.*

6. The public official must show that a defamatory falsehood relating to his official conduct was made with knowledge that it was false or with reckless disregard of whether it was false or not.

7. Debate on public issues (similar to Meiklejohn's "political" speech) should be uninhibited, robust and wide open. Note, however, that the "actual malice" rule is a *condition* which Meiklejohn would not impose on "political" speech or press.

8. Between "hot" news, as in *Walker*, and "cold" (?) news, as in the magazine article published by *Saturday Evening Post.*

9. Reports about *public officials* and *public figures*. The condition is that such reports not result from "actual malice;" that is, knowingly publishing falsehoods or reckless disregard of the truth.

10. The *Gertz* decision returns the development of the law of libel as it pertains to private individuals to the states and does away with the conditional constitutional privilege for reports about such individuals.

11. The three safeguards are: (1) a reasonably prudent editor must be aware that the information, if published, would substantially endanger the reputation of a private individual; (2) damages can only be awarded for "actual injury;" and (3) punitive damages can be awarded on a showing of "actual malice." A fourth condition for a successful libel suit by a private citizen: The plaintiff must prove the injury or damage.

[1] Op. cit.
[2] Sec. 559.410 RSMo. 1969.
[3] Williams v. Gulf Coast Collection Agency Co., 493 S.W.2d 367 (1973).
[4] Kimmerle v. New York Evening Journal, 262 N.Y. 99, 186 N.E. 217 (1933).

[5] Farnsworth v. Hyde, 512 P.2d 1003 (1973).
[6] Burke v. Triangle Publications, Inc., 302 A.2d 408, 410 (1973).
[7] DiMiceli v. Klieger, 206 N.W.2d 184, 186–87, 58 Wis.2d 359 (1973).
[8] Fort v. Holt, 508 P.2d 792 (1973).
[9] Op. cit., note 3.
[10] *See*, for example, DiMiceli v. Klieger, note 7.
[11] Op. cit., note 8.
[12] *See* Picard v. Brennan et al., 307 A.2d 833, 835 (Supreme Judicial Court of Maine, 1973).
[13] Watson v. Southwest Messenger Press, Inc., 299 N.E.2d 409 (Illinois Appeals Court, 1973).
[14] *See* 4.7, this chapter.
[15] *See* Chap. I, p. 2, and this chapter, pp. 66–67.
[16] Op. cit., note 7.
[17] Barr v. Matteo, 355 U.S. 171, 173, 78 S.Ct. 204, 206, 2 L.Ed.2d 179, 181 (1957).
[18] *See*, for example, Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d 193, 204 (Supreme Court of New Jersey, 1959) in which the court quotes from Dean Prosser's Restatement, Torts, Sec. 611.
[19] Ranous v. Hughes, 141 N.W.2d at 258 (1966).
[20] Hanrahan v. Kelly, 305 A.2d 151, 156 (1973), in which a Maryland court said that a finding of conditional privilege negates the presumption of malice and shifts the burden to plaintiff to show actual malice which, if found, would destroy qualified or conditional privilege.
[21] Op. cit., note 7, 206 N.W.2d at 188.
[22] *See* Chap. XII, p. 327. The declaration of immunity was made by the U.S. Supreme Court in Farmers Educ. and Co-op Union v. WDAY, Inc., 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).
[23] Addie Cherry v. Des Moines Leader, 114 Iowa 298, 299–300, 304.
[24] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82, 91 S.Ct. 1811, 1839, 29 L.Ed.2d 296, 334 (1971).
[25] Op. cit., *The Dangers of Libel.* A revised booklet was scheduled for publication early in 1975. The matter of corrections—oversimplified in the earlier edition, was to be stated differently, according to Executive Editor Louis Boccardi.
[26] *See* note 2.
[27] Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952).
[28] 376 U.S. at 268, 84 S.Ct. at 719–20, 11 L.Ed.2d at 699.
[29] *Editor & Publisher*, June 23, 1973, p. 20.
[30] As Brennan pointed out in a footnote (note 20), a similar rule to the one just established had been used in a number of state court cases in North Carolina, Michigan, Kansas, West Virginia, Iowa, Arizona and elsewhere.
[31] 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094.
[32] Briscoe v. Reader's Digest, 93 Calif. Rptr. 866, 483 P.2d 34. Also, *see* Chap. V, pp. 116–19.
[33] Op. cit., note 24. Also, *see* Appendix A, plurality and majority opinions of Supreme Court.
[34] Those who argue for a right of access to the mass media, in order that diverse and antagonistic views can be placed before the public despite monopolistic tendencies in mass communications, point to this suggestion by Brennan as encouraging legislative action to assure access. Would such action be in violation of the First Amendment? Right of access and the controversy it generates are discussed in Chap. XIII.
[35] "Where We Stand: A Legal View," Reprinted from *Columbia Journalism Review*, Sept./Oct., 1971, p. 39.
[36] *See* Chapter V, pp. 99–101.

[37] Time, Inc. v. McLaney, 406 F.2d 565, 573 (certiorari, or review by the U.S. Supreme Court, denied).
[38] Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 861.
[39] Dacey v. Florida Bar, Inc., 427 F.2d 1292, 1295.
[40] *See, e.g.*, Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,' " 1964 *Supreme Court Review* 191, 221; Note, "The Scope of First Amendment Protection for Good-Faith Defamatory Error," 75 *Yale Law Journal* 642, 644–45 (1966).
[41] 385 U.S. 374 (1967). Also, *see* Chap. V, pp. 112–14.
[42] "The Supreme Court, 1970 Term, 'Freedom of Speech, Press, and Association,' " *Harvard Law Review*, Vol. 85, No. 1, November, 1971, p. 225. © 1971 by The Harvard Law Review Association.
[43] Harnish et ux v. Herald-Mail Co., Inc., et al., 286 A.2d 146, 153.
[44] Time, Inc. v. Johnston, 448 F.2d 378, 380–83 (1971).
[45] 336 F.Supp. 133, 137–38 (1971).
[46] Standke v. B.E. Darby & Sons, 193 N.W.2d 139, 145 (1971).
[47] 335 N.Y.S.2d 738, 743–44 (1972).
[48] Op. cit., note 43.
[49] Mary Alice Firestone v. Time, Inc. 460 F.2d 712.
[50] Mistrot v. True Detective Publishing Corp., 467 F.2d 122, 124.
[51] Francis v. Lake Charles American Press, 265 So.2d 206. On Jan. 22, 1973, the U.S. Supreme Court dismissed the appeal by Lake Charles American Press, 93 S.Ct. 961 (1973) on the ground that no substantial federal question was involved. The apparent basis for such action: Since there was no conditional constitutional privilege involved, state libel law applied.
[52] Morris D. Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381. Rehearing denied, June 26, 1972.
[53] 192 S.E.2d 737.
[54] Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al. v. Henry M. Austin et al., 42 *Law Week* 5105. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented primarily because the decision extended the *Times-Sullivan* "actual malice" rule "to encompass every defamatory statement made in a context that falls within the majority's expansive construction of the phrase 'labor dispute,' " thereby allowing "both unions and employers to defame individual workers with little or no risk of being held accountable for doing so. . . ." *Id.*, at 5114.
[55] Mary Alice Firestone v. Time. Inc., 271 So.2d 745.
[56] U.S. 94 S.Ct. 2997, 41 L.Ed.2d 789.
[57] *Id.*, 94 S.Ct. at 3025. This summation of the extension of the *Rosenbloom* plurality opinion to the various jurisdictions was given by Justice White in his dissenting opinion in *Gertz*.

The extent to which *Rosenbloom* might have insulated the news media from libel suits had there been no *Gertz* decision is illustrated by the views put forth by Chief U.S. District Court Judge Raymond Pettine who, just prior to the Supreme Court's action in *Gertz*, dismissed a $5 million libel suit against the Providence Journal Co., Rhode Island. Judge Pettine said the *Rosenbloom* decision "may well have the practical effect of affirming the total immunity theory for the news media." As reported in the July, 1974, issue of *The Quill* (p. 11), Judge Pettine said, "After all, what incident covered by the news media is not or does not become an event of public interest? . . . Indeed, why is a court better equipped than the professional news media to define the parameters of what events involve public or general interest?"

[58] 94 S.Ct. (1974). Justice White would have affirmed the judgment of the lower courts on the ground that the publication was privileged under Guam's laws.

[59] 473 F.2d 744 (1973).
[60] *Id.*, at 744.
[61] *Id.*, at 745.
[62] 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).
[63] Op. cit., 473 F.2d at 745.
[64] Op. cit., note 62.
[65] Cervantes v. Time, Inc., and Walsh, 330 F.Supp. 936, 940 (Eastern District of Missouri, 1970).
[66] *Cf.*, *Caldwell* case, Chap. VIII, pp. 199–202. The Circuit Court in Cervantes, in note 12, looked upon forced disclosure as harassment.
[67] 464 F.2d 986, 995 (Eighth Circuit, 1972). On Jan. 15, 1973, the U.S. Supreme Court refused to take any action to set aside the ruling.
[68] *Editor & Publisher*, Nov. 2, 1974, p. 11.

PRIVACY

V

Privacy is an expanding legal doctrine which poses new dangers to mass communicators, the principal one being the vagueness or ill-defined limits of any such right. With libel suits more difficult to win against the public news media (even taking into consideration the *Gertz* decision in 1974), a seemingly attractive alternative has become invasion of privacy suits. In the chapter on libel, *Goldman v. Time, Inc.* and *Firestone v. Time, Inc.* represented the use of privacy suits either as an alternative to libel suits, as in *Goldman*, or in conjunction with libel actions, as in *Time* magazine's divorce tidbit about the Firestones. The difficulties of defending against such actions, plus the conditional constitutional privilege as extended to at least one kind of privacy suit, will be discussed later. First, however, the emergence of "personality" rights, as contrasted with the right to protect one's reputation from defamatory utterances, should be examined.

The earliest right of privacy—and it was not then called by such a name—was protection against an attack upon one's life or tangible property. In the 1300s, this right was expanded under English law to include legal redress against the mere threat to do bodily or property damage. Also in that same century, the concept of honor or the value of one's reputation, which is what the law of libel seeks to protect, received judicial recognition in the first reported judgment for slander.[1] Next came legal remedies for various nuisances, such as noises and odors, followed by the constitutionally guaranteed individual privileges contained in the Bill of Rights, such as the Fourth Amendment's shield against unlawful search and seizure. However, the Bill of Rights does not by name guarantee a right of privacy.

Aiding in the advance toward recognition of a constitutional right of privacy was a Supreme Court decision in 1886 that the Fourth and Fifth Amendments provide protection against all government invasions of the "sanctity of a man's home and the privacies of life."[2] Two years later Judge Thomas Cooley asserted in a treatise that man has a right "to be let alone," a statement subscribed to by various legal experts, including Justice Douglas who wrote in a 1952 Supreme Court decision that the "right to be let alone is indeed the beginning of all freedom."

Shortly after Judge Cooley's assertion, impetus was given to the concept of privacy by the *censor morum* of the American press, Edward L. Godkin, editor of the New York *Evening Post*, when he wrote:

> Privacy is a distinctly modern product, one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies. . . . The earliest houses of our Anglo-Saxon ancestors in England . . . consisted of only one large room in which both master and mistress, and retainers, cooked, ate, and slept. The first sign of material progress was the addition of sleepingrooms and afterward of "withdrawingrooms" into which it was possible for the heads of the household to escape from the noise and publicity of the outer hall. One of the greatest attractions of the dwellings of the rich is the provision they make for the segregation of the occupants. . . .[3]

But the principal influence in the emergence of such a right came in 1890 with publication of an article written by Louis D. Brandeis, a Harvard law teacher who later became a Supreme Court justice, and Samuel D. Warren, a Boston businessman. Both were concerned about the public press prying into the lives of citizens when they wrote the article which included this brief history of individual rights:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the rights to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.[4]

Concerning the Yellow Journalism of their day, the authors said that the press was overstepping the obvious bounds of propriety and decency by publication of gossip and the details of sexual relations—

information that could only be procured by "intrusion upon the domestic circle." Yet the complexities of life, they said, have made necessary some retreat from the world. Because of such a need and the refining influences of culture, which make an individual more sensitive to publicity, solitude and privacy have become essential.

The authors then examined the "superficial resemblance" between invasion of privacy and defamation, but concluded that the latter was more material than spiritual. To distinguish the intangible "personality" right of privacy from more tangible property rights, they referred to one's personal writings, saying:

> The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.
>
> If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to the products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art. . . . The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

Brandeis and Warren then asked what limitations should be placed on such a right, and concluded:

1. Such a right would not prohibit publication of a matter of "public or general interest." This is the key phrase in determining if conditional constitutional privilege extends to defamatory reports by the public news media about public figures and public officials and, as will be shown later, to at least one of four different types of invasion of privacy actions.

The authors readily admitted that there would be difficulties in applying a public interest rule, but said that such difficulties would be no greater than those which existed in other branches of the law. Such a statement, viewed from the mid-1970s, seems contemporary, for Justice Brennan, in his 1971 plurality opinion in *Rosenbloom*, announced that the determinant of the conditional constitutional privilege was whether the issue was of "public or general concern," leaving the delineation of the "reach of that term to future cases."[5]

2. Such a right would not extend to those who, in varying degrees, "have renounced the right to live their lives screened from public observation."

3. Such a right would not prohibit the communication of any matter, though private in nature, which is privileged in terms of the law of libel and slander.

4. Such a right would cease upon publication of the facts by the individual, or with his consent.

However, such a right would *not* be diminished because of the truth of the matter published, since "it is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy." The authors pointed out that the libel law provided sufficient safeguards against injury to reputation. The right of privacy, they wrote, "implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."

Following publication of the article, there was no immediate rush to enact privacy statutes or to promote such a right through common law. A conjoining of events helped to spur enactment of such laws, few as they are.

5.1 New York Civil Rights Law. In the 1902 case of *Roberson v. Rochester Folding Box Co.*,[6] the New York Court of Appeals refused in a 4-3 decision to halt the use of a girl's portrait to advertise a brand of flour even though the girl and her parents had not consented. The court held that the law was a practical business system, dealing with what was tangible, and that it did not "undertake to redress psychological injuries." Also, the court ruled that no common law right of privacy existed.

This decision led to considerable criticism and was instrumental in bringing about passage in 1903 of the first binding statutory recognition of the right of privacy in the United States—the New York Civil Rights Law. Section 50 reads:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait

> or picture of any living person without having first obtained the written consent of such a person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 51 permits an action for injunction and damages.

The New York Civil Rights Law does not mention privacy by name. It contains the phrase, "for the purposes of trade," which has been interpreted to mean continuous, rather than occasional or single use. In this way the courts have excluded news and news photographs from inclusion within the meaning of this law since their use generally involves one-time-only publication.[7] But the law also was extended by the New York courts to include as tortious any publication which placed identifiable persons in a "false light," or which was substantially fictionalized; however, such interpretations since have been limited by the application of the conditional constitutional privilege and the actual malice test.

5.2 Other recognition of privacy rights. Since New York enacted the Civil Rights Law, four other states have given statutory recognition to the right of privacy—California, Oklahoma, Utah and Virginia. California's statute is similar to New York's, but specifies $300 as the minimum amount recoverable. About 35 other states and the District of Columbia have recognized some kind of privacy rights through court decisions, while the courts in Nebraska, Rhode Island and Wisconsin have held that no common law right of privacy exists in those states. Courts in Colorado, Massachusetts, Minnesota and Washington have side-stepped the question by resolving privacy claims on other grounds. Federal courts have long recognized an action for invasion of privacy, and the U.S. Supreme Court has found a constitutional right of privacy in the Bill of Rights even though that document does not mention such a right by name.

Although some states have not enacted right of privacy statutes, or do not recognize it by common law, they do recognize such a right in specified situations. For example, Florida, Georgia, South Carolina and Wisconsin prohibit by statute identification of rape victims, and many states similarly protect the identity of juvenile delinquents. Utah is the only state that gives corporations a right of privacy; and this state, like Virginia, permits surviving relatives to bring privacy actions against the exploitation of the names or likenesses of deceased relatives. New York law specifically prohibits a surviving relative from bringing such an action on behalf of deceased kinfolk.

Texas had been among those states which gave neither statutory nor common law recognition to the right of privacy, but the state

Supreme Court in 1973 held that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted."[8] The state's highest court said two lower courts erred in finding that since no right of privacy existed at common law and none had been added by state statute, there could be no recovery. In ordering judgment of $25,000 damages, including $15,000 exemplary damages, in this non-news media case involving wiretapping, the Texas Supreme Court said:

> The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S. Right of Privacy 8, Sec. 1. A judicially approved definition of the right of privacy is that it is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. 62 Am.Jur.2d, Privacy, Sec. 1, p. 677, and cases cited.
>
> * * * The right of privacy is generally recognized and a preponderance of authority supports the conclusion that, independently of the common law rights of property, contract, reputation and physical integrity, the right exists and an invasion of the right gives rise to a cause of action. * * *
>
> Although the law of this State had not recognized a cause of action of a breach of the right of privacy, as such, the court in Milner v. Red River Pub. Co. . . . [249 S.W.2d 227, Tex. Civ. App.] did recognize that some of the right of privacy interests have been afforded protection under such traditional theories as libel and slander, wrongful search and seizure, eavesdropping and wiretapping, and other similar invasions into the private business and personal affairs of an individual.
>
> * * *
>
> Arguments in support of the right of privacy are summarized in 62 Am.Jur.2d, Privacy, Sec. 4, p. 683, "One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have

> rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity. A legally enforceable right of privacy is deemed to be a proper protection against this type of encroachment upon the personality of the individual."
>
> Restatement of Torts, Sec. 867, recognized the existence of the right of privacy: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[9]

Citing such authorities, the Texas Supreme Court reached the conclusion that an unwarranted intrusion of the right of privacy constituted a legal injury for which a remedy could be granted.

5.3 The Constitution and privacy. In 1928, Justice Brandeis, co-author of that famous article on privacy, discussed in a dissenting opinion the constitutional aspects of the tort, saying:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . .[10]

But a majority of the Court did not agree that a right of privacy was constitutionally recognizable. Not then. In 1965, however, in a plurality opinion, Justice Douglas argued that a right to privacy is one of the penumbras stemming from the specific guarantees contained in Bill of Rights Amendments.[11] On the constitutional issue of privacy, he wrote:

> The foregoing cases suggest that specific guarantees in

> the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers . . . is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> * * *
>
> We have had many controversies over these penumbral rights of "privacy and repose." See, e.g., Breard v. City of Alexandria, . . . Public Utilities Comm. v. Pollak, . . . Monroe v. Pape, . . . Lanza v. State of New York. . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

To which Justice Stewart, with Black joining him in dissent, commented that in the course of its opinion, the Court referred to no less than six amendments to the Constitution without saying which of the amendments, if any, were infringed by the Connecticut law. Therefore, what provision of the Constitution makes the state law invalid? Stewart quoted the Court as saying the right of privacy is "created by several fundamental constitutional guarantees;" but he responded by pointing out that he could find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by the U.S. Supreme Court.

As with Brennan's plurality opinion in *Rosenbloom*, there is always uncertainty whether such an opinion will "take hold." In *Griswold*, three separate, but concurring, opinions were written. Counting the dissenters, seven Court members could not join in Douglas' opinion; therefore, the question of whether a general right of privacy is part of the Bill of Rights may require a more explicit statement by a majority of the Court. In fact, when the U.S. Circuit Court of Appeals in Cincinnati reversed a $1 million libel and invasion of privacy judgment against the *Cleveland Plain Dealer* on

Sept. 10, 1973, a reason given was the absence of an *explicit* guarantee of a right to privacy in the Constitution. The three-judge appellate court panel, although noting the Supreme Court's *Griswold* decision, gave greater weight to the explicit guarantees contained in the First Amendment, saying that mere balancing of rights would not be sufficient when publication is involved. Instead, said the court, "if there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy."[12]

5.4 Four torts, not one. Because of disagreement whether a right of privacy exists, or confusion as to what the right is, or the rights are, clarifications have been attempted. One of the better known ones came in an article by the late William Prosser, dean of the University of California Law School at Berkeley, in which he described the right of privacy as four distinct torts, not one. He wrote:

> Today [1960], with something over 300 privacy cases in the books, the holes in the jigsaw puzzle have largely filled in, and some rather definite conclusions are possible.
>
> What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt at exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[13]

Of the four Prosser torts, three rest on venerable tort doctrine.[14] Intrusion expands on the law of trespass; "false light" occupies the same relative position as libel, and appropriation follows the reasoning of personal property law, according to an article in *Yale Law Journal* which further observed:

In each category the central injury has long been recognized in law, and calling it an injury to "privacy" is a semantic, not a legal, innovation. The public disclosure tort, on the other hand, presents a true conceptual novelty: the idea that mere publication of accurate data about a person might cause him legal injury [a suggestion virtually unheard of prior to the Warren-Brandeis article in 1890].

The false light action protects against injuries to reputation only; and, as with libel, truth is a defense. It therefore gives the individual no right to control accurate information about himself. Any relationship of the tort action to a concept of privacy is tenuous.

The action for appropriation of name or likeness protects against the publication of true information about the individual, but it concerns only that information on which the individual might have capitalized himself. The injury is a commercial one; the action protects less a right to privacy than a right to publicity. . . .[T]hose who have been utterly unknown before the publication . . . stand to recover least.[15]

The intrusion tort comes closer than false light or appropriation to offering a satisfactory definition of privacy. It protects the individual's right to control access to his immediate surroundings and thus defines privacy as control of physical space. Physical space is an important and well-recognized element of privacy, . . . for example, we most commonly refer to any infringement of privacy as an "invasion."

* * *

The public disclosure tort, by finding legal injury in the mere act of publishing accurate data about a person, protects something which is farther from traditional tort theory, and perhaps closer to a satisfactory concept of privacy. The actual content of a person's privacy is a subjective matter over which people inevitably disagree, but even as they disagree they can share a common concept of how privacy works and what purpose it serves. Scholars who have sought a conceptual definition of privacy have not been unanimous, but a common theme appears in many of their efforts: that privacy reflects a psychological need of the individual to keep some core of personality to himself, outside the notice of society. * * * The public disclosure

> tort action—which punishes the unjustified exposure through mass publication of the data of an individual's life—contains the only direct recognition which the law has given to that non-libel, non-territorial, non-commercial claim.[16]

Prosser, who did not attempt an exact definition of the public disclosure tort, described it generally as requiring that "something secret, secluded or private pertaining to the plaintiff" be invaded and that the something be publicized, although not requiring that the publication be false, or be for the commercial advantage of the defendant.[17]

Let's examine each of the Prosser torts, in turn, with emphasis on the news media.

5.5 Intrusion tort and news media. There are various ways of intruding into a person's privacy, the principal ones being eavesdropping and wiretapping. The courts have made it clear that wrongful means used to obtain information—even if that information falls within the protective zone of the First Amendment and the public interest standard—is actionable as an intrusion tort. This was reiterated in the 1971 case of *Dietemann v. Time, Inc.*, involving two *Life* magazine staffers who secretly took photographs and made voice recordings in the plaintiff's home. The $1,000 damage award was affirmed by the U.S. appellate court even though the First Amendment was claimed as protection for the way in which the information was obtained. Circuit Judge Hufstedler stated emphatically that the First Amendment "is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[18]

The *Dietemann* case illustrates four conditions that relate to the intrusion tort: (1) surreptitious recordings of a person's conversation is actionable; (2) publication is not essential to the tort; (3) existence of a technical trespass is immaterial (the *Life* staffers gained entry to Dietemann's home on the basis of seeking medical advice and did not disclose the real purpose of their visit), and (4) proof of special damages is not required.

That publication is not essential to the tort is demonstrated by the $425,000 out-of-court settlement by General Motors Corp. to consumer advocate Ralph Nader—the largest amount ever paid in suits of this type. In *Nader v. General Motors Corp.*,[19] it was held that the "mere gathering" of private information was not punishable unless the gatherer was "unreasonably intrusive." Although Nader claimed he was shadowed by private detectives after writing a book alleging that GM's Corvair was dangerous, and that acquaintances of his were

interviewed in order to compile a dossier on him, the New York court said that only wiretapping and eavesdropping could give rise to a cause of action for intrusion.

In *Pearson v. Dodd*,[20] Circuit Judge Wright said that whenever a claimed breach of privacy is being analyzed, injuries from intrusion should be kept separate from injuries from publication. Where there is intrusion, the intruder can be held liable no matter what, if anything, is published.

The intrusion tort, like the appropriation tort (reviewed later), provides the clearest warning to the news media in terms of what should not be done; that is, tortious, or wrongful, intrusion (by means of secret recordings, photographs, eavesdropping or wiretapping) into a person's private domain is punishable.

5.6 Public disclosure tort and news media. This tort, unlike the "false light" tort, is concerned with the publication of truthful, factual information that the plaintiff rightfully can keep private. The critical question becomes: at what point can public interest in the information overcome the tort? And the answer is not clear. As the article in *Yale Law Journal* pointed out:

> In all suits for public disclosure of private information, publishers may well enjoy a complete defense of privilege under the First Amendment. If this is true, then there can be no constitutionally acceptable remedy for the injury caused by publishing private, true facts, and the public disclosure tort is unconstitutional on its face—an inference some legal scholars have already drawn.[21]

The author argued otherwise, contending that a court cannot dispose of the issue by deciding, for example, that the name of an individual is "of legitimate public interest"; if it so decides, then it must balance the resulting First Amendment interest in publication of the name with protection of the privacy of the individual.[22]

The author's reference to disclosure or non-disclosure of the name of an individual relates to a suggestion he made for resolving a First Amendment dilemma conjured by the following example. If a woman suffered from the disease of compulsive overeating, such information could be published as news of public interest, but not her name or photograph since such identification would not be of significant value and would be unlikely to have any effect on the political choices (Meiklejohn's self-governance or "political speech"[23] theory) that readers make.[24]

Such a suggestion will not win many advocates in the news media although the technique of non-identification occasionally is used.

especially during the early phases of crime stories when suspects are being sought or questioned but no formal charges have been filed. Many newspapers also refrain from publishing the names of rape victims or juvenile delinquents (often because of state laws). Thus, when a newspaper reported the name and address of a rape victim, a judge in the District of Columbia ruled in late 1974 that she could maintain her invasion of privacy action because her name was not essential to the story. The newspaper had argued that the woman was a public figure and that she had been involved in a newsworthy matter; but the judge disagreed. A publication can be constitutionally protected only if the matter is newsworthy and does not shock the community's notion of decency, the judge said.

Apart from legal and ethical reasons for not publishing the names of rape victims, a journalistic tradition prevails insofar as publishing the *who* in most kinds of news stories. Similarly, reader interest often demands such information.

The problem is illustrated by the joint libel-invasion of privacy suit brought by Mary Alice Firestone, wife of tire heir Russell Firestone at the time of the *Life* magazine article.[25] The U.S. District Court for the Southern District of Florida, sitting without a jury, awarded Mrs. Firestone $15,000 compensatory and $15,000 punitive damages after finding that the article, "The Big Snoop," published in the May 20, 1966, issue, was libelous *per se* and the errors constituted reckless disregard of the truth. In denying the publisher's motion for summary judgment, the trial judge said that although the general subject of electronic eavesdropping "may be considered a 'matter of great public concern,' certainly the plaintiff's private marital difficulties, as referred to in the article, are not of that character." The court continued:

> Thus, while the general subject matter of an article might be protected, it does not follow that every particular reference therein is similarly immunized. It should also be stated that the fact that a publisher sees fit to refer to a particular individual in print does not establish the "public" character of the person or reference. The law in this area has not stretched so far as to allow the publisher to create its own defense to possible litigation.[26]

The Florida court capsulized the vulnerability of the media whenever they identify private individuals; that is, that although the general subject matter of an article may be protected by the conditional constitutional privilege, specific reference to identifiable individuals might not be. A careful publisher therefore would conclude

on the basis of the *Firestone* decision that the safe thing to do is eliminate identification of private individuals. But the three-judge U.S. Court of Appeals unanimously reversed the lower court, even though the judges were not in full accord as to the reasons for so doing.

Circuit Judge Ainsworth, in writing the court's opinion, said the review of the case was undertaken with the principles of the then recent decision of the Supreme Court in *Rosenbloom* squarely before the court; and he noted that the constitutional test had shifted from the type of individual involved to the nature of the event. Since clear and convincing proof of reckless disregard for the truth could not be found, the reversal was ordered.

Thus, what the author of the *Yale Law Journal* article (cited earlier) feared might happen is evidenced by the Circuit Court's application of the constitutional test to the event regardless of the type of individual involved. In this case at least, and in others that will be noted, an event of public interest appears to override the interest of a private person—if Mrs. Firestone in fact falls into such a category—in preventing public disclosure of a private matter (marital difficulty).

In *Harnish et ux v. Herald-Mail Co., Inc. et al.*,[27] the Maryland Court of Appeals also had to dispose of twin suits for libel and invasion of privacy which stemmed from an erroneous newspaper statement about an eviction notice sent to a wounded veteran of the Vietnam war. In a 5-2 split, the court affirmed a directed verdict for the newspaper. In applying the *Times-Sullivan* standard (by way of the *Rosenbloom* plurality opinion) to the claim of libel, the court also said that the same standard "disposes of the invasion of privacy claim." The court then reviewed the four Prosser torts, but with the addition of the qualifying word "unreasonable;" i.e., unreasonable intrusion, appropriation (without a qualifier), "unreasonable publicity given to the other's private life, and publicity which unreasonably places the other in a false light." The court then said:

> Obviously, only the last two are possible grounds here, the third [unreasonable publicity] being of doubtful pertinence. The fact that Dr. Harnish received the publicity as a result of his relation to a matter of general public interest keeps any invasion of his privacy, if invasion there was, from being unreasonable and actionable.[28]

Although the tension between freedom of press and the public disclosure tort remains, and although there appears to be a tendency on the part of courts to apply the conditional constitutional privilege

when this tort is claimed—if the event being reported is a matter of public interest—considerable discretion should be shown by the news media whenever decisions are being made about revelations concerning private details of a person's life—even if such revelations are truthful! In this tort, truth is not at issue and therefore not a defense except when the constitutional privilege applies.

5.7 False light tort and news media. Almost since the time Prosser identified this tort, there has been confusion—not only in terms of what the tort is but also the vulnerability of the media to such actions. Unless the Supreme Court says otherwise, it now appears that the federal courts—which have authority to review state court decisions affecting the First Amendment—are applying the *public interest* test to stories which give rise to false light privacy claims. If the stories meet the test, the conditional constitutional privilege helps to shield the publisher. Thus, the difference between the false light tort—which involves *nondefamatory* falsehoods—and libel (involving *defamatory* falsehoods) is semantic, not real, *when* the constitutional privilege applies. Prosser himself said false light cases differ from the three other torts because the interest protected is reputation with the same overtones of mental distress as in defamation. He even raised the question of whether any false libel could not be redressed upon the alternative ground of this privacy tort.

Earlier confusion about defenses against a false light action probably stems from the various opinions and interpretations accompanying *Time, Inc. v. Hill.*[29] In this 1967 case, the U.S. Supreme Court by plurality opinion extended the conditional constitutional privilege of *Times-Sullivan* to protect the news media from an invasion of privacy lawsuit resulting from the publication of *nondefamatory* falsehoods. The Court was badly divided—five separate opinions and a 6-3 decision that reversed a $30,000 judgment against *Life* magazine.

The origin of this case goes back to 1952 when, for 20 hours, James J. Hill and his family were held captives in their home 10 miles outside Philadelphia by three escaped convicts. Considerable news coverage followed this event and sometime afterward Hill moved his family to Connecticut reportedly to escape publicity. Later, a fictionalized version of the family's ordeal appeared in play and movie form, entitled "The Desperate Hours," which depicted the Hills as being terrorized when, in fact, they were courteously treated. *Life* decided to feature the play and even took actors to the family's former home so photographs could be taken for the Feb. 28, 1955, issue. This renewed publicity led to the privacy action, rather than a libel action, because the events reported, although untrue, did not

injure the family's good name or reputation. On the contrary, the family was made to appear heroic. In the suit, Hill claimed that *Life* had traded on the family's name without consent, thereby violating the Civil Rights Law (the only statutory basis for such a suit in New York).

The first trial in New York ended in a jury award of $50,000 general damages and $25,000 punitive damages, but upon review the New York Court of Appeals ordered a new trial because it thought the damage award excessive, although it did not dispute the invasion of privacy finding. In its ruling, the court stressed the fictionalization of the event for commercial purposes.

In dissenting, Presiding Justice Botein stated: "To hold, as suggested in the concurring opinion, that a violation of Section 51 [Civil Rights Law] may be established by showing that a newsworthy item has been published solely to increase circulation injects an unrealistic ingredient in the complex of the right to privacy, and would abridge dangerously the people's right to know."

A new trial ended in the award of $30,000 general damages and the case—the first of its kind involving the news media and a claimed right of privacy—went to the U.S. Supreme Court where Justice Brennan, joined by Justices Stewart and White, delivered the plurality opinion for the Court in which he applied the *Times-Sullivan* rule. Justices Black, Douglas and Harlan concurred in the result, but not for the reasons given by Brennan. Earlier the *Times-Sullivan* standard had been advanced by *Life* attorneys but rejected by the New York courts. Before applying the standard, Brennan, who had authored the famous 1964 *Times-Sullivan* opinion, took note of the following statement by the New York appellate court:

> The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect.

To which Justice Brennan replied:

> If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals. We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of

> public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

Material and substantial falsification, constituting actual malice, was necessary to overcome First Amendment protection for the *Life* article because it contained information of public interest (the opening of a new play).

Justice Harlan argued that negligent falsity should be sufficient for recovery.

Justices Black and Douglas would have been even more protective of the news media than the plurality, with Douglas commenting that a fictionalized treatment of the event would be as much in the public domain as a watercolor of the assassination of a public official. Thus, to Douglas, talk of any right of privacy in such a context was irrelevant.

The Court sent the case back to be tried under the libel formula of *Times-Sullivan*, but Hill undertook no such action. After twice having the case tried under the state's Civil Rights Law, and then undergoing the cost of appeals—all of this occurring during a span of more than 10 years—he could not afford the additional cost that would have been involved, as pointed out in the dissenting opinion of Justice Fortas, joined by Chief Justice Warren and Justice Clark.

The *Hill* case set off verbal fireworks among legal scholars, including debate on the question of the application of *Hill* to libel suits brought by private individuals (as contrasted with suits brought by public officials, such as in *Times-Sullivan*), since the *Hill* decision proceded the *Rosenbloom* decision by four years. In the meantime, another false light case was making its way through the courts, this one also involving fictionalization. *Messner, Inc. v. Warren E. Spahn*[30] involved years of litigation and wound up being dismissed in a memorandum decision of the Supreme Court in 1969 after the parties reached an out-of-court settlement.

Spahn, a famous baseball pitcher, filed an action under the New York Civil Rights Law to halt publication of an unauthorized biography. The Supreme Court for the County of New York (a lower court) issued an injunction in 1964 against the book publisher, Messner, Inc., to prevent sale of the book to the public and Spahn was awarded $10,000 in damages. The New York Court of Appeals affirmed, holding that fictionalization of a biography had stripped away First Amendment protection for the book and exposed it to action under the state law, although ordinarily such a biography would not have been included within the meaning of Sections 50–51

because of Spahn's status as a *newsworthy* figure. In its 7-0 decision, the appellate court said:

> In short, the statute prohibits invasions of privacy for purposes of advertising or trade. Book publication is a trade like any other, except that its intellectual value to society is uniquely great and vital to civilization. To the extent that freedom of the press in the ultimate interest of the public's right to factual knowledge protects the publication of the factual and historical, the publication is exempt from the proscriptions of the statute. Moreover, this exemption extends to . . . secondary uses of the primary news or cultural or historical publications. . . . [I]f the publication, however, . . . is neither factual nor historical, the statute applies, and if the subject is a living person his written consent must be obtained.

Messner appealed and the U.S. Supreme Court, in a memorandum decision in mid-1967, ordered reconsideration in the light of its then-recent *Hill* decision.[31] Accordingly, in a 4-1 opinion later that year, the state appellate court reaffirmed its original determination in the case. The court, in an opinion by Judge Keating, declared that the requirements of *Times-Sullivan* and *Hill* had been met, noting that the trial court had found "gross errors of fact," and that the research undertaken by the author of the biography "amounted, primarily, to nothing more than newspaper and magazine clippings, the authenticity of which the author rarely, if ever, attempted to check out."[32]

The lone dissenter, Judge Bergan, urged an alternative action: return the case to the trial court and let a decision rest on the plaintiff's showing of "reckless disregard of the truth" against which, the judge noted, taking a quote from Brennan's opinion in *Hill*, "the constitutional guarantees can tolerate sanctions."

Whether "gross errors of fact" met the *Times-Sullivan* requirement is unknown because of the out-of-court settlement. In fact, between 1967 (*Hill* and *Spahn*) and the *Rosenbloom* decision in 1971, the Supreme Court was silent about the right of privacy when balanced against free press, and not much was directed specifically at the tort of privacy in Brennan's plurality opinion in *Rosenbloom*, since that case involved libel; but in an important footnote, Brennan said that the *Times-Sullivan* standard "was applied to suits for invasion of privacy based on false statements where, again, a matter of public interest was involved. Time, Inc. v. Hill, 385 U.S. 374 (1967)."[33]

In *Rosenbloom*, Justice Marshall, joined by Justice Stewart, dissented and raised this interesting question:

> The authors [Warren-Brandeis] of the most famous of all law review articles recommended that no protection be given to privacy interests when the publication dealt with a "matter which is of public or general interest." . . . Yet cases dealing with the caveat raise serious questions whether it has substantially destroyed the right of privacy as Warren and Brandeis envisioned it.[34]

The Supreme Court has yet to declare itself on such a possibility. Without such a declaration, many federal and state courts were applying *Times-Sullivan*, *Hill* and *Rosenbloom* to nondefamation suits (Prosser's false light privacy tort). Such a development is evident in the following post-*Rosenbloom* pre-*Gertz* (*see* Chap. IV) cases:

1. *Goldman v. Time, Inc.*,[35] in which the U.S. District Court judge equated a false light privacy action to libel and applied the *Times-Sullivan* test. In this California case, as in similar New York cases, the judge applied a "newsworthiness" test which, he said, included such factors as the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the plaintiff voluntarily acceded to a position of public notoriety. The judge then concluded that the *Life* magazine article about Americans traveling abroad was entitled to protection of "newsworthiness," which he equated with public interest.

2. *Marvin Briscoe v. Reader's Digest Association*[36] was a pre-*Rosenbloom* case when the California Supreme Court on April 2, 1971, in effect held that the use of plaintiff's name in connection with a truck hijacking 11 years prior to publication stated a cause of action since a jury could reasonably find that the use of his name was not newsworthy because of possible minimal social value, gross offensiveness(!), lack of voluntary consent, and the effect such publication would have on Briscoe's rehabilitation. Fortunately for California journalism, the *Briscoe* case was removed to the U.S. District Court for the Central District of California before a lower state court could reconsider the matter in accordance with state Supreme Court instructions.

The U.S. District Court, in post-*Rosenbloom* action, granted a summary motion for dismissal on the basis that the conditional constitutional privilege applied and that Briscoe would have to show actual malice. But truth was never at issue. Instead, Briscoe based his "invasion of privacy" suit on two privacy torts: false light and public

disclosure of truthful, but embarrassing, private facts about his past life. The plaintiff claimed that the article, which contained a one-sentence reference to him by name, placed him in a false light by implying that his criminal conduct was a recent activity through the use of such words as "today" and "now" near the beginning of the article.

While the California Supreme Court did not decide the principal issues in the case, e.g., Briscoe's claim that he was put in a false light, the court may have foreshadowed the eventual outcome when it said that a "false light" cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice.[37] But the court then used such concepts as "hot news,"[38] recency and newsworthiness—the end result being confusion as to what these criteria meant and how the media could defend against such suits, at least in California.

Concerning "hot news," the California Supreme Court said that "particularly deserving of First Amendment protection are reports of 'hot news,' items of possible immediate public concern or interest."[39]

The court observed that in *Hill* the U.S. Supreme Court cited 22 cases in which the right of privacy gave way to the right of the press to publish matters of public interest; but 17 of these—or 77.3 per cent, as the court carefully noted—involved events which had occurred quite recently. The court conceded that truthful reports of recent crimes and the names of suspects or offenders would be protected by the First Amendment, but it questioned whether reports of *past* crimes and the identification of *past* offenders served the same public interest. Then, in answering its own question, the court stated that the "identification of the actor in reports of long past crimes usually serves little independent public purpose" with the notable exception of major crimes, such as the Saint Valentine's Day massacre. In connection with public interest, the court suggested that the public's interest in the rehabilitation of former criminals might be paramount.

As for "newsworthiness," the court said that on the basis of the assumed facts "we are convinced that a jury could reasonably find that plaintiff's identity as a former hijacker was not newsworthy;" that is, the incidents of Briscoe's past life were of minimal social value; revelation of one's criminal past is grossly offensive to most people in America, and Briscoe had not voluntarily consented to publicity.[40]

What threatened to become a journalistic nightmare in California—involving the news media in decisions concerning "hot" news, imme-

diacy or recency of the events being reported, social value of the information, balancing the public interest in rehabilitation of criminals—was eased when Judge Lydick of the U.S. District Court for the Central District of California disposed of Briscoe's claim of invasion of privacy by issuing a summary judgment on April 3, 1972, in which he stated the following "conclusions of law":

1. The publication was newsworthy.
2. It was published without malice or recklessness.
3. It was protected by the First Amendment's guarantee of freedom of the press; therefore, there could be no recovery for invasion of privacy if the publication was published in a nonmalicious, nonreckless manner.
4. It disclosed no private facts concerning Briscoe.
5. It did not invade Briscoe's privacy.

The full impact of the California Supreme Court's decision in *Briscoe*, which lower California courts still may follow unless or until the U.S. Supreme Court takes a different approach in deciding a case comparable to *Briscoe*, is difficult to assess. First, in ruling that the *Briscoe* complaint stated a cause of action, the California Supreme Court acted on the basis of the bare pleadings in the case. Second, the court was guided by two well-settled principles of California law: (1) that the court must accept as true all material facts alleged in such a complaint, and (2) that the complaint must be liberally construed to see if the plaintiff is entitled to relief on any grounds. Therefore, the court's decision was based on the following "facts" which were admitted only for the purposes of the pleadings: (1) after committing the hijacking in 1956, Briscoe became rehabilitated, lived an exemplary life, and assumed a place in respectable society; (2) after publication of the article in the January, 1968, issue of *Reader's Digest*, his daughter and friends scorned him; (3) the article contained *private* facts about him, and (4) the article was maliciously published.

Clearly if such "facts" were true, a cause of action existed even under the *Times-Sullivan*-to-*Metromedia* line of cases. Note, however, that the U.S. District Court did not reach such conclusions in the summary judgment for *Reader's Digest*. Nevertheless, the California Supreme Court decision in *Briscoe* is still the law of California and serves as a warning to the media there. The identification of persons in connection with stories about long-past crimes is legally dangerous—even though the First Amendment appears to be protective since crime news frequently has been construed as being in the public interest (as Federal Judge Lydick so ruled in *Briscoe*).

The "newsworthiness" test, as used by the California Supreme

Court, hopefully (from the journalists' standpoint) will give way to the force generated by *Times-Sullivan*, *Hill* and *Rosenbloom*. The principal problem concerns "newsworthy" reports about private individuals, rather than reports about public officials or public figures who, because of their status or stature, are more easily discernible as "newsworthy."

A different kind of problem emerged in *Firestone* when the Florida Supreme Court (more than a year after *Rosenbloom*) said that "newsworthiness" is that which is calculated to generate wide reader interest and thus may be a legitimate area of exploitation by the communications media. But the court perceived a clear distinction between mere curiosity, or morbid or prurient intrigue with scandal, or the potentially humorous misfortune of others, on the one hand, and "real public or general concern" on the other.[41] Although conceding that the Firestone divorce action was unquestionably newsworthy, the Florida court held that "reports thereof were not constitutionally protected as being matters of real public or general concern." Thus, in this instance, newsworthiness was not equated with public interest or general public concern—and some confusion or uncertainty persists. Since judges ultimately must determine what is newsworthy, contrast the Florida Supreme Court's statement with the more expansive one by Judge Harris of the U.S. District Court (Northern District of California) when he said in *Goldman*:

> This court is well aware of the power of the public media to bring virtually any person, even the most insignificant event, into its ambit as "news." In one sense, of course, all news is manufactured, for the public would generally not know of or be interested in matters not brought to its attention by the media. Nonetheless the right of the public to know, and of the media to tell, is so deeply entrenched in the American conscience that a great deal of latitude must necessarily be afforded the media in its selection and presentation of news.[42]

This same view permeated the decision of a three-judge panel of the U.S. Court of Appeals in Cincinnati when it unanimously reversed a $1 million libel-invasion of privacy judgment against the *Cleveland Plain Dealer*. In its 1973 ruling in *Cantrell v. Forest City Publishing Co.*[43] the appellate court showed a sympathy for the California Supreme Court's decision in *Briscoe* while, at the same time, holding that judgments about newsworthiness must remain primarily a function of the publisher.

In *Cantrell*, a reporter and a photographer for the *Cleveland Plain Dealer*, both off-duty and operating as free-lancers, went to Point Pleasant, W. Va., about five months after 44 persons lost their lives when a bridge over the Ohio River collapsed. Among the victims was Melvin Aaron Cantrell. The journalists did a follow-up feature on the Cantrell family which was published in the Aug. 4, 1968, issue of the *Plain Dealer*.

There was a question of whether the newsmen had been invited into the house. Mrs. Cantrell was not at home at the time. One of the Cantrell children testified that the newsmen did not ask permission to enter the home nor were they asked to leave; however, none of the children objected to being photographed.

The story, according to the appellate court, contained a number of inaccuracies and implied that Mrs. Cantrell was present in her home when the journalists were there. Five photographs were printed, depicting the home as dirty and run down and the children poorly clothed and untidy.

The original complaint had alleged intrusion, unreasonable publicity about the Cantrells' private lives, and "false light." In addition, a "malicious and defamatory libel" action was filed. The intrusion portion of the complaint was not presented to the jury. On appeal, an effort was made to restore this part of the complaint, but the appellate court rejected such consideration on the ground that "this was not the theory on which the case was tried in the District Court."[44]

The court pointed out that the two newsmen "may have been guilty of trespass against the property of the Cantrells," but that the grievance complained of in the action "lies in the claim that the publication of the article, not the physical intrusion [unlike the *Dietemann* case], damaged the plaintiffs."[45]

With the focus shifted to "false light," the appellate court applied the *Hill* rule, although noting important differences between the two cases. In *Hill*, the opening of the New York play was considered a matter of sufficient public interest to justify bringing the actual incidents back into the news. But in *Cantrell*, the court said there was no evidence of any activity related to the bridge disaster which would have "naturally rekindled public interest in the event." Despite this difference, the court observed: "Nevertheless, the article complained of appeared less than nine months after the event and we believe the 'journalistic judgment' of a newspaper publisher . . . cannot be circumscribed by linking newsworthiness solely to the passage of time."[46]

In applying the *Hill* rule, the court used the actual malice test as laid down originally in *Times-Sullivan*. In so doing, the court made it

clear that the reversal of the damage award did not mean that a private citizen "who involuntarily becomes newsworthy in the judgment of a publisher will forever remain a fair subject of publicity." Citing two California cases—*Melvin v. Reid*,[47] and *Briscoe*—the U.S. appellate court said the California Supreme Court dealt with situations in which publications which were essentially truthful "were held to constitute an invasion of privacy because the passage of time had rendered the subjects of the articles no longer newsworthy."

The court (which had its decision reversed—*see* note 48) continued:

> In each case criminal activities which had occurred many years earlier were publicized and the person revealed to have committed them was at the time of the publication an accepted member of society who had made a clean break with the past. * * * These cases correctly establish a rule that there is no absolute immunity from damages for publishing truthful matters about essentially private persons long after their connection with newsworthy events had ceased to exist. This is particularly true when the matter made public is offensive according to the standards of reasonable men.
>
> On the other hand, despite vigorous efforts to avoid publicity, some people remain newsworthy because of circumstances which arouse a legitimate interest in their lives. In Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir., 1940), cert. denied, 311 U.S. 711, 61 S.Ct. 393, 85 L.Ed. 462 (1941), this was held to be true in the case of a child prodigy who had made every effort for 25 years to avoid publicity and for whom the results of later publicity were disastrous. The judgment of what is newsworthy must remain primarily a function of the publisher. However, in cases where essentially private persons are the subject of publicity because of their involuntary connection with events of widespread interest, this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers. * * * No test has been authoritatively formulated . . . for judicial review of "newsworthiness" in these cases. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of a publisher. This is not such a case.[48]

One other case demonstrates the importance of the public interest test whenever a false light suit is initiated.

In 1967 an Indian killed a white jeweler in Vermillion, S.D. Upon a plea of guilty, Thomas White Hawk was sentenced to death, but the sentence later was commuted. About two years later, Baxter Berry, a white man, shot and killed an Indian on the Berry ranch in South Dakota. A murder charge was filed and Berry was found innocent. On Dec. 2, 1969, NBC ran a 26-minute film segment on the "First Tuesday" program with the first 22 minutes devoted to the life and difficulties of Thomas White Hawk; the next 3 minutes unsympathetically portrayed the Berry case, and the final minute focused on a dramatic closeout. Although the film narration did not explicitly say so, the use of the Berry case segment was to suggest that some people felt there was a double standard of justice in South Dakota.[49] Berry claimed that by innuendo he was made to appear as the "wrongful beneficiary" of that double standard, even though that phrase—double standard—did not appear in the audio text. His false light tort action claimed he was subjected to abuse and annoyance because of the program, thereby aggravating a heart condition. The trial in the U.S. District Court for the District of South Dakota resulted in a jury award of $25,000 in damages to Berry. NBC appealed. The three-judge appellate court unanimously reversed and ordered the case dismissed on the basis that the program was in the *public interest* and that no actual malice had been shown.[50]

District Judge Van Sickle, sitting as the third member of the Circuit Court by designation, wrote the opinion in which he equated the false light tort to the defamation tort and said:

> It is clear that as to the issue of privacy, Mr. Berry's act of shooting Norman Little Brave removed Mr. Berry's right to privacy as to that incident and matters relevant to it. Clearly, killing another person is a matter of public interest, and caused Mr. Berry to become a public figure. Therefore, before Baxter Berry could recover in this action, he must prove that he was cast in a false light out of "malice."[51]

Although the lower court had properly instructed the jury that it must find "actual malice" in the sense of *Times-Sullivan* in order to return a verdict for Berry, the Circuit Court undertook an independent judgment of the facts—as First Amendment cases require appellate courts to do—and came to an opposite conclusion concerning actual malice.

The above cases demonstrate the application of the actual malice test to false light lawsuits when news media reports fall within the

ambit of public interest—a phrase which ordinarily would encompass a newsworthy person or newsworthy event (newsworthy in the sense that journalists should have wide latitude in their judgment of what is newsworthy).

Prof. Don Pember of the School of Communication at the University of Washington wrote in 1972 that the defense of newsworthiness is the best weapon an editor has in staving off a lawsuit based upon a news or feature story. He continued :

> While newsworthiness is an elusive concept to legally define, jurists have granted that American readers have a broad range of tastes and interest. And as long as the press stays within this range of these tastes and interests, it is usually safe.
>
> Newsworthiness has three basic components: public interest, public figures and public records.[52]

Pember also cited the use of the term *legitimate* public interest and attempted to make a distinction between stories that *have* public interest and those which are *in* the public interest—a distinction not entirely clear. The problem of defending against an invasion of privacy suit when the alleged tort is false light has largely become one of defining public interest, and that delineation is still taking place. *Hill*, *Goldman* and *Cantrell* did not involve public figures in the usual meaning of those words, nor did these cases involve matters of public record in the usual sense of the term. They were, in short, judged to be matters of public interest. But that test has been rejected by the Supreme Court when *libel* suits by *private citizens* are being adjudicated. Using less-demanding standards than *New York Times*, states can establish liability so long as they do not impose liability without fault. They also can permit compensation for actual injuries based on defamatory words which make "substantial danger to reputation apparent" to a prudent editor. That's what a bare majority said in *Gertz v. Robert Welch, Inc.*[53] —a *libel* case. What effect, if any, will *Gertz* have on the false light tort?

In his opinion for the Court, Justice Powell said the phrase, "makes substantial danger to reputation apparent," placed in perspective the conclusions announced in *Gertz*. He continued: "Our inquiry would involve considerations somewhat different from those discussed above if a State proposed to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. Time, Inc. v. Hill. . . . Such a case is not now before us, and we intimate no view as to its proper resolution."[54]

That quotation of Powell's is the only reference to *Hill* in the

whole of his opinion for the Court. Clearly, the two cases do not belong together. The defamatory-nondefamatory dichotomy prevails. *Hill* involved words which did not make substantial danger to reputation apparent to a prudent editor; yet the readers of *Gertz* are told not to intimate any views concerning Court disposition of a nondefamatory falsehood suit. The admonition renews doubts about the applicability of the public interest test and the *New York Times* standard to false light suits brought by private citizens. And just as the courts were beginning to apply *Rosenbloom* to both kinds of suits when brought by private individuals! About the only "happy" note struck for the media in *Gertz* was the limitation of punitive damages to a showing of actual malice.

5.8 Appropriation tort and news media. The use of a person's name or likeness for commercial purposes, such as in advertisements, without that person's consent constitutes an actionable tort of appropriation for the defendant's advantage.

The New York and California laws are the most concrete examples of the ban on appropriation without consent, but virtually all jurisdictions recognize an action and recovery for such a tort. Problems of interpretation have arisen, such as the meaning of "for purposes of trade" in Section 50 of the New York law. In addition, false light cases, such as *Hill* and *Spahn*, had been filed under the New York Civil Rights Law, although that law is most clearly aimed at the appropriation tort. The reason: extensive fictionalization had been deemed by the New York courts to constitute appropriation of a person's name or likeness for commercial gain.

A different kind of case, involving a program of historical-educational interest, failed to come within the meaning of Sections 50-51. In *Youssoupoff v. CBS, Inc.*,[55] the state appellate court, like the lower Supreme Court for the County of New York, denied summary judgment in 1963 when asked to declare that the CBS program, "If I Should Die," violated the state statute. The program had recounted the murder of the infamous Rasputin. Prince Youssoupoff, living in Paris at the time of the suit, admitted killing Rasputin to end his influence over the czarina, but the prince contended that the broadcast was made for the purposes of trade, in violation of Section 50, without his consent. To facilitate the summary judgment motion, the plaintiff accepted CBS' claim of historical accuracy, so truth or falsity was not at issue.

The county court, in denying the motion, said there could be no recovery under the statute for use of a person's name or photograph "in connection with an article of current news or immediate public interest" and that, as a general rule, articles which were not strictly

news, but which satisfied an educational need, such as "stories of distant places, tales of historic personages and events, the reproduction of items of past news," were not within the ban of the statute.

5.9 Summary. The principal influence in the emergence of a right of privacy was an article by Brandeis and Warren in which they postulated a general right to maintain an inviolate personality which involves one's thoughts, emotions, facial expressions except when the "public or general interest" required exposure, or when the person concerned had renounced the right to live his life screened from the public, was involved in matters privileged under the laws of libel, or had given his consent.

New York was the first state to enact a "privacy" law which prohibits the use of a person's name or likeness for commercial purposes (e.g. advertising) without that person's consent. Four other states since have enacted statutes protecting privacy rights, while 35 additional states have recognized privacy rights through common law.

Because a "right of privacy" is so general, an analysis of case law by Prof. Prosser led him to conclude that the law of privacy comprises four torts, not one: intrusion, public disclosure of embarrassing (but truthful) private facts; false light (information false, but not defamatory), and appropriation.

Of the four, the intrusion and appropriation torts are clearest in terms of what the press ought not to do. The media have no basis—constitutional or otherwise—to tortiously intrude upon a person's privacy; i.e., when that person is secluded from the eyes and ears of the outside world. Neither can the media use a person's name or likeness for commercial purposes, e.g., advertising. The best defense in such instances is consent. Although some states recognize "implied consent" (answering a reporter's questions, posing for a photographer, etc.), the best defense is to have a printed release form signed by the individual in question. These forms are available commercially and photographers, as well as newsmen in some circumstances, should use them if there's a suspicion of intrusion or appropriation. The refusal of a person to sign such a release forewarns media represenatives of potentially dangerous situations.

And yet the only *absolute* right of privacy, vis-a-vis the press, may be an individual's right to refuse to be interviewed or the right of those who wish to meet in private to conduct personal or business affairs to exclude the media.[56] Even a person's home may be "invaded" by the press if the public interest is great enough, such as the commission of a crime where there would be great public interest.

The public disclosure tort—dissemination of embarrassing *private*, but *truthful*, information—is the principal "uncharted" danger now confronting the news media in the invasion of privacy realm. This is the tort about which Brandeis and Warren wrote. It is the tort which Justice Marshall had most specifically in mind when, in his dissenting opinion in *Rosenbloom*, he said that the "public or general interest" test might have substantially destroyed the right of privacy as envisioned by Brandeis and Warren. Therefore, a major difficulty facing the news media is the relationship between the public disclosure tort and public interest. This tort concerns the right of a person to shield his private affairs, thoughts and emotions from an outsider's gaze. But what one person believes is a private affair may in reality involve matters of public interest. Thus, while the desire of multi-millionaire Howard Hughes for privacy and seclusion is understandable, there clearly is public interest in much of what he does. Rather, the problem is not in deciding whether to use a news report about Hughes, or one about Jacqueline Kennedy Onassis, such as her partially successful legal battle to keep free-lance photographer Ronald Galella from getting within a certain distance of her or her children when they are in public places,[57] but whether to publish a story about a virtually anonymous person who may not be involved in something of public record, who may not have given consent, and about whom a news report might be of questionable public interest. Truth is not at issue in such a situation. Indeed, it is this tort which gives rise to the saying, "The greater the truth, the greater the invasion of privacy." Put another way: truth is no defense if embarrassing *private* facts are published, just as truth is no defense when wrongful means have been used to obtain information, or when that information is used for commercial purposes.

The matter of recency drew attention from a number of courts, including the U.S. Court of Appeals which noted in *Cantrell* that there is no absolute immunity from damages for publishing truthful matters about essentially private persons *long after their connection with newsworthy events has ceased*. This is particularly so when the matter made public "is offensive according to the standards of reasonable men." Yet this same three-judge panel said courts should not substitute their judgment for that of the publisher except where there are flagrant breaches of privacy or an absence of legitimate public interest. And this court placed greater emphasis on the specific guarantees in the First Amendment compared with the general right of privacy, as did Justice Brennan in his plurality opinion for the Supreme Court in *Hill:*

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[58]

As with libel law developments, greater constitutional protection has been afforded the media when faced with false light actions. *Hill*, *Spahn*, *Briscoe*, *Cantrell* and other cases represent application of the actual malice test to reports about essentially private individuals when these reports fall within the meaning of *public interest.* And, according to some courts, this public interest must be "legitimate" or "real," although the distinction may not be readily apparent. Obviously not everything the media might report would fall within the reach of that term. Thus far, however, many courts have been inclined to broadly interpret "matters of public interest." But *Gertz*—a libel case—poses renewed uncertainties. The "false light" tort involves nondefamatory falsehoods. When published reports fall within the meaning of public interest, then the person bringing the "false light" suit must overcome the conditional constitutional privilege by proving actual malice; i.e., knowingly publishing falsehoods or reckless disregard of the truth. The critical question, then, is whether what is published falls within the public interest category. Some courts in California, Florida and Ohio have sought to balance the public interest in the rehabilitation of those involved in long-past crimes against information which a publisher believes important to the story. The dilemma is apparent: the publisher should have considerable latitude in making such decisions lest a self-imposed "chilling" effect curtail the flow of information to the public; however, the public has a vital interest in returning former criminals to the status of useful citizens. Here, balancing of conflicting interests and a standard of reasonableness (*Cantrell* and *Harnish*) have been used by a number of courts.

Once the public interest protection applies, the media still face several problems: Given that the subject matter is in the public interest, are references to identifiable individuals similarly protected? Are all facts in such an article protected? Can the public interest factor be forfeited if reports do not concern recent events?

In addition, the problem of "newsworthiness" remains. If public

interest and newsworthiness are the same, then the difficulties of definition are one and the same. If they are not, as the Florida Supreme Court indicated in *Firestone*, then a different set of media anxieties are generated.

According to Prof. Pember, newsworthiness is the best defense against a privacy lawsuit. Admittedly the concept is difficult to define, but he said it consists of three basic components: public interest, public figures and public records.

Insofar as the public interest component is concerned, the Supreme Court has shown some ambivalence whenever private citizens are involved. In *Gertz v. Welch, Inc.*,[59] the Court in mid-1974 narrowed the definition of those who fall into the category of "public figures" and correspondingly added to that class of people known as "private citizens." In addition, the Court ruled that there was no public interest in giving conditional constitutional protection to *defamatory* falsehoods about private citizens (contrary to an earlier plurality opinion in *Rosenbloom*). But there is a significant difference between the decision in the *Gertz* case and those involved in "false light" cases. The former concerned *defamatory* falsehoods; the latter, *nondefamatory* falsehoods. Justice Powell noted the distinction in his opinion for the Court in *Gertz:*

> This phrase ["makes substantial danger to reputation apparent"] places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. Time, Inc. v. Hill, ... Such a case is not now before us, and we intimate no view as to its proper resolution.[60]

Clearly, then, the *Gertz* decision—which stripped away the conditional constitutional privilege for defamatory falsehoods about private citizens (although a state could require an "actual malice" test, if it wished)—does not apply to nondefamatory reports which place a person in a "false light." Just what the Supreme Court might say about such a situation, in light of the Court's change in membership since the 1967 *Hill* and 1969 *Spahn* decisions, is conjectural. In the meantime, the press has clearly gained from the application of the conditional constitutional privilege to nondefamatory reports about private persons, although it remains vulnerable to the three other privacy torts.

v–Pass in Review

1. Judge Thomas Cooley was among the first in America to assert that man has a right _____.

2. Brandeis and Warren wrote an article in 1890 which has been credited with providing the main impetus toward legal recognition of a right of privacy. They would have excluded from such a right matters of _____.

3. Brandeis-Warren believed that truth was *no* defense to an invasion of privacy suit. True or false.

4. The first statutory recognition of a right of privacy came in the state of _____. Since then many states have passed laws which recognize such a right. True or false.

5. A constitutional guarantee of right of privacy was judged to exist in which case before the U.S. Supreme Court? _____.

In this case, Justice Douglas argued that a right of privacy was contained where in the Bill of Rights?

6. Prof. Prosser said there are four torts, not one, concerning privacy. Can you identify the four?

7. What case extended the conditional constitutional privilege used in libel cases to "false light" privacy cases?

8. What distinction can you make between the nature of the cases in *Times-Sullivan*, *Butts* and *Rosenbloom* and the *Hill* case?

9. The *Hill* rationale, as developed by Justice Brennan, applies most clearly to which one of the four Prosser torts?

10. A number of cases makes it clear that the First Amendment protects the media no matter how the news is obtained. True or false.

11. If a photograph or interview may not have the aura of *public interest* surrounding it; or if, as in New York and California, the name or likeness of a person is to be used for commercial or trade purposes, such as in advertisements, prudence and the law would dictate that _____ _____ be obtained prior to publication.

12. Which of the four Prosser torts is most closely related to libel and the defenses permitted when libel suits are filed?

13. Which of the four Prosser torts is most difficult to define or the one most likely to "trap" unsuspecting journalists?

14. Although the Supreme Court majority in *Gertz* intimated no view as to the proper resolution of a case involving a false, non-defamatory statement about a private citizen (such as in the *Hill* case), there would be little likelihood that _____ damages could

be awarded were *Gertz* to be applied to *Hill*-type cases. Such damages could only be awarded if _____
_____.

V—Answers to Review

1. To be let alone.
2. Public or general interest.
3. True.
4. New York, even though Sections 50–51 do not mention privacy by name. False. This is a tricky question because only four states have passed statutes specifically recognizing the right of privacy. About 35 other states recognize the right through common law.
5. *Griswold v. Connecticut.* In a penumbra, or incompletely illuminated area, resulting from more specific rights guaranteed by various amendments in the Bill of Rights.
6. Intrusion, public disclosure of embarrassing private facts, "false light," and appropriation for the defendant's advantage of plaintiff's name or likeness. Concerning this latter tort, DO NOT USE a person's name or likeness for commercial purposes, such as in advertisements, without first obtaining written permission to do so.
7. *Time, Inc. v. Hill.*
8. The three libel cases involved *defamatory falsehoods;* the Hill case concerned *nondefamatory falsehoods.*
9. False light; i.e., placing a person in a false light—making the Hills appear heroic—through nondefamatory falsehoods.
10. False. Tortious gathering of the news is not protected, even if no publication results from such wrongful activity.
11. Written consent.
12. False light tort.
13. Public disclosure tort.
14. Punitive. Actual malice were shown.

[1] Frederick Kruger, "Privacy and the Press," Freedom of Information Center Report No. 6, March, 1967, p. 5.
[2] Boyd v. U.S., 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751.
[3] "The Right of the Citizen: To His Reputation," *Scribner's Magazine,* Vol. 8, July, 1890, p. 58.
[4] "The Right to Privacy," *Harvard Law Review,* Vol. IV, No. 5, Copyright 1890 by the *Harvard Law Review* Association, pp. 193+.
[5] Op. cit., Rosenbloom v. Metromedia, 403 U.S. 29, 44–45, 91 S.Ct. 1811, 1820, 29 L.Ed.2d 296, 312 (1971).
[6] 171 N.Y. 538, 64 N.E. 442.

7 Op. cit., note 1, p. 6.
8 Billings v. Atkinson, 489 S.W.2d 858.
9 *Id.*, at 859-60.
10 Olmstead v. U.S. 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956.
11 Griswold et al. v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. In this case, the Court reversed the convictions of the defendants who had been found guilty of violating the state's birth control law. Griswold was executive director of the Planned Parenthood League of Connecticut which gave out information and instructions to married persons on means of preventing conception. The state law had prohibited the use of "any drug, medicinal article or instrument for the purpose of preventing conception," and also forbade anyone from aiding or abetting the prevention of conception.
12 Margaret Mae Cantrell et al. v. Forest City Publishing Co. et al., 484 F.2d 150, 155–156 (Sixth Circuit, 1973).
13 "Privacy," *California Law Review*, Vol. 48, August, 1960, pp. 388–89.
14 Notes, "Privacy in the First Amendment," *The Yale Law Journal*, Vol. 82, No. 7, June, 1973, p. 1462, reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company.
15 The author of *Notes* suggested that this might be the reason California imposed a minimum liability of $300 for commercial use of a person's name, photograph or likeness.
16 *Id.*, 1472–1475.
17 *Id.*, at 1462.
18 449 F.2d 245, 249 (Ninth Circuit).
19 25 N.Y.2d 560, 207 N.Y.S.2d 647, 255 N.E.2d 765 (1970).
20 410 F.2d 701 (District of Columbia Circuit, 1968).
21 Op. cit., at 1463.
22 Op. cit., pp. 1469, 1471.
23 *See* Chap. II, pp. 20–21.
24 Op. cit., at 1470.
25 460 F.2d 712 (Fifth Circuit, 1972). *See* Chap. IV, p. 82.
26 *Id.*, at 716, note 7.
27 286 A.2d 146 (1972).
28 *Id.*, at 152.
29 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456.
30 393 U.S. 1046, 89 S.Ct. 676, 21 L.Ed.2d 600.
31 387 U.S. 239, 87 S.Ct. 1706, 18 L.Ed.2d 744.
32 233 N.E.2d at 842.
33 Op. cit., 403 U.S. 29, 31, 91 S.Ct. 1811, 1813, 29 L.Ed.2d 304.
34 *Id.*, 403 U.S. at 80, 91 S.Ct. at 1837–38, 29 L.Ed.2d at 333.
35 Op. Cit., Chap. IV, pp. 80–81.
36 93 Cal.Rptr. 866, 483 P.2d 34.
37 *Id.*, 483 P.2d at 44.
38 *See* Justice Harlan's opinion for the U.S. Supreme Court and his use of "hot news" in the combined cases of *Butts* and *Walker*, Chap. IV, pp. 71–74.
39 Op. cit., at 38.
40 *Id.*, at 43.
41 Op. cit., Firestone v. Time, Inc., 271 So.2d 745, 748 (1972).
42 Op. cit., 336 F. Supp. at 138; *see* Chap. IV, note 45, and pp. 80–81.
43 Op. cit., note 12.
44 *Id.*, at 153.
45 *Id.*, at 154–155.
46 *Id.*, at 154.
47 112 Calif. App. 285 (1931).
48 *Op. cit.*, at 156–57. On Dec. 18, 1974, the U.S. Supreme Court in effect upheld the jury's award of $60,000 in *actual* damages against the publisher

and article writer, but not against the photographer. The Court agreed with the jury that knowing or reckless falsehoods had been published. For the Court, Justice Stewart warned against inferring that States henceforth could apply a more relaxed standard of liability in false-light cases.

[49] Berry v. National Broadcasting Co., Inc., 480 F.2d 428 (Eighth Circuit, (1973). On July 22, 1974, the Supreme Court denied certiorari. 94 S.Ct. (1974).

[50] *Id.*, at 433.

[51] *Id.*, at 431. Note that the shooting elevated Berry to the status of "public figure"—one of the components in a defense of "newsworthiness." Would Berry be a "public figure" in light of the Supreme Court's decision in *Gertz v. Welch, Inc.* (1974) (*See* Chap. IV, p. 88)? Probably so.

[52] "Newspapers and Privacy: Some Guidelines," *Grassroots Editor*, Vol. 13, No. 2, March–April, 1972, p. 5.

[53] Op. cit., Chap. IV, pp. 85–88; 94 S.Ct. 2997 (1974).

[54] *Id.*, at 3011.

[55] 244 N.Y.S.2d 701; affirmed, 244 N.Y.S.2d 1.

[56] Washington Post Co. and Ben Bagdikian v. Richard Kleindienst, acting U.S. attorney general, and Norman Carlson, director of U.S. Bureau of Prisons, 357 F.Supp. 770, 772 (U.S. District Court, District of Columbia, 1972).

[57] Galella v. Onassis et al., 353 F.Supp. 196 (1972).

[58] 385 U.S. at 388.

[59] Op. cit., Chap. IV, note 56.

[60] *Id.*, 94 S.Ct. 2997, 3011.

FREEDOM OF INFORMATION VS. SECRECY

VI

Our form of government rests on an informed citizenry being provided with the information it needs in order to make wise choices. To this end the media have the implied responsibility (because of favored First Amendment treatment) of providing information to the public about the operation and performance of government. But the obligation does not rest solely on the media. Government itself should allow access to, and even facilitate the flow of, information except in those instances where national security or the public welfare would be endangered or the national interest damaged. Instead, there is mounting concern about secrecy in government, the growing use of executive privilege, the increased classification of data, and even incidents of "managed" news and outright deception.

At the opening session of a mid-1971 inquiry into government information policies and practices by a House subcommittee, Rep. Ogden R. Reid talked both about the scope of the hearings and their purpose:

> . . . [We] begin today an inquiry into a crisis of truth in government, a study of the improper exercise of the executive power bordering on dereliction. Nothing less than the balance between our coordinate branches of government and the protections set forth in the First Amendment are being threatened. These hearings will focus on the withholding of information by the claim of executive privilege, the misclassification of information, and prior restraint of publication by the executive branch.
>
> These issues raise fundamental constitutional questions, including the right of the public to know what its government is doing and the right of the Congress to have access to information necessary to carry out its legislative function.[1]

A "constitutional crisis in our government" is the way another congressman on that subcommittee, Rep. John E. Moss, referred to the issues being investigated.[2]

Other expressions of concern were aired, including those of David Wise, journalist and coauthor of a best seller, *The Invisible Government*, and of a college textbook, *Democracy Under Pressure*, who said:

> Mr. Chairman, I believe that the central fact about the American political system today is that large numbers of people no longer believe the government or the President, and I am speaking of any President. They no longer believe the government because they have come to understand that the government does not always tell the truth; that indeed it very often tells just the opposite.
>
> This erosion of confidence between the people and the government is perhaps the single most important political development in America in the past decade.[3]

And in a statement, Prof. Philip Kurland of the University of Chicago Law School told of an English newspaperman, Louis Heren, who made this comparison: "[T]he main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than diminution of his power. In comparative historical terms the United States has been moving steadily backward."[4]

The failure of Congress to retain a balance of power with the executive branch, said the professor, "proves or will prove the failure of democracy. And I still think the danger is nothing less than that."[5]

As the executive branch and the White House staff (the latter numbering about 2,200 in 1972) have grown in size and power, the words of Rexford Tugwell, a member of President Roosevelt's New Deal "brain trust," seem prophetic: that Congress gradually would be reduced "to argumentation, to investigation, and to acquiescence." From the standpoint of control of information, this power increasingly has become centralized in the presidency. Various restrictions have pleased neither Congress, nor the Washington press corps which had been critical of the diminished number of press conferences held by President Nixon—nine in 1970, and even fewer in 1971, compared with 24 to 36 annually for previous chief executives.

The "crisis" referred to by Congressman Moss is not the doings of one President or of a single administration; rather, it has a long ancestry. It stems from an accretion of power in one branch of government—power that is of questionable legal validity. It is the chief executive who takes a nation to war, with or without a declaration by Congress. Executive orders become substitutes for legislation. Executive privilege and classification of documents help determine the output of information to Congress and to the people via the press. It is the President who replaces treaties with secret agreements. And it is his authority that permits specific congressional

appropriations to be circumscribed and used for non-designated purposes, or not used at all.

6.1 Executive privilege. One of the presidential powers used in the information "battle" is executive privilege which dates back to 1792 and the administration of President Washington. The House of Representatives had asked the Secretary of War for all papers relating to the ill-fated expedition of Maj. Gen. St. Clair into the Northwest Territory during which 600 of his troops were killed by Indians at the headwaters of the Wabash River. Washington called his Cabinet together for consultation, and the Cabinet concluded unanimously "that the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public."[6] Washington decided the papers should be made available. But in 1796 he refused to comply with a House request to furnish a copy of the instructions pertaining to negotiations on the Jay Treaty. Since then, other presidents have resorted to the use of this asserted right to conceal information from Congress, the judiciary and the public.

Any legal basis for the doctrine is tenuous. Proponents of such a privilege claim that the right is constitutionally derived—implicit in the separation of powers and responsibilities of the office; i.e., since the President is responsible for the conduct of foreign affairs, he therefore can decide what should or should not be made public in that field of endeavor. Similarly, since he is commander-in-chief, the privilege extends to all information pertaining to national security. Opponents dispute such assertions, arguing that there is neither a constitutional nor a statutory basis for the privilege. Congress, frequently the protagonist along with the press in the struggle to gain information from bureaucrats, has never enacted legislation to provide such a shield for the presidency; and so occasionally the contention shifts to past congressional rules or to the recitation of case histories.

Generally speaking the courts have not been anxious to tackle the legality of privilege for the same practical reason that forestalls a congressional showdown with the executive, even though congressmen repeatedly assert their right to obtain whatever information is necessary to carry out their legislative mission. Who would enforce a court decision against a President who insists on privilege? What congressional agent (sergeant-at-arms?) would wade through Secret Service agents to seize necessary documents or compel testimony by a presidential aide (since the President himself could not be compelled to testify because of the judicially-created doctrine of execu-

tive immunity)? Who would imprison the President for contempt of Congress or contempt of court?

Since the administration of President Kennedy, no chief executive has allowed the indiscriminate use of the privilege. President Kennedy agreed in writing that he personally would be the only one to invoke the power during his administration. That policy since has been followed by his successors.

Shortly after taking office, President Nixon issued a memorandum to heads of executive departments and agencies which established the procedure to be followed on congressional demands for information and the invocation of privilege. The March 24, 1969, memo read, in part:

> The policy of this administration is to comply to the fullest extent possible with congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons executive privilege will not be used without specific Presidential approval.

Executive privilege has not been used as often as commonly believed. Presidents frequently have yielded to demands for information when public or congressional pressure has been strong.

During the first 2½ years that President Nixon was in office, five formal requests came from agencies asking that the privilege be exercised, but he used this power in only two instances. In one, he refused to permit a report critical of the administration-backed supersonic transport (SST) project to be submitted to Congress, although his aides had provided legislators with numerous pro-SST reports and memoranda. In the other, a near constitutional crisis occurred during the Pentagon Papers episode when, on three separate occasions, the Senate Foreign Relations Committee asked for a copy of the Papers and each time the administration refused, invoking executive privilege. The Papers finally were released, but only after newspapers had begun to publish some of the contents of the 47 volumes classified as "Top Secret—Sensitive," although no such security classification is authorized.

The use of privilege by President Nixon can be compared with the statement made in 1948 by Nixon when he was a congressman from California:

> Now, I am not criticizing the reporter for getting the information; that is his job. But I do say that when the time comes that the executive department feels that a particular letter is so confidential that it cannot be disclosed in executive session to a committee of Congress, but that its contents can be bandied about among newspaper reporters, it is certainly high time that the Congress did something about the situation and got the information to which it was entitled.[7]

After President Nixon's re-election in 1972, a series of scandals rocked the White House, including revelations that a so-called "plumbers' unit" had been formed by aides of the President in an attempt, among other things, to plug leaks of secret government information, such as the Pentagon Papers. In the process, the office of Daniel Ellsberg's psychiatrist was broken into—Ellsberg having admitted making copies of the Papers available to some congressmen; a break-in was attempted at the Democratic National Committee headquarters in the Watergate hotel in Washington, D.C., for the purpose of "bugging" telephones; there was disclosure of a White House "enemies list" which contained the names of more than 50 active journalists, and White House approval was given for the wiretapping of telephones of at least four newsmen. In the midst of such incredible developments came the disclosure that tape recordings existed of virtually all conversations which had taken place in the Oval Office of the White House—recordings unbeknownst to all but the President and a few aides. A confrontation involving executive privilege ensued between Nixon and judicial and legislative branches as efforts were made to determine if the President knew in advance and/or had given prior approval of the Watergate break-in. A grand jury investigation began, and some tapes were subpoenaed. Claiming immunity under executive privilege, the White House refused an order from U.S. District Judge John Sirica to turn over nine tapes. Judge Sirica's decision was appealed. On Oct. 12, 1973, the U.S. Court of Appeals for the District of Columbia upheld Judge Sirica in a 5-2 split.

The central question, said the appellate court, was whether the President may, in his sole discretion, withhold from a grand jury evidence in his possession that is relevant to the grand jury's investigation. Although acknowledging the long-standing judicial recognition of executive privilege, the court majority declared that such a privilege must be weighed against the public interest which, in this case, was overriding. However, the court agreed that the President

should be given an opportunity to argue that certain portions of the tapes ought not to be disclosed on the grounds of national security and foreign affairs—a decision that Judge Sirica could make after privately listening to the tapes. Ultimately—and in this instance temporarily avoiding a constitutional crisis—seven of the nine subpoenaed tapes were delivered to the District Court judge for examination prior to portions thereof being turned over to the grand jury. Two of the tapes, the President claimed, did not exist and one of them contained an unexplained 18-minute blank portion.

The vortex of the confrontation on executive privilege came shortly thereafter. At the request of special Watergate prosecutor Leon Jaworski, a subpoena duces tecum[8] was issued by Judge Sirica requiring the President to turn over 64 additional tape recordings or documents so that the judge could determine if they contained information relevant to scheduled trials for seven former Nixon aides who had been indicted on several charges, including obstruction of justice; but on May 1, 1974, the President claimed executive privilege and sought to have the subpoena quashed. The District Court refused to do so despite the contention by the President's counsel that the judiciary was without authority to review an assertion of executive privilege by the President. The District Court said the judiciary, not the President, was the final arbiter of a claim of executive privilege, a declaration affirmed by the Supreme Court in an 8-0 decision on July 24, 1974, upholding the lower court.[9] This decision would have the effect of bringing about the resignation of President Nixon on Aug. 9, 1974, because revelation of the content of the tapes disclosed that he did, despite earlier assertions to the contrary, participate in the attempted cover-up of the Watergate burglary-"bugging" operation.

In giving the Court's opinion, Chief Justice Burger first dealt with the contention that the judiciary could not interfere once the President had asserted a claim of privilege. Not so, said Burger. "Many decisions of this Court . . . have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch 137 (1803), that 'it is emphatically the province and duty of the judicial department to say what the law is.'" He went on to say:

> . . . [N]either the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public inter-

> est in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a District Court will be obliged to provide.
>
> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.

In citing a 1972 decision in which the Court denied a constitutional basis for reporters to refuse to reveal confidential sources of information in criminal matters,[10] the Chief Justice reiterated the concept that the public "has a right to every man's evidence except for those persons protected by a constitutional common law, or statutory privilege." He then said: "We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal case."

