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## Articles

- 102    ROBERT L. KERR  
          *The “Attack” Memorandum and the First Amendment*
- 139    STEPHEN BATES  
          *Disciplining the British Tabloids: Mosley v. News Group  
          Newspapers*
- 192    CHRISTOPHER SEAMAN AND DANIEL LINZ  
          *The Secondary Effects Doctrine Since Alameda*
- 215    JASMINE MCNEALY  
          *Plaintiff’s Status as a Consideration in Misrepresentation and  
          Promissory Estoppel Cases*

# THE “ATTACK” MEMORANDUM AND THE FIRST AMENDMENT: ADJUDICATING A STRONGER VOICE FOR BUSINESS IN THE MARKETPLACE OF IDEAS

ROBERT L. KERR

*This article considers the development of First Amendment doctrine pertaining to corporate political spending and commercial speech in the context of Justice Lewis F. Powell’s interest in strengthening the voice of business in the marketplace of ideas. An examination of Justice Powell’s pre-appointment memorandum, “Attack on American Free Enterprise System” and other relevant memoranda, correspondence, and documents in Justice Powell’s private Court papers not previously assessed in this regard suggests that, although Justice Powell’s jurisprudence indisputably advanced First Amendment protection for business interests, he also strove to maintain limits on such protection in order to preserve other societal interests.*

**Keywords:** Lewis Powell, commercial speech, corporate speech, advertising

## I. INTRODUCTION

Justice Lewis F. Powell, Jr., is remembered more than two decades after he left the Supreme Court for the many opinions he authored during his time there. His time on the bench was characterized by managing precarious balances in contentious cases, such as *University of California v. Bakke*, in which his opinion announcing the judgment of the Court both struck down a minority-admissions system and established an enduring rationale for race-conscious admissions.<sup>1</sup> Justice Powell also established such a reputation for his practice of synergizing swing votes with influential concurring opinions that the technique has since been dubbed “Powelling.”<sup>2</sup> He wrote more concurring opinions than any other justice during his time on the Court, and they frequently had the

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<sup>1</sup> 438 U.S. 265 (1978).

<sup>2</sup> Tristan Pelham-Webb, *Powelling for Precedent: ‘Binding’ Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693 (2009). Pelham-Webb credits the term “Powelling” to David O. Stewart, *A Chorus of Voices*, A.B.A. J., April 1991, p. 50, 52.

effect of altering majority opinions.<sup>3</sup> Particularly well known in journalism and media-law circles is his remarkable concurring opinion in *Branzburg v. Hayes*,<sup>4</sup> which has been called “the concurrence that spoke louder than the majority” because many courts have relied upon it to preserve a reporter’s privilege to protect anonymous sources that the case’s majority had rejected.<sup>5</sup>

Yet Justice Powell also continues to receive a great deal of attention for a document he completed while still in practice as a successful corporate attorney in Richmond, Virginia. Its original form was a confidential memorandum he wrote in response to conversations he had with a neighbor, Eugene B. Sydnor, Jr., who chaired the Education Committee of the U.S. Chamber of Commerce. As *The New York Times* reported it in September 1972, “Lewis F. Powell, Jr., in a confidential memorandum written two months before his nomination to the Supreme Court, urged the United States Chamber of Commerce to mount a campaign to counter criticism of the free enterprise system in the schools and the news media.”<sup>6</sup> The Chamber later distributed the memorandum to its national membership in a 1971 newsletter under the headline “Attack on American Free Enterprise System.” Its recommendations included the mounting of aggressive efforts in schools, media and the courts — particularly the Supreme Court — to advance business interests through the initiation of litigation and the filing of *amicus curiae* (friend-of-the-court) briefs. “[E]specially with an activist-minded Supreme Court,” it declared, “the judiciary may be the most important instrument for social, economic and political change.”<sup>7</sup>

Close to half a century after it was written, the memorandum lives on prominently in the popular consciousness of cyberspace. A recent Google search for the terms “Attack on American Free Enterprise System” and “Powell,” for example, returned about 4,290 links to related Web sites. A relatively less profuse but still considerable body of scholarly and professional literature largely characterizes the memorandum as highly influential in terms of expanding the political influence of big business, galvanizing much greater financial resources devoted to that purpose through lobbying, think tanks, legal foundations, the modern conservative movement, etc.<sup>8</sup> This article considers the memorandum’s historical influence from another perspective, focusing on

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<sup>3</sup> Samuel Estreicher and Tristan Pelham-Webb, *The Wisdom of Soft Judicial Power: Mr. Justice Powell, Concurring*, 25 CONST. COMMENT. 229 (2008)(documenting six of his concurring opinions that lower courts have treated as stating the majority holding of the Court).

<sup>4</sup> 408 U.S. 665 (1972) (Powell, J., concurring).

<sup>5</sup> Michelle Bush Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter’s Privilege*, 13 COMM. L. & POL’Y 379, 379-81 (2008)(showing that Justice Powell’s papers indicate he “fully intended to leave room for” a qualified reporter’s privilege with his *Branzburg* concurrence).

<sup>6</sup> Fred P. Graham, *Powell Proposed Business Defense*, N.Y. TIMES, Sept. 29, 1972, at 31.

<sup>7</sup> Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., “Attack on American Free Enterprise System,” [hereinafter “Attack Memorandum”] in U.S. Chamber of Commerce, WASH. REP., Aug. 23, 1971, at 6, on file in Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law [hereinafter LFP Papers].

<sup>8</sup> For fuller discussion of that literature, see notes 21-31 and accompanying text.

the jurisprudence of Justice Powell in cases in which the Court addressed the voice of business in the marketplace of ideas.<sup>9</sup> Justice Powell’s personal papers provide illuminating historical and legal insight into his role in the series of important cases — several of which are landmark — in which the Court considered the extent of First Amendment protection that should be accorded to corporate political media spending (often referred to as “corporate speech”) and commercial speech (advertising).<sup>10</sup> It was during Justice Powell’s years at the Court that the entire foundation for First Amendment protection of corporate political media spending was established,<sup>11</sup> as well as the greater part of modern commercial-speech law.<sup>12</sup> Those bodies of case law established the framework within which all such cases since that time have been adjudicated.