6.2 Classified information. Another means of controlling information is to classify it into one of three categories: "top secret," "secret" or "confidential." The establishment of standards for handling and transmitting classified information has been accomplished by means of executive orders. For example, Executive Order 10290 was issued by President Truman in 1951, but because of widespread public and press criticism, the order was rescinded by President Eisenhower and a new order, 10501, was issued in December, 1953.

For more than two decades, Order 10501 has been in effect. Its "preamble" reads:

> Whereas it is essential that the citizens of the United States be informed concerning the activities of their government; and
>
> Whereas the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by

> covert or overt means, including espionage as well as military action; and
>
> Whereas it is essential that certain official information affecting national defense be protected uniformly against unauthorized disclosure;
>
> Now, therefore, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered. . . .

The order then proceeds to designate classification categories—"top secret," "secret," and "confidential"—and gives instructions about responsibility and procedures for dealing with such information.

The legality of this order is debatable. Representative Moss is among those who question its legal foundation.[11] The issue was researched by the Library of Congress and the report stated that "an extensive search fails to reveal any statute which specifically authorizes the President to issue such an order." In addition, the Library also noted: "The extent of the President's constitutional power to control the disclosure by persons in the executive branch . . . and to withhold information from the Congress and the public has long been in controversy and was never fully settled."[12]

But the controversy is largely academic. Thousands of government employees annually classify tens of thousands of documents. National archives bulge with "secrets."

A classic example of frustration in attempting to fight bureaucratic censors is afforded by Julius Epstein, a researcher-historian at the Hoover Institution on War, Revolution, and Peace at Stanford University who, since the early 1950s, has been attempting to gain access to the still-classified records of "Operation Keelhaul." This joint U.S.-British army operation resulted in the forced repatriation of some 2,000,000 Soviet nationals about the time World War II ended.

In an effort to force disclosure, Epstein filed a suit against the Secretary of Army in U.S. District Court in which he argued that continued classification of the Keelhaul file could no longer be justified under Executive Order 10501's "Top Secret" classification; but the judge upheld the Army on Feb. 19, 1969,[13] stating that "the circumstances were appropriate for the classification made by the Department of the Army in the interest of the national defense or foreign policy." The judge made that decision without having examined a single document in that file, Epstein said, adding that how the

court could find as it did without first examining the file "remains a mystery in American judicial history."[14] In early 1970 the U.S. Court of Appeals upheld the lower court and in June of that year the U.S. Supreme Court decided not to review the case.

Just what could be so damaging to the nation so many years after the event is hard to imagine. Even more difficult to understand are the estimated 100 million pages of World War II records and documents still classified.

One witness at the House Government Information Subcommittee hearing was William Florence, a federal employee for 43 years before retiring. He had been involved in various ways in the classification of government information and, in his judgment, less than one-half of one per cent of the estimated 20,000,000 classified records and documents then in existence warranted secrecy.[15]

In an effort to spark eventual declassification of secret information, President Kennedy issued an executive order which amended 10501 by establishing an automatic time-phased system for downgrading and declassification. Under this system, the original classifier had to determine into which of four groups the information fell. Groups 1 and 2 comprised highly classified information and were exempt from automatic downgrading; group 3 information was automatically downgraded on a 12-year phase basis but was not automatically declassified, and group 4 material was automatically downgraded at 3-year intervals and automatically declassified after 12 years.

Then President Nixon issued Executive Order 11652 effective June 1, 1972, which advanced the timetable for automatic declassification of less "sensitive" information: 10 years for top secret papers; 8 years for secret documents, and 6 years for confidential data. In addition, the number of federal employes who could classify information was to be substantially reduced—from 43,000 to 16,000; and the burden of defending continued classification was shifted to the administrator, rather than resting on the person seeking to have documents made public.

But there are loopholes. The person requesting secret information must know which documents he wants so he can ask the department involved for declassification of that information. The person who classified the information then decides whether to declassify it. Should the request be turned down, the decision can be appealed to a departmental committee and then to a newly created Inter-Agency Classification Review Committee. A final turndown would still leave the federal courts as ultimate arbiter, as provided under the Public Information Act—popularly called the Freedom of Information Act.

6.3 Freedom of Information (FoI) Act. An 11-year congressional

effort to counteract the withholding of information by means of executive privilege, classification, or just an administrative urge toward secrecy, culminated in passage of the FoI Act which went into effect July 4, 1967. Previously, under Section 3 of the Administrative Procedure Act—the section replaced by the FoI Act—the burden of showing why information should be made public fell on the person seeking the information. Under the FoI Act (5 U.S.C. 522), which largely resulted from the persistence of Congressman Moss and the House Information Subcommittee which he chaired for many years, the burden was shifted to the bureaucrat. The new philosophy—given the force of law—had become: the public's right to know.

In June, 1967, Attorney General Ramsey Clark issued a memorandum explaining the philosophy and key features of the FoI Act. In the foreward, Clark wrote:

> If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.
>
> Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act.... President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.
>
> Public Law 89-487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.
>
> Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It

> leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

Clark cited the following key concerns of the law: (1) that disclosure be the general rule, not the exception; (2) that all individuals have equal rights of access; (3) that the burden be on the federal government to justify withholding of documents, not on the person requesting them; and (4) that individuals improperly denied access to documents have a right to seek injunctive relief in U.S. District Courts.

The act contains nine categories which exempt information from disclosure: national security, personnel files and practices, internal memoranda, investigatory files, trade secrets, reports on regulations of financial institutions, geological data on oil and gas wells, invasions of privacy (such as creditors seeking information, income tax files), and a catch-all category which permits withholding of data upon a showing of the need for confidentiality.

During the period 1967-71, the ratio of access to turndowns was about 17 to 1 which, on the surface, indicates FoI was having a favorable effect in prying out information. Many requests, however, were of a routine nature. Nearly 2,200 requests for access to records were denied during the same four-year period, either completely or in part. Of 1,822 outright refusals, only 99 court actions were initiated in U.S. District Courts. The government won 23 of those cases; complainants won 32 cases, either completely or partially, and the remainder were still pending at the end of the "audit" period. During that same period the Justice Department received 535 requests for information of more than a routine nature and turned down 311 with a "sue us" attitude. Only nine lawsuits were filed and the department was upheld in six of them.[16]

However, legal action may be successful without a court decision. Writer-researcher Harold Weisberg forced the Justice Department to reverse itself in 1970 and make records available of James Earl Ray's 1968 extradition proceedings from England to the United States following the slaying of civil rights leader Dr. Martin Luther King Jr. The department had contended that the information fell into the "investigatory files" category; but after Weisberg brought suit, the attorney general granted access to the records.

Although the law was changed, the bureaucrat's inclination toward secrecy remains, thereby helping to frustrate the spirit of FoI. Other weaknesses also have kept the FoI Act from fulfilling the hopes of its sponsors, such as: (1) there is no enforcement procedure within the

executive branch itself so that atrophy sets in whenever strong executive support is lacking; (2) the news media have shown little inclination to use the Act, principally because of the time-lag before information can be obtained in this way; (3) cover-ups are still possible within the nine exemption categories; (4) there are other statutes which permit agencies and departments to withhold information; and (5) bureaucrats can play games with legitimate requests because they have authority to make the service self-sustaining. For example, a Ralph Nader investigative group, the Center for the Study of Responsive Law, was faced with a potential charge of more than $85,000 when it asked in 1972 to see nearly 4,000 case reports concerning conditions at meat-packing plants. The USDA's Consumer and Marketing Service agreed to provide "sanitized" reports (confidential information removed) at a cost of $6 per file, plus 25 cents for each form made available.

Another situation, appropriately dubbed " 'Catch-22' at the Agriculture Department," was described in a report by the House Committee on Government Operations after one of its subcommittees (Foreign Operations and Government Information Subcommittee) had exposed, during 41 days of public hearings, various "dodges" used by federal agencies to deny requests for information.[17]

The "Catch-22" sequel began when Harrison Wellford of the Center for the Study of Responsive Law asked the USDA to make available research reports on the safety aspects of handling certain pesticides. His request was refused because the records sought were not clearly identified, according to USDA. So he asked for USDA's indexes to specific files so he could identify the sought-after records. He was told the indexes fell into the category of interagency memoranda—one of the categories of information exempt from disclosure. So Wellford took his case to a U.S. District Court, which is specifically permitted under FoI, and he won! In the meantime, two years had elapsed between his original request and the court victory. He returned to USDA and was allowed to look at the indexes. The information he wanted was contained in "jackets," but the jackets co-mingled confidential with non-confidential data and confidential information is exempt from forced disclosure. USDA told him that it would cost $91,840 to prepare the jackets for public showing. Was he prepared to pay that sum? At that point Wellford decided to seek the information elsewhere.

6.4 FoI Act and the press. During the first four years that the Act was in effect, there were 254,637 requests for information, but only 90 of them came from the press.[18] Of these 90 requests, only 12 were "formal requests" in which the press used the FoI Act in an

effort to pry out information. Ten came from magazines, 2 from newspapers, and none from the electronics media. By mid-1973, the news media had gone to court only three times in an effort to force disclosure of information through the use of the FoI Act.

This situation prompted U.S. Rep. William S. Moorhead, chairman of the House Subcommittee on Foreign Operations and Government Information, to express surprise and to say that the press should be the major user of the law. But the reasons this has not been so have become clear largely because of hearings conducted by the subcommittee. The major reason is the time-lag involved in requests for information and the media's need to have information in a hurry. This, coupled to the "delaying tactics of federal bureaucrats,"[19] has kept the media from making much use of the law.

6.5 FoI and the courts. An analysis in 1972 of FoI court decisions showed that judges seemed to be leaning toward the public's right to know except when the government gave national defense and foreign policy as reasons for withholding information.[20] In addition, the courts generally agreed with the government's contention that investigatory files compiled for law enforcement purposes need not be made public. Rejected in several instances were contentions that confidential financial and commercial information, as well as intra- and interagency memoranda, could be withheld.

An example of national defense clashing with FoI is demonstrated by the Dec. 7, 1971, decision of Judge Gesell of the U.S. District Court in the District of Columbia who upheld Defense Secretary Melvin Laird's refusal to permit Congressman Moss and others access to four volumes of the Pentagon Papers not previously made public. The judge concluded:

> The Freedom of Information Act was not designed to open all government files indiscriminately to public inspection. Obviously documents involving such matters as military plans and foreign negotiations are peculiarly the type of documents entitled to confidentiality. The orderly processes of government and indeed the stability of the country itself so require. Congress recognized this in the Act and the Constitution has no requirement to the contrary. The public's right to be informed cannot be transposed into a legal requirement that all governmental papers will be automatically revealed. Government, like individuals, must have some degree of privacy or it will be stifled in its legitimate pursuits. There is no basis here for upsetting the responsible decision made as to these particular papers.

> Defendants have made an adequate showing that disclosure would be harmful to the national defense or foreign policy. There is no need for an *in camera* review.[21]

By "responsible decision," Judge Gesell was referring to a task force that reviewed the 47 volumes after the *Times*, *Post* and other newspapers had published condensations of the first 43 volumes. The task force concluded that about two per cent of the first 43 volumes and the entire last four volumes should remain classified—a decision which drew concurrence from Laird.

Judge Gesell anticipated a U.S. Supreme Court decision on Jan. 22, 1973, in which the Court held 5-3 that judges may not examine *in camera* those documents which the government claims are secret by virtue of exemptions afforded under national defense and foreign policy.[22]

U.S. Rep. Mink and 32 other members of Congress had sought to force release of an inter-departmental report on an underground nuclear test in Alaska which had been classified as "Top Secret" by Executive Order. They scored a partial victory when the U.S. Court of Appeals ordered the U.S. District Court to undertake *in camera* review of the classified information, presumably for the purpose of ordering disclosure of any non-secret information. But such an order was rejected by the Supreme Court which examined congressional intent and concluded that the FoI Act was not intended "to subject the soundness of executive security classifications to judicial review." Further, said Justice White, the exemption to disclosure of information concerning national defense and foreign affairs also negates the proposition that *in camera* inspection is permitted for the purpose of separating secret from supposedly non-secret information with the latter thereby subject to disclosure.

The Court also looked at the FoI exemption pertaining to intra- and interagency memoranda, and held that a governmental agency could demonstrate to the court that particular documents are exempt under FoI or contain no factual information which can be separated from the "private remainder of the documents." Thus, *in camera* inspection is not necessary in every case involving intra-interagency memoranda in which the contention is put forward that some non-private information should be made public.

Justice Stewart concurred, and in so doing put the onus upon Congress for uncritical acceptance of the executive branch's use of the secrecy order. It is Congress, not the courts, said Stewart, which has "ordained unquestioning deference to the Executive's use of the 'secret' stamp." And he added:

> As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters . . . specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act."[23]

The cases litigated thus far indicate the nature of some of the legal technicalities associated with the FoI Act, including loopholes for bureaucrats who wish to improperly conceal information; delays that result after information is requested or after a legal action is commenced; time and expense involved in litigation; the David-Goliath situation when the Attorney General undertakes the government's defense if information is denied; and lastly, the various interpretations which can result. For example, consider the possible interpretations based on this one section of the statute: "[E]ach agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to any person." Given the intention to circumvent the FoI Act, a bureaucrat could have a field day with phrases such as "identifiable records," "in accordance with published rules," and "promptly."

The shortcomings were spelled out during 41 days of public hearings conducted by the Foreign Operations and Government Information Subcommittee, which ended in June, 1972. Among the findings reported by the parent committee was this general statement:

> The efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious in parts of two administrations. This reluctance has been overcome in a few agencies by continued pressure from appointed officials at the policymaking level and in some other agencies through public hearings and other oversight activities by the Congress. However, it has been clearly demonstrated during these hearings that much information of the type previously denied to the public has been made available under the act.[24]

The committee report concluded with recommendations for major changes in the act. Thereafter, the Senate and House passed different

versions of a bill to amend the act. A Conference Committee subsequently ironed out differences between the two measures and the compromise version (H.R. 12471) passed the Senate by voice vote on Oct. 1, 1974, followed by the nearly unanimous (349-2) approval of the House on Oct. 7. However, at the urging of all but one federal agency, President Ford vetoed the amendments on Oct. 17 just hours after Congress had taken a month-long recess so lawmakers could return home for the November elections. Supporters of the bill, however, vowed to fight to override the veto. They succeeded. On Nov. 20, the House voted 371-31 to override. On the following day, the Senate overturned the President's action by a 65-27 vote—three votes more than the necessary two-thirds.

The FoI amendments accomplish the following:

1. Alter that part of the law which required that a request for information be for "identifiable records"; instead, a request for information now must only "reasonably describe" the records being sought.

2. Require each agency to issue a schedule of fees for agency search and copying of records. Such fees should recover only the direct costs of search and duplication—not the cost of reviewing the records. As the Conference Committee had reported, ". . . [F]ees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information."[25]

3. Permit federal courts to make *de novo* (anew) reviews to determine if agencies have wrongfully withheld information from complainants. The amendments specifically authorize District Courts to examine *in camera* any requested records to determine if they have been properly withheld under one or more of the nine categories of information exempt from forced disclosure. By this action, Congress specifically intended to alter the Supreme Court's decision in *Environmental Protection Agency v. Mink, et al.*, under which courts were instructed that they could not review the Executive branch's determination of what could or could not be made public in response to FoI requests. The House-Senate conferees agreed that while *in camera* examination need not be automatic, "in many situations it will plainly be necessary and appropriate." But before such examination takes place, federal agencies are to be given the opportunity to establish by testimony or detailed affidavits that the documents are clearly exempt from disclosure. It was the *in camera* provision that President Ford chiefly objected to in his veto message, although he had vowed an "open" administration upon assuming the presidency following the resignation of Mr. Nixon. "I simply cannot

accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations," said President Ford on Oct. 17, "because of a judicially perceived failure to satisfy a burden of proof." In his judgment, federal judges would lack the expertise necessary to make determinations about the classification of records, especially those pertaining to national defense, intelligence-gathering and foreign affairs.

The House-Senate conferees had anticipated this objection and had included this statement in their report: ". . . [T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts . . . will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."

4. Modify Subsection (b)(7) of Section 552 to make it more difficult for agencies to withhold information under this category of exempt information called "investigatory files." The amendment would still exempt such files but only to the extent that the production of such records would (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source; (e) disclose investigative techniques and procedures, or (f) endanger the life or physical safety of law enforcement personnel. There are so many exceptions listed in this amendment that it's hard to see how any agency could be compelled to disclose information in investigatory files.

5. Require each agency to provide "any reasonable segregable portion" of any record after that record is purged of information not releasable under one or more of the nine exempt categories.

6. Require each agency to determine within 10 work days after receipt of a request for information whether it will comply with such request. If not, the agency must inform the information-seeker of the right of appeal to the agency head. Any appeal must be decided within 20 work days. If the appeal or the original request is turned down in whole or in part, the agency must inform the information-seeker of his right to judicial review. Each of the time limits could be extended 10 days for "unusual circumstances," such as the need to

search for and collect information from field offices; the need to gather voluminous amounts of information, or the need to consult with other affected agencies. If an agency becomes a defendant in an FoI lawsuit, it has 30 days after service in which to answer or otherwise plead to the complaint unless the court permits an exception.

7. Call upon U.S. District Courts to give precedence to cases brought under the FoI Act, except for those cases on the docket deemed of greater importance.

8. Give the District Courts the power to assess against the United States reasonable attorney fees and other costs in those cases where the complainants have "substantially prevailed." Whenever such court action results, and the court additionally issues a written finding that the circumstances surrounding the withholding of information raises questions whether the agency acted "arbitrarily or capriciously" in the withholding action, the Civil Service Commission can be directed to promptly initiate proceedings to determine whether disciplinary action is warranted against the employee primarily responsible for the withholding. After an investigation the Commission could make a recommendation to the agency concerned regarding corrective or disciplinary action.

9. Stipulate that each agency must annually submit a report to Congress which would show (a) the number of times the agency did not comply with requests for records and the reasons for such decisions; (b) the number of appeals and the reasons for appeals being rejected by the agency head; (c) the names and titles or positions of each person responsible for the denial of records; (d) the results of proceedings against employees who were primarily responsible for improperly withholding information, or an explanation of why disciplinary action was not taken; (e) a copy of every rule made by an agency regarding release of records; and (f) a copy of the fee schedule and total amount of fees collected by the agency in connection with providing information.

In addition, each agency would be required to regularly publish and distribute (by sale or otherwise) indexes that identify information which must be made public under the FoI Act. Such information would include final opinions, orders, statements of policy and policy interpretations if not published in the *Federal Register*, plus administrative staff manuals and agency staff instructions which affect the public. The indexes would have to list all such information dating back to July 4, 1967, when the FoI Act became law If, however, an agency determined that publication of an index was "unnecessary or impracticable," and it so stated in the *Federal*

Register, then it would only have to maintain an unpublished index which would have to be provided to anyone requesting the index.

6.6 Open meetings and open records. The FoI Act is the federal open records law. At the state level, many open records and open meetings laws have been enacted. In some states, such as Arkansas and Virginia, the statutes are included in a freedom of information act.

One of the shortest public records laws on the books is Arizona's 1901 statute which declares:

> Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person.[26]

Another relatively short statute, this one dealing with open meetings, was enacted in Idaho in 1953:

> All meetings, regular and special, of the board of trustees of any school district and all meetings of boards, commissions and authorities created by or operating as agencies of any county, city or village not now declared by law to be open to the public, are hereby declared to be public meetings open to the public at all times; provided, however, that nothing contained in this act shall be construed to prevent any such board of trustees or such other board, commission or authority from holding executive sessions from which the public is excluded, but no ordinances, resolutions, rules or regulations shall be finally adopted at such an executive session.[27]

States having both types of statutes are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

States which have just the open records requirement are Kansas, Kentucky, Mississippi, Missouri, Oregon, South Carolina and Wyoming.

Colorado and Vermont have open meetings laws.

These laws are far from uniform and suffer from some of the same defects that characterize the federal FoI Act.

Maryland's open records law exempts relatively few records: per-

sonnel files, hospital patient care reports, trade secrets and library circulation lists. By comparison, Iowa's statute exempts 11 categories of records. Other sections of the Iowa Code establish confidentiality for certain accident reports, personal and business tax records, some hearings of the Civil Rights Commission, juvenile court proceedings, as well as excluding courts, juries and military organizations from the provisions of the state open records law.

As for open meetings laws, the variations among the states are considerable with one exception: virtually all states permit executive sessions, although official action usually must take place at public sessions. Most state legislatures exempt themselves and/or their committees from the provisions of such laws.

Open meetings statutes generally contain "escape" clauses. For example, Iowa's law begins with the ringing declaration that closed public meetings are prohibited! The language used is: "All meetings of the following public agencies shall be public meetings open to the public at all times. . . ." Included within public agencies are any board, council, or commission created by the laws of Iowa or any governing or tax-supported body of any county, city, town, township, school corporation, etc. But then the law permits closed sessions when necessary to prevent irreparable injury to the reputation of individuals where employment or discharge is under consideration, to prevent premature disclosure of information on proposed real estate purchases, or "for some other exceptional reason so compelling as to override the general public policy in favor of public meetings."[28] That's the escape clause! But this same section goes on to say that any final action on any matter shall be taken in public meeting and not in a closed session. Yet the Iowa Attorney General, in an opinion, said that if four city councilmen illegally meet in secret, without informing other councilmen or the public, and if they sign a contract for legal services, then their actions are legal. As the *Des Moines Sunday Register* observed: "What is the sense of a law which says a public body cannot act in secret if the acts it takes are declared legal?"[29] Fourteen states, however, declare that any action taken contrary to their open meetings laws is null and void.

Unlike the federal FoI Act, some states decree a fine and/or jail term for violations of so-called "sunshine" laws. For example, anyone who violates Michigan's open records law could be fined a maximum of $500 and/or jailed for not more than one year. Florida permits a fine of up to $500 and/or imprisonment up to six months for violators of the open meetings law. Pennsylvania's law is a mere slap on the wrist, providing for a fine of between $10 and $25. Nebraska permits a fine of not more than $25. In half of the states, no penalty is provided.

Surveys on the effectiveness of these laws produce different findings. Reporters often are not fully aware of the statutes or do not make fullest use of them. In Virginia, a survey showed that most violations occurred when public business was conducted during closed executive sessions.[30] However, the conclusion was that access to public records generally was good and that most public officials were not given to outright secrecy.

In a study of open meetings laws,[31] Dr. John B. Adams, dean of journalism at the University of North Carolina, reported that only Tennessee met the 11 criteria he used for testing existing state laws against an ideal "sunshine" law. The criteria were: (1) include a statement of public policy in support of openness; (2) provide for an open legislature; (3) provide for open legislative committees; (4) provide for open meetings of state agencies or bodies; (5) provide for open meetings of agencies and bodies of political subdivisions of the state; (6) provide for open county boards; (7) provide for open city councils; (8) forbid closed executive sessions; (9) provide legal recourse when illegal secrecy takes place; (10) declare actions taken at meetings which violate the law to be null and void; and (11) provide penalties for those who violate the law.

If a state met all of the criteria, it received a score of 11. Mississippi and West Virginia, which have no open meetings laws, received zeros. Other ratings were: Arizona, Colorado and Kentucky, 10 each; Kansas, Maine and Minnesota, 9; Alaska, Arkansas, Florida, New Mexico, North Carolina, Oregon, South Carolina, Utah and Vermont, 8; California, Georgia, Illinois, Michigan, Missouri, Montana, Nebraska, New Hampshire, Texas, Washington and Wisconsin, 7; Iowa, Nevada, New Jersey, Oklahoma, South Dakota and Wyoming, 6; Alabama, Louisiana, Massachusetts, North Dakota, Ohio, Pennsylvania and Virginia, 5; Connecticut, Delaware, Hawaii, Idaho and Indiana, 4; and Maryland and Rhode Island, 1.

Colorado, which forbids executive sessions, was one point shy of the ideal because it does not provide any penalty if the law is violated. Conversely, Arizona allows closed executive sessions, but provides for a penalty in case of violation. Colorado (but only at the state level), Florida, Minnesota, North Dakota (inferred) and Tennessee provide for open executive sessions. Oregon permits news media representatives to attend executive sessions provided they agree to conditions stipulated by the agency concerning information that can or cannot be made public. Fifteen states do not permit final actions to be taken at closed sessions.

6.7 Summary. On the side of secrecy are (1) executive privilege; (2) classification as top secret, secret or confidential; and (3) a bureaucrat's inclination to shield his work from the public's gaze. On

the side of manipulation of news, there is systematic "leaking" of information to newsmen,[32] and instantaneous declassification, such as President Johnson's unilateral declassification of a secret document while being interviewed by Walter Cronkite on a Feb. 6, 1970, television show. Johnson's memoirs, like those of many other public officials who left government, contained classified information.

To counteract secrecy and manipulation of information, imperfect freedom of information laws exist federally and in many states. They form a legal basis for access to records and/or meetings. Such statutes, along with persistent news media representatives and public servants who recognize the public's need to know, lend substance to the hope that an "open" society will prevail. But much more remains to be done, including a strengthening of FoI acts to eliminate loopholes. Even Congress can be an adversary of the public's right to know because about 40 per cent of all of its committee meetings take place behind closed doors. Legislation has been introduced to make such sessions more difficult, including a requirement that explanations must be given each time a committee decides to conduct the public's business in secret; but thus far few committees follow the lead of the Senate Appropriations Committee which requires all of its subcommittees to conduct public sessions under a policy adopted in 1947 as the result of the 1946 Legislative Reorganization Act which required open committee meetings unless a majority of the committee decided otherwise.

VI–Pass in Review

1. What is executive privilege and what is its legal basis, if any?

2. "Operational Keelhaul" demonstrates the problem of (a) executive privilege; (b) classification of documents long after the need has passed; (c) the nation's security being threatened by the early release of classified documents; (d) all of these answers; (e) none of these answers. (Circle the best answer)

3. The Public Information Act, popularly known as the Freedom of Information (FoI) Act, is of historic significance because, for the first time, it gives legal force to a doctrine which the Fourth Estate espoused and helped to popularize, namely _____

_____.

4. Which of the following is a requirement under the FoI Act, according to Atty. Gen. Ramsey Clark: (a) disclosure is the general rule, not the exception; (b) all individuals have equal rights of access to information; (c) the burden rests on the government to justify the withholding of information, not on the person seeking such information; (d) all of these answers; (e) none of these answers.

5. Three of the nine categories in the federal FoI Act which permit exemptions to information disclosure seem to afford bureaucrats the most likelihood of success if a suit is brought under FoI to force disclosure. The three are:

6. Why do the news media not make greater use of the FoI Act?

VI—Answers to Review

1. Executive privilege is the power claimed by the President not to make information or records available to Congress or to the public. Proponents of this doctrine claim the power is derived from the Constitution. Opponents argue there is no constitutional or statutory basis for the doctrine. The root of the argument goes to "derived" powers versus explicit ones, or implied versus explicit powers. If, for example, the President is charged by the Constitution with the conduct of the nation's foreign affairs, then a derived or implied power would be to conduct such negotiations in secret or to keep highly sensitive information relating to foreign affairs under security wraps.

2. (b) Classification of documents long after the need has passed.

3. The public's right to know.

4. All of the answers.

5. National defense, foreign policy and investigatory files.

6. Long delays in getting information.

[1] Hearings before the House Foreign Operations and Government Information Subcommittee, "U.S. Government Information Policies and Practices—The Pentagon Papers," Part I, June 23, 1971, p. 8.

[2] *Id.*, p. 20.

[3] *Id.*, p. 329. This statement was made more than two years before a Senate select committee in mid-1973 made an investigation into the "Watergate" scandal which developed when White House staff members were linked to "political espionage" involving breaking and entering and "bugging" operations at the Democratic National Committee's headquarters, among other illegal activities.

[4] *Id.*, p. 800.

[5] *Id.*, p. 801.

[6] *Id.*, p. 360. Excerpts of Jefferson's notes of that Cabinet meeting as reported to the subcommittee during testimony of William Rehnquist, assistant attorney general, June 29, 1971.

[7] *Congressional Record*, April 22, 1948, p. 4783, as quoted by Rep. Paul N. McCloskey Jr. during House Government Information subcommittee hearings (op. cit.), pp. 30–31.

[8] See Appendix B for definition.

[9] U.S. v. Richard M. Nixon, President of the United States, and Richard M. Nixon, President of the United States, v. U.S., 94 S.Ct. 3090, 41 L.Ed.2d 1039. Justice Rehnquist did not participate in the decision.

[10] Branzburg v. Hayes, 408 U.S. 665, 683 (1972). In this and two companion cases (*see* Chap. VIII, p. 202) the Supreme Court held that there was no constitutional privilege for reporters to refuse to reveal confidential sources

and/or information to grand juries investigating criminal matters. The decision came as a disappointment to the news media which had hoped to find a "champion" against forced disclosures—the Supreme Court. Compare the arguments used in those cases involving the newsmen with the rationale put forth in the cases involving the President of the United States. If, in criminal matters, the President cannot successfully assert an absolute claim to privilege, reporters certainly will not be able to do so unless legislation is passed which confers such a privilege.

11 Op. cit., note 1, p. 73.

12 *Id.*, pp. 14–15.

13 Epstein v. Resor, 296 F.Supp. 214 (1969); 421 F.2nd 930, 9th Circuit Court of Appeals (1970).

14 Op. cit., note 1, p. 286. This same problem plagued the judiciary in consideration of the Pentagon Papers case.

15 *Id.*, p. 97.

16 *Congressional Record*, March 23, 1972, pp. E2866-E2870.

17 House Report No. 92-1419, "Administration of the Freedom of Information Act," Committee on Government Operations, Sept. 20, 1972, pp. 21–22.

18 Carole Fader, "The FoI Act and the Media," Freedom of Information Center Report No. 303, May, 1973, p. 1.

19 Op. cit., note 17, p. 8.

20 *Id.*, pp. 71–72.

21 Moss v. Laird, Civil Action 1254, and Fisher v. Department of Defense, et al., Civil Action 1865; not reported. *Cf.*, Chap. III, pp. 51–52. *In camera* means in a judge's private office.

22 Environmental Protection Agency et al. v. Patsy T. Mink, et al., 410 U.S. 73, 93 S.Ct. 287. 35 L.Ed.2d 119. Justice Brennan, joined by Justice Marshall, both concurred and dissented to parts of Justice White's opinion for the Court. Justice Douglas dissented. Justice Rehnquist took no part in the consideration or decision of the case.

23 *Id.*, 93 S.Ct. at 839.

24 Op. cit., note 17, pp. 8–9.

25 Conference Committee Report No. 93-1380, "Freedom of Information Act Amendments," 93rd Congress, 2nd Session, Sept. 25, 1974.

26 Title 39, Chapter 1, Article 2, Section 39–121.

27 Title 33, Chapter 7, Section 706a.

28 Chap. 28A.3, 1971 Code of Iowa.

29 An editorial, "Secret Government," Feb. 3, 1974, Section B, p. 1.

30 *FoI Digest*, Vol. 13, No. 3, May–June, 1971, p. 3.

31 "State Open Meeting Laws: An Overview," published by the Freedom of Information Foundation, Columbia, Mo., August, 1974. Several states, such as New York and Pennsylvania, were amending their laws at the time of the study; therefore, survey results may not accurately reflect the "openness" required by these states.

32 *See* FoI Center Report No. 274, "Leaks: Manipulating Secrecy," December, 1971. Also, *see* note 12, Chap. III.

FREE PRESS VS. FAIR TRIAL

VII

The Freedom of Information Act and open meetings-open records laws are legal foundations for the public's right to know. They provide some "muscle" for prying information from reluctant bureaucrats. But they also have sparked frequent clashes between bureaucrats and journalists. Similarly, journalists have found themselves engaged in another "battle" which pits them as principal guardians of the public's right to know against judges who are charged with the responsibility of preserving a fair and orderly administration of justice.

The "clashes" have bordered on the spectacular. One example is the 46 days in jail served by William T. Farr, a former reporter for the Los Angeles *Herald-Examiner* who ran afoul of a judge's "gag" order aimed at preventing out-of-court statements by lawyers and witnesses connected with the Charles Manson murder trial. Farr found out what a prospective witness purportedly was going to say and the result was a page one story about a bizarre plot to slay movie stars. This upset California Superior Court Judge Charles Older who feared the trial might be contaminated if any jurors, even though sequestered when court was not in session, chanced to see that story while moving to and from the courthouse. Farr was asked to identify who had given him the information, but refused, and because of the California "shield" law[1] the judge did not force the issue. But after the trial ended, Farr went to work for the Los Angeles County district attorney. He no longer was a reporter and the "shield" law no longer protected him, according to Judge Older who again ordered Farr to disclose the source of his information. When Farr refused, he was sentenced to an indefinite jail term for civil contempt. Theoretically, he might have stayed there for life by continuing to defy the judge's order, but Justice Douglas of the U.S. Supreme Court intervened and released Farr on his own recognizance on Jan. 11, 1973, "in the interest of justice" pending outcome of an appeal.[2] Subsequently, a three-judge panel of the California Court of Appeals denied Farr's contention that his open-ended sentence was tantamount to cruel and unusual punishment, which is prohibited by the U.S. Constitution. However, an avenue of "escape" was noted by the appellate court. If Farr could not be coerced into disclosing his sources, then any imprisonment beyond the state's five-day limit on imprisonment for contempt would become punitive.[3]

A determination on this question was reached June 20, 1974, by Superior Court Judge William H. Levit who declared that the news profession had established a moral principle to protect confidential-

ity of its sources and that Farr's commitment to that principle made it substantially unlikely that further incarceration would result in his compliance with Judge Older's order. Since Farr, who by then had rejoined the ranks of the Fourth Estate as a reporter for the Los Angeles *Times*, could not be coerced into compliance, Judge Levit, in his interpretation of the California law, apparently limited Judge Older to imposition of a jail term not to exceed five days. Shortly thereafter, Judge Older did impose the five-day sentence and fined Farr $500—a sentence appealed to the Ninth Circuit U.S. Court of Appeals.

Meanwhile, Farr came within an eyelash of going through the same ordeal a second time. In 1974 he again was called before a grand jury in Los Angeles which was attempting to determine if any of the six attorneys in the Manson trial had committed perjury when they denied having given Farr the information used in the story about what a prospective witness was going to say. Farr had said he received the information from two of the attorneys, but steadfastly refused to identify them. On June 27, 1974, Superior Court Judge Raymond Choate found Farr in contempt of court for refusing to identify the attorneys during an appearance before the grand jury. Within a week, however, Judge Choate reversed himself and dismissed the contempt conviction on the ground that a 1972 amendment of the California law shielded reporters from being forced to disclose confidential sources when called before grand juries. A California District Court of Appeals since has declared that the state legislature, by enactment of the amendment, intruded into a judiciary function and that the shield law, as amended, is no barrier to California judges who can, if they wish, order newsmen to testify on pain of contempt. Thus, the ramifications of the Farr case continue to spread.

Prior to the imposition of the five-day sentence by Judge Older, a defense committee established on behalf of Farr had pointed out that only one other American journalist had ever served more time in jail than the California reporter, that being John Peter Zenger—imprisoned for nine months before being found innocent of a seditious libel charge in 1735.

The Farr case is not an isolated clash of interests. Rather, there have been repeated encounters as judges have sought to forestall what they believe is interference by the press in the orderly administration of justice. Conversely, many newsmen believe that they are being unconstitutionally prevented from reporting information about crime and justice. The conflict is rooted in the First and Sixth Amendments, the latter requiring that "in all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury." What has happened is that potentially prejudicial information is being published or broadcast at both the pre-trial and trial stages which endangers an accused person's right to a fair trial. In an effort to reduce this threat, judges increasingly have been issuing "gag" orders designed to prevent anyone connected with a case from discussing it out of court. Reporters seeking to circumvent such orders are finding themselves increasingly faced with contempt citations and, as a consequence, they believe freedom of press and the public's right to know are being stifled.

Just when the issue of free press-fair trial emerged is difficult to say, but the famous Lindbergh kidnap case in the 1930s highlighted what was to become an increasingly acrimonious debate between practitioners of law and journalism marked by periodic efforts to restrain the most objectionable crime news reporting.

7.1 Lindbergh case and Canon 35. One of the more sordid chapters in American journalism was written after the kidnaping of the 20-month-old son of Charles and Anne Lindbergh on March 1, 1932. Because of the prominence of the father, who had become a national hero after his solo flight across the Atlantic Ocean in the "Spirit of St. Louis," press coverage was extraordinary. The child was found slain and three years later Bruno Richard Hauptmann was put on trial at Flemington, N.J., in a courtroom packed with reporters and photographers. Witnesses, jurors, anyone remotely associated with the trial were fair game for the press. Hauptmann, found guilty and later executed, very likely was deprived of his right to a fair trial in part because of massive publicity accompanying the trial.

After the trial, an 18-member Special Committee Between the Press, Radio and Bar was set up to seek "standards of publicity in judicial proceedings and methods of obtaining observance of them." In its 1937 report, the committee characterized the performance of the news media before and during the trial as "the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." But the only tangible result of the study was the adoption of Canon 35 by the American Bar Association (ABA) in 1937. This canon, as amended in 1952 and 1963, called for a ban on courtroom TV and radio broadcasting and photography.[4]

Photographic equipment has changed markedly since the 1930s. Flashbulbs no longer are needed for indoor photography because of improvements in film and lenses. Consequently the National Press Photographers Association, among others, argued that Canon 35 was obsolete and that courtroom photography should be permitted. But

the ABA's House of Delegates has consistently refused to dissolve the ban and most judges abide by the canon's prohibition. Even when Canon 35 was superseded by Canon 3A(7) in a new *Code of Judicial Conduct*, adopted by the House of Delegates in 1972, courtroom photography was prohibited except in a few special situations (see p. 180, this chapter).

Another notable example of press interference in due process is afforded by *Shepherd v. Florida*.[5] After the arrest of four Negroes in Lake County, Fla., on charges of raping a white girl, a mob gathered at the jail and the four prisoners were transferred elsewhere for safekeeping. In the meantime the home of Samuel Shepherd's parents was destroyed by fire, Negroes were forced to flee the community, and the National Guard had to be called to restore order. Various news reports were circulated and one newspaper even published a cartoon picturing four empty electric chairs with the caption, "No Compromise—Supreme Penalty."

In the 1951 majority opinion of the Supreme Court which reversed the convictions, Justice Jackson pointed out that newspapers published as a fact, and attributed the information to the sheriff, that the defendants had confessed, even though no confession ever was offered at trial.

Justice Jackson wrote:

> This Court has recently gone a long way[6] to disable a trial judge from dealing with press interference with the trial process. . . . And the Court, by strict construction of an Act of Congress, has held not to be contemptuous any kind of interference unless it takes place in the immediate presence of the court. . . . the last place where a well-calculated obstruction would be attempted. No doubt this trial judge felt helpless to give the accused any real protection against this out-of-court campaign to convict. But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law.

Jackson added that this case presented "one of the best examples of one of the worst menaces to American justice."

In another decision 10 years later, the Court ruled that the

defendant in a sensational murder trial had been deprived of due process of law even though one change of venue had been granted.[7] The defense had asked for a second change of venue and this request was denied. The Indiana Supreme Court had affirmed the conviction in the mass-murder case, but the U.S. Supreme Court reversed on the grounds that the barrage of publicity caused eight jurors to believe in the guilt of the accused, even though they said they would be fair and impartial. The Court held that "with such an opinion permeating their minds it would be difficult to say that each (juror) could exclude this preconception of guilt from his deliberations."

Two other "fair trial" cases led to important decisions by the U.S. Supreme Court. In *Rideau v. Louisiana*[8] in 1963, and *Estes v. Texas*[9] in 1965, a majority of the Court held that actual prejudice need not be demonstrated in order to show that due process was violated.

Rideau, an accused murderer, bank robber and kidnaper, was interrogated by the sheriff without benefit of counsel and the event was televised—not once, but three times! The Court held that a change of venue should have been granted and that due process had been denied even without a showing of actual juror prejudice.

In speaking for a majority of the Court, Justice Stewart said:

> . . . [W]e hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.[10]

In the Estes case, the defendant's conviction on a swindling charge was reversed because two days of the preliminary hearing and part of the trial were televised. The Court held that "no isolatable prejudice" had to be shown as a requisite for reversal.

7.2 The Court instructs the judiciary in *Sheppard v. Maxwell.* Imagine, if you can, newspapers printing these headlines about a person not even formally accused of a crime:

"Quit Stalling and Bring Him In."

"Why Don't Police Quiz Top Suspect?"

"Why Isn't Sam Sheppard in Jail?"

And in the Cleveland *Press* this headline over a page one editorial: "Getting Away with Murder."

Even before Dr. Sheppard was convicted of murdering his wife, these typographical pyrotechnics appeared:

"Dr. Sam Faces Quiz at Jail on Marilyn's Fear of Him."

"Sam Called a 'Jekyll-Hyde' by Marilyn, Cousin to Testify." The cousin was not called as a witness nor was any such testimony introduced at the trial.

These headlines were part of newspaper coverage which began with the slaying of the osteopath's wife on July 4, 1954, at the Sheppard home in suburban Cleveland. Louis B. Seltzer, then editor of the Cleveland *Press*, later took "credit" for forcing law enforcement officials to act against Sheppard who was convicted in 1954 and appealed. The U.S. Supreme Court refused to review the case in 1956, but seven years later, the Court ruled that convictions in state courts could be reviewed by federal district courts in habeas corpus proceedings which require prisoners to be brought before a judge along with information pertaining to reasons for their detention. If the reasons are insufficient, the prisoners can be freed.

Sheppard filed a petition for such a writ against the warden of Ohio State Penitentiary, E. L. Maxwell, and in support he submitted five scrapbooks of news clippings and headlines, principally from the Cleveland *Press* and *Plain-Dealer*, along with some quotes from Seltzer's book, *The Years Were Good*, in which the editor discussed his role in bringing Sheppard to trial.

In 1964, the chief judge of the southern district of Ohio, Carl Weinman, declared that there had been five separate violations of Sheppard's constitutional rights: Failure to grant a change of venue or a continuance because of newspaper publicity before the trial; inability to maintain impartial jurors during the trial because of publicity; failure of the trial judge to disqualify himself although there was some question about his impartiality; unauthorized communications to the jury during its deliberations, and improper introduction of lie detector testimony.

The State of Ohio appealed and the U.S. Court of Appeals reversed Judge Weinman's action. This led to a U.S. Supreme Court review of the case. In an 8–1 opinion written by Justice Tom Clark, the Court ruled:

> Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District

> Court with instructions to issue a writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.[11]

Sheppard v. Maxwell is a landmark case because trial judges were instructed in what they must do to insure a fair trial. Failure to take safeguards, the Court warned, would lead to reversal of convictions obtained. Judges were told to:

1. Adopt strict rules governing the use of the courtroom by newsmen.
2. Limit the number of newsmen in the courtroom "at the first sign that their presence would disrupt the trial."
3. Insulate prospective witnesses from news media.
4. Prohibit "extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."
5. Continue a case or transfer it to another county "not so permeated with publicity" whenever there's "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."
6. Sequester the jury.

The Court said judges must take steps by rule and regulation that will protect their processes, adding: "Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Note, however that the Court avoided direct infringement of First Amendment freedoms by instead suggesting "gags" for those who might give information to the press, rather than directly restricting what the press could print. The latter would be a clear violation of press freedom.

Concerning Sheppard's fate, the writ was issued and the state decided to try him again on the second-degree murder charge. The 16-day trial was marked by tight restrictions, with the number of reporters in the courtroom severely limited. A verdict of innocent was returned on Nov. 16, 1966. Sheppard attempted to put his life together again. He remarried, returned to the practice of osteopathic medicine at a Youngstown, Ohio, hospital, but resigned shortly afterward when he was named in a malpractice suit after a patient died. He was divorced, set up an office in Columbus, turned briefly to professional wrestling, remarried, and on April 6, 1970, died—the end of a tragic personal story and one that casts a shadow across the news media.

7.3. Warren Commission. On Nov. 22, 1963, President John F.

Kennedy was killed by an assassin in Dallas, Tex. The Associated Press moved a story shortly thereafter which read, in part:

> DALLAS, Tex. (AP)—A 24-year-old man who professed love for Russia was charged today with murder in the death of President Kennedy.
>
> The charge was filed against Lee Harvey Oswald. Officers said he was the man who hid on the fifth floor of a textbook warehouse and snapped off three quick shots that killed the President and wounded Gov. John B. Connally of Texas.

And United Press International (UPI) moved a story for afternoon papers on Nov. 23 which read, in part:

> DALLAS (UPI)—Lee Harvey Oswald, an avowed Marxist and a Fidel Castro sympathizer, was charged today with the assassination of President Kennedy.
>
> Manacled, his face cut and bruised, his manner sullen, the 24-year-old political misfit and Marine reject was booked on a murder charge and jailed without bond.
>
> . . . [D]istrict Attorney Henry Wade said he had 15 witnesses to the assassination. He said investigators had learned from Oswald's Russian-born wife that he had a rifle of the type used to kill the President and had it with him the night before the assassination.
>
> "I believe we have the evidence to convict him," Wade said.

There were many other news reports during the period following the arrest of Oswald until he was slain in the basement of the Dallas Police Department building by Jack Ruby—the first real televised murder. The collective result was to leave no doubt in the minds of most Americans that Oswald was the killer. The question remains: If Ruby had not taken the law into his own hands, could Oswald have received a fair trial anywhere in the United States, let alone in Texas where he would have been tried? No change of venue could have redressed the assault upon his right to a fair trial. Sequestering of a jury would not have safeguarded his rights. He stood convicted in the eyes of most Americans. An assassin "spared" the administrators of justice an ordeal incomparable in the annals of law to that time.

Upon assuming the presidency, Lyndon Johnson appointed a commission headed by Chief Justice Earl Warren to investigate Kennedy's assassination. The Warren Commission, as it became known, issued a report in September, 1964, which said that neither the press nor the public had a right to be contemporaneously informed by the

police or prosecuting authorities of the details of the evidence being accumulated against Oswald. "Undoubtedly the public was interested in these disclosures," said the commission, "but its curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury. The courtroom, not the newspaper or the television screen, is the appropriate forum in our system for the trial of a man accused of crime."

The commission pointed out that within 24 hours of the assassination more than 300 news media representatives were in Dallas, many of them attempting to crowd onto the third floor of the police department where Oswald was undergoing interrogation.

Concerning the news media and police, the commission concluded:

> While appreciating the heavy and unique pressures with which the Dallas Police Department was confronted . . ., primary responsibility for having failed to control the press and to check the flow of undigested evidence to the public must be borne by the police department. It was the only agency that could have established orderly and sound operating procedures to control the multitude of newsmen gathered in the police building after the assassination.
>
> The commission believes, however, that a part of the responsibility for the unfortunate circumstances . . . must be borne by the news media. The crowd of newsmen generally failed to respond properly to the demands of the police. Frequently without permission, news representatives used offices on the third floor, tying up facilities and interfering with normal police operations.
>
> . . . [T]he Commission believes that the news media, as well as police authorities . . . must share responsibility for the failure of law enforcement which occurred in connection with the death of Oswald. On previous occasions, public bodies have voiced the need for the exercise of self-restraint by the news media in periods when the demand for information must be tempered by other fundamental requirements of our society.

Among the recommendations was one that urged representatives of the bar, law enforcement associations, and news media to "work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigation, court proceedings, or the right of individuals to a fair trial."

The commission added that the promulgation of a "code of

professional conduct" by the news media to cover future situations would be "welcome evidence that the press had profited by the lesson of Dallas." This recommendation was rejected shortly thereafter by the board of directors of the American Society of Newspaper Editors (ASNE). A voluntary code, the board said, could be "more harmful than the evil complained of" because of restrictions—even self-imposed ones—on freedom of press.

7.4 Katzenbach-Mitchell guidelines. The failure of the news media to act in regard to the commission's recommendation prompted U.S. Atty. Gen. Nicholas Katzenbach to announce on April 16, 1965, rules governing what Justice Department personnel could release to the press at the time a person was arrested for a federal crime. The rules, made public at the ASNE's annual meeting in Washington, D.C., applied to FBI agents, U.S. marshals, U.S. attorneys, Bureau of Prisons and the Immigration and Naturalization Service.

Katzenbach told the editors that his order placed restraints upon news sources, not on the press. "It is not for us to regulate the conduct or the content of the press," he said, adding: "For my part, I hope we can demonstrate that there is room in our Constitution for both the First Amendment and the Sixth."

Prior to Katzenbach's announcement, the ASNE had approved a committee report calling upon the Fourth Estate to vigorously resist any regulation that might "black out" large areas of crime news.

The Katzenbach guidelines applied only to criminal cases and became operative at the time of arrest or indictment. However, on Oct. 26, 1971, Atty. Gen. John N. Mitchell issued another directive which extended the guidelines to federal civil cases and placed them in effect from the time a person became the subject of a criminal investigation, rather than from the time of arrest.

Under the guidelines, Justice Department personnel can make public:

1. The defendant's name, age, residence, employment, marital status and similar background information.

2. The substance or text of the charge, such as the complaint, indictment or information.

3. The identity of the investigating and arresting agency and the length of the investigation.

4. The circumstances immediately surrounding an arrest, including the time and place of arrest, pursuit, possession and use of weapons and a description of any items seized.

Information about a defendant's prior criminal record is not to be volunteered, but federal conviction data can be released upon request.

The rules require personnel to refrain from making available:

1. Observations about a defendant's character.
2. Statements, admissions, confessions or alibis attributable to a defendant.
3. References to investigative procedures, such as fingerprints, polygraph examinations, ballistic or other kinds of laboratory tests.
4. Statements concerning the identity, credibility or testimony of prospective witnesses, or the refusal or failure of the accused to make a statement.
5. Statements concerning evidence or arguments in the case; any opinion as to the guilt of the accused, or any statement concerning the possibility of a plea of guilty to the offense charged or to a lesser offense.

Personnel also are instructed to take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in federal custody. In addition, any photographs of a defendant should not be made available unless a law enforcement function would be served by such release.

7.5 The "Reardon Committee." The continuing concern for fair trials and the orderly administration of justice led the ABA to create a study group composed of 12 prominent judges and lawyers with Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court as chairman. The "Reardon Committee" released a 226-page report in October, 1966, and many of the recommendations contained therein were adopted in 1968 by the ABA House of Delegates. The 1966 report sparked the "battle of the century" for American newspapers, according to the annual report of the Freedom of Information Committee of the Associated Press Managing Editors which declared that the Reardon Report "would curtail news coverage of the police station and the courts more drastically than anything that's happened to news reporting in this country in many decades."

As adopted by ABA, the standards recommend that lawyers, law enforcement officers and judges not release information of the type banned under the Katzenbach-Mitchell guidelines. Press representatives reacted most strongly against those standards which call for exclusion of the public, and therefore the press, from any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case if matters might be disclosed that could be inadmissible in evidence at a trial and therefore possibly result in interference with a defendant's right to a fair trial. In addition, the ABA adopted the following standard relating to the exercise of the contempt power:

It is recommended that the contempt power should be used only with considerable caution but should be exercised under the following circumstances:

1. Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial: (a) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is willfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect; or (b) makes such a statement intending that it be disseminated by any means of public communication.

2. Against a person who knowingly violates a valid judicial order not to disseminate, until completion of the trial or disposition without trial, specified information referred to in the course of the judicial hearing closed pursuant to . . . [ABA-adopted] recommendations.[12]

The controversy unleashed by the report and subsequent adoption of the recommended standards reached such proportions that in 1969 the ABA's Legal Advisory Committee on Fair Trial and Free Press—the successor to the Reardon Committee—published an information manual, *The Rights of Fair Trial and Free Press*, which said, in part:

—The standards are directed primarily to lawyers, court and law enforcement personnel, and not to the press.

—They specify types of prejudicial information which lawyers participating in the case *should not release*, because such information may not be admissible in court and could influence the outcome of the trial.

—They provide *for the prompt release* from official sources of basic facts about crimes committed and circumstances surrounding them.

—They urge law enforcement agencies to follow the same rules as apply to lawyers with respect to withholding of specified prejudicial information before trials.

—They do not impose restrictions upon the freedom of the media to publish information they are able to obtain through their own initiative, or to criticize law enforcement or the courts.[13]

The ABA committee also stated the proposition that there was no

conflict of rights involved in the free press-fair trial issue and urged a *modus vivendi* for the groups concerned.

7.6 Voluntary press-bar guidelines. Although press opposition has simmered down since ABA adoption of the Reardon standards, basic fears remain. The two major ones are that judges will increasingly use their contempt power against journalists and that First Amendment freedoms will suffer as a consequence of restraints placed on both news sources and newsmen. The Farr case, noted earlier, as well as some unusual actions by judges to be noted later emphasize the danger.

As a way of warding off further restrictions, and also out of a deepening concern that Sixth Amendment rights need to be protected, news representatives in 23 states had by 1973 joined with state bar associations in promulgating voluntary agreements or guidelines concerning free press-fair trial issues. Such agreements are voluntary, do not necessarily represent consensus among all journalists or newspapers in those states, and lack means of enforcement. What they represent are (1) concern about the issues involved and (2) limited efforts to curb abuses.

According to a survey by the Freedom of Information Committee of the Associated Press Managing Editors, most of the editors, lawyers and judges who participated in the survey in their states reported that voluntary agreements between the news media and legal profession have been successful.[14] Editors in 20 of the code states said there had been no appreciable loss of the people's right to know. In one state editors believed some freedom had been lost, and in the two other states no clear-cut view emerged.

States with voluntary guidelines as of mid-1974 were Arizona, California, Colorado, Idaho, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin. In New Jersey and Pennsylvania, the voluntary guidelines have been adopted as rules of court.

Massachusett's guide to bar-press relations lists some do's and don'ts for both groups. The press should avoid:

1. Publication of interviews with subpoenaed witnesses after an indictment is returned.

2. Publication of the criminal record of the accused after an indictment is returned or during the trial unless made part of the evidence in the court record. The defendant is being tried on the charge for which he is accused and not on his record.

3. Publication of confessions after an indictment is returned unless made a part of the evidence in the court record.

4. Publication of testimony stricken by the court unless reported as having been stricken.

5. Editorial comment preceding or during trial, tending to influence judge or jury.

6. Publication of names of juveniles involved in juvenile proceedings unless the names are released by the judge. In most states, such publication is forbidden by law except when the juvenile court judge authorizes such publication.

7. The publication of any "leaks," statements or conclusions as to innocence or guilt, implied or expressed by the police or prosecuting authorities or defense counsel.

The Massachusetts' guidelines for the bar permit a factual statement of the arrest, circumstances and incidents concerning a person charged with a crime, but the following should be avoided:

1. Statements or conclusions as to the innocence or guilt, implied or expressed, by the prosecuting authorities or defense counsel.

2. Out-of-court statements by prosecutors or defense attorneys to news media in advance of or during trial, stating what they expect to prove, who they propose to call as witnesses, or public criticism of either judge or jury.

3. Issuance by the prosecuting authorities, counsel for the defense or any person having any official connection with the case of any statements relative to the conduct of the accused, statements, "confessions" or admissions made by the accused or other matters bearing on the issue to be tried.

4. Any other statement or press release to the news media in which the source of the statement remains undisclosed.

The guidelines also contain the statement that in the interest of fair and accurate reporting, news media have a right to expect the cooperation of the authorities in facilitating adequate coverage of law enforcement processes.

7.7 American Bar Association's code. Not only have joint bar-press guidelines emerged, but the ABA's House of Delegates adopted a Code of Professional Responsibility which became effective Jan. 1, 1970, for all ABA members. Included in the code is Disciplinary Rule 7-107 which deals with trial publicity, as follows:[15]

A. A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

1. Information contained in a public record.
2. That the investigation is in progress.
3. The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
4. A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
5. A warning to the public of any dangers.

B. A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement of the type which federal law enforcement officials cannot release under the Katzenbach guidelines.

C. DR 7-107 does not preclude a lawyer from announcing:

1. The name, age, residence, occupation, and family status of the accused.
2. If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
3. A request for assistance in obtaining evidence.
4. The identity of the victim of the crime.
5. The fact, time and place of arrest, resistance, pursuit, and use of weapons.
6. The identity of investigating and arresting officers or agencies and the length of the investigation.
7. At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
8. The nature, substance, or text of the charge.
9. Quotations from or references to public records of the court in the case.
10. The scheduling or result of any step in the judicial proceedings.
11. That the accused denies the charges made against him.

D. During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense in a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be

disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

7.8 Rules, standards adopted by the judiciary. In addition to guidelines adopted by press-bar representatives, the ABA's disciplinary rules pertaining to trial publicity, and the issuance of rules by police chiefs in many cities patterned, for the most part, after the Katzenbach guidelines, the courts themselves have adopted rules governing the release of information. For example, Rule 8 of the Criminal Rules of the U.S. District Court for the Eastern District of New York is a paraphrase of the Reardon-inspired recommendations adopted by the ABA in 1968 and the Disciplinary Rule 7-107 adopted shortly thereafter.[16] Like those adopted by many federal courts, Rule 8 also is patterned after the standards promulgated by the Judicial Conference of the United States which, in turn, were prompted by the Reardon Committee recommendations.

In a case analogous to *Rideau*, the Pennsylvania Supreme Court unanimously reversed the conviction of Alan D. Pierce after law enforcement authorities released pre-trial statements purporting that Pierce was the confessed "triggerman" in a slaying and that he had a past record of violent crimes.[17] In ordering a new trial, the court issued strict guidelines for all Pennsylvania police and district attorneys concerning types of information that should not be released to the news media, as follows: (1) existence or contents of any statement or confession given by the defendant or his refusal to give a statement or to take tests; (2) prior criminal record of defendant, including arrests and convictions; (3) any inflammatory statements as to the merits of the case or the character of the defendant; (4) the possibility of a guilty plea. In addition, authorities were warned not to pose defendants for photographs at or near the scenes of crime. The court said that anything short of compliance with these standards may deprive a defendant of due process and result in reversal of convictions obtained.

7.9 Contempt power vs. freedom of press. With courts adopting stricter rules on the release of extrajudicial and pre-trial statements, and placing limitations on the press during the hearing and trial phases of cases in accordance with instructions from the U.S. Supreme Court in *Sheppard*, it is little wonder that newsmen have found themselves dangling at the end of contempt citations. The power of a judge to deal with what he regards as interference in the trial process is well established when the interference takes place in

or near the courtroom, such as a disturbance in the courtroom. But what about the judge's contempt power when presumably contemptuous behavior takes place far from the courtroom? The landmark ruling in such situations goes back to 1941 and the U.S. Supreme Court's decision in the combined cases of *Bridges v. California* and *Times-Mirror Co. v. Superior Court.*[18]

The managing editor of the *Los Angeles Times* and the Times-Mirror Company were fined a total of $600 for publication of three editorials, one of which concerned two labor union members who had been found guilty of assaulting non-union truck drivers. The editorial urged the Superior Court judge to deal harshly with the defendants. In the contempt action, the trial judge found an "inherent tendency," and the California Supreme Court a "reasonable tendency" (the standard used by judges in England), on the part of the newspaper to interfere with the orderly administration of justice. But the U.S. Supreme Court reversed the lower courts, stating in part:

> It is to be noted at once that we have no direction by the Legislature of California that publications outside the courtroom which comment on a pending case in a specified manner should be punishable. As we said in Cantwell v. Connecticut, 310 U.S. 296, 307–308, . . . such a "declaration of the state's policy would weigh heavily in our challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." . . . For here the Legislature of California has not appraised a particular kind of situation and found a specified kind of danger sufficiently imminent to justify a restriction on a particular kind of utterance.

Then, using a yardstick applied in 1919 by Justice Holmes—the "clear and present danger" doctrine for restricting First Amendment freedoms—the Court commented:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. . . . For the First Amendment does not speak equivocably. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest

> scope that explicit language, read in context of a liberty-loving society, will allow. * * *
>
> We are aware that although some states have by statute or decision expressly repudiated the power of judges to punish publications as contempts on a finding of mere tendency to interfere with the orderly administration of justice in a pending case, other states have sanctioned the exercise of such a power. . . . But state power in this field was not tested in this Court for more than a century. . . . And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of a situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press.

The Court—in stating that there must be a clear and present danger to the orderly administration of justice before a judge can punish indirect contempt (contempt that takes place outside the courtroom)—concluded unanimously:

> . . . [I]n accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression.
>
> We are all of the opinion that, upon any fair construction, their [editorials'] influence on the course of justice can be dismissed as negligible, and that the Constitution compels us to set aside the convictions as unpermissible exercise of the state's power.

This decision was buttressed by the Court's opinion in *Craig v. Harney*[19] on May 19, 1947—a case involving a county court judge at Corpus Christi, Tex., who refused to accept a jury's verdict. An editorial described the judge's action as a "travesty on justice" and the judge promptly sentenced the newspaper publisher, an editorial writer, and a reporter to three days in jail for contempt. In reversing the contempt action, the U.S. Supreme Court conceded that the newspaper indulged in "strong language, intemperate language, and, we assume, in unfair comment." But, said the Court: "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice.

The danger must not be remote or even reasonable; it must immediately imperil."

When, in 1968, two newsmen were held in contempt of court during the James Earl Ray trial in the slaying of Dr. Martin Luther King Jr., the judge did so on the grounds that their stories constituted "a clear and present danger"—the same test required by the U.S. Supreme Court in the absence of legislative declaration.

More recently, the U.S. Supreme Court refused on Nov. 17, 1971, to review a Washington Supreme Court ruling that a trial judge could not use his contempt power to punish two Seattle, Wash., reporters for stories they had written about events occurring in open court.[20] As the state's highest court ruled:

> If restraints upon the exercise of First Amendment rights are necessary to preserve the integrity of the judicial process, then those restraints must be narrowly drawn. The limitations imposed cannot be greater than is necessary to accomplish the desired constitutional purpose. That is not what occurred here. To sustain this judgment of contempt would be to say that the mere possibility of prejudicial matter reaching a juror outside the courtroom is more important in the eyes of the law than is a constitutionally guaranteed freedom of expression. This we cannot say.

But almost before the ink was dry on this decision, and certainly before media practitioners had time to digest the import of the Washington Supreme Court's ruling, a most unusual case was taking shape in Louisiana. In November, 1971, U.S. District Court Judge E. Gordon West fined two Baton Rouge, La., newsmen $300 each for contempt of court after they ignored a judge's order that testimony during a hearing in open court not be published. An appeal was begun in part on the basis that testimony in open court was part of the public record and therefore "safe" to report.

The Fifth Circuit Court of Appeals subsequently held[21] that the judge's order violated the First Amendment, principally because of the proposition repeatedly reaffirmed by the U.S. Supreme Court since *Craig v. Harney* that a trial is a public event and those who see and hear what happens in the courtroom may report it with impunity. "There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it," the Supreme Court had said in *Harney*.[22]

The appellate court also said there was no similarity between what

Judge West faced in his courtroom and the "Roman holiday" or "carnival atmosphere" created by the hundreds of reporters at the Sheppard trial. Furthermore, the public's right to know was particularly compelling since the litigation involved a charge that elected state officials had trumped up charges against an individual solely because of his race and civil rights activity.

Thus, on the face of it, reporters Larry Dickinson of the *Baton Rouge State Times* and Gibbs Adams of the *Baton Rouge Morning Advocate* seemed justified in ignoring an unconstitutional order. Even the ABA-adopted standards specify that the contempt power should be exercised only against a person who knowingly violates a *valid* judicial order.[23] As it turned out, the reporters won a pyrrhic victory because the appellate court went on to assert that unless there could be a showing of "transparent invalidity" or "patent frivolity" surrounding the order, "it must be obeyed until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality, or lack thereof." The case was remanded to Judge West for a determination of whether the contempt finding would still be appropriate in light of the fact that the order disobeyed was constitutionally infirm.

The newsmen carried their case to the U.S. Supreme Court, arguing that the judge's order was so patently illegal that it freed them from responsibility to comply with it while their appeal was pending. Also the specter of prior restraint was raised in a brief submitted in their behalf. Asserting that newspaper coverage of the hearing did not pose a threat to anyone's right to a fair trial, the brief asked if government could meet its heavy burden to justify prior restraint "merely by the assertion of the possibility of a theoretical conflict arising in the future between constitutional rights." If so, "then freedom of the press as we know it would be held hostage to the fertile imagination of the judges."[24]

In the federal government's brief, U.S. Solicitor General Robert H. Bork and Asst. Atty. Gen. Henry E. Petersen contended that the judge's order was not frivolous nor was it unreasonable to conclude that newspaper accounts of the hearing might cause irreversible prejudice to the rights of the accused and the public to have an impartial jury trial at the place where the crime was allegedly committed. Under such circumstances, the reporters had no right to disregard the District Court's order because they thought it frivolous or patently invalid. Compliance with such an order, claimed the government's brief, must be compelled in an area where some restrictions on the press are permissible in pursuit of the constitutional requirement of impartial juries.

Whatever the merits of opposing arguments, the Supreme Court declined to hear the appeal in a memorandum decision which drew dissent only from Justice Douglas.[25]

In yet another case, the news media ultimately were vindicated but again ended up the "losers." In November, 1971, Justice George Postel of the Supreme Court for the County of New York barred the public, including the press, from the criminal trial of Carmine J. Persico. Reporters, instructed by the judge to write only about those things occurring in open court or face contempt, pressed the judge about the wisdom of such an order and he thereupon granted a defense motion to exclude the public from the trial. Under New York law, only certain types of trials, such as those involving rape or abortion proceedings, can be closed by a judge. Persico was being tried for an alleged loan shark operation. News organizations appealed and the Court of Appeals on March 22, 1972, unanimously declared Justice Postel to have erred in closing the trial to the public. But the proceedings had been closed nonetheless!

The dilemma of being right, but ending up as "losers," is also illustrated by the following selected cases:

A. A "gag" order was issued by a Superior Court judge in California prohibiting the news media from publishing the names of nine prison inmates who were to appear as witnesses in a murder trial involving the stabbing death of a convict. Note that the order was not directed toward witnesses, court officers, etc., but at the news media. Upon appeal by several southern California newspapers, a three-judge panel of the Fourth District Court of Appeal in San Bernardino unanimously vacated the lower court order on the ground that it was an unconstitutional prior restraint. Referring to the clear and present danger doctrine, Judge John Kerrigan said for the panel, "Even in the infrequent notorious cases, a prior restraint on publication should be considered only upon presentation of strong proof that the publication sought to be restrained meets the clear and present danger standard."[26] However, said the court, "The conclusion is inescapable that a prior restraint on publication in the name of a fair trial should rarely be employed against the communication media."

But until the appellate court vacated the lower court's order, the press remained unconstitutionally restrained.

B. This same situation developed in a New Orleans, La., case involving a pre-trial hearing for two persons accused of the rape-slaying of a student nurse. Criminal Court Judge Oliver P. Schulingkamp issued an order which directed the news media to avoid publication of (1) interviews with subpoenaed witnesses; (2) past criminal records, if any, of the defendants; (3) any possible confes-

sions or other incriminating statements unless made a part of the court record; (4) any testimony stricken from the record unless reported as having been stricken; and (5) editorial comment which might influence witnesses or jurors. The Times-Picayune Publishing Corp. of New Orleans attacked the order as being unconstitutional, citing *Bridges*, *Craig v. Harney* and *Dickinson* as precedents, but the Louisiana Supreme Court refused to order a stay of Judge Schulingkamp's "guidelines" although three of the court members dissented. On July 29, 1974, Justice Powell of the U.S. Supreme Court stayed that portion of Judge Schulingkamp's order which imposed direct restrictions on the press,[27] but he did so only until the entire Court could decide what to do, if anything, about the issue involved.

Powell said the order imposed significant prior restraint on media publication and therefore would come to the U.S. Supreme Court "bearing a heavy presumption against its constitutional validity." As precedents, he cited the Pentagon Papers case, *Organization for a Better Austin*, *Bantam Books* and *Near*. In addition, he noted that the Supreme Court repeatedly has recognized that trials are public events (*Sheppard*, *Estes* and *Craig v. Harney*). Furthermore, the trial judge's order was directed, in part, at media content (*see*, *Miami Herald Publishing Co. v. Tornillo*, Chap. XIII).

But in granting the stay, Powell also called attention to some of the options available to the trial judge to protect the defendants' rights to a fair trial, including those enumerated in *Sheppard* by Justice Clark. Powell also indicated that the defendants might have sought to close the pre-trial hearing to the press and public. Unlike states like California, Iowa and Montana, Louisiana does not have a law permitting a closed pre-trial hearing. Powell noted that the Supreme Court had not been called upon to determine whether such laws are constitutional, and he said that he intimated no view on that question even though he called the possibility of a closed hearing to the trial judge's attention.

Powell made it clear that his decision to grant the stay was based, in part, on the "reasonable probability" that four other members of the Supreme Court would consider the main issue "sufficiently meritorious for the grant of certiorari" and that there would be a "significant possibility of reversal of the lower court's decision. . . ."

Note, however, that even though the press appears to be vindicated by Justice Powell's action, it nonetheless had been denied the right to publish certain kinds of information or opinions about the case on pain of what might prove to be a valid contempt charge. The Times-Picayune Co. abided by the judge's order even though it had ample reason to believe the order was unconstitutional. In the process it was unconstitutionally restrained.

C. A different kind of "gag" order occurred in Hawaii, only this one resulted from passage of a law which makes it a misdemeanor for law enforcement officials to disclose records relating to the questioning, apprehension, detention, arrest or charging of persons for or in connection with a criminal offense in cases where there are no convictions. As a result, Honolulu police announced that henceforth they would not release any information on arrests until an accused person was convicted![28] But within a few days of this announcement, the news media succeeded in obtaining a temporary injunction against enforcement of the new statute from Circuit Court Judge Norito Kawakami. In issuing the injunction, the judge said the law was being applied in such a manner as to violate freedom of press guarantees.[29] The Honolulu police department rescinded its order, but a spokesman indicated there would be a curtailment of pre-conviction information.

D. Although a judge's power is virtually unlimited in the courtroom, there's a question of how far a "gag" order reaches beyond the physical environs of the courtroom. Except in those instances where a "clear and present danger" exists, it does not reach into a newspaper and control what an editorial writer might wish to say; but can such an order apply to news media representatives wherever they might be in the courthouse building? Does it extend to the sidewalks around the courthouse? The law is not settled in this regard.

In mid-1973, U.S. District Court Judge Winston E. Arnow at Gainesville, Fla., fined Columbia Broadcasting System, Inc., $500 for criminal contempt when a CBS artist did not, according to the judge, abide by his verbal order not to make sketches in or outside the courtroom (the latter from memory) during the trial of the "Gainesville Eight." The judge also had issued an order limiting the number of reporters in the courtroom and prohibiting certain kinds of statements by the defendants, witnesses and members of the Vietnam Veterans Against the War.

On July 11, 1974, the Fifth Circuit Court of Appeals voided the ban on sketches, but it ordered a different judge to determine if the contempt of court fine should prevail in view of the order being unconstitutional.[30] Thus, as in *Dickinson*, the order was illegal but the contempt of court fine might still be upheld. The anomaly results from the need to protect conflicting interests.

The *Estes* case showed that a judge dare not permit the televising or broadcasting of court proceedings. He also can ban photo journalists from the hallway outside the courtroom, according to the Fifth Circuit Court of Appeals which upheld a fine imposed on a news photographer who violated a standing order of a lower court by taking a picture of a defendant in the hallway.[31] But whether the

ban can extend to all areas of the courtroom building is arguable. The Seventh Circuit Court of Appeals upheld a ban on photographers and broadcasters on the floor where the courtroom was located, as well as the first floor entrance to elevators, but it rejected that part of the order which attempted to put off-limits the main lobby and an open plaza.[32]

The ABA's Canon 3A(7), which superseded Canon 35, was adopted by the House of Delegates on Aug. 16, 1972 and, when implemented by a jurisdiction, provides, as follows: "A judge should prohibit broadcasting, televising, recording, or taking of photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions. . . ." In the new *Code of Judicial Conduct*, this Canon permits a judge to authorize the use of recording devices for (1) presentation of evidence and for perpetuation of a record; (2) for ceremonial purposes (such as photographing a naturalization ceremony); (3) the recording or reproduction of court proceedings if the means of recording do not distract or impair the dignity of the proceedings, the parties consent, each witness consents, the reproduction is exhibited after the proceeding has been concluded and all direct appeals have been exhausted, and the reproduction is exhibited only for instructional purposes in educational institutions. There is nothing in the canon that prohibits sketching in or near the courtroom. A judge, however, is given broad power to use electronic or photographic devices, such as closed circuit TV, to accommodate an overflow crowd, to "pipe" the trial proceedings to a special room set aside for the convenience of the press, or to televise the proceedings to a special room where a disruptive defendant is being held.

7.10 Selected Cases. Since the Supreme Court laid down the "law" about what the judiciary must do to protect a defendant's right to a fair trial, there have been cases which have challenged the ability, ingenuity and patience of the judiciary to protect such rights. Only a few of these will be reviewed. They are included because of their notoriety or because of the measures invoked by the judiciary.

1. Richard Speck was arrested on July 17, 1966, and accused in the slaying of eight student nurses in their hospital dormitory in Chicago. The arrest took place six weeks after the Supreme Court's decision in the Sheppard case, 15 months after the Katzenbach guidelines were announced, and about two years after the Warren Commission made its recommendations. Two days before Speck's arrest, Chicago Police Supt. Orlando Wilson was quoted in Chicago newspapers and by wire services as saying that "he (Speck) is the killer." And using virtually the same words that were used by District

Attorney Henry Wade ("I believe we have the evidence to convict him (Oswald)," Wilson said, "I feel we have enough evidence to convict him."

Resulting criticism prompted Wilson to reply, "I saw no reason for withholding this information." Why? Because Speck's fingerprints were found in the dormitory, the superintendent said, and because the only survivor of the mass murders, who hid under a bed, had identified Speck.

A change of venue was granted and the trial took place in Peoria, Ill., about 150 miles from the murder scene. The trial judge restricted the number of reporters in the courtroom, limited the number of telephones that could be installed in the building for use by newsmen, warned those connected with the case not to discuss it outside the courtroom, and had the jury sequestered. The two-week trial ended in a guilty verdict; and on Nov. 22, 1968, the Illinois Supreme Court rejected a defense counsel contention that Speck had not received a fair trial.

2. Following the assassination of U.S. Sen. Robert Kennedy in June, 1968, Los Angeles Mayor Sam Yorty released notebooks found in the home of the accused, Sirhan Sirhan, which contained a number of statements including "Kennedy has to be assassinated before June 5, 1968" (the first anniversary of the Arab-Israel six-day war).

On June 7, when Sirhan was indicted, Los Angeles Superior Court Judge Arthur Alarcon implemented a number of Reardon-inspired restrictions (even before the Reardon recommendations were adopted by the ABA). The judge prohibited the dissemination of any information about the investigation and prosecution of Sirhan by any attorney, court attache, public official, grand juror or law enforcement officer connected with the case.

The judge's "gag" order stirred strong opposition from segments of the California press and from the California Freedom of Information Committee which voiced fears that such orders could:

1. Deprive the public of its right to be informed of official actions;
2. Promote dissemination of false rumors that might create needless alarm, and prevent officials from allaying public fears by giving factual information or denying such rumors;
3. Subordinate the First Amendment and provisions of the California State Constitution by diluting the right of free speech and forbidding comment even by persons remotely removed from direct connection with the case but who might have helpful information;

4. Put unreasonable emphasis on the rights of the defendant at the expense of other equally important public rights;

5. Provide an undesirable precedent by enunciating principles of secrecy in matters of crime, law enforcement and trials.

The Los Angeles chapter of Sigma Delta Chi urged that the restrictions be rescinded and the chapter's board of directors went on record as "vigorously" opposing the "curtain of secrecy" drawn about the case.

Sirhan later was found guilty and sentenced to be executed.

3. On July 30, 1968, Judge W. Preston Battle, who presided at the trial of James Earl Ray for the murder of Dr. Martin Luther King Jr., issued a code of procedures containing various restrictions. The code forbade anyone connected with the case, and all persons employed in the Shelby County, Tenn., Criminal Courts Building, from participating in interviews or press conferences or from making any extrajudicial statements about the case pertaining to: (1) guilt or innocence of accused; (2) any plans relating to preparation or conduct of the trial, including techniques or strategy to be used; (3) jurors or potential jurors who might be empaneled; (4) credibility of any information or witness; (5) the treatment, acts or attitude of the defendant.

The judge also set up a committee of seven lawyers to advise him if any prejudicial pre-trial information was released. On Sept. 30 the judge found two Memphis newsmen, a lawyer and a private detective guilty of contempt of court for violating provisions of the code. He ruled that comments carried in stories written by the two reporters were "extremely prejudicial" and constituted a clear and present danger to empaneling an impartial jury.

Since the contempt citation was based on actions that had not taken place in or near the courtroom, the judge admitted that he was acting at the "frontier of the law," but cited the *Sheppard* decision as the basis for taking such steps.

4. In one of the strangest cases on record, Charles Manson, later found guilty in the mass slaying of five persons, including actress Sharon Tate, tried to contaminate his own trial in Los Angeles when, on Aug. 4, 1970, he grabbed a newspaper and held it up for the jurors to see. The headline read: MANSON GUILTY, NIXON DECLARES.

A defense attorney, who had brought the newspaper into the courtroom, was sentenced to three nights in jail by the presiding judge who stopped the trial and questioned jurors to determine if they had been influenced by the headline. One juror so indicated, but this was not enough for a mistrial, in the opinion of the judge.

President Nixon apparently believed it was not necessary to restrain an opinion about Manson's guilt or innocence because the jury was being guarded against outside-the-courtroom contamination. In fact, during a trial that required a six-million-word transcript, the jury was sequestered 197 nights!

5. On Jan. 29, 1974, both the prosecution and the defense agreed that 17-year-old Elmer Wayne Henley Jr., accused of 6 of 27 mass murders in Houston, Tex., could not receive a fair trial at that time because of prejudicial publicity. An extended continuance was granted by the District Court judge in Houston who overruled a defense motion to throw the case out on grounds of massive prejudicial publicity. Following the discovery of the mass murders in August, 1973, another defendant in the slayings, David Brooks, reportedly made a statement accusing Henley of killing six of the victims. This statement was published in the *Houston Post* and widely disseminated.

The trial of Henley was moved to San Antonio where, at the time of jury selection, District Court Judge Preston Dial considered, for a time, barring the press and public from the courtroom to reduce the risk of exposing jurors to possible prejudicial news media reports; but when attorneys for several news organizations moved to file a protest, the judge relented and opened the proceedings to the press. Henley was found guilty and sentenced on Aug. 8, 1974, to 594 years in prison (99 years for each of the slayings). The question in this and other cases reviewed in this chapter persists: does a change of venue or extended delay of trial overcome the danger to fair trials of prejudicial pre-trial publicity?

7.11 Summary. Like previous chapters, the chapter on free press-fair trial deals with rights in conflict; i.e., the right of the public to know and the constitutional right of a free press in conflict with the constitutional right of an accused person to a fair trial.

There are two critical phases in this controversy: the pre-trial stage and the trial stage. An accused person is most vulnerable at the pre-trial stage when, as in the Sheppard case, massive prejudicial information can be disseminated. To prevent the release of prejudicial pre-trial information, the Katzenbach guidelines were implemented. They apply to federal law enforcement officials, but since have been adopted by various state and local police departments.

In 1966, the U.S. Supreme Court in its *Sheppard* decision laid down instructions as to what the judiciary must do to protect the trial process; i.e., change the location of trials, insulate witnesses, proscribe extrajudicial statements, sequester juries, limit the number of reporters at the trial, etc.

Next came the Reardon Committee recommendations, aimed at law enforcement officers, the bar and the judiciary—but not the press. As adopted by the ABA in 1968, these standards are intended to prevent the sources of news from releasing prejudicial information at both the pre-trial and trial stages.

With various restrictions placed upon the sources of crime and criminal justice news, the inevitable consequence has been confrontations between the press and the judiciary in the form of publication of prohibited information and the issuance of contempt citations, such as in the Farr case. Clearly, a judge's power is most valid when dealing with situations that take place in his presence. The U.S. Supreme Court has held that a judge can only deal with outside-the-courtroom press interference in the orderly administration of justice when there is a clear and present danger to the administration of justice, or when a legislative body has seen a danger and taken steps to prevent it. Thus, the news media are confronted with a dilemma: they can disobey what ultimately may be determined to be an invalid exercise of a judge's power in "gagging" the press, yet still be held in contempt of court, or they can constitutionally exercise freedom of press and, notwithstanding the ultimate legality of their action, face the wrath of a judge through his power to deal summarily with what he construes to be contempt of court. The dilemma is one that will confront journalists and jurists for many years to come.

CHAP. VII—Pass in Review

1. What is the Sixth Amendment and why might it "collide" with the First Amendment?"
2. What was Canon 35 (now Canon 3A(7))?
3. One of the chief means of assuring an accused person a fair trial is to grant a change of venue; that is, move a trial beyond the probable influence of prejudicial news reports. Could this have been done in the Lee Harvey Oswald case? What about some other widely-publicized criminal cases, such as the 27 mass murders in Houston, Tex.? Should newspapers have reported that a teenager accused in the murders had confessed?
4. The case of *Sheppard v. Maxwell* (1966) is historic for what principal reason?
5. Name at least two specific precautions trial judges are admonished to take to insure a fair trial. Base your answer on *Sheppard v. Maxwell.*
6. What was one of the recommendations of the Warren Commission concerning the news media, bar and law officers?

7. Name at least two kinds of information that cannot be released by federal officials under the Katzenbach-Mitchell guidelines.

8. *Bridges v. California* and *Times-Mirror Co. v. Superior Court* (1941) established an important precedent, to wit: the only time a judge can deal with out-of-court media interference in the orderly administration of justice (in the absence of legislative direction) is if there is a _____.

CHAP. VII—Answers to Review

1. The "due process" amendment provides that a person accused of a crime shall have the right to a speedy and public trial by an *impartial* jury. The press, in its enjoyment of First Amendment freedoms (particularly the freedom from prior censorship or restraint), has from time to time published information which endangers a fair trial.

2. Canon 35, as adopted by the American Bar Association, urged judges to ban photographers, microphones and TV cameras from the courtroom while court is in session. Most judges have adopted Canon 35 or its successor, and some even prohibit the taking of photographs in the corridors around the courtroom or in the building itself when a trial is in progress. Such restrictions are enforced in order to assure orderly administration of justice.

3. The answer in the case of Lee Harvey Oswald is that a change of venue would not have assured him an impartial jury. In your discussion of the issues involved, either with the instructor or with other students, some comment should be directed at the paucity of empirical data concerning the impact of prejudicial news reports on prospective or actual jurors. Also, how practical or feasible is it to "lock up" the jury each night in what may be a three- or four-month-long trial? Do you agree with the press' contention that the reporting of crime news is an important part of the public's right to know; and if you do, how do such reports perform a public service or meet a public need?

If the advocates of uninhibited crime news reporting use the argument of the public's right to know about the administration of criminal justice, then questions can be generated along these lines:

—Does the public have a right to know everything that government does, even to the detriment of an individual's right?

—Does the public have a right to be contemporaneously informed, or can there be a hiatus between the event and reports of that event?

—Does the public have to be informed about *all* aspects of a criminal case, including information which might be prejudicial?

—What ethical burdens are placed on the press—either by the practitioners themselves or by the public—in the reporting of crime news? Or should there be none in keeping with the notion that the public has a right to know *everything?*

The Code of Ethics adopted by the Society of Professional Journalists in 1973 does not come to grips with the ethics of published reports in connection with the 27 mass murders in Houston, Tex. (that one of the accused teenagers had confessed and implicated another youth in the slayings). Under "Fair Play," the code states that journalists should show respect at all times for the *rights* of people encountered in the course of gathering and presenting news; that the news media "should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply;" and that the media should not "pander to morbid curiosity about details of vice and crime." The media involved in publication of prejudicial information could respond that there were official charges filed in the mass murders, that they would have published any replies by the accused, and that the 27 mass murders were sensational by their very nature without any need to "pander" to morbid curiosity. Therefore, the only ethical denouncement of such published and televised reports of a confession would have to come from the very general admonition to show respect for the *rights* of others. Very general, indeed!

4. *Sheppard v. Maxwell* is a landmark case because for the first time the U.S. Supreme Court instructed trial judges on what they must do to insure a fair trial.

5. There were six broad instructions: (a) adopt strict rules governing the use of the courtroom by newsmen; (b) limit the number of newsmen in the courtroom if their presence would disrupt the proceedings; (c) insulate prospective witnesses from the media; (d) prohibit prejudicial out-of-court statements by lawyers, witnesses or court officials; (e) if necessary, continue a case or grant a change of venue, and (f) sequester the jury.

6. Media, bar and law officials should work together to establish ethical standards to prevent interference with a fair trial.

7. Your answer may have included two of the following: observations about defendant's character; any statements, admissions or confessions attributable to defendant; references to investigative procedures, such as lie detector or truth serum tests, etc.; statements concerning identity, credibility or testimony of prospective witnesses; and statements concerning evidence or arguments in the case or speculation about the guilt or innocence of the accused.

You might ask yourself this question: When federal law officials

refuse to give newsmen information prohibited by the Katzenbach-Mitchell guidelines, aren't they violating the spirit, if not the letter, of the First Amendment which most clearly prohibits the federal government from abridging freedom of press? Isn't the press' freedom being abridged by such a "gag" order? Technically and perhaps constitutionally, the answer is no. The "gag" order is aimed not at newsmen, but at the federal employes. Newsmen are free to publish any of the prohibited information, if they can obtain it from other sources.

8. Clear and present danger to the orderly administration of justice.

[1] *See* Chap. VIII, pp. 195–98, for additional information on "shield" laws, including an amendment of the California law in part because of what happened to Farr.

[2] Farr v. Peter J. Pitchess, Sheriff of Los Angeles County, 93 S.Ct. 593. In releasing Farr, Douglas pointed out that he was not judging the merits of the case. Nor, said Douglas, did the fact that the Supreme Court denied certiorari on Nov. 13, 1972 (93 S.Ct. 430), impart any implication or inference concerning the Court's view of the merits of the case.

[3] *The Quill*, February, 1974, p. 8.

[4] Canon 35 in the ABA s *Canons of Judicial Ethics* stated: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

[5] 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740 (1951).

[6] A reference to the Court's decisions in *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1946). *See* p. 174.

[7] Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

[8] Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663.

[9] Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543.

[10] Op. cit., 373 U.S. at 726, 83 S.Ct. at 1419, 10 L.Ed.2d at 665.

[11] Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522–23, 16 L.Ed.2d 600, 621 (1966).

[12] American Bar Association's Legal Advisory Committee on Fair Trial and Free Press, *The Rights of Fair Trial and Free Press*, Chicago, Ill., 1969, Appendix A, pp. 13–14.

[13] *Id.*, p. 10. Readers might ask themselves if the jailing of reporter Farr, because of his refusal to identify a source of information, does not, in effect, impose restrictions on his future initiative, even if such restrictions are self-imposed. Similarly, the jailing or threat of imprisonment which has confronted other journalists (*see* Chap. VIII) might easily lead to self-restraint on the part of the press. And it was self-censorship by the media, when confronted by the danger of large damage awards in libel cases, which led the Supreme Court to extend a conditional constitutional privilege to the press where none had existed before.

14 *Editor & Publisher*, Jan. 20, 1973, p. 11.
15 Op. cit., Code of professional responsibility, p. 28.
16 *See*, U.S. v. Pfingst, 477 F.2d 177, 185 (1973), note 5. The U.S. Court of Appeals (Second Circuit) affirmed the conviction of the defendant, Joseph Pfingst, holding in part that a pre-trial press conference held to announce the return of a bribery indictment against Pfingst did not deny the accused his right to due process. The press conference, the Circuit Court noted, occurred six months prior to selection of a jury. The defendant had argued that the press conference violated the spirit, if not the letter, of Rule 8.
17 Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973).
18 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).
19 Op. cit., note 6.
20 State v. Sperry et al., 483 P.2d 608 (1971); certiorari denied, 404 U.S. 939 (1971). Since the jury in a murder trial was not sequestered, the trial judge ordered that any testimony ruled inadmissible or stricken from the record should not be reported. Two reporters for a Seattle newspaper violated the order and were cited for contempt.
21 U.S. v. Dickinson, 465 F.2d 496 (1972).
22 Op. cit., note 6, 331 U.S. at 374.
23 *See* p. 168.
24 *Editor & Publisher*, Oct. 13, 1973, p. 10.
25 Dickinson v. U.S., 94 S.Ct. 270 (1973).
26 Sun Company of San Bernardino v. Superior Court, 105 Calif. Rept. 873, 29 Calif. App. 3rd 815 (1973).
27 Times-Picayune Publishing Corp. v. Louisiana, 95 S.Ct. 1 (1974).
28 *The Quill*, July, 1974, p. 10.
29 *The Quill*, August, 1974, p. 8.
30 U.S. v. Columbia Broadcasting System, Inc., 497 F.2d 102 and 497 F.2d 107. Cf., action of New Jersey Supreme Court which lifted a ban on sketching in state courtrooms (*The Quill*, May, 1974, p. 10). It did so with the understanding that the new policy would be revoked if the sketching interfered with courtroom decorum. In the CBS case, sketching in the courtroom—but not from memory outside the courtroom—could have been prohibited if, in the trial judge's opinion, such activity would have interfered with the decorum of the courtroom.
31 Seymour v. U.S., 373 F.2d 629 (1967).
32 Dorfman v. Meiszner, 430 F.2d 558 (1970).

SUBPOENA POWER VS. NEWSMEN'S PRIVILEGE

VIII

The press traditionally plays an adversary role in its relationship to government—the "watchdog" for the people against those in power. Even the term "Fourth Estate" signifies virtual branch-of-government status—unofficial to be sure, yet indicative of the expectation that news media will participate in the checks and balance system. To assist the press in this function, the First Amendment was adopted, thereby providing a privileged status so that the news media could more effectively fulfill their mission.

In practice, the adversary relationship has become extremely intense. Segments of the media have been exposed to intensive and prolonged governmental legal and verbal assaults because they have criticized, or reported news critical of, those in power. One event, for example, which demonstrates the danger to the press was the Democratic party's national convention in Chicago in 1968. While covering the violence associated with that conclave, about a score of journalists were injured, several seriously, mostly at the hands of Chicago police who seemed to vent on newsmen either their frustrations in trying to cope with large numbers of demonstrators who frequently goaded police to action, or their dislike of hippie-type dissidents, or both.

Another result of the convention-related incidents was an apparent rising tide of hostility toward the press on the part of public officials and private citizens alike, the latter demonstrable in several ways.[1] In part, the reaction stemmed from allegations that newsmen had distorted or exaggerated some of the events being reported. Also, some disenchantment probably stemmed from earlier news media coverage of civil rights demonstrations and militant groups, since, like messengers blamed for the bad news they carry, the news media were seen by some as being responsible for, or contributing to, the social malaise being reported.

After the convention, coverage continued of various militant groups, such as the Weathermen faction of Students for a Democratic Society and the Black Panthers. One consequence became manifest when Vice-President Agnew opened the administration's verbal assault on the news media in a speech on Nov. 13, 1969. He charged that network TV news often was inaccurate and biased and that the channels of public opinion were being controlled by fewer and fewer

people. Another developing theme was that the conservative viewpoint in America was not being adequately presented by the media which allegedly were preoccupied with the shrill voices of dissent.[2]

8.1 Use of subpoenas.[3] There was more than just verbal abuse, however. After the Democratic party's convention in 1968, subpoenas were issued in growing numbers as federal attorneys sought to force TV network news departments, national news magazines and some large-city newspapers to turn over unused reporters' notes, unused film footage, and file material relating to Weathermen, Black Panthers, etc. *Time* magazine was among the first to face legal compulsion pertaining to files about the Weathermen, and its law firm advised editors to comply. Next came *Newsweek*, *Life*, CBS and reporters for a number of large dailies. On Jan. 30, 1970, a San Francisco-based reporter for the *New York Times*, Earl Caldwell, was subpoenaed to appear before a grand jury probing into activities of Black Panthers.

Media criticism of the subpoena-power use swelled until on Feb. 4, 1970, the Justice Department indicated that henceforth it would temper demands for file material and reporters' notes by entering into negotiations with the affected media; but the media counterattack did not abate. On March 10, NBC President Julian Goodman said:

> Not since 1798 . . . has American journalism been under greater attack. It began with television news. It has moved to newspapers, news magazines and other periodicals. It extends to events the newsman covers, to people he talks to, to confidences he needs, to words he writes and to scenes he photographs. The intent of the attackers doesn't matter, but the effect does. It can limit legitimate news coverage. It can narrow the range of the newsman's sources. It can dry up the flow of information to the public and reduce the newspaper story or the broadcast report to the level of a handout.[4]

Henceforth, said Goodman, NBC would resist any government actions that "violate the confidence of our sources, that weaken our credibility and that limit our access to information." NBC's policy would be to refuse to turn over any information which had not been broadcast if, by so doing, the network believed its newsgathering operations would be jeopardized.

The controversy continued. On one side it was argued that the administration of justice required the full power to subpoena records and journalists whenever necessary. On the other, the press con-

tended that the subpoenas were so broadly worded that they amounted to harassment, intimidation, violation of confidential arrangements between reporters and sources and therefore were in violation of the spirit of the First Amendment. Against this backdrop, Atty. Gen. Mitchell laid down five guidelines that he hoped would provide a *modus vivendi* for press and federal attorneys. He did this on Aug. 10, 1970, in a speech to the American Bar Association's House of Delegates. Negotiations with the media were still the rule, but Mitchell said henceforth no Justice Department subpoenas would be issued against the press without his personal approval.

As summarized, the guidelines were:

1. In determining whether to request issuance of a subpoena, the approach must be to weigh any limiting effect on the exercise of First Amendment rights against the public interest to be served by the fair administration of justice.

2. All reasonable attempts should be made to obtain the information from non-press sources.

3. Negotiations should be attempted in all cases in which a subpoena is contemplated.

4. The attorney general must personally authorize any action leading to a subpoena.

5. In seeking such authorization, the following principles will apply: The information is essential and cannot be obtained elsewhere; subpoenas should be limited to verification of published information under ordinary circumstances; if not, then great caution should be observed when seeking unpublished information or when a claim to confidentiality is made.

This statement by Mitchell helped to calm agitation—at least for a time. But another battle flared after the Feb. 23, 1971, award-winning telecast by CBS of a documentary, "The Selling of the Pentagon," which dealt with Defense Department expenditures for public relations and propaganda purposes. Vice-President Agnew led a parade of public officials in denouncing the program which he characterized as a "subtle but vicious broadside against the nation's defense establishment." The FCC gave CBS 20 days in which to show how the program met the requirements of the Fairness Doctrine that obligates broadcasters to air different sides of controversial issues.[5] The culmination of the attacks came on April 17 when a House special subcommittee, headed by Rep. Harley Staggers of West Virginia, issued a subpoena ordering the network to deliver to the subcommittee any and all notes, film, sound tape recordings, scripts, names and addresses of all persons appearing in the telecast, and a statement of all disbursements of money made in connection with

the program. The sweeping nature of the subpoena was one reason why CBS President Frank Stanton announced that his network would comply only with that portion of the order which demanded film copy and transcript of material actually telecast. Terming the subcommittee's demands unprecedented in the history of the relationship between federal government and press, Stanton declared that no part of the press could constitutionally be required to comply with a subpoena with respect to unpublished material gathered by reporters. Further, argued Stanton, First Amendment protection does not depend upon whether the government believes broadcast journalists are right or wrong in their judgments.

As a showdown loomed in the House, news media spokesmen supported CBS. ABC and NBC issued statements defending the stand taken by the rival network. The denouement came on July 13, 1971, when, in a rare disavowal of one of its own powerful committees, the House voted 226–181 to return the contempt resolution back to committee, thereby ending further attempts in Congress to punish the network.[6]

Since the CBS case, there have been many other attempts to use subpoenas against the press. For example, CBS and NBC were served with 121 subpoenas in a 30-month period demanding that they produce various kinds of news material. The editor of the *Los Angeles Times* told a subcommittee of the U.S. Senate's Judiciary Committee that his newspaper had been served with more than 30 subpoenas during a period of several years, threatened with more than 50 others, and that the paper had spent more than $200,000 to defend itself against these subpoenas. A review of the situation led to the issuance of a 193-page report on May 29, 1972, by an 11-member independent task force sponsored by the Twentieth Century Fund. The committee, chaired by Robert Williamson, former chief justice of the Maine Supreme Judicial Court, said: "These subpoenas have raised in the clearest form the central issue: that the government's law enforcement efforts—particularly those directed at political radicals—are taking forms that pose a serious threat to the confidence between journalists and their sources, thus reducing the free flow of information to the public."[7]

Perhaps Justice Douglas capsulized the danger best when, in dissenting to a 5-4 decision which held that reporters cannot refuse to identify confidential sources of information in the absence of protective, or "shield," legislation, he wrote:

> Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they

> exercise caution in how they use whatever information they can obtain. Without immunity they may be summoned to account for their criticism. Entrenched officers have been quick to crash their powers down upon unfriendly commentators.
> * * *
>
> The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.[8]

The pressure continues. In 1974, the president of the American Society of Newspaper Editors, Arthur C. Deck, said that never before had the press lived through such concentrated efforts to restrain the press as in the past few years and that "the harassment continues."[9]

8.2 Newsmen's claim to "privilege." As a consequence of attempts to force disclosure, journalists increasingly are claiming a privilege denied to most other individuals or groups in our society; namely, the right to shield confidential sources of information and the information itself. In fact, those relationships which have been legally recognized as having such a "privilege"—e.g., lawyer-client, doctor-patient, priest-confessant and husband-wife—are different from the journalists' claim to privilege in that the identity of the participants is known. The journalist not only wishes to shield the information, but the source of that information, too.

Many lawyers and judges oppose shield legislation for journalists, arguing that due process of law and orderly administration of justice require virtually all citizens to come forth with information when subpoenaed to do so. Failure to do so, they contend, should be punished by fines and/or imprisonment.[10]

Historically, however, such punishment has rarely been invoked against the press, principally because of the tradition observed by most journalists of refusing to divulge confidential sources of information or the information itself even if such refusal means going to jail. In only four of some 80 cases reported in a 1971 article did newsmen eventually reveal the identity of confidential sources. The article summarized the history of this tradition in this way:

> The first major American confrontation on the issue of confidential sources, in 1848, sent a Washington correspondent to jail for refusing to tell the Senate his source for publication of a proposed treaty between the United States and Mexico. The court in that case dealt mainly with the right of the Senate to punish contempts of its authority, rather than protection of confidential sources. Additional reported cases in 1874 and 1887 dealt more with questions of anonymous publication than with confidentiality of sources. But these helped to establish the precedent that there is no right under the common law for a reporter to refuse to identify his confidential sources.
>
> In two instances, in 1935 and 1948, judges allowed newsmen to protect their sources on unspecified grounds, without deciding the privilege claim. In several other cases, demands for identification of the sources were dropped on legal grounds which avoided the privilege claims. The only four instances in legal annals in which newsmen did yield to judicial pressure and reveal their sources came in the investigation of a grand jury leak in Hawaii in 1914; during a murder trial in Pennsylvania in 1930; during a 1931 Texas investigation of the alleged beating and kidnaping of two Communist organizers; and during a Minnesota labor dispute in 1961. In all four cases the newsmen were threatened with jail for remaining silent, and in the Pennsylvania and Texas cases, . . . [two journalists] were imprisoned briefly before agreeing to reveal their sources.[11]

Journalists who refuse to comply with judges' orders to reveal confidential sources drew a mixed reaction from Prof. Chafee who, as vice-chairman of the Commission on Freedom of the Press, argued against such a "novel privilege" because the trend of the best legal judgment is away from all occupational privileges including that of attorney-client. Chafee then played the devil's advocate by noting:

> On the other hand, this power to make reporters disclose their confidential sources of information should be exercised with great caution. * * * It is . . . desirable to respect the reporter's claim of confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable. The consequences of threats of imprisonment for contempt are likely to be met by obstinate silence or by evasions and subterfuges. For instance, if the reporter finds his appeal to a special privi-

> lege of the press gives him no protection, he may fall back on a much broader privilege which all constitutions and courts recognize, that no man can be compelled to furnish evidence which supports a criminal charge against himself [Fifth Amendment]. In other words, he may hint that he was perhaps a participant in the crime which he described in his newspaper and would betray himself if he said anything more. Judges are quick to give him this way of escape. . . .[12]

8.3 State shield laws. Professor Chafee argued against "shield" privileges for journalists. There still is no such law at the federal government level although many attempts have been made to enact one. There are, however, many state "shield" laws, the earliest dating to 1896 when Maryland enacted a statute which reads, in part "that no person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial before any committee of the legislature or elsewhere the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed."[13]

The Nebraska legislature captured the political and legal philosophy of such a privilege when it enacted Legislative Bill 308 in 1973. Section I states: "(1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere; (2) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit or disseminate news or other information vigorously so that the public may be fully informed; (3) That compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public; (4) That there is an urgent need to provide effective measures to halt and prevent this inhibition; (5) That the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce; and (6) That this Act is necessary to insure the free flow of information and to implement the First and Fourteenth Amendments and Article I, Section 8, of the United States Constitution, and the Nebraska Constitution."

By 1974, 25 states had enacted legislation to protect newsmen

from forced disclosure of confidential sources and/or confidential information except under certain circumstances. They are Alabama, Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island and Tennessee. Nine states adopted these laws since 1970. Mindful of the *Farr* case, California, in 1971, and Indiana and New Mexico, in 1973, amended their laws to protect journalists even after they leave media jobs.

The laws are not uniform and various "loopholes" have been discovered, such as when Farr left his job on the Los Angeles *Herald-Examiner* and therefore was not protected by the California "shield" law. For example, Arkansas protects that which is written or published in good faith, without malice and in the public interest. Louisiana permits a district court to revoke the privilege whenever a judge finds it essential in order to prevent injustice. Rhode Island permits Superior Courts to order disclosure if necessary in a criminal prosecution or to prevent threats to human life, but only if the information is unobtainable elsewhere. The Illinois law is similar to Rhode Island's—forced disclosure is permitted if all other sources of information have been exhausted and the information is essential to the public interest. Minnesota, North Dakota and Tennessee also permit courts to divest newsmen of the privilege under certain circumstances.

Delaware, New York, North Dakota, Rhode Island and Tennessee extend the privilege not only to the source but to the information itself. The California law was changed in 1974 to protect reporters from subpoenas for *unpublished* notes or other such information. Previously, unpublished information was not protected on the theory that a newsman does not serve the public interest by withholding information.

New York's law states:

> . . . [N]o professional journalist . . . shall be adjudged in contempt of any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication *or to be published*. . . . [Italics added.]

8.4 Model "shield" law. In November, 1971, the board of directors of Sigma Delta Chi (now the Society of Professional Journalists) approved a model "shield" law which the society's chapters, in those states without such laws, might seek to have enacted. The model law does not, however, call for an absolute privilege:

> No person shall be required in any proceeding or hearing to disclose any information or the source of any information procured or obtained by him while he was (a) engaged in gathering, writing, photographing or editing news and (b) employed by or acting for any organization engaged in publishing or broadcasting news, unless the body proposing to require disclosures of such information or source shall have first obtained a final order of a court, made after a hearing, and expressly finding:
>
> (1) The existence of probable cause to believe that the witness or his sources has evidence which is relevant and material to an issue properly pending before such body; and
>
> (2) Disclosure by such person is the only method by which such evidence, or evidence of similar effect, can be obtained; and
>
> (3) The failure of disclosure of such evidence will cause a miscarriage of justice.[14]

The above exceptions to absolute privilege parallel the views expressed in an April 9, 1970, editorial in the St. Louis *Globe-Democrat*. The editorial took the position that at times sources of information need to be protected, such as when a newspaper is investigating alleged corruption in some agency of government. But the editorial also stated: "No reporter in conscience can protect someone guilty of crime or conspiracy to commit crime on the grounds of 'confidential association.' That is just a high-sounding name for complicity."

The American Civil Liberties Union has opposed shield legislation in part because such a privilege might conflict with the existing right of litigants to compel testimony or disclosure of evidence, as in the case (reviewed later) of Judy Garland's lawsuit which was thwarted by a newspaper columnist's refusal to identify a source of information.

The Society of Professional Journalists' model law and the views expressed in the *Globe-Democrat* editorial seek to balance legitimate needs of the law against "fishing expeditions" by governmental investigators where the purpose sometimes seems to be the plugging of information leaks or the punishing of bureaucrats who leak information to the press rather than the correction of wrongdoings by those in office.

Canon 5 of the American Newspaper Guild's Code of Ethics is inflexible in terms of the protection that a newsman should give to confidential sources and/or information, stating flatly: "The news-

paperman shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies, and that the newspaperman's duty to keep confidences shall include those he shared with one employer after he has changed employment."

8.5 Court tests of claims to privilege. The claim of First Amendment protection against forced disclosure of confidential sources/information has found little support in the courts. Notable cases have included:

A. *Garland v. Torre.*[15] Actress-singer Judy Garland brought a libel action against CBS in the mid-1950s based on comments reported in Marie Torre's column, "TV-Radio Today," published in the New York *Herald Tribune*. In the column, Miss Torre had attributed certain statements to an unnamed CBS executive. When counsel for Miss Garland took a deposition from Miss Torre, the columnist refused to identify the CBS executive, claiming that to do so would violate a confidence. She still refused to identify the source at a U.S. District Court hearing and was held in criminal contempt and sentenced to 10 days in jail; but she was released on her own recognizance pending appeal.

Until this case, journalists' claim to privilege had been based on the common law, but Miss Torre refused to identify her source of information on First Amendment grounds.

Justice Stewart, then of the Second Circuit Court of Appeals, heard the case and agreed with Miss Torre's attorney that compulsory disclosure might abridge press freedom by imposing some limitation upon availability of news. But such freedom, he said, is not absolute. A determination of when curtailment is justified often presents a "delicate and difficult" task which requires a balancing of rights. Concerning the conflicting rights, he agreed that freedom of the press is basic to a free society, but so too are courts armed with the power to discover truth. Further, the concept that it is the duty of a witness to testify has roots as deep in history as the guarantee of a free press. The obligation of a witness to testify and the correlative right of a litigant to obtain judicial compulsion of testimony without question could impinge upon First Amendment freedoms. If so, Stewart added, the court would not hesitate to conclude that freedom of press "must give place under the Constitution to a paramount public interest in the fair administration of justice."[16]

Since the questions asked of Miss Torre went to the heart of Miss Garland's suit, the judge held that the Constitution did not sanction a refusal to answer. If the news source was of doubtful relevancy to the case, or if an attempt was being made to require many disclosures

of a newspaper's confidential sources, the judge indicated he would have considered an alternative ruling.

The U.S. Supreme Court declined to review the decision and so, accompanied by considerable publicity, Miss Torre went to jail for 10 days.

B. *Murphy v. Colorado.*[17] Another case, marked by the severity of the jail term, involved a reporter for the Colorado Springs *Gazette-Telegraph*, Vi Murphy, who was held in criminal contempt of the state Supreme Court for refusing to disclose a confidential news source. She was jailed for 30 days after the U.S. Supreme Court decided not to review the case.

C. *State of Oregon v. Buchanan.*[18] Miss Annette Buchanan was on the editorial staff of the University of Oregon student newspaper, the *Daily Emerald*, when she wrote a story in 1966 about the use of marijuana. She had interviewed seven students after promising not to reveal their identities. When summoned before a county grand jury, she refused to disclose the names of her informants, was held in contempt of court and fined $300. The state supreme court upheld the fine although expressing some sympathy for Miss Buchanan's plight. Aided by several journalism groups, Miss Buchanan appealed, but the U.S. Supreme Court refused to review the case.

D. *Caldwell v. U.S., et al.* In the three previous cases, the newswomen had based their refusals to identify sources on the First Amendment. Their attempts to constitutionally vindicate such refusal failed. Then suddenly, for a few brief months, it seemed that the First Amendment argument might succeed.

Earl Caldwell, a black reporter stationed in San Francisco for the *New York Times*, was subpoenaed on Feb. 2, 1970, to appear before a federal grand jury investigating Black Panther activity. He was ordered to bring tape recordings and notes pertaining to interviews with Black Panthers. Not only did he decide not to do so, but he refused to go before the jury. He and the *Times* moved to quash the subpoena which subsequently was modified to omit any mention of documents that Caldwell might have in his possession pertaining to the Panthers. The motion was based principally on the contention that any appearance at a secret grand jury session would destroy Caldwell's relationship with the Panthers and suppress vital First Amendment freedoms by driving a wedge of distrust between him and them. In pressing for qualified, not absolute, privilege, Caldwell and his newspaper argued that only if there were a compelling governmental interest in the reporter's testimony, which they claimed had not been shown, should he be forced to appear before the jury.

Judge Zirpoli of the Northern District Court of California ruled that Caldwell had to appear before the grand jury because "it has long been settled 'that the giving of testimony and the attendance upon court or grand jury . . . are public duties which *every person* within the jurisdiction of the government is bound to perform upon being properly summoned.' "[19] But the judge issued a protective order which would have drastically limited the scope of the investigation of Caldwell by (1) not requiring him to reveal confidential associations, sources or information received, developed or maintained by him, and (2) not requiring him "to answer questions concerning statements made to him or information given to him by members of the Black Panthers unless such statements or information were given to him for publication or public disclosure. . . ."

Caldwell also would have been permitted to consult with counsel during his appearance before the grand jury to assure that the court's order was being carried out. Because of this "shield" for the reporter, Zirpoli dismissed the motion to quash. Caldwell still refused to go before the jury, was cited for contempt and appealed. The *Times*, however, did not join in the appeal although it continued to pay Caldwell's legal expenses because, as Managing Editor A.M. Rosenthal wrote in a memo to the staff, it believed that when a reporter refuses to authenticate his story, the newspaper must step aside; "otherwise some doubt may be cast upon the integrity of *Times*' news stories."[20]

A month later the newspaper submitted an *amicus curiae* brief considered more conservative than others already on file. The *New York Times*' chief counsel James Goodale explained that the newspaper did not want to risk throwing away the entire Zirpoli opinion since it carried the privilege for journalists much further than had any previous court decision. Rather than push for an absolute privilege, the *Times* took the narrower position that a reporter has a conditional privilege which is to be balanced by the government's right to be informed against the reporter's right to gather news.[21]

In the short run, Caldwell seemed to be on the winning track. On Nov. 16, 1970, the Ninth Circuit Court of Appeals reversed the lower court in a decision which seemed to expand the journalists' privilege and which brought elation to the ranks of the Fourth Estate. Judge Charles Merrill wrote the opinion and stated, in part:

> The case is one of first impression and one in which the news media have shown great interest and have accordingly favored us with briefs as *amici curiae*. As is true with many problems recently confronted by the courts, the case presents vital questions of public policy: questions as to how

> competing public interests shall be balanced. The issues require us to turn our attention to the underlying conflict between public interests and the nature of such competing interests.[22]

After reviewing arguments put forth by Caldwell and the government, the judge continued:

> The premise underlying the Government's statement is that First Amendment interests in this area are adequately safeguarded as long as potential news makers do not cease using the media as vehicles for their communication with the public. But the First Amendment means more than that. It exists to preserve an "untrammeled press as a vital source of public information," Grosjean v. American Press Co. . . . Its objective is the maximization of the "spectrum of available knowledge," Griswold v. Connecticut. . . .
> * * *
>
> The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. See, e.g., Associated Press v. U.S., . . . (1945); Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

After reviewing the powers of grand juries, the Circuit Court said:

> . . . [W]here it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.
>
> We go no further than to announce this general rule. As we noted at the outset, this is a case of first impression. The courts can learn much about the problems in this area as they gain more experience in dealing with them. For the present we lack the omniscience to spell out the details of the Government's burden or the type of proceeding that would accommodate efforts to meet that burden. The fashioning of specific rules and procedures can better be left to the District Court under its retained jurisdiction. * * *

> Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely-enjoys the trust and confidence of his sensitive news sources.

The Circuit Court thus stressed that this was a case of first impression, that the ruling applied only to cases of the Caldwell type and therefore was narrowly drawn, and that no attempt was being made to detail how the government would meet its burden of showing compelling need.

At this point the government appealed.

E. Branzburg cases. These cases, like *Caldwell*, subsequently would be reviewed by the U.S. Supreme Court. The first one, *Branzburg v. Judge Hayes*, began with reporter Paul Branzburg of the *Louisville Courier-Journal* writing a story published Nov. 15, 1969, about two unidentified persons in Jefferson County, Ky., synthesizing hashish from marijuana. When called before the county grand jury and asked to identify the pair, Branzburg refused on grounds that the Kentucky shield law and the state and U.S. Constitutions justified such refusal. Prior to this case it was generally believed that the Kentucky law granted an absolute privilege to reporters; but the state Court of Appeals held[23] that the statute did not permit a reporter to refuse to testify about events he personally had observed, including the identity of persons seen by him, although the court conceded that the law did shield the newsman from having to disclose the identity of persons who supplied information. This distinction indicates that reporters in Kentucky should not only observe, but also obtain information from, those at the scene of a story whenever a pledge of confidentiality is given.

The second Branzburg case followed publication of a story on Jan. 10, 1971, which described the use of illegal drugs in Frankfort, Ky. The newsman reported that he had spent two weeks interviewing several dozen drug users. The Franklin County grand jury ordered the reporter to identify the lawbreakers, but Branzburg moved to have the subpoena quashed because it would entail a drastic "incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring . . . [Branzburg's] appearance before the grand jury." Branzburg also argued that he should be excused from any appearance before the jury since once he "is required to go behind the closed doors of the grand jury room, his

effectiveness as a reporter in these areas [use and sale of illegal drugs] is totally destroyed."

As in the *Caldwell* case, a protective order was issued so Branzburg would not have to disclose confidential sources of information, but the order required him to "answer any questions which concern or pertain to any criminal act" actually observed by him. Again, the Kentucky Court of Appeals reaffirmed its earlier interpretation of the state shield law and rejected the reporter's claim to First Amendment privilege. Concerning the U.S. Circuit Court's ruling in the *Caldwell* case, the Kentucky appellate court announced some "misgivings" about that decision because it drastically departed "from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment."

F. Pappas case. Paul Pappas, a WTEV television newsman working out of the Providence, R.I., office of a New Bedford, Mass., station, was called to New Bedford on July 30, 1970, to report on civil disorders taking place there. He went to a Black Panthers' headquarters and was allowed inside on the condition that he not disclose anything except an anticipated police raid which did not materialize. Pappas later was called to testify before the Bristol County grand jury. Claiming a First Amendment privilege, he refused to divulge anything he had witnessed inside the headquarters, but a lower court judge ruled that in the absence of a state shield law the reporter must answer or face contempt charges. Pappas took the case to the state Supreme Judicial Court which affirmed the lower court by stating that the public "has a right to every man's evidence except in exceptional" circumstances.[24] This court flatly rejected the U.S. Circuit Court's opinion in *Caldwell v. U.S.*, concluding instead that the obligation of every newsman, like that of every citizen, is to appear when summoned and to answer relevant and reasonable inquiries.

G. U.S. Supreme Court rejects privilege claim. On June 29, 1972, the U.S. Supreme Court issued its long-awaited first decision on the claim of newsmen to a constitutional privilege against disclosing sources of information or the information itself. In a 5-4 decision, the Court held in the trilogy of cases—*Branzburg v. Hayes, et al.; In the Matter of Paul Pappas*, and in *U.S. v. Caldwell*[25] —that freedom of press is not abridged when newsmen are required to appear and to testify before state and federal grand juries.

The Nixon appointees—Chief Justice Burger and Justices Blackmun, Powell and Rehnquist—concurred in the opinion written by Justice White. Justices Douglas, Stewart, Brennan and Marshall dissented. As in the Pentagon Papers case, this decision tends to show

the philosophical lineup of the Court, particularly in matters of the so-called law-enforcement type—a classification which includes the privilege cases.

In the decision for the Court, Justice White made the following statements:

1. The sole issue before the Court is the obligation of reporters to respond to subpoenas as other citizens are required to do and to answer questions relevant to an investigation into the commission of a *crime.*[26]

2. The great weight of authority is that newsmen are not exempt from the normal duty of all citizens. Neither the common law nor constitutional law exempt newsmen from such duty.

3. There is no federal shield law and up to this time the only testimonial privilege has been rooted in the Fifth Amendment. "We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy," said Justice White. "This we decline to do."

4. Only when news sources are implicated in crime or possess information relevant to the grand jury's task need they or reporters be concerned about grand jury subpoenas. As Justice White observed, "Nothing before us indicates that a large number . . . of *all* confidential news sources fall into either category and would in any way be deterred by our holding that the Constitution does not" exempt newsmen from appearing and furnishing information relevant to the grand jury's task. This is White's answer to the contention that without a testimonial privilege, confidential news sources will dry up with consequent impairment of the public's right to know. As White said, the evidence presented to the Court failed to demonstrate that there would be a significant constriction of the flow of news if existing rules were reaffirmed, since these rules had not seriously impeded the development or retention of confidential news sources.

5. There was no evidence in these cases to show that the grand juries were on "fishing" expeditions. If such were the case, White said, a different outcome could be expected. Similarly, harassment of the press by grand juries would not be countenanced by the courts. Such juries are subject to judicial control just as subpoenas, which are too broadly drawn, are vulnerable to motions to quash. Grand juries, said White, must operate within the limits of the First and Fifth Amendments.

In a dissenting opinion, Justice Stewart noted that traditionally the judiciary has imposed virtually no limitations on the grand jury's broad powers to investigate.

6. White raised the question of who would qualify for the privilege should it be extended. Pamphleteers? Any one who writes or broadcasts for the public? If so, then the courts would have to determine if the information could be obtained elsewhere and if there were a "compelling need" for such information or testimony. Such difficulties, argued White, would embark the judiciary on a long journey toward an uncertain destination.

But Stewart retorted, "Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases." But Stewart made it clear that he did not favor an absolute privilege for journalists.

7. Congress has the freedom to determine whether a statutory newsman's privilege is necessary, said White, and to fashion one as narrow or as broad as legislators deem necessary. Here, then, was an invitation to lawmakers to resolve the issue by statute, if they were so inclined.

U.S. Sen. Alan Cranston of California followed hard on the heels of this suggestion by introducing shield legislation the day after the Court's decision. Virtually absolute in its protection, this bill failed to gain congressional approval and was followed in 1973 by draft legislation from the influential chairman of the Senate Judiciary Subcommittee on Constitutional Rights, Sam J. Ervin Jr. of North Carolina, calling for a conditional privilege in all state and federal jurisdictions. But through 1974 no shield legislation had been passed by Congress.

H. The Mark Knops case. The *Caldwell, Branzburg, Pappas* decision by the U.S. Supreme Court affected other cases moving along the appellate route. One in particular involved an editor who was jailed for refusing to reveal confidential sources of information which, in the main, already was known by law enforcement officials.

On Aug. 25, 1970, an explosion ripped through Sterling Hall on the University of Wisconsin campus in Madison, resulting in death to one person and injury to several others. Two days later, an underground newspaper, the Madison *Kaleidoscope*, printed a story entitled "The Bombers Tell Why and What Next—Exclusive to the Kaleidoscope." As editor of the paper, Mark Knops was subpoenaed to appear before the Walworth County grand jury and asked questions about the bombing and about an arson at Wisconsin State University in Whitewater. He refused to answer and invoked the Fifth Amendment, but immunity was promised and he thereupon declined to answer on the basis of a First Amendment privilege

claim. He was held in contempt and sentenced to five months and seven days in jail or until he cleared himself of contempt by answering the questions.

On Feb. 2, 1971, the state Supreme Court confirmed the sentence in a decision that read, in part:

> Appellant here does not ask, as did Caldwell, that he be allowed to ignore the subpoena entirely. He asks that he be afforded the same prerequisite as the District Court [Zirpoli] afforded to Caldwell before disclosure could be compelled.
>
> Appellant's entire argument rides on the validity of his contention that disclosure will actually result in a diminution of the free flow of news that the public is entitled to read. * * *
>
> In weighing the value which the public derives from receiving this information appellant cites Bridges v. California (1941) . . . for the proposition that the framers of the Constitution "intended to give to liberty of the press, as to other liberties, the broadest scope that could be countenanced *in an orderly society.*" (Emphasis supplied.) That may very well have been the intention of the framers. However, in a disorderly society such as we are currently experiencing it may well be appropriate to curtail in a very minor way the free flow of information, if such curtailment will serve the purpose of restoring an atmosphere in which all of our fundamental freedoms can flourish. One exceedingly fundamental freedom which the public is currently doing without is the freedom to walk into public buildings without having to fear for one's life. * * *
>
> The fact situation here is so remote from that in *Caldwell* that even if this court were to accept the premises of the *Caldwell* decision [U.S. Circuit Court's], it would still be inapplicable to this case. Unlike *Caldwell*, the appellant here does not face an unstructured fishing expedition composed of questions which will meander in and out of his private affairs without apparent purpose or direction.[27]

On the contrary, he faces five very narrow and specific questions, all of which are founded on information which he himself has already volunteered. The purpose of these questions is very clear. The need for the answers to them is "overriding," to say the least. The need for these answers

> is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks.
>
> We conclude that a weighing of competing values is involved here. The court must consider on the one hand the interest of free flow of information, and on the other, the interest of fair and effective administration of the judicial system. * * * In weighing these conflicting values, we think . . . the appellant is compelled to disclose the information sought.[28]

Judge Heffernan, dissenting in part, took judicial notice of both state and federal government records which showed that authorities knew who had bombed Sterling Hall; therefore, the State of Wisconsin no longer had a compelling state interest in having Knops testify to what already was known. But the state, said Heffernan, continued to have a compelling interest in the Whitewater campus arson. Accordingly, he agreed with the majority in affirming a contempt finding; but since the answers to questions put to Knops about the Sterling Hall explosion already were known, the judge would return the case to the trial court for resentencing of Knops.

Prior to completion of sentence, Knops was released from jail on bail by order of U.S. District Court Judge John W. Reynolds pending appeal to the U.S. Supreme Court. The case was held in abeyance awaiting the outcome of the *Caldwell-Branzburg-Pappas* cases. Despite the U.S. Supreme Court's decision, which adversely affected Knops' appeal, a technicality intervened to keep the editor out of jail. The county grand jury's term had expired; therefore, Knops could not go back and answer questions in order to purge himself of contempt. That's how the case ended, although a newly constituted grand jury could have subpoenaed him and, should he again refuse to testify, another contempt action could have resulted.

I. The Peter Bridge case. Since the highest court spoke out against privilege for newsmen, other reporters have been sent to jail. Peter Bridge, a former reporter for the defunct Newark, N.J., *Evening News* was jailed from Oct. 3–24, 1972, for refusing to divulge information to a grand jury. Although he answered more than 50 questions, Bridge refused to answer five questions pertaining to a story he wrote about an unidentified man who allegedly offered a public housing official a $10,000 bribe. Bridge claimed the protection of the New Jersey shield law and the First Amendment, but the state law provides that if a newsman identifies his source in a story—which Bridge had done (the alleged bribery being a second-

hand report)—the immunity is waived.[29] The reporter was freed from jail after the grand jury reported there was no basis in fact for the story.

There have been other clashes involving the journalists' claim to a privilege which the courts almost unanimously have declared does not exist except where conferred by statute. Such statutes generally attempt to provide a *modus vivendi* between the conflicting, but vital, interests at stake. The need for some kind of common ground was stressed by Fred W. Friendly, journalism professor at Columbia University and former president of CBS News, who wrote:

> A shield law must be precisely drawn. It should provide protection from prosecutors and others bent on fishing expeditions but at the same time be limited enough not to produce all-purpose immunity for journalists. The shield law and the guidelines by which journalists work must be structured in such a way as to provide protection for the public's need to know, but not be a sanctuary for those who because of fear, special interests, or just plain irresponsibility are seeking a privileged place to hide.
>
> Above all, a journalist needs to understand the uses and the abuses of the subpoena. The subpoena can be a paralyzing arrow aimed at our backbone, but . . . it can also be a liberating force intended to keep our backsides from resting too comfortably. * * *
>
> It has been said that journalism is too important to be left to the journalists, and indeed the law is too vital to be left to the lawyers. The tragedy is that the only time these two corps turn to each other is across a courtroom or in anxious preparation for such a confrontation, or in some kind of emergency session brought on by the abuses of fair trial-free press, as in Dallas in 1963. What is required is a continuing dialogue on a scheduled basis with a prescribed agenda.[30]

This same sense of seeking accommodation is evident in legislation proposed by the Joint Media Committee established by the Society of Professional Journalists, American Society of Newspaper Editors, Associated Press Managing Editors Association, National Press Photographers Association and Radio-Television News Directors Association. The five national organizations agreed not to push for absolute immunity. A defendant journalist in a libel suit would not be protected if his defense was based on a confidential source who had uttered the allegedly defamatory statement. In addition, a federal

district court could remove the protective shield if the court found "clear and convincing" evidence that (1) the writer or broadcaster probably had information relevant to a specific law violation—a provision which protects against fishing expeditions; (2) there are no other means of obtaining the necessary information—a safeguard against lazy law enforcement; and (3) there is a "compelling and overriding national interest" in making the information available to the investigative body.

Efforts to seek a middle ground are evident in the proposal of the Joint Media Committee and the model shield law proposed by the Society of Professional Journalists. Such efforts also are apparent in some court decisions since *Branzburg*.

On Feb. 6, 1974, the Vermont Supreme Court said that the First Amendment protects a Vermont newsman from being forced to disclose his news sources at a pre-trial deposition proceeding in a criminal case unless the person seeking the information demonstrates that it is relevant, material, and not available from another source.[31] The court went on to say:

> . . . [T]he language and attitude of the Branzburg majority does not indicate an entire absence of concern for the news gathering functions so relevant to the full exercise of the First Amendment. The opinion confines itself to grand jury proceedings and trials. It declines to pass upon appearance of newsmen before other bodies or agencies. Even more noteworthy, the concurring opinion of Mr. Justice Powell suggests that the First Amendment supports enough of a privilege in news gatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct.

The court concluded that when a newsman objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate there is no other adequately available source for the information and the information is relevant and material on the issue of guilt or innocence. "Unless such a showing is made," said the court, "the newsman cannot properly be compelled to answer the question."

Thus, in certain circumstances, a newsman still can exert a First Amendment claim to remain silent about his source of information in a case that involves a criminal matter, according to the Vermont Supreme Court. Only on a showing of relevancy and materiality to

guilt or innocence, *and* the inability to obtain the information elsewhere, could the First Amendment claim be laid aside. In a civil matter, such as a libel lawsuit, the *balancing* of interests exemplified in *Garland* still appears to be the way in which decisions on forced disclosure are resolved.

In the case of *Edward L. Carey v. Britt Hume*,[32] decided on Jan. 28, 1974, by the District of Columbia Circuit Court of Appeals, Judge McGowan took into consideration Supreme Court opinions in *Times-Sullivan*, *Garland* and *Branzburg* in arriving at the conclusion that a newsman must reveal a confidential source under certain circumstances. The facts of the case involve a story by Britt Hume, a reporter for columnist Jack Anderson, which alleged that the plaintiff had removed certain documents from his United Mine Workers of America office, impliedly to frustrate a government probe into the financial matters of his employer. The plaintiff then allegedly complained to police that a box, impliedly containing the documents, had been stolen by a burglar. Carey filed a libel suit and the journalist claimed that the story was based on eyewitness observations by the plaintiff's co-workers, although Hume consistently refused to reveal his sources.

Citing *Garland*, Judge McGowan said that questions asked of columnist Torre went to the heart of Judy Garland's suit, and that in that case the court had balanced freedom of press against a paramount public interest in the fair administration of justice—the tilt being toward fair administration of justice. As for *Times-Sullivan*, McGowan said it could be argued that the Supreme Court had so downgraded the social importance of civil libel suits that a plaintiff's interest in pressing such claims rarely could outweigh a newsman's interest in protecting his source.[33] Nevertheless, the Supreme Court continues to cite *Garland*, said McGowan, which strongly suggests its continuing vitality and negates the inference that the Court does not consider the interest of a defamed person an important one. He continued:

> *Branzburg's* lengthy discussion of a newsman's duty to testify before a grand jury undoubtedly has implications with respect to . . . a newsman's claim of privilege in other areas as well. . . . We cannot ignore the fact that the interests asserted by the newsman in the *Branzburg* trilogy of cases were not accorded determinative weight by five members of the Court.
>
> . . . *Branzburg* . . . in language if not in holding, left intact, insofar as civil ligation is concerned, the approach taken in Garland. That approach essentially is that the

> Court will look to the facts on a case-by-case basis in the course of weighing the need for testimony in question against the claims of the newsman that the public's right to know is impaired.

The circuit court then held that the newsman must reveal the names of the sources who supplied information on which the allegedly defamatory story was based where the plaintiff has no other reasonable means of identifying such sources and where identification is critical to the plaintiff's course of action. Identification of the sources is especially important if plaintiffs are to overcome the "actual malice" hurdle imposed by the Supreme Court as a protective device for the news media.

Another case that surely will be cited in future claims of newsmen to a First Amendment privilege not to have to reveal confidential sources and/or information in *criminal* cases is the one involving former President Nixon who had claimed executive privilege in an attempt to thwart a subpoena.[34] Among the matters under investigation was involvement of White House aides in the June 17, 1972, break-in and "bugging" of the Democratic party's national headquarters in the Watergate complex of offices and apartments.[35]

In giving the 8-0 decision of the Court (Justice Rehnquist did not participate), Chief Justice Burger emphasized that the President's claim to privilege was not based on the grounds of military or diplomatic secrecy, but rather on a "general privilege of confidentiality of presidential communications." Such a general claim, the Chief Justice said, must be weighed against the inroads it would make "on the fair administration of criminal justice." The allowance of a privilege "to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." Thus, the Court refused to sanction an absolute, unqualified privilege for the President of the United States because such a privilege would impede the judiciary in carrying out its primary constitutional duty of doing justice in criminal prosecutions. Thus, Mr. Nixon's concern for law and order, as noted in his appointments to fill vacancies on the Supreme Court, had become a two-edged sword. From the media's standpoint, however, if the Court couldn't find such a privilege for the chief executive officer of the United States under the above circumstances, it is not very likely to uphold such a claim to privilege put forth by journalists in cases involving criminal matters.

8.6 Summary. A wave of subpoenas followed the Democratic party's national convention in 1968 and led to enactment of shield laws in a number of states along with efforts to enact national shield

legislation. In addition, Justice Department guidelines were issued which stipulated that personal approval had to be given by the U.S. attorney general before a journalist could be subpoenaed and then only after negotiations with the media had failed.

The issue involves conflicting interests: fair administration of justice, citizen's obligation to give testimony, reporters' contention that if they're forced to disclose confidential sources and/or information the sources will dry up and ultimately the public's right to know will be adversely affected.

In court tests of the claim to privilege, both the common law and the U.S. Constitution have been held not to afford such protection. What looked promising in the *Caldwell* decision by a U.S. Court of Appeals that the government had the burden of showing "compelling need" in order to learn the identity of a reporter's confidential sources or the information itself fell to a majority decision of the U.S. Supreme Court in which the claim to First Amendment protection was denied. In Justice White's opinion in *Caldwell*, *Branzburg* and *Pappas*, reporters were to be treated as any other citizen. However, the Court held that journalists were not to be exposed to grand jury "fishing expeditions." Other than criminal trials and relevant grand jury proceedings which do not involve fishing expeditions, the journalists' claim to First Amendment protection against forced disclosure appears to have some vitality when balanced against government's need to know.

Balancing of interests remains the principal means of resolving claims to First Amendment protection in *civil litigation*. If such a claim goes to the heart of a lawsuit and if the information cannot be obtained elsewhere, the privilege claim probably will not prevail.

VIII–Pass in Review

1. Under the Mitchell guidelines for issuance of Justice Department subpoenas, negotiations with the media continued as the rule. In addition, the issuance of subpoenas has to be approved by whom?

2. Even though CBS was not cited for contempt by the House of Representatives for refusing to produce various information and documents related to "The Selling of the Pentagon," the vote—226 to 181—was close. What rationale might be used for defending the position that CBS should have been cited for contempt of Congress? Conversely, why should CBS not have been cited?

3. Journalists first tried to gain "shield" protection under the common law. Failing, they turned to the First Amendment. What case represented the first effort by a journalist to use the First

Amendment as a basis for refusing to disclose a confidential source? What did the court decide and what were the principal reasons for the decision?

4. Professor Chafee noted that journalists could, if the situation demanded, use the Fifth Amendment; that is, decline to answer on the grounds of self-incrimination. But when Mark Knops invoked the Fifth Amendment, what happened to thwart this protective device?

5. Which state plugged a loophole in its shield legislation to protect newsmen after they took non-news jobs and what case prompted such action?

6. In the *Caldwell* case, Justice White said that neither common law nor constitutional law protected newsmen from forced disclosure under certain circumstances. But he indicated there was a way that newsmen could be given such protection. How?

7. Justice White indicated in *Caldwell* that there was some protection for newsmen when they went before grand juries. To what did he have reference?

8. On what basis did the Wisconsin Supreme Court hold that Mark Knops could be compelled to testify?

9. The Joint Media Committee's proposed shield legislation contains certain exemptions to absolute immunity for newsmen. What are the exemptions?

Why not challenge yourself and your classmates? Have one group argue for absolute shield legislation while the other group takes a more moderate position. Most importantly, be prepared to defend the position taken either in a paper or by means of a classroom presentation, or both.

VIII–Answers to Review

1. Attorney general.

2. A principal argument for punishing CBS for contempt relates to Congress' need for information to carry out its legislative function. Such an argument is part of the controversy over executive privilege. If the press can use the argument of the public's right to know in seeking to gain information from reluctant bureaucrats, how can it logically deny information to the people's chosen representatives?

A variety of reasons can be put forth by the press, beginning with the absolutist position that the First Amendment prohibits any

interference in the operations of the press, including the threat implicit in subpoenas from congressional committees. If Congress can force the press to reveal its sources of information, then such sources of information may dry up and the net result would be a reduction in the amount of information the public has a right to know. Further, subpoenas represent "threats" against the media and therefore result in a "chilling" effect on First Amendment freedoms. Also, using Justice White's rationale in *Caldwell*, the congressional subcommittee appeared to be on a fishing expedition directed more at punishment for audaciousness than relevancy to remedial legislation. Without protection, therefore, CBS was correct in refusing to provide information other than what was made public during the telecast, according to defenders of CBS' action.

3. *Garland v. Torre.* Circuit Court Judge Stewart balanced the First Amendment claim against the duty of citizens to give testimony and a litigant's right to compel testimony—both included in the broader public interest in fair administration of justice. On balance, the judge tipped the scale in favor of fair administration of justice.

4. He was given immunity from prosecution and then ordered to identify the writer of a letter who claimed "credit" for the bombing of a university building.

5. California. The William Farr case.

6. Congress could pass shield legislation.

7. The information sought must be *relevant* to the grand jury's task and the grand jury cannot *harass* newsmen. Judges would protect newsmen in both situations, Justice White said, although skepticism was expressed in dissenting opinions.

8. In the absence of a state shield law or constitutional immunity against disclosure, Knops could be required to answer the five *specific* questions because of an "overriding" or "compelling" state need for the information. As in the *Garland v. Torre* case, conflicting rights were balanced and the scale tilted in favor of administration of justice.

9. The proposal would not permit a defendant in a libel case to use the immunity to protect the identity of a source who uttered the allegedly libelous statement; the information sought must be relevant to a specific law violation, thereby guarding against fishing expeditions; no other means are available for obtaining the necessary information; and there is a compelling and overriding national interest in the information.

From a critical standpoint, one might ponder the difficulties of defining *overriding national interest* or wonder about the advisability of permitting discovery of confidential news sources in libel actions,

such as Mayor Cervantes' libel suit against *Life* magazine, where one of the purposes of such a suit *might* be to determine where leaks of information were occurring. In the *Cervantes* case, discovery proceedings were blocked by both the U.S. District Court and the appellate court so the issue was not confronted.

1 A national poll conducted by CBS early in 1970 showed that 55 per cent of those questioned favored peacetime restrictions on the press if the government thought that information to be published was harmful to the national interest. Other indicators of public disaffection included a statement by Chicago Mayor Richard Daley that he had received 60,000 letters in support of police during the demonstrations compared with only 4,000 that were critical; a Federal Communications Commission report that hundreds of letters critical of TV network news coverage had been received; and an NBC report that 6,280 telegrams, phone calls and letters were received, of which 5,200 were critical of NBC convention coverage.

2 The vice-president's criticism of news media continued intermittently into 1972. For example, on March 15, 1972, in a speech at Drake University, Des Moines, Iowa, he said, "I think the national media in particular—by that I mean the networks, national news magazines, the principal newspapers with far flung services—I think they have been oriented too long in one direction. I don't think they're accurately reflecting in every instance the views of conservative people of this country."

3 Subpoenas are used to force a person to testify at judicial proceedings. Failure to comply can result in a contempt citation, which in turn can lead to fine and/or imprisonment. *See* Appendix B for definitions of legal terms.

4 Sigma Delta Chi Foundation lecture at University of Texas, Austin, Tex., on March 10, 1970. These guidelines later became the principal requirements of Justice Department Order No. 544-73, issued Oct. 16, 1973 (43 *Law Week* 2232). One of the guidelines in that order was that a news media member could not be subject to questioning "as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story."

5 For more complete definition of Fairness Doctrine, *see* Chap. XII, pp. 334–41. Also, for further FCC handling of complaints about this program, *see* Chap. XI, p. 314.

6 For detailed information on this case, including CBS' cost of defending against this legal effort to force disclosures of nonbroadcast information, see Robert Sherrill's "The Happy Ending (Maybe) of 'The Selling of the Pentagon,' " in *New York Times Magazine*, May 16, 1974. Also, Fred W. Friendly, "The Unselling of *The Selling of the Pengaton*," Harper's Magazine, June, 1971, pp. 30+.

7 Report by Task Force on Government and the Press, Twentieth Century Fund, entitled *Press Freedoms Under Pressure*, New York, 1972, p. 15.

8 Dissenting opinion in combined cases of Branzburg v. Hayes, In the Matter of Paul Pappas, and U.S. v. Caldwell, 408 U.S. 665, 724–25, 92 S.Ct. 2686, 2693–94, 33 L.Ed.2d 657, 664–65 (1972). Compare Douglas' dissent with disclosure to the Senate Watergate Committee in August, 1973, that White House counsel John W. Dean III had prepared a list of "political enemies," which included the names of more than 50 active journalists. The Dean memorandum, prepared Aug. 16, 1971, asked other White House aides "how we maximize the fact of our incumbency in dealing with persons known to be active in opposition to our administration. Stated a bit more bluntly—how we can use the available federal machinery to screw our political enemies."

[9] Speech at the 46th annual Georgia Press Institute, Athens, Ga., Feb. 22, 1974.

[10] The ABA's House of Delegates, during its midyear meeting Feb. 4–5, 1974, voted 157-122 against shield legislation to protect journalists. The majority agreed that such legislation would create a "privileged class" and that it would be too difficult to clearly and narrowly define those who should be shielded.

Cf. such views with the Supreme Court's unanimous decision on July 24, 1974, that President Nixon could not claim executive privilege in refusing to release to a special prosecutor 64 tape recordings that might have relevancy to criminal matters (Chap. VI, pp. 137–39).

[11] David Gordon, "The Confidences Newsmen Must Keep," reprinted from *Columbia Journalism Review*, Vol. X, No. 4, November/December, 1971, p. 17.

[12] Zechariah Chafee Jr., *Government and Mass Communications*, Vol. II, Chicago: The University of Chicago Press, 1947, pp. 496–97. The Fifth Amendment is not fully protective because immunity against prosecution can be granted and then the journalist once more is exposed to the danger of contempt if he refuses to answer questions. This happened in the Mark Knops case, reviewed later in this chapter.

[13] Chap. 239, Acts of 1896, later amended to include broadcast news journalists. Also, *see* David Gordon, "The 1896 Maryland Shield Law," *Journalism Monographs* No. 22, February, 1972, p. 7.

[14] *The Quill*, December, 1971, p. 27.

[15] 259 F.2d 545 (Second Circuit, 1958); certiorari denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958).

[16] 259 F.2d at 548–49.

[17] Murphy v. Colorado, not reported; certiorari denied, 365 U.S. 843, 81 S.Ct. 802 (1961).

[18] 436 P.2d 729, 250 Oreg. 244 (1968); certiorari denied, 392 U.S. 905 (1968).

[19] Application of Caldwell and New York Times for Order Quashing Subpoenas, 311 F.Supp. 358 (1970).

[20] *Newsweek*, Nov. 30, 1970, p. 87; copyright Newsweek, Inc. 1970, reprinted by permission.

[21] *Id.*, p. 87.

[22] Caldwell v. U.S., 434 F.2d 1081, 1083 (1970).

[23] 461 S.W.2d 345 (1970). This case originally involved Branzburg and Judge Pound of Jefferson County, but he subsequently was replaced by Judge Hayes.

[24] 266 N.E.2d 297 (1971).

[25] 40 *Law Week* 5025, June 27, 1972. *Also*, 92 S.Ct. 2646.

[26] Note that the Caldwell, Branzburg, Pappas cases involved investigations by grand juries into possible violations of *criminal* law, unlike the *civil* action suit brought by Mayor Cervantes of St. Louis against *Life* magazine and writer Denny Walsh in which the courts refused to compel Walsh to disclose sources of information. *See* Chap. IV, pp. 91–92.

[27] Note that the Wisconsin Supreme Court put a different interpretation on Caldwell's "ordeal" than did Justice White.

[28] State v. Knops, 183 N.W.2d 93, 49 Wis.2d 647 (1971).

[29] Rule 37, pertaining to New Jersey's Revised Statutes 2A:84A–21 (Supp. 1970), states: "A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or (b) without coercion and with knowledge of his right or privilege made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone."

30 "Justice White and Reporter Caldwell: Finding a Common Ground," reprinted from *Columbia Journalism Review*, Sept./Oct., 1972, p. 36.

31 Vermont v. St. Peter, 42 *Law Week* 2427, Feb. 19, 1974.

32 492 F.2d 631. On May 28, 1974, the Supreme Court denied an application by Hume for a stay of judgment, 94 S.Ct. (1974). Justices Brennan, Douglas and Marshall would have granted the stay. A week later, the Supreme Court dismissed Hume's petition for a writ of certiorari.

33 Judge McGowan's opinion came six months before a majority of the Supreme Court in Gertz v. Welch (*see* Chap. IV, pp. 85–88) restored some vitality to libel suits brought by private individuals.

34 Op. cit., Chap. VI, note 9 and pp. 137–39.

35 Judge Sirica also had ordered John F. Lawrence, Washington bureau chief of the *Los Angeles Times* to jail after Lawrence had been subpoenaed by attorneys for the Watergate break-in defendants to turn over tape recordings of an interview with Alfred C. Baldwin III, chief government witness. The interview had been obtained by two *Times*' reporters and the recordings then were placed in Lawrence's custody. When he "respectfully declined" to obey the judge's order concerning the subpoena, using a First Amendment argument, he was taken directly from the courtroom to jail without even having the chance to say good-by to his wife. He spent several hours in jail before District of Columbia Circuit Court of Appeals ordered him released, pending an appeal. But shortly thereafter Baldwin released the *Times*' reporters from their pledge of confidentiality and the tapes thereupon were turned over to the court.

At the hearing on Dec. 19, 1972, which led to the judge's order that the tapes be turned over to the court, two reporters for the *Washington Post*—Carl Bernstein and Robert Woodward, who later would receive Pulitzer prizes for their investigative reporting in connection with Watergate and its aftermath—were warned, but not by name, that attempts to obtain information from members of the Watergate grand jury had the potential for being a contemptuous offense, since grand jurors are sworn to secrecy. The reporters described this experience in their book, *All the President's Men*, published by Simon and Schuster (New York: 1974), pp. 222–23.

PORNOGRAPHY IX

Pornography, like privacy, involves an area of the law still very much in flux. The reason lies in the great difficulty of defining something which may be "obscene" to one person but a work of "art" to another. Any such definition must, of course, pass the First Amendment safeguards against censorship and prior restraint. Justice Stewart capsulized the constitutional dilemma when he pointed out in a 1966 dissenting opinion that the First Amendment protects coarse expression as well as refined, and vulgarity as well as elegance. "A book worthless to me," he wrote, "may convey something of value to my neighbor. In a free society to which our Constitution has committed us, it is for each to choose for himself."[1]

Not only are there enormous definitional problems, but a host of other related difficulties cry out for solution in any attempt to control pornography. Can anti-obscenity laws apply equally to adults *and* juveniles? If so, does the fact that an adult voluntarily wishes to see "pornographic movies," or read "obscene" books, make a difference? Can the law constitutionally distinguish between a person who does not want to be subjected to pornographic literature, such as a patron of the U.S. Postal Service who opens an unmarked envelope which contains "obscene" photographs, and one who sent off a request for such photographs? What constitutes commercial exploitation of sex as contrasted with a natural, healthy interest in the subject?

Justice Black, arguing that the "First Amendment forbids any kind . . . of governmental censorship over views as distinguished from conduct," asked "how talk about sex can be placed under . . . censorship . . . without subjecting our society to more dangers than we can anticipate at the moment." It was to avoid such dangers that the First Amendment was adopted, he said, in urging the Court to "recognize that sex at least as much as any other aspect of life is so much a part of society that its discussion should not be made a crime."[2]

At the same time, Justice Tom Clark demonstrated a growing intolerance of "pornography" when he wrote, in a dissenting opinion,[3] of the increasing number of such cases coming before the Supreme Court and of the states' mounting problem of coping with such material. Then, expressing some outrage, triggered by frustration, Justice Clark said, "I have 'stomached' past cases for almost 10 years without much outcry. Though I am not known to be a

shrinking violet—this book [*Memoirs of a Woman of Pleasure*] is too much even for me."

What Justice Robert Jackson feared would happen in 1948 has become a reality. The Supreme Court is the "High Court of Obscenity"—representing the last chance to halt or encourage the countless attempts to ban, seize, or otherwise suppress the publication and distribution of books, films and magazines which local or national censors find offensive. At one time or another, the U.S. Postal Service, state or local review committees, citizens' "decency" boards, etc., have proscribed such books as Whitman's *Leaves of Grass*, Dreiser's *An American Tragedy*, Steinbeck's *The Grapes of Wrath* and *East of Eden*, Joyce's *Ulysses*, and D. H. Lawrence's *Lady Chatterley's Lover*, to name a few. Films, such as Rossellini's "The Miracle," have been banned by governmental boards. Censors have prohibited the mailing of certain books, magazines and films considered obscene or pornographic.

9.1 History. While the advent of the printing press spurred censorship in England, obscenity was not initially within the scope of state prohibition. Rather, censorship by the Star Chamber was aimed at blasphemy and sedition. The government made no official effort to prohibit dissemination of obscene material. Such material raised moral questions cognizable only in ecclesiastical, not common-law, courts. Not until 1727 was the publication of obscene literature held to constitute an indictable offense.[4]

In the United States, obscenity was the target of both common law and statutory law. By 1792, all 14 states made blasphemy or profanity, or both, statutory crimes, although they did not specifically outlaw obscenity. Massachusetts had made it a crime as early as 1712 for anyone to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon." In 1815 the first reported obscenity conviction was obtained under the common law of Pennsylvania. A similar conviction occurred in Massachusetts in 1821—the same year that Vermont passed the first state law proscribing publication or sale of "lewd and obscene" material. Federal legislation barring importation of such matter first appeared in 1842.

Although obscenity laws were few in number and enforcement lax, according to Justice Brennan,[5] the situation changed significantly after 1870 when federal and state governments became much more active in attempts to suppress obscenity. By the end of the 19th century at least 30 states had some type of general prohibition against dissemination of obscene matter, and the federal government had numerous anti-obscenity statutes on the books at the time of the U.S. Supreme Court's landmark decision in *Roth v. U.S.* in 1957.

It was the *Roth* decision (discussed later) which finally set aside a century-old legal test of obscenity imported from England as the result of *Regina v. Hicklin* (1868).[6] The two-part *Hicklin* standard was whether "the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Thus, the determination of obscenity stemmed from the effects of *isolated passages* upon the *most susceptible person*.

Prior to the *Hicklin* test, a New Yorker, Anthony Comstock, had begun his "war" against obscenity that culminated in passage of the federal Anti-Obscenity Act of March 3, 1873—a statute prohibiting the mailing of any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." That statute—now codified as Section 1461 of Title 18 of the United States Code—is still on the books in substantially the same form as when it was originally enacted. It reads, in part:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and . . .
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

9.2 Courtroom battlegrounds. Despite legislative and administrative attempts to deal with pornography, courtrooms have been the principal setting for the many confrontations with "pornography." These struggles can be divided into two broad categories: those that involve substantive issues, such as constitutionality of various federal, state and local laws; and those concerned with procedural issues,

principally involving the ways authorities can legally seize or confiscate allegedly pornographic material so as not to infringe upon the rights of individuals. Generally speaking, procedural safeguards now require that prior restraint or seizure of allegedly obscene matter must be of short duration and lead to an adversary proceeding where the rights of the citizen can be protected against arbitrary and unjustified action by government. Such an adversary proceeding helps to prevent administrative censorship.

The cases about to be examined fall primarily into the substantive category, dealing more with attempts to map out that area of speech and press which can be punished constitutionally.

A. *Samuel Roth v. U.S.* and *David S. Alberts v. State of California.*[7] Four months prior to the U.S. Supreme Court's decision in these combined cases, the same Court had held in *Butler v. Michigan*[8] that a Michigan law, prohibiting sale of material that tended to corrupt the morals of minors, was unconstitutional when extended to adults. The Court declared that the law restricting what adults could read was overly broad. Then came the decision in *Roth* and *Alberts* in which a majority held that the federal obscenity statute,[9] prohibiting the mailing of obscene or otherwise indecent material, and the California law under which Alberts had been convicted, were constitutional and did not violate the due process rights of the defendants. The Court split in *Roth* was 6-3, and in *Alberts*, 7-2. In *Roth*, Chief Justice Earl Warren concurred in the result, but not for the reasons given by Justice Brennan, while Justices Harlan, Black and Douglas dissented. In *Alberts*, Harlan concurred in the Brennan opinion.

Briefly, Roth published and sold books, magazines and photographs in New York. He was convicted by a U.S. District Court jury on four counts of violating the federal obscenity statute, and the conviction was affirmed by the U.S. Court of Appeals and the Supreme Court.

Alberts conducted a mail order business in Los Angeles. He was convicted by a Municipal Court judge on a misdemeanor complaint[10] which charged him with lewdly keeping for sale obscene and indecent books and using pandering-type advertisements. He was fined $500, sentenced to 60 days in jail and placed on probation. The conviction was affirmed by a California Superior Court and by the U.S. Supreme Court.

The significance of *Roth-Alberts* is threefold:

1. The Court, presented squarely with the issue of whether obscenity is constitutionally protected by the First or Fourteenth Amendment, ruled that it was not because it is utterly lacking in

"redeeming social importance." Thus, obscenity falls into that unprotected class of speech/press that includes some kinds of libelous speech or press not incorporated into the privilege forged by *Times-Sullivan* and its "progeny;" speech or press which invades a person's privacy, and purely commercial speech as first noted in *Valentine v. Chrestensen*[11] and more recently in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[12]

2. The old *Hicklin* rule was renounced by Brennan, who said: "The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."

3. A new standard was enunciated. Henceforth the test for determining if material was obscene would be: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[13]

The *Roth* standard, as it became known, had emerged in earlier court decisions at state and federal levels, but the various parts were fashioned into one test in *Roth.*[14] Problems of definition are apparent and provoked much disagreement both in *Roth-Alberts* and in subsequent cases.

Chief Justice Warren urged the Court to confine itself to the conduct of the defendants rather than the nature of the materials. Harlan dissented in *Roth* principally on the ground that federal censorship can do far more harm than censorship applied in one or more of the states which, in his view, should have primary responsibility for deciding most obscenity cases. Basically, Harlan believed the states should be permitted considerable leeway in deciding permissible speech and press, or in deciding other legal problems, because they can act as separate social "laboratories"—50 of them where solutions to common problems can be sought.

Justice Douglas, with Black concurring, dissented principally because thoughts, not actions, were being punished. He noted an earlier California court definition of obscene material—"if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"[15] —and then observed: "By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government."

B. *Jacobellis v. State of Ohio.*[16] In this case, which came seven years after *Roth*, six justices in four different opinions reversed the

conviction of a Cleveland Heights theater manager who had been fined $2,500 for violation of a state statute that prohibited the showing of obscene, lewd, or lascivious films. Again there was disagreement with the *Roth* standard as only Justice Goldberg concurred with Brennan's plurality opinion which engrafted a corollary onto the *Roth* test; i.e., that the material must be "utterly without redeeming social importance" to be obscene. Emphasis was provided by Brennan's categorical statement that "material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied constitutional protection."

In addition to this new requirement, Brennan said that "contemporary community standards" meant national, not local, standards. Thus, the film that led to Jacobellis' conviction first had to be found utterly lacking in redeeming social importance as judged by national standards. Only then could a determination be made concerning its appeal to prurient interest and whether it went beyond "normal candor" and became "patently offensive." Since several film critics had praised the movie in question ("Les Amants"), it could not be found obscene when the criterion, "utterly without redeeming social importance," was applied.

Justices Douglas and Black concurred in the reversal for basically the same reasons given in their dissenting opinions in *Roth*. Justice Harlan dissented, principally because he believed the states should take the lead in these cases. Justice Stewart, in a concurring opinion, provided his own definition of hard-core pornography ("I know it when I see it"), and he argued that this should be the only kind punished by criminal law. Chief Justice Warren and Justice Clark dissented, largely because they believed that state courts should play a larger role in interpreting and applying the original *Roth* standard, with the U.S. Supreme Court restricting itself to a review of the record rather than promulgating expanded tests.

C. *Ginzburg*, *Mishkin* and *Memoirs* cases. Fourteen opinions "decided" these cases in 1966 as the Court, by a 5-4 decision, affirmed in the *Ginzburg* case one of the heaviest prison sentences handed out in any obscenity case up to that time.

1. Ralph Ginzburg had been sentenced to five years in prison and fined $28,000 following conviction on 28 counts of violating the federal obscenity statute. According to a majority of the U.S. Supreme Court, the "leer of the sensualist" permeated the advertising used by Ginzburg to promote three publications: *Eros*, a quarterly magazine; *Liaison*, a biweekly newsletter; and a book, *The Housewife's Handbook on Selective Promiscuity*.[17]

Brennan said in his plurality opinion for the Court that as part of

the "sordid business of pandering," mailing privileges for *Eros* were sought at Intercourse and Blue Ball, Pa.; but when the post offices at these towns indicated they could not handle the anticipated volume of business, mailing privileges were obtained at Middlesex, N.J.

Significantly, the Court did not affirm the conviction on a finding that the publications themselves were obscene—which would have required the tests as announced in *Roth* and *Jacobellis*—but rather on the basis that Ginzburg, through "pandering" advertisements, had advertised the publications as though they were obscene, thereby leaving himself defenseless. There was no need to apply the *Roth* or *Jacobellis* tests to the content of the publications.

The *Ginzburg* decision, coupled with the Court's 6-3 upholding of the conviction of Edward Mishkin under the New York criminal statute which resulted in a three-year prison sentence and $12,000 fine, sent shock waves through segments of the movie and publishing industries. The "pandering" rule, or the vague "leer of the sensualist" test, was seen by some as a signal from the Court for a crackdown on pornography.

Ginzburg succeeded in obtaining a reduction in sentence to three years, but finally, with all legal moves exhausted, he tore up a copy of the Bill of Rights, issued a parting statement to newsmen, and on Feb. 17, 1972—almost six years after the Supreme Court had affirmed his conviction—began serving his sentence. Nine months later he was paroled.

2. In the *Mishkin* case,[18] Justice Brennan again delivered the opinion of the Court with Justices Black, Douglas and Stewart dissenting. A principal argument used by Mishkin and rejected by the Court was that the magazines he published dealt with such deviant sexual practices (such as flagellation and lesbianism) that they therefore did not appeal to the prurient interest of the "average" person. Brennan brusquely swept this argument aside as "being founded on an unrealistic interpretation of the prurient appeal requirement." He said: "Where the material is designed for and primarily disseminated to a clearly deviant sexual group, rather than the public at large, prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

Brennan indicated that the prurient-appeal requirement was adjustable to fit social realities and that it could be applied to the group or groups intended to receive the material in question, rather than to an "average person" in the community.

3. In the *Memoirs* case,[19] the Court by a 6-3 margin reversed a ruling by the Superior Court for Suffolk County, Mass., that the

book, *Memoirs of a Woman of Pleasure*, was obscene. The plurality opinion by Brennan, joined by Chief Justice Warren and Justice Abe Fortas, drew dissent from Justices Clark, Harlan and White. Justices Black, Douglas and Stewart agreed that the book was not obscene, but for reasons different from those expressed by Brennan.

Brennan's determinative opinion held that the Supreme Judicial Court of Massachusetts, which had affirmed a lower court finding, erred in holding that the book need not be "utterly without redeeming social value" in order to find it obscene. In *Jacobellis*, his opinion had not been a determinative one. A book cannot be proscribed, said Brennan in *Memoirs*, unless it is found to be *utterly* without such value. He continued: "This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive.[20] Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."

As stated by Brennan, the criteria which must be met separately and then coalesce before material can be judged obscene (excluding pandering-type advertisements which obviate the *Roth-Jacobellis* test) were: (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The latter part of this test is predicated on Prof. Meiklejohn's concept of absolute First Amendment protection for "political" speech. Brennan made this clear when he stated in a footnote that "material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."

Justice Black characterized the three-part test of obscenity as "vague and meaningless," and said the "social value" test was more nebulous than the "unknown substance of the Milky Way."[21] Concerning the *Ginzburg* and *Mishkin* cases, Black again urged that a distinction be made between speech and conduct, with the former not subject to government regulation.

Justice Harlan, who had argued against the Court's imposition of standards of obscenity on the states, dissented in *Memoirs* (because the Court was overruling a state determination of obscenity), joined the majority in upholding the conviction of Mishkin which had occurred in a state court, and dissented in *Ginzburg* on the basis that the federal statute banned only "hard-core" pornography and that

neither Ginzburg's publications nor his advertising fell within that narrow class. *Memoirs*, he argued, did not fall within the "hard-core" definition and therefore could not be barred from the mails, although it could be proscribed by the various states if they so desired.

Concerning the Court's action in the trilogy of cases, Harlan said:

> The central development that emerges from the aftermath of *Roth* . . . is that no stable approach to the obscenity problem has yet been devised by this Court. Two Justices [Black and Douglas] believe that the First and Fourteenth Amendments absolutely protect obscene and nonobscene material alike. Another Justice [Stewart] believes that neither the states nor the federal government may suppress any material save for "hard-core pornography." *Roth* in 1957 stressed prurience and utter lack of redeeming social importance; as *Roth* has been expounded in this case [and in *Ginzburg* and *Mishkin*] . . ., it has undergone significant transformation. The concept of "pandering," emphasized in the separate opinion of the Chief Justice in *Roth*, now emerges as an uncertain gloss or interpretive aid, and the further requisite of "patent offensiveness" has been made explicit as a result of intervening decisions. Given this tangled state of affairs, I feel free to adhere to the principles first set forth in my separate opinion in *Roth*. . . .[22]

Justice White dissented in *Memoirs* principally because he believed that (a) the "social importance" test was relevant "only to determining the predominant prurient interest of the material;" (b) materials should be judged by their predominant theme; and (c) the First Amendment did not prevent a state from treating *Memoirs* as obscene and forbidding its sale.

Justice Clark dissented in *Memoirs* and, like Justice White, urged the Court to return to the original *Roth* standard which did not include the "utterly without" test.

D. *Ginsberg v. State of New York.*[23] The conviction of Samuel Ginsberg under a New York state "variable obscenity" statute, which made it unlawful to sell obscene material to minors under age 17 although that same material could legally be sold to those 17 and older, was affirmed by a 6-3 decision of the Court in 1968. Justice Brennan again delivered the Court's opinion with dissent by Black, Douglas and Fortas.

In 1965 a 16-year-old boy bought two "girlie" magazines at Ginsberg's store in Bellmore, Long Island, after being sent there by

his mother who wanted to test the New York law. Ginsberg was convicted and placed on probation for one year. The Court held that to sustain state power in such cases as *Ginsberg* required only that "we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." The majority so held.

In concurring, Justice Stewart wrote:

> I think a state may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience [a reference to a rationale used for imposing more regulation on radio-television than on other media[24]]—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a state may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[25]

Justice Douglas, joined by Black, dissented for reasons given in earlier dissenting opinions. And Justice Fortas, in questioning why a magazine is obscene when sold to a 16-year-old, but not obscene when sold to a 17-year-old, termed Ginsberg's conviction "a serious invasion of freedom."

In 1969, New York was among 36 states[26] which had laws shielding children from the sale or distribution of material deemed pornographic. Shortly after the *Ginsberg* decision, 14 states either passed or amended their laws to reflect New York's "variable obscenity" feature, although some states placed the protective age limit at 18.

E. *Stanley v. Georgia.*[27] In 1969, the Court ruled for the first time that mere possession of obscene material in the home was not a crime. A Georgia law used to convict Stanley for possession of obscene matter—a "stag" movie—was declared unconstitutional. Justice Marshall gave the Court's opinion and distinguished this case from *Roth* on the ground that *Stanley* involved "mere private possession" contrasted with regulation of commercial distribution of obscene material. As Marshall said, among the people's fundamental rights is the freedom, except in very limited circumstances, from "unwanted governmental intrusions into one's privacy." Such intrusion resulted when law enforcement officers, while searching Stanley's home for evidence of book-making, found the movie.