Through relevant memoranda, correspondence, and other documents in Justice Powell’s private Court papers not previously assessed in this regard, this article considers development of those bodies of First Amendment law in the context of his documented interest in strengthening the voice of business. The analysis of those records provides a window into the priorities Justice Powell maintained in his efforts to shape the case law in relation to the campaign he outlined before joining the Court for advancing business interests in the marketplace of ideas. It suggests that although his jurisprudence indisputably advanced those interests in terms of First Amendment protection, he also strove more than many characterizations of his “Attack” memorandum might suggest, to maintain limits on such protections in order to preserve other societal interests. This article contains a more detailed discussion of the “Attack on American Free Enterprise System” memorandum in historical context, followed by analysis first of his role in First Amendment cases involving corporate political media spending and in cases involving commercial speech. Both bodies of the Court’s jurisprudence reflect a grounding in the broader views that shaped citizen Powell’s memorandum, as well as a more nuanced and balanced adjudication of those views as forged by Justice Powell.

## II. THE “ATTACK” MEMORANDUM OF CITIZEN POWELL

In his memorandum for the Chamber of Commerce shortly before joining the Supreme Court, Powell sounded a clarion call for coordinated political activism by the

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<sup>9</sup> For fuller discussion of the specific elements of the “Attack on American Free Enterprise” memorandum that justify interpreting it as the outline for a campaign to influence the marketplace of ideas so as to advance the interests of the business community, see notes 13-20 and accompanying text.

<sup>10</sup> The term “corporate speech” is often used to distinguish corporate media spending that seeks to influence political outcomes or social climate from “commercial speech,” media efforts that promote products or services. Each has generated a distinct body of First Amendment law, and in that context, all corporate speech is not *commercial*, and neither is all commercial speech *corporate*.

<sup>11</sup> For fuller discussion of those cases on corporate political media spending, see notes 67-139 and accompanying text.

<sup>12</sup> For fuller discussion of those cases on commercial speech, see notes 144-213 and accompanying text.

business community and a greater voice for business in the nation's discourse. "Few elements of American society today have as little influence in government as the American businessman, the corporation, or even the millions of corporate stockholders," he wrote. "Current examples of the impotency of business, and of the near-contempt with which businessmen's views are held, are the stampedes by politicians to support almost any legislation related to 'consumerism' or to the 'environment.'"<sup>13</sup> He called for corporations to counter the "disquieting voices . . . of criticism" by waging through advertising and other public discourse "a sustained, major effort to inform and enlighten the American people," not only separately but with a level of coordination beyond any ever mounted at that time.<sup>14</sup> "Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations," the report declared.<sup>15</sup> As support for its assertions, it invoked sources such as *The Wall Street Journal*, commentator William F. Buckley, Jr., and economist Milton Friedman.<sup>16</sup>

The memorandum can be understood as the outline for a broad, multi-faceted campaign to influence the marketplace of ideas<sup>17</sup> so as to incline public opinion more favorably toward the business community. It explained that the educational programs it recommended "would be designed to enlighten public thinking." Among the specific measures it calls for was keeping the national television networks "under constant surveillance" for "criticism of the enterprise system," which should be countered by developing "staffs of eminent scholars, writers and speakers" who "are thoroughly familiar with the media, and how most effectively to communicate with the public." It recommended coordination of "a sustained, major effort to inform and enlighten the American people" through advertising aimed at "institutional image making," suggesting American business should devote at least ten percent of its "total annual advertising

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<sup>13</sup> "Attack Memorandum" at 6.

<sup>14</sup> *Id.* at 1, 5.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> The memorandum included citations to Jeffrey St. John, *Memo to GM: Why Not Fight Back?*, WALL ST. J., May 21, 1971; an untitled column by Buckley in the RICHMOND NEWS LEADER, June 8, 1970; and Friedman's foreword in ARTHUR A. SHENFIELD, *THE IDEOLOGICAL WAR AGAINST WESTERN SOCIETY* (1970).

<sup>17</sup> The Supreme Court has emphasized the "marketplace of ideas" concept as the rationale for deciding First Amendment cases more than any other. It was first articulated by Justice Oliver Wendell Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919): "The best test of truth is the power of the thought to get itself accepted in the competition of the market." The concept that truth naturally overcomes falsehood when they are allowed to compete derives from Enlightenment philosophy regarding the value of free exchange of ideas and has been prominent in American discourse on freedom of speech and press since before the nation's founding. See JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 31-41 (1988). For a discussion of the way the concept has been applied by the Supreme Court, see W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q., no. 1, 1996 at 40.

budget to this overall purpose.”<sup>18</sup> Corporations were urged to utilize their communications with employees and stockholders “far more effectively as educational media.”<sup>19</sup> The memorandum advocated that the Chamber of Commerce “insist upon equal time on the college speaking circuit.” exerting “whatever degree of pressure — publicly and privately — may be necessary to assure opportunities to speak.” It also recommended pushing for more pro-business faculty members, monitoring textbooks, adding courses “dealing with the entire scope of the problem addressed by this memorandum,” and providing incentives for faculty to publish pro-business articles in scholarly and professional journals and popular magazines.<sup>20</sup>

In scholarly literature, the “Attack on American Free Enterprise System” memorandum has been characterized as highly influential in a number of contexts, but most broadly as the inspiration for a broad, pro-business political movement. Houck declared that in the Powell memorandum, “the concept for a business-interest litigation center was born,” beginning with a study based on the memorandum by the California Chamber of Commerce that resulted in creation of the Pacific Legal Foundation in 1973, after the study recommended such a course of action.<sup>21</sup> Foden has labeled the wave of similar organizations that soon followed “the Freedom Based Public Interest Movement” and also traces their inspiration to the Powell memorandum’s call for “the creation of conservative public interest groups to defend the business community in the courts.”<sup>22</sup> Bogus characterized the Powell memorandum’s vision as “realized more quickly and effectively than he could have imagined,” including the beginning of successful “tort reform” campaigns “designed to shield big business and medicine from citizen lawsuits.”<sup>23</sup> Plater has discussed how the memorandum’s call “for business to begin funding academic and representational programs and foundations to counteract the 1960s ideologies in American society” contributed to successful efforts to block environmental regulation.<sup>24</sup> Franklin traced the U.S. Chamber of Commerce’s highly successful efforts at the Supreme Court in recent years — winning almost seventy percent of cases in which

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<sup>18</sup> “Attack Memorandum” at 5.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1458-60 (1984).

<sup>22</sup> Timothy L. Foden, *The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement*, 4 CONN. PUB. INT. L.J. 210, 212-14 (2005). See also Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of ‘Public Interest Law,’* 52 UCLA L. REV. 1223, 1241-1245 (2005) (discussing the great numbers of similar litigation centers launched in the seventies and eighties and calling the Powell memorandum an “important moment in the mobilization of business constituencies behind new public interest law organizations.”).

<sup>23</sup> Carl T. Bogus, *Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 1-5 (2008).

<sup>24</sup> Zygmunt J.B. Plater, *Environmental Law in the Political Ecosystem — Coping With The Reality of Politics*, 19 PACE ENVTL. L. REV. 423, 483-486 (2002). See also Zygmunt J.B. Plater, *Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. AND LITIG. 9 (2005), and Zygmunt J. B. Plater, *Theories of the Corporation*, 44 TENN. B.J. 14 (2008).



it filed a brief either as a party or an *amicus* the first three terms of the Roberts Court and sixty-two percent during the previous eleven terms of the Rehnquist Court — to the litigation practices launched in response to Powell’s memorandum.<sup>25</sup> Kovacs considered the memorandum’s role in cultivating intellectuals as “the willing tools of big economic interests,” producing what he labeled as “the neointellectual . . . who uses power, politics, and fear to perpetuate anti-democratic school initiatives.”<sup>26</sup>

The “Attack on American Free Enterprise System” memorandum is also widely discussed far beyond academic circles, as reflected by its Web presence. Even Wikipedia — in one prominent indication of the memorandum’s enduring presence in popular culture, apart from criticisms of the online encyclopedia’s reliability — declares: “In an extraordinary prefiguring of the social goals of business that would be felt over the next three decades, Powell set his main goal: Changing how individuals and society think about the corporation, the government, the law, the culture, and the individual. Shaping public opinion on these topics became, and would remain, a major goal of business.”<sup>27</sup> The Media Transparency site is one of many that feature copies of the memorandum and discussions on its impact, including a detailed analysis that characterizes it as “a leading catalyst in politicizing key sectors of the business establishment.”<sup>28</sup> Some commentary contends that the impact of Powell’s memorandum has been exaggerated, with *The American Prospect* executive editor Mark Schmitt contending that the memorandum was “no more the blueprint for what followed than Leonardo da Vinci’s drawings are design for the modern helicopter.”<sup>29</sup> Yet several postings on the U.S. Chamber of Commerce’s site laud the memorandum’s seminal influence, including a press release that declares its National Chamber Litigation Center to be “the brainchild of former U.S. Supreme Court

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<sup>25</sup> David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019-25 (2009).

<sup>26</sup> Philip Kovacs, *Neointellectuals: Willing Tools on a Veritable Crusade*, 6 J. CRITICAL EDUC. POL’Y STUD., no. 1, 2008, available at <http://www.jceps.com/index.php?pageID=article&articleID=116>. Kovacs offered examples of individuals he characterized as “neointellectuals”: “David Horowitz, who leads a crusade against ‘dangerous’ professors; Diane Ravitch, E. D. Hirsch, and Chester Finn, who monitor and create texts with the intent of keeping the United States under a positive light; Armstrong Williams, a living, breathing, paid advertisement; and Margaret Spellings, who repeatedly distorts research to market NCLB [No Child Left Behind], are all neointellectuals who continue to answer Powell’s call. . . . In terms of political involvement, think tank-housed neointellectuals such as Newt Gingrich, Diane Ravitch, Krista Kaffer, Frederick Hess, Eugene Hickok, Chester Finn, and Jay P. Greene enter political arenas to generate consent for pro-business educational initiatives at local, state, and national levels. Where philosophers of education timidly discuss entering policy arenas, neointellectuals engage aggressively and with determination.”

<sup>27</sup> “The Powell Memorandum,” in *Lewis F. Powell, Jr.*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Lewis\\_F.\\_Powell,\\_Jr.](http://en.wikipedia.org/wiki/Lewis_F._Powell,_Jr.) (last visited Jan. 28, 2010).

<sup>28</sup> Jerry Landay, *The Powell Manifesto: How A Prominent Lawyer’s Attack Memo Changed America*, MEDIA TRANSPARENCY, Aug., 20 2002, <http://old.mediatransparency.org/story.php?storyID=21> (last visited Jan. 26, 2010).

<sup>29</sup> Mark Schmitt, *The Legend of the Powell Memo*, AM. PROSPECT, April 27, 2005, available at <http://www.prospect.org/cs/articles?articleId=9606>.

Justice Lewis Powell. . . . Heeding Powell's observation that 'American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government,' the U.S. Chamber of Commerce established NCLC to serve as the voice of business in the courts."<sup>30</sup> Despite his skepticism about some assessments of the memorandum's impact, Schmitt acknowledges that the 130-page online study "Justice for Sale" (which he calls "a superb and still-relevant analysis of the use of corporate and right-wing foundation funds") documents clear linkage between the memorandum and the California Chamber of Commerce's decision to establish the Pacific Legal Foundation, "which remains an anchor of the anti-environmental 'property rights' movement."<sup>31</sup>

The era in which the "Attack on American Free Enterprise System" memorandum was first circulated has been documented as one shaped by the historical dynamics of a backlash from big business in response to a wave of success by consumer and environmental movements in the late sixties and early seventies.<sup>32</sup> According to Lee Edwards, official historian of the Heritage Foundation, beer magnate Joseph Coors said the "Attack on American Free Enterprise System" memorandum convinced him that American business was "ignoring a crisis," which led him in 1971 to invest the first \$250,000 to fund what later became the Heritage Foundation.<sup>33</sup> Other recent works on political developments of the period have credited the memorandum with motivating greater levels of political activity by the business community in the seventies, both

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<sup>30</sup> *NCLC Celebrates 30 Years of Advocacy on Behalf of the Business Community*, Feb. 22, 2007, U.S. Chamber of Commerce, [http://www.uschamber.com/nclc/070222\\_press\\_release.htm](http://www.uschamber.com/nclc/070222_press_release.htm). Another posting on the Chamber site states that the NCLC "has participated in more than 1,000 cases . . . at every level of the judicial system and before many regulatory agencies" as part of an "ambitious advocacy program" including "all aspects of employment relations, environmental regulation and enforcement, government contracts, as well as other cutting-edge legal issues in the areas of class action reform, product liability, toxic torts, and punitive damages." *NCLC Celebrates 30 Years of Service to the Business Community*, U.S. Chamber of Commerce, <http://www.uschamber.com/nclc/about/anniversary.htm> (undated posting, last visited Jan. 29, 2010). In 2007, the Chamber established its Lewis F. Powell Award for Business Advocacy, noting: "It was because of his 1971 memorandum that the organization was founded to advocate the concerns of American businesses before the judiciary." *Chamber's Litigation Center Celebrates 30th Anniversary*, U.S. Chamber of Commerce, Sept. 12, 2007, <http://www.uschamber.com/press/releases/2007/september/07-160.htm>.

<sup>31</sup> Schmitt, *supra* note 29. See also Barbara Moulton, *Justice for Sale: Shortchanging the Public Interest for Private Gain, Alliance for Justice*, 1993, <http://www.afj.org/for-nonprofits-foundations/resources-and-publications/free-resources/justice-for-sale.html>.