F. *U.S. v. Reidel.*[28] Prior to the Court's 7-2 decision in this case,

there had been considerable debate in law review journals concerning the vitality of *Roth*.[29] If *Roth* was dying, then the Court in this mid-1971 decision resuscitated it. Justice White delivered the opinion of the Court which reversed a U.S. District Court's dismissal of an indictment against Norman George Reidel who had been charged with mailing allegedly obscene material. The question of obscenity was not decided by the District Court, only the constitutionality of the federal statute.

Justice White, joined by Chief Justice Burger and Justices Brennan, Stewart, Blackmun and, in part, by Harlan, who wrote a separate, but concurring, opinion (as did Marshall), stated emphatically: "*Roth* has not been overruled. It remains the law in this Court and governs this case. Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's."

White then dealt with a seeming inconsistency between the *Stanley* decision and the one reached in the case under review:

> To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion adjured.
>
> * * *
>
> [Reidel] . . . has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now.

Justice White then appended a kind of postscript to lawmakers which would be loudly echoed by a 5-4 majority of the Court in 1973. He said:

> The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend

statutes and ordinances. *Roth* and like cases pose no obstacle to such developments.

In dissent, Justice Black, joined by Douglas, wrote: "I particularly regret to see the Court revive the doctrine of *Roth*.... As the Court's many decisions in this area demonstrate, it is extremely difficult for judges or any other citizens to agree on what is 'obscene.' Since the distinctions between protected speech and 'obscenity' are so elusive ... almost every 'obscenity' case involves difficult constitutional issues."

But as Chief Justice Burger later would say, the Court cannot sidestep the admittedly "tough individual problems of constitutional judgment involved in every obscenity case"--a statement uttered in 1973 which reiterates what had been said by the Court in *Roth* some 15 years earlier.

G. *Miller v. California*,[30] *Paris Adult Theater I v. Slaton*,[31] *U.S. v. 12 200-Ft. Reels of Super 8mm. Film*,[32] *U.S. v. Orito*[33] and *Kaplan v. California*.[34] Separate opinions were written in each of these cases in mid-1973 by Chief Justice Burger and, for the first time since *Roth*, a majority of the Court agreed on substantial changes in the standard for testing obscenity. The effect of the 5-4 decision is to make it easier—but not easy—for the states to make illegal specific kinds of obscenity no matter whether viewed only by consenting adults and regardless of any steps taken to shield such material from juveniles.

Dissent was registered in each case by Justices Brennan, Douglas, Marshall and Stewart because, generally, they feared the decisions would trigger repressive actions against constitutionally protected speech/press.

As a result of the decisions, at least two major changes resulted in the "law" of obscenity:

1. The Court did away with that part of the *Roth* standard which had been engrafted by Brennan in his *Memoirs* plurality opinion for the Court; i.e., the "utterly without redeeming social value" corollary.

2. The Court changed the requirement that allegedly obscene material had to be judged on the basis of a national, rather than a local community, standard. Instead, the Court reinstated the local community standard which, it said, can be determined by local juries.[35]

The Court, however, warned that laws dealing with obscenity must be specific in what is outlawed, otherwise they will be unconstitutional. To provide guidance in what may be an exceedingly difficult undertaking, the Chief Justice singled out the laws in Oregon and

Hawaii for favorable comment, and he also gave some "plain" examples of what could be declared obscene in accordance with the newly announced obscenity test. Henceforth a state could outlaw *patently offensive* representations or descriptions of ultimate sexual acts (actual or simulated, normal or perverted), masturbation, excretory functions, and lewd exhibitions of the genitals. There may be other kinds of representations or descriptions of sexual acts which can be outlawed but which were not mentioned by the Chief Justice in his opinions for the Court.

The test of obscenity that emerges from these decisions marks the first time since *Roth* (1957) that a majority of the Court could agree on the wording. In *Miller*, five Court members agreed that the test of obscenity included: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. If the material appeals to prurient interest and is patently offensive, then it must have "serious literary, artistic, political, or scientific value to merit First Amendment protection," Chief Justice Burger said.[36]

Justice Brennan abandoned his position as stated in *Roth* and in other subsequent opinions and joined with Justices Black and Douglas in the belief that any formulation of what constitutes obscenity will have a suppressive effect on protected expression. He said in his dissenting opinion in *Paris Adult Theater I* that all of the states, except Oregon, would have to enact new laws to meet the newly-stated criteria of what constitutes obscenity. Chief Justice Burger disagreed with this statement although he declined to speculate on how many states would have to redraft their laws to meet the concrete guidelines necessary in any attempt to deal with commercialized "hard core" pornography.

In addition to the changes made in the test of obscenity, the Court declared that the government can act to prevent importation of obscene material even though such material is intended for private, not commercial, use; can halt interstate or intrastate transportation of such material no matter what use the purveyor intends to make of it; and can act against such material no matter what precautions are taken by the commercial purveyor of such material to prevent juveniles from being exposed to the material. Apparently the only place where obscene material is safe from the reach of the law is when it reaches the privacy of one's home.

To perhaps guard against overzealous prosecutors, Chief Justice Burger said in *Miller*:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that the specific prerequisites will provide fair notice to a dealer in such material that his public and commercial activities may bring prosecution.[37]

Justice Brennan, joined by Justices Marshall and Stewart, believed that the new formulation would require independent review of every obscenity case by the appellate courts, including the Supreme Court, and would throw upon the highest court the awesome task of making criminal and constitutional law in each case decided by the Court, just as Justice Harlan had warned 15 years earlier in *Roth*. Further, Brennan did not agree that the Chief Justice's restriction of the obscenity test to material depicting or describing "conduct" would provide the necessary safeguard for protected speech. As Brennan said: "If the application of the 'physical conduct' test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse. Surely we have passed the point where the mere written description of sexual conduct is deprived of First Amendment protection."[38]

The Chief Justice attempted to make the following distinction between protected and unprotected speech: "We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights."[39]

The problem of differentiation is apparent. The Chief Justice says that the decision is not directed at thought or speech; however, the decision permits punishment of *depiction* and *description* of sexual conduct. Words are the means of *describing* sexual conduct. The distinction that the Chief Justice attempts to make is unclear; nor does he provide clarification when he refers, in a footnote in *Miller*, to the speech-conduct dichotomy, as follows:

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behav-

> ior. In United States v. O'Brien, . . . a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be "sufficiently justified if . . . it furthered an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[40]

Just how any government effort to suppress conduct—that is, public exhibition of obscene behavior which presumably would be analogous to O'Brien burning his draft card (the nonspeech element which was not protected by the First Amendment)—could be extended to include something that is entirely speech (pictorial or textual representation of sexual conduct) without there being suppression of free expression remains to be seen.

This dilemma drew the following response from the Chief Justice:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. * * *
>
> The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The 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." *Roth v. U.S.* . . . . But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[41]

Justice Douglas interpreted the First Amendment much differently. He agreed that *conduct* can be regulated, but not representations—such as words, drawings and photographs—of that conduct. Furthermore, he raised the issue of *ex post facto* law, which is specifically forbidden by the Constitution. *Ex post facto* law declares an act to be a crime even though it was not a crime at the time it was committed. In discussing the new test of obscenity in *Miller*, as well as those since *Roth*, Douglas said that these are standards written into the Constitution by Supreme Court decisions. "Yet how," he

asked, "under these vague tests can we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?"[42]

Indeed, how? Miller's conviction on a charge of mailing unsolicited sexually explicit material in violation of a California statute was vacated by this Supreme Court decision and the case remanded for further consideration not inconsistent with the majority decision. Thus, a standard not known to Miller at the time he mailed the material could be used to sustain his conviction; but the majority would respond that he was convicted under a tougher standard—*Roth* and its corollaries—and therefore derives no benefit from *Miller*.

The problem of vagueness persists, resulting finally in a major change of position on the part of the chief architect of *Roth*. As Brennan wrote:

> . . . [A]fter 15 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them.[43]

But Brennan did not go as far as Douglas. To do so, he argued, would be to strip the "States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interest."[44] Since the concept of obscenity "cannot be defined with sufficient specificity and clarity to provide fair notice to those who create and distribute sexually oriented material," Brennan said he would limit state restrictions to material that might fall into the hands of juveniles or unconsenting adults.[45]

Citing such precedents as *Stanley*, *Ginsberg* and *Jacobellis*, the Chief Justice noted in *Miller* that sexually explicit material had been thrust upon unwilling recipients and, in harmony with Brennan,

wrote: "This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."

Thus, Justice Douglas stood alone in contending that the First Amendment tolerates no sanctions against material classified as "obscene," even when such material falls into the hands of unconsenting adults and/or juveniles.

The effect of *Miller* and the decisions in the other cases was not long in being felt. On June 24, 1974, the Supreme Court, in a 5-4 decision, affirmed the conviction of William L. Hamling and others for conspiring to mail, and mailing, an obscene advertisement with sexually explicit photograhs which were used to promote the sale of a book, *The Illustrated Presidential Report of the Commission on Obscenity and Pornography.*[46] In giving the Court's opinion (with the same lineup of justices as in *Miller*), Justice Rehnquist said about the matter of *ex post facto* that *Miller* permits the imposition of a lesser burden of proof on the prosecution than did *Memoirs* (by eliminating the "utterly without redeeming social value" test and the national standard requirement); therefore, petitioners derived no benefit from the *Miller* formulation. However, Rehnquist pointed out that any appeals in process at the time of *Miller* would receive any benefit that flowed from the Court's decisions in that and the companion cases.

Concerning the claim of "vagueness" by petitioners, Rehnquist said that the word "obscene," as used in 18 U.S. Code Sec. 1461 (the law prohibiting the mailing of obscene material), is not merely a descriptive term, but a "legal term of art" which does not change with each indictment. Rather, said Rehnquist, "It is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. . . . Since the various component parts of the constitutional definition of obscenity need not be alleged in the indictment in order to establish its sufficiency, the indictment in this case was sufficient to adequately inform petitioners of the charges against them."

Justices Brennan, Douglas, Marshall and Stewart dissented.

Justice Brennan, joined by Marshall and Stewart, said that the U.S. statute, as construed by the Court, "aims at total *suppression* of distribution by mail of sexually oriented materials" and therefore, in his view, is unconstitutionally broad. He also raised the interesting problem that is posed by the reversion to local community standards; i.e., national distributors of sexually oriented material "will be

forced to cope with the community standards of every hamlet into which their goods may wander."[47]

In upholding the constitutionality of the anti-obscenity statute when "applied according to the proper standards for judging obscenity," the Court majority, as in the *Ginzburg* case which involved a violation of the same U.S. law, permitted imprisonment of Hamling for one year on conspiracy charges, and three years on the mailing counts, in connection with sending out 50,000 one-page illustrated advertisements (as in *Ginzburg*). The book itself was not judged to be obscene. Hamling also was fined $32,000. One other defendant received a prison term totalling three years and several others were fined.

Similarly, the Supreme Court let stand the conviction of the editor and publisher of *Screw* magazine for violation of New York's obscenity law. The action of the Court came again in a 5-4 split on July 25, 1974.[48] The conviction of editor Jim Buckley and publisher Al Goldstein previously had been affirmed by the New York Court of Appeals which said the magazine had used photos of genitals prominently and lewdly displayed.

Such was not the case in the film, "Carnal Knowledge," hence the Supreme Court reversed the conviction of Billy Jenkins on a charge of distributing obscene material by showing the film at a theater in Albany, Ga. It did so in a unanimous decision given on the same day that Hamling's conviction was being affirmed.[49]

The state law under which Jenkins was convicted defines obscenity in the way set forth by the Supreme Court's plurality opinion in *Memoirs*, according to Justice Rehnquist who delivered the Court's opinion in *Jenkins*. The law reads: "Material is obscene if considered as a whole applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."[50] But the film, said Rehnquist, is not obscene under the constitutional standards announced in *Miller* which provided that no one would be subject to prosecution for the sale or exposure of obscene materials unless they depict or describe patently offensive "hard core" sexual conduct. The "plain examples" cited in *Miller* were recited by Rehnquist who, along with his colleagues, viewed the film and declared that it was not patently offensive. "There is no exhibition whatever of actors' genitals, lewd or otherwise . . .," Rehnquist said. "There are occasional scenes of nudity, but nudity is not enough to make material legally obscene under the *Miller* standards."

The problem of national vs. community standards also drew further comment in this case. Rehnquist said for himself and four of his brethren who joined in his opinion, that juries could either be instructed to apply a specific community's standards or the standards of a community which remained unspecified. Further, juries do not have "unbridled discretion" in determining what is patently offensive.

Justices Brennan, Douglas, Marshall and Stewart concurred in the results, but not for the reasons given by Rehnquist. Brennan, joined by Marshall and Stewart, said the obscenity formulations in *Miller* will require independent appellate review on a case-by-case basis. Then, reiterating a warning he gave in his dissenting opinion in *Paris Theater I*, Brennan said that it is clear that as long as the *Miller* test remains in effect, "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."[51]

On the same day that the Supreme Court denied certiorari in the case involving the editor and publisher of *Screw* magazine, it also allowed obscenity convictions to stand in a number of other cases by refusing to review them a second time around, as in the cases of *Miller* or *Paris Adult Theater I*, or in the first instance. Thus, July 25, 1974, stands as a warning to those convicted under the *Miller* standards that their petitions for review by the highest court in the land may be rejected. Despite the repeated dissent of four justices—Brennan, Douglas, Marshall and Stewart—the Court, in rapid-fire order, took the following actions:

1. It dismissed the appeal of Miller in *Miller v. California*[52] for want of a substantial federal question. In its original decision 13 months earlier, the Court had vacated the judgment of the Appellate Department of the Superior Court of California and remanded the case for reconsideration in light of its decision in that case. The Appellate Court again affirmed Miller's conviction. Having done so in light of the *Miller* decision of the Supreme Court, there no longer was a First Amendment, or federal, question since material judged to be obscene does not warrant constitutional protection. Justice Brennan, joined by Marshall and Stewart, disagreed with the decision not to grant certiorari, arguing that the California law under which Miller had been convicted was overbroad and therefore unconstitutional. He said that the lower court's judgment should be vacated and the case again remanded for consideration of whether Miller should have a new trial at which local community standards would be applied to determine the question of obscenity. Justice Douglas would have reversed the conviction outright.

2. It dismissed the appeal of *Louis Watkins v. State of Carolina* [53] for want of a substantial federal question. Like *Miller*, the case had been remanded to the South Carolina Supreme Court for reconsideration in light of the 1973 *Miller* decision. On remand, the South Carolina court again affirmed the conviction of Watkins on a charge of feloniously exhibiting an obscene motion picture film in violation of the state's Code of Laws (Sec. 16-414.2). Brennan, Douglas, Marshall and Stewart dissented for the reasons given in *Miller* (1974).

3. *Paris Adult Theater I* also had been remanded to the Georgia Supreme Court for further consideration in keeping with the 1973 decision in that case as well as in the companion cases. The Georgia Supreme Court affirmed its original decision which had prohibited the exhibition of two films, "Magic Mirror" and "It All Comes Out in the End," on the grounds that they were hard core pornography even though viewed only by consenting adults. The U.S. Supreme Court denied certiorari over the objections of Brennan, Douglas, Marshall and Stewart.[54]

4. In *Kaplan v. U.S.*,[55] certiorari was denied by the Supreme Court. This left intact the District of Columbia U.S. Court of Appeals' affirmance of the conviction of Kaplan in the District of Columbia Court of General Sessions on a charge of presenting an obscene film in violation of the District of Columbia Code (Sec. 22-2001(a) (1) (b)) which prohibits a person from knowingly presenting "any obscene, indecent, or filthy play, dance, motion picture, or other performance."

5. *Thomas Justin Millican, etc. v. U.S.*—certiorari denied.[56] In effect, the denial sustains the conviction of Millican in U.S. District Court for the Northern District of Georgia on a charge of using the mails to distribute allegedly obscene materials in violation of 18 U.S. Code Sec. 1461.

6. *Werner E. Enskat v. State of California*—certiorari denied.[57] The denial leaves intact the conviction of Enskat in Superior Court of California, Los Angeles County, on a charge of exhibiting an allegedly obscene motion picture in violation of the state's penal code (Sec. 311.2).

7. *Frank Cangiano and Cosmo Cangiano v. U.S.*—certiorari denied.[58] Petitioners were convicted in U.S. District Court.

8. *Michael G. Thevis v. U.S.* and *Peachtree News Company v. U.S.*—certiorari denied.[59] Petitioners were convicted in U.S. District Court for the Middle District of Florida on charges of using a common carrier for the carriage of allegedly obscene material in interstate or foreign commerce in violation of 18 U.S. Code Sec. 1462.

9. *Village Books, Inc., et al. v. Arthur Marshall Jr., State's Attorney for Prince George's County, Maryland*—certiorari denied.[60] The petitioners had been enjoined by Circuit Court for Prince George's County from selling allegedly obscene books under authority of Article 27, Secs. 418 and 418A, Annotated Code of Maryland.

10. *J-R Distributors, Inc., et al. v. State of Washington*—certiorari denied.[61] Petitioners had been convicted under the Revised Code of Washington, Sec. 9.68.010, which prohibits the sale, distribution or exhibition of obscene material. In his opinion for the court, Justice White said that only some of the material in question had been filed with the U.S. Supreme Court, although he noted that the Washington Supreme Court had found all of the material obscene under both the *Roth* and *Miller* standards. As for the materials filed with the U.S. Supreme Court, White declared that they fell within the category of hard core pornography which is unprotected by the First Amendment. He added: "Mr. Justice Brennan would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication whose dominant theme is represented by repeated photographs of men and women performing sex acts with a variety of animals."

Brennan, joined by Marshall and Stewart, said the Washington statute was overbroad and therefore unconstitutional. He also argued that in light of the *Jenkins* decision, the U.S. Supreme Court had the responsibility to independently review the allegedly obscene material in light of the second and third parts of the *Miller* obscenity test. At a minimum, Brennan contended, the Court should vacate the judgment below and remand for an independent review of the materials by the state Supreme Court. White disagreed with this contention, insisting instead that the U.S. Supreme Court has never indicated that plenary review is mandatory in every obscenity case.

11. *Robert Brown, a/k/a Bob Brown v. U.S.*—certiorari denied.[62] Petitioner was convicted in U.S. District Court for the Eastern District of Virginia on a charge of transporting allegedly obscene materials by common carrier in interstate or foreign commerce in violation of 18 U.S.C. 1462.

12. *Alan David Sians v. U.S.*—certiorari denied.[63] Sians was convicted in U.S. District Court for the Northern District of Illinois on charges of violating 18 U.S.C. 1462.

13. *Gary Gilbert Carlson and Thomas N. Truax v. U.S.*—certiorari denied.[64] Petitioners were convicted in U.S. District Court for the Central District of California on a charge of mailing allegedly obscene material in violation of 18 U.S.C. 1461.

14. In two separate cases in November, 1974, a majority of the Court upheld the constitutionality of the anti-obscenity laws of Illinois and Wisconsin.

The action by the majority of the "Burger Court" in the cases cited above since the 1973 decisions in *Miller* and the companion cases makes it apparent that convictions in obscenity cases will be easier to maintain in the face of higher court review—when and if such review takes place.

9.3 Summary. The majority decision in *Miller* and the companion cases means that once again new attempts are being made to deal with the elusive and difficult problems caused by pornography. For the present a bare majority of the Supreme Court has decided to encourage state legislatures to make new attempts to specifically define certain kinds of sexual acts (pictorial or otherwise) which can be constitutionally proscribed. Such laws must conform to the three-part test laid down in *Miller* for dealing with commercialized "hard core" pornography:

1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest.
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
3. And whether the work—*if* it appeals to prurient interest and is patently offensive—lacks serious literary, artistic, political or scientific value.

Further, the material is to be judged by local community standards, not by a national standard. And there need not be a finding that the material is utterly without redeeming social value.

The current test is a far cry from the *Hicklin* standard that existed for nearly 100 years; i.e., determining whether the material is obscene by judging the effects of *isolated passages* on the *most susceptible person.*

CHAP. IX—Pass in Review

1. What was the *Hicklin* test of obscenity?
2. What was the *Roth* standard?
3. What is a "variable obscenity" statute?
4. What is the speech-conduct dichotomy that has been used in resolving some freedom of speech cases?
5. What standard was enunciated in *Miller* (1973), and what did the Supreme Court majority specifically reject or require?

CHAP. IX—Answers to Review

1. The effect of isolated passages on the most susceptible person.
2. Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
3. This kind of statute makes it illegal to sell, or make available, obscene material to persons under a certain age. Such statutes are intended to protect juveniles.
4. As used in *U.S. v. O'Brien* (1968), a distinction was made between pure speech concerning draft laws and a young man's action when he burned his draft card. The latter (conduct) is subject to governmental regulation; pure speech is not. Is Chief Justice Burger using such a test in *Miller*? Defend your answer.
5. Basically the Court retained the *Roth* standard, as modified by subsequent cases, but threw out two requirements that had to be met in order to find material obscene; i.e., the Court rejected the concept that material had to be "utterly without redeeming social value" (the "social value" test), and that national standards had to be used rather than local community standards. The majority also insisted that state laws must be specific in what is being proscribed. Thus, the laws must "spell out" the types of sexual acts which can be declared unlawful when depicted or described.

[1] Ginzburg v. U.S., 383 U.S. 463, 498, 86 S.Ct. 942, 956, 16 L.Ed.2d 31, 53–54.
[2] *Id.*, 383 at 481–82, 86 S.Ct. at 953, 16 L.Ed.2d at 44–45.
[3] Dissenting opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413, 441, 86 S.Ct. 975, 989, 16 L.Ed.2d 1, 18 (1966).
[4] Op. cit., Justice Douglas' dissenting opinion in *Memoirs*, 383 U.S. at 428–30, 86 S.Ct. at 982–83, 16 L.Ed.2d at 11–12.
[5] Dissenting opinion, Paris Adult Theater I v. Slaton, 93 S.Ct. 2628, 2658 (1973).
[6] L.R. 3 Q.B. 360.
[7] 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).
[8] 352 U.S. 380. 77 S.Ct. 524. 1 L.Ed.2d 412 (1957).
[9] *See* p. 220 for partial text of statute.
[10] In 1957, the California Penal Code (Sec. 311) provided, in part, that a person is guilty of a misdemeanor if he willfully and lewdly "writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene writing, paper, or book" or advertises such material.
[11] 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).
[12] 93 S.Ct. 2053 (1973).
[13] Op. cit., 354 U.S. at 489, 77 S.Ct. at 1311, 1 L.Ed.2d at 1509.
[14] For citations of state, federal cases, *see* note 26, 354 U.S. at 489, 77 S.Ct. 1311, 1 L.Ed.2d at 1509.
[15] People v. Wepplo, 78 Calif. App. 2d Supp. 959, 961, 178 P.2d 853, 855.
[16] 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Although Justice

Brennan used the phrase, "utterly without redeeming social importance," in *Roth*, he did not include it as a formal part of the test of obscenity until his plurality opinion in *Jacobellis*. In *Roth*, obscenity was presumed to be utterly without redeeming social importance; in *Jacobellis* and afterward, the "utterly without" had to be proven.

17 Op. cit., Note 1.

18 Mishkin v. State of New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56.

19 Op. cit., note 3.

20 The words "patently offensive" were used in a 1962 Court ruling in *Manual Enterprises v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639. By a 6-1 decision (two justices not participating) the Court curbed the Postal Service's discretionary power to censor allegedly obscene material.

21 Dissenting opinion in *Ginzburg*, 383 U.S. at 480, 86 S.Ct. at 952, 16 L.Ed.2d at 43. *See* Meiklejohn concept of what kind of speech should be absolutely protected by the First Amendment, Chap. II, pp. 20–21.

22 Dissenting opinion in *Memoirs*, 383 U.S. at 455–56, 86 S.Ct. at 996, 16 L.Ed.2d at 26–27.

23 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195.

24 For more complete discussion, *see* Chap. XI, p. 292.

25 390 U.S. at 649–50, 88 S.Ct. at 1285–86, 20 L.Ed.2d at 209–210.

26 State statute citations are included in Appendix B of *Ginsberg* opinion, 390 U.S. at 647–48, 88 S.Ct. at 1284–85, 20 L.Ed.2d at 208–209.

27 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542.

28 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813.

29 *See*, for example, David Engdahl, "Requiem for Roth: Obscenity Doctrine Is Changing," *Michigan Law Review*, Vol. 68, No. 2, December, 1969, p. 201, and Stanley K. Laughlin Jr., "A Requiem for Requiems: The Supreme Court at the Bar of Reality," *Michigan Law Review*, Vol. 68, No. 7, June, 1970, pp. 1393–94.

30 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

31 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446.

32 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500.

33 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513.

34 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492.

35 But in a June 24, 1974, decision in *Billy Jenkins v. State of Georgia* (42 *Law Week* 5055), the Supreme Court unanimously reversed Jenkins' conviction on a charge of violating the Georgia obscenity statute by showing "Carnal Knowledge." The reversal was predicated on the determination by the Court that the movie was not the "public portrayal of hard core sexual conduct for its own sake, and for ensuing commercial gain," which the Court held to be punishable in *Miller*. In giving the Court's opinion in *Jenkins*, Justice Rehnquist made it clear that juries do not have "unbridled discretion" in determining what is "patently offensive." And on the matter of local community standards, the Court reiterated that juries need not be instructed to apply "national standards," although instructions to a jury concerning which "community standard" had to be applied could be precise or imprecise (*Id.*, at 5056).

36 413 U.S. at 26, 93 S.Ct. at 2616, 37 L.Ed.2d at 431. Note the shift in emphasis. Prurient, patently offensive material must have serious literary, artistic, political, or scientific value, whereas in *Memoirs*, the material had to be "utterly without" such value to be declared obscene. *See* note 16.

37 Op. cit., 413 U.S. at 27, 93 S.Ct. at 2616–17, 37 L.Ed.2d at 432–433.

38 Dissenting opinion in Paris Adult Theater I, 93 S.Ct. 2628, 2656.

39 Paris Adult Theater I, 93 S.Ct. at 2641–42.

40 Note 8 in Miller, 93 S.Ct. at 2616.

41 Miller, at 2620–21.

42 Dissenting opinion in Miller, 93 S.Ct. at 2623. *See* note 43.

[43] Op. cit., 93 S.Ct. at 2647.
[44] *Id.*, 93 S.Ct. at 2657.
[45] *Id.*. at 2662.
[46] Hamling et al. v. U.S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590.
[47] *Id.*, 94 S.Ct. at 2921.
[48] Buckley and Goldstein v. People of the State of New York, 94 S.Ct. (1974). Justice Brennan, joined by Stewart and Marshall, dissented and urged a new trial. Justice Douglas would reverse the convictions. The defendants were sentenced as follows: $250 fine or 30 days imprisonment on each of six counts of violating New York's obscenity statute. 352 N.Y.S. 2nd 601.
[49] Jenkins v. State of Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642. See Note 35.
[50] Georgia Code Ann. Sec. 26-2101(b) (1972).
[51] Op. cit., note 49, 94 S.Ct. at 2757.
[52] 94 S.Ct. (1974).
[53] 94 S.Ct. (1974). Facts and opinion, 203 S.E.2d 429.
[54] 94 S.Ct. (1974). Facts and opinion, 228 Ga. 343, 185 S.E.2d 768; 231 Ga. 312, 201 S.E.2d 456.
[55] 94 S.Ct. (1974). Facts and opinion, 277 A.2d 477; 311 A.2d 506.
[56] 94 S.Ct. (1974). Facts and opinion, 487 F.2d 331.
[57] 94 S.Ct. (1974). Facts and opinion, 20 Calif. App.3d Supp. 1, 98 Calif. Rptr. 646; 33 Calif. App.3d 900, 109 Calif. Rptr. 433.
[58] 94 S.Ct. (1974). Facts and opinion, 464 F.2d 321; 491 F.2d 905. Former decision, 413 U.S. 913, 93 S.Ct. 3047.
[59] 94 S.Ct. (1974). Facts and opinion, D.C., 329 F.Supp. 265; 484 F.2d 1149; 486 F.2d 1403.
[60] 94 S.Ct. (1974). Facts and opinion, 269 Md. 748, 310 A.2d 48.
[61] 94 S.Ct. (1974). Facts and opinion, 82 Wash.2d 584, 512 P.2d 1049.
[62] 94 S.Ct. (1974).
[63] 94 S.Ct. (1974). Facts and opinion, 481 F.2d 1406.
[64] 94 S.Ct. (1974).

ADVERTISING X

Advertising is a multi-billion dollar industry which seeks to influence consumers to act in certain ways. This form of communication is allied with the capitalistic *laissez-faire* concept whereby, in theory, government intervenes as little as possible in the marketplace. Under the *laissez-faire* concept, a healthy, competitive marketplace is vital to the operating economic system and to the public it serves. But the revelations that large corporations were "rigging" the marketplace through restraint of trade and monopolistic practices led Congress to enact antitrust legislation—the Sherman Act of 1890 and the Clayton Act of 1914. In addition, Congress foresaw the need of a marketplace "police" force and passed the Federal Trade Commission Act (FTCA) a few weeks before the Clayton Act became law.

10.1 Industry self-regulation. Even before the FTC Act was passed, concern about advertising malpractice had led a trade journal, *Printers' Ink*, to formulate in 1911 a "model statute," which since has been adopted in many states. The statute makes false, deceptive or misleading advertising punishable as a misdemeanor.

One of the first attempts at self-regulation came in 1915 with the establishment of the National Vigilance Committee which later became the Better Business Bureau. Many other self-regulatory efforts followed, culminating in the most extensive one to date—the National Advertising Review Board (NARB) created jointly in late 1971 by the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, and the Council of Better Business Bureaus. A National Advertising Division (NAD) was set up to handle investigations or to initiate complaints. The NAD can dismiss a complaint or find the complaint justified and request modification or withdrawal of the advertisement. An appeal then can be made to the NARB. The board is comprised of 30 advertiser members, 10 advertising agency members, and 10 "public" or non-industry members, with five-member panels the mechanism by which the board reviews appeals. The first NARB chairman, Charles W. Yost, former U.S. ambassador to the United Nations, served until late 1973 when he was succeeded by Ted Etherington who once had headed the American Stock Exchange and subsequently was chairman of the National Center for Voluntary Action.

Only complaints involving the truth or accuracy of advertisements are considered by NAD and NARB, although additional kinds of

reviews can be authorized. Initially, findings were kept secret, but this proved unworkable since any party to the complaint could publicize the results once the case had been resolved. This policy was changed to one of public disclosure in November, 1972. Advertisers who refuse to modify or withdraw untruthful or inaccurate advertisements face the threat of having NAD or NARB turn the matter over to appropriate governmental agencies.

In 1972—its first full year of operation—NAD received or initiated 444 complaints, of which 131 were dismissed and 84 were upheld. The remainder were still under investigation at the end of the year. During this same period, eight NARB panels were convened to hear appeals. Advertisers were upheld in five instances; complainants in three.

The first reported agreement to change an ad because of NARB pressure came in June, 1972, when Colgate-Palmolive Co. agreed to drop its "Go Organic" ads for a shampoo product. The industry's trade publication, *Advertising Age*, hailed this development by saying that the "action provides some pretty vivid evidence that NARB is much more than a paper tiger, and that maybe the industry is capable of putting its own house in order after all."[1]

10.2 FTC and regulatory power. Whether the industry can stave off further governmental regulation by putting its "own house in order" is largely academic. The power of the FTC, the principal independent regulatory agency vis-a-vis advertising, has gradually been broadened legislatively and through judicial interpretation.

In creating the five-member FTC commission (see Fig. 1 for organizational chart), Congress gave it the broad task, as set forth in Section 5 of the Act,[2] of "preventing unfair methods of competition in commerce." As Congress was aware, any attempt to frame a definition that would encompass all unfair practices would be an impossible task since human inventiveness in such endeavor is virtually limitless. One legislator remarked, "Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."[3] Rather than attempt an endless task, federal lawmakers gave the FTC various powers by which to carry out its function of preserving competition. In addition to the broad mission contained in Section 5, the FTC was given the power to investigate (Sections 6(a), (b) and 9), to adjudicate particular cases and issue cease and desist orders (Section 5(b)), to make legislative recommendations (Sections 6(3), (f)), and to issue rules and regulations necessary to carry out the provisions of the Act (Section 6(g)).

Whether the language of Section 5, calling upon the commission to prevent "unfair methods of competition in commerce," included false advertising *per se* was not at first clear, but two years after passage of the Act the commission decided that for a company to falsely advertise a product was an unfair advantage over competitors and therefore unlawful. The U.S. Supreme Court upheld this interpretation in 1922.[4] However, the premise that false advertising automatically constituted an "unfair method of competition" was rejected by the Court in 1932 (FTC v. Raladam).[5] Since competition with other firms was not involved in this case, the Court held that the "unfair methods" language of Section 5 could not apply and that the FTC had overstepped its jurisdiction. The ruling meant that even if there was deceptive advertising, the FTC could do nothing about it unless an adverse effect on competition could be shown. This decision was instrumental in bringing about passage of the Wheeler-Lea Act of 1938 which broadened the FTC's powers by changing Section 5 to read: "Unfair methods of competition in commerce and *unfair or deceptive acts or practices in commerce* are hereby declared unlawful." In addition, Section 12 was added:

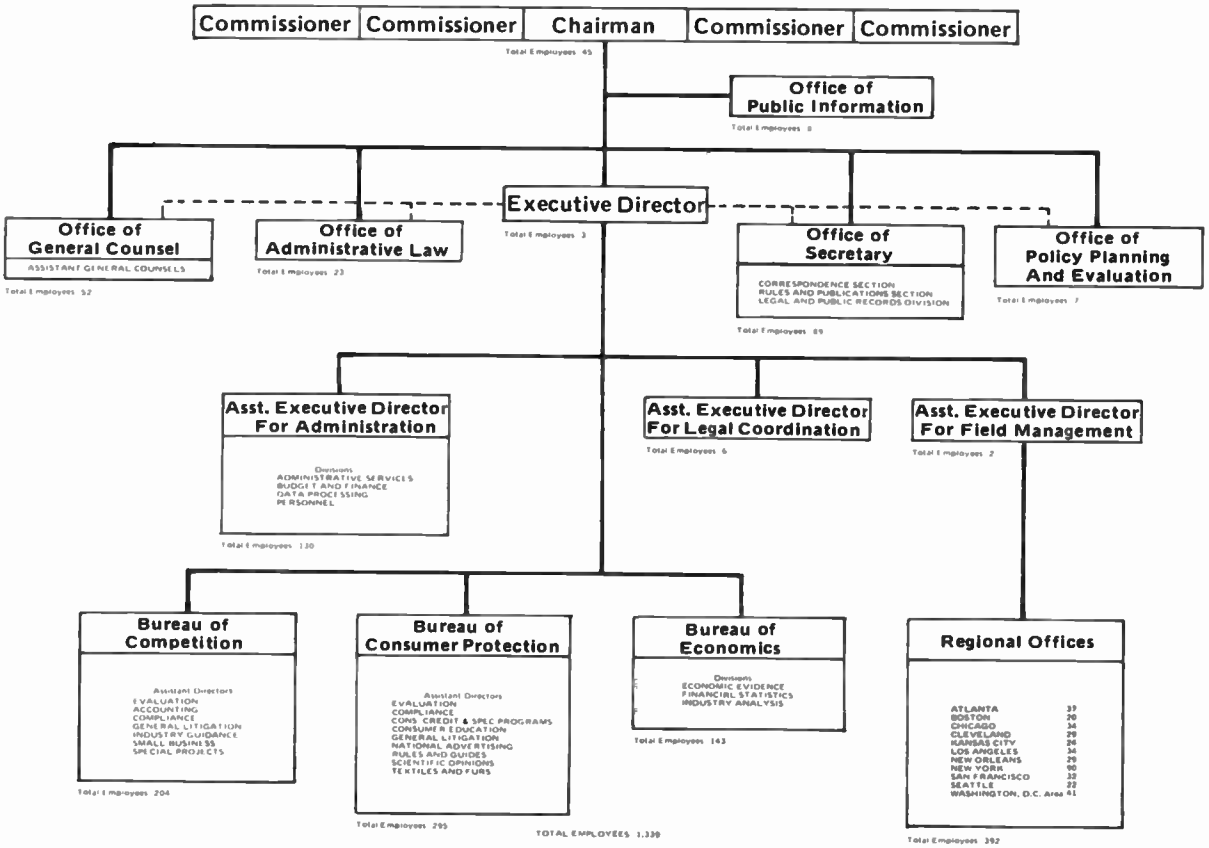
> It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics. . . . The dissemination or the causing to be disseminated of any false advertisement within the provisions of . . . this section shall be an unfair or deceptive act or practice in commerce within the meaning of Section 5.

In discussing the effect of this amendment, the Third Circuit U.S. Court of Appeals said: "The change effected by the amendment lay in the fact that the Commission could thenceforth prevent unfair or deceptive acts or practices in commerce which injuriously affect the public interest alone, while under the original act the Commission's power to safeguard the public against unfair trade practices depended upon whether the objectionable acts or practices affected competition."[6]

The Wheeler-Lea Amendment fashioned three major changes:

1. The FTC could protect consumers against deceptive advertising no matter what effect, if any, such advertising had on competition.
2. False advertising of food, drugs and cosmetics ultimately would be brought within the meaning of Section 5 so that a violation of a final FTC order could result in a suit in federal district court and a

Fig. 1 Federal Trade Commission



maximum civil penalty of $5,000 for each violation.[7] In addition, a criminal misdemeanor charge could result if a product was injurious to health or if there was intent to defraud or mislead.[8]

3. The general rule of *caveat emptor*—let the buyer beware—changed to reflect increased governmental concern for consumer protection. The rule would shift toward *caveat venditor*—let the seller beware. This is seen most clearly in decisions shortly after enactment of the Wheeler-Lea Act. The seller's intent,[9] or his knowledge[10] of advertising falsity, became immaterial in determining his violation of the law because he entered the marketplace at his own peril. And in that marketplace, standards of deception were to be gauged in terms of what is deceptive to "that vast multitude which includes the ignorant, the unthinking and credulous."[11]

10.3 Deceptive advertising. Various court decisions also have given the commission broad discretion in determining when the "public interest" is involved and in acting in the "public interest."[12] However, a variety of procedural and legal difficulties have plagued the FTC, among them: what constitutes deception? Congress purposefully omitted a definition.

With the Wheeler-Lea amendment protecting "buyers from the overly ambitious advertisers,"[13] various rules have emerged from FTC and court decisions, including:

1. In determining the likelihood of a particular advertisement being deceptive, actual deception need not be shown.[14]

2. The meaning of advertisements, and their tendency or capacity to mislead or deceive, are questions to be determined by the commission and its findings should be upheld by the courts unless arbitrary or clearly wrong.[15]

3. The commission is required to establish only the tendency or capacity of an advertisement to deceive and not actual deception itself.[16]

4. Misrepresentation of fact is considered deceptive.[17]

5. A totally false statement cannot be qualified or modified.[18]

6. A statement may be deceptive even though literally or technically not construed to be misrepresentation.[19]

7. In making product performance claims, "substantial test data" is needed to support such claims.[20]

8. Products, such as children's toys, must be "reasonably related" to the size of the containers in which they are presented for sale.[21]

9. There must be a "reasonable basis" for making product claims.[22]

10. Ambiguous statements, susceptible of both misleading and truthful interpretations, will be construed against the advertiser.[23]

11. Failure to disclose material facts where the effect is to deceive a substantial segment of the public is equivalent to deception.[24]

The above "rules" involved cases of alleged false, deceptive or unfair advertising, labeling or packaging. With the advent of commercial television in the late 1940s, new dimensions for deception became possible as movement, sound and color were combined into one powerful medium. As Circuit Court Judge Wisdom pointed out in a 1963 case:

> Everyone knows that on TV all that glistens is not gold. On a black and white screen, white looks grey and blue looks white; the lily must be painted. Coffee looks like mud. Real ice cream melts much more quickly than the firm but fake sundae. The plain fact is, except by props and mock-ups some objects cannot be shown on television as the viewer, in his mind's eye, knows the essence of the objects.
>
> The technical limitations of television, driving product manufacturers to the substitution of a mock-up for the genuine article, . . . often has resulted in a collision between truth and salesmanship. "What is truth?" has been asked before. On television truth is relative. Assuming that collisions between truth and salesmanship are avoidable, i.e., that mock-ups are not illegal per se, the basic problem this case presents is: What standards should the Federal Trade Commission and courts work out for television commercials so that advertisers will appear to be telling the truth, consistently with Section 5. . . .[25]

Part of the answer was not long in coming. Colgate-Palmolive Co. had been sponsoring a TV commercial which showed an actor placing "Rapid Shave" cream on what purported to be sandpaper and, moments later, shaving the sandpaper clean with one stroke of the razor. In reality, the "sandpaper" was plexiglas covered with sand. When the shaving cream was tested, the FTC discovered that real sandpaper could not be shaved clean until moisturized for an hour. Thus, the TV commercial was termed a misrepresentation and the FTC issued an order which the Court of Appeals, First Circuit, set aside because, in the court's opinion, the order was so broad that any prop or mock-up would be deceptive. On appeal, the U.S. Supreme Court upheld the FTC's order that the mock-up was materially deceptive, although the Court stated that not all props or mock-ups would fall into such a category. If, for example, mashed potatoes were used as a prop for ice cream because the latter would melt

rapidly under TV lights, the way in which they were used would determine whether the deception was material. As the Supreme Court pointed out:

> In the ice cream case the mashed potato prop is not being used for additional proof of the product claim, while the purpose of the Rapid Shave commercial is to give the viewer objective proof of the claims made. If in the ice cream hypothetical, the focus of the commercial becomes the undisclosed potato prop and the viewer is invited, explicitly or by implication, to see for himself the truth of the claims about the ice cream's rich texture and full color, and perhaps compare it to a "rival product," then the commercial has become similar to the one now before us. Clearly, however, a commercial which depicts happy actors delightedly eating ice cream that in fact is mashed potatoes or drinking a product appearing to be coffee but which is in fact some other substance is not covered by the present order.[26]

What emerged from this case were these general rules: (1) not all props are deceptive *per se*; (2) material deception can involve the use of props for a misrepresentation of a product's characteristics; (3) or the undisclosed use of a prop or mock-up at strategic moments in a commercial, such as the substitution of plexiglas for sandpaper in order to substantiate a product claim, is material deception.

Since the *Colgate-Palmolive* ruling, technical advances have helped to reduce the need of props and mock-ups, such that blue objects no longer are needed to make white look white. Color television also has contributed to changes in technique. In fact, the nature of advertising deception is changing and newer methods of dealing with deception and unfairness have emerged.

10.4 Unfairness Doctrine. According to an FTC official, the Wheeler-Lea Amendment added virtually an entire new third area to the Commission's authority. It empowered the FTC to attack practices which might not constitute unfair methods of competition in the traditional antitrust sense, or which might not be deceptive or misleading with respect to consumers, but which nevertheless are *unfair* in terms of impact on consumers. By means of this "Unfairness Doctrine," the FTC is extending its regulatory function not only to false and deceptive advertising, but to unfair advertising, such as advertising which makes claims without sufficient scientific testing.[27] The Unfairness Doctrine received a major boost from the U.S. Supreme Court in its 7-0 decision in *FTC v. Sperry and Hutchinson*

Co.[28] which broadly interpreted the power of the Commission under Section 5. Although the case was remanded back to the FTC for further proceedings, the opinion by Justice White served to greatly strengthen the regulatory agency in its efforts to deal with unfair practices absent any effect on competition. The Court said that two major questions were posed concerning Section 5:

> First, does Section 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does Section 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history and prior cases compel an affirmative answer to both question.[29]

The leading case prior to the Wheeler-Lea Act was *FTC v. R.F. Keppel & Brothers, Inc.*,[30] which also brought *Raladam* into question. It involved the sale of penny candies in "break and take" packs, a form of merchandising which induced children to buy lesser amounts of admittedly inferior candy in the hope of hitting a bonus package containing extra candy and prizes. The FTC issued a cease and desist order under Section 5 on the theory that the popular marketing scheme contravened public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children. The Supreme Court sustained the FTC's conclusion that the practice was "unfair" even though any competitor could maintain his position by adopting the challenged practice. As the Court said in *Keppel*, "Here, the competitive method is shown to exploit consumers, children, who are unable to protect themselves. . . . It is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."[31]

In *Keppel*, the Court rejected the argument that absent an antitrust violation or at least incipient injury to competitors, the FTC could not even issue a cease-and-desist order preventing an immoral practice. Neither the language nor the legislative history of the Act suggested such a fixed and unyielding interpretation. And it was the "reach" of *Keppel*, displacing that of *Raladam*, which was legislatively confirmed when Congress adopted the Wheeler-Lea Amendment to Section 5. Thus, said the Court in *Sperry-Hutchinson (S&H)*, "legislative and judicial authorities alike convince us that the Federal

Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the spirit of the antitrust laws."[32]

Two examples of the commission's use of the "Unfairness Doctrine" since the *S&H* case are a proposed complaint and order against Personna razor blades following a determination that the distribution of sample blades by means of packets in home-delivered newspapers would be unfair to the public because of the hazards to the health and safety of unwary consumers handling the newspapers—particularly children; and a consent order by which six major advertisers of cigarettes agreed to include in cigarette advertisements the danger-to-health warning which now appears on cigarette packages. In the razor blade case, the company discontinued the practice subsequent to the issuance of the proposed complaint.

Gerald J. Thain, assistant director for the FTC's National Advertising Division in the Bureau of Consumer Protection, expects the "Unfairness Doctrine" to develop into one of the commission's most important legal tools in the future. After *S&H*, the FTC explored a number of areas in which the Unfairness Doctrine could be applied, e.g., (1) advertising claims implying substantial benefits toward satisfying basic emotional needs or anxieties such as the need for affection or acceptance, when the advertised product does not in fact offer such benefits; (2) advertising that clearly associates a product with strongly held social values when in fact the product has no significant relationship to such social values; and (3) advertising of products to particularly vulnerable population groups when evaluation of the advertised product requires a mature and sophisticated analysis which the members of the population groups are unable to perform.[33]

FTC Commissioner Mary Gardiner Jones, in an address prepared for the National Conference of University Professors of Advertising at Tempe, Ariz. (March 11–14, 1973), agreed that the FTC's mandate to rout out unfairness in the marketplace was reaffirmed by the Supreme Court's *S&H* decision. Just how this is to be done, she said, will constitute an important part of the commission's goals in the coming years. She added:

> I believe that regulators—charged both with promoting healthy competition in our economy and with eliminating unfairness in the marketplace—must focus their attention on the public's need for hard product data. I am convinced

> that in the decades to come this must become the affirmative objective of regulatory and public action. Whether advertisements are the best medium for disclosing and communicating this data remains an unsettled question.[34] Nevertheless, the public's need for solid information provides an important overall conceptual framework within which to formulate regulatory policies respecting advertising.

10.5 Advertising agency responsibility. Advertising agencies at first were considered merely agents for the firms seeking to sell to the public; therefore they were not held responsible if advertisers were found guilty of wrongdoing. But in the late 1940s, the FTC served notice that henceforth it would hold agencies jointly responsible except in situations where they were at the mercy of the advertiser for information.[35] In *Colgate-Palmolive Co. v. FTC*,[36] the U.S. Court of Appeals rejected an advertising agency's plea to be excluded from the FTC's cease-and-desist order. The court said it could see no reason why agencies, "which are now big businesses, should be able to shirk from at least the prima facie responsibility for the conduct in which they participate."

In *Carter Products, Inc. v. FTC*,[37] the Fifth Circuit U.S. Court of Appeals said that an agency could be held responsible for deceptive advertising to the extent the agency participated in the development of the commercial.

And in *Merck & Co., Inc. v. FTC*,[38] the appellate court upheld a cease-and-desist order against the company's TV commercials for Sucret lozenges, which the commission had found to be false and misleading, and against the agency which had protested that as a mere agent it had relied in good faith on the information provided by the company. The court disagreed, saying:

> To be aware of the true extent of the therapeutic qualities of Sucrets and Children's Sucrets, the advertising agency needed to do nothing more than to read the packaging labels and instructions for use. . . . The advertising prepared . . . went far beyond the more modest claim appearing on the labels and instructions.
>
> * * *
>
> Nor is it a defense to the agency that the advertising was approved by Merck's legal and medical departments. The agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has

> expertise. Its responsibility for creating deceptive advertising cannot be shifted to the principal who is liable in any event.[39]

Thus, it now is common practice for the FTC to name as a respondent an agency which prepared allegedly illegal advertisements. The rationale is that the agency contributes to the injury of the consumer and may also enjoy an unfair competitive advantage over agencies that do not utilize deceptions or falsehoods.

10.6 Overview of FTC. Probably no other federal agency has undergone such persistent criticism as the FTC. Many studies have been made since its inception, and recommendations concerning it have run the gamut from abolishing it to giving it broad new powers.[40] More recently, the FTC has responded in several ways: (1) a reorganization in 1970; (2) recruitment of younger, more aggressive staff members; and (3) implementation of new programs and policies aimed at by-passing slower case-by-case methods and tearing away the stigma that the agency only fights trivial battles because it fears political repercussions if it takes on blue-chip companies.

A. Structure, size and budget. The FTC underwent a reorganization in 1970 which, among other changes, resulted in the creation of two operating bureaus—Consumer Protection and Competition—where formerly there had been five; a new Division of National Advertising, and a significant increase in the autonomy of the regional offices. In fiscal 1971, the regional offices received 26,333 complaints alleging improper business practices, and began 2,671 preliminary investigations and 1,531 formal investigations into antitrust, unfair competition, and consumer protection matters.

In fiscal 1972, there were 1,458 FTC employees—975 in the national headquarters and 483 in regional offices. The budget totaled $24.5 million. By comparison, there were 1,145 employees and a budget of $13.5 million in fiscal 1966. And in 1961 there were 973 full-time employees. A major reason for the agency's growth in the 1960s can be traced to new enforcement responsibilities placed on it by Congress through such legislation as truth in lending, credit reporting, flammable fabrics, textile fiber products and fair packaging-labeling.

The FTC is actually three distinct entities—the Commission, which has quasi-legislative (rule-making) and quasi-judicial (hearing complaints and issuing edicts) powers; administrative law judges (formerly called hearing examiners) who are independent of the commission and the staff and who conduct hearings into staff-filed complaints; and the staff itself.

B. Enforcement methods, penalties. Enforcement methods available to the commission are (1) publicity; (2) industry guides; (3) trade regulation rules which provide criteria for specific practices or activities and, if not followed, could raise a question of possible law violation; (4) advisory opinions (allowing businessmen to obtain binding advice from the FTC); (5) letters of voluntary compliance, which precede and can forestall the filing of formal complaints if assurances are given that the acts or practices complained of will cease; (6) consent orders, and (7) cease-and-desist orders.

Concerning letters of voluntary compliance, the Division of National Advertising, since its creation in 1970, has rejected the use of this "enforcement" method. According to Assistant Director Thain, such letters are worthless because they carry no sanction against renewed violation of a similar kind or even a renewal of the same practice. Such voluntary compliance assurances, he added, are useful "only if one is building a paper record showing a large number of 'accomplishments' with little concern for the substance of such accomplishments."[41]

If the FTC believes an unlawful practice has taken place it can proceed at various levels of formality. Most cases are disposed of through an oral promise, exchange of letters, or a more formal letter of voluntary compliance. If no agreement is reached at this stage, the consent order procedure is employed. The FTC notifies the advertiser of its intention to institute proceedings, and furnishes a "proposed complaint." If the respondent agrees to a consent order, he is bound as if the matter had been fully adjudicated. But a consent order is for settlement purposes and does not constitute an admission by the businessman or agency of any violation. Only if a consent order is not agreed upon does the Commission issue the formal complaint. In the cases in which no settlement is reached, evidence is presented by both sides before an administrative law judge whose decision may be appealed by either party to the full five-member commission. If an order to cease and desist is ultimately issued by the FTC, the respondent can seek review in a U.S. Circuit Court of Appeals.[42]

Once a cease-and-desist order becomes final, violations are punishable by civil penalty—a maximum fine for each violation of $10,000. Certain statutes also provide criminal sanctions; e.g., false advertising of food, drugs, devices or cosmetics that are injurious to health and where the intent existed to defraud or mislead.

The consent order, unlike the letter of voluntary compliance, has all the force of an order obtained by litigation, as does a cease-and-desist order, but it avoids the expense and delay associated with

cease-and-desist litigation. Violation of a consent order may result in a civil penalty of up to $10,000 per violation.

10.7 Advertisers' objections to FTC procedures. At the 1973 annual meeting of the American Association of Advertising Agencies, Tom Dillon, president of Batten, Barton, Durstine & Osborn, Inc., described the initial phase of an FTC move against an advertiser in the following manner:

> Some few days after the Commission has decided that a proposed complaint and order is justified, it authorizes the release of that information to the press, sometimes accompanied by a press conference. The Commission is not obliged to advise the respondent of when or where this press conference or release will take place, and past procedure has been merely to place the complaint in the mail on the same day that it is released to the press. If the respondent is advised, it is merely a courtesy. There is nothing in the FTC procedures calling for the formal notification of the proposed action except by registered mail.
>
> Ordinarily this is the time in which the sensational headlines are made in the press, and ordinarily, since the respondent doesn't know what the charges are or when they will be revealed, there is no effective method of achieving a balanced press report.[43]

Dillon contended that the "consent decree" phase is a powerful inducement to a respondent to enter into such an order because (1) there is no legal admission that the respondent did anything wrong, and (2) a failure to agree will invariably lead into a legal process that will take two or three years and may cost the respondent a million dollars or more in attorneys' fees and other charges. Dillon commented ruefully:

> So, not untypically, a Consent Decree is negotiated which has perhaps little or no relation to the original charges aired in the proposed complaint in the press. However, when the Consent Decree is signed, neither the press nor the public perceives anything but the message that you have admitted to everything, and, in fact, you confessed. The allegations in the proposed complaint, then, follow you for many, many years. The initial press clippings of the proposed complaint, whatever they may contain irrespective of whether they are subsequently disproved, will last forever in the files of history.

10.8 Constitutionality of advertising regulation. Before turning to the newer methods being employed by the FTC in its battles against fraudulent, deceptive and unfair advertising, a basic question needs to be examined. What is the legal rationale for regulating this kind of speech? A starting place is the assertion made in 1942 that commercial speech, such as product advertising, has a weaker claim, if any, to First Amendment protection. In *Valentine v. Chrestensen* (1942), the U.S. Supreme Court made a distinction between freedom to express political views and freedom to advertise a commercial enterprise, saying: "We are equally clear that the Constitution imposes no such [First Amendment] restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment."[44]

F. J. Chrestensen had been prevented from passing out handbills advertising the location of a submarine he owned. Handbills of "information or public protest" were permitted under the New York City law, so Chrestensen printed a criticism of the City Dock Department on the blank side of the handbills and sought to distribute them. He again was prevented from doing so and obtained an injunction against further interference by police commissioner Lewis J. Valentine. On appeal, the U.S. Supreme Court unanimously reversed issuance of the injunction, rejecting the argument put forth by the American Civil Liberties Union that it would be impossible to make a philosophically sound distinction between commercial and noncommercial handbills.

In 1964, in *Times v. Sullivan*, the Court made an important distinction between commercial and "informational" advertising. A full-page "advertisement" appeared in the New York Times, signed by civil rights leaders, protesting certain conditions in Montgomery, Ala. As Justice Brennan said for a unanimous court:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . That the Times was paid for the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[45]

In 1972, the U.S. Supreme Court, by not granting certiorari, let

stand a $150,000 libel judgment against Dun & Bradstreet for erroneously printing a bankruptcy report about a Kansas firm. Only Justice Douglas favored a Court review, commenting: "I am unpersuaded by the notion that because the petitioner's publications were commercial in nature they deserved less or no First Amendment protection."[46]

Concerning the banning of cigarette commercials from radio and television by Congress after Jan. 1, 1971, a three-judge panel of the U.S. District Court, in a 2-1 split, held in part that product advertising is less vigorously protected than other forms of speech.[47]

In a 5-4 decision, the U.S. Supreme Court, in a narrow holding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[48] ruled that an ordinance which prohibited newspapers from carrying sex designated advertising columns for certain kinds of job opportunities did not violate the newspaper's First Amendment rights. The Court affirmed a modified order by the Pennsylvania Commonwealth Court which banned "all reference to sex in employment advertising column headings," except as may be exempt under the ordinance, or certified as exempt by the commission. The Supreme Court majority took the position that the Pittsburgh Press advertisements resembled the *Chrestensen*, not the *Sullivan*, advertisement in that they did not express any position, as a matter of social policy, whether certain positions should be filled by certain members of one or the other sex, nor did they criticize the ordinance or the commission's enforcement practices. They were merely a proposal of possible employment and thus were "classic examples of commercial speech." The Pittsburgh Press contended that *Chrestensen* was not applicable because that case involved only commercial content whereas the case under review required editorial judgment in terms of the column in which an advertisement should be placed; e.g.,"Jobs—Male Interest," "Jobs—Female Interest," "Male-Female."

In his opinion for the Court, Justice Powell undertook a brief, and not entirely clear, distinction between content and editorial judgment vis-a-vis First Amendment protection, concluding that the argument put forth by the newspaper was not persuasive enough to lift the newspaper's actions from the category of commercial speech. Anticipating such a position, the Pittsburgh Press also argued that commercial speech should be accorded a higher level of protection than that affored by *Chrestensen* and its progeny. The position taken was that exchange of information is as important in the commercial realm as in any other, and therefore the distinction between commercial and other speech should be abrogated. The majority hedged a bit, with Justice Powell writing:

> Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want-ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here.[49]

The Court concluded with this reassurance to the media:

> We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.[50]

Despite the Court's effort to decide only the most narrow question, Chief Justice Burger dissented on the grounds of a "disturbing enlargement" of the commercial speech doctrine laid down in *Chrestensen*, launching the Court on a "treacherous path" of defining what layout and organizational decisions of a newspaper are "sufficiently associated" with the "commercial" parts of the newspaper to be constitutionally unprotected and therefore subject to governmental regulation. Burger believed that the newspaper was clearly within its protected journalistic discretion which, in his view, includes the right to arrange the content of the newspaper, whether news, editorials or advertisements, as it sees fit. As for the argument posited by the majority that a newspaper could not carry ads that illegally call for

prostitutes, etc., the Chief Justice said such a hypothetical situation was not at issue in the present case since there was no "blatant involvement by a newspaper in a criminal transaction."

Justice Douglas also dissented, saying in part:

> Commercial matter, as distinguished from news, was held in . . . [*Chrestensen*] not to be subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided. As I have stated on earlier occasions I believe that commercial materials also have First Amendment protection.
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> * * *
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> As Mr. Justice Stewart says, we have witnessed a growing tendency to cut down the literal requirements of First Amendment freedoms so that those in power can squelch someone out of step. Historically the miscreant has usually been an unpopular minority. Today it is a newspaper that does not bow to the spreading bureaucracy that promises to engulf us. It may be that we have become so stereotyped as to have earned that fate. But the First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs. [At this point Douglas, in a footnote, cited the Meiklejohn concept of the First Amendment as given in *Free Speech and Its Relation to Self-Government* (1948), pp. 45–46.] I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action[51] — the only point which in the Jeffersonian philosophy marks the permissible point of governmental intrusion.[52]

Justice Stewart, joined by Justice Douglas, and in part by Justice Blackmun, dissented principally on traditional grounds of prior restraint. What the Court gave approval to, said Stewart, is a governmental order dictating to a publisher in advance how he must arrange the layout of the pages in his newspaper. Nothing in *Chrestensen* supports such a decision, he declared, adding that whatever validity the 1942 case has, "it does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments. Any possible doubt on that score was surely laid to rest in . . . [*Times-Sullivan*]."[53]

Stewart concluded with a warning that if governmental agencies can force a newspaper to print a classified advertisement in a certain

way, then there is no reason that he can see which would prevent the Government from forcing a newspaper publisher to conform in some other way in order to achieve other goals thought socially desirable. "And if Government can dictate the layout of a newspaper's classified advertising pages today," he said, "what is there to prevent it from dictating the layout of the news pages tomorrow?"[54]

Even when eyed from the Court's majority viewpoint, *Chrestensen* must be viewed narrowly and only in the context of purely commercial speech even though some doubt can be entertained whether the handbills, as modified by Chrestensen, were in essence purely commercial speech. One wonders what the Supreme Court now would decide if the circumstances were the same as the *Chrestensen* case—especially in light of the reaffirmation of unequivocal protection afforded to editorial judgment and to the free expression of views on issues, no matter how controversial. Yet FTC relies to a considerable extent on *Chrestensen* in its arguments that commercial advertising is without constitutional protection.[55]

At the theoretical level, distinctions can be made between commercial speech and other forms of speech, although the logic employed can be subjected to some discomfiture:

1. Purely commercial speech is intended to influence private decisions, such as a person deciding which make of automobile to purchase; whereas protected speech must have social, political, literary or scientific value. But isn't there some social value in advertisements which influence a consumer to make *wise* purchases, such as an automobile which uses less gasoline?

2. Only false, deceptive and unfair advertisements are subject to regulation. Such an assertion is not accurate. Advertising may be literally true yet leave a false impression and therefore be subject to control. Other kinds of advertising may be subject to prior restraint as, for example, price advertisements for prescription drugs which are prohibited by law in about 20 states. However, during the decade of the '60s and the forepart of the '70s, 11 states have revoked such laws, a U.S. District Court in Richmond, Va., has declared such a law to be unconstitutional, and even the FTC staff now agrees that such advertising would save consumers millions of dollars annually. And even Chrestensen's handbills, which contained truthful advertising, suffered suppression by authorities.

The "public interest" in health, safety or clean streets may override uneasiness about some kinds of speech being unprotected by the First Amendment.

3. Any attempt to equate the rationale for determining pornography as unprotected speech to commercial speech also falls upon

hard times. To say that advertising should be unprotected because it is "utterly lacking in redeeming social value" suffers in the light of *Miller v. California*, which did away with this portion of the obscenity test. Also noteworthy is the extreme difficulty (attested to by Justice Brennan's change of heart following 15 years of valiantly trying to define something as elusive as pornography) of giving form to something as multivarious as "unprotected" speech. *Times-Sullivan* made it clear that not all kinds of advertisements are beyond the pale of the Constitution. Are there not other kinds, too? In the light of *Times-Sullivan*, *Miller* and various dissenting views by Supreme Court justices, there is room for uneasiness in the presence of sweeping commands that obscenity, libel and commercial speech are unprotected forms of speech. Such is no longer the case in some kinds of libel suits if the words complained of concern an event of public interest or public concern. So, too, "informational" advertising. But let's put aside the questions of constitutionality and return to the "fray" and the FTC's attempts to deal with certain kinds of advertising prohibited by law. To further its efforts, the FTC has introduced some relatively new weapons, including "corrective" advertisting and advertising substantiation.

10.9 "Corrective" advertising. Procedural safeguards for those accused of violating Sections 5 or 12 of the FTC Act often have led to complaints about agency foot-dragging in dealing more aggressively with fraudulent, deceptive, or unfair advertising. As Prof. Ernest Gellhorn of Duke University Law School wrote:

> Despite recent charges, the most significant obstacle to FTC prevention and prosecution of consumer deception through false advertising is probably not a lack of prosecutorial vigor. Rather, it is procedural problems that plague the Commission. Lacking preliminary injunctive powers [prior to 1974] except in case of false food and drug advertisements—itself an unused power—the FTC is impotent to prevent deceptive practices until after the trial and administrative appeals. Respondents freely rely upon procedural devices . . . to delay and postpone such cases endlessly. Two or three years is not an uncommon period between complaint and issuance of a cease-and-desist order; more than a decade is not unheard of. In recent years the FTC has expanded voluntary compliance, advisory opinion, and similar programs; but these provide scant protection against the persistent, recalcitrant firm. Unless the FTC can prosecute the hard-liners effectively and

> swiftly, it can hardly expect their competitors to cooperate and willingly place themselves at a significant disadvantage.[56]

Responding to some of these difficulties, the FTC has significantly increased the number of cease-and-desist orders since 1970. In addition to a major reorganization that went into effect that same year, the commission decided to allocate a larger share of its resources to checking on national television advertising for the following reasons:

1. The volume, intensity, immediacy, and impact of television advertising.
2. The commission's concern that such advertising was not providing "useful and effective information."
3. The commission's belief that there had to be a response "to the rising tide of consumer indignation and exasperation about the alleged unfair and deceptive tactics of some advertisers—tactics which if not challenged would create an irresistible pressure on competitors to engage in similar practices."[57]

Concurrent with that decision, the commission began to issue complaints with proposed orders designed to probe more effective remedies, such as "corrective" advertising.

The first corrective advertising case surfaced on Sept. 30, 1970, when the FTC required—with the consent of the company involved—that a certain percentage of the firm's advertising budget be devoted during a year's time to correcting any false impressions left by previous advertising. However, the company could, if it wished, stop advertising during the year's period, thereby escaping the full thrust of the consent order.

Corrective advertising was suggested by the FTC staff and adopted by the commission in part at the urging of a group of law students at George Washington University calling themselves S.O.U.P., Inc. (Students Opposing Unfair Practices). They had petitioned the FTC to require corrective advertising as part of a cease-and-desist order following disclosure that Campbell Soup Co. was using glass marbles to enhance the appearance of its vegetable soup during televised commercials. The commission did not believe that such a remedy was suitable in that case and opted instead for a consent order without the special feature. However, the commission did assert at the time that it had the power to impose such a unique remedy—unique in the sense of requiring corrective advertising in the general media. Prescription drug advertisers previously had been subject to such a requirement for several years, although they could carry out corrective advertising through medical journal ads or by direct mail.

In justifying such a remedy, the FTC believed that it would serve a threefold purpose: (1) dispel residual consumer deception; (2) help to restore competition to its proper level; and (3) deprive false advertisers of ill-gotten gains (such as a disproportionate share of the market), especially since the traditional cease-and-desist order was merely an admonishment to "go and sin no more" and carried no punishment for past "sins."

The frustrations of trying to deal with allegedly deceptive advertising were cited as one reason for the new remedy when Robert Pitofsky, then director of the FTC's Bureau of Consumer Protection, spoke at a convention of the American Association of Advertising Agencies on May 14, 1971, at White Sulphur Springs, W. Va. He cited these examples:

1. It took the FTC 16 years to get the word "liver" out of Carter's Little Liver Pills.

2. The FTC began investigating Geritol ads in 1959 and the case was still in litigation in 1975.

The Geritol case included the filing of an FTC complaint in 1962, followed by a cease and desist order in 1964. In 1967, a U.S. Court of Appeals (Sixth Circuit) upheld the FTC. In 1968, a public hearing was held concerning the alleged failure of the maker of Geritol, J.B. Williams Co., and its wholly owned advertising agency (Parkson Advertising Agency), to comply with the order although they had introduced new and revised ads for Geritol. This was followed by the filing of a $1 million suit against the company. On Jan. 22, 1973, a U.S. District Court in New York issued a summary judgment, assessing a $456,000 fine against the Williams company and a $356,000 fine against the agency for failure to comply with the FTC's five-year-old order. The company and agency appealed. On May 2, 1974, the Second Circuit Court of Appeals, in a 2-1 split, held that the company was entitled to a jury trial to determine whether or not the television commercials had made various forbidden representations.[58] Juries, said Judge Friendly for the majority, "may be the most appropriate finder of fact on the question of what television commercials mean." In setting aside the District Court's summary judgment in favor of a jury trial, the majority also held that duplicate penalties could not be imposed against both the company and its advertising agency since they were in fact one entity. The court also noted that the FTC originally had requested one judgment against both defendants ($500,000) but that the U.S. Attorney General had doubled the agency's demand in the action he had filed on behalf of the government (reduced to $812,000 in the District Court's summary judgment).

In a strong dissenting opinion, Judge Oakes said that not only did the majority pay inadequate attention to the FTC's lengthy adversary proceedings in this case, but that it also would strip the agency of its major role in the regulatory scheme of deciding what is or is not deceptive advertising. Oakes cited *U.S. v. Morton Salt Co.*[59] to support his contention that the FTC had been delegated sole authority to determine if cease-and-desist orders had been complied with. The FTC must be accorded great deference at this stage of the proceedings, he concluded, observing ruefully that after 12 years of adversary proceedings "justice must be swift as well as just."[60]

The frustrations of such cases as Geritol and Carter's Little Liver Pills, plus the perceived need to deal with "residual consumer deception," led the FTC to implement corrective advertising. In mid-1971 it issued a consent order (agreed to by the ITT Continental Baking Co., Inc.) which stipulated that if any advertising appeared for Profile bread during a year's period, at least one-fourth of such advertising would have to call attention to the fact that the "bread is not effective for weight reduction," as originally implied.[61] The FTC-approved commercial, which appeared on television, went like this:

> I'd like to clear up any misunderstanding you may have about Profile bread from its advertising or even its name. Does Profile bread have fewer calories than other breads? No, Profile has about the same per ounce as other breads. To be exact, Profile has seven fewer calories per slice. That's because it's sliced thinner. But eating Profile will not cause you to lose weight.[62]

Another corrective ad agreement was reached in May, 1972, this time with Ocean Spray Cranberries, Inc. The consent order concerned the food energy in a cranberry juice product.[63] It also named the advertising agency as a respondent on the theory that an agency which prepares and disseminates alleged illegal advertising contributes to the injury of the consumer and also may enjoy an unfair competitive advantage over other agencies which do not use deceptive or unfair practices.

After the Ocean Spray action, the FTC moved against another bread company and subsequently against the makers of various analgesics, but in the latter instance the corrective ad period was placed at two years to make it harder for a company to decide not to advertise at all during the life of the consent order.

The FTC's corrective ad innovation has been freely attacked by advertisers. Howard Bell, president of American Advertising Federa-

tion, said such a program could lead to a businessman's possible "self-annihilation," adding:

> Since there are other remedies available to the government today to correct abuses in the marketplace, this kind of punitive remedy maligns business and creates an environment in which it can be neither free nor enterprising. If one wanted to silence advertising in this country and substitute a government information service, I can think of no better way to begin the process.[64]

Corrective advertising faces an uncertain future. Two of the five FTC commissioners—Paul R. Dixon and Everette MacIntyre—oppose such a remedy. Standards will have to be established for the issuance of corrective ad orders which will satisfy judicial review, and this means that the requirements laid down in the order cannot be too severe lest they become punitive. Such a finding would nullify an FTC order.[65] FTC's Gerald Thain did not believe this would happen. He voiced the opinion that the courts will uphold the commission's authority to order such a remedy even though it is not specifically enumerated in the FTC Act.[66] A "test" case may not be far away. In a consent order negotiated in mid-1973, FTC escalated the "war." A Boise, Idaho, tire dealer agreed to buy a quarter-page advertisement in the *Idaho Statesman* devoted exclusively to *retracting* disputed claims concerning the performance of a particular brand of steel radial tires. The Boise Tire Co. had claimed that this tire was rated No. 1 in quality, design and service. The FTC's regional office in Seattle said the ad created the impression that the tires had been objectively compared with others when, in fact, there was no accepted industrywide standard of quality or grading, according to the agency. The correction and retraction had to be printed under a heading, in capital letters and in 14-point type, which read: "THIS ADVERTISEMENT IS PUBLISHED PURSUANT TO ORDER OF THE FEDERAL TRADE COMMISSION."[67]

In a non-FTC effort to compel corrective advertising, the Consumer Product Safety Commission (CPSC) unanimously voted to require A.K. Electric Corp. of Brooklyn, N.Y., and its distributors to run corrective advertising in connection with a household trouble light declared by CPSC to be hazardous. The companies were to have been compelled to buy time on three national TV networks for three consecutive nights and place two-column 100-line ads in newspapers representing 85 per cent of the nation's daily newspaper circulation. Cost would have been about $366,000, not counting production costs. Instead, U.S. District Court Judge George Hart Jr. of the

District of Columbia permanently enjoined the 37 companies from further manufacture, sale, or distribution of the light, but rejected the CPSC's attempt to force the firms to buy the advertising on the basis that there had already been extraordinary news coverage about the hazard—enough to warn the public of the danger, according to the judge. Prior to his decision on Sept. 3, 1974, the judge personally had called the three commercial TV networks and asked them to publicize the danger, which they did.

10.10 Substantive rulemaking power. Under Section 6(g), the commission has the power "to make rules and regulations for the purpose of carrying out the provisions of" the FTC Act. But for 48 years (1914–1962) the power lay dormant, and for 12 years thereafter (until 1974) the question of the FTC's authority to use such power remained in doubt. The issue: Could the powers contained in Section 6 be used to bring about enforcement of Section 5 proceedings? In *U.S. v. Morton Salt Co.*,[68] the Supreme Court ruled that the FTC Act must be read "as an integrated whole" and that businesses could be required to submit reports under Section 6(b) in order for the FTC to obtain information that could be used to determine compliance with cease-and-desist orders issued under Section 5. But whether this power was tantamount to substantive rulemaking power (i.e., the power to specify, prior to any adjudication, what constitutes deceptive or unfair trade practices) remained uncertain through non-use of the authority. But in 1962 the FTC asserted that Section 6 was not limited merely to investigation and information-gathering.

The crucial test of the rulemaking power came after the commission promulgated a trade regulation rule[69] (published in the *Federal Register* on Dec. 16, 1971) which required the posting of octane ratings on gasoline pumps. The rule was attacked in a suit brought by the National Petroleum Refiners Association. In September, 1972, the U.S. District Court for the District of Columbia nullified the FTC's rulemaking power on the ground that the commission lacked statutory authority. As Judge Aubrey Robinson Jr. concluded:

> The commission's claim of unlimited rulemaking power under the Federal Trade Commission Act is . . . not only unsupported by anything in the Act itself, or its legislative history, but is also inconsistent with the history of other statutes entrusted to the commission's administration by Congress [e.g., Flammable Fabrics Act]. * * *
>
> In the face of an overwhelmingly contrary legislative history, there must be some basis for granting an agency unprecedented and far-reaching rulemaking power other

> than the claim of the agency itself that such power is necessary or desirable for its more efficient operation. The only support, however, for the commission's novel theory of statutory construction is its own works. While the courts may have sustained imprecise grants of rulemaking power in some instances, they have never done so in the face of an overwhelmingly contrary legislative history, such as that of the FTC Act.[70]

The District Court apparently did not include in its ruling a prohibition against the FTC issuing guidelines—not rules—for various trades and industries. This program originated in 1918 and more than 300 industries have since operated under one or more guidelines. More than 192 such "guides" were in effect in the early 1970s.

The FTC appealed Judge Robinson's decision and it also went to Congress in a move to obtain statutory authority for the claim to substantive rulemaking power. Chairman Kirkpatrick, prior to resigning in January, 1973, characterized the denial of such authority as a severe blow to the agency's ability to maintain competition and to protect consumers. Without such power, Kirkpatrick said, the FTC would be reduced to case-by-case adjudication, rather than dealing with unfair or deceptive practices on an industrywide basis.

The FTC's anguish turned to jubilation on June 27, 1973, when a three-judge panel of the Court of Appeals for the District of Columbia unanimously upheld the agency's power to issue substantive rules.[71] The court declared that such a power is not only consistent with the "plain language and broad purposes" of the FTC Act, but also appears to be a "particularly apt means" for carrying out the Act's purposes. Such an authority can be used to expedite, simplify and carry out Section 5 enforcement, said the appellate judges, in citing the *Morton Salt* precedent that the Act must be read as a whole. However, they pointed out that Section 5 adjudication proceedings still would be necessary prior to issuance of a cease-and-desist order to halt alleged deceptive or unfair practices. Nevertheless, said the court, rulemaking could expedite and simplify the adjudicatory process.

The petroleum industry's turn to appeal had come. On Feb. 25. 1974, the Supreme Court refused to review the case.[72] It thereupon was returned to the U.S. District Court for additional hearings on the validity of the specific requirements of the octane rating rule, although the rulemaking power no longer could be invalidated by that court. Nevertheless, there was some industry speculation that since the Supreme Court had neither affirmed nor reversed the appellate

court through its decision not to grant certiorari, there might yet be a challenge in the highest tribunal of the octane rating requirement once the District Court had concluded the case.[73] Such a possibility is remote.

Whatever the ultimate outcome, the FTC already was moving full steam ahead as a consequence of the Circuit Court's opinion. The agency's major thrust appeared to be in two broad areas: information disclosure in advertising and defining unfairness.[74]

With substantive rulemaking and Unfairness Doctrine safely in its arsenal, the FTC staff was well into the collection of supporting data and the preparation of an omnibus advertising rule for the food industry. The ultimate proposal to the commission was expected to include a ban on advertising heavily sugared products during TV children's shows.[75] In addition, nutrition disclosures would be required for any product which contained added nutrients or where nutrition information appeared on the label, such as on breakfast cereals. In addition, consideration was being given to calorie disclosure for products which did not include nutrients on the label. A variety of other possible requirements were under study, including a proposed ban on calling any food "perfect" or "unique," or claiming that a product produces or enhances health, vigor, alertness, etc. Hearings were to be conducted on this global approach to advertising problems so that advertisers, consumers, public interest groups and others would have the opportunity to comment on (1) the desirability of FTC-established standards for affirmative disclosure of nutrition information; (2) the most useful kinds of consumer information and whether such data should be imparted by means of advertising or at the point of sale; and (3) the ways in which the FTC might deal with the inherent differences in media.[76]

But in its proposed trade regulation rule on food advertising, issued Nov. 7, 1974, the Commission delayed action in connection with the advertising of heavily sugared products. Instead, it referred this matter to the Food and Drug Administration which was studying the relationship between sugar ingestion and dental caries. Upon completion of the FDA's review of available scientific evidence, the FTC said it would consider what steps, if any, it would take to regulate the advertising of foods which contain sugar in amounts and/or forms that might be deleterious to the health of consumers. Also, the Commission did not adopt a staff proposal for achieving affirmative disclosure of nutrition information in all food advertising. Rather, its proposed rule would establish nutritional standards before certain claims could be made in food advertising.

The proposed rule also would require that certain nutrition infor-

mation be disclosed when various voluntary claims are made. The four types of claims covered by the proposed rule are: (1) *emphatic nutrition claims* which refer to the amounts of various vitamins, minerals and protein in a food (e.g., "loaded with Vitamin A"); (2) *nutrient comparison claims* (e.g., Food X has more Vitamin A than Food Y); (3) *nourishment claims* (e.g., Food X is nutritious); and (4) *claims for foods intended to be combined with other foods* (e.g., Food X, when combined with Food Y, gives the consumer nourishing Vitamin A). Final action on the proposed trade regulation rule could not be taken until after the deadline in early 1975 for receiving written comments on the proposal.

10.11 Ad substantiation. Another modus operandi, which added to the FTC's "new image," was the ad substantiation program. Announced in June, 1971, and based on powers contained in Section 6, the program requires advertisers in selected industries to submit to the FTC upon request all tests, studies, or other available data to substantiate advertising claims concerning price, safety, performance, efficacy, or quality. Originally, advertisers in a selected industry were given 60 days in which to comply with the FTC's Order to File Special Reports. Failure to do so could lead to an adjudicatory proceeding.

Five policy considerations led to the decision to implement the program:

1. Public disclosure of information obtained can assist consumers in making rational choices from among competing claims.
2. The public's information needs are not being met voluntarily.
3. Public disclosure can enhance competition by encouraging competitors to challenge advertising claims which have no basis in fact.
4. Knowledge that documentation, or lack thereof, will be made public will encourage advertisers to have adequate substantiation on hand before claims are made.
5. Since the FTC has limited resources for detecting claims which are not substantiated by adequate proof, making the "documentation" available to the public can help alert consumer, businessmen and public interest groups to possible Section 5 violations.[77]

The program's primary goals are education and deterrence; i.e., public disclosure of data assists consumers to make rational choices. and disclosure encourages advertisers to have adequate data on hand before making claims.

In its first substantiation action, the FTC asked seven U.S. and foreign automakers to document 75 advertising claims. Then came similar orders to makers of electric shavers, air conditioners, TV sets,

cough and cold remedies, tires, dentifrices, detergent soaps and, as the FTC declared, eventually all major industries would be included. But after the first year of operation, the value of the program stirred some doubts. The seven automakers sent to the FTC hundreds of pages of documentation, much of it highly technical so that private consultants had to be employed to analyze and evaluate the information. In addition, by the time the data on 1971 models could be sifted, evaluated and made available to the public, 1972 models already were in the showrooms. Consequently, little interest was shown in the information by consumer groups or the news media. According to the president of the American Association of Advertising Agencies, 168 persons examined the automobile advertising information between November, 1971, and January, 1972. Terming the program a failure, he added: "So little attention has been paid to this vastly expensive and difficult adventure by the commission that it no longer keeps records of how many people have seen its documentation."[78]

Undaunted by criticisms, FTC's Pitofsky defended the program, saying:

> In a report to Congress dated May 16, 1972, the Commission staff reported that 30 per cent of the advertising claims for which substantiation was sought were inadequately substantiated. Most people would agree that is an astonishingly high figure. I will be surprised in future rounds of substantiation if the same high level of unsubstantiated or inadequately supported claims emerges. Many representatives of advertisers and their agencies have advised us—and shown us—that clearance procedures previously in force have been tightened up or changed in response to the threat of public disclosure of ad claims. If the existence of the program leads advertisers to be more cautious with the claims they communicate, I believe the Commission would be justified in judging its substantiation program at least a partial success.[79]

In mid-1972, the program presumably suffered a setback when the FTC withdrew its own complaint against Pfizer, Inc., after having tried for two years to get Pfizer to back up certain claims about its sunburn lotion, "Un-Burn." The FTC complaint, issued July 15, 1970, had charged that the company's advertisement falsely implied that scientific tests substantiated the claim that "Un-Burn" anesthetized nerves in sensitive sunburned skin and stopped pain quickly. The complaint included both a deceptive practice and an unfair

practice allegation, the latter resulting from advertising claims which, according to the FTC, lacked adequate and well-controlled scientific studies or tests.