<sup>32</sup> TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 137-39 (2003) (discussing the Powell memorandum in the context of the business community's reaction to legislative action that included enactment of the National Environmental Protection Act and the Clean Air Act Amendments and the creation of the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission).

<sup>33</sup> LEE EDWARDS, *THE POWER OF IDEAS: THE HERITAGE FOUNDATION AT 25 YEARS* 125-26 (1997).

through financial support and media efforts.<sup>34</sup> In a *New York Times* op-ed column in 1972, for example, General Motors Chief Executive Officer R.C. Gerstenberg called for greater influence by business interests in the marketplace of ideas. "Recent experience teaches us that the importance of public opinion should never be underestimated, that legislation follows opinion, and uninformed opinion can lead to bad legislation and to unreasonable controls and restraints by government," he wrote. "The business community has a job to do. . . . Individually and collectively, we must speak out more than we have."<sup>35</sup> The early seventies also saw the launching of the groundbreaking advocacy strategy that would make Mobil Oil the most prominent corporate voice of the seventies by purchasing space on *The New York Times* op-ed page far more regularly than any other company had at that time.<sup>36</sup> Mobil's editorial-advocacy campaign was so successful in those years that political scientist Walter Berns titled an essay he published at the end of the decade "The Corporation's Song: Book and Lyrics by Hobbes, Locke, and Madison. Music by Mobil Oil?"<sup>37</sup>

The year after the "Attack on American Free Enterprise System" memorandum was distributed to Chamber members, the Business Roundtable was formed by some 200 chief executive officers from the nation's largest corporations in order to establish a unified political voice representing their diverse business interests. Its activities included one-on-one lobbying of legislators by the CEOs directly, campaign-finance spending through political-action committees, and media activities designed to shape public opinion. By the mid-seventies, *Business Week* called it "the most powerful voice of business in Washington."<sup>38</sup> Business historian Scott Bowman concluded that "[l]ess than a decade later, all their objectives had been accomplished."<sup>39</sup> Over the course of the decade, big business dramatically overhauled its manner of engaging the legislative process.<sup>40</sup> Between 1968 and 1978 the number of corporations with public-affairs offices in Washington increased from some one hundred to more than five hundred, and by 1980

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<sup>34</sup> JOHN MICKLETHWAIT AND ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 77-78 (2004); JOHN JUDIS, *THE PARADOX OF AMERICAN DEMOCRACY: ELITES, SPECIAL INTERESTS, AND THE BETRAYAL OF THE PUBLIC TRUST* 9 (2000).

<sup>35</sup> R.C. Gerstenberg, *To Tell the Truth*, N.Y. TIMES, Dec. 29, 1972, at A23.

<sup>36</sup> Robert L. Kerr, *Creating the Corporate Citizen: Mobil Oil's Editorial-Advocacy Campaign in The New York Times to Advance the Right and Practice of Corporate Political Speech, 1970-80*, 21 AM. JOURNALISM, no. 4, 2004, at 39.

<sup>37</sup> Walter Berns, *The Corporation's Song: Book and Lyrics by Hobbes, Locke, and Madison. Music by Mobil Oil?* in *PROSPERITY AND FREEDOM: THE FOUNDING FATHERS, COMMERCE, AND THE CORPORATION* 1 (American Enterprise Institute, ed. 1981).

<sup>38</sup> *Business' Most Powerful Lobby in Washington*, BUS. WK., Dec. 20, 1976, at 60.

<sup>39</sup> SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT* 145 (1996). See also Patrick J. Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 AM. SOC. REV., no. 5 (1992).

<sup>40</sup> Kim McQuaid, *Big Business and Public Policy in Contemporary United States*, in 11 *BUSINESS AND GOVERNMENT IN AMERICA SINCE 1870* 177-79 (Robert F. Himmelberg, ed., 1994); James Q. Wilson, *The Corporation as a Political Actor*, in *THE AMERICAN CORPORATION TODAY* 413 (Carl Kaysen, ed., 1996).

more than eighty percent of the Fortune 500 companies had their own Washington offices, with more than half of them created after 1970.<sup>41</sup> Between 1974 and 1982, the number of corporate political-action committees soared from 89 to 1,467. By the end of the seventies, persons employed by private industry to represent its interests in the nation’s capital outnumbered federal employees in the Washington metropolitan area.<sup>42</sup> In his history of the period, political journalist Thomas Byrne Edsall wrote that “the political stature of business rose steadily from the early 1970s, one of its lowest points in the nation’s history, until, by the end of the decade, the business community had achieved virtual dominance of the legislative process in Congress.”<sup>43</sup>

### III. THE JURISPRUDENCE OF JUSTICE POWELL

For all the discussion of the ambitious agenda that attorney Powell’s memorandum put forth, he demonstrated a surprising degree of reluctance to join the Supreme Court. According to his biographer, he told his sister on the day he was sworn in as a justice in January 1972 that if he had had another twenty-four hours to consider the appointment, he would not have accepted it. At the time, Powell was a senior partner in a prestigious Richmond, Virginia, law firm and past president of the American Bar Association and American College of Trial Lawyers.<sup>44</sup> In 1969, when he had been Richard Nixon’s first choice for a previous vacancy on the Court, he had asked that his name be withdrawn from consideration. Powell said at the time that at sixty-two he was too old to begin an appointment to the Court. He also had concerns about his health, and his wife was very reluctant to leave their home in Richmond, the city where she had always lived. Harry A. Blackmun eventually filled that seat.<sup>45</sup> Two years later, following the retirements of Hugo Black and John Marshall Harlan, Nixon pressured Powell to accept a nomination that he again declined initially, before finally acceding to the President’s insistence that it was Powell’s duty to the country. Even after accepting in October 1971, Powell attempted to withdraw once again in a conversation with Attorney General John Mitchell hours before Nixon was to announce the nomination on national television, but was persuaded otherwise.<sup>46</sup> Powell’s confirmation hearings generated some controversy, particularly over his record on desegregation and civil liberties,<sup>47</sup> but he was confirmed just one vote short of unanimity. Only Senator Fred Harris of Oklahoma voted against Powell, declaring him “an elitist” who had never “shown any deep feelings for little people.”<sup>48</sup>

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<sup>41</sup> David Vogel, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 195-97* (1989).

<sup>42</sup> *Id.* at 198.

<sup>43</sup> THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* 107-108 (1984).

<sup>44</sup> JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 1 (2001).

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.* at 3-8.

<sup>47</sup> *Id.* at 233-40.

<sup>48</sup> *Id.* at 240.

Justice Powell began his fifteen years on the Supreme Court in 1972 as part of a wave of new faces and ideologies. Between mid-1969 and the beginning of 1972, Nixon appointed four new justices, including Blackmun, Warren E. Burger as chief justice following the retirement of Earl Warren, and William H. Rehnquist. "When Powell took his seat at the Conference table, . . . on the crucial issues, the Nixon Justices could be expected, more often than not, to end up on the same side," Justice Powell's biographer wrote. "Each of them was more conservative than any of the holdovers from the Warren Court. Together they formed a block of four, loosely united by outlook and sympathy, and — apparently — poised under the leadership of Chief Justice Burger to remake American constitutional law."<sup>49</sup> By some measures, Justice Powell would prove a consistent centrist, siding with the majority in ninety percent of the cases — more than any other justice — and casting fewer dissenting votes during his time on the bench.<sup>50</sup> Klafter deemed that "[a]s a pragmatist, Powell had a distinct advantage. . . . There was nothing but his own sense of justice to keep him from building a majority with justices on either side of the ideological spectrum."<sup>51</sup> Other analysis has contended that Justice Powell's particular pragmatism was characterized by a "representative balancing" methodology through which he aimed to give voice to a wide range of interests by arriving at a rule that could accommodate all of them, "consistent with recognition of and respect for other competing interests." Kahn concluded that such an approach was an unacceptable foundation for judicial review, however, because rather than "calling on legal argument and the unique virtues of the Justice, it calls upon the virtues of statesmanship, and offers neither principled explanations nor anything "new to the political debate."<sup>52</sup> It also has been argued that Justice Powell's judicial centrism was actually more a reflection of "the social vision of the class he represented" than of a consistently principled approach. Noting his upbringing in "a relatively well-to-do background in the solid white Virginia middle class" and his relatively rapid climb "to the upper echelon of corporate America" in his law practice, Tushnet asserted that Justice Powell's background "did not expose him to the wide range of human experiences that might have expanded his social vision. . . . [T]he people he worked with were drawn from a relatively narrow range."<sup>53</sup>

Most dominant in Justice Powell's professional experience was his work as a highly successful corporate attorney, including membership on the boards of eleven corporations. "Powell's nearly forty years of experience in corporate boardrooms led him to trust the character of the average American businessman," Pritchard declared in a

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<sup>49</sup> *Id.* at 252-3.

<sup>50</sup> *Justice Lewis F. Powell, Jr.: Balance Wheel of the Court*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 310 (Jacob W. Landynski, Charles M. Lamb and Stephen C. Halpern, eds., 1991).

<sup>51</sup> Craig Evan Klafter, *Justice Lewis F. Powell, Jr.: A Pragmatic Realist*, 8 B.U. PUB. INT. L.J. 1, 8 (1998).

<sup>52</sup> Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 5, 58 (1987).

<sup>53</sup> Mark Tushnet, *Lives in the Law: Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1854, 1883 (1995).

study considering Justice Powell’s jurisprudence on securities laws in the context of his professional background. “In Powell’s world, free enterprise and the businessmen who made it work were the foundation of strong communities.”<sup>54</sup> That research concluded that “it would be difficult to identify anyone who did more to limit the reach of the federal securities law than Powell,” finding that acting “in all good faith,” his reading of requirements on businesses regarding information provided to investors “was colored by his experience in corporate boardrooms, consistently leading him to favor narrower readings.”<sup>55</sup> Indeed, before his confirmation to the Court, Justice Powell had worried that his experience as a corporate lawyer would generate the sort of controversy that contributed to the rejection of Nixon nominee Clement Haynsworth two years before. He confided to Attorney General John Mitchell his fear that “the nomination of another southern lawyer with a business-oriented background would invite — if not assure — organized and perhaps prolonged opposition.”<sup>56</sup> Ultimately, little attention was paid to Justice Powell’s connections to big business during the confirmation hearings, at least partly because his Chamber of Commerce memorandum was not uncovered by news media until a few months later.

In recent years, Justice Ruth Bader Ginsburg has frequently noted the influence of the memorandum in speeches at law schools. In 2001, she said, “Powell’s idea took hold as an array of public interest legal foundations were established to represent ‘conservative’ or business groups.”<sup>57</sup> A few years earlier she had observed: “In 1971, then private practitioner Lewis F. Powell, Jr., . . . commented that ‘the judiciary may be the most important instrument for social, economic and political change.’ He advised the business community to adopt the ‘astute’ ways of activist liberals ‘in exploiting judicial action.’ The briefs that currently troop before the Supreme Court, from all manner of organizations, suggest that Powell’s message has been heard.”<sup>58</sup> Recent analysis by legal scholar Jeffrey Rosen has linked the success of the “Attack on American Free Enterprise System” memorandum’s call for “creating a network of activist conservative litigation groups” with the growing strength of the “Constitution in Exile” movement. Such efforts

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<sup>54</sup> A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 947 (2003).

<sup>55</sup> *Id.* at 844, 946-47 (2003). In other research, Pritchard has found that Justice Powell’s influence at the Supreme Court worked to restrain prosecutions for insider trading until justices rebuffed his efforts a decade after he left the Court. A.C. Pritchard, *United States v. O’Hagan: Agency Law and Justice Powell’s Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13 (1998).

<sup>56</sup> Letter from Powell, to John N. Mitchell, Attorney General, U.S. Department of Justice, Dec. 12, 1969, cited in Jeffries, *supra* note 44, at 2.

<sup>57</sup> Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, Joseph L. Rauh Lecture, David A. Clarke School of Law, April 9, 2001, available at Supreme Court of the United States, [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-09-01a.html#foot14](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html#foot14).

<sup>58</sup> Ruth Bader Ginsburg, *Supreme Court Pronouncements on the Conduct of Lawyers*, 1 J. Inst. Stud. Legal Ethics 1, 9-10 (1996). For other examples of similar comments, see also Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 MAINE L. REV. 301 (2000); Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH.U. J. L. & POL’Y 1 (2001). [start here]

actively promote litigation aimed at advancing a doctrine of “economic rights” that would roll back government regulation to early twentieth-century standards.<sup>59</sup>

Research has documented the ways in which corporate interests have won ever greater Bill of Rights guarantees since the early seventies,<sup>60</sup> and a significant number of cases in which Justice Powell participated can be seen as part of that process. Those lines of relatively recent First Amendment law have spawned vast bodies of related scholarship. One vein of that work documents evidence of the corrupting influence of corporate spending in relation to democratic processes.<sup>61</sup> The literature on jurisprudence relating to corporate political media spending also includes a body that encompasses assertions of support for its soundness in terms of law, philosophical grounding, political and social benefit, and consistency with fundamental principles of American freedom of expression,<sup>62</sup> and another that rejects all such assertions.<sup>63</sup> In the similarly considerable

<sup>59</sup> Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., April, 17 2005, at 44. That period is often called the “*Lochner* Era” in reference to the *New York v. Lochner*, 198 U.S. 45 (1905) ruling that struck down a New York regulation limiting to sixty the number of hours that bakery employees could be required to work in a week and provided broad precedent for invalidating other regulation of business, until its holding was rejected by the Court in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>60</sup> Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577 (1990 ).