In the Matter of Pfizer, Inc.,[80] the Commission, in withdrawing the complaint, said:

> The consumer is entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a "reasonable basis" for making performance claims. A consumer should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented. * * * In addition, fairness to competitors requires that the vendor have a reasonable basis for his affirmative product claims. A sale made as a result of an unsupported advertising claim deprives competitors of the opportunity to have made that sale for themselves.
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> * * *
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> While the Commission finds that . . . [Pfizer] failed in its attempt to demonstrate affirmatively the existence of a reasonable basis for its Un-Burn advertising, the evidence is not sufficient to prove that repondent in fact *lacked* a reasonable basis for its advertising claims. The record evidence is simply inconclusive with regard to the adequacy of the medical literature and clinical experience relied upon by respondent, and with regard to the reasonableness of such reliance.
>
> While this failure of proof might be cured by a remand, the Commission does not believe further proceedings are warranted in the public interest. The reformulation of the legal standard from "adequate and well-controlled scientific studies or tests" to "reasonable basis" might warrant an extensive trial *de novo* [retrial], and the advertising in question has already been discontinued. The significance of this particular case lies, therefore, not so much in the entry of a cease-and-desist order against this individual respondent, but in the resolution of the general issue of whether the failure to possess a reasonable basis for affirmative product claims constitues an unfair practice in violation of the Federal Trade Commission Act. As to that issue, the foregoing opinion expresses the views of the Commission."

Thus, the Commission enunciated a "reasonable basis" standard whenever affirmative product claims were made. Based on this deci-

sion, the staff prepared and the commission issued a proposed complaint against General Motors in October, 1972, which challenged the advertising contention that Chevy Vega was the best handling passenger automobile ever built in the United States. The FTC charged that there was no reasonable basis to support such a claim—and reasonable basis, said Chairman Kirkpatrick in the *Pfizer* case, is essentially a factual issue which depends on the type of claim being made, the type of product being advertised, the extent of reliance on such claims by consumers, and the type of evidence or data used in making a particular claim.

In addition to the GM complaint, proposed complaints were issued against three air-conditioner manufacturers alleging that the respondents had no reasonable basis for making certain claims in their advertisements. By mid-1974, only one of the proposed complaints had been resolved when Rheem Manufacturing Co. agreed to a consent order to refrain from advertising its Corsaire and Rheemair units as the most efficient or quietest unless it had a "reasonable basis" for making such claims. The company pointed out that its advertising for those two product lines had changed long before the consent order went into effect. On Nov. 4, 1974, the Commission unanimously voted to accept a consent agreement which prohibits GM and a GM advertising agency from making unsubstantiated comparative claims as to the handling of GM automobiles under certain conditions; e.g., emergency evasive actions, cornering at speeds above 30 miles an hour, or road-handling on rough roads or under severe steering-braking conditions. The agreed-to consent order provided that future comparative handling claims must be supported by competent scientific data.

To counteract some of the problems with ad substantiation, the commission decided in 1973 not to seek documentation for each and every advertising assertion, but instead to direct Section 6(b) orders at three or four major selling themes of a product's advertising—themes common to the industry. Also, in addition to the technical documentation, companies were to be requested to submit a narrative summary, in layman's language, of the substantiation of claims covered by the 6(b) orders. Then, in early 1974, the FTC announced that it was reducing the time frame for responding to 6(b) orders from 60 to 30 days and focusing attention on more suspicious claims. The purpose would be quicker action on unsubstantiated claims, said Chairman Engman, although less information would be available to the public. Instead, the summary and backup information would be made available to the public, but not the massive data that had been received under the initial substantiation orders. Thus,

the FTC's requirements were sharpened to better deal with the concept that advertisers should be able to substantiate advertising claims when called upon to do so. Coupled with this concept was the "reasonable basis" standard of *Pfizer* and the Unfairness Doctrine of *S&H* which yield the theory "that the failure to possess substantiation amounts to a lack of reasonable basis, which in turn is an unfair act or practice under Section 5."[81]

10.12 Advertising directed at children. Another major development likely to mature in the 1970s is special consideration by the FTC of advertising effects on certain classes of consumers or audiences, such as children. In *Keppel*, the Supreme Court emphasized that children were a special class of consumers "unable to protect themselves."[82] This idea was expressed for the first time by the FTC when it issued a consent order against Mattel, Inc., requiring the toy manufacturer to cease using any advertising which distorted the performance of its "Hot Wheels" racing car or "Dancerina Doll."[83] The proposed complaint had said the alleged deceptive or unfair advertising "unfairly exploits a consumer group unqualified by age or experience to anticipate or appreciate the possibility that the representations [in TV advertising] may be exaggerated or untrue." The proposed complaint continued, "Further, respondents unfairly play upon the affection of adults, especially parents and other close relatives, for children, by inducing the purchase of toys and related products through deceptive or unfair claims. . . ."[84] The Commission, in its consent order, required the toymaker to cease doing certain things in its advertising, such as using distorted camera angles, misrepresenting visual perspectives so as to increase the speed or realism of the toys, and other practices—especially, said the FTC, "taking into consideration the level of knowledge, sophistication, maturity, and experience of such age group or age groups."

The law traditionally has afforded children special protection, such as shielding them from pornography or from publicity (in the case of juvenile offenders). Much more recently the FTC began to extend special protection to children against advertising which exploits their innocence and gullibility and thus destroys their ability to make rational, intelligent purchasing decisions.[85]

Prodded by pressure groups, such as Action for Children's Television (ACT), the Association of National Advertisers announced its Children's Television Advertising Guidelines in July, 1972, which includes recommendations that commercials not:

1. Reflect disdain for parents or parental judgment.
2. Suggest that possession of one product makes a child better

than his peers or, if the product is not purchased, the child will be subjected to contempt or ridicule.

3. Capitalize on a child's difficulty in distinguishing between reality and fantasy.

4. Urge children to pressure parents into buying something.

But ACT and other consumer interest groups were not satisfied. With the FTC considering an omnibus food advertising rule in mid-1974, as well as other measures designed to protect the "innocent and the gullible," the Council of Better Business Bureaus announced on May 20 of that year that it was establishing, with the advertising industry's support, a special unit to review ads directed at children. This announcement followed joint meetings of FTC officials, consumer and industry representatives, largely at the urging of Commission Chairman Engman. Under the plan, major children's advertisers agreed to submit copies of their ads for review purposes based on criteria laid down in Children's Television Advertising Guidelines. Whether this plan would end agitation to force all children's advertising off television remains to be seen. Probably not.

In response to a government "threat" that it might act if the industry did not, the television board of directors of the National Association of Broadcasters (NAB) on July 1, 1974, ratified recommendations by its TV Code Review Board which restrict both the advertising time and content of advertisements in children's programming.[86] Prodded to take voluntary action by FTC Chairman Engman and FCC Chairman Richard Wiley, the NAB directors, by an 8-4 vote, ratified the following code changes which affect only those TV stations that subscribe to the code:[87]

1. Reduce the amount of non-program material (principally advertising) in Saturday and Sunday children's programming to 10 minutes (previously 12 minutes) per hour in 1975 and 9½ minutes per hour in 1976;

2. Limit weekday non-program material to 14 minutes per hour in 1975 and 12 minutes in 1976;

3. Require a clear separation between programming and advertising by an appropriate device other than a fade to black; and

4. Ban the advertising of non-prescription (over-the-counter) drugs and vitamins.

Just three days prior to the board's action, all five FTC commissioners had proposed a ban on televised premium offers directed at children under 12. The proposal must first be subjected to public hearings before the FTC could issue such an edict (assuming that it would pass legal review). The TV board of directors immediately and unaminously opposed such a ban, pointing out in a statement that

there already are various code restrictions or prohibitions concerning the televising of premium offers directed at children. The board said such a ban would be discriminatory and compared it to the cigarette advertising law which drove such advertising off the air yet failed to reduce cigarette consumption. The advertising appeared in other media. If premium advertising is wrong when directed at children, said the board, then it is wrong for all media, not just television.[88]

10.13 Subliminal advertising. Subliminal advertising, like subliminal (below the threshhold of consciousness) learning, has been a subject of controversy for many years. Whatever its effectiveness, the Federal Communications Commission announced on Jan. 24, 1974, that the use of "subliminal perception is inconsistent with the obligations of a [broadcast] licensee, . . . and broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive."[89]

10.14 Summary. The FTC, created by act of Congress in 1914, was given the power under Section 5 to prevent unfair methods of competition in commerce. Whether such power included false advertising that had no relationship to competition remained in doubt until the Wheeler-Lea amendment of 1938. By this amendment, the FTC was given authority to declare unlawful any unfair or deceptive acts or practices which affected consumers regardless of impact on competition. It was this change in the law that marked the turning point from a philosophy primarily based on the ancient concept of *caveat emptor* ("let the buyer beware") to one of *caveat venditor* ("let the seller beware").

Though the legal philosophy has turned the corner, problems of defining false, deceptive or unfair advertising abound. Some patterns, however, have emerged: (1) proof of actual deception is not essential, only the *tendency* of the advertising to deceive or mislead; (2) knowledge of falsity or intent of advertisers is immaterial; (3) standards of deception are not to be based on what would deceive a select few, but on what would deceive the multitudes (which include the ignorant and unthinking); and (4) where an advertisement is susceptible to two meanings, the false or deceptive one will be controlling.

With the development of commercial television as a powerful means of communication, different standards have emerged for judging unlawful television advertising, such as the prohibition against props or mock-ups which are *materially* deceptive. Also, new techniques have had to be developed as the nature of advertising changes. National advertisers infrequently resort to outright deception or falsity. Instead, claims are made concerning a product's uniqueness,

therapeutic value, or an implied quality which somehow will satisfy the consumer's psychological or emotional desire to be loved or accepted. In addition, artfully contrieved messages are directed at special classes of consumers, such as children who are less experienced than other groups when it comes to separating reality from fantasy. Lastly, a particular medium, such as television, may have characteristics which, in theory, make advertising via that medium particularly vulnerable to regulation. To meet such changing conditions, the FTC has been forced to go beyond the traditional case-by-case adjudicatory process—a process which consists of voluntary and involuntary stages. The voluntary stage includes industry guides, advisory opinions, letters of voluntary compliance, and trade rules or regulations. The involuntary enforcement procedures consist of consent orders (which result from negotiations between the FTC and the advertiser by which the latter agrees to cease and desist from certain kinds of acts or practices but does not admit any violation of the FTC Act) and cease-and-desist orders, the violation of which can lead to a civil penalty fine of $10,000 for each violation. And, as the Geritol case showed, each day of alleged non-compliance with a cease-and-desist order can constitute a separate offense.

In the 1970s thus far some major developments have led to a strengthening of the FTC's power to deal with wrongful advertising either on a more programmatic basis (e.g., Unfairness Doctrine, rulemaking power and ad substantiation), whereby the FTC can map out areas of chief concern and then apply regulatory measures), or by means of more novel weapons or standards (e.g., "reasonable basis" test and corrective advertising). Eventually, however, even the programmatic techniques must lead to the case-by-case enforcement methods whenever errant advertisers are detected. Hence, long delays still seem inevitable unless the newly authorized injunctive power proves a major weapon in quickly halting deceptive practices or acts.

The principal new programs, standards or weapons being utilized by the FTC are:

1. Unfairness Doctrine. The power to deal with unfair practices, even when such practices have no relation to monopolistic conditions or competition, was upheld in 1972 by the U.S. Supreme Court in the *S&H* case; i.e., unfairness to consumers could itself be the basis for Section 5 actions. Here, then, is a new power that can be used against a type of advertising which once was shielded from government regulation.

2. Substantive rulemaking power. Again, the FTC's right to promulgate substantive trade regulations was upheld by the Court of Appeals and indirectly by refusal of the Supreme Court to grant

certiorari in the octane rating case, thus providing the go-ahead for the agency to operate on an industrywide basis, rather than solely by the case-by-case method. This authority can expedite and simplify complaint proceedings under Section 5 and permit FTC regional offices to be more active in matters of noncompliance with substantive rules. The rulemaking power can be used in a variety of ways. For example, this power, in tandem with the Unfairness Doctrine, is the foundation on which the FTC is acting in regard to food advertising.

Children are the reason government, the industry, and consumer activist groups put their heads together in mid-1974. One result was the announcement of a voluntary screening program for TV advertising directed at children's audiences. Whether the review procedures created by the Council of Better Business Bureaus will de-fuse consumer agitation remains to be seen, but the procedures employed apparently will go far beyond the truth and accuracy limitations imposed on the National Advertising Review Board which, by mid-1974, had considered about 600 complaints (about one per cent of them related to children's advertising) and, to that time, had yet to call any case to the attention of the FTC or any other governmental regulatory body.

3. Ad substantiation. This new program, implemented in mid-1971, also is being used on an industrywide basis. Its purpose is twofold: education of the public and deterrence of false or deceptive advertising. Problems of coping with voluminous amounts of information, much of it highly technical, and making the information public in time to be of use to consumers have led the FTC to redirect ad substantiation toward the more suspicious advertising claims and to try and make more readable summaries of the information available to the public on a faster timetable.

4. "Unreasonable basis" test. Out of the *Pfizer* "Un-Burn" case came a new standard for challenging certain types of advertising claims. In essence, before *Pfizer* it was necessary for the FTC to prove that a challenged claim was false; afterward, the FTC only had to show that such a claim lacked a *reasonable basis.* Initially, however, the FTC had attempted to impose a "well-founded scientific test" requirement, but the commission transmuted this into a "reasonable basis" principle.

When the *Pfizer* principle and Unfairness Doctrine (Section 5) are joined with ad substantiation requirements (Section 6) the result is a theory that the failure to possess substantiation constitutes a lack of a reasonable basis for making a claim which, in turn, is tantamount to an unfair act or practice. Practicalities sometimes get in the way of

application, such as in the Wonder Bread case where the absence of comparative advertising claims (e.g., our bread is better than your bread because . . .) meant that an unfairness complaint by the FTC staff could not be upheld by the Commission, nor could a corrective advertising remedy be imposed.

5. Corrective advertising. This is one of the more novel administrative law concepts to emerge thus far in the '70s. It is a device by which the FTC can deny to an advertiser any ill-gotten gains from false, deceptive or unfair advertising. By means of a consent order, a company agrees to devote 25 per cent of its advertising budget for a stipulated period of time (two years in the most recent orders) to corrective advertising in order to dispel residual consumer deception and to make the marketplace more competitive again. The Profile bread case was the first to require corrective advertising. By the beginning of 1975 about 15 such orders had been issued. Undoubtedly a legal challenge will result and the courts could curb such a power if they found corrective ad orders to be punitive.

As with a definition of deception or unfairness, practical problems confront the FTC. For example, a corrective advertising remedy will be most appropriate when the *facts* show there has been *residual consumer deception* or continued competitive injury even after offending advertisements are withdrawn from the marketplace. The burden of establishing such facts falls upon the FTC. This means that consumers or businessmen must be found who demonstrate the existence of residual consumer deception or the effect of continued competitive injury. No small task! The Wonder Bread case, and several others since, show the nature of some of the practical difficulties confronting the agency.

6. Injunctions. A broadened power to gain injunctions was conferred by statute on the FTC in late 1973. It was quickly put to use in the consumer protection field when, in early 1974, a temporary injunction was issued by a U.S. District Court judge in the Western District of Washington against three travel agencies that were promoting "psychic surgery" tours to the Philippines. As implied by its name, this kind of "surgery" did not involve the actual removal of any diseased tissue.

The more widespread use of the injunctive power is possible now in connection with Sections 5 and 12 cases. Such power had been sparingly used in connection with Section 12 cases (food, drugs and cosmetics), but only to prevent injury to health and welfare in keeping with the public interest concept.

In retrospect, many of the delays associated with FTC efforts to rid the marketplace of deceptive and unfair advertising will remain,

despite increased power to seek injunctions and the use of the rulemaking authority to speed adjudication procedures. The principal cause of such delays is the need to assure "due process" for those accused of violating the FTC Act.

CHAP. X—Pass in Review

1. The National Advertising Review Board is an industry-created self-regulatory group which basically deals with complaints about two kinds of advertising. The two kinds are:

2. Originally, Section 5 of the FTC Act pertained only to what kind of unfair methods?

But Section 5 was amended in _____ (year) to prohibit unfair methods in both _____ and _____.

3. The legal philosophy prior to the Wheeler-Lea amendment was *caveat emptor*, which means _____; but with enactment of the amendment, the philosophy shifted toward _____ _____, or _____.

4. In determining whether a particular advertisement is deceptive, the FTC must show actual deception. True or false.

5. The undisclosed use of plexiglas for sandpaper in a shaving cream commercial on television was held by the U.S. Supreme Court to constitute _____ _____.

6. What is the significance of the Supreme Court's ruling in the *S&H* case which involved the Unfairness Doctrine?

7. Because they are only agents, advertising agencies cannot be held responsible for false, deceptive or unfair advertising. True or false.

8. When an advertiser enters into a consent order, he is pleading guilty to the allegations which led to issuance of such an order. True or false.

9. The landmark case in determining that purely commercial speech is unprotected by the First Amendment is _____ _____.

Marshall whatever compelling reasons you can and defend the proposition that commercial speech either deserves or does not deserve First Amendment protection.

10. Defend the use of corrective advertising orders on three grounds:

11. The appellate court's decision in the case involving the posting of octane ratings on gasoline pumps helped to solidify the FTC's power to issue _____ .

11. What is ad substantiation?

12. Three major weaknesses were initially apparent in the ad substantiation program. What were they?

13. What is the "reasonable basis" standard?

14. A broadcast station cannot use subliminal perception or subliminal advertising. True or false.

CHAP. X—Answers to Review

1. Accuracy and truth.

2. Unfair methods in competition. 1938. Competition and commerce.

3. "Let the buyer beware." *Caveat venditor*—"let the seller beware."

4. False. A *tendency* to deceive would be sufficient.

5. Material deception.

6. That the FTC can define and prohibit an *unfair practice* even if the practice has no relationship to antitrust laws or competition; that is, solely on the basis of the practice's effect on consumers.

7. False. Agencies can be held responsible—they *share* responsibility with the advertiser to the extent that they participated in the development of such advertising. Some FTC thinking inclines toward the idea that the agency may even have *primary* responsibility because of the expertise an agency has in such matters.

8. False. No culpability is admitted by agreeing to a consent order.

9. *Valentine v. Chrestensen.* Try some of these arguments depending on your choice of proposition: The boundary line between protected and unprotected speech is too difficult to draw (witness the difficulties of the nation's highest tribunal in differentiating between non-protected (obscene) and protected speech. Commercial speech is private speech, unlike "political" speech which fulfills a public need. Not all commercial speech is unprotected; e.g., *Times-Sullivan* and "informational" speech which merely appeared in the conventional form of an advertisement but contained the kind of speech that Meiklejohn would absolutely protect and the Supreme Court in *Times-Sullivan* conditionally protected (absent malice). If government can regulate purely commercial speech, what's to stop it from applying controls to quasi-commercial speech? What's wrong with protecting all speech as distinguished from action, conduct or non-speech?

10. Corrective advertising orders help to (a) dispel residual consumer deception; (b) restore competition to its proper level; (c) deprive advertisers of ill-gotten gains. Such an order adds more sting than the cease-and-desist order or the consent order which tells the advertiser to go and sin no more.

11. Ad substantiation is a Section 6(b) order to selected companies within an industry requiring them to furnish data in support of advertising claims.

12. Initially, three major weaknesses of ad substantiation were: (a) length of time before information could be made public; (b) voluminous amount of information received by the FTC; (c) the highly technical nature of some of the information which made evaluation difficult.

13. A company must have "in hand" a reasonable basis for making advertising claims, e.g., scientific test data. Failure to have such data in hand before making advertising claims can constitute an unfair practice within the meaning of Section 5.

14. True.

[1] June 19, 1972.
[2] 38 Stat. 717 (1914), as amended, 15 *U.S.C.* Sec. 45 (1964).
[3] H.R.Rep. No. 1142, 63d Cong., 2d Sess. 18–19 (1914).
[4] FTC v. Winstead Hoisery Co., 258 U.S. 483.
[5] FTC v. Raladam Co., 283 U.S. 643.
[6] Scientific Manufacturing Co. v. FTC, 124 F.2d 640, 643–44 (1941).
[7] In 1950, Congress added to the FTC's penalty power by providing that a $5,000 fine could be assessed for each day of violation of a final cease-and-desist order (64 Stat. 21, 15 U.S.C. Sec. 55(a) (2) (1964)). The penalty power was increased again when a "rider" to the Trans-Alaskan Pipeline bill, signed into law Nov. 16, 1973, increased the maximum fine to $10,000 and authorized the FTC to issue preliminary injunctions, to represent itself in court (rather than rely on the Justice Department) and to undertake information-gathering research without fear of having to obtain Office of Management and Budget approval.
[8] 52 Stat. 114 (1938), 15 U.S.C. Sec. 54 (1964).
[9] Gimbel Bros., Inc. V. FTC, 116 F.2d 578 (Second Circuit, 1941).
[10] D.D.D. Corp. v. FTC, 125 F.2d 679 (Seventh Circuit, 1942).
[11] Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 679 (Second Circuit, 1944). For a comprehensive report, *see* Gaylord A. Jentz "Federal Regulation of Advertising: False Representations of Composition, Character, or Source and Deceptive Television Demonstrations," *American Business Law Journal* Spring, 1968, pp. 409–27.
[12] In Hill Brothers v. FTC, the U.S. Court of Appeals construed the Act to give the commission broad discretion in determining when the public interest was involved, 9 F.2d 481 (Ninth Circuit, 1926); certiorari denied, 270 U.S. 662 (1926). But this interpretation was narrowed considerably by a U.S. Supreme Court ruling in 1929. The Court held that for an FTC complaint to be filed, the "public interest must be specific and substantial." FTC v. Klesner, 280 U.S. 19. This constricted interpretation was gradually eased until the prevailing view was announced in a 1968 case; i.e., that the commission is permitted to make such a determination with "little or no interference from the courts." *See*, Francis J. Charlton and William A. Fawcett, "The FTC and False Advertising," *University of Kansas Law Review*, Vol. 17, June, 1969, p. 615.
[13] *Id.*, Charlton and Fawcett, "The FTC and False Advertising," pp. 617–18.
[14] *E.g.*, Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (Seventh Circuit, 1961); FTC v. Sterling Drug, Inc., 317 F.2d 669, 670 (Second Circuit, 1963).

15 *E.g.*, Kalwajtys v. FTC, 237 F.2d 654, 656 (Seventh Circuit 1956); certiorari denied, 352 U.S. 1025 (1957). Also, FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

16 Op. cit., Charlton and Fawcett, note 12, p. 618.

17 Continental Wax Corp. v. FTC, 330 F.2d 475 (Second Circuit, 1964); Rushing v. FTC, 320 F.2d 280 (Fifth Circuit, 1963), certiorari denied, 375 U.S. 986 (1964).

18 Bakers Franchise Corp. v. FTC, 302 F.2d 258 (Third Circuit, 1962).

19 Kalwajtys v. FTC, 237 F.2d 654, 656 (Seventh Circuit, 1956).

20 In the Matter of National Dynamics Corp. et al., 82 FTC 488, 548 (1973); Accord, Universe Co., 63 FTC 1282 (1963), affirmed sub. nom. Kirchner v. FTC, 337 F.2d 751 (Ninth Circuit, 1964).

21 In the Matter of Activitoys, Ltd., et al., 82 FTC 1264, 1265 (1973).

22 In the Matter of Pfizer, Inc., 81 FTC 23 (1972); In the Matter of National Dynamics Corp., et al. (motion for reconsideration denied), 82 FTC 1289, 1290 (1973); In the Matter of Volvo, Inc., 82 FTC 1851, 1855 (1973); and proposed complaints against General Motors, Ford and Chrysler because of mileage performance claims on behalf of some of their products, *FTC News Summary*, No. 19, Aug. 2, 1974, p. 2.

23 Murray Space Shoe Corp. v. FTC, 304 F.2d 270 (Second Circuit, 1962).

24 P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (Fourth Circuit, 1950); Clinton Watch Co. v. FTC, 291 F.2d 838 (Seventh Circuit, 1961); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965).

25 Carter Products, Inc. v. FTC., 323 F.2d 523, 525–26 (Fifth Circuit, 1963).

26 Colgate-Palmolive Co. v. FTC, 326 F.2d 517 (First Circuit, 1963), reversed, 380 U.S. 374, 393 (1965).

27 Address by Gerald J. Thain, assistant director for food and drug advertising, Bureau of Consumer Protection, entitled "Consumer Protection: Advertising—the FTC Response " July 7, 1971, before the Food and Drug Law Section of the American Bar Association meeting in New York City.

28 92 S.Ct. 898 (1972), with Justices Powell and Rehnquist taking no part in the consideration or decision of this case.

29 *Id.*, 92 S.Ct. at 903.

30 291 U.S. 304, 54 S.Ct. 423, 78 L.Ed. 814 (1934).

31 *Id.*, 291 U.S. at 313, 54 S.Ct. at 426–27, 18 L.Ed, at 819–20.

32 Op. cit., note 28, 92 S.Ct. at 905. The Commission has described the factors it considers in determining whether a practice is unfair when it is neither in violation of the antitrust laws nor deceptive:

"(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 406 (Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking), 29 Fed. Reg. 8324, 8355 (1964).

33 Address by Thain, "Regulating Advertising in the 1970's," given before the Federal Bar Association—Bureau of National Affairs conference on new developments in advertising regulations, Feb. 22, 1972.

34 Here she broached the idea that advertising need not survive at all costs. Compare this view with the Supreme Court's statement in FTC v. Colgate-Palmolive Co., 380 U.S. 374, 390–91 (1965): "If, however, it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs."

[35] Bristol-Myers Co. v. FTC, 185 F.2d 58 (Fourth Circuit, 1950). A cease-and-desist order was issued by the FTC against the company, but not against the agency, alleging that toothpaste advertising was false and deceptive. The agency was not included because the FTC felt that Bristol-Myers was very active in the preparation of copy.

[36] Op. cit. note 26.

[37] Op. cit., note 25.

[38] 392 F.2d 921 (Sixth Circuit 1968).

[39] *Id.*, 392 F.2d at 928–29.

[40] *See*, American Bar Association's Ash Council Report, April 1, 1971; Center for Study of Responsive Law, "The Closed Enterprise System," June, 1971; Report of the President's Advisory Council on Executive Organization, January, 1971; and Posner, "The Federal Trade Commission," 37 *University of Chicago Law Review* 47 (1969).

[41] Letter to author, Oct. 19, 1972.

[42] Note, " 'Corrective Advertising' Orders of the Federal Trade Commission," Vol. 85, No. 2, December, 1971, p. 481–82, *Harvard Law Review*, © 1971 by the Harvard Law Review Association. Note that although voluntary compliance measures do not have the force of law, they can be taken into consideration by administrative law judges when they hear complaints filed by the FTC's staff.

[43] A paper delivered at the annual meeting in White Sulphur Springs, W. Va., on May 19, 1973, entitled "How the FTC Stacks the Deck."

[44] 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262. Chrestensen owned a submarine which he planned to exhibit in New York. Upon attempting to distribute handbills publicizing the submarine, he was told that a city ordinance barred such distribution. He thereupon deleted prices and other commercial information from the handbill—but not a description of the sub and its location. The reverse side was used to attack the city's action. He again was prevented from distributing the handbills and sued to enjoin enforcement of the ordinance. An injunction was granted in U.S. District Court (34 F. Supp. 596) and affirmed by the Court of Appeals (122 F.2d 511). On appeal, the Supreme Court reversed, stating that the joining together of advertising and political messages was intended as evasion, and holding that "the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S. at 54, 62 S.Ct. at 921.

[45] Op. cit., 376 U.S. at 266, 84 S.Ct. at 718.

[46] Dun & Bradstreet v. Kansas Electric Supply Co., 405 U.S. 1026, 92 S.Ct. 1289, 31 L.Ed.2d 486.

[47] Op. cit., Chap. XIV, note 8. Also, *see* Chap. XIV, pp. 379–409, for a more complete discussion of advertising and its relationship to the Fairness Doctrine and access to the media.

[48] 414 U.S. 914 93 S.Ct. 2553 (1973).

[49] 93 S.Ct. at 2560.

[50] 93 S.Ct. at 2561–62.

[51] By action, Justice Douglas apparently has reference to the close intermingling of speech and action so that the one may be inseparable from the other. He gave as an example the false shouting of "fire" in a crowded theater—the one used by Justice Holmes in Schenck v. U.S., op. cit., Chap. II, pp. 24–25.

[52] 93 S.Ct. at 2565.

[53] 93 S.Ct. at 2566–67.

[54] 93 S.Ct. at 2568.

[55] *See* Ira M. Millstein, "The Federal Trade Commission and False Advertising," *Columbia Law Review*, New York, March, 1964, p. 464.

[56] "Proof of Consumer Deception Before the Federal Trade Commission," *University of Kansas Law Review*, Vol. 17, June, 1969, pp. 559–60.

[57] Annual Report of the Federal Trade Commission, fiscal year ending June

30, 1971; House Document No. 92–211, 92nd Congress, 2nd Session, p. 2.

58 U.S. v. J.B. Williams Co., Inc., et al., 42 *Law Week* 2606, May 28, 1974.

59 338 U.S. 632 (1950).

60 Op. cit., 42 *Law Week* at 2607. Cf. the majority's view concerning the need for a jury trial with the commission's own view, to wit: "It is well established that the Commission's expertise is sufficient to interpret an advertisement without consumer testimony as how an advertisement is perceived by the public." In the Matter of National Dynamics Corp., et al., 82 FTC 488, 548 (1973); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965); Niresk Industries, Inc. v. FTC, 278 F.2d 337, 342 (Seventh Circuit), certiorari denied, 364 U.S. 883 (1960).

In *Colgate-Palmolive*, the Supreme Court said that the FTC often is in a better position than the courts to determine when a practice is deceptive and that such judgment is to be given great weight by reviewing courts. "This admonition," said the Court, "is especially true with respect to allegedly deceptive advertising since the finding of a Section 5 violation in this field rests so heavily on inference and pragmatic judgment." 380 U.S. at 385.

61 Perhaps to forestall any deviousness in compliance with its order the FTC also stipulated: "In the case of radio and television advertising, such approved advertising is to be disseminated in the same time periods and during the same seasonal periods as other advertising of Profile bread; in the case of print advertising such advertising is to be disseminated in the same print media as other advertising of Profile Bread." In the Matter of ITT Continental Baking Co., Inc., et al., 79 FTC 248, 255.

62 Speculation that the corrective advertising increased Profile bread sales was denied by a company official. There was a reduction in the advertising budget during the year the order was in effect and the company shifted from 30- to 60-second spot television commercials because the corrective ads could better be handled in such a time period. *See Broadcasting*, May, 1972, p. 33.

63 In an editorial on May 22, 1972, entitled "Copout," *Advertising Age* roundly criticized the company's acceptance of the corrective ad order, saying that "expediency seems to be winning out over principle these days." In response to a statement from the company president that "there are times when economics and practicalities dictate that a company compromise on a lawsuit," the editorial said: "This sort of response, it seems to us, is terribly shortsighted and can only serve to make it harder for other advertisers, with legitimate beefs, to win their tilts with the government on another day." (P. 14.)

64 Speech delivered at the AAF's Tenth District meeting in Dallas, Tex., as reported in the fall. 1970, issue of *Linage*, p. 21.

65 *See* Note, " 'Corrective Advertising' Orders of the Federal Trade Commission," *Harvard Law Review*, Vol. 85, December, 1971, p. 501. Copyright 1971 by The Harvard Law Review Association.

66 Op. cit., note 33.

67 *Advertising Age*, June 11, 1973, p. 1.

68 388 U.S. 632 (1950).

69 A trade regulation rule is legally binding on all parties within the intended scope of the principles involved. Such a rule is issued only after open hearings on the proposed rule and only after a finding by the commission that the trade practices in question are inherently unfair or deceptive.

In addition to the octane ratings rule the commission also adopted another rule in 1971 that required supermarkets to maintain an adequate stock of an advertised special and to make the special readily and conspicuously available. Op. cit., 1971 Annual Report of FTC, p. 8.

70 National Petroleum Refiners Association, et al. v. FTC, 340 F.Supp. 1343.

71 482 F.2d 672.

[72] 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974). Justice Stewart would have granted certiorari and Justice Powell took no part in the consideration of the petition or in the decision.

[73] *See, Advertising Age,* March 4, 1974, p. 4.

[74] *See, Broadcasting,* Oct. 1, 1973, p. 32. The need for definitional refinement is evident in a split 3-2 decision by the commission in a matter involving ITT Continental Baking Co. (42 *Law Week* 2256, Dec. 13, 1973). The majority held that Wonder Bread advertising falsely implied that the bread is an extraordinary food in terms of producing dramatic growth of children who eat the bread when, in fact, it is no more nutritious than other enriched breads. At the same time the Commission dismissed the staff-brought charge that the advertising was unfair because of alleged exploitation of children who, seeing the ads and desiring to be big and strong, would want their parents to purchase the bread. In a complicated decision, the Commission held that any "injury" to children or parents flowing from the promises contained in the advertisements was inseparable from the falseness of the promises in the advertising; thus, a separate charge of unfairness could not be sustained. Nor, said the Commission, could corrective advertising be compelled in any remedial order since the allegation on which the corrective advertising argument was based could not be upheld. Any corrective advertising would have to require the company to state that Wonder Bread had been falsely advertised as more nutritious and better for children's growth than other white enriched breads, but no such comparative statements had been made; therefore, the company could not be required to inform its customers of something it had not done.

Such views drew dissent from Chairman Engman who said, in part, that advertisers who choose children as their target audiences in TV advertising are subject to higher standards than other advertisers. They are bound to deal in complete fairness with such a group, Engman said, adding that any advertising which exploits the anxieties of children, or takes advantage of their tendency to confuse reality and fantasy, is unfair within the meaning of Section 5.

Commissioner Jones also dissented, saying that corrective advertising was necessary to help dispel almost two decades of what she termed deceptive advertising brought on by the association of Wonder Bread's nutrition claims to growth.

[75] *See, Advertising Age,* March 25, 1974, p. 1.

[76] *Advertising Age,* April 15, 1974, p. 4. Note that by mid-1974 several federal courts already had referred to television as the most powerful medium of communication and consequently more subject to control than other media. *See* Chap. XI, p. 293.

[77] Paper presented at the 1972 regional convention in New York City of the American Association of Advertising Agencies by Robert Skitol, "What Is an Adequate Substantiation," June 5, 1972. At the time, Mr. Skitol was assistant to the director of the FTC's Bureau of Consumer Protection.

[78] Speech by John Crichton on Nov. 3, 1972, entitled "Consumerism and Government Regulation in the U.S.A.," delivered at the 7th national conference of Britain's Institute of Practitioners in Advertising.

[79] Speech given on Oct. 4, 1972, entitled "Advertising and the New Consumerism—a Second Look," at the 11th annual Corporate Counsel Institute in Chicago, Ill.

[80] Docket No. 8819, July 18, 1972; ATTR No. 572. Commissioner Jones concurred in the statement of law applicable to this case but dissented to the disposition of the case on the ground that dismissal deprived the company of an opportunity to seek a court review of the issues involved.

[81] Gerald Thain, "Advertising Regulation: The Contemporary FTC Approach," *Fordham Urban Law Journal,* Spring, 1973, p. 390.

[82] Op. cit., 291 U.S. at 313.

[83] In the Matter of Mattel, Inc., 79 FTC 667 (1971).
[84] *Id.*, 79 FTC at 670.
[85] View expressed by Gerald Thain in a speech given July 7, 1971. Op. cit., note 27.
[86] *Broadcasting*, July 8, 1974, p. 24.
[87] About 60 per cent of the commercial TV stations subscribe to the TV code; the others are free to do what they wish.
[88] Op. cit., note 86, p. 24. For details of prohibition against cigarette advertising on radio-television, *see* Chap. XIV, pp. 379–85.
[89] FCC 74–78, 42 *Law Week* 2404, Feb. 5, 1974.

RADIO & TV: OVERVIEW

XI

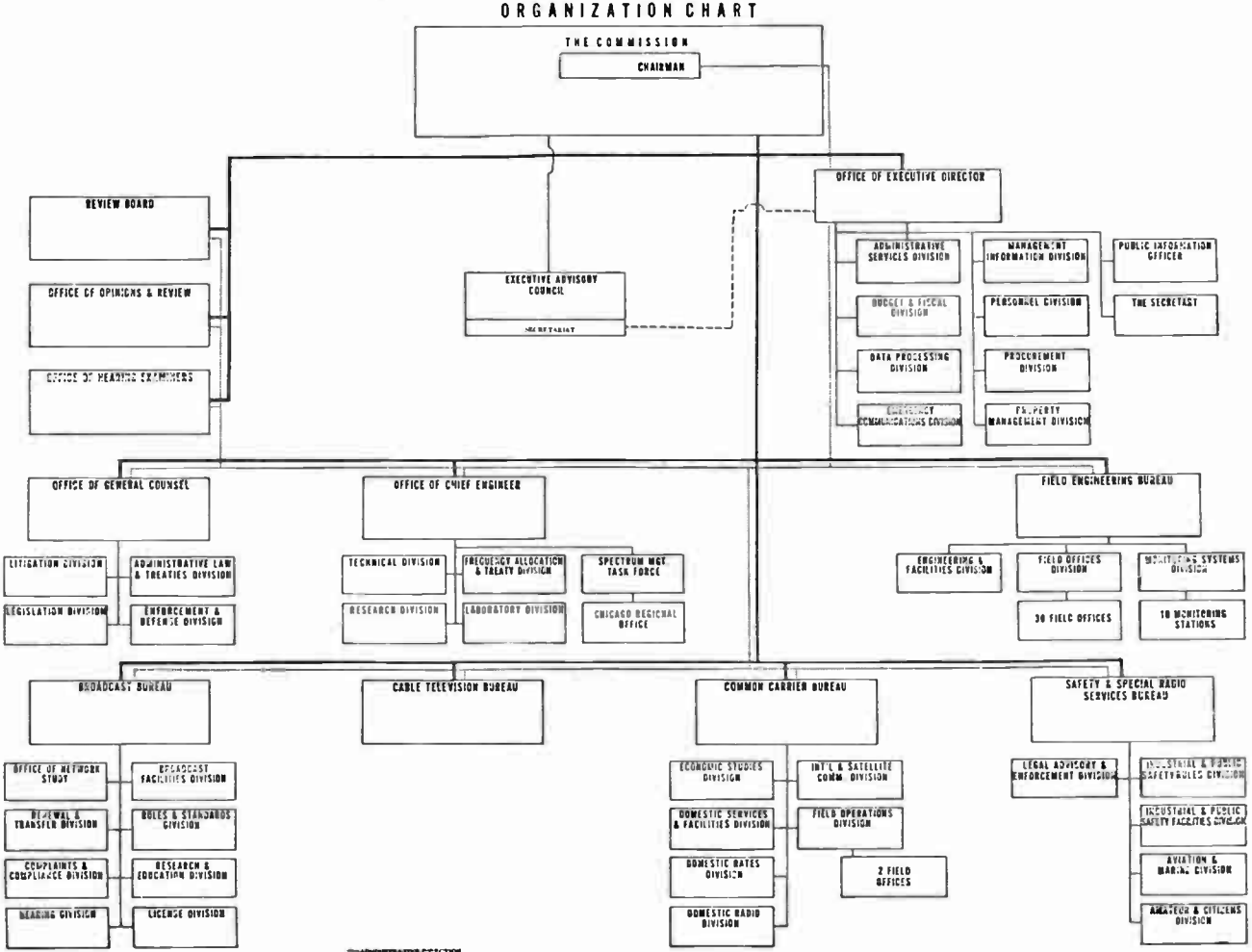
(Overview of FCC, rationale for broadcast regulation, cable television, license renewal criteria and citizens' challenges, media ownership, Nixon administration and TV networks, prime time, prohibition against censorship.)

Advertising has many relationships to the broadcast medium. Revenue from the purchase of time by advertisers provides the main support for commercial broadcasting. In addition, advertising has contributed in unexpected ways to controversial broadcasting issues, such as fairness, citizens' access to the media, and First Amendment theory. Before examining these and other issues, an overview will be helpful.

The first regulatory efforts came with the Radio Act of 1912 which authorized the Secretary of Commerce and Labor to license radio operations. Enforcement presented no immediate problems because there were more frequencies available than license applicants. But that situation changed rapidly in the early 1920s as more and more stations sought to go on the air. Then, adding to regulatory difficulties, came a ruling that the Secretary did not have authority under the 1912 Act to impose restrictions on frequencies, power or hours of operation.[1] The result was bedlam on the airwaves as many broadcasters jumped frequency, boosted power and otherwise operated much as they wished. To end the chaos, the Radio Act of 1927 was passed which established the Federal Radio Commission with power to issue licenses, allocate frequencies, and specify operating conditions. The present regulatory law and commission (the Communications Act of 1934 and the Federal Communications Commission) are directly descendant from the 1927 Act; in fact, the language in both acts is virtually the same, including a key phrase in Section 303 which stipulates that the seven-member Commission shall license and otherwise regulate broadcasters "as the public convenience, interest, or necessity requires."

The FCC (see Fig. 2 for organizational chart) is an independent regulatory agency which licenses about 8,900 operating stations, including approximately 4,460 AM (amplitude modulated) and 2,700 FM (frequency modulated) commercial radio stations, 760 educational FM radio stations, 520 commercial VHF (very high

Fig. 2 Federal Communications Commission



frequency) television stations, 239 commercial UHF (ultra high frequency) television stations, 96 educational VHF television stations, and 150 educational UHF television stations. In addition, there were about 3,100 operating cable systems (called CATV—community antenna television) in 1974, serving some 8 million subscribers in nearly 5,800 communities, and another 2,500 systems approved for operations but which had not yet begun transmissions. By 1977, the FCC will require each CATV system to have a minimum of 20 channels in the cable that goes to a subscriber's TV set.

Included in this mélange, but not subject to licensing, are the three national commercial TV networks (which also have radio networks): National Broadcasting Co. (NBC), which began as a radio network in 1927; Columbia Broadcasting System (CBS), and American Broadcasting Companies (ABC). Each network owns five VHF TV stations—the maximum allowed by the FCC. These stations are licensed by the commission. In this way, and in others, networks are subject to FCC pressure and regulation.

There also is a non-commercial, educational network consisting of about 240 public TV stations and 760 radio stations. Helping to "service" this educational network is the Public Broadcasting Service (PBS), which was established by the Corporation for Public Broadcasting (CPB)—itself created by Congress in 1969 as a private corporation governed by a 15-member bipartisan board appointed by the President with advice and consent of the Senate. Much of its funding comes from the federal government ($45 million in fiscal 1973). CPB created PBS to handle program production and distribution activities, but considerable controversy has ensued over control of programming. Concerning this "struggle," U.S. Sen. Sam J. Ervin, D-N.C., commented:

> Another example of the Nixon administration asserting itself over the media involves public broadcasting. In the last Congress, the President vetoed the appropriation for . . . [CPB]. The appropriation which later came out of the 92nd Congress represented a substantial reduction in funding. The administration also made a point of arguing for more local control over public broadcasting. One effect of that would be . . . less network public affairs programming critical of administration policies.
>
> Recently, the board of directors for [CPB], now controlled by administration appointees, announced that in view of the funds reduction it was withholding the funds for public affairs programming. . . . The chairman of the

> board explained that public affairs programming is not a "desirable activity" for public broadcasting to be engaged in. And so, programs such as William Buckley's "Firing Line," "Bill Moyers' Journal," "Wall Street Week in Review," and "Washington Week in Review" all of which had at one time or another been critical of the Nixon administration and all of which had always been independent of the Nixon administration—were not to be funded for the coming season.
>
> Nine days ago, the Corporation Board announced that it had decided to fund some of these programs after all. I would again suggest to you that while this appears to be a concession to public affairs programming on the board's part, the damage has been done. The producers of these programs which are allowed to return have gotten the message.
>
> Incidentally, now that the central board is more sympathetic to the administration's views, we hear no more of decentralized control.[2]

In regulating such an immense industry,[3] the FCC operates in a quasi-legislative and quasi-judicial manner. It has a staff, plus administrative law judges (formerly called hearing examiners) who are independent of both the staff and the Commission and who conduct formal hearings and issue interlocutory (subject to further review) orders. The Commission itself issues rules and regulations, conducts hearings, serves an adjudicatory function through findings and the issuance of orders, including the rarely used power (given to the commission in 1952 by Congress) to issue cease-and-desist orders to stations deemed in violation of the law. Anyone violating a lawful requirement of the FCC can be punished by a fine of not more than $10,000 or by imprisonment of up to one year, or both.

Among the FCC's major tasks in regard to broadcasting are: (1) to issue or renew broadcast licenses in accordance with Section 307 of the 1934 Act;[4] (2) to revoke licenses of stations not operating in the public interest, although the burden of proof falls upon the Commission; and (3) to otherwise regulate broadcast stations in the public convenience, interest or necessity.

11.1 Rationale for regulation. Before continuing with an overview of the FCC, the basis for regulating the broadcast industry warrants examination, particularly in light of the First Amendment's prohibition of prior restraint, censorship or most other forms of governmental interference with speech and press. Why should the

government license broadcasters when it clearly would not have such a power over newspapers?

Traditional theory of broadcast regulation begins with the concept that the public "owns" the airwaves. Conversely, newspapers do not use anything that is publicly owned. Since the public "owns" the airwaves, it has the right to say how this valuable resource will be used. It has said so by means of congressional enactment of the 1934 Act, which stipulates that a licensee must operate in the public convenience, interest and necessity. Just what constitutes the *public interest* is largely left up to the FCC to define.

At the time the Radio Act of 1927 was being drafted, the senators most involved in choosing the language selected the term "public interest" because (1) it was the statutory standard then in use by the Interstate Commerce Commission for regulating public utilities and railroads, and (2) because the senators couldn't think of anything better.[5]

Another argument that is used in behalf of regulation is the "scarcity" concept. The airwaves not only are a valuable publicly-owned resource, but they are limited. Only so many stations can be accommodated; therefore, those which use this resource can be subjected to regulation. Not so those who use printing presses since, in theory, there's no limit to the number of presses. But technological developments are knocking the scarcity argument into a cocked hat. For example, the 3,100 cable systems in 1974—with more on the way—have the capacity to drastically alter the "scarcity" concept. The reasons lie in the different characteristics of the two kinds of "broadcasting." "Over-the-air" broadcasting uses a medium—airwaves—which is finite. Only so many signals can be accommodated without interference with other signals. But CATV doesn't use the air to transmit signals to subscribers' homes. Like a telephone company, CATV moves signals by cable and each cable can contain 20, 40 or 60 wires. Each wire represents a different "channel." Thus, a veritable cornucopia of programming diversity is *potentially* within reach of every community. To "fill" each of these channels, a CATV system could be interlocked with other CATV systems and thereby "import" signals from afar, such that on any given Sunday during the pro football season each and every televised game could be offered to a CATV subscriber. But the FCC and the courts have had quite a bit to say about "importation" of signals from beyond certain distances. More about such developments later. A refocusing on the "scarcity" argument makes it clear that the newer technology makes, or threatens to make, such a rationale for regulation, obsolete, so new

reasons have been advanced for regulatory control, especially (1) media differences, and (2) the fiduciary, or proxy, concept.

The "media differences" argument takes several forms. First, broadcast messages, unlike their counterpart in newspapers and magazines, are "in the air." Once the radio or TV set is turned on, the listener or viewer becomes, in a sense, part of a "captive" audience. The book or newspaper reader not only must make a decision to pick up the book or newspaper, but he must actively select the stories or pages to be read. The user of the electronics medium does not make as many "affirmative" decisions, so the theory goes. True, the viewer must decide to turn on the TV set, turn it off, or switch channels (and even in these instances someone else could make such choices); but once he's "tuned in," he's more of a "captive" than the print medium user. Concerning such an idea, Chief Justice Burger has said:

> The Commission [FCC] is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive" audience. * * * The "captive" nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion on his set."[6]

The fiduciary concept, which reached its zenith in the U.S. Supreme Court decision in the *Red Lion* case,[7] is based on the idea that the licensee is only a "trustee"—a fiduciary—for the public, and that because of this status the First Amendment does not prohibit government from requiring the "trustee" to do certain things, such as share his frequency with others. In so doing, he functions as the public's proxy and, therefore, can be obligated to give suitable time and attention to matters of public interest without the First Amendment standing in the way.

This concept of public access to the media, particularly to the broadcast medium, will be examined more fully later, but first it should be emphasized that the *public interest* referred to in *Red Lion* is the same *public interest* which led to a broadening of news media protection against successful libel[8] and false-light invasion of privacy[9] cases. In terms of radio-television, the public interest factor is used to require broadcasters to do certain things or to operate in a prescribed manner, whereas in the name of public interest the free-

dom of the news media is enhanced by greatly expanding their protection against successful lawsuits. Whether there is a consistent application or use of the public interest standard depends, to a considerable extent, upon one's point of view. Some have argued that the public interest might better be served by permitting licensees greater freedom from governmental regulation. Instead, new conceptualizations are advanced on behalf of continued regulation by government.

One of the more recent ones is based on the assumed power of the medium; i.e., television is declared the more powerful of the media in its impact upon users of mass communications, therefore, it should be more subject to control.[10] If such were the case, then one might posit the antithesis: Since radio is a less powerful medium, why not deregulate it? The difficulty of accepting the notion that television is the most powerful medium lies in the lack of empirical evidence. Marshall McLuhan and others can warn that the electronics medium, particularly television, threatens society's basic values, but *knowing* this intuitively or philosophically is different from *knowing* this empirically. There are so many variables in disentangling cause-effect in something so complex as human (communication) behavior that statements about one medium's power vis-a-vis other media should be regarded with some skepticism even though courts and legislatures act as though the necessary evidence had been gathered by social scientists. Lawmakers often cannot wait until knowledge is certain; rather, they may have to act on the basis of intuition, or on some other uncertain basis.

Concerning the First Amendment's tolerance for any kind of media regulation, Justice Douglas has almost singularly observed:

> What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announced is that government shall keep its hands off the press. That principle has served us through days of calm and eras of strife, and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez faire regime which the First Amendment sanctions.[11]

11.2 Cable television and First Amendment implications. The ultimate effect of cable television on the "scarcity" rationale can be disputed, but certainly CATV (community antenna television) is undercutting the theory. And this system of communication is developing rapidly. Since the first commercial system was established in the late 1940s, CATV's development has been "explosive," as the U.S. Supreme Court observed in *U.S. v. Southwestern Cable Co.*[12]

Cable TV initially was developed for communities unable to get over-the-air TV reception because of terrain or distance from stations. Master antennas were built to pick up broadcast station signals and feed them by cable to subscribers for a fee. In 1950, 70 such systems were in operation in the United States. That number has grown to 3,100 systems with an average of 2,200 subscribers. The largest, in San Diego, has more than 57,000. Some have fewer than 100. Most systems offer between 6 and 12 channels, with the average being 10. However, the systems are capable of offering as many as 60 channels in a cable. The average monthly fee, according to a 1974 FCC report, is $5, with installation costs ranging from gratis to about $100.

The multichannel capacity of CATV means the potential exists for bringing into a home a variety of communication services never before considered possible. Not only can diverse and conflicting ideas gain access to the "marketplace of ideas," as Justice Holmes envisioned, but CATV can be used for facsimile reproduction of documents, electronic mail delivery, information retrieval, facsimile newspapers, etc. CATV can enormously augment the public's choice of programs *without* using the airwaves. It also can be used to originate programs.

In *U.S. v. Midwest Video Corporation*,[13] the Supreme Court, in a 5-4 decision, sided with the FCC in requiring CATV systems to originate programs, rather than just be carriers of signals from other sources. Earlier, in *Southwestern*, the Court had decided that the FCC could regulate the cable systems regardless of whether signals were transmitted by airwaves or by cable.

Justice Douglas, joined by Justices Stewart, Powell and Rehnquist, dissented for the following reasons: (1) Congress is the one to make decisions on CATV origination and it has not acted; (2) CATV is a common carrier and has no more control over message content than does a telephone company; (3) there is nothing in the 1934 Act which suggests that CATV carriers can be "compulsorily converted into broadcasters." The majority, however, believed that the FCC had to be given wide latitude in such matters, especially since Congress had not spoken out on the issue.

The origination rule affected about 800 systems in operation at the time of the decision. Because of the closeness of the Court's split in *Midwest* and because of the newness of CATV, the FCC decided to go slow in implementation of the regulation. In fact, it was consigned to "regulatory limbo" and the issue would not surface again until the commission undertook consideration of proposed new rulemaking on the subject.[14] In arguments against forced origination, CATV spokesmen said many systems already were originating programs voluntarily, and that the need for local programming already was being met by the FCC's rule which requires systems in the top 100 markets to make channels available for use by educational institutions, government, the public, and on a leased-access basis.[15]

The uncertainties which have marked CATV regulatory attempts, plus the significance of a "wired nation" potential, led one writer to observe:

> From a system that dictates programming on a national or at best a regional level, broadcasting can be transformed into a medium by which even the smallest community can effectively communicate with itself. In an increasingly impersonal society where governmental, economic, and social structures are so large, the ability to reverse the process of bigness, to redirect energies to local problems, and to establish local communications can have enormous value.
>
> * * *
>
> Obviously, the implications of such a system and the issue of who controls it are watershed questions, comparable in importance to development of the railroad, the telephone, ... and cable's stepfather, over-the-air broadcasting. Yet the industry has been evolving under a curious stop-and-go pattern, alternating between over-regulation and at times no regulation.[16]

If a regulatory vacuum existed in 1971, it was filled by extensive and complex rules which went into effect March 31, 1972. Among the FCC requirements were those which stipulated that cable systems in the top 100 markets had to provide a non-broadcast channel for each broadcast signal carried, and that they had to provide a free "public access" channel, an educational channel, and a channel for state and local government use. The purpose of such rules was to prevent CATV owners from "freezing out" public use of the systems. The rules also permitted CATV systems in the top 100 markets—a *market* being determined by survey data collected either by Ameri-

can Research Institute or A.C. Nielsen Co., such that each county is classified as being in a given market if a majority of viewers or listeners in that county turn to stations in a particular geographical area; thus, the Chicago market is one of the top 10 because the potential number of viewers or listeners is so large, whereas stations in the Des Moines, Iowa, area operate in one of the top 100 markets — to import signals from other markets (distant signals) which they had been prohibited from doing since 1966. In addition, all cable systems were given the green light to rebroadcast TV network programs on the same day, but not simultaneously, thereby striking a compromise designed to protect the over-the-air stations. However, CATV systems were prohibited from (1) broadcasting sports events regularly seen during the preceding two years in the CATV station's community; (2) showing movies that were more than two years old, except for films that were at least 10 years old (and of the latter only a limited number could be shown each month); (3) broadcasting series-type programming; and (4) devoting more than 90 per cent of their programming to feature films and sports events.

The regulations are so extensive that the FCC in late 1974 began considering proposals to ease the regulatory burden on pay cable. The Justice Department, for example, filed a brief several weeks before the FCC conducted a hearing on rule changes and urged the Commission to abolish *all* restrictions on CATV and to refrain from imposing new regulations for a five-year period so the system could grow unimpeded in a free market condition. The brief stated, "There would seem to be no present danger to the public interest in removing existing restrictions on pay cable."

Clearly, CATV will have considerable impact on traditional theories pertaining to broadcast regulation, but precisely what the result will be is difficult to say. As Circuit Court Judge Wright said in *Business Executives' Move for Vietnam Peace v. FCC:* "It has always been clear that the broadcast media . . . are affected by strong First Amendment interests. Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress."[17]

11.3 License renewal, citizens' challenges, comparative hearings, and ascertainment of community problems. CATV systems, like their "on-the-air" counterparts, face periodic license renewals once they are granted licenses to operate. Thus, the power to license is a "life and death" one. Every three years, on a staggered basis, thousands of stations—including CATV-types—go through the renewal process. Congress may change this by extending the period before renewal is required, but the fact will remain that periodically a

station faces a situation which lends substance to the remark that the FCC can regulate by lifted eyebrow; i.e., by merely showing displeasure with a certain practice, and without resorting to rulemaking, the FCC can bring about changes. Yet despite this power, hundreds of licenses routinely are renewed each year. Only a very few licenses have ever been taken away for *programming reasons*—a situation which prompted Commissioner Johnson to tell a Senate subcommittee:

> The problem . . . is that in the 5½ years I have been on the Commission, each year, after all the talk is swept away, the fact remains that 2,500 licensees come in and ask for a license renewal, and 2,500 get a license renewal.
>
> There have been very few exceptions to that general rule.
>
> * * *
>
> . . . [FCC staff members] go over the license renewal forms. But after they have been over them, the net result is they all get approved, with exception of some that get letters about minor technical defects, or logging requirements, or antenna towers, and things of that sort.
>
> * * *
>
> . . . I don't know of anybody who has lost his license for . . . [programming] reasons. And I cannot believe that all 7,500 licensees in America are doing such an all-fired good job that they all deserve to be renewed on that ground, and yet, that is what has happened.[18]

Although licensees have rarely lost their stations because of programming, the FCC has manifested concern in a number of ways. In 1965, the commission issued its *Policy Statement on Comparative Broadcast Hearings*[19] in which two primary objectives were cited toward which competing applicants for a license should direct their statements: (1) the best practicable service to the public; and (2) maximum diffusion of media control. Under the first objective, full-time participation in station management (as contrasted with absentee ownership) would be of "substantial importance" in determining who would be given the license. The full impact of this policy statement would not be felt until the WHDH-TV case four years later.

Another development during this period also contributed to increased agitation at renewal time from citizens' groups protesting reissuance of licenses. Prior to a U.S. Court of Appeals decision in 1966, economic injury and electrical interference were the only

grounds on which license renewal could be challenged,[20] but in *Office of Communication of United Church of Christ v. FCC*,[21] the court permitted intervention by public groups as representatives of a community's interest. Later, individual members of a listening audience were given "standing" to intervene.[22]

At a renewal proceeding, the incumbent licenseholder must show that his programming has adequately served the community's needs and that proposed programming will continue to serve those needs, while those seeking to wrest away the license for themselves must show that their *proposed* programming will somehow better serve the community. Two problems are immediately apparent: (1) what kind of programming serves the community needs; (2) what kind of added weight, if any, should the FCC give to licensee's actual performance when stacked against mere promises of a contender. The second of these drew considerable attention from the FCC in mid-1974 when it began inquiring of licensees how they had done in terms of their proposed programming submitted three years earlier when license renewals were being considered by the FCC. As for ascertaining the kind of programming that serves a community's needs, the FCC gave the following guidance in a 1960 report and statement of policy:[23] "The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located . . . have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programming."

Programming and media ownership were two factors which entered into one of the most spectacular license renewal actions to date. On Jan. 22, 1969, the FCC voted not to renew the license of WHDH-TV in Boston—a decision which sent tremors racing through the broadcast industry. The channel 5 license was valued at $50 million and the FCC's action raised the specter of other licenses similarly being taken away.

Various legal steps were taken to halt the transfer of the license to a group known as Boston Broadcasters, Inc. (BBI), but the transfer became final on March 19, 1972, when the new licensee began operations.[24]

Prior to the WHDH case, the Commission's policy had been to favor the incumbent licensee against other applicants because of "the clear advantage of continuing the established service" of the existing

station compared with the risk attached to accepting at face value the proposed programming of new applicants even though such proposals might contain admittedly superior features.[25] In *WHDH*, the hearing examiner had concluded that on the whole the licensee's broadcast record was favorable. The Commission later determined that the programming was "within the bounds of average performance" and that it did not give "unusual attention to the public's needs or interests." And yet, for technical reasons, this factor was not supposed to have influenced the Commission when it made the comparative evaluation of the various applicants for the channel 5 license; that is, no "demerit" was attached to "average performance."

According to Chairman Dean Burch, who was not on the Commission at the time of the decision to take away the license, diversification was one of the main factors against WHDH, since the station and the *Herald-Traveler* newspaper in Boston were jointly owned.[26] In addition, Burch said integration of ownership and management was a major factor influencing the award to BBI. Nevertheless, the decision to strip WHDH of its license was flawed in several ways, Burch said, adding that an "unconscionable injustice" had been done.[27] Earlier, Commissioner Johnson had shown no inclination to doubt the wisdom of the majority's decision, with whom he joined. Quite the contrary. "The door," he said, "is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for successes before the licensing agency where previously the only response had been a blind reaffirmation of the present licenseholder."[28]

Citizen groups not only were emboldened by *United Church* and *WHDH*, but they also drew encouragement from the FCC's adoption of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*[29] in February, 1971. Among the *Primer's* requirements was the filing of an annual report with the FCC which listed what the licensee considered to be the most significant community problems and how his proposed programming would deal with those problems. In ascertaining those problems, the incumbent licenseholder, or challenger, is required to describe economic, social, racial, ethnic, and other characteristics of the community; to conduct consultations with leaders of significant segments of the community as well as with members of the general public; to list and evaluate problems which become apparent as the result of such consultations; and to propose programming responsive to ascertained problems.

The principal drafter of this policy was Robert T. Bartley who retired in mid-1972 after serving as an FCC commissioner for 20

years. *Broadcasting* magazine interviewed him just before his retirement and reported:

> While the climate of the times may have something to do with the citizen-group movement that is now plaguing broadcasters—and the Commission—he [Bartley] says a large factor is today's broadcaster himself—one of a new breed the commissioner feels is more interested in business than in broadcast service. "The old timers," the 63-year-old commissioner says, "knew what was going on in their communities and served the needs." The new ones, he says, lack that awareness.
>
> He suggests, though, that one path to protection may lie in the primer the Commission has adopted to aid broadcasters in ascertaining community needs. * * * "If broadcasters had had a Bartley primer and paid attention to it 15 years ago," he says, "there wouldn't have been a WLBT case." WLBT (TV) Jackson, Miss., in the benchmark citizen-group case movement, lost its license as a result of charges by local blacks that it ignored their interests and discriminated against them.[30]

The number of license renewals held up by serious complaints and by petitions to deny renewals jumped from a customary few in the mid-1960s to more than 60 in 1970. With only six FCC attorneys to handle such cases at the time, a backlog quickly resulted, and it continued at least into fiscal 1974 when the House of Representatives included an extra $3 million appropriation for the FCC to be used exclusively for reducing the backlog. This piling up of renewal cases continued despite two developments which offset the chance of successfully challenging incumbent licenseholders. The first, in 1970, was the FCC's issuance of a *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants;*[31] and the second resulted from a court decision in 1972 which permitted the FCC to deny a petition that sought to block license renewal for WMAL-TV in Washington, D.C., without first conducting a hearing.

In the 1970 policy statement, the FCC voted 6-1 to favor the incumbent licenseholder over rivals if the incumbent could show that the station's programming had been "substantially attuned to the needs and interests" of his broadcast area. However, stations not offering "substantial" service still were subject to challenge, as Commissioner Johnson emphasized in his lone dissent.

In the WMAL-TV case, the U.S. Court of Appeals (District of Columbia Circuit) in June, 1972, in effect turned down the bid of a

minority group which had alleged, in seeking a hearing on a petition to deny renewal of the station's license, that the station had failed to adequately ascertain the community's needs, that programming was unresponsive to the needs of blacks in the nation's capital, and that the station was discriminatory in its employment practices.[32] The decision, permitting the FCC to turn down such a petition without a hearing, was hailed by broadcasters because it meant that many of them would be able to avoid costly renewal hearings if the FCC decided that they were unnecessary—as it had in about 100 cases affected by the WMAL ruling concerning FCC power. The decision did not mean, the Commission was careful to point out, that all petitions to deny license renewals would be dismissed. What it did mean, according to Commissioner Richard Wiley, who became FCC chairman in March, 1974, after Burch became a counselor to President Nixon, was reassurance for the Commission's traditional policy of permitting wide discretion for broadcasters in such matters as programming, ascertainment of community needs, and obligations concerning equal employment opportunities.[33]

The "substantial service" concept in the 1970 policy statement was significantly altered several years later when the commission, by a 3-2 vote,[34] renewed the license of KHJ-TV in Los Angeles. A competing group for channel 9 had contended, to the satisfaction of a hearing examiner who had the precedent of *WHDH* very much in mind, that KHJ-TV's programming consisted primarily of old movies interspersed with commercials, and that media diversity would be enhanced (in accordance with the Commission's policy statement in 1965 about media diffusion) by awarding the license to the competing group; but the Commission overruled the examiner's decision in part because the licensee's programming was "within the bounds of *average performance*," thereby warranting neither a preference nor a demerit, and because the Commission did not believe that renewal proceedings should be used to restructure ownership patterns in the broadcast industry.[35]

The movement toward weakening the likelihood of successful challenge of incumbent licenseholders is further evidenced in the bill passed by the House of Representatives on May 1, 1974, and sent to the Senate.[36] The bill not only would extend the license renewal period from three to five years, but it would prohibit the FCC from taking into account (1) the "ownership interests or official connections of the applicant in other stations or other communications media or other businesses," and (2) the participation of ownership in management of the station unless the commission first adopted rules prohibiting such ownership interests or activities and gave the incum-

bent licenseholders a "reasonable opportunity" to conform to such rules. The obvious effect of the proposed legislation would be to prevent future WHDH-type cases since media ownership and participation of ownership in management were major factors in the decision to take away the license. However, if the FCC gave advance notice through its rulemaking power, and provided a "reasonable opportunity" for licenseholders to comply, media diffusion and management integration with ownership still could be major factors in license renewal proceedings.

In addition, the bill would require the Commission to consider whether the licensee has followed FCC procedures for the "ascertainment of the needs, views, and interests of the residents of its service area" and whether the licensee's operations have been "substantially responsive" to those needs, views and interests. An obvious difficulty with the language of the bill lies in interpretation of "substantially responsive."

Although any "party of interest" could file a petition to deny license renewal, the bill would require that such action take place within Commission-specified time periods. Furthermore, the FCC would have to prescribe procedures which would encourage a licensee and those persons raising significant issues regarding the station's operations to conduct "good faith negotiations" to resolve such issues during the term of the license period. Although it's clear that "good faith negotiations" do not mean the give-and-take bargaining characteristic of labor-management disputes, there still remains uncertainty what the licensee's obligation would be under this proposal.

One other provision in the bill calls for the FCC to announce, within six months after the amendments went into effect, what it would do, if anything, about multiple ownership of stations. This is an issue that causes considerable concern to the U.S. Department of Justice, the FCC, and the industry.

11.4 Regulation of media ownership. The so-called "duopoly" rules prohibited common ownership of stations in the same broadcast service in the same market; thus, a licensee could not own two television stations in the same market, or two radio stations in the same market. But there was no rule barring common ownership of one TV and one radio station in the same market. On March 25, 1970, the rules were amended to proscribe common ownership of stations in different broadcast services in the same market—except in communities with no more than 10,000 population.[37] The change did not affect multiple ownerships already in existence.

Also on March 25, 1970, the FCC announced consideration of a one-to-a-market rule which would have prohibited cross-ownership of

media, such as a newspaper and a TV station, in the same market. The proposal would have required media owners to reduce their holdings to one or more newspapers, or one TV station, or one AM-FM radio combination within a five-year "grace" period. Also, a broadcast license would not have been granted to the owner of a daily newspaper in the same market. At the time this rule was under consideration, there was common ownership of at least one daily newspaper and one broadcast station in 231 cities. Because of the economic impact of such a proposal, the FCC did not adopt the rule. However, cross-media ownership was to be taken into consideration whenever comparative hearings were conducted. The presumption would be that undue concentration of media ownership would be detrimental to local programming and programming diversity, and therefore not be in the public interest.

A licensee currently is permitted to own a maximum of 7 AM and 7 FM radio stations, and 7 TV stations (5 VHF and 2 UHF) if no more than 1 TV station and 1 radio station are in the same market. Also, under a policy that applies to the top 50 television markets, an applicant seeking to become a licensee of more than two TV stations in those markets must make a "compelling showing" that the public would be better served by permitting such ownership concentration.[38]

Hearings were conducted in mid-1974 by the FCC to decide on a one-to-a-market rule. Among the questions considered was whether such a limitation would apply to all markets or just to the smaller ones. If the prohibition extended across the board, then joint TV-newspaper ownership in 231 cities would have to be terminated. Among the factors being weighed by the FCC at the time were petitions already on file from the Justice Department which urged the Commission not to renew licenses of radio and/or TV stations in four major cities where, in each city, stations and newspapers were said to be jointly owned.[39] As a result of the hearings, the Commission in early 1975 voted to prohibit future media cross-ownership in the same locality of newspapers and television or radio stations. Only a few divestitures would be required by the ruling.

11.5 Nixon administration, networks and media ownership. Among the leading critics of TV networks was President Nixon who, during a televised news conference on Oct. 26, 1973, accused the networks of "outrageous, vicious, distorted reporting"—a charge pending in complaint form before the National News Council when it issued its first report in April, 1974.[40] Prior to this outburst, the Nixon administration had shown displeasure with the national news media, particularly network television, on a number of occasions.

For example, the Office of Telecommunications Policy (OTP) announced on Dec. 18, 1972, that legislation was being drafted to hold local TV stations accountable at license renewal time for "balance" and taste in network programs, particularly news programs. According to Senator Ervin, what the OTP in the White House really wanted was control of network news. Ervin quoted OTP Director Whitehead as saying: "Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."[41] To which Ervin responded:

> Since it would be impossible for local station managers to push a button to shut off disagreeable portions of the network news programs, this proposal would encourage local managers to pressure the network news officials to drop comment critical to the administration. The ultimate arbiter of whether the local management had met these responsibilities would be the FCC. In effect, . . . Whitehead's proposal would make the FCC the censor of so-called "bias and distortion."
>
> I would suggest to you that even if this administration proposal fails to win congressional approval [it failed], the networks have gotten the message. If not, it was underlined by an apparently unconnected event which occurred about the same time. In December, the finance chairman of Mr. Nixon's campaign in Florida challenged the license of WJXT in Jacksonville. WJXT was the station whose reporters discovered some controversial statements of Nixon Supreme Court nominee G. Harold Carswell. The statements contributed to his failure to receive Senate confirmation. To make matters worse, the station is owned by the *Washington Post* and it will cost them about one-half million dollars to defend against the challenge. The owners of other stations must also wonder what will happen should they arouse the displeasure of the current administration. Most stations can ill afford to spend that kind of money to beat off challenges to their licenses. It is a high price for irritating the President.[42]

Shortly after the OTP director's statement, a White House special counsel, Charles Colson, forecast the dissolution of network power, if not the networks themselves.[43] This was followed by Justice Department suits in April, 1974, aimed at breaking the TV networks'

control of entertainment-type programming during prime evening viewing hours. The networks were accused of monopolizing and restraining trade during prime time. The Justice Department said its actions were aimed at restoring competitive programming by barring the networks from using any entertainment programs they produced, thereby encouraging the use of independently-produced or locally-produced programs. News- and sports-type programs would be excluded.

The networks responded that the antitrust suits were part of a calculated effort by the Nixon administration to intimidate them and to violate their First Amendment rights. CBS accused the administration of attempting to "inhibit criticism of the President . . . and his appointees."[44] The Justice Department responded by saying that questions concerning the motives behind the suits were irrelevant. The public, said the Justice Department, in denying the charge, "has a right to the benefits of competition and its right cannot be defeated by questioning the motives of those charged with protecting the public."[45] In the meantime, the department was opposing—again with alleged political overtones—cross-media ownership in the same market. In early 1974 it urged the FCC not to renew the licenses of newspaper-owned radio-TV stations in Des Moines, Iowa (in this instance management denied the existence of joint ownership); St. Louis, Mo.; Milwaukee, Wis., and Minneapolis, Minn.

The newspapers which had become the objects of Justice Department concern included the *Des Moines Register*, the *Milwaukee Journal*, and the *St. Louis Post-Dispatch*—each critical of the Nixon administration, especially after disclosures relating to the Watergate scandal.[46] Nicholas Johnson, who had left the Commission and returned to his native Iowa by the time of the Justice Department's actions, asked why the department should apparently show no concern about cross-ownership of such media "giants" as the *Chicago Tribune* and WGN-TV, or the Cox-owned media outlets in Atlanta, Ga., which were strong supporters of the President, but instead concentrated on media critics of the administration. Whatever the merit of such a suggestion, the fact remains that both the Justice Department and the Commission itself had earlier—such as the policy statement in 1965, in the case of the FCC—shown concern about media concentration in the hands of a few owners. A somewhat related concern accounted for the Commission's adoption of controversial rules in 1970.

11.6 Prime time access rules. In May, 1970, the FCC set forth the prime time access rules which specified that during the top viewing hours nightly, one out of the four hours had to be free from network

programming in the top 50 markets. The purpose of the rules was to stimulate local programming and to permit development of independent non-network sources of programming. To the extent the purpose was achieved, network influence over affiliated stations would be reduced.

Originally, "prime time" was 7 to 11 p.m. in most time zones. Later, the FCC permitted some variations and ultimately the rules were relaxed to permit, beginning in the fall of 1974, 3½ hours of network programming Monday through Saturday and the full four hours on Sunday. But the Second Circuit U.S. Court of Appeals ruled on June 18, 1974, that no change could be made prior to September, 1975. The FCC's change of position came with the realization that the rules had failed to stimulate the kind of programming envisioned by the Commission. What many TV stations did, in order to plug the one-hour "gap" created by the original ruling, was to use shows produced in Great Britain or Canada, or old syndicated series produced by independent companies prior to the prime time rules. Many stations did not increase production of local programs.

On Nov. 15, 1974, the Commission, by a 5-2 vote, imposed a prime time access rule, effective Sept. 1, 1975, which applies only to the top 50 markets in which there are three or more operating commercial TV stations. The decision opens up one of the four prime-time hours—usually the first hour—and prohibits affected stations in the top 50 markets from plugging that hour with any program previously carried by any TV network. However, certain kinds of programs are exempt from the prohibition, including documentaries, other news-type reports of fast-breaking events, children's specials, major sports events (such as the Olympics or "bowl" football games), and political broadcasts.

11.7 Prohibition against FCC censorship. The 1934 Act—specifically Section 326 of that Act—prohibits the Commission from exercising "the power of censorship over radio communications or signals transmitted by any radio station." Further, "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio and television communication."

Section 326 notwithstanding, the FCC imposes a considerable variety of restraints on programming, as one law journal article pointed out:

> Despite the First Amendment and statutory prohibition of censorship, both the Federal Communications Act and actions taken by the Commission pursuant to its broad

> grant of regulatory power have affected not only the form of broadcasting, but its content as well. Thus, covert sponsorship of broadcast activities—"payola"—is expressly forbidden by statute, as is the airing of rigged quiz shows. Similarly, the Commission has acted to impose sanctions against the broadcasting of obscenity, profanity, defamation, fraudulent contests, illegal lotteries, harmful medical advice, and gambling information. Moreover, a regulation affecting news material provides that no mechanically reproduced production of news or other material "in which the element of time is of special significance" because the broadcast might create the impression that the event was "live," may be made without an announcement that portions of the broadcast were mechanically reproduced.[47]

Such sanctions generally have been found constitutionally permissible. A few of these are reviewed more fully below:

A. Regulation of "obscenity." In April, 1973, the FCC notified station WGLD-FM of Oak Park, Ill., that it was liable for a $2,000 fine for allegedly violating the criminal obscenity statute which states that "whoever utters any obscene, indecent or profane language by means of radio or television communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."[48] The fine resulted from discussion on a sex talk show, "Femme Forum"—one of the so-called "topless" radio talk shows which proliferated for a time prior to the commission's crackdown on WGLD-FM.[49] The Commission hoped that imposition of the fine would result in a test case, but the station decided to pay the fine rather than take on the financial burden associated with such a challenge. Earlier the Commission also had issued a Notice of Apparent Liability to WUHY-FM in Philadelphia, proposing to fine that station for the broadcast of obscene and/or indecent language. WUHY-FM likewise elected to pay the fine rather than contest the statute or the Commission's action under the U.S. Code. Thus, the definitions of "obscene" and "indecent" remain untested when applied to broadcasting.

Concerning profanity, which also is forbidden by Section 1464 of the U.S. Code, the intention of the speaker has been the governing factor. In cases involving language commonly regarded as profane ("hell," "damn," "God damn it," etc.), the test has been whether the utterances were "words importing an imprecation of divine vengeance or implying divine condemnation, so used as to constitute a public nuisance."[50] Complaints of such language, unaccompanied by

evidence of the intention of the user, do not normally furnish a basis for Commission action.[51]

The fines levied against WUHY-FM and WGLD-FM resulted in other licensees either "cleaning up" their shows or doing away with them entirely.[52]

The FCC, in noting the definition of obscenity given by the U.S. Supreme Court in *Miller v. California*,[53] pointed out that the Court has never ruled on the meaning of "indecent" or "obscene," as used in Section 1464, nor has it made specific reference to the *broadcasting* of questionable material, in contrast to rulings handed down on obscenity in the print medium or in motion pictures. Further, the FCC is of the opinion that the use of certain language in on-the-spot news coverage might be permissible even when that same language, used gratuitiously in a different situation, might be in violation of Section 1464.[54]

B. Drug-oriented music. The FCC has asked licensees to make reasonable efforts to keep drug-oriented music off the airwaves—a request which the U.S. Supreme Court declined to review.[55]

The controversy began shortly after the FCC issued a public notice on *Licensee Responsibility to Review Records Before Their Broadcast*,[56] which was interpreted by some, according to Justice Douglas, as a prohibition against playing "drug-related" songs. That belief was strengthened five weeks later when the FCC staff provided a list of 22 songs which it labelled "drug oriented" on the basis of the lyrics. Justice Douglas said, "The industry widely viewed this as a list of banned songs, and many licensees quickly acted to remove other songs from the air as well. Some announcers were fired for playing suspect songs."

The FCC attempted to clarify its order,[57] but although it seemed to repudiate the list of banned songs, it continued to exert considerable pressure by noting that "the broadcaster could jeopardize his license by failing to exercise responsibility in this area." Just what that responsibility entailed, short of not playing "drug-oriented" music on the air, was not made clear, but in an appearance before a Senate select committee, the FCC chairman, Burch, said he probably would vote to take away the license of a station that was playing songs the FCC believed promoted the use of drugs.[58]

Yale Broadcasting Co. attempted to draft a station policy and asked the FCC for a ruling on whether its policy complied with the Commission's orders. But the Commission said the proposed policy was too abstract and declined to issue a declaratory ruling. The company then brought action on First Amendment grounds, arguing that the regulations were impermissibly vague. The lower courts

disagreed and the Supreme Court declined to review the case, despite Justice Douglas' notation that the threat of governmental action can impose a prohibited restraint upon the press (including radio).[59]

C. Anti-lottery law. The 1934 Act not only specifies in Section 312(a)(6) that a license can be revoked for violation of the obscenity statute, but also for violation of the U.S. Code prohibiting the broadcast of lottery information. Title 18, Section 1304, states that "whoever broadcasts by means of any radio station . . . any advertisement of or information concerning any lottery . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both." The law, which also prohibits publicizing of lotteries via the U.S. mail (so that newspapers which value second-class mailing privileges should be on guard[60]), was passed before the states themselves began to enter the lottery "business" as a means of raising revenue. By mid-1974, 13 states were in the lottery "business," and others were preparing to enter. One result was pressure on congressmen to alter the law so the publicizing of state lotteries via the mails or by broadcast would be legal. The failure to make such lotteries legal, warned U.S. Atty. Gen. William Saxbe in August, 1974, could lead to civil suits for permanent injunctions against such lotteries as well as possible charges of violating the criminal provisions of the U.S. Code.

A lottery is defined as consisting of three elements—and all three must be present for the definition to apply: (1) prize—something of value must be offered as an inducement to participate; (2) consideration—the participant must give up something of value, such as money, to take part in the contest; (3) chance—no skill is required in order to have a chance to win a prize.