<sup>61</sup> See, e.g., Randy M. Mastro et al., *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315 (1980); Allen K. Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 GA. L. REV. 675 (1983); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985); David R. Lagasee, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347 (1995); Robert Weissman, *First Amendment Follies: Expanding Corporate Speech Rights*, 19 MULTINAT’L MONITOR 15 (1998).

<sup>62</sup> See, e.g., Michael J. Merrick, *The Saga Continues — Corporate Political Free Speech and the Constitutionality of Campaign Finance Reform: Austin v. Michigan Chamber of Commerce*, 24 CREIGHTON L. REV. 195, 223 (1990); Prescott M. Lassman, *Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Commerce*, 78 VA. L. REV. 759 (1992); John S. Shockley and David A. Schultz, *The Political Philosophy of Campaign Finance Reform as Articulated in the Dissents in Austin v. Michigan Chamber of Commerce*, 24 St. Mary’s L.J. 165 (1992); Morris Lipson, *Autonomy and Democracy*, 104 YALE L.J. 2249 (1995); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1 (2001); Robert H. Sitkoff, *Management and Control of the Modern Business Corporation: Corporate Speech and Citizenship*, 69 U. CHI. L. REV. 1103 (2002); Michael R. Siebecker, *Building a ‘New Institutional’ Approach to Corporate Speech*, 59 ALA. L. REV. 247 (2008); Daniel R. Ortiz, *The Difference Two Justices Make: FEC v. Wisconsin Right to Life, Inc. II and the Destabilization of Campaign Finance Regulation*, 1 ALB. GOV’T L. REV. 141 (2008).

<sup>63</sup> See, e.g., Douglas M. Ramler, *Austin v. Michigan Chamber of Commerce: The Supreme Court Takes a “Less Speech, Sounds Great” Approach to Corporate Political Expression*, 43 FED. COMM. L.J. 419 (1991); Michael Schofield, *Muzzling Corporations: The Court Giveth and the*

literature on commercial speech jurisprudence can be found both criticism of the effort to maintain a subordinate status for such expression in terms of First Amendment protection<sup>64</sup> and an abundance of arguments for maintaining that distinction,<sup>65</sup> as well as a middle, less dichotomous approach to the question.<sup>66</sup>

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*Court Taketh Away a Corporation's "Fundamental Right" to Free Political Speech in Austin v. Michigan Chamber of Commerce*, 52 LA. L. REV. 253 (1991); Sean T. Geary, *Austin v. Michigan Chamber of Commerce: Freedom of Expression Issues Implicated by the Government Regulation of Corporate Political Expenditures in Candidate Elections*, 72 B.U. L. REV. 825 (1992); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. Colo. L. Rev. 1109 (1993); Martin H. Redish and Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998); Susan W. Dana, *Restrictions On Corporate Spending On State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce*, 27 HASTINGS CONST. L. Q. 309 (2000).

<sup>64</sup> See, e.g., R. H. Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977); Martin H. Redish, *The Value of Free Speech*, 130 U. PENN. L. REV. 591, 630-35 (1982); Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990); Leo Bogart, *Freedom to Know or Freedom to Say?*, 71 TEX. L. REV. 815 (1993); Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993); Michael W. Field, *On Tap*, 44 Liquormart, Inc. v. Rhode Island: *Last Call For The Commercial Speech Doctrine*, ROGER WILLIAMS U. L. REV. 57 (1996); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123; Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553 (1997); Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 Seton Hall L. Rev. 1626 (1997); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PENN. L. REV. 771 (1999); Deborah J. La Fetra, *Kick it up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1207 (2004); Samuel A. Terilli, *Nike v. Kasky and the Running-but-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383, 386 (2005); Bruce E.H. Johnson, *First Amendment Commercial Speech Protections: A Practitioners Guide*, 41 LOY. L.A. L. REV. 297, (2007).

<sup>65</sup> See, e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech,"* 130 U. PENN. L. REV. 646 (1982); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Richard Moon, *Lifestyle Advertising and Classical Freedom of Expression Doctrine*, 36 MCGILL L.J. 76 (1991); Ronald K.L. Collins and David M. Skover, *The Psychology of First Amendment Scholarship: A Reply*, 71 Tex. L. Rev. 819 (1993); Ronald K.L. Collins and David M. Skover, *Commerce and Communication*, 71 Tex. L. Rev. 697 (1993); Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805, 809 (1993); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Tamara R. Piety,



## A. JUSTICE POWELL IN CORPORATE POLITICAL MEDIA SPENDING CASES

Justice Powell’s influence in the landmark 1978 *First National Bank of Boston v. Bellotti*<sup>67</sup> decision cannot be overstated. The ruling that has been characterized as the “Magna Carta” of corporate First Amendment jurisprudence.<sup>68</sup> The sort of expression involved in corporate political media spending — most often (though misleadingly) referred to as “corporate speech”<sup>69</sup> since *Bellotti* — seems in retrospect to be closest to

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*Merchants of Discontent: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377 (2001); Bruce Ledewitz, *Corporate Advertising’s Democracy*, 12 B.U. PUB. INT. L.J. 389 (2003); C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1162 (2004); Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 412-13 (2006); Rebecca Tushnet, *It Depends on What the Meaning of “false” is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 229 (2007); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, (2008).

<sup>66</sup> See, for example, Frederick Schauer, “Categories and the First Amendment: A Play in Three Acts,” 34 *Vanderbilt Law Review* 265 (1981); Steven Shiffrin, “The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,” 78 *Northwestern University Law Review* 1212 (1983); Ronald A. Cass, “Commercial Speech, Constitutionalism, Collective Choice,” 56 *University of Cincinnati Law Review* 1317 (1988); Daniel Hays Lowenstein, “Too Much Puff: Persuasion, Paternalism, and Commercial Speech,” 56 *University of Cincinnati Law Review* 1205 (1988); Frederick Schauer, “Commercial Speech and the Architecture of the First Amendment,” 56 *University of Cincinnati Law Review* 1181 (1988); Edward J. Eberle, “Practical Reason: The Commercial Speech Paradigm,” 42 *Case Western Reserve Law Review* 411 (1992); Nat Stern, “In Defense of the Imprecise Definition of Commercial Speech,” 58 *Maryland Law Review* 55 (1999); Ronald K.L. Collins and David M. Skover, “The Landmark Free-Speech Case That Wasn’t: The *Nike v. Kasky* Story,” 54 *Case Western Reserve Law Review* 965, 1045-47 (2004).