The FCC believes that in association with a lottery broadcast pleas to buy tickets, information as to where, how and when to make a purchase or where, how and when winning tickets will be drawn, and live broadcasts of actual drawings or long lists of winners and prizes constitute violations of Section 1304. The Department of Justice, which has responsibility for criminal prosecutions under Section 1304, has stated that the fact that a lottery may be legal under local or state laws does not legalize the broadcast of advertisements for, or information about, a lottery. In addition, the FCC says that no matter how worthy the purposes of bingo games, raffles and the like, their promotion by broadcasters appears to be in violation of Section 1304 and FCC regulations.[61]

Contrary to an FCC ruling, the U.S. Supreme Court has held that a contestant sitting at home and listening to a "give-away" show on television or radio does not satisfy the element of consideration.[62] More recently, the Third Circuit U.S. Court of Appeals unanimously

overturned a lower court ruling which had upheld an FCC order that prohibited Jersey Cape Broadcasting Corp. of Wildwood, N.J., from broadcasting news items about winning numbers in the state-sanctioned lottery.[63] As Judge John Gibbons said:

> By banning any broadcast of a winning state lottery number the FCC is imposing a small prior restraint upon the dissemination of information of interest to perhaps 58 per cent of New Jersey's adult population. The FCC contends, however, that the winning lottery number is not "news" and therefore not protected by the First Amendment. Even if the winning number has some news value, the FCC argues, its broadcast would directly promote a lottery and could, under the terms . . . [of the U.S. Code and 1934 Act], be prohibited by the FCC. The FCC is wrong on both grounds.
>
> The contention that the winning lottery number is not news is simply frivolous. On the day of the lottery, the winning number is "hot news." * * * Clearly, the winning lottery number is press information protected by the First Amendment.
>
> * * * Congress, while exercising its plenary power to license the use of broadcast frequencies, did not, in enacting the Communications Act, claim any power to impose conditions on the grant of such licenses that would violate the First Amendment. It is clear from the congressional expression set out in . . . [Section 326—anti-censorship] that the provisions of . . . [the lottery law] are not applicable to news broadcasts.
>
> To avoid serious constitutional difficulty and to logically reconcile these two sections, the application of 18 U.S.C. Sec. 1304 should be restricted to promotion of lotteries for which the licensee receives compensation [i.e., advertisements]. The announcements involved in this case are unadulterated broadcast journalism and are clearly protected by the First Amendment and . . . [Section 326 of the 1934 Act].[64]

The appellate court's decision is a narrow one, applying only to "hot news" about winning ticket holders. The court did not exempt advertising or advance promotion of a lottery. And its ruling was limited to state-conducted or state-sanctioned lotteries and applies only in the Third Circuit (Delaware, New Jersey, Pennsylvania and the Virgin Islands).

D. Network regulation. Networks are not licensed, but the stations they own and those which are affiliates are subject to licensing; therefore, considerable pressure can be exerted on networks indirectly. There also is direct regulation which, in the opinion of some, violates the First Amendment and Section 326.

At the time of the Radio Act of 1927, networks were just emerging and few people could foresee their eventual domination of the broadcast industry. Congress did, however, allude to this possibility by reference to "chain broadcasting" in the 1927 legislation—defined as the simultaneous broadcasting of an identical program by two or more connected stations. Because of increasing concern over domination of broadcasting by the networks (about 340 of the 660 commercial radio stations were affiliated with national networks by 1939), the FCC issued its Chain Broadcasting regulations in mid-1941. The regulations struck at (1) contracts requiring stations to be exclusive affiliates of networks; (2) agreements by the networks not to sell programs to other stations in an affiliate's area, and (3) the 28-day option notice by which a network, having given the prerequisite notice, could require an affiliate to carry a network program during that period called "network optional time." The latter provision hindered stations in the development of local program service, said the FCC as part of its rationale in seeking to limit network ownership of stations. At the time the rules were promulgated, 18 of the most powerful stations in the nation were owned either by NBC or CBS. NBC brought suit to enjoin enforcement of the regulations, principally on the grounds that its First Amendment rights would be violated and that such regulatory action exceeded the authority granted by Congress. At the heart of the suit was the fundamental question of whether the FCC could be more than a mere traffic policeman concerned only with the technical aspects of broadcasting; i.e., monitoring stations to be certain they were broadcasting on assigned frequences at specified power output. The courts, in holding that the FCC neither exceeded its power under the statute nor transgressed against the First Amendment, took the position that the commission was more than just a traffic controller.

In dismissing the suit,[65] Judge Hand wrote for a three-judge panel of U.S. District Court that Section 303 of the 1934 Act was broad enough to permit a "public interest" in network practices, and that the Commission was competent to appraise the effect upon broadcasting of restrictive or monopolistic practices. Concerning the First Amendment argument, Judge Hand conceded that the regulations *indirectly* sought to control what programs the stations could broadcast and that they do "fetter the choice of the stations." The end

result of the regulations is coercion, the judge admitted, but he then observed:

> . . . [I]f the public interest in whose name this was being done were other than the interest in free speech itself, we should have a problem under the First Amendment. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.[66]

Note that Judge Hand, in giving pre-eminence to the right of listeners under First Amendment theory as it applied to broadcasting, anticipated by a quarter-century one of the basic tenets laid down in *Red Lion* by the U.S. Supreme Court which declared that what is crucial under the First Amendment is the right of the public—not the rights of licensees—to receive suitable access to social, political, esthetic, moral and other ideas. That is the right, said the Supreme Court, which cannot be constitutionally abridged.

NBC and CBS appealed the District Court decision and Justice Frankfurter, in delivering the 5-2 opinion of the Supreme Court, dealt with the First Amendment argument by saying:

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices . . ., is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress . . . was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the [1934] Act, is not a denial of free speech.[67]

E. Broadcast news regulation. Not only have regulatory actions been aimed at networks generally, and at some program content specifically, but broadcast news also has come in for its share of FCC attention. Since the First Amendment was intended most clearly to

protect news media from governmental interference, the FCC has been very circumspect when broadcast news programs are being subjected to agency scrutiny.

In *Metromedia, Inc.*,[68] a station was accused of altering a videotape to make it appear that an interviewee had responded to an interviewer's question when, in fact, the questioner was not in the studio at the time of that particular question and answer. The Commission informed the licensee that it had the "responsibility for exercising reasonable diligence in preventing the broadcast of false or misleading information," and that it should not permit producers to engage in deliberate distortion. Further, the commission indicated that the matter would be considered again at license renewal time.

The Commission generally has refrained from examining the fairness or truthfulness of news coverage, or the news judgment of stations or networks, because of its fear of acting as censor. This is not because fairness or truth is unimportant, said the commission, in response to complaints about the accuracy of TV news coverage of the Democratic National Convention in Chicago in 1968,[69] but because the determination of fairness "by a governmental agency is inconsistent with our concept of a free press. . . . We do not sit as a review body of the 'truth' concerning news events."

In a standard announced in connection with a complaint concerning a CBS documentary, "Hunger in America," the Commission placed the burden of proof upon the complainant. Responding to complaints about the program from some congressmen, the FCC said it would act when there was extrinsic evidence of deliberate misrepresentation, adding: "And when we refer to appropriate cases involving extrinsic evidence, we do not mean the type of situation, frequently encountered, where a person quoted on a news program complains that he very clearly said something else. The Commission cannot appropriately enter the quagmire of investigating the credibility of the newsmen and the interviewed party in such a type of case."[70] Since no extrinsic evidence of deliberate misrepresentation was found, even though CBS erroneously reported that a baby had died of malnutrition, the FCC took no further action.

Similarly, the Commission declined to "punish" WBBM-TV of Chicago for televising a "staged" marijuana "party." Although the FCC said the station had made a mistake in failing to indicate that the event was staged, it decided against any action because to do otherwise might discourage journalistic activity.[71] The licensee also was assured that the incident would not affect the station's license renewal. However, the FCC urged stations to adopt policies which would deal with the "staging" of news events. A mitigating circum-

stance in the "pot party" episode was that participants in the televised event had previously used the drug. However, doing their "thing" for the television audience raises some ethical questions, as well as legal ones, which the FCC did not consider (e.g., aiding and abetting?).

Another CBS program, "The Selling of the Pentagon," also led to a storm of protests. Despite allegations that video-tape editing had distorted some of the interviews, the FCC declined to act by virtue of its earlier policy. It said, "Lacking extrinsic evidence or documents that on their face reflect deliberate distortion, we believe that this governmental licensing body cannot properly intervene."[72]

It was "The Selling of the Pentagon" and the network's defiance of a congressional subcommittee's subpoena which very nearly resulted in the House of Representatives voting a contempt citation against CBS President Stanton.[73] In the aftermath, several bills were introduced in Congress to punish anyone who was intentionally deceptive in the presentation of broadcast news.[74] One bill, for example, would have imposed a maximum fine of $10,000 and imprisonment of up to one year, or both, plus license revocation, for such deception. The bills, however, made little headway and soon were forgotten.

"Instant analysis" of presidential addresses is another area of concern, although the FCC again has refrained from any official action against the practice which results from immediate comment about a speech when the President has not provided the press with an advance copy. CBS commentator Eric Sevareid has urged the networks to drop the practice because the analysis generally is used as a "filler" to round out the time period following such a talk. On June 6, 1973, CBS announced an end to the practice, although the two other major TV networks did not follow suit. The CBS decision did not sit too well with some of that network's newsmen, especially those in the Washington bureau. On Nov. 11, 1973, Board Chairman William Paley announced that CBS News again would provide such analysis "when, in its news judgment, such service seems desirable and adequate preparation is feasible."

The FCC, in a summary statement issued in 1974, had this to say about news distortion, slanting or "staging":

> The Commission sometimes receives allegations that a network, station or newscaster has distorted or suppressed news, or unduly emphasized certain aspects of the news, or has staged, instigated or fabricated news occurrences. The Commission will not attempt to substitute its judgments or

> news values for those of a licensee, but the deliberate distortion, slanting or "staging" of news by broadcast stations would be patently inconsistent with the public interest and would call for remedial action by the Commission. However, the Commission in order appropriately to commence action in this sensitive area must receive significant extrinsic evidence that the news was deliberately distorted or fabricated. Were this Commission to proceed upon the basis simply of what was said over the air, it would be in the position of determining the "truth" of each factual situation, evaluating the degree to which the matter complained of departed from the "truth," and, finally, calling upon the licensee to explain the deviation. The Commission believes that such activities on its part would be inappropriate for a Government licensing agency.[75]

F. Licensee editorializing. As it has done a number of times, the FCC applies regulations which test the limits of its power; then, for various reasons, the regulations may be modified, withdrawn, or consigned to regulatory limbo. Turnabouts are not unknown. Licensee editorializing provides an example. Over a 20-year period, the Commission went from a ban on licensee advocacy, to lukewarn endorsement of editorializing, to outright embrace.

The ban was imposed in *Mayflower Broadcasting Corp.*,[76] a 1941 case in which the Commission heard arguments that the license of a Boston radio station should not be renewed because it had editorialized. Although the commission did not take such drastic action, it nonetheless spoke out sharply and unequivocally about "advocacy," saying:

> Under the American system of broadcasting, it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to support the candidates of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

Even though the FCC toned down its anti-editorializing edict the following year, *Mayflower* remained as a prohibition against licensee advocacy. This did not mean, however, that stations were to avoid controversial programming. On the contrary, even in the 1940s the Commission sought to move licensees in this direction. In a report issued on March 7, 1946, the Commission anticipated some present-day issues, such as right of reply, rates for political broadcasts, and the need for controversial programs. Of the latter, the Commission said:

> The problems involved in making time available for discussion of public issues are admittedly complex. Any vigorous presentation of a point of view will of necessity annoy or offend at least some listeners. There may be a temptation, accordingly, for broadcasters to avoid as much as possible any discussion over their stations, and to limit their broadcasts to entertainment programs which offend no one.
>
> To operate in this manner, obviously, is to thwart the effectiveness of broadcasting in a democracy.[77]

The Commission concluded the report by emphasizing the crucial need for discussion programs and by stating that the carrying of such programs "in reasonable sufficiency" and during good listening hours would be a factor to be weighed at license renewal time.

This report, called the "Blue Book," was designed to aid licensees operate in the public interest by providing more details on minimum programming standards than ever before attempted, but industry opposition became so intense that the report was never put into effect.

Three years later the Commission gave the go-ahead to editorializing. In its report on June 2, 1949, the Commission concluded that advocacy within reasonable limits and subject to the general requirements of fairness (discussed in Chap. XII) would not be contrary to the public interest.[78] This lukewarm endorsement turned to a warm embrace when the Commission issued a report on July 29, 1960, entitled *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*. Comparable in some ways to the controversial "Blue Book," this document sought to describe licensee programming responsibilities in concrete terms. Editorializing was listed as the 7th of 14 major elements "usually necessary to meet the public interest, needs and desires of the community in which the station is located. . . ."[79]

11.8 **Summary.** In the Radio Act of 1927 and the Communica-

tions Act of 1934, the key phrase for licensing and regulating radio, and later television, stations is "public convenience, interest, or necessity."

In the face of the First Amendment command that Congress shall make no law abridging freedom of speech and press, the regulation of radio-TV has proceeded along several theoretical levels or involved different rationales, including (1) the public owns the airwaves so that their use can be regulated in the public interest; (2) the airwaves are a limited, or scarce, resource which makes their use more subject to regulation; (3) listeners and viewers are members of a "captive" audience, unlike the users of the print medium, and therefore the electronics medium is more susceptible to regulation; (4) licensees are fiduciaries or trustees for the public, because they use what belongs to the public, so they can be compelled to share their facilities and frequencies with others, or be required to operate in certain ways; and (5) the broadcast medium, particularly television, is more powerful than other media and therefore more subject to regulation and control.

Cable television or CATV (community antenna television) developments are having an impact on the "scarcity" theory, yet CATV itself is subject to FCC regulation, according to a Supreme Court ruling, even though CATV signals are not generally transmitted via the airwaves. The full impact of CATV on regulatory theory still is not clear, but newer rationales already have been advanced to replace outmoded ones.

All stations periodically face license renewal once a license is granted. The renewal period currently is three years, but attempts are being made in Congress to extend this period.

Various criteria are used by the FCC in deciding whether to renew licenses. Stations must show that their programming has adequately served community needs. In this regard, the Commission has listed 14 types of programming—beginning with the kind that facilitates self-expression—necessary to meet community needs and the public interest.

Although impetus was given to citizen groups to challenge license renewals because of *United Church of Christ in America* and *WHDH*, the net result has been a return to the pattern of incumbent licenseholders rarely losing out in their renewal application.

Concerning media ownership, a licensee is permitted to own one TV and one radio station in the same market. A licensee may be permitted to own two TV stations anywhere in the top 50 markets if a "compelling showing" is made that such ownership would better serve the public need or interest. By mid-1974 the Justice Depart-

ment was opposing radio or TV license renewals where stations and newspapers in the same metropolitan areas were jointly owned. The Commission also was considering adoption of a one-to-a-market rule.

Section 326 of the Communications Act prohibits censorship of programs by the FCC or agency interference with the right of free speech. But federal law and FCC regulation prohibit obscene, indecent or profane broadcasts on pain of imprisonment and/or fine. What constitutes obscenity or indecency in broadcasts is difficult to define (as it is in the print medium or in motion pictures). In a move aimed at bringing about a "test" case, the FCC fined two stations for the broadcast of alleged obscene or indecent words, but the stations elected to pay the fines rather than undergo the expense of litigation. The Commission also made it clear that stations which broadcast drug-oriented music would have license renewal applications closely scrutinized. Such manifest displeasure is comparable to regulation by "lifted eyebrow" rather than by edict.

The Commission generally seeks to avoid substitution of its judgment for that of the licensee or network whenever broadcast news is at issue, but deliberate distortion, slanting or "staging" of news would be inconsistent with the public interest and call for remedial action. Before the FCC would commence action against a news broadcast or broadcaster, *significant extrinsic evidence* of distortion or fabrication would have to be presented by the complainant. Further, the Commission has made it clear that it will not serve as a judge of the "truth" of a news situation or event. Such circumspection on the part of the Commission is mandated by the First Amendment.

On the issue of licensee editorializing, the Commission has undergone metamorphosis: from outright opposition to enthusiastic endorsement of advocacy—with the public safeguarded by the presence of the Fairness Doctrine (discussed in Chaps. XII and XIV).

CHAP. XI–PASS IN REVIEW

1. Which theory or rationale, used to justify regulation of radio-TV, is subject to the most discomfiture by developments in cable television?

2. Explain the "trustee" concept and why such a concept would permit regulatory control of the licensee.

3. What action did the FCC take to assure that the public would not be "frozen" out of CATV?

4. If a station's programming is "substantially attuned to the needs and interests" of a licensee's broadcast area, then the Commis-

sion will favor that licensee over any rivals at license renewal time. True or false?

5. Can a licensee own more than one TV station in the same market?

6. What are the prime time access rules and what purpose did the FCC have in mind when it promulgated the rules?

7. What are the three elements necessary in a lottery?

8. What must a complainant present to the FCC when making an allegation that a news program was deliberately distorted or fabricated?

CHAP. XI—ANSWERS TO REVIEW

1. The "scarcity" theory; i.e., the airwaves are a limited resource, therefore subject to regulatory control.

2. The public owns the airwaves and the licensee is only granted a privilege (or license) to use what is owned by the public. As the user of what belongs to all of us, the licensee serves as a trustee or fiduciary; as such, we can (through the FCC) require that trustee to do certain things in our best interest, such as sharing with us his frequency or facilities under certain conditions.

3. The FCC adopted rules which require CATV systems in the top 100 markets to provide a free "public access" channel, plus an educational channel, and a channel to be used by government at the local and state levels.

4. True.

5. No.

6. The FCC had intended that 30 minutes out of the four-hour prime time evening hours (Monday through Saturday) be used for non-network programming. A federal court delayed the effective date of this regulation until September, 1975. The FCC had hoped that its prime time access rule (which originally had freed one hour each week night) would result in more locally-produced programs. Such was not the case. Stations turned instead to old syndicated programs. Late in 1974, the FCC approved a different prime time access rule, effective Sept. 1, 1975, which opens up one hour of prime time in the top 50 markets wherever there are three or more operating commercial TV stations. Some network programming, however, will be permitted during that fourth hour.

7. Prize, consideration, chance.

8. Significant extrinsic evidence; i.e., evidence apparent on the surface.

[1] U.S. v. Zenith Radio Corp., 12 F.2d 614 (Northern District of Illinois, 1926). In 1926, the U.S. attorney general also gave an opinion which had

the effect of limiting the power of the Secretary of Commerce and Labor.

[2] Speech entitled "The President and the Press," given at Texas Tech University on Feb. 16, 1973. Senator Ervin was chairman of the Senate's Special Watergate Committee which investigated various illegal activities involving some White House aides.

[3] The annual revenue for the three commercial TV networks and all of the commercial TV stations now exceeds $3 billion annually. The combined revenue for the seven national commercial radio networks and all of the commercial AM and FM stations is more than $1¼ billion each year.

[4] The license is issued for a maximum period of three years before it must be renewed. The Commission can, however, renew a license for a shorter period as a means of spurring compliance with rules and regulations. The Nixon administration, joined by 5 of the 7 FCC commissioners (Nicholas Johnson, who was not reappointed after his six-year term expired in late 1973, and Benjamin Hooks favoring retention of the three-year period), urged Congress to extend the license renewal period to five years. The House of Representatives passed the five-year license bill by a 379-14 vote on May 1, 1974, and sent the measure to the Senate.

In a statement to the press on March 8, 1973, Clay Whitehead, director of the White House Office of Telecommunications Policy, said extension of the license renewal period would reduce harassment of licensees who have met the programming needs of their communities.

[5] *The Quill*, February, 1974, p. 12.

[6] Combined cases of Columbia Broadcasting System, Inc. v. Democratic National Committee (DNC); FCC v. Business Executives' Move for Vietnam Peace (BEM); Post-Newsweek Stations, Capital Area, Inc. v. BEM; and American Broadcasting Companies, Inc. v. DNC, 412 U.S. 94, 128, 93 S.Ct. 2080, 2099, 36 L.Ed.2d 772, 798 (1973).

[7] Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). *See* Chap. XII, pp. 345–47.

[8] *See* Chap. IV, p. 69 and p. 76.

[9] *See* Chap. V, pp. 113–14.

[10] *See* Chap. XIV, p. 384.

[11] Op. cit., note 6; concurring opinion, 93 S.Ct. at 2115.

[12] 392 U.S. 155, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

[13] 406 U.S. 649, 92 S.Ct. 1869, 32 L.Ed.2d 390 (1972).

[14] *Broadcasting* June 3, 1974, p. 24.

[15] *Id.* According to a survey reported by the National Cable Television Association, 22 per cent of the systems surveyed (serving 57 per cent of the CATV subscribers) originated programs in 1974.

[16] Stuart P. Sucherman, "Cable TV: The Endangered Revolution." Reprinted from *Columbia Journalism Review*, May/June, 1971, pp. 13–14.

[17] 450 F.2d 642, 649 (1971).

[18] Hearings before Communications Subcommittee of U.S. Senate Commerce Committee, "Overview of the FCC," 92nd Congress, 2nd Session, Feb. 1 & 8, 1972, pp. 188–89.

[19] 1 FCC 2d 393.

[20] *See, Comments*, "Public Participation in License Renewals and the Public Interest Stand of the FCC," *Utah Law Review*, June, 1970, p. 462.

[21] 359 F.2d 994 (District of Columbia Circuit, 1966).

[22] Joseph v. FCC, 404 F.2d 207 (District of Columbia Circuit, 1968).

[23] *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 F.R. 7291, 7295 (1960).

[24] 33 FCC 2d 432.

[25] Wabash Valley Broadcasting Corp., 35 FCC 677 (1963).

[26] Op. cit., 33 FCC 2d at 435.

[27] *Id.*, at 436. Because of the "finality" of the FCC's order by which the

channel 5 license was awarded to BBI, Chairman Burch did not go into detail concerning the "injustice" except to note that BBI's claim that it would provide 36 per cent local live service was "insufficiently supported" and therefore warranted a demerit. Yet, said Burch, such programming is at the heart of service to the community and, when separated from the application, leaves the application for the license without any foundation.

28 16 FCC 2d at 28.

29 27 FCC 2d 650.

30 *Broadcasting*, June 26, 1972, p. 34.

31 FCC Docket No. 70-62, 40869. Commissioner Johnson dissented.

32 *Broadcasting*, July 10, 1972, p. 17. In connection with charges of discrimination against blacks, the FCC voted *tentatively* not to renew the license of the Alabama governmental agency that operates the state's eight ETV stations. It did so on Sept. 18, 1974. If the decision sticks, this would be the first time the FCC decided not to renew an educational station's license because of citizen complaints. At a hearing on Sept. 18, charges of discrimination were voiced against Alabama Educational Television Commission and afterward the commission voted 4-2 not to renew the license. Chairman Wiley did not participate in the decision. Voting not to renew the license were James Quello, Glen Washburn, Abbott Washburn and Benjamin Hooks. Voting to renew were Robert E. Lee and Charlotte Reid. The Commission planned to review its decision after a written report was drafted—a process that would require several months, according to an FCC spokesman. The following January, the Commission voted to lift the AETC's license, although the state agency was not disqualified. This meant that it might file an application to be designated anew as the licensee, especially since it had taken "corrective" measures.

33 *Broadcasting*, July 17, 1972, p. 32.

34 RKO General, Inc. (KHJ-TV), 16 P.&F. Radio Reg. 2d at 1269–70.

35 RKO General, Inc., 44 FCC 2d 123. Commissioners H. Rex Lee and Johnson dissented and Commissioners Wiley and Hooks did not vote.

36 H.R. 12993, 93rd Congress, 2nd Session.

37 22 FCC 2d 306.

38 John Hay Whitney, 28 FCC 2d 736 (1971). The rules were amended again on Feb. 26, 1971, so as not to apply to cross-ownership of AM and FM stations in the same market.

39 *See* pp. 304–05.

40 The council was awaiting evidence to support the charge when it issued its first report on April 1, 1974, covering an eight-month period. During that time, 160 complaints about inaccurate or unfair reporting by the national news media were received. Twenty-eight were judged specific enough to warrant further consideration by the full council. Of these, 13 involved network news programs. On May 15, 1974, the council said the White House had failed to provide specifics to back up the charges by President Nixon. Therefore, said the council chairman, Judge Stanley H. Fuld, " . . . it is impossible to get at the truth of the President's charges. . . ."

41 Op. cit., note 2.

42 *Id.*

43 *Broadcasting*, Feb. 12, 1973, p. 24. Colson pleaded guilty on June 3, 1974, to a charge of obstructing justice in connection with White House efforts to discredit Daniel Ellsberg, Vietnam war critic who had made copies of the secret Pentagon Papers study available to some congressmen. See Chap. III, pp. 38–52.

44 *Broadcasting*, April 1, 1974, p. 20.

45 *Id.*

46 On Sept. 3, 1974, the Justice Department asked the FCC not to renew the operating license of KSL-AM-FM-TV in Salt Lake City, Utah. The group of

stations is owned by the Church of Jesus Christ of Latter-day Saints (Mormon Church). The department said that renewal would perpetuate "the high degree of concentration in the dissemination of local news and advertising that now exists in Salt Lake City." The church also owns the *Deseret News*, one of two daily newspapers in Salt Lake City, plus the leading CATV system in the city, and 14 other CATV franchises.

47 *Note*, "The First Amendment and Regulation of Television News," *Columbia Law Review*, April, 1972, pp. 747–48. Footnotes omitted.

48 18 U.S. Code 1464.

49 *Broadcasting*, April 16, 1973, p. 31. Commissioner Johnson dissented, terming the FCC's action in WGLD-FM "censorship."

50 An FCC brochure, *The FCC and Broadcasting*, issued Jan. 15, 1974, p. 9.

51 *Id.*, p. 9

52 *Broadcasting*, April 2, 1973, p. 27.

53 For definition of obscenity, *see* Chap. IX, p. 230.

54 Op. cit., note 50, pp. 8–9.

55 Yale Broadcasting Co. v. FCC, 414 U.S. 914, 94 S.Ct. 211, 38 L.Ed.2d 152 (1973). Justice Douglas dissented, saying that the government cannot, "consistent with the First Amendment, require a broadcaster to censor its music any more than it can require a newspaper to censor the stories of its reporters." He continued: "Under our system the government is not to decide what messages, spoken or in music, are of the proper 'social value' to reach the people." Like Douglas, Justice Brennan also would have granted certiorari. Cf., "social value" test, Chap. IX, p. 225 and p. 230.

56 28 FCC 2d 409 (1971). Commissioner Johnson dissented.

57 32 FCC 2d 377.

58 Hearings on the "Effect of the Promotion and Advertising of Over-the-Counter Drugs on Competition, Small Business, and Health and Welfare of the Public," before the Monopoly Subcommittee of the Senate Select Committee on Small Business, 92nd Congress, 1st Session, Part 2, pp. 734–36 (1971).

59 Op. cit., 94 S.Ct. 211 (1974). Also, 478 F.2d 594 (District of Columbia Circuit, 1972).

60 The postal laws apply equally to published announcements of bingo games or other contests sponsored by religious or charitable organizations when such "contests" meet the definition of a lottery. Publicity given to such events could jeopardize the mailing privilege. The safe thing to do is check with the local postmaster. There's also the danger of criminal prosecution.

61 Op. cit., note 50, p. 14.

62 Combined cases of FCC v. ABC, NBC and CBS, 374 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954).

63 491 F.2d 219. On May 28, 1974, the U.S. Supreme Court granted the FCC petition to review this decision. 94 S.Ct. (1974).

64 New Jersey Lottery Commission v. U.S., 491 F.2d 219 (1974). The U.S. Supreme Court granted certiorari on May 28, 1974 (94 S.Ct. (1974)).

65 NBC v. U.S., 47 F.Supp. 940 (1942); affirmed, 319 U.S. 190 (1943).

66 *Id.*, 47 F.Supp. at 946.

67 Op. cit., 319 U.S. at 226–27. Justices Black and Rutledge took no part in the consideration or decision of these cases. Justice Murphy, joined by Justice Jackson, dissented, principally on the ground that the FCC had not been given the express power to deal with network contracts, affiliations or business arrangements.

68 14 FCC 2d 194 (1968).

69 Democratic National Convention Television Coverage, 16 FCC 2d 650 (1969). For more detailed discussion of this and other issues confronting the FCC and its regulation of broadcast news, *see*, *Note*, "The First

Amendment and Regulation of Television News," *Columbia Law Review*, April, 1972, p. 746+.

[70] "Hunger in America," 20 FCC 2d 143, 151 (1969).

[71] 18 FCC 2d 124 (1969).

[72] 30 FCC 2d 150, 152 (1971).

[73] For additional details, *see* Chap. VIII, pp. 191–92.

[74] *E.g.*, H.R. 9817 and 9855, 92nd Congress, 1st Session (1971).

[75] Op. cit., note 50, p. 10.

[76] 8 FCC 333.

[77] *Public Service Responsibility of Broadcast Licensees*, FCC Mimeograph No. 81575, April 10, 1945.

[78] *Report on Editorializing by Broadcast Licensees*, 13 FCC 1.

[79] Op. cit., p. 298, this chapter.

RADIO & TV: SECTION 315 XII

(Section 315: equal time and the Fairness Doctrine (personal attack and political editorializing rules)).

This section of the Communications Act of 1934 has spurred more controversy and opposition than all the other sections combined. There are various reasons for the broadcast industry's hostility, the principal ones being: (1) the equal time provisions of the *law*, plus the personal attack and political editorializing *rules*, as laid down by the FCC in keeping with the legislative mandate known as the Fairness Doctrine, require a *limited* right of access to a station's facility such that the licensee takes on the status of a common carrier; (2) programming standards are mandated by this section; (3) licensee's programming freedom is circumscribed—unconstitutionally, the industry has unsuccessfully contended in repeated court tests.

12.1 Equal time law. The "equal opportunities" requirement, more widely known as the "equal time" language of Section 315, was transferred intact from the Radio Act of 1927 to the 1934 Act. Until 1959, when Congress amended the section to include the Fairness Doctrine, "equal time" was the only provision of Section 315. While reading the law, note that once the section is "activated," the licensee is under legal compulsion to do certain things, but only if he first decides to permit a legally qualified candidate for public office to use his facilities either on a free or a paid basis.

As amended in 1952 and 1959, Section 315 reads:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presenta-

tion of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.[1]

The 1952 amendment inserted subsection (b) above. The 1959 amendment incorporated the exemptions pertaining to news and news-type programs in subsection (a). Congress made this change after a perennial candidate, Lar Daly of Chicago, demanded equal time because of an interview with a major candidate on a news-type program. The station refused on the assumption that such programs were exempt from Section 315—a belief dating back to 1927. Daly appealed and to the surprise of many the FCC ruled in his favor. Since the effect of such a ruling was to discourage stations from allowing major candidates to appear on news or news-type programs, Congress hurriedly amended the law. In so doing, it incorporated the language of the Fairness Doctrine.

Section 315 originally was intended to prevent a licensee from giving exclusive or favored-treatment exposure to a particular candidate; but the 1959 amendment made it legal for a licensee's news programs to concentrate on major political contenders to the detriment, except for fairness requirements, of minor party candidates.

In fiscal 1971 the FCC initiated license revocation proceedings against two radio stations for allegedly censoring what candidates wanted to say and for failing to afford equal opportunities. Such actions are the exception, however, since most stations are careful to avoid confrontations with provisions of Section 315. This does not mean that no problems of interpretation have arisen. On the contrary, the following rules were established because of challenges:

A. The candidate must be publicly declared. Sen. Eugene J. McCarthy was running for the Democratic party's presidential nomination in 1968 when the three commercial television networks broadcast a "year-ender" interview of President Lyndon Johnson on Dec. 19, 1967. McCarthy attempted to invoke Section 315, but the FCC turned him down on the ground that at the time of the interview President Johnson was not a declared candidate. The Minnesota congressman took his case to the Court of Appeals, but the FCC's decision was upheld.[2]

B. The time given to all other legally qualified candidates for the same office must be mathematically equal, but it need not be given at exactly the same time. For example, if one candidate received three minutes of prime time, then all other candidates for that same office would have to be given three minutes of prime time.

C. Licensees are not required to notify candidates about any air time due them under equal opportunities. Rather, the candidates must assert such a right at appropriate times.

D. Section 315 does not apply to appearances made on behalf of candidates; that is, by their agents or allies. It applies only to the candidates themselves.

E. If a candidate is charged for air time, all other candidates for that office must be charged the same rate for the same amount of time.

The fact that licensees are not required to provide free air time in the first instance benefits the wealthier candidates or parties. Various proposals have been advanced from time to time in an effort to remedy this situation.

F. The mere label, "news-type program," may not protect the station from a demand for equal opportunities.

U.S. Rep. Shirley Chisholm, D-N.Y., had sought equal time to respond to TV appearances by two other party candidates just prior to the June 6, 1972, California primary. The FCC ruled[3] that Sens. George McGovern of South Dakota and Hubert Humphrey of Minnesota had been interviewed on news-type programs and therefore ABC and CBS networks and their affiliated stations were exempt under Section 315(a)(2). But on June 3, 1972, the U.S. Court of Appeals for the District of Columbia Circuit, although not specifically ruling on the merits of the case, issued an "interim" relief order which permitted Mrs. Chisholm equal time on the two networks prior to the primary. A delay for the purpose of permitting argument on the merits of the request would have resulted in forfeiture of Mrs. Chisholm's equal-time right, since the primary would have been over by then. The court held that the appearances of McGovern and

Humphrey on the TV shows were more like debates and consequently were not exempt from the equal opportunities requirement.

The order took the FCC by surprise and cast some doubt on what constituted news-type programs.

G. If a declared candidate appears on a non-news program, but does not mention his candidacy, does Section 315 apply? Yes, ruled the FCC on June 16, 1972. The candidate is "using" the facilities of the licensee; therefore, all other candidates for that same office must be afforded the same opportunities.

The word "use" has caused considerable difficulty. In an early legislative draft of Section 315, the licensee was to be considered a "common carrier in interstate commerce," much like a telephone company. Such a designation would have had important implications in terms of fairness and access to radio and television. This language was deleted because it was felt that the licensee would lose control over the initial decision whether to permit the use of his facilities by a political candidate. But once a licensee grants air time to a candidate, either on a paid or free basis and apart from the exceptions already noted, he virtually becomes a common carrier since he cannot censor what a candidate will say and must permit the use of his facilities when legally obligated to do so.

The Commission's 1970 public notice, *Use of Broadcast Facilities by Candidates for Public Office*,[4] cites numerous rulings that *all* appearances of legally qualified candidates on a television station, no matter how brief or perfunctory, constitute a use of that station's facilities within the meaning of Section 315. Further, the Commission has emphasized that the appearances need not be of political nature in order to activate the equal-time requirement. The only exemption, as permitted by Congress when it amended Section 315 in 1959, was for certain news-type programs; therefore, "nonpolitical" or "entertainment" type programs are not exempt. The consequences can be amusing, depending on one's point of view.

Comedian Pat Paulsen was declared by the FCC to be a legally qualified candidate for the Republican party's nomination for President in 1972 because he had qualified to be on the New Hampshire ballot.[5] The question arose whether his appearance on a purely entertainment-type program—a Walt Disney telecast—might give rise to equal-time requirements. In deciding that such an appearance would do so, the FCC called attention to a Supreme Court ruling which prohibits licensees from exercising censorship over the material broadcast by candidates, and observed, "It follows, therefore, that since candidates may broadcast whatever material they desire, a

licensee under no circumstances could limit such a candidate to 'political uses' only, and any use by a candidate would entitle his opponent to 'equal opportunities' unless specifically exempted in Section 315."[6] Thus, if running for President was a joke, which Paulsen fervently denied, it might have been a costly one for him in terms of lost opportunities to appear on strictly entertainment-type radio or TV programs.

H. The problem of what to do when a candidate's spokesman or supporter uses a licensee's facility was dealt with in a 1970 ruling (*Letter to Mr. Nicholas Zapple*).[7] The FCC held that when a licensee sells time to supporters or spokesmen who, during a campaign, urge the election of their candidate, discuss the issues, or criticize an opponent, then the licensee must afford *comparable* time to the opponents' spokesmen or supporters. Known as the quasi-equal opportunities doctrine, or the political party corollary to the Fairness Doctrine, the *Zapple* doctrine, like its progenitor, does not require that free time be given to respond to paid-time comments. Note that the *Zapple* doctrine applies only to supporters or spokesmen, not to candidates themselves. If candidates were included, then equal—not comparable—time would be required.

The Commission later attempted to extend *Zapple* to a non-election or non-campaign period, but its ruling was reversed by a Court of Appeals.[8]

The *Zapple* doctrine has produced considerable uncertainty, as indicated by the kinds of questions raised in the FCC's *Notice of Inquiry into the Fairness Doctrine*[9] in mid-1971. In the *Notice*, the FCC asked:

1. Should the *Zapple* doctrine be restricted or expanded?

2. Should it be disassociated from the Fairness Doctrine and incorporated into the equal-time provisions?

3. Should it be limited to a seven-day deadline for requesting the quasi-equal opportunity?

4. Should it continue to apply only to major parties, or should it be extended to all parties or to some mathematically-defined "parties with substantial public support," based perhaps on the percentage of popular support a party garners during an election year? Should new parties be included?

5. Should it be extended to include spokesmen for ballot issues, such as school bond issues or constitutional amendments?

6. Should it be extended to broadcasts by the President of the United States so that an automatic right to respond in comparable time, format, etc., would accrue to appropriate spokesmen following a presidential broadcast?

Concerning the latter question, considerable litigation resulted both before and after the Inquiry was announced and prior to the FCC's mid-1972 decision. In *Fair Broadcasting of Controversial Issues*,[10] the FCC declined to extend *Zapple* to presidential broadcasts, saying instead that the Fairness Doctrine was applicable whenever such broadcasts dealt with controversial issues of public importance. The same issue confronted the Commission the following year when it denied requests by the Democratic National Committee to compel the three major networks to provide time for DNC to respond to three separate appearances on radio and television by President Nixon.[11] Although ABC did grant such time, the other networks refused. ABC's action led to the Republican National Committee seeking time to respond to DNC's broadcast. The FCC also rejected RNC's request and both political parties appealed.

In upholding the FCC, the U.S. Court of Appeals unanimously declared:

> Reason and logic teach us that an unjust result would be reached by giving one political party an opportunity to respond to a second party which had been given the opportunity to respond to the President who is a member of the first party. Any other result would be clearly erroneous. Should we grant RNC an opportunity to respond to DNC we would embark upon a course of request after request. We refuse to sanction the commencement of such an unending circle. It is somewhat more difficult to dispose of DNC's complaint. In reality, DNC is asking this court, as it unsuccessfully sought from the Commission, to create a new corollary to the doctrine. They seek a ruling whereby each time a President addressed the nation the opposition party would be entitled to an "equal opportunity" under Sec. 315(a) of the Communications Act. . . . We believe this position to be an unacceptable one.
>
> It has been held that addresses by the President are subject to the Fairness Doctrine when they concern controversial issues of public importance. *Letter to Republican National Committee*, 40 FCC 625 (1964); *Letter to Blair Clark*, 11 FCC 2d 511 (1968). At the same time the Commission has held that "equal opportunities" do not apply to presidential addresses unless the President is a legally qualified candidate and his speech comes under one of the provisions of Sec. 315. *Committee for the Fair Broadcasting of Controversial Issues, supra*, 25 FCC 2d 283.[12]

The court then went on to agree that the President may function in a political capacity as well as being the leader of the nation, the latter being a role in which politics is not a factor. Distinguishing between these roles is a burden that "must fall to the Commission in ruling on requests such as that filed by DNC."

DNC also sought time to respond to the President's economic policy message on Aug. 15, 1971, broadcast by three networks. The Commission again turned down the DNC request in a 4-1 decision, refusing to apply the equal-time section of the law; instead, it applied the general fairness standard and held that the networks had met their obligations to be fair.[13] Shortly thereafter, the FCC again rejected a DNC request for free time to respond to an hour-long interview of President Nixon on CBS on Jan. 2, 1972, and to an hour-long NBC program on Dec. 21; 1971, which described a day in the life of the President.[14]

The upshot of the Fairness Doctrine Inquiry, in part, was the Commission's mid-1972 report on *Handling of Political Broadcast*, in which two preliminary observations were made:

> First, the issue is not whether the American people shall be reasonably informed concerning the contrasting viewpoints on controversial issues of public importance covered by Presidential reports. The Fairness Doctrine is . . . applicable to such reports—as indeed it is to a report by any public official that deals with a controversial issue of public importance. *See* Section 315(a). Rather, the issue is whether something more—something akin to equal time—is to be required. The word "required" brings us to our second point. * * * [T]he issue is not what programming judgment the licensee makes in this area but, rather, whether there should be an FCC requirement.[15]

The Commission then reviewed the proposal that there should be equal time for an opposition spokesman to respond to presidential reports via the broadcast media and reached these conclusions:

1. Congress probably would have to make such a decision, as it did when it enacted the equal opportunities law.

2. Proposals put forth by DNC and American Civil Liberties Union during the inquiry would not be "sound policy."

DNC and ACLU had argued for a specific rule which would require licensees to broadcast the opposing views of appropriate spokesmen following the appearance of a public official on radio and/or TV. Licensees' discretion would be much more limited under this proposal than under the general fairness obligation; and, in

addition, the proposal would apply to all public officials, including the President, during both non-election and election periods.

In response, the FCC noted that since the adoption of the *Editorializing Report* in 1949, the Commission had been "urged to adopt even more precise rules—always in the cause of insuring robust debate." The Commission responded:

> However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide-open debate. The genius of the Fairness Doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate. * * * Thus, the arguments for flexibility, rather than rigid mechanical rules, . . . remain persuasive. Applying those principles, we do not believe it appropriate to adopt equal time policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring that the public is reasonably informed concerning contrasting viewpoints best serves the public interest.

Concerning the presidency, the FCC declared:

> Were we to require free time for that office, we would run afoul of the equal time provision; we would find that we had required the broadcaster to devote hours of prime time not just to the significant candidates but also to as many as 15 fringe party candidates. . . . Our point is obvious: reform here is needed, we believe, but it must come from the Congress because that is the only way it can be effectively accomplished.

In a preliminary dissenting opinion, Commissioner Johnson verbally roughed up his colleagues:

> We are in the midst of a highly televised Presidential election year. The FCC has just concluded what it calls a "broad ranging inquiry into the efficacy of the Fairness Doctrine." It has just rushed into print with that portion of its findings having to do with the political use of radio and television by the President. And what does it offer. A punt on first down.
>
> Broadcasters are urged to voluntarily "make the maximum possible contribution" to the nation's political

process—without being told what that might be, or being required to do anything.

Congress is asked to lead the reform—but is given no new suggestions by the agency ostensibly set up to regulate the area.

The FCC is taking the rest of the year off.

* * *

. . . [W]hat should the Fairness Doctrine require when the President speaks? An automatic right of reply? By whom? When? If the President goes on all three networks, in prime time, for free, can something less than that constitute an adequate right of reply—by someone who is decidedly disadvantaged anyway going into a verbal contest with the President of the United States.

Those are the questions this Commission set out to address. They are the kind of questions the Congress set up the Commission to deal with. They are the very questions we dodge—and therefore resolve in favor of the incumbent President.

Questions come more readily than solutions concerning the complex issues which face those who have the power to regulate or legislate. A sharp clash of opinion between Commissioner Johnson and FCC Chairman Burch illustrates the dilemma. The disagreement took place during a hearing conducted by the Communications Subcommittee of the Senate Commerce Committee. At one point it was noted that the President could pre-empt prime time on all three TV networks virtually at will. In commenting on this, Johnson said:

You have got three or four questions here. One is, is there going to be any time at all made available to any spokesman for a contrary point of view, whether it is even a network commentator, or a member of the party out of power, or a . . . [congressman].

And the question is, how much time is he going to get? Is he going to get that time free?

Lots of times the networks will give free time to the President on all three networks in the primest of prime time, and then refuse even to sell time on one network for a shorter period of time, in a worse chunk of the day, to somebody else. This is the kind of problem you are dealing with.

Mr. Burch. Could I comment briefly on Mr. Johnson's exposition of the problem.

This is sort of classic Johnson analogies that you have heard this morning of stating a problem in a very forthright way, but casually slandering the President, the Vice President, the broadcasters, and then coming up with no particular solution to the problem.

The fact is that in the case of an address by the President of the United States, it is always subject to the Fairness Doctrine. Any time he goes on the air, he is subject to the Fairness Doctrine. Each of the networks who carries him is subject to that doctrine. If he deals with any controversial issue, they are obligated to seek out someone from a different point of view. That is not to say that they are going to put someone on for 30 minutes in a given time slot, because first of all, you are faced with the problem of who is the counterpart of the President of the United States. * * *

Besides which, the Fairness Doctrine has never spoken in terms of equal time. * * *

Judge Tamm went through the fact that it is a bit of a myth to suggest, as does Commissioner Johnson, that really the only person who gets heard is the President of the United States. Anybody who watches the evening news, or reads his newspaper, realizes that simply is not the case.

* * *

We have an access problem. We have a fairness problem. We have all the rest. But it does not seem fair to me to suggest that somehow the FCC is simply loafing by [sic] while somebody steals all of the airways. That just simply is not the case.[16]

I. A different kind of problem is illuminated by the debates between John F. Kennedy and Richard M. Nixon on national television during their 1960 campaigns for the presidency. The debates could be televised because Congress, through adoption of Senate Joint Resolution 207, temporarily suspended the applicable provisions of Section 315 such that all other candidates for the presidency, except the two frontrunners, could be denied equal time. Had Congress not acted, the networks would not have carried, on a free basis, the famous debates. Why? At the time at least 14 other

presidential candidates representing little known political parties were on the ballot in various states, including contenders put forth by the Tax Cut Party, Prohibition Party, Afro-American Unity Party, and American Beat Consensus.

The 1960 debates marked the only time the equal-time requirement has been suspended. Various proposals have been made since then concerning Section 315, including the suggestion by CBS President Frank Stanton in March, 1968, that Congress suspend the law for six years. Stanton told a House subcommittee that the Fairness Doctrine would hold the broadcaster accountable during this period of time and that the over-all result would be increased coverage of political activities.

On several occasions Commissioner Johnson urged the allocation of a block of free time on radio and TV for all candidates, with the major party candidates receiving equal time while proportional time would be given to minor party candidates based on the number of votes received in the preceding election or, in the case of new parties, how many signatures they had obtained on petitions.

Chairman Burch told a Senate subcommittee on March 7, 1973, that he and other commissioners favored repeal of the equal-time law because of its inclusion of minor party candidates. The result, he said, is limited election coverage. Spokesmen for major networks also called for an end to equal time in appearances before the subcommittee.

12.2 Fairness Doctrine. Even though this doctrine is contained within Section 315, it is significantly different from the equal-time requirements. Once the licensee makes a decision to give free or paid time to a candidate, the licensee becomes a common carrier. In essence, he turns over his facilities to a political candidate(s) for a stipulated period of time. Under the Fairness Doctrine (apart from the requirements laid down in 1967 when the personal attack and political editorializing rules were adopted by the FCC, and except for the *Zapple* corollary), the licensee has considerable "good faith" discretion in meeting Fairness Doctrine obligations. In fact, the licensee has complete decision-making power concerning programming designed to meet the fairness law.

This doctrine is the creation of the FCC as finally endorsed legislatively by Congress—"rooted," according to the Commission, in the Radio Act of 1927 (not expressly, but implied in the "public interest" language of the 1927 Act).

One of the earliest statements concerning fairness in broadcasting came in the Commission's *Great Lakes* decision: "Insofar as a program consists of discussion of public questions, public interest re-

quires ample play for the free and fair competition of opposing views and the Commission believes that the principle applies . . . to all discussions of issues of public importance. . . ."[17]

There were other applications of the emerging doctrine on a case-by-case basis until, in 1949, at the time the Commission endorsed licensee editorializing, fairness requirements were formalized with the statement that "when a broadcast station presents one side of a controversial issue of public importance reasonable opportunity must be afforded for the presentation of contrasting views."[18] Interestingly, the report on editorializing, which included the Fairness Doctrine language that would be made into law by Congress in 1959 when it amended the 1934 Act, was adopted by a minority of the commission because two commissioners were abroad at the time, two dissented, leaving three in favor of implementing the report (and even one of the trio had some misgivings). Nevertheless, a lawful quorum was present and the Fairness Doctrine became official policy to be interpreted or applied in the following way, according to the 1949 report:

> If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

In assessing a licensee's performance at license renewal time, the Commission indicated in the 1949 report that a standard of "reasonableness" would be used:

> . . . [I]t is clear that the standard of public interest is not so rigid that an honest mistake or error in judgment on the part of a licensee will be or should be condemned where his overall record demonstrated a reasonable effort to provide a balanced presentation of comment and opinion on such issues. The question is necessarily one of the

> reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved.

Congress amended Section 315 in 1959 to exempt news and news-type programs from the equal-time provisions. In so doing, Congress included the Fairness Doctrine: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The Fairness Doctrine works like this: the FCC first must determine if a complaint in fact deals with a controversial issue of public importance; if so, then the doctrine is invoked and the Commission must determine if the licensee has given the issue "balanced" coverage. Unlike equal time, the licensee is afforded broad discretion in meeting his obligation. As the Commission pointed out,[19] after first citing a U.S. Court of Appeals decision:

> The Court has also made it clear that the Fairness Doctrine does not create a right in any particular person or group to be granted time, that the Fairness Doctrine is issue oriented, and that it is sufficient for the licensee to show that it has presented the viewpoints advocated by the complainant. *Green v. FCC* . . ., 447 F.2d 323, 328 (District of Columbia Circuit, 1971). Moreover, the Commission and the Courts "have stressed the wide degree of discretion available under the Fairness Doctrine and that the key to the doctrine is . . . the exercise of reasonable standards by the licensee." *Democratic National Committee et al. v. FCC*, supra. . . ."

Only if the licensee is unreasonable or acts in bad faith will the Commission substitute its judgment for that of the licensee. As the Commission said:

> . . . [I]t does not serve the public interest—and specifically our goal of robust, wide-open debate—to try to move, in effect, to mechanistic fairness formulas (or stated differently, modified equal time requirements) with respect to broadcast treatment of controversial issues. This would, we believe, represent a quagmire of inappropriate governmental intervention in broadcast journalism. The crucial

> test is whether the licensee has acted reasonably—to the end that "the American people must not be left uninformed on crucial issues of the day." *Green v. FCC.* . . . On the facts here, we cannot find that the broadcast licensees have acted unreasonably or left the American people uninformed on the issue of the economic program.[20]

Anybody who brings a complaint has the heavy burden of showing that the licensee is under a fairness obligation, as the Commission declared in a 1972 ruling:

> Absent detailed and specific evidence of failure to comply with . . . [fairness requirements], it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time. Accordingly, although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the Fairness Doctrine (e.g., in-depth spot checks at renewal time), it has long been our policy normally to require that Fairness Doctrine complaints (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the positions advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issues. *See, Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 F.R. 10415 (1964).[21]

No license has ever been revoked solely for Fairness Doctrine violations and the Commission only once has refused to renew a license in part on fairness grounds.[22] In two instances, the license renewal period was shortened to one year. Generally, the Commission's action in such cases consists of advising that the record of the violation has been included in the licensee's file for consideration at license renewal time, or requesting the station to correct a malpractice.[23]

The only FCC refusal to renew a license for fairness reasons occurred in 1970 in a case involving WXUR-AM-FM at Media, Pa. The stations had been purchased in 1966 by Faith Theological Seminary, headed by Dr. Carl McIntire, to bring the "conservative, fundamentalist" religious viewpoint to the Philadelphia area and to air Dr. McIntire's "Twentieth Century Reformation Hour"—a program carried by several hundred radio stations. License renewal denial was based in part on alleged fairness violations as well as misrepresentation of programming proposals in the renewal application. The U.S. Court of Appeals upheld the Commission's decision to take away the license, but it did so almost entirely on the misrepresentation issue. Judge Tamm, who wrote the decision, said the station had gone "on an independent frolic, broadcasting what it chose in any terms it chose, abusing those who dared differ with its viewpoints."[24] Judge Wright, who concurred, did so only on the misrepresentation issue. Chief Judge David Bazelon originally said he would concur, but he later dissented for what he said was a prima facie violation of the First Amendment because the station had been ordered off the air. Among the questions most bothersome to him was how a small station with limited resources could monitor all of its programs in order to identify controversial issues or personal attacks. If such a station could not afford to undertake necessary safeguards to abide by Commission rules, the net result would be a "very critical First Amendment question," according to the judge, who proceeded to ask how public access to ideas is enhanced by forcing a station off the air.

"In the context of broadcasting today," he said, "our democratic reliance on a truly informed American public is threatened if the over-all effect of the Fairness Doctrine is the very censorship of controversy which it was promulgated to overcome." He then asked if time and technology have so eroded the necessity for a government-imposed Fairness Doctrine that the doctrine has come to defeat the purposes for which it was first advanced. Would not more freedom, such as enjoyed by the printed press, enhance, rather than retard, the "public's right to a marketplace of ideas," he asked. Such doubts or suggestions are in stark contrast to Prof. Barron's contention that since monopolistic conditions have made it virtually impossible for all manner of ideas to gain access to the marketplace, legal requirements should be imposed on the *media*—not just broadcasting—to make them more hospitable to public access.[25]

Judge Bazelon's change of heart came primarily from having been exposed to the arguments used by NBC President Julian Goodman in opposition to the doctrine. Goodman said:

Like so many government activities, the Fairness Doctrine, which set out from a narrow and moderate base, has been extended year by year in the ways it is applied. Six years ago [1966], the FCC received only 300 Fairness Doctrine complaints. By 1971, the number had grown to more than 1,500.[26] This was not because broadcasting had changed or become less fair. It was because partisans, politicians and special pleaders latched onto the fact that the . . . Doctrine could get them a government-enforced opportunity of reaching huge television audiences with preachments of their own special causes. And they are using the situation without concern for the damage it may do to the integrity and value of the whole institution of an independent press.

Complaints under the . . . Doctrine, regardless of their substance, compel the broadcaster to search his files, review reams of broadcast material to show "balance," probe the memories of his newsmen, consult his lawyers and prepare defensive responses. In a minor case affecting NBC, . . . three months of effort and correspondence were involved before the FCC acknowledged that the news judgments we made were within our discretion as journalists.

But the necessary effort and inconvenience this involves is only a small part of the problem. The major part lies in the inhibiting effect this sort of government intrusion can have on independent news investigation and reporting.

A timid broadcaster who has gone through one or two of these experiences may think twice before he tackles a subject of strong controversy—the kind that the public needs most to know about. But he knows that where there is controversy, there are advocates who will turn to the FCC, under the umbrella of the Fairness Doctrine, to obtain a broadcasting voice that may bear no relationship to the interest or newsworthiness of their cause. And once they invoke the government process, the broadcaster knows that he must defend himself from second-guessing that will come not from a specialist in journalism, but from a generalist in the government bureaucracy.

There is no censorship in its accepted definition. Nobody is telling anybody else what can or cannot be broadcast. Yet a form of censorship does exist—a censorship after the fact. The peril to the American public is that with

> time, it can become self-censorship before the fact, inducing caution and blandness. The theoretical advantages of assuring fairness—even if they exist—are certainly not worth the weakening effect on the independence of the press—the strongest instrument democracy has.[27]

About a year after Goodman's address, the Commission upheld a staff ruling that an NBC-TV documentary, "Pensions: The Broken Promise," broadcast on Sept. 12, 1972, had violated the Fairness Doctrine by advocating one side of a controversial issue. The network was given 20 days in which to submit a statement indicating how it intended to fulfill its fairness obligations. Instead, NBC appealed, contending the FCC had extended the doctrine into the area of *news judgment*. NBC argued that the agency was seeking to usurp the news judgment of broadcasters and impose an official standard on investigative reporting. The U.S. Court of Appeals in Washington, D.C., stayed the FCC order pending a court hearing. Then, on Sept. 27, 1974, the court reversed the FCC, saying that broadcast journalists must be given wide latitude to determine if their news programs are fair.

The FCC said that if the broadcaster's interest in First Amendment freedom was greatest in the news and documentary areas, the right of the public to have access to competing viewpoints in such presentations is no less compelling. Further, the opposing viewpoints did not have to be presented in the same program. For such reasons, the Commission saw no merit in NBC's contention that the ruling was inconsistent with either the purpose of the Fairness Doctrine or the journalistic discretion afforded broadcasters in determining how they will comply with fairness obligations.[28]

Another situation, which illustrates Goodman's warning that broadcasters might resort to self-censorship, came to light on Feb. 7, 1974, when ABC television cancelled a Dick Cavett show that would have featured four widely known "leftists" of the 1960s (Abbie Hoffman, Jerry Rubin, Tom Hayden and Rennie Davis). A network spokesman said the broadcast contained controversial issues of public importance which the network felt should be "balanced on the same program by opposing views." Cavett protested, arguing that the Fairness Doctrine had never been interpreted to require the airing of controversial viewpoints on the same program; but the network responded that since his late-night talk show was aired every two weeks, the time span would be too great to ensure balance. Cavett also pointed out that when he had interviewed Vice-President Gerald Ford during an earlier talk-show, the network had not required the presentation of contrasting viewpoints during that same program.[29]

Some of the situations which have developed under the doctrine, plus the dangers—real and imagined—to First Amendment freedoms, have led a number of prominent persons to call for repeal of the doctrine or to question its validity. Chairman Burch expressed serious doubts about the "foundations of the doctrine" in a speech before the Federal Communications Bar Association in early 1973. Technology's impact on the "scarcity" rationale and the "choatic mess" facing the Commission in the growing number of complaints were chiefly responsible for his doubts.[30]

Whitehead, director of the Office of Telecommunications Policy, called for repeal of the doctrine; Chief Judge Bazelon did a turnabout in the WXUR case; Judge Wright of the appellate court in Washington, D.C., expressed a go-slow attitude toward application of the doctrine because of complaints by broadcast journalists of a "chilling" effect on reportorial enterprise imposed by the mere existence of the doctrine. Justice Douglas has said the doctrine is unconstitutional.

Quite a different viewpoint has been expressed by Prof. Thomas I. Emerson, Lines professor of law at Yale University, who said, "The FCC is presently considering a revision of the Fairness Doctrine. My feeling is that the revision should be very strongly in favor of the Government requiring stations to open their facilities to more viewpoints. I think that because radio and TV are limited facilities, the efforts of Government to permanently promote greater variety of expression through the fairness rule and similar doctrines would be consistent with the First Amendment."[31]

CBS' chairman, William Paley, responded with statistical data to the limited-facilities argument: 677 broadcast stations and 1,949 daily newspapers at the time of the Radio Act of 1927; 8,434 stations and 1,775 daily newspapers in 1974. "The multiplicity of voices heard over these stations—two-thirds of which have no network affiliation—far exceeds that provided by any mass medium at any time in our history," he said.[32]

And the debate goes on. . . .

12.3 Personal attack and political editorializing. The Fairness Doctrine, as legislatively enacted in 1959, confers no right of access to the broadcast medium on any individual or group; rather, the only "right" of access is for ideas so that the public will have the benefit of robust, wide-open debate. The licensee can fulfill his obligations under the doctrine without permitting anybody outside of the station the use of his facilities. But the personal attack and political editorializing rules, as formalized in 1967 by the Commission, do confer a limited right of access on certain individuals or groups, just as equal time does.

Through the years the Commission has shown considerable concern for "concretizing" the Fairness Doctrine in certain instances. For example, it made this statement in its 1949 report on editorializing by licensees: " . . . [E]lementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist."[33]

FCC guidelines for dealing with personal attack took definite form in a May 9, 1962, memorandum opinion concerning renewal of a Florida station's license. In that case, a petition had been filed opposing license renewal on the ground that the licensee had attacked various individuals in the community in a series of editorials. Referring to its 1949 report, the FCC said: "In appropriate recognition of the serious nature of such attacks, we pointed out that fairness may dictate that 'time be allocated' to the person or group attacked. Where, as here, the attacks are of a highly personal nature which impugn the character and honesty of named individuals, the licensee has an affirmative duty to take all appropriate steps to see to it that the persons attacked are afforded the fullest opportunity to respond."

This decision in the *Maypoles* case provided the first Commission definition of "personal attack" and indicated the scope of the licensee's responsibility.[34] Two months later, the FCC disposed of another complaint involving a broadcast editorial by advising a Billings, Mont., station that it should have promptly supplied a copy of an editorial to the person attacked and offered that person an opportunity to reply.[35]

About the same time the Commission also entered the first stage of a policy decision concerning political editorializing by licensees. During a 1962 gubernatorial campaign in California involving incumbent Pat Brown and contender Richard Nixon, two commentators on KTTV (a Times-Mirror Broadcasting Co. station) aired frequent editorial attacks against Brown. The California State Democratic Committee complained to the FCC, and the Commission, in a telegram to the licensee, stated: " . . . [F]airness requires that when a broadcast station permits, over its facilities, a commentator or any person other than a candidate, to take a partisan position on the issues involved in a race for political office and/or to attack one candidate or support another by direct or indirect identification, then it should send a transcript of . . . such program to the . . . candidate immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast."

"Appropriate spokesman" was used because if the candidate him-

self appeared then the equal-time provision of Section 315 would come into play.

Thus, in the *Maypoles*, *Billings* and *Times-Mirror* cases, the Fairness Doctrine, while broad in its general requirements of fairness, also was being used to focus on two specific situations: personal attack and political editorializing.

Prior to July 5, 1967, no part of the Fairness Doctrine had been formalized via the rule-making authority of the Commission. On that date the FCC issued the personal attack and political editorializing rules. As amended, they are:

> Sec. 73.123 Personal attacks; political editorials.
>
> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
>
> (b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).
>
> NOTE: The Fairness Doctrine is applicable to situations coming within (b) (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (b) (2), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F.R. 10415. The categories

> listed in (b) (3) are the same as those specified in Section 315(a) of the Act.
>
> (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate to respond over the licensee's facilities:
>
> *Provided, however,* that where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.[36]

Networks have opposed the personal attack rules, arguing that they are designed to vindicate reputation and, unlike the broader Fairness Doctrine itself, do not advance public interest in the presentation of controversial issues of public importance. Nor, as CBS pointed out, does the truth of the attack make any difference. The right of reply remains vested in the attacked person or group. Furthermore, even if the original broadcast sought to be fair by quoting the attacked person, CBS said that the attacked person would still have a right to reply.[37]

In a statement to the Communications Subcommittee of the Senate Commerce Committee shortly after adoption of the rules, NBC said:

> The Commission has made the personal attack doctrine applicable only to an attack taking place in a discussion of a controversial issue of public importance. Using the Commission's standards, we are unable to perceive why an attack on a program discussing controversial issues of public importance should be accorded treatment differing from an attack on a variety entertainment program. The Commission's reasoning would lead to different results depending on whether the attack occurred on "Meet the Press" or "The Tonight Show."
>
> Moreover, the personal attack doctrine is much more rigid and inflexible in its terms than the Fairness Doctrine.

> The latter permits the licensee the flexibility of good faith judgment in the presentation of conflicting views, whereas the personal attack doctrine requires the licensee to act—without allowing any judgment in the matter—if a personal attack takes place on his facilities. . . .[38]

Another interesting aspect of personal attack is that it could require more than equal time. As pointed out in a Court of Appeals decision: "In fact, equality will not always be sufficient in response to a controversial issue. In a personal attack situation a 10-second statement that a party was a Fascist or Communist might require that more than 10 seconds be given to the party attacked to explain and refute the representation."[39]

12.4 Constitutionality of Fairness Doctrine *(Red Lion).* Whether the Fairness Doctrine generally, and the personal attack and political editorializing rules specifically, would survive a test of constitutionality was decided in favor of the FCC by court decisions in 1967 and 1969. In 1967, the case of *Red Lion Broadcasting Co., Inc. v. FCC* underwent U.S. Court of Appeals review.[40]

On Nov. 27, 1964, Pennsylvania radio station WGCB of the Red Lion Broadcasting Co. carried a 15-minute broadcast by the Rev. Billy James Hargis as part of the minister's "Christian Crusade" series. In discussing a book written by Fred J. Cook, entitled *Goldwater—Extremist on the Right*, Rev. Hargis accused Cook of working for a Communist-affiliated publication and also levelled other charges. Cook demanded free reply time, which the station refused. The FCC then declared that the broadcast constituted a personal attack and that the station had failed to meet its obligation under the Fairness Doctrine by not sending a tape, transcript or summary of the broadcast to Cook and offering him free time to reply. Such steps were necessary under a commission decision in 1962 concerning Times-Mirror Broadcasting Co.,[41] even though the rules would not formally be implemented until 1967.

In the decision given by Circuit Court Judge Tamm, the appellate court held that the Fairness Doctrine was not unconstitutionally vague and that the broadcaster could not insist upon payment by the party who sought to respond to a personal attack. The Red Lion station appealed.

Justice White, in delivering the Supreme Court's opinion in the combined cases—*Red Lion* (personal attack) and *U.S. v. Radio-Television News Directors Association* (political editorializing),[42] made these points in upholding the constitutionality of the rules and the power of the FCC to promulgate them:

1. The rules enhance, rather than abridge, freedom of speech and press.

2. The FCC was implementing congressional policy (the Fairness Doctrine) and acting in the public interest.

3. The rules fell short of imposing censorship on the licensee's programming—censorship being forbidden by Section 326.

4. Broadcasting, as a new medium, has different characteristics which justify differences in applying First Amendment standards.

5. Personal attack rules are indistinguishable in constitutional principle from Section 315, which had been validated in 1959 by the Court (*Farmers Educational & Cooperative Union v. WDAY*, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407).

6. Those who "are licensed stand no better than those to whom licenses are refused" as far as the First Amendment is concerned. Thus there is nothing in the First Amendment to prevent the government "from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community." Further, it is the right of the viewers and listeners, not the broadcaster, which is paramount. In this connection, Justice White espoused the Meiklejohn doctrine; i.e., it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas which is crucial. And it is *this* right which cannot be constitutionally abridged either by Congress or the FCC.

7. As proxies for the entire community, licensees can be obligated to give suitable time and attention to matters of "great public concern," without the First Amendment being violated.

And in a final footnote, Justice White included this tantalizer for advocates of access:

> * * * A related argument, which we also put aside, is that quite apart from scarcity of frequencies [seen by courts as a reason for validating regulation] . . ., Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. Citizen Publishing Co. v. U.S., 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

In a nutshell, *Red Lion* permits the FCC to impose obligations on licensees to present ideas and information about matters of "great public concern." Whether required or not, the fiduciary or "trustee"

concept requires this kind of operation so the public receives suitable access to social, political, and other ideas.

But in the absence of personal attack, political editorializing, or equal time, how is the gap bridged from specific ideas of particular individuals or groups to community broadcasting facilities? Assuming that a licensee is operating in good faith under fairness requirements, which ideas and spokesmen should he select, and how many over what period of time? Under the FCC's Fairness Doctrine, with the exception of personal attack and political editorializing, the licensee has virtually total discretionary power.

Stated another way, one might ask how we get from the grandiosity of *Red Lion* to the everyday world of television which a former FCC commissioner, Newton Minow, characterized in 1961 as a "vast wasteland"?

12.5 Summary. The "equal opportunities" part of Section 315 dates back to the Radio Act of 1927 and constituted the entire section until 1959 when Congress amended that part of the law to exempt news and news-type programs while, at the same time, adding the Fairness Doctrine language. "Equal time" applies only to legally qualified candidates for public office and can be invoked only if the licensee permits a candidate to use his broadcast facilities, either on a paid or a free basis. Once the licensee permits such a use, then all other candidates for that same office have a right to use the station's facilities on an equal basis. In essence, the licensee gives up control of his facilities for that purpose and becomes a common carrier. News and news-type programs are exempt from equal time; the licensee is not obligated to notify candidates that they qualify for equal time, and the licensee does not have to provide candidates with a script, tape or summary of what their opponent(s) said.

If a candidate's supporters or spokesmen are allowed to use a station's facilities, then supporters and spokesmen of all other candidates for that same office must be afforded *comparable*—not equal—time under the *Zapple* corollary.

Concerning broadcasts by Presidents, the Fairness Doctrine—not equal time—applies to speeches by chief executives which raise or deal with controversial issues of public importance. If a President, however, gives a "political" speech, then the Commission is saddled with the task of deciding if the equal time doctrine applies, and a prime factor in such consideration would be whether the President is a declared candidate for re-election. Ultimately Congress may have to resolve these difficult issues, the FCC said in a 1972 report.

The Fairness Doctrine is both general and specific. As included by Congress in the 1959 amendment, the doctrine places upon licensees

an affirmative obligation (the station cannot simply refuse to air any controversial issues since such a programming decision clearly would not be in the public interest) to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Under this doctrine, licensees have considerable discretion in how they will meet fairness obligations. Also, no individual or group can claim a right to give his or their side of a controversial issue. No one must be notified and no transcript or tape is mandated. Only if there is unreasonableness or bad faith will the Commission substitute its judgment for that of the licensee's. With such flexibility, it is little wonder that with the possible exception of WXUR-AM-FM no station has lost its license because of fairness violations. And yet as many as 2,000 fairness complaints are received annually by the Commission. As seen in the FCC's attempted invocation of the doctrine in connection with an NBC documentary on private pension plans, the intrusion of a governmental agency into the broadcast news judgment area is fraught with First Amendment complications. Journalistic discretion commands First Amendment protection and must be given wide latitude. And yet the Fairness Doctrine specifically was made applicable to news and news-type programs by Congress through the agency it created, the FCC.

In 1967, the FCC "concretized" the generality of the Fairness Doctrine by formulating personal attack and political editorializing rules. In both instances the licensee is obliged to do certain things whenever the rules come into play. In the case of personal attack on an identifiable person or group (other than on foreigners, political candidates or those attacks made during a news or news-type program, although an editorial given during such a program is not exempt), the licensee must, within one week, notify the attacked party of the attack, provide a script, tape or summary of the attack, and offer a *reasonable opportunity* to respond.

Comparable action must be taken by licensees in connection with editorials endorsing or opposing legally qualified candidates. In the event of an attack upon a candidate, that candidate must be notified within 24 hours of the attack, a script or tape of the editorial must be provided, and a *reasonable opportunity* must be provided for the candidate to respond. If the attack is to take place within 72 hours of election day, advance notification of the editorial must be given. Should a licensee endorse a candidate, then all other legally qualified candidates for that office must be notified within 24 hours, provided with a script or tape of what was said, and given a reasonable opportunity to respond. Advance notice is required if the endorsement is to be made within 72 hours of election day.

In the 1969 landmark decision by the U.S. Supreme Court in *Red Lion*, the constitutionality of the personal attack and political editorializing rules was upheld. Justice White said for the unanimous (8-0) Court that the rules enhance, rather than abridge, freedom of speech and press; congressional policy was being implemented (the Fairness Doctrine amendment of 1959); censorship was not imposed on licensee's programming; broadcasting has characteristics different than other media and therefore differences are justified in applying First Amendment standards; and licensees are proxies or fiduciaries for the community and, as such, they can be obligated to present views and voices representative of the community, or to air matters of "great public concern."

CHAP. XII—PASS IN REVIEW

1. Sen. Eugene McCarthy's attempt to obtain equal time to reply to statements by President Lyndon Johnson during a televised interview was thwarted by an FCC ruling. What was the basis for that ruling?
2. Must equal time be equal to the exact minute?
3. The equal time provisions of Section 315 apply to supporters and spokesmen of candidates for public office, not just to the candidates themselves. True or false?
4. Does equal time apply to entertainment-type programs? News or news-type programs?
5. How could John F. Kennedy and Richard M. Nixon carry out their famous televised debate in 1960 without a host of other presidential candidates being given equal time by the major TV networks?
6. What is the exact wording of the Fairness Doctrine?
7. The complainant has a heavy burden of showing that the licensee is under a fairness obligation. True or false?
8. Why did the U.S. Court of Appeals (District of Columbia Circuit) reverse an FCC ruling that NBC was under a fairness obligation in connection with a documentary on private pension plans?
9. Who and what are not covered by the personal attack rules?
10. Can you think of a good reason why political candidates are not protected by the personal attack rules?

CHAP. XII—ANSWERS TO REVIEW

1. At the time of the interview, President Johnson was not yet a *declared* candidate for re-election.

2. Yes.

3. False. The *Zapple* corollary applies to supporters and spokesmen of candidates. When invoked, the doctrine provides that *comparable time* must be given to them.

4. Yes, comedian Pat Paulsen discovered that any appearance he made on radio or TV—after he became a legally qualified candidate—could activate the equal time requirement. News and news-type programs are exempt from equal time, but not from fairness requirements.

5. Congress temporarily suspended the applicable provisions of Section 315.

6. The licensee is under an affirmative obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

7. True.

8. A major reason given by the court was that journalistic discretion or a broadcaster's news judgment must be given wide latitude. Can you think of reasons why the First Amendment should protect the newscaster from the FCC's ruling invoking the fairness obligation? What about the danger of self-censorship if broadcasters know they'll be forced into lengthy and costly justifications of their programming? Is there a chilling effect in such agency rulings?

9. Foreigners, political candidates and news and news-type programs.

10. Political candidates are afforded a "forum," or a chance to respond, by means of equal time or, in the case of their supporters or spokesmen, the *Zapple* corollary.

[1] 47 U.S.C.A. 315.
[2] 390 F.2d 471 (District of Columbia, 1968).
[3] FCC 72-486, June 2, 1972.
[4] 35 F.R. 13048.
[5] 33 FCC 2d 297 (1972). Also, *In Re: Request for Review of the Pat Paulsen Ruling Concerning Section 315 . . .*, 33 FCC 2d 835 (1972).
[6] *Id.*, 33 FCC 2d at 836.
[7] 23 FCC 2d 707; reaffirmed in *In Re: Complaint of Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283 (1970).
[8] Republican National Committee, 25 FCC 2d 739 (1970). The ruling was reversed in CBS v. FCC, 454 F.2d 1018 (District of Columbia Circuit, 1971).
[9] Op. cit., Chap. XIV, note 19.
[10] Op. cit., note 7.
[11] 31 FCC 2d 708 (1971). The first appearance was on March 15, 1971, when NBC's "Today" show included a 45-minute interview with the President; the second was an hour-long interview of the President by Howard K. Smith on March 22, 1971, carried simultaneously on ABC radio and television; and the third was a presidential address carried by all three networks on April 7, 1971, in which administration programs and policies concerning Southeast

Asia were outlined. ABC granted DNC time to respond to the address principally because issues other than Southeast Asia were discussed, but NBC and CBS refused.

12 DNC v. FCC, et al. and RNC v. FCC, et al., 460 F.2d 891, 903–04 (District of Columbia, 1972) (opinion by Judge Tamm). On Oct. 10, 1972, the U.S. Supreme Court declined to review this case.

13 *In Re: Complaint of DNC against NBC, CBS and ABC*, FCC 72-116 (Mimeo No. 74738), decided Feb. 3, 1972.

14 *In Re: Complaint of DNC against CBS and NBC*, FCC 72-359 (Mimeo No. 75592), decided April 19, 1972.

15 FCC 72-534 (Mimeo No. 79505), adopted June 16, 1972.

16 Op. cit., note 18, Chap. XI, pp. 180–81.

17 F.R.C. Annual Report (1929), p. 32.

18 Op. cit., note 78, Chap. XI.

19 In Re: Complaint by Richard B. Kay, Cleveland, Ohio, Concerning Political Broadcast [by CBS, NBC and PBS], 33 FCC 2d 1006 (1972).

20 In Re: Complaint of Democratic National Committee against NBC, CBS, ABC, 33 FCC 2d 631, 640 (1972). The FCC refused to order the three networks to provide the committee with time to respond to three uninterrupted presidential TV and radio appearances, including the President's economic program broadcast on Aug. 15, 1971.

21 Op. cit., note 19, 33 FCC 2d at 1007-08. The commission rejected the complaint on the ground that the complainant had failed to provide the necessary information.

22 Brandywine-Main Line Radio, 24 FCC 2d 18 (1970).

23 For fuller discussion *see* Mark Ellman, "And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising," *California Law Review*, September, 1972, pp. 1416+.

24 Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (1972).

25 For Prof. Barron's views, *see* Chap. XIII, pp. 353–57.

26 In fiscal 1973, the FCC handled about 2,000 fairness complaints. Ninety-four resulted in written decisions by the commission, with 5 complaints being upheld against the licensees. Of these, 3 involved personal attack and 2 were for fairness violations (including one against NBC because of a documentary on pensions—a determination set aside by the U.S. Court of Appeals, District of Columbia Circuit, in 1974).

27 An address, " 'Fairness' Today (Censorship Tomorrow?)," given at the "Great Issues Forum" at the University of Southern California Oct. 11, 1972.

William S. Paley, CBS chairman, also called for an end to the Fairness Doctrine in an address on May 31, 1974, at the dedication of the Newhouse Communications Center, Syracuse, N.Y. He said, "In spite of the fact that the FCC has shown moderation in putting it to use, the very fact that the . . . Doctrine confers on a government agency the power to sit in judgment over news broadcasts makes it a tempting device for use by any administration in power to influence the content of broadcast journalism."

28 Cf. the Commission's view as expressed in this case with earlier ones cited on pp. 312–15 of Chap. XI, especially the Commission's decision not to take any action in connection with the CBS program, "The Selling of the Pentagon." Also, the U.S. Court of Appeals decision (43 *Law Week* 2009) strikes a tone heard three months earlier when the U.S. Supreme Court unanimously upheld the First Amendment right of *newspaper* editors to decide for themselves what they would or would not print. *See, Tornillo*, Chap. XIII, pp. 369–73.

29 *The Quill*, March, 1974, p. 12.

30 *Broadcasting*, July 9, 1973, p. 17. But Burch's successor as chairman, Richard Wiley, said late in 1974 that he envisions a more "meaningful

implementation" of the Fairness Doctrine. *Broadcasting*, Sept. 16, 1974, p. 5.

31 "Where We Stand: A Legal View." Reprinted from *Columbia Journalism Review*, September/October, 1971, p. 39.

32 Op. cit., note 27.

33 Op. cit., note 78, Chap. XI.

34 *Fairness Doctrine*, a staff report for the Communications Subcommittee of the U.S. Senate Commerce Committee, 90th Congress, 2nd Session (1968), p. 38.

35 Billings Broadcasting Co., 40 FCC 518 (1962).

36 47 C.F.R. 73.123 (1971).

37 Richard W. Jencks, CBS general counsel, in a speech at the Practicing Law Institute seminar in New York on June 22, 1968, entitled, "Equal Time, Fairness and the Personal Attack Rules: A Comparison."

38 Op. cit., note 34, p. 112.

39 Combined cases of Democratic National Committee v. FCC, and Republican National Committee v. FCC, 460 F.2d 891 (District of Columbia Circuit, 1972).

40 381 F.2d 908 (District of Columbia Circuit).

41 *See*, pp. 342–43 this chapter.

42 Op. cit., note 7, Chap. XI.

RADIO & TV: ACCESS TO THE MEDIA

XIII

One of the foremost advocates of a public right of access to the media is Prof. Jerome A. Barron of George Washington University Law School who found in *Red Lion* the touchstone for reconstructing the First Amendment in terms of the public's rights, rather than the rights of media owners and operators. For nearly a decade, the idea of public access seemed to be gaining momentum, beginning with *Times-Sullivan* in 1964 (a brief notation by Justice Brennan in his opinion for the unanimous Court), and capped by *Red Lion;* but the idea of forced access to the *media*—newspapers, magazines, radio, TV, etc.—suffered two severe setbacks at the hands of the U.S. Supreme Court in separate cases in 1973 and 1974. Even access to the broadcast medium via the Fairness Doctrine is falling upon harder times as more and more prominent persons begin to question its effectiveness or validity, or both.

Prior to the Supreme Court's decision in *Red Lion*, Barron wrote an article in which he argued that media-imposed, rather than governmental, censorship is the greater danger to our free society and that some way must be found to permit diverse views and ideas to be disseminated. He expressed these concerns:

> There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating the opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there was a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum—unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in a poor position to compete with those aired as a matter of grace.
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> * * *
>
> . . . First Amendment theory must be re-examined, for only by responding to the present reality of the mass media's repression of ideas can the constitutional guarantee of free speech best serve its original purpose [1]

Commercialism is the major reason why conventional media do not convey unorthodox ideas, Barron insisted, and he argued that this failure is demonstrated by the development of new media "to convey unorthodox, unpopular, and new ideas"- most notably the underground press.

In urging a re-interpretation of the First Amendment away from the traditional media-oriented one, Barron referred to the First Amendment expansionist views of the late Prof. Alexander Meiklejohn—an "absolutist" in terms of political "speech" being uninhibited so the citizenry would be better informed. It was Meiklejohn who urged a constitutional amendment by which Congress would be given the power "to provide for the intellectual and cultural education of all the citizens of the United States," thereby permitting the fullest participation in the self-governing process.[2] Concerning access to the media, he believed that "what is essential is not that everyone shall speak, but that everything worth saying shall be said." Thus, to him, access was idea-oriented and not intended to confer a "right" on any particular individual or group. This same concept undergirds the Fairness Doctrine.

Barron argued that when commercialism predominates among the mass media—as it does now—the First Amendment can be changed; but this need not be done through amendment or judicial restructuring. Rather, a right of access can be achieved through congressional statute validated by a "sympathetic court."[3]

His concern about access to the media also is prompted by declining newspaper competition, although critics have cited statistics to show that the number of daily newspapers has increased slightly in the past year or two. True, newspapers on the periphery of metropolitan areas have sprung up, but competition among major dailies in the largest cities has decreased until it is virtually non-existent.

Referring to Justice White's opinion for the Court in *Red Lion*, Barron launched into an "expansionist" interpretation of that opinion by saying:[4]

> *Red Lion* launches the Supreme Court on the path of an affirmative approach to freedom of expression that emphasizes the positive dimension of the First Amendment. In fact, the access-for-ideas rationale practically replaces the original legal justification for broadcast regulation—that broadcasting is a limited-access medium. This older view proceeded on the theory that since there were only so many frequencies to go around, some substantive criteria

had to be improvised in order to have a rational allocation policy. * * *

Red Lion reveals an interplay between the older technical limited-access theory, . . . and the new First Amendment-based theory of access, which attempts to provide mechanisms for the interchange of ideas in the dominant media.

On its respectable or conventional level, the Supreme Court in *Red Lion* relied on the limitation-of-the-spectrum argument for its result. * * * On the other hand, the opinion is studded with observations that give it a radical undertone throughout and that display the constant tension in the opinion, and perhaps in the Court, between a rationale for broadcast regulation based on limitation of the spectrum and one based on maximizing opportunities for expression.

* * *

. . . The *Red Lion* case . . . finds the law of freedom of expression in mid-passage. Old and new theories of broadcast regulation walk into each other in the case.

Mr. Justice White says in *Red Lion* that it is not a First Amendment purpose to countenance monopolization of the marketplace of ideas. For this proposition he cites a string of cases, many of them involving print media, particularly newspapers. My point is that *Red Lion* is not just a broadcast case. It is a media case. It represents a look at the First Amendment in the light of new social realities of concentration of ownership and control in a few hands that has been produced by the twin developments of media oligopoly and technological change. It is in the background of these realities that the new First Amendment right of access spoken of by Mr. Justice White should be understood. There is a remarkable sentence in *Red Lion*. It marks the recognition by the Supreme Court of a new constitutional right: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."

Barron concluded in this manner:

. . . [N]ew forms for dialogue are necessary. What I propose is to implant these forms on an existing structure. I would not substantiate government control of the media for their present private ownership. What I suggest is that

> the media be rendered more hospitable as a routine and legal matter to diversity of viewpoint.
>
> Interchange of ideas will not arise naturally and without new procedures. Economic and technological factors have become such constraints on the life of ideas that the *laissez-faire* Millsian approach to freedom of expression . . . is now a hopeless anachronism. But the democratic faith in reason . . . is still the basic assumption of our institutions. Unless we are ready to discard this faith, we should give considerable attention to the idea of access and to attempts to realize that idea through new legislation and more intensive and sympathetic uses of existing law.

Some support was generated for Barron's thesis. At the American Civil Liberties Union (ACLU) biennial national conference in mid-1968, the conferees went on record as favoring the concept and a workshop group specifically urged:[5]

1. That ACLU bring suits challenging discriminatory refusal by publications to accept advertisements and notices.

2. That support be considered for suits which would challenge derogatory treatment by publications of individuals and organizations where no right of reply is allowed.

Neither of these proposals was approved as policy by the 80-member national board of directors.

In a speech on Aug. 11, 1969, before American Bar Association members, FCC Commissioner Kenneth Cox urged that Congress require newspapers to provide free "right of reply" space to persons criticized in print.[6]

The drumming up of support for "access" legislation reached into the White House where, on March 6, 1974, President Nixon announced he would seek enactment of a law giving political candidates the right to reply to false charges in newspapers. The following day, a presidential aide modified Nixon's statement, saying that a right of reply law would be sought for public officials and public figures. The scope of such a law was not spelled out, but Nixon had been highly critical of the press' handling of the growing Watergate scandal and had said at the March 6 press conference that former White House aides then under indictment "have been convicted in the press over and over again." His resignation on Aug. 8, 1974, and subsequent acceptance of a presidential pardon for any and all crimes he may have committed during his presidency (an acceptance which could be construed as an admission of guilt in connection with Watergate charges, according to President Ford who granted the pardon even

before any formal charges could be filed), blunted any additional momentum toward federal right-of-reply legislation.

13.1 The antithesis of access. Various arguments have been marshaled to counter the access proponents.

In terms of the monopoly charges by Prof. Barron, the chairman of CBS, William S. Paley, said there is little overlapping of control of broadcast stations by newspapers: 19 per cent of the 934 TV stations were owned by newspapers in 1974 and 7 per cent of the 7,500 radio stations. Furthermore, of the 8,434 stations, two-thirds had no network affiliations. Also, FCC rules limit or prohibit excessive media concentration, particularly in the largest markets. Therefore, said Paley, "The possibility of any major news source consistently distorting or misusing its function in the face of all of these other competing forces for enlightenment is virtually non-existent. This pluralism constitutes the strongest safeguard that a free society can have against abuses of freedom of the press."[7]

Prof. Emerson—no stranger to advocacy of free speech—has warned that "any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy events' and present all viewpoints under the watchful eyes of petty officials is likely to undermine such independence as the press now shows without achieving any real diversity."[8]

At the same meeting where former FCC Commissioner Cox urged a mandated right of access to the print medium for those subjected to criticism, Clifton Daniel, associate editor of the *New York Times*, said that discrimination is the very essence of the editorial function of newspapers. Because of space limitations only a small portion of the daily flow of news is used by any newspaper. And at the same forum where Barron called for ways to extend *Red Lion* to the print medium, Daniel referred to the twin problems of space and news volume by saying:

> Space! How much space? Last year [1968], *The New York Times* received 37,719 letters to the editor and printed six per cent of them. * * * If we had printed them all—all 18 million words of them—they would have filled up at least 135 complete weekday issues of . . . [the *Times*].
>
> * * *
>
> Nondiscrimination! Discrimination is the very essence of the editing process. * * * Every day of the year . . . [the *Times*] receives an average of 1,300,000 words of news material. At best, a tenth of it can be printed.[9]

In citing statistics to show there are more, rather than fewer, daily newspapers in the United States, Daniel also called attention to a remarkable success story:

> Fourteen years ago, Norman Mailer, the novelist, and Edwin Fancher each put up $5,000 to start an offbeat neighborhood weekly in Greenwich Village. Altogether, only $70,000—less than Adolph Ochs needed to gain control of *The New York Times* [in 1900]—had to be invested in the *Village Voice* before it turned a profit. Its circulation is now more than 127,000—greater than the circulation of 95 per cent of the United States dailies. * * * From the beginning, the *Village Voice* has been a forum for those unorthodox opinions that are said to be seeking access to the press. It was the *Village Voice* that blazed the trail for the underground press. While some may think that the underground press is scandalous, its existence is nevertheless welcome proof that our press is indeed free and that the First Amendment does not have to be reinterpreted, rewritten, or wrenched out of context to give expression to unorthodox ideas.

Any solution concerning access, Daniel argued, should come from the industry itself, since attempts by the judiciary or by legislators to impose such a right would be unconstitutional, in his judgment. Apart from private enterprise multiplying the number of outlets for ideas, Daniel suggested another approach:

> Until now, I have said nothing about the right of reply—the right to reply to group and personal attacks. I have left it to the last because it does not provide as much of a problem for newspapers as enforced access to the press. Indeed, the right of reply is widely recognized and accepted. In practice, most newspapers recognize a prior-to-publication right of reply when dealing with controversial matters. On *The New York Times*, we have a standing rule that anyone who is accused or criticized in a controversial or adversary situation should be given an opportunity to comment before publication. The rule is sometimes overlooked in the haste of going to press. It is often not possible to obtain comment from all interested parties, but the principle is there and the effort is required. More importantly, the same is true of the news agencies that serve practically every daily paper and broadcasting station in the United States.

> The right of reply after publication is also widely accepted. However, I would caution against creating an absolute right of reply or trying to enshrine such a right in law. I would particularly caution against guaranteeing a right of reply to large, ill-defined, hypersensitive population groups. Newspapers must have the right to refuse to publish a reply, provided they are willing to accept the consequences of doing so—a suit for damages, for example.

The *Times'* right-of-reply principle, as described by Daniel, is like the Fairness Doctrine (but not the personal attack segment) in that an affirmative obligation is created on the part of the newspaper or on the licensee. In one instance there is no enforcement of fairness under the law as it now exists; whereas in the other, there is not much inclination to enforce the regulation when a licensee has been unfair—primarily because the concept tends to defy enforcement. Also, Daniel is referring to personal attack or personal criticism situations in agreeing that a right of reply should be voluntarily given. But Barron's thesis goes far beyond attack upon identifiable individuals or groups. The thrust of his concern for access is *ideas*, *attitudes*, *opinions*, etc.—making them available to the public. Thus, access and right of reply are different in kind as used by the law professor and by the editor. And finally, the ultimate control in a right-of-reply situation would reside with the owners-editors. Immunized to a great extent by *Times-Sullivan* and its progeny, newspapers are under far less pressure than ever before to accord such a "right." They may do so, but not because of legal "persuasion." In fact, "right of reply," as applied to newspapers, is a misnomer. No such definitive right exists except in an ethical sense in the minds of publishers or editors.

13.2 The courts and access to the print medium. In 1947, the Commission on Freedom of the Press—the so-called Hutchins Commission—made a series of recommendations which produced spontaneous combustion among many editors and publishers. Among its proposals, the commission suggested that as an alternative to libel, legislation should be enacted to permit an aggrieved party to obtain a retraction, a restatement of the facts, or be given an opportunity to reply. A legislative "solution" to the access problem was suggested by the commission. This same idea was included in Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia*[10] when he wrote: "If States fear that private citizens will not be able to respond adequately to publicity involving them [because of the extension by the Court of the *Times-Sullivan* standard to private citizens], the solution lies in the direction of ensuring their ability to respond,

rather than in stifling public discussion of matters of public concern."

And in a footnote to the passage above, Brennan pointed out that some states already had adopted retraction statutes or right-of-reply statutes. Before turning to such legislation, however, a quick review of what the courts have done about access vis-a-vis the print medium might be instructive. In a 1919 case, *Uhlman v. Sherman*,[11] a lower court in Ohio held that a newspaper had to open its advertising columns to a would-be purchaser of space if the public generally was permitted to buy such space. Only reasonable rules could be imposed, such as restricting the length of the advertisement or typographic exuberance.

Beyond this lone precedent, there are no others. Some might argue that *Associated Press v. U.S.*[12] is an access wedge into the print medium. It is, but only from an anti-monopoly view since the Supreme Court ruled that the wire service could not refuse to sell its service in a market where one AP member newspaper already existed. To jump from this ruling to the conclusion that newspapers are "fiduciaries," or that they are legally more than private enterprises, is to miss the specific language used by Justice Black in giving the Court's opinion in that 1945 case; i.e., that the decision against AP was not based on any application of a "public utility" concept to the newspaper business.[13]

In *Approved Personnel, Inc. v. The Tribune Co.*,[14] the Florida Supreme Court in 1965 looked at the past and concluded:

> . . . [T]he law seems to be uniformly settled by the great weight of authority through the United States that the newspaper publishing business is a private enterprise and is neither a public utility nor affected with the public interest. The decisions appear to hold that even though a particular newspaper may enjoy virtual monopoly in the area of its publication, this fact is neither usual nor of important significance. The courts have consistently held that in the absence of statutory regulation on the subject, a newspaper may publish or reject commercial advertising tendered to it as its judgment best dictates without incurring liability for advertisements rejected by it.

And Chief Justice Burger, while an appellate judge in the District of Columbia Circuit, wrote an opinion in *Office of Communication of United Church of Christ v. FCC*, in which he said: "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it

is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot."[15]

In *Bloss v. Federated Publications Inc.*,[16] the Michigan Supreme Court held that a newspaper did not have to accept motion picture advertisements because it is a "purely private business and, therefore, free to contract with and do business with whomsoever the publishers thereof see fit, and conversely, free to refuse to contract with and do business with any parties they choose to reject."

If courts were going to apply *Red Lion* to newspapers, the chance came in *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*[17] U.S. District Court Judge Marovitz agreed with four newspapers that they did not have to accept the union's "advertorial" which was critical of a department store's sale of clothing made by non-union workers. The judge noted that the press is treated with special constitutional regard. And he rejected the union's argument that the newspapers were analogous to the "company town" in *Marsh* or the shopping center in *Logan Valley Plaza*. Instead, he considered newspapers to be private property, just as the more recent 5-4 decision of the Supreme Court considered the shopping center in *Lloyd Corporation* to be private property such that the owners could prohibit distribution of handbills by an anti-war group.

In commenting on Barron's contention of a right of access for "representative groups" to assure opportunities for minorities to express their views in the marketplace, Judge Marovitz said:

> Under a doctrine of open access, the problems inherent in such line-drawing are obvious. Why limit space to representative groups? Do not non-representative groups or individuals need greater assistance? Are there two sides to every issue or three or an infinite number? Why limit access to the issue-oriented and not to the amateur sports writer or cartoonist? Most important, why limit access to those who can pay, for surely the poor are just as entitled to comment? The mere raising of these questions indicates why such extensive freedom is given to the press. There is scant, if any middle ground between minor meddling and full abridgement.

This decision came before the free-time access proposal of the FTC in the form of counter-advertising and prior to several FCC and Court of Appeals rulings which required licensees to allow the free use of their facilities to respond to commercials. Just how news-

papers could be forced to provide free space—let alone space that someone is willing to pay for—was not constitutionally clear at that time.

The Court of Appeals upheld Judge Marovitz's decision and the Supreme Court denied certiorari.[18] Similarly, another U.S. Court of Appeals upheld a newspaper's refusal to accept an advertorial in a 1971 case.[19]

Just prior to the decision in *Amalgamated Clothing Workers*, Barron referred to this case in arguing for access to the print medium:[20]

> On the press side of things, what other mechanisms for access do I suggest beside affording the right of reply in a libel-"public figure" context to groups and individuals under attack?[21] I suggest that the political advertisement be approached not as a matter of grace to be granted by a newspaper at its pleasure but as a matter of right to the group that would purchase. Let me give a recent illustration of the problem I am thinking of. * * * All Chicago dailies turned down the ad, and the union has filed a suit in the federal court. The suit will stand or fall depending on whether the federal court accepts the view that there is a positive dimension to the First Amendment.
>
> Surely the First Amendment must mean something more than that the publishers are to be left alone and that major advertisers are not to be offended. Freedom of the press is guaranteed because of the assumption we have historically made about the role of the press as the vehicle for debate. If there is a reason to believe that role is in jeopardy, then the modest correctives that I suggest, which in no way impinge on the editorial discretion, ought not to be resisted. In the case of public facilities such as subways, bus terminals, and shopping center parking lots, the Supreme Court and the federal courts have recognized that the interplay of ideas must have a field in which to operate. In public facilities the doors are now being constitutionally opened to that dialogue. To say that the doors of the press should also be thrown open is to apply a similar philosophy to the press, an institution that has so often called itself with pride, and perhaps with justice, the fourth branch of government.

13.3 "Public facilities" cases. Apart from radio-television, access "victories" have been most evident where "public facilities" were

involved, e.g., transit systems and shopping centers. The renewed emphasis on private property rights in shopping center cases (e.g., *Lloyd Corporation*[22]) temporarily, at least, may have blocked access to this "forum." The transit company cases generally have involved refusals to accept certain kinds of advertising. Apart from the question of whether a transit system is privately or publicly owned, another major difference would lie in the nature of the medium. Transit systems are not news media first and advertisers second; rather, they accept advertising as an adjunct to their main business of transporting people. They are not First Amendment forums—so a Supreme Court majority has declared. Therefore there is only a marginal relationship, if any at all, between an access case involving transit companies and one involving traditional media of communication.

In its most recent statement on the matter, the Supreme Court, in *Lehman v. City of Shaker Heights et al.*,[23] upheld the right of the city-owned transit system to adhere to a policy of rejecting *all* political and public issue advertising. The Court, in a 5-4 split, declared that the transit system's car card space was not a First Amendment forum and that refusal to accept political advertising from candidate Harry J. Lehman did not violate the First or Fourteenth Amendments. It therefore affirmed the judgments of the Ohio Supreme Court and two other Ohio courts which had been of one voice in disallowing Lehman's plea for an order to force acceptance of the advertisement.

The rationale used by Justice Blackmun in his opinion for the Court was (1) the transit system's cars are not the same as the "open spaces" of parks, meeting halls, street corners, or other public places which, under certain conditions, traditionally are viewed as First Amendment forums; (2) passengers on buses or subway cars are a "captive" audience, unlike radio or television viewers who can "switch off" whenever they wish;[24] and (3) the city's policy passed the test, to wit: that since state action was involved (a governmental rule which prohibits all political advertising in transit cars), the policy could not be considered "arbitrary, capricious or invidious."

Justice Blackmun concluded his opinion in this way: "No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation."

Justice Douglas concurred in the results, principally because he did not believe captive audiences should be subjected to such advertising although he apparently has no objection if they are exposed to strictly commercial-type messages. He said: "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it."

Justice Brennan, joined by Justices Marshall, Powell and Stewart, dissented. His chief reason: Once the city created a forum for the dissemination of information and ideas, it could not discriminate among forum users solely on the basis of message content. Lehman's message, argued Brennan, unquestionably was protected by the First Amendment, although such messages are subject to reasonable "time, place and manner" regulation. However, a reasonableness standard does not countenance a total ban on political advertising. In reference to *Valentine v. Chrestensen*,[25] Brennan took the position that although commercial advertising may be accorded less First Amendment protection than speech of political or social importance, it nonetheless is speech and warrants *some* protection. For the time being he left unanswered the question of whether the "commercial speech" distinction announced in *Valentine* is still valid—a distinction declared inoperative when, as in *New York Times v. Sullivan*, the "advertisement" communicates information or ideas of political or social value.[26]

The captive audience argument did not impress Brennan who countered with his main theme that the city had decided to establish an advertising forum in the first instance and, furthermore, transit company passengers are not compelled to read the card advertisements. If they find a particular message offensive, Brennan said, they need not look at it. Left unclear is how a passenger could determine that a particular message is offensive without first having read it. To such a question, Brennan might respond: better some offensiveness than pre-censorship.

The Court's ruling in *Lehman* serves as a brake on access-to-the-media advocates, unlike earlier decisions by the California Supreme Court and a U.S. District Court:

1. In *Wirta v. Alameda-Contra Costa Transit District*,[27] the California Supreme Court, in a 4-3 decision, affirmed a lower court ruling that the transit district could not limit access of paid advertising by barring antiwar advertisements. Declaring that the refusal to sell to one and not to another would be a denial of equal protection, the court majority concluded that the company, "having opened a

forum for the expression of ideas by providing facilities for advertisements on its buses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection."

2. In *Kissinger v. New York City Transit Authority*,[28] a U.S. District Court judge ruled that transit officials and the advertising firm associated with the Authority could not refuse to accept and display antiwar posters from Students for a Democratic Society on the basis that the posters were "entirely controversial" and "would be objectionable to large segments of . . . [the company's] population." Refusal to accept such advertorials would only be justified if there were a "clear and present danger" of disorder, the judge said.

13.4 Access by legislation. If access is to be forced on the print medium, it most likely would have to be legislatures that do it and in such a way as to overcome First Amendment obstacles. And for any such "right" to be meaningful *and* constitutional, a change in the Constitution would probably be required.

The legislative approach to access has been attempted on a very limited basis by several states. For example, Florida, Mississippi and Wisconsin have statutes which penalize newspapers under certain conditions if they fail to correct or retract an erroneous story, or if they refuse to print, as in the case of Mississippi and Florida, a statement from a candidate who has been criticized in print.[29]

The Florida statute provides that prior to the filing of a libel suit the offending newspaper must be given an opportunity to retract false statements in good faith. If the newspaper refuses to do so within 10 days of receiving notice, then such refusal is considered evidence of malice. A "good faith" correction, apology or retraction will allow a successful plaintiff to recover only actual damages.

The Mississippi statute reads:

> If during any primary or other election campaign in Mississippi, any newspaper . . . shall print any editorial or news story reflecting upon the honesty or integrity or moral character of any candidate who was elected or defeated in such campaign, such newspaper shall, on written or telegraphic request of such candidate or his agents, print in such newspaper not later than the second issue of such newspaper . . ., a statement by the candidate or his duly accredited representative giving the candidate's reply. Such statement will be printed in the exact language which the candidate . . . presents and shall be printed as near as is

> practical on the same page, in the same position, and in the same size type and headlines as the original editorial or news story reflecting on the candidate. . . .

The penalty for failing to print the statement: If the libel suit verdict favors the candidate (and under *Times-Sullivan* he would have to show malice or reckless disregard), then the award would be the amount of the damages or injury suffered or a penalty of $500, whichever would be the larger.

Wisconsin's law provides that reasonable opportunity must be given to allow correction (about seven days) and that:

> A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

Concerning the above statutes, it should be noted that they differ in kind and degree from a "right" of access for representative groups, for ideas, or even for advertising on either a paid or unpaid basis. These statutes are not mandatory in requiring publication or access, but only impose an additional penalty should a person who has been attacked in print win a libel judgment. A publisher is free to decide whether to print or not to print a retraction—unlike the broadcast station licensee whose facilities have been used to attack an identifiable person. That licensee must offer time for rebuttal or be liable to loss of license.

The fact that the Court broadened the First Amendment protective shield around the news media in both libel and privacy cases served to generate interest in access to the print medium. As pointed out in *Harvard Law Review* following extension of the *Times-Sullivan* principle to private citizens wishing to sue the news media:

> Even the establishment of an absolute privilege for news media against libel suits would not be troublesome if there were other devices to guard reputation. Justice Brennan suggested the use of right-of-reply and retraction statutes. However, statutes which explicitly dictate what the news media must publish pose practical and constitutional problems of their own. Publication of a denial by the defamed individual would not carry the weight of an adjudication of the truth of the original charge, might not reach the

> same audience, and might only reawaken interest in the charge's accuracy. Retraction might be more effective, but it is hard to see how the media could constitutionally be required to publish a retraction without a judicial proceeding to determine the truth. Yet, potential litigation over truth could, because of its cost, encourage retraction of what is believed to be true; and such a chilling effect could well be impermissible. As a result, it is unlikely such statutes will prove adequate to fill the gap created by the elimination of the libel action.[30]

Quite a different "slant" has been taken by Barron. Concerning *Times-Sullivan*, he said that unless that "doctrine is deepened to require opportunities . . . to reply to a defamatory attack, the . . . decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate."[31] And in a speech two years later, he said:

> It was the essential philosophy of . . . [*Times-Sullivan*] that a free press, engaged in public debate, should not have to live in fear of prohibitive libel judgments. But what is the purpose of free debate. It is free so that there shall really be free debate within the nation. If that is true, then a necessary step to securing debate should have been to require newspapers to provide the subjects of their attacks with an opportunity to reply. This would have been a fair price to extract for the new relative freedom from libel judgments. In many cases the same corporations or families own both television stations and newspapers, yet the responsibilities of these same people in the newspaper field are far less. Does not *Red Lion* present a sharp contrast to *New York Times v. Sullivan?* In reason, does it not seem absurd that both decisions should be correct? One of them, since it fails to provide the vital supplement of right of reply, is in error, and that one is *New York Times v. Sullivan.*[32]

These questions can be asked concerning the appropriateness of such a right of access:

1. In terms of traditional freedom of press, would newspapers want the additional protection against libel afforded by *Times-Sullivan* if the corollary was an enforceable or mandatory right of access? In terms of applying a right of access to personal attack, the effect might be to make newspapers more timid through self-imposed

censorship. This, in turn, would be a "chilling" effect and defeat the philosophy which undergirds *Times-Sullivan.*

2. There may only be a tenuous relationship between assuring a right of reply to an individual attacked by the press and the broader goal of making worthwhile ideas, information, unorthodox views, etc., available in the marketplace. The one does not necessarily relate to the other since any such right of reply presumably would be limited to rebuttal of attack or criticism.

3. With the possible exception of a footnote, *Red Lion* is addressed to the broadcast medium. One may argue against such singular application, or question the constitutionality or logic of treating one medium differently than another, but the fact remains that the broadcast and print media are treated differently for reasons noted in legislation and court decisions.

Daniel of the *New York Times* argues that any judicial or legislative resolution of a right of access to the print medium would be unconstitutional because of the controls that would have to be exercised over the press to accomplish mandatory access. And developments in Florida, resulting in a U.S. Supreme Court decision, ultimately supported his contention.

In that state, a rarely used right-of-reply criminal statute, enacted in 1913 and applicable specifically to newspapers, was declared unconstitutional in two different court tests during 1972. In both cases the state's attorney general declined to defend the constitutionality of the statute because of doubts that the law could withstand such a test.

In the first case, decided on Feb. 15, Volusia County Judge Robert Durden dismissed charges against the News-Journal Corp. of Daytona Beach which had resulted in the arrest of Herbert M. Davidson, editor and publisher of the News-Journal papers. The arrest followed a complaint by Daytona Beach Mayor Richard Kane in October, 1971—just before a city primary election—that the newspaper corporation had violated Section 104.38, which reads:

> If any newspaper in its column assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of costs any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such

> reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this statute shall, upon conviction, be guilty of a misdemeanor.

The Volusia County judge cited *Times-Sullivan* in declaring that the Florida law imposed an unconstitutional burden on freedom of press. He also held that the language of the statute was too vague. He then proceeded to make a distinction between the broadcast and print media by saying: "In declaring . . . the statute unconstitutional, this court is not unmindful of the Fairness Doctrine as is applied to radio and television. . . . However, this court recognizes the distinction between the limited air waves, which constitute a part of the public domain, and newspapers."

The judge did not rule out the possibility that the state might enact "proper legislation" which "would discourage the irresponsible use of the press for personal attacks upon the character of public officials," but any such legislation would have to take into account the constitutional prohibitions against infringements upon the free press.

In the second case, a candidate for the Florida state legislature, Pat Tornillo Jr., charged that two *Miami Herald* editorials had assailed his character and that the newspaper had refused to allow him his statutory right by not printing letters he had written in reply. On Oct. 2, 1972, Dade County Circuit Court Judge Francis Christie declared the law unconstitutional, agreeing with arguments by the newspaper attorneys that since a newspaper cannot be prevented from publishing an article, neither can it be compelled to print one.

On July 18, 1973, the Florida Supreme Court, in a 6-1 per curiam decision, reversed the lower court and upheld the constitutionality of the statute. Relying heavily on *Red Lion* and the Meiklejohn concept of an informed citizenry being paramount in terms of what the First Amendment should protect, as well as the ideas of Prof. Barron, who was one of the attorneys representing Tornillo, the court said:

> The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified paper content is excluded*. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.
>
> The right of the public to know all sides of a contro-

> versy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. * * *
>
> Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few.* The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees.
>
> * * *
>
> In conclusion, we do not find that the operation of the statute would interfere with freedom of the press. . . . Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusions. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counter-thought which the concept of free press both fosters and protects and which is essential to intelligent self-government.[33]

The lone dissenter, Justice Boyd, argued that since the First Amendment prohibits government from limiting the right to publish news and editorial comment, it also prevents the government from compelling a publisher to print another person's statement against the publisher's will. "Free people," he said, "can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished."

Tornillo provoked considerable interest and concern on the part of newspapers. When the case was argued before the Florida Supreme Court, at least 18 amici curiae briefs were filed—15 of them by Florida newspapers.

The *Miami Herald* appealed and on June 25, 1974, the U.S. Supreme Court unanimously reversed Florida's top court and declared the 61-year-old state law—which had only been used twice during that period—unconstitutional.

Chief Justice Burger, in giving the Court's landmark opinion, said that the choice of what goes into a newspaper—whether fair or unfair—constitutes the exercise of editorial judgment and govern-

ment cannot interfere with that judgment.[34] Although he said that not all future attempts to deal with the access problem would necessarily be unconstituional, he declared that Florida's "remedy" amounted to governmental coercion which is in conflict with the First Amendment.

"Press responsibility is not mandated by the Constitution," he wrote, "and like many other virtues it cannot be legislated."[35]

Concerning forced access to the media, the Court ignored *Red Lion* (upon which Prof. Barron had built much of his access argument), relying instead on the same case used by Tornillo (*Associated Press v. U.S.*), only the Court used it to knock down proponents of access. In that 1945 antitrust decision, the Supreme Court had said that the First 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. . . ."[36] But in reviewing that decision, Chief Justice Burger specifically called attention to the lower court ruling in *Associated Press* which did not compel the wire news service or any of its member newspapers to publish anything which "their 'reason' tells them should not be published." In reviewing the Supreme Court's decision in *Branzburg v. Hayes*, Chief Justice Burger emphasized that *Branzburg*, as well as companion cases then before the Court,[37] led to decisions which involved neither an express, nor an implied, command that the press publish what it preferred to withhold. In citing *Pittsburgh Press Co. v. Human Relations Commission*,[38] in which a bare majority of the Court upheld a city ordinance that prohibited help-wanted advertisements from specifying "male" or "female," the Chief Justice recalled the narrowness of the Court's holding in that case by citing the majority's choice of language, to wit: "Nor . . . does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." Turning to the issues at hand in *Tornillo*, the Chief Justice said:

> We see that beginning with *Associated Press*, . . . the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A

> responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

In response to Tornillo's contention that the Florida statute did not restrict the newspaper's right to speak out in any manner it chose, the Court held that such an argument "begs the core question," adding:

> Faced with penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably "dampens the vigor and limits the variety of public debate." New York Times Co. v. Sullivan, supra, 376 U.S., at 279. * * * Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Tornillo makes it clear that there is to be no forced access into the realm of the print medium—at least not under any plans yet advanced for accomplishing such a goal. Readers might, at this point, recheck the language used by Chief Justice Burger and ask themselves if there might be any application of this ruling to the "editorial judgment" of broadcast news editors vis-a-vis the Fairness Doctrine, which certainly requires broadcasters to include in news-type programs views and issues which they might prefer to leave out. Wasn't the more recent decision of the U.S. Court of Appeals (District of Columbia Circuit), reversing the FCC's imposition of a fairness

obligation on NBC in connection with a documentary on private pension plans, in tune with *Tornillo* by allowing wide latitude for editorial judgment or journalistic discretion? Clearly, the FCC must walk on eggs when it seeks to impose the Fairness Doctrine on broadcast news. In light of *Tornillo*, one might ask if the doctrine remains viable as applied to broadcast news. Have the courts nullified a substantial part of the congressional amendment of Section 315? Does the media differences argument hold up when function and purpose of editors and reporters, regardless of media, are considered? Prof. Barron asked how *Times-Sullivan* and *Red Lion* could both be right. He concluded that *Times-Sullivan* was wrong. The question can be asked: How can *Tornillo* and *Red Lion* be right insofar as journalistic latitude and any mandated right of access for ideas are in conflict?

The decision in *Tornillo* came on June 25, 1974. Two days later the FCC issued its long-awaited report[39] on its broad-ranging inquiry, begun in mid-1971, into the efficacy of the Fairness Doctrine and related public interest policies. Concerning access and the continued viability of the Fairness Doctrine, the Commission said:

> Our studies during the course of this inquiry have not disclosed any scheme of government-dictated access which we consider "both practicable and desirable." We believe, to the contrary, that the public's interest in free expression through broadcasting will best be served and promoted through continued reliance on the Fairness Doctrine which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion. This system is far from perfect. However, in our judgment, it does represent the most appropriate accommodation of the various First Amendment interests involved, and provides for maximum public enlightenment on issues of significance with a minimum of governmental intrusion into the journalistic process.
>
> In our opinion, this Commission would not be justified in dictating the establishment of a system of access to particular spokesmen on either a free or a paid basis. If the access were free, the government would inevitably be drawn into the role of deciding who should be allowed on the air and when. This governmental involvement in the day-to-day processes of broadcast journalism would, we believe, be antithetical to this country's tradition of uninhibited dissemination of ideas. With regard to the sugges-

> tions that we establish a system of paid access, we believe that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth," . . . or wherein "money alone determines what issues are to be aired, and in what format," . . .[40]

Quixotically, the FCC reaffirms its faith in a far-from-perfect Fairness Doctrine because government-mandated access to the broadcast medium would infringe upon the journalistic process and therefore be unconstitutional, yet the Fairness Doctrine can be applied by the Commission to broadcast news to require editors to do something which they might not wish to do. Somehow, the latter action does not constitute unconstitutional infringement on the journalistic function.

Perhaps the FCC is on sounder ground in its approach to access being taken in CATV rulemaking. In connection with requiring CATV systems to provide four access channels (public, educational, governmental and leased), the Commission said: "From watching the development of our access program, we are now, more than ever, convinced of the propriety and need for such a program. Access is still in its infancy and it has a long, hard struggle ahead before it becomes an accepted part of the communication process in this country."[41]

13.5 Summary. The proponents of access to the media saw in the Supreme Court's *Red Lion* decision a means of making all media—not just radio and television—more receptive to demands for access. They construed the First Amendment as protecting the public's right of access to ideas and experiences—a view not inconsistent with some of the language used by Justice White in *Red Lion*. Just how a legislature or court could require access—even limited access—without unconstitutionally weakening freedom of press remained hotly debated until the Supreme Court in *Tornillo* unanimously declared Florida's limited right of reply statute to be unconstitutional because the government (by means of the statute) interfered with editorial judgment. In *Tornillo*, the Court conspicuously did not mention *Red Lion*, thereby leaving unanswered questions about the impact of the Fairness Doctrine on the editorial judgment of broadcast journalists. *Tornillo* makes it clear that there can be no forced access into the print medium, at least by the method used in Florida. Whether some way can be found to preserve the necessary freedom of editorial judgment and still make the print medium accept and publish that

which editors chose not to publish is unanswerable—but unlikely—at this time. Also unanswered: Is *Tornillo* a media case or just a print medium case?

Concerning access to public facilities, the test is whether the forum being provided is a First Amendment forum. If it is not, and the decision to deny access is not capricious and conforms with reasonable governmental objectives, then no First Amendment right seemingly is violated by denial of access.

Finally, one action which commends itself to media owners and professional journalism groups alike is initiative within the communications industry to provide the public with opportunities to air different viewpoints or to correct misstatements of fact or bias. The *New York Times* has a right-of-reply policy whenever a person is criticized in a *Times*' story. More recently, the Field Newspapers (*Chicago Sun-Times* and *Chicago Daily News*) adopted a Code of Professional Standards in which the problem of a growing credibility gap between newspapers and the public is recognized, in part, by the inclusion of a limited right of access. For example, under "fair play" simultaneous rebuttal is offered to any person or organization whose reputation is attacked and every effort is to be made to present all sides of a controversial issue. In terms of "public access," the code states:

> We recognize and respect the right of the public to comment on public issues or material appearing in our pages. It will be our policy in each newspaper to provide a regular department for such commentary or correction, subject only to limitations of relevancy and space.
>
> We want a dialogue with our readers, for it is their newspaper as well as ours. It shall be the policy of our editors and their staffs to encourage the maximum amount of public participation in bringing all points of view before our readers.

Although falling short of what some access-minded spokesmen would like, such policy declarations are a step forward in bridging the apparently widening gap between the public and an all-too-aloof or complacent media.

CHAP. XIII—PASS IN REVIEW

1. In the opinion of Prof. Barron, which danger is greatest to our society: Media-imposed censorship or government-imposed censorship?

If your answer is correct, then what rejoinder can you make to Prof. Barron's expressed concern? Play the role of Devil's Advocate.

2. Viewed from Prof. Barron's position, answer the question: Access to the media for what or for whom?

3. The majority of the U.S. Supreme Court in *Lehman v. City of Shaker Heights* gave three principal reasons for ruling against forced access for Lehman to card space in the city-owned transit system. Name two of the reasons.

4. What was the principal reason why the Supreme Court, in its unanimous decision in *Tornillo*, invalidated the Florida right-of-reply statute?

CHAP. XIII—ANSWERS TO REVIEW

1. Media-imposed censorship. One rejoinder that can be made is that a diversity of media exists—more than 1,700 daily newspapers, more than 8,000 operating radio and TV stations, thousands of weekly newspapers and magazines, underground newspapers, CATV, etc. Also, who will decide what is to be published if forced access proponents win their argument in court? Government bureaucrats? Judges? Legislators? Do these types of people have the qualifications and/or experience to make such judgments?

2. Access to the media for ideas and experiences. Citizens have a right to be informed of ideas that will help them perform better in their role as citizen—an idea espoused by Prof. Meiklejohn when he argued that the First Amendment absolutely protects "political speech." *See* Chap. II, pp. 20–21, for elaboration of the Meiklejohn theory of the First Amendment.

3. Advertising space was not a First Amendment forum because the transit system rejected all political advertising, not just Lehman's; passengers are a "captive" audience and deserving of more "protection," unlike members of radio or TV audiences who can "switch off" if they don't wish to listen or see something; and, third, the government rule was not capricious, arbitrary or invidious.

4. The statute violated the First Amendment because of its intrusion into the function of editors.

[1] "Access to the Press—A New First Amendment Right," 80 *Harvard Law Review* 1641–42 (1967). Copyright 1967 by The Harvard Law Review Association.

[2] *Id.*, pp. 1675–76. See Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, pp. 25–28 (1960).

[3] Op. cit., note 1, p. 1667.

[4] Address on "Access—the Only Choice for the Media" at the 8th Annual

Lecture on Law and the Free Society, Dec. 10, 1969, at the University of Texas School of Law, as reprinted in 48 *Texas Law Review* 766, 769–71 (1970).

5 *FoI Digest*, Vol. 10, No. 3, September-October, 1968, p. 1.

6 *FoI Digest*, Vol. 11, No. 3, September-October, 1969, p. 4.

7 Op. cit., note 27, Chap. XII.

8 *The System of Free Expression*, pp. 670–71 (1970). Cf., Professor Emerson's advocacy of access to the broadcast medium, Chap. XII, p. 341. However, he would not extend access to the print medium for the reason indicated above.

9 "Right of Access to Mass Media—Government Obligation to Enforce First Amendment?", given as an address at the eighth annual lecture on Law and the Free Society, Dec. 10, 1969. Reprinted in *Texas Law Review*, Vol. 48, p. 785.

10 Op. cit., *see* Chap. IV, pp. 74–78.

11 31 Ohio Dec. 54

12 Op. cit., 326 U.S. 1 (1945).

13 326 U.S. at 19.

14 177 So.2d 704, 706.

15 Op. cit., 359 F.2d 994, 1003 (1966).

16 380 Mich. 485, 157 N.W.2d 241 (1968).

17 307 F.Supp. 422 (1969).

18 435 F.2d 470 (7th Circuit, 1970); certiorari denied, 402 U.S. 973 (1971).

19 Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Circuit, 1971).

20 Op. cit., *Texas Law Review*, Vol. 48, pp. 774–75 (1970).

21 Note that the Supreme Court had not yet ruled in *Rosenbloom;* thus, private citizens were not included by Barron because they were not yet included under the *Times-Sullivan* "malice" standard.

22 Op. cit., Chap. II, note 44.

23 298 U.S. 418, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

24 Cf. this view with that of the U.S. Court of Appeals (District of Columbia Circuit) in Banzhaf v. FCC (*see* Chap. XIV, pp. 381-83). Speaking for a three-judge panel, Chief Judge Bazelon, in upholding an FCC determination that the electronics medium must permit access for anti-cigarette messages to counter cigarette commercials, differentiated between radio-television and the print medium in part on the basis that radio and television users could not easily escape from commercial messages.

25 Op. cit., Chap. X, note 44.

26 *See* Chap. IV, pp. 69–70.

27 68 Calif. 2d 51, 434 P.2d 982, 64 Calif. Rept. 430 (1967).

28 274 F.Supp. 438 (1967).

29 Florida Statutes Annotated, Sec. 770.02; Mississippi Code Annotated, Sec. 3175 (1942); Wisconsin Statutes, Sec. 895.05(2) (1961).

30 A review of the Supreme Court term, "Freedom of Speech, Press, and Association," Vol. 85, No. 1, November, 1971, p. 227. Copyright 1971 by The Harvard Law Review Association.

31 Op. cit., note 1, p. 1657.

32 Op. cit., note 4, pp. 773–74.

33 Tornillo v. Miami Herald Publishing Co., 287 So. 2d 78, 82–86. Rehearing denied Oct. 10, 1973.

34 Cf. with his view in *United Church of Christ*, p. 360–61, this chapter.

35 94 S.Ct. 2831 (1974).

36 Op. cit., 326 U.S. 1, 20.

37 Op. cit., 408 U.S. 665, 681 (1972). Also, for fuller discussion of this and the companion cases, *see* pp. 202–05, Chap. VIII.

38 *See* Chap. X, pp. 257–60, for fuller discussion.

[39] "Fairness Doctrine and Public Interest Standards—Handling of Public Issues," *Federal Register*, Vol. 39, No. 139, July 18, 1972, pp. 26372+.
[40] *Id.*, p. 26383.
[41] "Cable Television—Clarification of Rules and Notice of Proposed Rulemaking," *Federal Register*, Vol. 39, No. 78, April 22, 1974, p. 14289.

RADIO & TV: ADVERTISING, FAIRNESS DOCTRINE AND ACCESS

XIV

Issues pertaining to advertising have contributed in unexpected ways to unusual developments in mass communications law. Advertising, considered "commercial speech" in most instances and therefore not qualified for the full protection of the First Amendment (if any at all), has been subjected to a doctrine which originally was applied to news or news-type information, or to editorializing by broadcast licensees. The doctrine is the fairness obligation that affirmatively rests with licensees when they're airing controversial issues of public importance. The companion of fairness—access—also has reared its "ugly" head, if viewed from the standpoint of advertisers.

Before the FCC expressed itself definitively in 1949 on the Fairness Doctrine, there had been only one application of the doctrine to an advertising situation. In a 1946 case, the FCC made a narrow application of fairness to the question of whether a station, which advertised alcoholic beverages, could refuse to accept counter-advertising from a temperance group. The FCC did not deny renewal of the station's license for its failure to provide paid time for the advocates of temperance, but it did provoke the fairness question by saying that the "advertising of alcoholic beverages can raise substantial issues of public importance."[1]

14.1 Cigarette advertising and Fairness Doctrine. The issue of the application of the Fairness Doctrine to commercial advertising was not squarely joined until a young New York attorney, John P. Banzhaf III, complained to the FCC in 1967 that station WCBS-TV in New York had refused to give him proportional time to rebut cigarette commercials. The station replied that the Fairness Doctrine did not apply to product commercials. Banzhaf, in filing a complaint with the FCC, argued that WCBS-TV was under obligation to "affirmatively endeavor to make its . . . facilities available for the expression of viewpoints held by responsible elements" primarily because "portrayal of youthful and virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seeks to create the impression . . . that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life."

The FCC, in considering the case, was mindful of the agitation and concern expressed about the dangers of cigarette smoking, including

a 1964 report by a U.S. Surgeon General's committee which concluded that cigarette smoking contributed substantially to mortality from certain specific diseases and to the overall death rate and termed it "a health hazard of sufficient importance . . . to warrant remedial action." Additionally, the FTC had announced a proposed regulation to require warnings on cigarette packs to take effect Jan. 1, 1965, plus the requirement of such warnings in all advertising beginning in July, 1965, if the package requirement and voluntary reform did not alter the situation. But the House Commerce Committee began hearings on proposed legislation and prevailed upon the FTC to hold up implementation of the rules. The result was the Cigarette Labeling and Advertising Act which went into effect in 1968.

Also, the National Association of Broadcasters' Radio and Television Codes were modified in 1964 to reflect increasing public pressure on such advertising. The TV Code was modified to include this statement: "The advertising of cigarettes should not be presented in such a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country."

On June 2, 1967, the FCC, in an historic ruling, held that the Fairness Doctrine was applicable to cigarette commercials, stating: "A station that carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker's health."[2]

The FCC, in formulating this decision, relied to some extent on the U.S. Supreme Court ruling in 1942 in *Valentine v. Chrestensen* that product advertising has a weaker claim, if any at all, to First Amendment protection.[3]

The FCC was careful to point out that its ruling applied only to cigarette commercials, that "equal time" for responding to such advertising was not necessary, and that if WCBS-TV could not obtain paid sponsorship for anti-smoking messages then these would have to be provided without charge in accordance with the *Cullman* rule.[4] With considerable foresight, Commissioner Lee Loevinger, although concurring in the 6-1 opinion, doubted that the FCC would be able to rationally distinguish *Banzhaf* from future cases involving hazards to health and life. Commissioner Nicholas Johnson also concurred, but pointed out that he could see no valid reason for excluding other advertising from the "reach" of the Fairness Doctrine. Such adver-

tising should face the same considerations of fairness as any other type of advocacy, he contended.

Although the FCC ruling hit the advertising and broadcasting industries like a bombshell, Banzhaf was not satisfied. On Sept. 7, 1967, he appealed to the U.S. Court of Appeals, District of Columbia Circuit, asking that the FCC's wording—"significant amount of time"—be changed to "substantially equal" time. The NAB and Tobacco Institute also instigated legal action to have the Commission's ruling set aside as unconstitutional.

The appellate court's three-judge panel upheld the FCC's order,[5] but since the Supreme Court had not yet ruled on the constitutionality of the Fairness Doctrine, the appellate court related the danger of smoking to public health and declared:

> Thus as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. . . . In view of the potentially grave consequences of a decision to [smoke] . . ., we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard but that it be heard repeatedly.

On the issue of the First Amendment and the limitation it places on the FCC or any other regulatory agency, the court had considerable difficulty, stating that this issue had to be decided on a case by case basis and that in this particular instance the public health concern sustained the FCC ruling.

In the opinion given by Chief Judge Bazelon, the court said:

> Intervenors NBC, *et al.* argue cogently that the public interest standard cannot constitutionally now include any component of program content. They say the First Amendment obviously would not tolerate administrative supervision of the material published by the newspaper press. The radio press was initially treated differently only because (1) peculiar technical factors require a policeman to prevent interference between different stations, and (2) the then available broadcasting channels were so limited in number that the Commission could hardly ignore all considerations of the nature and quality of programming in choosing among applicants. The first reason does not justify supervision of content, they say, and the sec-

ond, if ever sufficient, is an anachronism now that the available channels often outnumber the applicants and the broadcasting stations serving most areas far outnumber the newspapers. Accordingly, in their view, the First Amendment now limits the Commission's licensing discretion to technological considerations; the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market.

This argument has considerable force. First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of some technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege." It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

On the other hand, we cannot solve such complex questions by replacing one set of shibboleths with another. The First Amendment is unmistakably hostile to governmental controls over the content of the press, but that is not to say that it necessarily bars every regulation which in any way affects what newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets. Moreover, the broadcasting medium may be different in kind from publishing in a way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened

> to, but it may reasonably be thought greater than the impact of the written word.
>
> These considerations are at least sufficient to convince us that we are not obliged simply to "invalidate the entire course of broadcasting development" with no inquiry into the particulars of the ruling before us. Rather, we think the proper approach to the difficult First Amendment issues petitioners raise is to consider them in the context of individual regulatory policies and practices on a case-by-case basis. On this approach, since the narrow public health power which supports the cigarette ruling does not "sweep . . . widely and . . . indiscriminately" across protected freedoms, the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press.[6]

The court reached that conclusion because (1) the ruling did not ban any speech; (2) product advertising is not as rigorously protected as other speech; (3) the FCC ruling increased, rather than decreased, information; and (4) the First Amendment stood to gain more than it would lose by any decrease in cigarette advertising. Thus, the court agreed with the FCC that stations carrying cigarette advertising had a public interest obligation to carry anti-smoking information, and it upheld both the FCC ruling and the Cigarette Labeling Act of 1965.

The Tobacco Institute and the National Broadcasting Co. (NBC) appealed, but the Supreme Court denied certiorari on Oct. 13, 1969.[7] Meanwhile, the FCC announced in February, 1969, that it would consider a rule totally banning cigarette advertising from radio and TV unless Congress intervened. Opposition from the NAB, Tobacco Institute and other special interest groups was intense (in 1970 the $11-billion tobacco industry spent $205 million for TV advertising and $12.4 million for radio advertising). Nevertheless, the regulatory agency decided to ban such advertising after Jan. 1, 1971. Congress then moved into the fray and passed the Public Health Cigarette Smoking Act of 1969 which prohibited cigarette and "little cigar" advertising in the broadcast medium on the date set by the FCC. This action led to additional court tests.

NAB filed suit as did owners of six stations. NAB claimed that the ban discriminated against broadcasting and infringed upon freedom

of speech. Its purpose in bringing the suit, said NAB, was "to affirm the right of broadcasters to carry advertisements of any legal product, particularly if such advertising is permitted in competing media, such as newspapers and magazines."

On Oct. 14, 1971, three judges sitting as a panel of the U.S. District Court in the District of Columbia upheld the constitutionality of the law, with sharp dissent from Circuit Court Judge J. Skelly Wright, sitting by assignment.[8]

In the majority opinion, Judge Oliver Gasch cited a series of precedents, including *Valentine v. Chrestensen* and *Banzhaf*, to declare that product advertising "is less vigorously protected than other forms of speech," and that the unique characteristics of electronic communication make it "especially subject to regulation in the public interest." The advertising ban, said the two judges, does not prevent stations from speaking out on the virtues or harm of smoking; rather, they "have only lost an ability to collect revenue . . . for broadcasting their commercial messages."

In dealing with the sticky problem of upholding the ban in terms of the broadcast, but not the print, medium, Judge Gasch relied, in part, upon the rationale that broadcast advertising was the "most persuasive" type—a theme similar to that developed by Chief Judge Bazelon in his 1968 *Banzhaf* opinion. But the major reasons were: (1) public ownership of the airwaves, as contrasted with the privately owned print medium (an argument which had failed to impress Judge Bazelon), and (2) the requirement that licensees must operate in the public interest.

In dissenting, Judge Wright said:

> It would be difficult to argue that there are many who mourn for the Marlboro man or miss the ungrammatical Winston jingles. Most television viewers no doubt agree that cigarette advertising represents the carping hucksterism of Madison Avenue at its very worst. Moreover, overwhelming scientific evidence makes it plain that the Salem girl was in fact a seductive merchant of death—that the real "Marlboro Country" is the graveyard.

But the Constitution, he argued, protects more than just "healthy" speech.[9]

Both NAB and the station owners appealed and on March 27, 1972, the Supreme Court summarily affirmed the legality of the ban in a 7-2 decision with only Justices Douglas and Brennan indicating that the Court should probably have assumed jurisdiction for a full-scale review.[10]

14.2 Results of the ban on cigarette advertising on TV-radio. Without attempting to untangle difficult cause-effect relationships, some after-the-ban results serve to enflame protagonists on both sides of the question: "Does advertising pay?" After the ban had been in effect for one year the tobacco industry reported that cigarette consumption increased by 8 billion units over the previous year (1970), reaching 529 billion units. Sales continued upward, reaching 584.7 billion units in 1973—up 4 per cent from 1972. Per capita consumption also went up in 1971—the first time since 1966, reaching 3,982 units compared with 3,969 in 1970. Advertising expenditures by domestic cigarette manufacturers totaled $247.5 million in 1973, $237.4 million in 1972, and $251.6 million in 1971, compared with $314.7 million in 1970 (the latter figure slightly more than 8½ per cent of the approximately $3.6 billion spent for all broadcast advertising in 1970). About $133 million more was spent in 1971 than in 1970 for cigarette advertising in newspapers, magazines and billboards, but the total decline in advertising expenditures amounted to 28 per cent.

The conclusion drawn by some from such results was that the ban did not hurt cigarette sales.[11] In fact, on the basis of such data, the FTC asked Congress in July, 1972, to enact legislation requiring a stronger warning on cigarette packages and in all advertising, plus notice on each package and in all advertising of the tar and nicotine content of each cigarette.[12] Congress responded by passing such legislation.

14.3 Fairness Doctrine and other advertising. In 1967, Prof. Louis Jaffe of Harvard University Law School was asked if the FCC had a sound legal basis for applying the Fairness Doctrine to cigarette advertising and, if so, could the doctrine be applied to all advertising, especially that associated with possibly harmful products, such as some non-prescription drugs (including soporifics, or sleep-inducing drugs). Prior to any court rulings on the application of the Fairness Doctrine to cigarette advertising, Prof. Jaffe replied:

> This question assumes that the Fairness Doctrine itself has a sound legal basis, which in my opinion it does. Congress has recognized that the broadcaster has an obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Whether this requires the broadcaster to provide free time is arguable. The FCC seems to assume that it does regardless of the capacity to pay at least in a case where the character and/or views of the person requesting time has

> been attacked. Does the Fairness Doctrine unconstitutionally restrict free speech? It is questionable whether a newspaper could be constitutionally required as a condition of expression to open its columns to rebuttal, though when the paper has attacked the character of a person, the requirement would probably be upheld. TV and radio, however, are limited outlets under the control of a limited number of persons and the Court might allow restrictions which could not be validly imposed on the written media. And because this grant of monopolistic control is so valuable, the Court might tolerate a financial levy in the form of the time for rebuttal. If these hurdles are overcome, I see no reason why the doctrine cannot validly be applied to the question of cigarette smoking *whether advertised or not* since the question is "an issue of public importance" for the discussion of which the broadcaster is required to provide time. The same would go for alcohol, soporifics insofar as they involved an "issue of public importance."[13]

When asked about the application of the doctrine to guns and autos advertised on television, he replied:

> The meaning of the Commission's cigarette ruling is that cigarette advertising in the context of the controversy presently raging is, impliedly if not expressly, the taking of a position. Whether the advertisement of a gun or an automobile or its use in a program is subject to the Fairness Doctrine involves simply application of the general principle.
>
> Thus, we would ask if there is a controversy about the use of guns or automobiles? Does the broadcast in question take a position in that controversy? If so, the broadcaster exercising his discretion as to time, manner, etc., is obligated to present other sides of the controversy.[14]

It took a reluctant FCC about four years to approach the view expressed by Jaffe, arriving there by stages and pushed along the way by the U.S. Court of Appeals in the District of Columbia.

Initially, in *Banzhaf*, the Commission stressed that its holding was limited "to this product—cigarettes." In a lengthy memorandum in 1967, it disclaimed any intention of implying by its "limited" ruling on cigarette advertising that an appeal "by a vocal minority will suffice to classify advertising of a product as controversial and of public importance."

Some idea of the impact of *Banzhaf* can be gained from the following FCC and court decisions:

A. In terms of general product advertising, a case early in 1970 would come back to haunt the FCC. On Feb. 6, 1970, Friends of the Earth (FOE) wrote to WNBC-TV in New York to complain about advertisements promoting more powerful motors in automobiles and high-test gasoline. This national organization for environmental protection complained that these products contributed to air pollution and therefore posed a danger to public health. FOE contended that the *Banzhaf* ruling could not be limited to cigarettes, but was applicable to any product whose "normal use has been found by congressional and other governmental actions to pose such serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance. . . ." It asked that the station undertake to inform its listening public of the other side of the controversial matter. The station replied that (1) *Banzhaf* was limited to cigarette advertising and imposed no Fairness Doctrine obligation concerning other product advertising; (2) the advertising complained of did not generate a controversial issue of public importance; and (3) the licensee already had broadcast information on this particular problem and therefore had met any obligation to the public that might have arisen.

FOE then lodged a complaint with the FCC, but the Commission dismissed it on Aug. 5, 1970, citing several reasons, among them (1) the uniqueness of the *Banzhaf* ruling; (2) the belief that an extension of the cigarette ruling to product advertising generally would undermine the broadcasting system based, as it is, on revenue from such commercials and that this would not be in the public interest; and (3) the complexity of the air pollution problem and the expertise that would be required to deal with it compared with the relative simplicity of the FCC's approach to cigarettes.[15]

Commissioner Johnson dissented, claiming that the majority's logic was faulty in contending that cigarettes somehow were unique. "The question," he said, "is not whether pollution of the lung differs from pollution of the air, or whether the products are manufactured or used differently, but whether advocacy of their use raises an issue of controversy and public importance sufficient to involve the Fairness Doctrine."[16]

He continued:

> I cannot believe that a majority finds it more important to preserve a commercial broadcast system than *life itself* on our planet.
>
> * * *

> The Commission turns aside the pleas of the Friends of the Earth . . . [and others] who have filed some of the more thoughtful and impressively documented petitions ever received by this Commission. These groups see at stake here nothing less than the quality of life in contemporary America. . . . It is sad and somewhat disheartening that this Commission holds dearer the quantity of commercial profits than the quality of human life itself.

FOE appealed and the U.S. Court of Appeals subsequently reversed the FCC's ruling. Before then, the Commission already had begun to modify its view.

B. On May 12, 1971, the FCC again refused to extend the doctrine to general product advertising. In *National Broadcasting Co., et al. (Chevron Decision)*,[17] a complaint had been filed against commercials which claimed that non-leaded gasoline would minimize air pollution. The FCC reaffirmed its earlier position that "it would ill suit the purposes of the Fairness Doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility." But in an important footnote, the Commission clarified how a product commercial might invoke Fairness Doctrine requirements:

> This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play.[18]

C. Although unlikely that product commercial advertising would be as explicitly controversial as the examples cited by the FCC, nonetheless the Commission's statement represented a shift from its "uniqueness" ruling in *Banzhaf* and a step toward Commissioner Johnson's dissenting view in *FOE*. But the difficulties faced by the Commission in devising a general policy that would take into account conflicting interests led to an announcement on June 11, 1971, of a "Notice of Inquiry" into Fairness Doctrine and public interest standards.[19] As the Commission stated in that Notice:

> If our policies are sound, they should have stood the test of time and application. If they are not sound—if they

unreasonably restrict the journalistic function of broadcasters or permit broadcasters to unreasonably restrict access—the corrective act is called for.

FCC Commission Chairman Dean Burch told a Senate subcommittee:[20]

> We instituted this comprehensive review . . . in response to the new and complex issues, many of them having to do with access and the implications of commercial messages, that have been arising in recent years. This is the first such overview in more than 20 years, and our objective quite simply is to measure the doctrine's efficacy under present Commission policies and procedures—to find out if it positively encourages the airing of controversial issues of public importance, and if not why not.
>
> We divided the inquiry into four parts. First, there is the Fairness Doctrine generally in which comments were invited on the operation of the commission's personal attack and political editorializing rules, on the *Cullman* rule, and on the extent to which the doctrine has had the practical effect of fulfilling the high standards of *Red Lion*. Second, we are inquiring as to whether free or paid access to the media should be permitted for the discussion of public issues, directly or indirectly raised by the presentation of product commercials. Third, we asked for comment on whether there is a right of access to the broadcast media for those wishing to express views on controversial issues—and comments on this aspect have been delayed somewhat pending litigation in the *BEM* case.

In that part of the Notice of Inquiry—concerned specifically with "Access to the Broadcast Media as a Result of Carriage of Product Commercials," the FCC cited a 1970 U.S. Court of Appeals decision in *Retail Store Employees Union v. FCC*,[21] and the issues raised by that case:

> . . . This aspect of the inquiry is prompted by a recent court decision and several complaints in which very broad-ranging policy questions appeared to be raised—questions that reach beyond the concrete situations involved. Thus, we deal first with the policy questions raised in the opinion of the Court of Appeals for the District of Columbia Circuit in *Retail Store Employees Union*. . . . We refer specifically to the issues raised in Part III of the opinion. The factual setting is simply stated: a department store

> (Hill's) had access to a station's facilities (WREO) to present frequent advertisements of the standard commercial nature. . . . The . . . union . . . decided on a strike and boycott to gain its bargaining objectives. It sought to support the boycott by purchasing time for one-minute announcements stating that there was a strike at Hill's and urging listeners to respect the picket lines. These facts are sufficient to pose the basic issue: namely, does the union have a right to purchase time for its spots in these circumstances?
>
> . . . [T]he court did not resolve the above issue. But it did indicate that the issue " . . . deserves fuller analysis than the Commission has seen fit to give it". . . .

The FCC then referred to the two issues cited by the court:

1. That advertising, such as the store urging people to buy products during the strike, might implicitly take a position even though no mention is made of the strike or boycott.
2. That there is an analogy between the FCC's cigarette advertising ruling and congressional policy requiring "even-handedness in labor-management relations," and that the latter might enter the considerations because the union's attempt to buy air time and the store's commercials might be viewed as "weapons of 'economic warfare.' "

The FCC further observed:

> Two of the court's basic considerations—that product commercials can carry implicit messages and that pertinent national policies should be taken into account—have very wide applications indeed. For example, we might consider the national policy of avoiding environmental pollution. . . . As we indicated . . . [in the *FOE* decision], a great number of products commonly advertised over the broadcast media have pollution consequences: cars because of their gasoline engines; gasoline itself; airplanes; detergents; and, indeed, every product that is normally packaged in a non-biodegradable container.
>
> * * *
>
> We indicated . . . [in the *Chevron* decision] the desirability of an overview of the policy issues involved, and we here invite interested parties to address such issues as the following:
>
> (i) Ought there be some public interest responsibility beyond that of fairness to carry material opposing or

arguing the substance of product commercials? If so, should time be afforded free or only on a paid basis?

(ii) What account should be taken of the court's observation (in *Retail Store*) that spot announcements may not add substantially to public knowledge and, on the other hand, that repetition is a significant factor to be considered?

(iii) What should or must be the licensee's area of discretion in this entire matter—and is there some workable standard for distinguishing various categories of commercials, some of which would give rise to fairness or public interest duties and some of which would not?

(iv) Finally, what would be the predictable effect of any new policy adopted here on the carriage of product advertisements and thus on the continued growth and health of the commercial broadcasting system?

The hearings resulted in the submission of various briefs, including one by Howard Bell, American Advertising Federation president, which warned that extension of the Fairness Doctrine to product commercials "holds the potential for eroding away the commercial system of broadcasting as presently constituted." And then, taking a position later endorsed by the director of the Office of Telecommunications Policy, Bell urged the abolition of the doctrine in favor of broadcasters being judged under the public interest standard at the time of license renewal, rather than "attempting to legislate fairness under a policy that presents more uncertainty and confusion than solutions and benefits." AAF then urged the policy that the FCC followed prior to and in its *Chevron* decision: " . . . [T]hat no Fairness Doctrine obligations arise from the airing of commercials, with the *caveat* that any advertiser who undertakes to treat a matter of controversy in his commercial removes his message out of the general rule and invites 'fairness' treatment."

This policy would be adhered to following the lengthy study and hearings into various aspects of the Fairness Doctrine, including application of the doctrine to commercials. The policy continuation, announced in mid-1974, came in response to a brief filed by the FTC near the conclusion of the FCC hearings in March, 1972. In the brief, the FTC unanimously proposed that the FCC adopt a counter-advertising rule which would require broadcasters to set aside a stipulated amount of time on a free and regular basis so advertising claims could be contested by complainants. The FTC said that counter-advertising would be an appropriate means of overcoming some shortcomings in regulatory tools and would be a suitable

approach to some failings of broadcast advertising which were beyond FTC's capacity to cope with. The FTC pointed out that certain advertising was particularly susceptible to, and particularly appropriate for, counter-advertising because of characteristics that allowed for challenge. It listed four categories and gave examples:[22]

1. *Advertising asserting claims of product performance or characteristics that explicitly raise controversial issues of current public importance.* The claim that products contribute to solving ecological problems or that advertisers are making special efforts to improve the environment.

2. *Advertising stressing broad recurrent themes, affecting the purchase decision in a manner that implicitly raises controversial issues of current public importance.* Food ads which might encourage poor nutritional habits, or detergent ads which might be related to water pollution.

3. *Advertising claims based on scientific premises which are controversial.* Different tests, studies or claims not fully validated.

4. *Advertising that is silent about negative aspects of a product.* Drugs which are priced substantially above equivalent products.

Counter-advertising on a quid pro quo basis would not be essential in terms of 30- or 60-second spot rebuttals; rather, the FTC suggested a block of time, such as five minutes during prime time, or 30 minutes at some less desirable time. Although deferring to the FCC concerning implementation of the plan, the FTC urged that the following points be embodied in any final decision:

1. Adoption of rules containing the above guidelines and imposing upon licensees an "affirmative obligation to promote effective use of this expanded right of access."

2. Open availability of all commercial time for anyone willing to pay the specified rate regardless of whether the party seeking to buy the time wishes to advertise or counter-advertise.

3. Licensees should provide a substantial amount of free air time for persons or groups that wish to respond to advertising but lack funds. The FTC commented: " . . . [I]t seems manifest that licensees should not limit access, for discussions of issues raised by product commercials, to those capable of meeting a price determined by the profitability of presenting one side of the issues involved. Providing such free access would greatly enhance the probability that advertising, a process largely made possible by licensees themselves, would fully and fairly contribute to a healthy American marketplace."

There have been many reactions to the FTC proposal, including the following comments of FCC Chairman Burch during questioning

by Sen. Howard H. Baker Jr. of Tennessee at a hearing conducted by the Communications Subcommittee:[23]

> Senator Baker. As I understand it the main thrust of the FTC statement was to the effect that the agency did not have the staff and the competence to judge all of the fairness questions involved and that as a result of the shortcomings of the FTC's regulatory tools they suggested instead that the FCC require counter-advertising.
>
> Now, with that in view, the next . . . question is, what is your situation as far as staff requirements . . .?
>
> Mr. Burch. Well, our staffing requirements are frankly very severe, not only in the counter-advertising field, . . . but . . . all the way.
>
> I think perhaps the FTC filing might be very efficacious from their point of view. What it would do to us is something else entirely. That is part of our inquiry. . . .
>
> We certainly will consider the FTC filing. They raise some very serious and fundamental questions as regards the nature of a commercial broadcasting system. What sort of rules and regulations you have on access, whether it is paid or free, who prepares the programs, how long do they last. . . . And I am not suggesting that they are just . . . pushing their work over to us. They are not. They consider this complementary to the work they do. But whatever problems it solves for them may raise even more severe problems for us.
>
> Senator Baker. * * * What I am driving at . . . is a statement by you as to whether or not counter-advertising or some similar technique administered by the FCC is a necessary adjunct to the mandate of the FTC or can it be done otherwise.
>
> Mr. Burch. I think it can be done a number of ways. I am frankly not that familiar with FTC's problems, either their tools or legislative authority. But we have not at the Commission [FCC] . . . moved into the counter-advertising field. . . . * * * We have relied basically on the fact that broadcasters are not common carriers [like telephone, telegraph], and until the *BEM* case came out, there had never been established a First Amendment right of access, and where that case is going to lead us I do not have the vaguest idea right at the moment. * * *

A discussion ensued concerning fairness and right of access in regard to environmental or ecological issues generated by commercials, and Commissioner Johnson responded to a question.

> Mr. Johnson. I think the problem . . . is that there are a large number of issues before our country right now that everybody would acknowledge to be terribly important, that are very heavily influenced by commercial advertising. Take the issue of mass transit. The advertising for the automobile simply has no counterpart. . . . The broadcaster is disinclined to present points of view that are in contrast to those of his heavy advertiser for a number of reasons. As a result a number of these issues will not be discussed in our society fully and fairly unless there is counter-advertising.
>
> I can see that this would raise some ideological problems for many people at the FCC. But I do not think those problems are principally manpower problems. I have commented on the inadequacy of FCC manpower . . . , but in this particular instance it is not a case of taking a task that is now being performed by the FTC and handing it over to the FCC to perform; it is simply a matter of the FCC issuing a rule saying that counter-advertising must be permitted on the air.
>
> . . . [T]here will be some controversies like Fairness Doctrine controversies. I do not deny that. But the FCC will not be preparing the counter-ads. The FCC will not be processing each ad. The FCC will not be prescribing the ads. The FCC will not be caught up in the day-to-day administration of the system. We will simply be functioning in the same kind of quasi-judicial way we do now with the Fairness Doctrine and complaints under that doctrine.
>
> Whether or not we ought to do this is an ideological issue. I do not really think it is a manpower issue.
>
> Senator Baker. But for a frame of reference how much manpower would be required to undertake this job?
>
> Mr. Johnson. It takes somebody a couple of days to draft an order saying that the FCC is going to do this; it then takes whatever time the commissioners want to spend discussing it, 15 minutes to an hour; it then takes a vote; it then takes the printing up of the document and the distribution of it. * * *

> It is not the same as the FTC filing suits and holding hearings and going through lawsuits and litigating false and misleading issues. It is not that workload.
>
> Senator Baker. What happens to the workload after the decision has been made . . . ?
>
> Mr. Johnson. I would contend probably less than what now happens under the Fairness Doctrine which encompasses all of these issues, and they are processed by a handful of people at the most in the Complaints and Compliance Branch with the Broadcast Bureau. They handle some 60,000 pieces of correspondence a year and I cannot imagine that this is going to add that much more to that current workload. . . .
>
> Mr. Burch. Senator Baker, I would like to just comment that I really do think it is going to take longer than 15 minutes . . . [for] the Commission to make such a major decision. I mean, that simply is unrealistic. It might be easy for Commissioner Johnson to do it in 15 minutes.

In further testimony, Chairman Burch indicated that he understood the FTC proposal as one which would "acknowledge the fact that all advertising is somehow controversial, and that the only real way to get at that problem is to have access on a regular basis, either free or paid for," upon complaint of a person or group that applied for counter-advertising time. He then told the subcommittee:

> In the past, the only question about a commercial was whether it was true or false. If it were false, it became an FTC matter. With the *Banzhaf* case . . . , the Fairness Doctrine was extended to commercial advertising, and from that we have proceeded to the point now whether other types of commercials may raise controversial issues, and under the FTC proposal, presumably all commercials raise controversial issues, which is a rather rapid extension of that which we said we would not extend.

Among the first to express opposition was director Whitehead of the then year-old White House Office of Telecommunications Policy. He told the Senate Constitutional Rights Subcommittee that the proposal was evidence of a further tendency "to discriminate against the broadcast industry." Following this Feb. 2, 1972, statement, Whitehead went before the Colorado Broadcasters Association and declared:

> The . . . [FTC] wants to shape the Fairness Doctrine

> into a new tool of advertising regulation and thereby expand the doctrine's already chaotic enforcement mechanism far beyond what was originally intended and what is now appropriate."[24]

Then on April 10, 1972, at the NAB's national convention in Chicago, Whitehead combined the counter-ad proposal with the appellate court's decision in the *BEM* and *DNC* cases to charge that either or both would make licensees agents of the government and would amount to unconstitutional efforts to control the content of broadcasting. For what purpose? He replied:[25]

> The court made this effort simply to create a personal right-of-access mechanism for the broadcast media. But, in using a government instrumentality theory to accomplish this, the end result is an abridgeable right of access—abridgeable at the discretion of the government.
>
> * * *
>
> What this boils down to is that there would be government-controlled access to the broadcast media to state a personal opinion on almost any matter.

To the contention by Whitehead and others that counter-advertising would discriminate against broadcasters, FTC Chairman Kirkpatrick responded that such an argument "ignores the differences between television and other media," and he noted that a consumer "must take evasive action" to avoid commercials and "is a member of the advertiser's captive audience."[26]

A senior vice-president for the American Association of Advertising Agencies said of the proposal: " . . . It could lay a giant economic burden on TV and be a huge deterrent to using it. . . . * * * . . . I think the counter-advertising issue will be a couple of years in the resolution—and will be decided finally in the Congress or the Supreme Court."[27]

And the president of CBS-TV, Robert D. Wood, looked upon counter-advertising as something that could "choke the life out of broadcasting" by driving advertisers "to the sanctuary of other media."[28] Then, with perhaps Congress or the FCC in mind, Wood pointed out that if the networks lost 10 per cent of their advertising billings each year ($140 million in annual income), such a loss would just about match the amount networks spend annually on news and public affairs programming.

The FCC formally rejected the FTC's counter-advertising proposal in a decision announced in mid-1974. With only partial dissent by

Commissioner Hooks, the Commission said that the Fairness Doctrine does not provide an appropriate vehicle for correcting commercial advertising. Instead, the FTC was *reminded* that a congressionally-mandated remedy exists for dealing with false or misleading advertising in the form of various FTC sanctions.

In its mid-1974 declaration, the Commission said:

> We believe that the adoption of the FTC proposal—wholly apart from a predictable adverse economic effect on broadcasting—might seriously divert the attention and resources of broadcasters from the traditional purposes of the Fairness Doctrine. We are therefore not persuaded that the adoption of these proposals would further "the larger and more effective use of radio in the public interest . . . ," 47 U.S.C. Section 303(g), or contribute in any way to the promotion of genuine debate on public issues.
>
> We do not believe that our policy will leave the public uninformed on important matters of interest to consumers. Certainly, we expect that consumer issues will rank high on the agenda of many, if not most, broadcasters since their importance to the public is self-evident. But our point is that the decision to cover these and other matters of similar public concern appropriately lies with individual licensees in the fulfillment of their public trustee responsibilities, and should not grow out of a tortured or distorted application of Fairness Doctrine principles to announcements in which public issues are not discussed.[29]

The rejection of counter-advertising means that false or misleading advertising aired over the broadcast medium first must be found to be false or misleading and then, according to the FCC, it should be banned altogether, rather than make the claims in such advertising "a subject of broadcast debate."

D. Shortly after the FCC announced in 1971 that it intended to begin a long-ranging inquiry into the Fairness Doctrine, the agency used the footnote in its *Chevron* decision to uphold a complaint by the Wilderness Society and the FOE that NBC had violated the Fairness Doctrine by broadcasting commercials on behalf of Standard Oil of New Jersey (ESSO) pertaining to Alaskan oil development. In its ruling, the Commission said:

> In the light of the present controversy over the desirability of developing and transporting Alaskan oil, we are not persuaded by . . . [NBC's] argument that the advertise-

> ments are merely "institutional advertising," or that a discussion of an oil company's search for oil and its asserted concern for ecology are not controversial issues of public importance.
>
> * * * It appears, therefore, that . . . [NBC's] determination that such advertisements did not raise Fairness Doctrine obligations was unreasonable.[30]

With this decision—even though the Commission subsequently ruled that NBC had met its fairness obligation because of "continuing programming" on the subject and therefore it need not undertake any special programming—the FCC seemed to alter its original position that *Banzhaf* was unique and that beyond this one product there would be no further application of the Fairness Doctrine to product advertising. From the vantage point of the Commission's mid-1974 declaration, however, it's clear that *Banzhaf* has been rejected and that the Fairness Doctrine does *not* apply to ordinary or "normal" product advertising.

Concerning *Banzhaf*, the Commission said:

> We do not believe that the underlying purposes of the Fairness Doctrine would be well served by permitting the cigarette case to stand as a Fairness Doctrine precedent. In the absence of some meaningful or substantive discussion, such as that found in . . . "editorial advertisements" . . . , we not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. It would be a great mistake to consider standard advertisements, such as those involved in "Banzhaf" and "Friends of the Earth" as though they made a meaningful contribution to public debate. It is a mistake, furthermore, which tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion. Accordingly, in the future, we will apply the Fairness Doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.[31]

What will happen if licensees, mistakingly believing that the commercials do not obviously and meaningfully discuss public issues, fail to present contrasting viewpoints? The Commission said:

> We fully appreciate that, in many cases, this judgment may prove to be a difficult one and individual licensees

> may well reach differing conclusions concerning the same advertisements. We will, of course, review these judgments only to determine their reasonableness and good faith under the particular facts and circumstances presented and will not rule against the licensee unless the facts are so clear that the only reasonable conclusion would be to view the "advertisement" as a presentation on one side of a specific public issue.[32]

E. Issues concerning "editorial" commercials—"advertorials."

In two related cases, the FCC held that broadcasters could continue to follow the general policy of rejecting all "editorial advertisements" if they wished. The Democratic National Committee (DNC) had asked the FCC to declare that stations could not arbitrarily refuse to sell air time to "responsible entities" for the purpose of soliciting funds and commenting on public issues.[33] The Commission turned down DNC's plea. Similarly, the Commission held that WTOP radio in Washington, D.C., could not be required to sell time to Business Executives' Move (BEM) for Vietnam Peace which wished to broadcast anti-Vietnam war announcements.[34]

In two other cases, the FCC also rejected pleas to apply the Fairness Doctrine to paid radio and TV commercials which were promoting Army careers. Commissioner Johnson dissented and an appeal was filed by David Green, individually and as chairman of the Peace Committee of the Baltimore Meetings of the Religious Society of Friends, and by Stephen P. Pizzo, individually and on behalf of the G.I. Association.[35]

In its mid-1971 Notice of Inquiry into the Fairness Doctrine, the Commission called for comments on access generally to the broadcast media, and paid access specifically. In citing the *DNC* and *BEM* cases, which then were on appeal to the U.S. Court of Appeals, the FCC said:

> It has also been urged that, quite aside from the fairness obligation of broadcasters, there is a right of access—at least on a paid basis—for all those wishing to express a viewpoint on a controversial public issue. The Commission has rejected this blanket claim on the ground that there is neither Constitutional nor statutory right for any individual or group to present their views, and that as a matter of policy it would not serve the public interest to act as if there were. * * * The legal issues [in *DNC* and *BEM*] are thus before the court, and the policy issues are sharply pointed up in the majority and minority opinions of the

> Commission. We request comment on the question whether there is any feasible method of providing access for discussion of public issues outside the requirements of the Fairness Doctrine. More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to be provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the Fairness Doctrine. The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (e.g., for discussion of controversial issues generally or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and whether it would be appropriate for this Commission to lay down criteria or guidelines for these purposes. If so, what would they be? Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? In other words: should we reaffirm present Commission policy and practice?

There is, in the above request for views and comments concerning one aspect of fairness, an almost plaintive appeal from the FCC, to wit: if there is any *feasible* method of dealing with the potential and actual multitude of fairness issues, beyond the policies already enunciated, then tell us what they are and how the procedures would apply.

When the Inquiry had been completed, but before the FCC had issued any findings or recommendations, the staff generally believed that nothing new had resulted from the many recommendations, briefs and views presented during the course of the Inquiry.

The staff's view was buttressed by the Commission's mid-1974 policy statement, to wit:

> In our opinion, this Commission would not be justified in dictating the establishment of a system of access to particular spokesmen on either a free or a paid basis.
>
> * * *
>
> While we have rejected the suggestion that the Commission should establish a system of mandated access (either

> free or paid), we certainly do not mean to suggest any disapproval of efforts by broadcasters to provide for access to their stations. Indeed, the Fairness Doctrine itself insures that many citizens will be afforded a type of access. . . .
>
> * * *
>
> Although we have here reaffirmed the present system of licensee responsibility and discretion and rejected requests for the creation of a direct "right" of access, we wish to emphasize that this system is predicated entirely upon the assumption that licensees will in fact make a reasonable, good faith effort to meet their public obligations. Licensee discretion is but a means to a greater end, and not an end in and of itself, and only insofar as it is exercised in genuine conformity with the paramount right of the listening and viewing public to be informed of the competing viewpoints on public issues can such discretion be considered an adequate means of maintaining and enhancing First Amendment interests in the broadcast medium. For the present, we remain convinced that the general rubric of the Fairness Doctrine, with its emphasis on licensee responsibility and discretion, provides the most desirable and practical means to that end. However, should future experience indicate that the doctrine is inadequate either in its expectations or in its results, the Commission will have the opportunity—and the responsibility—for such further reassessment and action as would be mandated by the public interest and the First Amendment.[36]

In essence, the inquiry begun in 1971 resulted in a reaffirmation of the status quo and, insofar as *Banzhaf*, a renunciation. The Fairness Doctrine is to be the instrumentality by which "advertorials"—those commercials which obviously and meaningfully (substantively) discuss controversial issues of public importance—are to be answered, and any rejoinders are largely dependent on the "good faith" discretion of the licensee. Forced access—either paid or free—is ruled out—at least by the Commission. What remains to be seen is how the courts will react to the mid-1974 declaration, especially in light of obvious difficulties in imposing fairness requirements on the journalistic discretion of the licensees and networks.

14.4 Court decisions. Two of three FCC decisions in 1970 "access" cases were reversed in 1971 by the U.S. Court of Appeals in the District of Columbia Circuit and in one of these—involving the

combined cases of *Democratic National Committee (DNC)* and *Business Executives' Move for Vietnam Peace (BEM)*—the U.S. Supreme Court reversed the appellate court and upheld the FCC's ruling that a station cannot be required to accept "advertorials" if it has a general policy of not accepting that kind of advertising. The ruling served to blunt the momentum of access-to-the-media proponents.