<sup>67</sup> 435 U.S. 765 (1978).

<sup>68</sup> Norman Dorson and Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195, 212 (1982).

<sup>69</sup> This article for the most part forgoes that expression in favor of terminology that is more representative of what was at issue in the cases of the corporate free-speech movement: *corporate political media spending*. Of course, a corporation cannot literally “speak” in the way that human beings can, given that it is an “artificial being . . . existing only in contemplation of law,” as Chief Justice John Marshall so succinctly put it in the majority opinion of the seminal corporation case of U.S. law, *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). It can only spend — pay someone to express messages on its behalf (through the spending decisions of corporate management). Beyond that, the use of the term “corporate speech” also represents a rather disingenuous act of rhetorical framing, creating the impression that something that does not in fact actually exist is an everyday reality. Legal scholar Linda Berger has focused much work on the way that the metaphors society and the legal system choose to focus upon in regard to corporate spending demonstrate contrasts in understanding of the corporate role in a democratic society and can even influence judicial outcomes. Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58

what Justice Powell had in mind in his memorandum for the Chamber of Commerce. That is, although the commercial-speech cases also reflect his broad concerns with structurally strengthening the voice of big business, what was at stake in the line of cases that begins with *Bellotti* was essentially what the memorandum urged most strongly: greater spending by corporate interests to influence political outcomes more favorable to those interests. More specifically, the question in *Bellotti* (and all the related cases since then) was whether the First Amendment could be used to block regulation of corporate managers’ spending directly from the profits in corporate treasuries — which in principle belong to the stockholders — on media communications aimed at influencing political outcomes. And it is in *Bellotti* that the pro-business agenda attributed to Justice Powell by so much commentary on his “Attack on American Free Enterprise System” can most clearly be identified.

The question of providing First Amendment protection for corporate political media spending was a deeply dividing proposition among the justices on the Court in 1978, and indeed it has remained so to this day. In his *Bellotti* dissent, Justice Byron R. White insisted that “corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.”<sup>70</sup> The ruling went against that argument five-to-four that spring day in 1978, and more than three decades later, in the Supreme Court’s latest pronouncement on the subject, an almost completely different set of justices split by exactly the same count.<sup>71</sup> But it was the holding that *Bellotti* institutionalized in First Amendment case law that opened the door to that body of case law, without which corporate managers would only be able to spend their own money for political purposes, rather than that of their shareholders. For it was in *Bellotti* that the Court first brought corporate political media spending within the constitutional protections theretofore extended only to the freedom of speech of human beings — and Justice Powell’s private papers on the case indicate it might well not have found a majority but for his determined efforts.

Early on in their discussions on the case, Justice Powell and the clerk who worked most closely with him on *Bellotti* began to develop the transformational theory that ultimately would form the foundation of his majority opinion — that the bottom line was not whether corporations should have the same First Amendment rights as human

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*Mercer L. Rev.* 949 (2007); Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 *J. ALWD* 169 (2004). As the late Chief Justice Rehnquist — who authored a substantial body of opinions consistently focused on the reality of corporate political media spending rather than the rhetoric of corporate “speech” — once pointed out, to treat the institutional messages of corporations the same in First Amendment law as those of natural persons “is to confuse metaphor with reality.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

<sup>70</sup> *Bellotti*, 435 U.S. at 813 (1978) (White, J., dissenting).

<sup>71</sup> In *Citizens United v. Fed. Election Comm’n*, 175 L. Ed. 2d 753 (2010), that five-to-four majority granted much broader First Amendment protection for corporate political media spending than the *Bellotti* Court, holding for the first time that corporations may make unlimited political expenditures directly from their treasuries in candidate elections.

beings, but instead that the “inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>72</sup> It was via that premise that Justice Powell would transform corporate political media spending into “the type of speech indispensable to decisionmaking in a democracy.”<sup>73</sup> A bench memorandum prepared for Justice Powell in advance of oral arguments by clerk Nancy J. Bregstein stressed that “both sides have phrased the central question of the case” as whether corporations had First Amendment rights.<sup>74</sup> But she warned that the corporate appellants would likely lose if the Supreme Court began from the premise — as the Massachusetts Supreme Court had — “that corporations are unique because of their artificial existence” as a creation of state law.<sup>75</sup> “If, on the other hand, one conceives of the problem in terms of *what* is prohibited rather than *who* is guaranteed a certain right . . . then the fact that appellants are corporations takes on a different significance [emphasis included],” she wrote. Taking the latter approach could be an uphill battle at the Court, she noted. “From the unanimity of the court below and the fact that there were four votes here to DFWSFQ [dismiss for want of a substantial federal question], I gather that others have adopted the former major premise.”<sup>76</sup> Bregstein conceded that “the Court never has held explicitly that the First Amendment protects corporate speech to the extent that it protects the speech of natural persons,” but argued “that is because until now government has not attempted to restrict corporate speech.”<sup>77</sup>

When the justices met in conference two days after the *Bellotti* oral arguments in November 1977, eight of the justices preferred not to address the question of corporate First Amendment rights. They agreed instead on reversing the ruling on the narrower grounds that the regulation’s “materially affecting” provision was unconstitutional<sup>78</sup> — which would have meant stopping far short of the landmark ruling that ultimately resulted. The Massachusetts Supreme Court had declared constitutional the state regulation stipulating that “no question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.”<sup>79</sup> Justice Powell indicated in his notes that he personally would prefer to go beyond that and also declare the entire Massachusetts statute unconstitutional, but wrote, “If we can decide case solely on the

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<sup>72</sup> *Bellotti*, 435 U.S. at 777.

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

<sup>74</sup> Memorandum from Bregstein to Justice Powell (Sept. 13, 1977) at 11 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>75</sup> *Id.* at 1.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 3. Regarding her work in *Bellotti*, Justice Powell’s former clerk (now an attorney residing in Pennsylvania) said: “Unfortunately, my memory is very hazy about most things that long ago, including my work on this case. The materials you are already reviewing are a much better record of what happened than anything I could tell you.” Nancy J. Bregstein Gordon, e-mail message to author, Dec. 16, 2009.