1. In the combined cases of *Green v. FCC* and *G.I. Association v. FCC*,[37] the Court of Appeals (District of Columbia Circuit) affirmed the FCC determination that the stations involved had not violated the Fairness Doctrine by refusing free air time to counter commercials about military service. The three-judge Appeals Court panel unanimously agreed that recruitment attempts could not be equated with the Vietnam war or the Selective Service system and therefore were not a controversial issue of public importance which would invoke fairness requirements. Judge Wilkey gave the court's opinion, saying that to meet the fairness test "it would be sufficient if each licensee could show that the point of view advocated by petitioner . . . had been or was being presented on its station by others." He added: "In our view, the essential basis for any Fairness Doctrine, no matter with what specificity the standards are defined, is that *the American public must not be left uninformed*." The court declared that the public had been kept well informed on the war and the draft. It also swept aside the contention that a one-to-one relationship existed between *Banzhaf* and the cases under consideration. Judge Wilkey said:

> Our disposition of petitioners' complaint . . . renders extended evaluation of the similarities between this case and *Banzhaf*, strictly speaking, unnecessary. However, petitioners' dogged reliance on that case, as well as Commissioner Johnson's lengthy dissenting discussion, compels us to interject a word of explanation regarding the matter of analogy to the cigarette litigation. Petitioners claim that *Banzhaf* sweepingly holds that "when one side of a controversial issue is presented in the form of frequent spot announcements, the other side must be allowed to present its views in a similar fashion." We would have thought that the opinions of court and Commission would have made unmistakably clear that it is not every advertisement carrying a controversial message which calls for response through a similar spot announcement format. * * *
>
> Nor can we accept the dissenting commissioner's view. He argues that because of the possibilities of grave physical injury and death associated with service in Vietnam, mili-

> tary recruitment ads raise issues equally as significantly related to the general public health as do cigarette commercials and therefore require similar treatment under the Fairness Doctrine. Such reasoning overlooks, we think, the crucial point that the doctrine's goal is the "promotion of informed decision-making by the public" [Retail Store Employees Union v. FCC, 436 F.2d 248, 257]. "It is the right of the public to receive suitable access to . . . ideas and experiences which is crucial here" [*Red Lion*, 395 U.S., at 390 and 89 S.Ct., at 1807], rather than the desire of those who espouse competing views to express their opinions no matter how fully the same subject matter is covered in the licensee's programming or is patently apparent to the public.

In terms of fairness and access to the broadcast medium, the test laid down by the U.S. Court of Appeals (District of Columbia Circuit) and the Supreme Court in *Red Lion* is an informed citizenry. If a licensee fulfills that mission, or demonstrates a "reasonable" effort to do so, then a station is under no obligation to specific individuals or groups who wish to gain access to the licensee's facilities.

2. The Court of Appeals (District of Columbia Circuit) reversed the FCC's dismissal of the complaint by FOE against WNBC-TV in New York.[38] The court, in agreeing with Commissioner Johnson, rejected the argument that cigarettes alone are a unique threat to human health, saying instead: "Where there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products [automobiles and gasoline], then the parallel with cigarette advertising is exact and the relevance of . . . *Banzhaf* is inescapable."

The court also took notice of the Commission's changed position in the *Chevron* and *ESSO* cases in remanding *FOE* to the FCC for determination of whether the TV station had satisfied the fairness requirement. FCC appealed.

Partially because of this ruling, FOE and Citizens for Clean Air challenged the renewal of license of a TV station in New York because that station allegedly failed to present a balanced view of the city's air pollution problem and therefore violated the Fairness Doctrine sufficiently to warrant denial of license renewal. The station responded by saying that although the court had extended the Fairness Doctrine to commercials, the way in which a station fulfilled its fairness obligation still rested with the licensee. The FCC agreed and renewed the station's license in mid-1972.

3. In the combined *DNC* and *BEM* cases, two members of the three-judge appellate court panel reversed and remanded the cases to the Commission for action consistent with the majority's opinion, given by Judge Wright,[39] that a "flat ban on paid public issue announcements is in violation of the First Amendment, at least where other sorts of paid announcements are accepted." Reasonable procedures and regulations could be developed in regard to editorial advertisements, Judge Wright said, but there must be even-handed treatment of all paying, non-commercial advertisers. By declaring unconstitutional the FCC's general policy which had permitted a station to refuse, as a matter of policy, all "advertorials," the court said it was seeking to prevent one-sided domination of an issue which would result from the airing of only a few viewpoints.

Using *Red Lion* and *Times-Sullivan* as touchstones, Judge Wright first looked at the FCC's contention that advertorials are just one of several possible formats that a licensee can use to cover public issues and that under the Commission's permissive "reasonableness" standard for meeting fairness obligations, the particular format (editorial advertising) was not compulsory. Also, the FCC had interpreted the First Amendment to be equally permissive, although Judge Wright said the Commission's reasoning on this point "was rather sparse."

In dealing with these contentions, the court responded:

> The *Red Lion* Court itself stated specifically that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas." * *
>
> . . . [T]he limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. * * *
>
> We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-expression. * * *
>
> All the petitioners ask is that broadcasters be required to accept some editorial advertising. They do not advocate an absolute right to air their advertisements. . . . Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming.

In applying *Times-Sullivan*, the court said: "We must concur in the Supreme Courts only recorded comments on constitutional protec-

tion for editorial advertising. . . . The Court said that editorial advertisements, unlike commercial advertisements, are of fundamental concern, since they deal with political questions."

In dissenting, Judge McGowan noted that the majority held that some, but not all, advertorials would have to be accepted by a licensee. How many? How often? From which groups? By such a decision, McGowan said, the court had given the FCC a "task of heroic proportions," and he wondered if such an undertaking could be constitutionally required.

Since the *DNC* decision affected the networks (because they had been asked to sell time to the committee), CBS and ABC asked the Supreme Court to review the lower court's decision. *DNC* was combined with *FCC v. BEM* and the Supreme Court at first refused to grant a stay of the appellate court's decisions,[40] but then reconsidered and granted a stay in the *DNC* case pending a review.[41]

On May 29, 1973, the Court reversed the appellate court in an opinion[42] by Chief Justice Burger which drew complete accord only from Justice Rehnquist, partial concurrence from Justices Stewart, White, Blackmun and Powell, a separate but concurring opinion by Douglas, and outright dissent by Brennan and Marshall.

Among the major points made by the Chief Justice:

1. In evaluating First Amendment claims of DNC and BEM, great weight must be afforded the decisions of Congress and the experience of the FCC.

2. Concerning the discussion of public issues, Congress chose to leave broad journalistic discretion with the licensee because it specifically forbade censorship (Section 326) and it decided against common carrier status for broadcast stations. "Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the [1934] Act."

3. Broadcasters are allowed significant journalistic discretion in deciding how best to fulfill their Fairness Doctrine obligations.

4. The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: (a) its acceptance by a sufficient number of readers—and hence advertisers—to assure financial success; and (b) the journalistic integrity of its editors and publisher. (Note how this view of the Chief Justice dovetails with his earlier view, when he was an appellate court judge, in *United Church*, and with his decision in 1974 for the Court in *Tornillo*.) A broadcast licensee has a large measure of journalistic freedom, the Chief Justice said, but not as large as that exercised by newspapers. Why? Because a licensee must balance what he might prefer to do as a private entrepreneur with what is required of him as

a "public trustee." Nonetheless, a licensee's policy against accepting advertorials cannot be examined as an abstract proposition; it must be viewed in the context of his journalistic role—a role which requires considerable licensee discretion and the absence of rigid limitations, especially in light of the fact that every licensee is held accountable for the totality of his performance of the public interest obligation.

5. The novel question raised in this case—i.e., is the licensee so much a creature of the government that restraint imposed by the licensee is tantamount to government restraint and therefore violative of the First Amendment rights of DNC and BEM—was answered in the negative by the Chief Justice, principally on the ground that the licensee is given wide discretion to operate in the public interest, therefore he is not an instrument of government.

6. The interest of the public is foremost in terms of the First Amendment; and the FCC was justified in concluding that the public interest in requiring access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth (*Red Lion*, 395 U.S. at 392). Even if the Fairness Doctrine or the *Cullman* standard were applied to editorial advertising, the affluent still would determine in large measure the issues to be discussed because the power to initiate such speech would lie with them.

7. The Fairness Doctrine might be jeopardized if applied to editorial advertising because the licensee would experience financial hardship from having to make regular programming time available for those holding views different from the ones expressed by the advertorialists. The result would be the further erosion of journalistic discretion in the coverage of public issues and subordination of the public interest to private whims, especially since the broadcaster would find himself in the position of being virtually unable to reject advertorials dealing with trivial matters or those already covered by the licensee under the fairness obligation.

8. The Court of Appeals, in remanding the cases to the Commission for development of regulations to implement a constitutional right of access for advertorials, was placing an extremely difficult task on the Commission (as Judge McGowan had noted in his dissenting opinion); and, furthermore, the lower court's decision would increase the risk of enlarging government control over the content of broadcast discussions of public issues—a power carefully circumscribed by the 1934 Act. Further, Commission responsibilities under such a right-of-access system would tend to draw the FCC into a case-by-case determination.

9. In dealing with the problem posed by the appellate court's reference to decisions which prevented state-supported schools and public transit systems from banning controversial advertorials while accepting other kinds of advertising, Chief Justice Burger made the distinction that in none of those cases did an affirmative and independent statutory obligation exist to provide full and fair coverage of public issues of public importance, such as Congress had imposed upon licensees. "The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media," said Burger, "but rather who shall determine what issues are to be discussed by whom, and when."

A broadcaster who neglects his obligation does so at the risk of losing his license.

10. Congress or the Commission may devise some kind of limited right of access that is both practicable and desirable, Burger said, noting the then on-going Commission inquiry into various aspects of the Fairness Doctrine. He concluded with this observation:

> . . . [T]he history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees. The Commission's pending hearings into the Fairness Doctrine are but one step in this continuing process. At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding.

Justice Brennan, joined by Marshall, dissented, in part because the "exclusionary policy" adopted in *DNC* and *BEM* inhibits, rather than furthers, the nation's "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" (*Times-Sullivan*, 376 U.S. at 270, 84 S.Ct. at 721). Because they thought a station's policy of flatly refusing to accept advertorials would be contrary to the policy announced in *Times-Sullivan*, Brennan and Marshall would have affirmed the appellate court's determination that such a licensee policy would be violative of the First Amendment.

Brennan also took issue with the Court's position on the Fairness Doctrine vis-a-vis licensee discretion to meet that doctrine. Such a position, said Brennan, is insufficient to satisfy the First Amendment interests of the public since the broadcaster retains almost complete control over the selection of issues and viewpoints to be covered, the manner of presentation and, perhaps most important, who shall

speak. "Given this doctrinal framework," said Brennan, "I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of 'uninhibited, robust, and wide-open' exchange of views to which the public is constitutionally entitled."

Later in his opinion, he asserted, " . . . In light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that *absolutely* denies citizens access to the airwaves necessarily renders even the concept of a 'full and free discussion' practically meaningless." And, he added, that is precisely the policy that the Court upholds in its *DNC-BEM* decision.

Contrary to the Chief Justice's argument concerning the need for journalistic discretion or licensee discretion, Justice Brennan said that "we are concerned here not with the speech of broadcasters themselves but, rather, with their 'right' to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public." Balancing the need for individuals to have the opportunity to express their views on public issues against the limited interest of broadcasters in exercising journalistic discretion over the mere allocation of advertising time that is already made available to some members of the public led Brennan to conclude that the interest of the broadcaster should not prevail.

Justices Stewart and Douglas were in virtual agreement in terms of major reasons why they opposed forced access for advertorials. Concerning the logic employed to equate the broadcaster to government, such that the broadcaster's control over advertorials would amount to governmental control and therefore, on its face, be unconstitutional, Douglas disputed the validity of any such equation. If the government really were operating the electronic press, he said, it would be prevented by the First Amendment from selecting broadcast content and exercising editorial judgment. It would not be permitted in the name of "fairness" to deny air time to any person or group on the ground that their views had been sufficiently aired. Yet broadcasters perform precisely these functions and enjoy precisely such freedoms under the 1934 Act.

In concurring in the results, Justice Stewart made this important distinction: BEM's spot advertisements were rejected by a single station, while only one network turned down DNC's request for paid air time; yet many broadcasters accept advertising of the BEM and DNC type, leading Stewart to say: "This variation in broadcaster policy reflects the very kind of diversity and competition that best protects the free flow of ideas under a system of broadcasting predicated on private management." It would not be in the public

interest, he contended, to force every broadcaster to accept a particular type of advertising.

In a "plug" for greater freedom for broadcasters, Stewart said: "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensible to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice."

Concerning the *Red Lion* decision, in which it was decided that the broadcasters' First Amendment rights were "abridgeable," Stewart said that such a decision, whether right or wrong, did not mean that those rights were nonexistent.

Douglas, of course, took the position that TV and radio stand in the same protected position under the First Amendment as the print medium does. He commented, "The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the tradition of nations that never have known freedom of press. . . ."

14.5 Summary. The *Banzhaf* case resulted in an historic decision by the FCC in 1967: The Fairness Doctrine was applicable to cigarette commercials because smoking and its danger to health were controversial issues. The Commission intended that the ruling would apply only to cigarette commercials—that the doctrine's use in this instance would be unique. A U.S. Court of Appeals subsequently upheld the Commission because the ruling did not ban any speech; product advertising is not as rigorously protected by the First Amendment as other kinds of speech; information to the public was increased, not decreased; and the First Amendment stood to gain more than it would lose by any decrease in cigarette advertising.

When the ban on cigarette and "little cigar" advertising was enacted by Congress, another case—in which the claim was put forth that the First Amendment rights of broadcasters were being violated—resulted in a three-judge panel splitting 2-1 in declaring the law constitutional. The panel's majority relied heavily on the proposition that commercial speech is less vigorously protected than most other forms of speech; the public owns the airwaves (as contrasted with private ownership in the print medium); and licensees are required to operate in the public interest. In dissent, Judge Wright argued that the First Amendment protects more than just "healthy" speech. The majority's decision, however, was affirmed summarily in a 7-2 split of the Supreme Court.

The question of whether the Fairness Doctrine and mandated access should be applied to commercials—either of the "advertorial"-

type, institutional, or "ordinary" product-type—remained contested and therefore in doubt from the time of *Banzhaf* until mid-1973 when the Supreme Court in the combined cases of *DNC* and *BEM* reversed a lower court, thereby affirming the FCC's policy which permitted a station to refuse all "advertorials." In his opinion for the Court, Chief Justice Burger stressed that broadcasters—even though they're "public trustees" and therefore somewhat different than their print medium counterparts—must be allowed significant journalistic discretion in deciding how best to fulfill fairness obligations. The public interest, said the Court, would not be served by requiring access through paid commercials of the "advertorial" type since such a requirement would be weighted heavily in favor of the affluent. Also, mandatory free access (such as that proposed by the FTC) would jeopardize the financial well-being of licensees and erode journalistic discretion. The question was not whether there would be discussion of controversial issues, but rather who would determine what issues were to be discussed, by whom, and when. And in opting for the FCC's policy, clearly the Court was saying that the licensee in large measure would have the responsibility of determining which issues were to be discussed, who would discuss them, and when such discussion would take place. In noting the then on-going inquiry into the Fairness Doctrine, the Chief Justice said that a limited right of access might be devised, but he did not speculate as to the parameters of such a right. Until that happened, the Fairness Doctrine would remain the vehicle for the public's right of access to ideas and experience.

In mid-1974, the Commission declared itself concerning the efficacy of the Fairness Doctrine and what it thought about mandated access:

1. It renounced the *Banzhaf* precedent. Henceforth, the Fairness Doctrine would not apply to product commercials which did not *obviously* and *meaningfully* discuss controversial public issues.

2. It recast the *Chevron* decision vis-a-vis "advertorials" by adding more qualifiers: If *meaningful* or *substantive* discussion takes place in so-called "advertorials"—comment which *realistically* can be said to inform the public on any side of a controversial issue of public importance—then a fairness obligation can be imposed on licensees. But the determination in the first instance rests with the licensee who is to use *reasonableness* and *good faith* in making the decision as to whether a commercial has substantively discussed such an issue.

3. It rejected the counter-advertising proposal unanimously recommended in 1971 by the five-member Federal Trade Commission. Instead, the FCC said that false or misleading advertising should

be banned altogether rather than be the subject of broadcast debate. The fact that the determination of falsity might extend well beyond the time the commercial in question is "on the air" raises questions about the FCC's decision to dump the matter back into the lap of the FTC. Clearly, false or misleading advertising is not in the public interest. And although the FCC probably could not act against "suspect" advertising until due process had run its course, a mandated public forum to discuss advertising and advertisers (under the same set of circumstances which protect licensees from libel actions when political candidates invoke the "equal opportunities" part of Section 315) might have been the innovative approach the FCC said it was looking for when it launched its 1971 inquiry. Perhaps the mandated access channels in CATV will someday be used for counter-advertising.

4. It rejected mandated access, even on a paid basis, and was given the green light to do this by the *DNC-BEM* decision. In effect, the Commission opted for the system in operation prior to the commencement of its 1971 inquiry; that is, reliance on the Fairness Doctrine to provide the public with access to ideas and experiences. Whether this doctrine will be used oftener than in the past, and whether its use can withstand Supreme Court concern for the well-being of journalistic discretion (emphasized again in *Tornillo* and *Pittsburgh Commission on Human Relations*), should prove to be watershed questions in the months and years ahead. Certainly the FCC record on mandated fairness obligations, if the record is duplicated in the future, is little cause for alarm among broadcasters.

CHAP. XIV–PASS IN REVIEW

1. In what case did the FCC first apply the Fairness Doctrine to commercial speech?
2. What is the *Cullman* rule?
3. The U.S. Court of Appeals upheld the FCC's *Banzhaf* ruling. In so doing, how did it get around the First Amendment prohibition against governmental interference in programming or free speech?
4. What was the counter-advertising plan and who proposed it?
5. What were two principal reasons why the FCC opposed counter-advertising?
6. Based on the FCC's mid-1974 policy declaration, will the Fairness Doctrine apply to ordinary or "normal" product advertising?
7. What does the FCC expect licensees to show when they are deciding whether an issue they've aired is controversial and therefore places a fairness obligation upon them?

8. What interest, according to Chief Justice Burger in *DNC-BEM*, can outweigh the First Amendment interest in broad journalistic discretion?

CHAP. XIV—ANSWERS TO REVIEW

1. *Banzhaf* case.

2. The FCC-adopted *Cullman* rule provides that if the licensee broadcasts a *sponsored* program which for the first time presents one side of a controversial issue, he cannot reject the presentation of other views on the ground that he cannot obtain paid sponsorship for that presentation.

3. The Court of Appeals held that the ruling by the FCC did not ban any speech; product advertising is not as vigorously protected as some other kinds of speech; the FCC ruling increased, rather than decreased, information; and the First Amendment gained more than it lost by any decrease in cigarette advertising.

4. Counter-advertising was proposed by the FTC. If adopted by the FCC, it would have required the allocation of a block of free air time by licensees—if paid sponsorship could not be obtained—during which consumers could criticize advertising or attempt to "debunk" advertising claims.

5. First, the FCC feared that counter-advertising would undermine the financial stability of broadcasting by forcing stations to give away free air time; second, false or misleading advertising ought not to be debated, but should instead be banned; and third, the broadcaster still faces a public interest obligation concerning advertising.

6. No. Only to commercials—"advertorials"—which obviously and meaningfully discuss controversial issues of public importance.

7. Reasonableness and good faith.

8. Public interest.

[1] Petition of Sam Morris, 11 FCC 197.

[2] 9 FCC 2d 921.

[3] Op. cit., Chap. X, note 44.

[4] From Cullman Broadcasting Co., 40 FCC 576, 577 (1963), in which the FCC decided that if a licensee broadcasts one viewpoint for the first time on a controversial issue of public importance during a sponsored program, a contrasting view or views must be broadcast even though paid sponsorship cannot be obtained.

[5] Banzhaf v. FCC, 405 F.2d 1082.

[6] *Id.*, 405 F.2d at 1099-1101 (footnotes omitted).

[7] Tobacco Institute, Inc., et al. v. FCC, et al., 396 U.S. 842, 90 S.Ct. 50; and NBC v. FCC, et al., 396 U.S. 842, 90 S.Ct. 51.

[8] Capital Broadcasting Co., et al. v. John Mitchell, U.S. attorney general, et al., 333 F.Supp. 582.

[9] Both before and after the *Valentine* ruling (*see* note 3), the courts under-

standably have experienced difficulty in providing constitutional protection for non-commercial, or "political," speech when it is a part of "commercial" speech. Handbills, littering, door-to-door canvassing, picketing, etc., have posed many problems. Generally, the courts have permitted city and state regulation of purely commercial solicitation, but have refused to support most prohibitions of "solicitations" by religious, social or political groups. When there has been no clear distinction, the courts have looked to the motivation behind the solicitations (no easy task, either). Frequently, courts have had to balance the broader social interest of the non-commercial elements, which formed a "mix" with strictly commercial elements, to determine if such an interest outweighed the personal "profit" motive.

Even when a determination has been reached that such "speech" warrants constitutional protection, courts may have to decide on what basis it might be "reasonably" regulated; i.e., controls on sound amplification, restrictions on littering (such as fine the person who threw the handbill on the street, rather than halt the distributor of the handbills), limitations on when and where public meetings might be held, etc.

Judge Wright was not prepared to make a distinction between "healthy" and "non-healthy" speech, just as Justices Black and Douglas chose not to attempt to distinguish between pornographic and non-pornographic matter. Judge Wright's fear was that the state, using the guise of "non-healthy" speech determinations, could suppress speech for other than health reasons.

10 NAB, et al. v. Richard G. Kleindienst, U.S. attorney general, et al., and Capital Broadcasting Co., et al. v. Kleindienst, 92 S.Ct. 1290 (1972).
11 *See, Changing Times* magazine, March, 1972, p. 19.
12 Antitrust and Trade Regulation Report No. 574, Aug. 1, 1972, pp. A-11-12, published by Bureau of National Affairs, Inc.
13 *The Viewer*, Vol. II, No. 6, December, 1967, p. 1, published by National Audience Board, Inc.
14 *Id.*, p. 5.
15 24 FCC 2d 743.
16 *Id.* at 753.
17 29 FCC 2d 807.
18 *Id.*
19 "The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act," 36 *Federal Register* 11825, FCC release 71-623.
20 Testimony on Feb. 8, 1972, during hearings, "Overview of the Federal Communications Commission," before Senate Communications Subcommittee of the Commerce Committee, 92nd Congress, 2nd Session, pp. 176-77.
21 436 F.2d 248, decided Oct. 27, 1970.
22 FTC news release, 4-0107, Jan. 6, 1972.
23 Op. cit., note 20, pp. 192-196.
24 Antitrust and Trade Regulation Report No. 551, Feb. 22, 1972, p. A-19.
25 *Broadcasting*, April 17, 1972, p. 28.
26 *Advertising Age*, March 6, 1972, p. 62.
27 William J. Colihan Jr. speech on June 5, 1972, at AAAA Eastern Region's annual conference in New York.
28 *Broadcasting*, July 31, 1972, p. 29.
29 Op. cit., Chap. XIII, note 39, p. 26382.
30 30 FCC 2d 643, 646 (1971).
31 Op. cit., Chap. XIII, note 39, p. 26382.
32 *Id.*, p. 26381.
33 25 FCC 2d 216 (1970).
34 25 FCC 2d 242 (1970).
35 24 FCC 2d 156 (1970). Pizzo-G.I. Association and co-petitioners: San Francisco Women for Peace, and The Resistance.

[36] Op. cit., p. 26383.
[37] 477 F.2d 323.
[38] Friends of the Earth v. FCC, 449 F.2d 1164.
[39] 450 F.2d 642.
[40] 404 U.S. 1055, 93 S.Ct. 742, 30 L.Ed.2d 744 (1972).
[41] 405 U.S. 953, 92 S.Ct. 1174, 31 L.Ed. 230 (1972).
[42] CBS v. DNC; FCC v. BEM; Post-Newsweek Stations, Capital Area v. BEM; and ABC v. DNS, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772.

APPENDIX A
COURT STRUCTURE, PROCEDURE AND JURISDICTION

There are two main branches of law vis-a-vis court systems and functions: civil and criminal. There are two major classifications of courts: those with original, or "trial court," jurisdiction, and those with appellate jurisdiction. In some instances a court may have both original and appellate jurisdiction. In addition, there are courts of general jurisdiction which handle a wide variety of criminal and civil cases, and courts of specialized jurisdiction which only handle cases involving certain amounts in controversy (small claims courts) or dealing with special subject matter (domestic relations courts).

Criminal law, whether state or federal, involves cases that can lead to forfeiture of life or liberty by means of capital punishment or imprisonment in a penitentiary, and/or result in fines. A criminal misdemeanor involves a lesser offense than does a felony and consequently punishment is usually limited to incarceration in a jail or some other comparable penal institution (but not a penitentiary) for no more than one year and/or a fine not to exceed a certain amount.

Under the civil law, someone or something (a person, corporation or state) usually is claiming that someone or something has caused some kind of injury or damage and seeks, by means of a damage suit, to have such injury redressed. In addition to a damage suit, the plaintiff may also seek a remedy to stop the wrong (or tort) from continuing. In a court that has general jurisdiction, damages could be awarded as a function of the *court of law* while the same judge, sitting as a *court of equity*, could issue a restraining order, such as a temporary injunction, to prevent continuation of the wrong or illegal action.

The law that governs a federal or state case, whether criminal or civil, and regardless of the kind of court involved, is found in the constitutions of those states or of the United States (constitutional law), in the statutes (statutory law), or in the common law. The common law, or "case law," is derived from judgments and decrees of courts that go far back in history. Thus, in a sense, common law is judge-made law. Many important legal areas are based on common law principles, including tort law and contract law. Common law also implements constitutional and statutory law and, in turn, is conditioned by them.[1] The need for "case law" is apparent when judged

by the futility of trying to cope, by means of statutory and constitutional law alone, with the multiforms of illegal and harmful situations that can result in complex societies.

Federal Judicial System

Section 1 of Article III of the U.S. Constitution briefly describes how the system is to be set up: "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

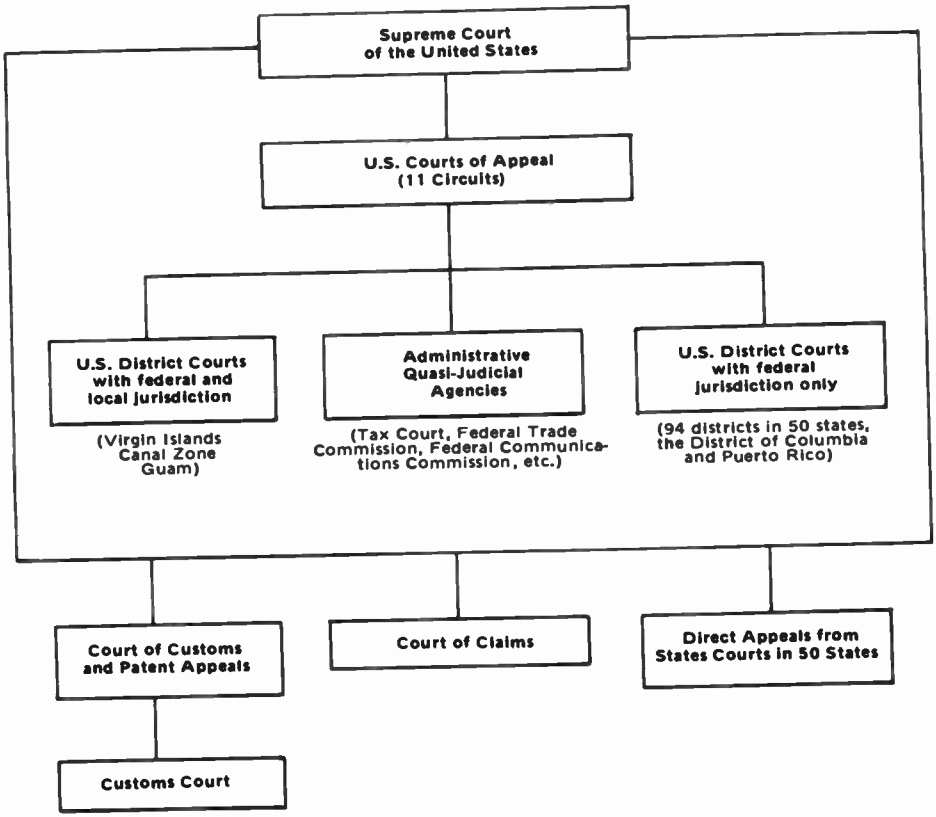
And Section 2 of that article addresses itself to the jurisdiction of such a system of courts: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdictions; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Congress was not long in carrying out the above provisions. The First Congress in 1789 established the federal judicial system at a time when 11 of the 13 states had ratified the Constitution. It established the Supreme Court comprised of a chief justice and five associate justices; 13 district courts as courts of original jurisdiction, and three circuit courts, each consisting of one district court judge and two Supreme Court justices who travelled the circuit to hear and adjudicate cases.

Today, by contrast, there are nine members of the Supreme Court—a chief justice and eight associate justices; 94 district courts in the 50 states, the District of Columbia and Puerto Rico; and 11 circuit U.S. Courts of Appeals—a juduciary totalling 600 judges compared with 100 in 1900, according to Chief Justice Burger in a 1973 year-end report. In addition, a para-judicial magistrate's court was created by Congress in 1968 to replace the system of U.S.

Fig. 3 Federal Judicial System*



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commissioners then in use as a means of reducing the workload on district courts.[2] Looking at each level of the judiciary system, the function and jurisdiction of these courts are (*See* Fig. 3):

A. Magistrates courts. These courts are created at the behest of district court judges and, as of 1974, there were 88 full-time, and 400 part-time, personnel constituting the magistrates system. The courts' principal functions are (1) to conduct preliminary hearings and (2) to dispose of minor-type cases under certain circumstances.

The preliminary hearing is for the purpose of determining if there is sufficient evidence to hold a person in custody pending further criminal action, such as a grand jury indictment or the filing of an information by a U.S. district attorney. Secondly, the magistrate can set bond (if the offense charged is a bondable one) and permit the accused to post bond and be free pending further action.

Magistrates cannot accept pleas in felony cases, but they do have the power to try criminal misdemeanor cases if both the defendant and the government consent. By giving consent, both parties automatically waive a jury trial. The jurisdiction that can be exercised by magistrates over minor offenses is defined in 16 U.S. Code Sec. 3401.

B. District courts. These are the "trial courts" in the federal judicial system—courts of original jurisdiction for both criminal and civil cases. In the latter cases, however, certain conditions may be attached. For example, in a civil action between citizens of two different states (called a diversity action), the sum or value involved must exceed $10,000. If the United States is a party in a civil suit and the sum or value is $10,000 or less, the case may be disposed of in the U.S. Court of Claims although the district courts would have concurrent jurisdiction. District courts also have original jurisdiction in bankruptcy cases, in certain kinds of admiralty and maritime cases, and in those types of cases as Congress, from time to time, might designate. Such mandates have come in the Freedom of Information Act of 1967, the Sherman and Clayton anti-trust laws of 1890 and 1914, respectively, and the Copyright Law of 1909, to mention a few. U.S. attorneys frequently are required to seek equitable remedies through proceedings initiated in this court—thus it may sit either as a court of law or a court of equity.

Decisions of these courts are reviewable directly by the U.S. Supreme Court in certain limited situations, or, more usually, by the intermediate appellate court—the Court of Appeals.

Generally one district court judge will constitute the court, but in those instances where an interlocutory (temporary) injunction is at issue, a three-judge panel is specifically required by a 1910 act of Congress.[3] The powers of a single judge are spelled out in a 1942

statute[4] and by the Supreme Court. Like all federal judges, district judges are appointed by the President subject to confirmation by the Senate. The average judge among the nearly 400 holding such appointments disposed of 329 civil and criminal cases in 1973, according to Chief Justice Burger. The number of districts in a state depends on the state's population. For example, California has four districts—Northern, Central, Eastern and Southern; Iowa has two—Northern and Southern. There are 11 district judges in the Northern District of California; there is one each in the Iowa districts.

At the beginning of 1974, the backlog of cases at the district court level was 125,000 compared with 69,000 in 1962. In appropriate cases, the district judges file decisions in which they give their reasons for arriving at such conclusions. Some, but not all, of these opinions are reported in the *Federal Supplement*, usually abbreviated *F. Supp.* Thus, a citation such as 52 F.Supp. 362 means volume 52, page 362, of that publication.

C. Courts of Appeals. These courts carry the bulk of the appellate reviews in the federal system. The reason is apparent in statistics. There are 11 circuits, each with a Court of Appeals (the First through the Tenth Circuits plus the District of Columbia), compared with one Supreme Court (the final appellate court). The smallest circuit (the First) has three judges, while the largest (the Fifth, which includes Alabama, Florida, Georgia, Louisiana, Mississippi, Texas and the Canal Zone) has 15. About 15,000 cases are being filed annually with these courts compared with 5,400 in 1963. By contrast, 3,171 cases were filed with the Supreme Court in 1973 and that court issued 327 written opinions, although some cases were summarily decided.

On the average it takes about four years from the time a case is filed in district court until it's disposed of at the appellate level—and this time-lag persists despite the fact that more cases are being decided at the appellate level without benefit of oral hearings and the absence of written opinions. When opinions are given, they appear in *Federal Reporter, 2nd Series.* Thus, a citation, 480 F.2d 428, means volume 480, page 428, of the *Federal Reporter, Second Series.*

By far the vast majority of cases handled by the Courts of Appeals stems from appellate jurisdiction, but a small number involves original proceedings. The decisions of numerous administrative agencies, such as the Federal Trade Commission and Federal Communications Commission, are directly reviewable in the District of Columbia Circuit Court of Appeals. Decisions of the District Courts are reviewable for errors. A three-judge panel of a Court of Appeals usually will hear cases and controversies unless a hearing or rehearing before the

court in banc (all of the judges) is ordered by a majority of the circuit judges of the circuit who are in regular active service.[5] Such in banc "sittings" occurred, for example, in the Pentagon Papers cases.[6]

Every case that is filed in, or reaches, a Court of Appeals is first screened by a member of that court who decides if oral arguments are necessary. Such arguments allow the parties in a dispute, such as in a civil matter, or the defense attorney and U.S. district attorney or Justice Department representative, in a criminal matter, to present additional views concerning points raised in briefs which are included at the time of the filing of the case. Furthermore, court members can direct questions to opposing counsel. Whenever a constitutional issue is at stake, a Court of Appeals broadly reviews the initial decision to determine what the Constitution requires.

D. Supreme Court. The Supreme Court, which since 1869 has consisted of nine members, has original jurisdiction in two classes of cases: those involving U.S. ambassadors and those in which a State is a party. The remainder of its jurisdiction by and large lies in hearing and deciding appeals from cases tried or decided in federal courts or those which usually have been decided by the state supreme courts.

In his review of 1973, the chief justice noted how the gravity of the issues now facing the Court has changed. From 1803 to 1857, he said, not one act of Congress was declared unconstitutional by the Court, and only 36 state statutes fell into this category. But in 1973 alone, 57 of 177 cases argued before the Court involved claims that city ordinances, state laws, or federal laws violated the U.S. Constitution, and many of these claims were upheld.

Attempts by Congress to delimit the jurisdiction of the Supreme Court, such as in the First Judiciary Act of 1789, must contend with the fact that the Court is the final arbiter as to what the Constitution means. Chief Justice John Marshall declared in an 1803 decision in *Marbury v. Madison*[7] that the judicial power of the United States (meaning the Supreme Court's power) extended to all cases arising under the Constitution. Through the broad interpretation of the commerce clause, the police power, etc., in the Constitution, many cases have been swept within that ambit and consequently subject to Supreme Court review. If this power of interpretation were not enough, then Congress, by enactment in 1925, considerably expanded the Court's discretionary power of review. Thus, there are two major ways that a case can be brought before the Court: (1) the litigants appeal for review of a lower court decision because they believe they have a right to have their case heard by the court of last resort; or (2) the Court can exercise its discretionary power by means of a writ of certiorari and bring a case up for review. By far, most

cases fall within the latter situation. Thus, the parties may only ask that the Supreme Court review their case; they cannot demand review by right. They ask the Court to consent to review by petitioning for a writ of certiorari. The discretionary power was first given by Congress in 1891 when it also modernized the Courts of Appeals and their circuits.

Concerning which appeals should or should not be granted, the Court follows the so-called "rule of four;" that is, at least four Court members must agree that the questions or issues contained in the appeal should be carried forward by means of briefs and oral arguments, otherwise the appeal will be dismissed.

Many petitions for writs of certiorari are filed with the Court each year and have contributed substantially to the number of cases being filed with the Court—1,234 in 1951; 3,171 in 1973. Most of these cases are disposed of by denying the petitions. Such a denial is not a "holding" of the Court concerning the merits of the case. However, if the Court summarily affirms or dismisses a case, such an action is on the merits.

If a majority of the Court members who take part in the decision of a case agrees on the ultimate disposition of a case, then such agreement will constitute a "holding" by the Court. But the majority might not be in agreement as to why a decision of an inferior court should be affirmed or reversed. If three of the five members, for example, agree on the reasoning, then one member will write the opinion for the Court and the other two most likely will associate themselves with that opinion. But the two who disagreed with the reasoning of the plurality opinion can write separate, but concurring, opinions—concurring in the results. The four who disagree with the decision or holding of the Court register dissent and such disagreement usually is elaborated upon in a dissenting opinion. Members may join in a concurring or dissenting opinion by one or more of their brethren; that is, associate themselves with a concurring or dissenting opinion.

The *Rosenbloom* case, decided by the Supreme Court in 1971,[8] is an example of a majority of the members agreeing that a radio station should not be held liable for damages because of an error made in a news program (even though the error was clearly libelous). But only 3 of the 5 in the majority could agree as to why the Court of Appeals decision should be affirmed. Thus, Justice Brennan wrote a plurality opinion and was joined in that opinion by only two other justices who believed that Brennan was correctly interpreting the Constitution insofar as libel suits by private citizens were concerned. Therefore, the Brennan opinion was not a "holding" by the Court. In

fact, the plurality opinion was specifically rejected by a majority of the Court in a 1974 case.[9] Similarly, many of the Court's considerations of obscenity cases from *Roth* in 1957 until *Miller* in 1973 could only muster plurality opinions. In some of these cases as many as seven different opinions were written as the justices sought to explain the reasons for their votes.[10]

Per curiam decisions also are given by the Court; that is, an unsigned decision by at least a majority of the Court, such as in the Pentagon Papers cases. A short statement as to the reasons for the Court permitting resumption of publication of the papers was given in the per curiam decision, and then each Court member wrote a separate opinion explaining why the *New York Times* and the *Washington Post* should, or should not, be permitted to publish the classified study.

Court decisions can be of several types. The Court can (1) affirm an inferior court's decision or action; (2) reverse a decision and remand the case back to the lower court for dismissal of the case or whatever; (3) return the case to the lower court for proceedings consistent with the views expressed in the Court's opinion; (3) vacate a judgment and remand for further proceedings; and (4) grant or deny applications for stays of judgments.

Court decisions and opinions are recorded in three publications: *United States Reports*, *Supreme Court Reporter* and *United States Supreme Court Reports*, Lawyers' Edition. A citation such as 94 S.Ct. 2437 (1974) means that the case was decided in 1974 and is reported in volume 94, page 2437, of the *Supreme Court Reporter*.

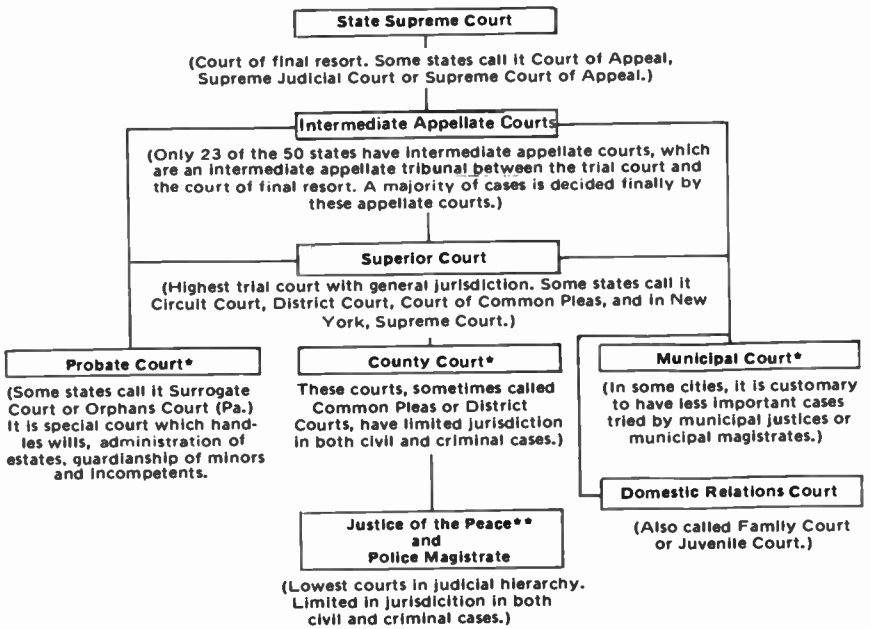
E. Specialized federal courts. There are a number of courts which have jurisdiction limited to a special class of cases indicated by the court's name, such as Court of Claims, Customs and Patent Appeals Court, and the Tax Court. The Court of Claims has jurisdiction over certain kinds of money claims against the United States—a jurisdiction concurrent with that of the district courts. Among its powers, the Court of Claims can award a maximum of $5,000 to anyone erroneously convicted or imprisoned by the federal government.

State Judicial Systems

The federal system is simplicity personified compared with the state systems since the latter vary from state to state. Generally the lowest level of courts will have limited jurisdiction in both civil and criminal cases and will be called by such names as magistrate's court, police court, municipal court or justice of the peace court (*See* Fig. 4).

These courts deal with a variety of minor offenses, such as public

Fig. 4 State Judicial System*



*Courts of special jurisdiction, or as Probate, Family or Juvenile, and the so-called inferior courts, such as Common Pleas or Municipal courts, may be separate courts or may be part of the trial court of general jurisdiction.

**Justice of the Peace courts do not exist in all states. Their jurisdiction vary greatly from state to state where they do exist.

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intoxication, speeding, trespassing, illegal parking, etc. They may be empowered to handle civil cases which do not involve a sum of money exceeding a few hundred dollars. If these courts are empowered to impose a jail sentence for a misdemeanor, the length of the sentence will be severely limited.

A. Courts of original jurisdiction. Somewhere above the layer of magistrate or justice of the peace courts will be courts variously designated but which have one thing in common—original jurisdiction for either criminal cases or civil cases, or both. These will be the principal trial courts in the state and will be called by such names as district court, court of common pleas, circuit court or, as in the state of New York, the Supreme Court (and each county in that state has such a court with the Court of Appeals serving as the uppermost appellate court in the state). These courts may handle civil suits usually involving a minimum sum of money and they probably will handle both criminal misdemeanors and felonies (if the two kinds of cases are within the jurisdiction of the same court). In the larger cities, courts of original jurisdiction may be set up to handle civil suits exclusively, or only criminal cases.

B. In the more populated states, an intermediate appellate court structure will exist. In Missouri, for example, Courts of Appeal sit in Kansas City, Springfield and St. Louis. Generally they will have appellate jurisdiction only.

C. Each state has a supreme court although it may not be called by that name (as in New York). State constitutions generally indicate the kinds of cases that can be reviewed by the highest court in the state, such as those involving constitutionality of state laws. Usually only civil cases involving a certain amount of money can be appealed to the supreme court, such as in Missouri where the amount must exceed $15,000. Also, any case that involves the state as one of the parties in a suit generally can be reviewed, as can any adjudications at the intermediate appellate level.

[1] *See*, concurring opinion by Justice Robert H. Jackson in D'Oench Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 472, 62 S.Ct. 676, 686, 86 L.Ed. 956, 969–70 (1942).
[2] 82 Stat. 1108, 28 U.S. Code Secs. 631–39.
[3] 36 Stat. 557.
[4] 56 Stat. 199.
[5] Per curiam decision in Joseph P. Moody et al. v. Albemarle Paper Co. et al., 94 S.Ct. 2513. 2514 (1974).
[6] *See* Chap. III, pp. 38–43.
[7] 1 Cranch 137, 2 L.Ed. 60.
[8] *See* Chap. IV, pp. 74–78.
[9] The case involved Elmer Gertz v. Robert Welch, Inc. (op. cit., Chap. IV, pp. 85–88). Justice Powell, who gave the Court's opinion, and Justice Rehn-

quist, who joined in that opinion, were not on the Court at the time of the *Rosenbloom* decision. Justice Blackmun, also an appointee of President Nixon, joined in Powell's opinion although he had associated himself with the Brennan plurality opinion in 1971.

10 *See* Chap. IX, pp. 222–29.

APPENDIX B
DEFINITIONS OF LEGAL TERMS[1]

A

adjudication—Giving or pronouncing a judgment or decree; also the judgment given.

adversary system—The system of trial practice in the United States in which each of the opposing, or adversary, parties has full opportunity to present and establish opposing contentions before the court.

amicus curiae (*a-mi'kus kū'ri-e)*—A friend of the court; one who interposes, with the permission of the court, and volunteers information upon some matter of the law.

appellant—The party appealing a decision or judgment, which he considers unfavorable, to a higher court.

appellate court—A court having jurisdiction of appeal and review; not a "trial court."

appellee—The party against whom an appeal is taken.

arraignment—In criminal practice, to bring a prisoner to the bar of the court to answer a criminal charge.

B

bail—To set at liberty a person arrested or imprisoned, on security being taken, for his appearance on a specified day and place.

bail bond—An obligation signed by the accused, with sureties, to secure his presence in court.

banc (*bangk*)—Bench; the place where a court permanently or regularly sits. A "sitting in banc" is a meeting of all the judges of a court, as distinguished from the sitting of a single judge.

brief—A written or printed document prepared by counsel to file in court, usually setting forth both facts and law in support of his case.

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[1] Many of the definitions appearing in this appendix were taken, with permission, from a booklet, *The Newsman's Guide to Legalese*, published by the Pennsylvania Bar Association, Harrisburg, Penn.

C

certiorari (*s'er'shi-ō-rā'ri*)—An original writ commanding judges or officers of inferior courts to certify or to return records of proceedings in a cause for judicial review. In effect the issuing of the writ indicates that an appeal of the case will be heard.

change of venue—The removal of a suit begun in one county or district to another, for trial.

common law—Law which derives its authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of courts. Also called "case law."

complainant—Synonymous with "plaintiff."

complaint—The first or initiatory pleading on the part of the complainant, or plaintiff, in a civil action.

contempt of court—Any act calculated to embarrass, hinder or obstruct a court in the administration of justice, or calculated to lessen its authority or dignity. Contempts are of two kinds: direct and indirect. Direct contempts are those committed in the immediate presence of the court; indirect is the term chiefly used with reference to the failure or refusal to obey a lawful order.

D

damages—Pecuniary compensation which may be recovered in the courts by any person who has suffered loss, detriment, or injury to his person, property, or rights, through the unlawful act or negligence of another.

de novo—Anew, afresh. A "trial de novo" is the retrial of a case.

decree—A decision or order of the court. A final decree is one which fully and finally disposes of the litigation; an interlocutory decree is a provisional or preliminary decree.

demur (*dē-mer'*)—To file a pleading (called a "demurrer"), admitting the truth of the facts in the complaint, or answer, but contending they are legally insufficient.

directed verdict—An instruction by the judge to the jury to return a specific verdict.

dissent—A term commonly used to denote the disagreement of one or more judges of a court with the decision of the majority.

due process—Law in its regular course of administration through the courts of justice. The guarantee of due process requires that every man have the protection of a fair trial.

E

enjoin—To require a person, by writ of injunction from a court of equity, to perform or to abstain or desist from some act.

equitable action—An action which may be brought for the purpose of restraining the threatened infliction of wrongs or injuries, and the prevention of threatened illegal action. Such a remedy is not available at common law.

equity, courts of—Courts which administer a legal remedy according to the system of equity, as distinguished from courts of common law.

et al—An abbreviation of et alii, meaning "and others."

ex parte—By or for one party; done for, in behalf of or on the application of one party only.

ex post facto (*eks pōst fak'to*)—After the fact; an act or fact occurring after some previous act or fact, and relating thereto.

fair comment—A term used in the law of libel, applying to statements made by a writer in an honest belief of their truth, relating to official act, even though the statements are not true in fact.

felony—A crime of a graver nature than a misdemeanor. Generally, an offense punishable by death or imprisonment in a penitentiary.

fiduciary (*fi-dū'shi-ā-ri*)—A term derived from the Roman law, meaning a person holding the character of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires.

G

general demurrer—A demurrer which raises the question whether the pleading against which it is directed lacks the definite allegations essential to a cause of action or defense.

H

habeas corpus (*hā'be-as kor'pus*)—"You have the body." The name given a variety of writs whose object is to bring a person before a court or judge. In most common usage, it is directed to the official or person detaining another, commanding him to produce the body of the prisoner or person detained so the court may determine if such person has been denied his liberty without due process of law.

I

in banc—All the judges of the court sitting together to hear a cause (suit, litigation or action—either civil or criminal).

in camera (*in kam'e-ra*)—In chambers; in private.

indictment—An accusation in writing, found and presented by a grand jury, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a crime.

information—An accusation of some criminal offense, in the nature of an indictment, from which it differs only in being presented by a competent public officer instead of a grand jury.

injunction—A mandatory or prohibitive writ issued by a court.

instruction—A direction given by the judge to the jury concerning the law of the case.

inter alia—Among other things or matters.

interlocutory—Provisional; temporary; not final. Refers to orders and decrees of a court.

J

jurisprudence—The philosophy of law, or the science which treats of the principles of positive law and legal relations.

jury—A certain number of people, selected according to law, and sworn to inquire of certain matters of fact, and declare the truth upon evidence laid before them.

grand jury—A jury whose duty is to receive complaints and accusations in criminal cases, hear the evidence and find bills of indictment ("true bills") in cases where they are satisfied a trial ought to be had.

petit jury—The ordinary jury of twelve (or fewer) persons for the trial of a civil or criminal case; so called to distinguish it from the grand jury.

L

libel—A method of defamation expressed by print, writing, pictures or signs; in its most general sense, any publication that is injurious to the reputation of another.

M

mandamus (*man-dā'-mus*)—The name of a writ which issues from a

court of superior jurisdiction, directed to an inferior court, commanding the performance of a particular act.

misdemeanor—Offenses less than felonies; generally those punishable by fine or imprisonment other than in penitentiaries.

mistrial—An erroneous or invalid trial; a trial which cannot stand in law because of lack of jurisdiction, wrong drawing of jurors or disregard of some other fundamental requisite.

moot—Unsettled; undecided. A moot point is one not settled by judicial decision.

N

nolle prosequi (*nol'e pros'e-kwi*)—A formal entry upon the record by the plaintiff in a civil suit, or the prosecuting officer in a criminal case, by which he declares that he "will no further prosecute" the case.

nolo contendere (*nō'lō kon-ten'de-re*)—A pleading, usually by defendants in criminal cases, which literally means, "I will not contest it."

P

parties—The persons who are actively concerned in the prosecution or defense of a legal proceeding.

plaintiff—A person who brings an action; the party who complains or sues in a personal action and is so named, on the record.

preliminary hearing—Synonymous with "preliminary examination." This is the hearing given a person charged with crime by a magistrate or judge to determine whether he should be held for trial.

Q

quasi-judicial—Authority or discretion vested in an officer wherein his acts partake of a judicial character.

R

rule of court—An order made by a court having competent jurisdiction. Rules of court are either general or special; the former are the regulations by which the practice of law is governed; the latter are special orders made in particular cases.

S

slander—Base and defamatory words tending to prejudice another in his reputation, business or means of livelihood. Slander is an oral defamation unlike libel, which is a written or printed defamation.

special performance—An order from a court instructing the subject of the order to carry out an affirmative act.

stare decisis (*sta're de-si'sis*)—The doctrine that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to future cases where the facts are substantially the same.

statute—The written law in contradistinction to the unwritten law.

stay—A stopping or arresting of a judicial proceeding by order of the court.

subpoena—A process to cause a witness to appear and give testimony before a court or magistrate.

subpoena duces tecum (*su-pē'na dū'sēz tē'kum*)—A process by which the court commands a witness to produce certain documents or records in a trial.

T

tort—An injury or wrong committed, either with or without force, to the person or property of another.

trial de novo—A new trial or retrial in an appellate court in which the whole case is gone into as if no trial had been held in a lower court.

V

venue—A particular county, city or geographical area in which a court with jurisdiction may hear and determine a case.

W

warrant of arrest—A writ issued by a magistrate, justice of the peace or other competent authority, to a sheriff or other officer, requiring him to arrest the person therein named and bring him before the magistrate or court to answer to a specified charge.

writ—An order issuing from a court requiring the performance of a specified act, or giving authority and commission to have it done.

APPENDIX C
LAW OF COPYRIGHT

Copyright is a form of protection given either by federal statute (Title 17 of the U.S. Code), state statutory law (although not many states have enacted such laws) or the common law to the authors of literary, dramatic, musical, artistic and other kinds of intellectual works. Under the law a copyright holder is given a complete monopoly as to how or when such a work can be used or reproduced.[1] With the exception of "fair use" (explained later), no part of a copyrighted work can be used by someone else without first obtaining the copyright holder's permission.

The first national copyright law was enacted in 1790 by the First Congress. Since then, there have been three general revisions of the federal copyright act—1831, 1870 and 1909, the latter being the one in effect at the time this book was published. The 1790 legislation came shortly after ratification of the U.S. Constitution which states in Article I, Section 8, that "Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." At the time, 12 of the 13 original states (Delaware being the exception) had enacted legislation to protect an author's work; and these laws, including the 1790 statute, generally were patterned after the first copyright law that had been passed in England in 1709.

The constitutional authorization for copyright is predicated on the thesis that the sciences, arts, and other human endeavors will be advanced by encouraging writers, through the monopoly that protects their writing, to be creative. The protection afforded is for a limited time, whereupon copyrighted works become a part of the public domain. The copyright period stipulated in the 1790 legislation was 14 years with right of renewal by the author, if still living, for another 14 years. The current copyright law, as amended, provides for an initial copyright period of 28 years with a 28-year renewal proviso. Under a bill calling for a general overhaul of the badly outdated Act of 1909, the copyright period generally would be for the life of the author plus 50 years,[2] which would bring the federal law in line with those of virtually all other countries.[3]

The 1909 Copyright Act did not establish exclusive federal jurisdiction over the matter of copyright. In fact, Section 2 of Title 17

states: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

This section of the law refers to *unpublished* works, which state law and the common law can protect; but *published* works, if they are to be protected, must be copyrighted under the *federal* law. Like many other facets of copyright law, the question of what constitutes publication is a sticky one. For example, prior to the 1971 amendment of the 1909 Act,[4] sound recordings were not protected by federal legislation, so that once a sound recording was "published" it presumably would fall into the public domain. This was part of the rationale put forth in *Goldstein et al. v. California*,[5] in which it was argued that the state penal code (Section 653h), prohibiting unauthorized duplication of sound recordings (commonly referred to as "record piracy"), was invalid. The appellant claimed that the state law conflicted with the U.S. Constitution and the 1909 Act. Prior to the *Goldstein* ruling by the U.S. Supreme Court, state and federal courts generally had classified sound recordings as *unpublished* works on the theory that they were not copies of, in this case, musical compositions. As unpublished works, they could be protected by state law or the common law. The Supreme Court held that since sound recordings were not a part of the Copyright Law at the time appellants were accused of violating the California statute, states could protect those works not specifically enumerated in Section 5 of Title 17. Such protection was not pre-empted by the 1909 Act, the Court declared.[6]

Under the federal Act, 14 classes of "published" works or material can be copyrighted: (1) books, including cyclopedic works, directories, gazetters, and other compilations; (2) periodicals, including newspapers; (3) lectures, sermons and addresses prepared for oral delivery; (4) dramatic or dramatic-type musical compositions; (5) musical compositions; (6) maps; (7) works of art, including models or designs for works of art; (8) reproductions of works of art; (9) drawings of plastic works of a scientific or technical character; (10) photographs; (11) prints and pictorial illustrations including prints or labels used for articles of merchandise; (12) motion picture photoplays, such as feature-length dramatic-type films or television plays, short subjects, animated cartoons, musical plays, and similar productions having a plot; (13) motion pictures other than photoplays, such as news films, travel films, documentaries, or similar works that have no plots; and (14) sound recordings.[7]

If the work is unpublished, it need not be copyrighted to be protected. The common law of literary property protects unpublished works so long as copies of those works are not placed on sale, sold, or otherwise made available to the public. The protection afforded by the common law continues as long as the works remain unpublished.

Certain kinds of unpublished works can be registered under the federal Copyright Law: musical compositions, dramas, works of art, drawings and sculptural works of a scientific or technical character, photographs, motion pictures, and those works prepared for oral delivery. Other kinds of material, such as books, cannot be copyrighted until published.

Published works are those that in some way have been made available to the public, although no specific number of copies or method of distribution is required or stipulated by the law in order to constitute "publication." Thus, the distribution of copies to a limited group might constitute publication and thereby place the work in the public domain if it had not been properly marked and registered with the Office of Copyright.

Three steps should be taken to secure and maintain statutory protection for published works:

1. The original and copies must carry the correct copyright notice. In the case of books, three elements must be included in the copyright notice and they must appear either on the title page or the page immediately following (normally the reverse side of the page bearing the title). The elements are the copyright notice, the name of the copyright holder, and the year the book was published. One of the three following forms would be required to give a legally binding copyright notice:

Copyright 1975, by John Doe
Copr. 1975, by John Doe
© John Doe 1975

By adding—© under UCC 1975 by John Doe—under the copyright notice, protection is secured in those countries that are signatories of the Universal Copyright Convention.

The date of publication ordinarily is the year in which copies first are placed on sale or publicly distributed by the copyright holder. If the work previously had been registered for copyright in unpublished form, such as a photograph, then the year during which registration occurred should be used in the copyright notice. Although no copyright notice is required for unpublished works, it is advisable to add such a notice to show intention or interest in copyright upon

publication. For works other than books, different copyright notices may be required.

2. Publish the work.

3. Register the claim to copyright in the Copyright Office. A form appropriate to the type of work or material first must be obtained from the Copyright Office, the Library of Congress, Washington, D.C. 20559. This form, plus two copies of the published work,[8] plus the appropriate fee ($6 in the case of published works) then are sent to the Register of Copyrights.

Not everything that is created can be copyrighted. Categories of material which generally will not be eligible for statutory copyright protection include:[9]

1. Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listings of ingredients or contents.

2. Ideas,[10] plans, methods, systems, or devices, as distinguished from a description or illustration.

3. Works that are designed for recording information and do not in themselves convey information, such as blank forms to be used as time cards, account books, diaries, blank checks, score cards, address books, report forms, and the like.

4. Work consisting entirely of information that is common property and containing no original authorship. For example: standard calendars, height and weight charts, tape measures, rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.

5. Works published in whole or in part by the United States Government provided that the Postmaster General has not secured a copyright on behalf of the United States for those publications authorized by 39 U.S. Code Sec. 2506.[11]

In general, the principles of copyright law can be summarized as follows: (1) there is no exclusive property right in a general subject; (2) all previous publications on a subject can be consulted without this necessarily constituting infringement; (3) the rights of an author or creator are limited to what is "original" with him; i.e., what he has independently created. As with the word *publication*, there is difficulty in interpreting the meaning of *originality*, or the degree of originality that must exist for a work to be protected.

Copyright Infringement

There is no definition in the Act of 1909 as to what is copyright infringement. Rather, Section 104 states: "Any person who willfully

and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor. . . ."[12] If found guilty, the infringer is liable by means of an injunction to halt the sale of the infringer's work, destruction of the infringing copies and plates, and, in the case of a criminal misdemeanor (willful infringement for profit), imprisonment not to exceed one year, or a fine of between $100 and $1,000, or both. In addition, actual damages are recoverable, such as the market value of the infringed copyrighted material. Even if no actual damages can be shown, the 1909 Act permits the recovery of various sums, depending on the nature of the infringement, up to a maximum of $5,000 (in the case of motion pictures) absent knowing or willful infringement. Also, a fraudulent notice of copyright is a misdemeanor punishable by a fine of not less than $100 and not more than $1,000.

A three-year statute of limitations applies to both the civil and criminal sections of the Copyright Act.

Three major factors often are considered in determinations of infringement: (1) originality of the copyrighted work; (2) proof of access to the copyrighted work; and (3) similarity between the works being compared.

Some courts have held that the originality must be substantial before infringement can be found; but there is disagreement as to what delimits "substantial." Furthermore, not all courts are willing to apply such a standard.

As for proof of access, even in the absence of such proof infringement can be found. Access was one of several factors considered in *Senta Marie Runge v. Joyce Lee and Joyce Lee Cosmetics, Inc.*[13] when a jury awarded Ms. Runge the following damages resulting from publication of a book about cosmetics: $80,000 compensatory damages against the company for copyright infringement; $25,000 in punitive damages against Ms. Lee for unfair competition; $20,000 in punitive damages against the company for unfair competition, and the District Court judge granted Ms. Runge $12,000 in attorney fees, issued a permanent injunction and ordered the remaining copies of the infringing book impounded and destroyed—actions affirmed by the Ninth Circuit U.S. Court of Appeals which considered the factors of access and originality, as well as "circumstantial" evidence.

Concerning "originality," the three-judge panel quoted from an earlier decision of the Ninth Circuit court, saying: "The author must have created the work by his own skill, labor and judgment, contributing something 'recognizably his own' to prior treatments of the same subject. However, neither great novelty nor superior artistic

quality is required" for the work to be copyrightable.[14] The appellate court approvingly quoted one of the District Court judge's instructions to the jury, to wit: that there would be no infringement if a subsequent writer "used her own labors, skills or common sources of knowledge open to all men, and the resemblances are accidental or arise from the nature of the subject matter. . . ."

The factors considered by the appellate court in affirming the jury's award of damages were: (1) the defendant had been employed by the plaintiff and in the course of her work had used the book written by the plaintiff (access); (2) the defendant had very little writing experience prior to the publication of the book (one newspaper article that was unrelated to the topic of her book); (3) the defendant wrote the book in one month. Thus, the issue of infringement was resolved not alone by a comparison of the two books to determine if there had been unlawful copying of a copyrighted book, but by such considerations as the defendant's demonstrated prior writing ability.

Few cases would involve word-by-word copying, consequently a similarity test may be used. Some courts have required that any similarity must be "substantial;" but, again, there is no uniformity concerning the meaning of substantial. Evidence of "common errors" in the works being compared also is used in reaching conclusions about similarities.

In determining "substantial similarity," courts may use either a pattern test or an audience test.[15] The pattern test was advocated in a 1945 law review article by Prof. Zechariah Chafee Jr. of Harvard University. Using such a test might require the use of experts who would seek to determine if a pattern of appropriation exists, such as in an infringement case involving nuclear physics textbooks.[16] The audience, or "ordinary observer," test could be applied by a jury of laymen. Ultimately, however, the method of analysis best suited to the particular facts of a case probably will be the one that's used; and most likely there will be more than one line of analysis. In *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*,[17] the Ninth Circuit U.S. Court of Appeals said that complete or substantial identity between the original and the copy is not required, adding that "copying and infringement may exist although the work of the pirate is so cleverly done that no identity of language can be found in the two works."

News Stories and Copyright Law

It is well established by judicial precedent that the facts involved in news stories cannot be copyrighted. What can be copyrighted is

the style of writing involved in the news stories. Once a news story is reported, other news organizations may independently investigate and report the facts they obtain.[18] Competing news organizations cannot "pirate" the news from one another; that is, "bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or expense."[19] Note the requirement imposed in the Supreme Court's decision: independent investigation or other expense. The avoidance of piracy requires an independent investigation. If one newspaper steals a story from another, but substantially changes the style of writing or the way in which the story is written and thereby avoids infringement, an injunction and/or recovery might be obtained on a theory of unfair competition, as in the Supreme Court's decision in *International News Service v. Associated Press.*[20] In this case, INS was alleged to have taken news stories transmitted by AP for AP-member newspapers and sent the stories to clients which had purchased the INS wire service. AP stories were not copyrighted since, at the time of transmission by leased wire, they had not yet been published and therefore were not copyrightable. For this reason, AP brought a suit based on unfair competition that was supported by the Court's affirmation of the issuance of an injunction against INS.

Concerning copyright of news story facts, Justice Mahlon Pitney said for a Supreme Court majority: ". . . [T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day. It is not to be supposed that the framers of the Constituion . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

In a more recent, but similar, case, an injunction was granted against radio station WPAZ in Pottstown, Pa., after a newspaper in that city, the *Pottstown Mercury*, complained of *unfair competition* in the use of its news stories by the station without permission or authorization. The issuance of the injunction was upheld by the Pennsylvania Supreme Court.[21]

Just as a newspaper cannot copyright the facts, neither can a photographer copyright the subject matter of photographs. Only the particular arrangement or composition can be protected.

A newspaper can copyright each and every issue of the paper, but such a copyright protection may not extend to the separate elements; therefore, separate copyrights may be sought for feature stories, photographs, contests and advertisements in a given issue.

Any advertisements or commercials that meet the criteria for copyright can be given such protection; but in the case of a newspaper advertisement, for example, both the newspaper and, if different, the creator of the advertisement, should file for copyright. As for the name of a newspaper or magazine, it would be protected under the common law involving trade-marks.

"Fair Use" of Copyrighted Works

Nowhere in the Copyright Act is there any mention of the "fair use" of a copyrighted work. Despite the language of the 1909 Act in granting a monopoly to the copyright holder to exclusively control what happens to a protected work, the courts have created the doctrine of fair use and it has become, in the words of the Second Circuit U.S. Court of Appeals, "the most troublesome in the whole law of copyright. . . ."[22] Senate Bill 1361 contains a broad "fair use" provision in Section 107 which states:

> Notwithstanding the provisions of Section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> (1) the purpose and character of the use;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Literary criticism and comment is foremost in laying a claim to fair use since they do not serve the same function as the work being reviewed. Further, the other purposes cited in S. 1361 are clearly in the public interest and therefore should not be stymied by a complete monopoly. And yet the conferral of a statutory right to such a monopoly also involves the public interest, since it is in that interest that creativity is protected and therefore encouraged. The balancing of interests has rested upon the judiciary.

Concerning the applicability of the fair use doctrine, the Second Circuit Court of Appeals said: "Whether the privilege [of fair use] may justifiably be applied to particular materials turns initially on the nature of the materials, *e.g.*, whether their distribution would serve the public interest in the free dissemination of information and

whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography."[23] In the case being considered at the time of the Second Circuit panel's comment about fair use, billionaire recluse Howard Hughes was attempting to prevent publication of a biography about him by Random House. To further this desire, Rosemont Enterprises was established and purchased the copyright to three Hughes-related articles that had appeared in *Look* magazine (Feb. 9, 23 and March 9, 1954) under the title "The Howard Hughes Story." In granting a preliminary injunction, the U.S. District Court rejected Random House's "fair use" argument concerning biographies, saying that such a fast-moving biography "can scarcely be said to be scholarly, scientific or educational. . . ."[24] Borrowing from copyrighted sources for non-scholarly purposes, said the judge, is severely limited under the doctrine of "fair use." But the appellate court disagreed with the lower court, saying that on the facts presented the public interest should prevail over the copyright protection. The court said: "Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e., the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work." Such concerns, the court declared, are irrelevant "to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use." Rather, the public interest should be the primary concern in any "fair use" determination.

The courts have taken into consideration various factors in making determinations about "fair use." In addition to the public interest element stressed by the Second Circuit panel, other factors include: (1) the nature (or function) of the material (*e.g.*, scholarly, scientific or educational); (2) the amount used in relation to the whole of the copyrighted work; (3) the amount of independent research that went into the alleged infringer's work; (4) the motives behind the infringement (*e.g.*, commercial gain); and (5) the reduced demand for the original work as a consequence of the infringement.

As the author of a law review article said: "Generally, the courts will find a use fair where it serves a different function than the original and does not reduce the author's economic benefit. Courts have also been sympathetic in finding a fair use by scholarly, scientific or educational works, which conform to the constitutional

purpose, whereas they have not exercised the same leniency for commercial uses." But ultimately "each case turns on its particular facts."[25]

Photocopying and Copyright Law

An important decision was reached in 1972 when a commissioner ruled in *Williams & Wilkins Co. v. U.S.*[26] that the making of single photocopies of book or periodical material is sufficient to incur liability because, contrary to what the defendants argued, such "copying" met the definition of "publishing." "Publishing," said the commissioner, "means disseminating to others, which defendant's libraries [National Institutes of Health and the National Library of Medicine] clearly did when they distributed photocopies to requesters and users." The commissioner further observed that "courts have held that duplication of a copyrighted work, even to make a single copy, can constitute infringement."

The commissioner's ruling—that photocopying of an entire article from a journal, even though not for commercial exploitation, constitutes an unfair use and therefore infringes upon the copyright—was submitted to the full U.S. Court of Claims since such a finding had important ramifications for libraries, researchers, students, teachers, etc., in light of the widespread use of photocopying. The full court, by a 4-3 vote, reversed the commissioner thereby narrowly vindicating the government's position that photocopying of articles from medical journals is fair use. But this ruling was limited to the photocopying being done by government medical-type libraries and is not applicable to "dissimilar systems or uses of copyrighted materials by other institutions or enterprises, or in other fields, or as applied to items other than journal articles, or with other significant variables."[27] Thus, the door has been left ajar for infringement suits involving much of the practice of photocopying.

Under S. 1361, Section 108(a), a limited right to photocopy would be extended to libraries and archives. The section reads: " . . . [I]t is not an infringement of copyright for a library or archive, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section and if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library are (i) open to the public, or (ii) available not only to researchers affiliated with the library or

archives or with the institution of which it is a part, but also to other persons doing research in a specialized field."

The making of *one copy* (!) is limited to the following purposes: preservation or security of the original work, or deposit for research use; replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen if the library, after a reasonable effort, has determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States.

The conflict of interests between librarians, the public, publishers, authors and researchers-students is nowhere more evident than in the above section of the copyright bill which would severely limit photocopying.

Cable Television and Copyright

In *Rosemont*, one of the factors considered by the Second Circuit Court of Appeals was *function*. This factor, plus the question of public performance, was critical in Supreme Court decisions concerning alleged infringement by cable television systems.

In *Fortnightly Corporation v. United Artists Television, Inc.*,[28] the Supreme Court held in a 5-1 decision that cable television serves a different function than over-the-air broadcasting. The latter involves the production and selection of programs, according to Justice Stewart who wrote the Court's opinion, while CATV simply carries, without any editing being required, such programs once they have been released to the public. The Court, in getting around Section 1 of Title 17 (which gives the copyright owner the exclusive right to control the *public performances* of his work), decided that CATV operators do not perform the programs that they receive and carry; that, in fact, they are comparable to the television viewer in receiving copyrighted performances from over-the-air broadcasts. Therefore, since no public performance is involved, the CATV user of copyrighted broadcast material is not an infringer. By this logic, the Court reversed the Second Circuit Court of Appeals which had ruled that retransmission of a television broadcast was a public performance within the meaning of 17 U.S. Code Sec. 1. Justice Fortas dissented partly on the ground that the meaning of "perform" is vague, but also because he believed the Court had indulged in an oversimplification of the function served by CATV, especially when it picks up a signal and carries it beyond the area normally served by the broadcaster of that signal.[29]

The question of infringement when CATV imports distant signals

arose in *Teleprompter Corp. et al. v. CBS* and *CBS v. Teleprompter Corp.*[30] A majority of the Supreme Court held that importation of such signals does not constitute a performance; therefore, a CATV system does not lose its status as a non-performer or non-broadcaster as a result of such importations.

In one of the two cases decided by the Court, CBS had contended that there were three other differences between the *Fortnightly* case and the ones then being reviewed, namely: (1) many CATV systems were originating programs, thereby functioning the same way as over-the-air broadcasters; (2) Teleprompter Corp. sold advertising time on its CATV operations (thereby gaining commercially by picking up over-the-air broadcast signals and, via cable and/or microwave relay towers, retransmitting them to the homes of CATV subscribers; and (3) there were interconnections between CATV systems so that one system could relay a program to another system and vice versa—just as network television could relay programs to affiliates and receive material from those stations. Therefore, CBS contended, CATV had crossed over the line and was functioning as broadcasters.

In discussing these contentions, Justice Stewart, who again gave the opinion of the Court, said: "The copyright significance of each of these functions—program origination, sale of commercials, and interconnection—suffers from the same logical flaw: in none of these operations is there any nexus with the defendants' reception and rechanneling of the broadcasters' copyrighted materials." What Stewart meant is that none of CBS' copyrighted material was involved in CATV's origination of programs, nor were such materials transmitted via the systems' interconnections, nor was advertising sold on the basis of the copyrighted programs. Concerning importation of distant signals, the copyright holder argued that if CATV systems are allowed to import and rechannel programs broadcast in other cities, they will dilute or diminish the profitability of later syndication of such programs since viewer appeal diminishes with successive showings in the same market area.

Stewart responded by noting that an advertiser typically pays the broadcasters a fee for each transmission based on an estimate of the number of viewers who will watch a given program. "By extending the range of viewability of a broadcast program," he said, "CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor." Then in tacit recognition of the issues being litigated, Stewart made this observation:

"These shifts in current business and commercial relationships,

while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."[31]

In dissenting, Justice Douglas verbally whiplashed CATV's practice of importing distant signals, saying:

> A CATV that builds an antenna to pick up telecasts in Area B and then transmits it by cable to Area A is *reproducing* the copyright but by theft. That is not "encouragement to the production of literary (or artistic) works of lasting benefit to the work" that we extolled in Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.Ed. 630.
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> * * *
>
> We are advised by an *amicus* brief of the Motion Picture Association that films from TV telecasts are being imported by CATV into their own markets in competition with the same pictures licensed to TV stations in the area into which the CATV—a nonpaying pirate of the films—imports them. It would be difficult to imagine a more flagrant violation of the Copyright Act. Since the Copyright Act is our only guide to law and justice in this case, it is difficult to see why CATV systems are free of copyright license fees, when they import programs from distant stations and transmit them to their paying customers in a distant market. That result reads the Copyright Act out of existence for CATV.

[1] In RCA Manufacturing Co. v. Whiteman et al., 114 F.2d 86, 88 (Second Circuit, 1940), Judge Learned Hand said, "Copyright in any form, whether statutory or at common law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work."

[2] Senate Bill 1361, "General Revision of Copyright Law," introduced by Sen. John L. McClellan, D-Ark., on March 26, 1973 (93rd Congress, 1st Session). For the past two decades there have been persistent efforts in Congress and by the Office of Copyright to obtain a general revision of the copyright law because many questions pertaining to new technologies since the 1909 Act was passed remain unresolved. These include such issues as photocopying, cable television's use of over-the-air broadcasts that contain copyrighted material, computer programming, sound recordings, etc. The House of Representatives passed H.R. 2512 in 1967, but a comparable measure, Senate Bill 644, remained bottled up in the Senate Judiciary Committee. In April, 1974, the copyright subcommittee cleared S. 1361 for consideration and possible action by the parent Judiciary Committee.

[3] Statement by Rep. Bertram L. Podell, D-N.Y., *Congressional Record*, Vol.

119, No. 80, p. H4060. On May 29, 1973, Rep. Podell introduced the McClellan bill in the House (H.R. 8186). While Congress had debated this and other proposals for amending the copyright law, a series of one-year extensions of *renewed* copyrights have been made so that some protection has existed past the 56-year statutory period.

4 17 U.S. Code Sec. 5(n).

5 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973). The Supreme Court affirmed the lower court's determination that the California law was valid. Justices Blackmun, Brennan and Douglas dissented. Chief Justice Burger gave the opinion for the Court.

6 Section 301 of Senate Bill 1361 would pre-empt all other laws, stating, in part: "On and after Jan. 1, 1975, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by Sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State."

7 The classes do not exclude certain kinds of works which, though not enumerated, may be copyrightable. Computer programs would be an example of material that is copyrightable, but not listed.

8 Photographs need not be individually copyrighted. Instead, the copyright owner can put together a collection of prints, photograph them, and send two copies of the "master" photograph to the Register of Copyrights.

9 Circular 1, *General Information on Copyright*, Copyright Office, Washington, D.C., p. 4.

10 Ideas can be protected on the theory that they are literary *property*—the same basis on which an advertising slogan can be protected. Such protection, however, usually requires that the ideas be both "concrete" and "novel," although just what constitutes concreteness or novelty is subject to some uncertainty. *See*, Melville B. Nimmer, *Nimmer on Copyright*, Vol. 2, Matthew Bender & Co., New York, 1973, p. 749.

11 The publication of a government document which contains copyrighted material does not abridge or annul the rights of the copyright holder.

12 In Senate Bill 1361, Section 501 reads: "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright."

13 441 F.2d 579 (1971).

14 Doran v. Sunset House Dist. Corp., 197 F.Supp. 940, 944 (Southern District of California, 1961); affirmed, 304 F.2d 251 (Ninth Circuit, 1962).

15 Lanny R. Holbrook, "Copyright Infringement and Fair Use," *University of Cincinnati Law Review*, Vol. 40, No. 3 (1971), p. 539.

16 *Id.*, at 539–40.

17 162 F.2d 354, 360 (1947). Quote from 18 C.J.S. Sec. 34, p. 176.

18 International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918).

19 *Id.*, 248 U.S. at 243, 39 S.Ct. at 74.

20 Op. cit., note 18. Justice Brandeis dissented, in part because he questioned whether news should be considered property, saying: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." 248 U.S. at 250. In Desney v. Wilder, 299 P.2d 257 (1956), the California Supreme Court reiterated Brandeis' view that "ideas are as free as the air," such that no one can have property rights in public domain facts.

21 Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 411 Pa. 383, 192 A.2d 657 (1963).

22 Dellar et al. v. Samuel Goldwyn, Inc., et al., 104 F.2d 661, 662 (1939).

[23] Rosemont Enterprises, Inc. v. Random House, Inc. and John Keats, 366 F.2d 303 (1966); certiorari denied, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967).

[24] 256 F. Supp. 55 (Southern District of New York, 1966).

[25] Op. cit., note 15, p. 547.

[26] 172 U.S.P.Q. 670 (Court of Claims, 1972).

[27] 42 *Law Week* 2282, Dec. 4, 1973. In his opinion for the court, Judge Davis pointed out that prior to the proliferation of copying machines, copying generally was acceptable, as distinguished from printing, reprinting and publishing.

[28] 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968). Justices Douglas, Harlan and Marshall took no part in either the consideration of the case or in the decision. Justice Abe Fortas dissented.

[29] The FCC asserted regulatory control over CATV (Cable Television Rep. & Order, 37 Fed. Reg. 3252, 36 FCC 2d 141 (1972)) and was upheld in this regard by the Supreme Court in U.S. v. Southwestern Cable Co., 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968), and again in *Fortnightly*. These regulations do restrict cable systems in their use of distant signals. What the commission is attempting to do is carry water on both shoulders by providing protection for the competing interests; i.e., permit the growth of this newer technology (cable TV) while still affording reasonable protection for local broadcasters, especially the still-developing UHF television stations whose growth and well-being drew special congressional attention.

[30] 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974). Justice Blackmun dissented in part; Justice Douglas, joined by Chief Justice Burger, dissented.

[31] Senate Bill 1361 originally proposed a sliding scale of royalty fees based on a CATV system's gross receipts. These fees periodically would be paid to the Register of Copyrights who then would make disbursements in accordance with the requirements set forth in S. 1361, including payments to bona fide copyright holders whose works had been used by CATV systems. The original scale of fees ranged from 1 to 5 per cent of gross receipts; *e.g.*, 1 per cent of a CATV system's gross receipts up to $40,000, and ultimately reaching 5 per cent of gross receipts totally more than $160,000. But this section of the bill was altered in mid-1974 by the full Senate Judiciary Committee which overwhelmingly voted to kill a provision in the bill that would have barred importation of a sports event from a distant market when that same event was being played in the system's local market. In addition, the sliding fee schedule was cut to a range of ½ to 2½ per cent in terms of the gross receipts noted above.

APPENDIX D
CONSTITUTION OF THE UNITED STATES AND BILL OF RIGHTS (PLUS 14th AMENDMENT)

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ART. I

Sec. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Sec. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Sec. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Sec. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Sec. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business: but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Sec. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same, and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been encreased during such time, and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Sec. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both

Houses shall be determined by yeas and Nays, and the names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations presented in the Case of a Bill.

Sec. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Sec. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Recepits and Expenditures of all public Money shall be published from time to time.

No title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Sec. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit

Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ART. II

Sec. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no person

have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Sec. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves

and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Sec. 3. He shall from time to time give the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Sec. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Art. III

Sec. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Sec. 2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Juris-

diction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Sec. 3 Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Art. IV

Sec. 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Sec. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but

shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Sec. 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Sec. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Art. V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Art. VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Art. VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

BILL OF RIGHTS

(The first ten amendments went into effect Dec. 15, 1791.)

Art. I

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 peaceably to assemble, and to petition the government for a redress of grievances.

Art. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Art. III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Art. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Art. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Art. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Art. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Art. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Art. IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Art. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Art. XIV
July 28, 1868

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall

not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

INDEX