<sup>78</sup> Conference Notes of Justice Powell (Nov. 11, 1977) at 1-3 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>79</sup> *First National Bank of Boston v. Attorney General*, 359 N.E.2d 1262, 1270 (Mass. 1977).

conclusive presumption [of the ‘materially affecting’ provision], I probably could join” the majority in such a ruling.<sup>80</sup> After that conference, however, other justices began to rethink their positions, and Justice William J. Brennan, Jr., who had been assigned to author the majority opinion, told the others that he had concluded the Court must address the broader question — and if it did he would uphold the constitutionality of the Massachusetts regulation. He indicated agreement with the judgment that corporate political media spending represented a threat to democratic processes. Justice Brennan said he did not know if his views could attract a majority of the Court,<sup>81</sup> but reminded the other justices that “[c]orporate spending as a corrupting influence in the political process . . . has produced numerous corrupt practice acts” over the course of the twentieth century, which could be called into question if the Court struck down the Massachusetts regulation.<sup>82</sup> The same week, Chief Justice Burger expressed similar “misgivings about the case, particularly on its potential for undermining the well established Corrupt Practices Act’s limitations.” Not only did the Chief Justice find “differences between the First Amendment rights of an individual as compared with a corporate-collective body,” but “[c]orporations rarely, if ever consult stockholders on expenditures and indeed a great many expenditures are made without consulting with the directors, even though management is accountable to both the directors and stockholders.”<sup>83</sup>

Those developments led to Justice Powell writing the other justices and expressing his interest in drafting an opinion grounded in his view that “circumscribing speech on the basis of its source, in the absence of a compelling interest that could not be attained otherwise, would be a most serious infringement of First Amendment rights.”<sup>84</sup> After working on the draft for more than two months, Justice Powell was able to gain the support of Justice Potter Stewart on March 7,<sup>85</sup> but the remaining votes needed to form a majority would prove more challenging. It was growing clear how deeply divided the Court would be in *Bellotti*, as Justice Brennan joined Justice White’s dissent the same day,<sup>86</sup> and two days later Justice Thurgood Marshall did the same.<sup>87</sup> At that point, Justice Powell sent a letter to justices he was still hoping would support his opinion — Justices Blackmun, Rehnquist, Stevens, and Chief Justice Burger — to emphasize the changes he

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<sup>80</sup> Conference Notes of Justice Powell (Nov. 11, 1977) at 3 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>81</sup> Memorandum from William J. Brennan, Jr. (Dec. 1, 1977) at 1-3 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>82</sup> *Id.* at 4.

<sup>83</sup> Letter from Warren E. Burger to Justice Brennan (Dec. 6, 1977) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>84</sup> Memorandum from Justice Powell (Dec. 1, 1977) at 2 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>85</sup> Letter from Justice Stewart to Justice Powell (March 7, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>86</sup> Letter from Justice Brennan to Justice White (March 7, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>87</sup> Letter from Thurgood Marshall to Justice White (March 10, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

was making in response to Justice White’s dissent.<sup>88</sup> The next day, Chief Justice Burger provided his support for Justice Powell’s opinion, though still noting his concern over its potential to undermine corrupt practices laws.<sup>89</sup> After making additional changes in response to requests from Justice John Paul Stevens,<sup>90</sup> Justice Powell won over the fourth vote for his opinion.<sup>91</sup> It took still further revisions — including the narrowing of the *Bellotti* holding by removing language that had asserted any such regulation of corporate political media spending could go no farther than the “least restrictive alternative”<sup>92</sup> — to win over Justice Blackmun and form a majority.<sup>93</sup>

Justice Powell continued working to broaden his majority over the course of the remaining weeks before the ruling was handed down on April 26, particularly with Justice Rehnquist, characterizing *Bellotti* as “one of the most important cases to come before the Court since you and I took our seats” six years before.<sup>94</sup> But Justice Rehnquist responded with a withering dissent that proclaimed the majority decision to be significantly at odds with settled law. “It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes,” he would write. “A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.”<sup>95</sup> Even after seeing a draft of the dissent in mid April, Justice Powell continued to lobby Justice Rehnquist, warning that his “view would empower state governments (and possibly the federal government) to exercise what to me would be a shocking degree of control over expression and debate in our country.” He conceded that “no prior decision has expressly recognized corporate speech generally as explicitly as my opinion does,” but argued that “the trend of our decisions over the past century” supports “the proposition that artificial entities are treated as ‘persons’ for purposes of exercising and relying upon constitutional rights.”<sup>96</sup>

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<sup>88</sup> Letter from Justice Powell to Chief Justice Burger, and Justices Blackmun, Rehnquist, and Stevens (March 10, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>89</sup> Letter from Chief Justice Burger to Justice Powell (March 11, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>90</sup> Letter from Justice Stevens to Justice Powell (March 8, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers); Letter from Justice Stevens to Justice Powell (March 10, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>91</sup> Letter from Justice Stevens to Justice Powell (March 13, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>92</sup> Letter from Justice Blackmun to Justice Powell (March 13, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

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

<sup>94</sup> Letter from Justice Powell, to William H. Rehnquist (April 17, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>95</sup> *Bellotti*, 435 U.S. at 824-26 (Rehnquist, J., dissenting).

<sup>96</sup> Letter from Justice Powell, to Justice Rehnquist (April 17, 1978) at 1-2 (*Bellotti*, 435 U.S. in LFP Papers).

1. Beyond *Bellotti*

Justice Powell also authored the majority opinion two years later in *Consolidated Edison v. Public Service Commission*, a case that extended First Amendment protections on corporate political media spending by state-regulated monopolies such as Consolidated Edison, a utility corporation.<sup>97</sup> The State of New York had barred such corporations from enclosing corporate political messages with electric-bill inserts, but Justice Powell's majority opinion declared regulation of such spending "strikes at the heart of the freedom to speak."<sup>98</sup> Justice Blackmun's dissent, joined by Justice Rehnquist, while declaring no "disapprobation . . . of the precious rights of free speech," asserted the central issue to be the utility corporation's state-granted "monopoly status and . . . rate structure." It argued that constitutionally protecting the use of bill inserts for corporate political communications "amounts to an exaction from the utility's customers by way of forced aid for the utility's speech."<sup>99</sup> Justice Stewart, like Justice Powell a former corporate attorney and the first justice to join the majority opinion in *Bellotti*, had noted similar concerns at the justices' conference on *Consolidated Edison*.<sup>100</sup> Justice Powell largely ignored that argument in his majority opinion, however, dismissing it with a footnote that cited as primary support a commercial-speech ruling he had also authored and would be handed down by the Court on the same day as *Consolidated Edison*. "Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights," he wrote.<sup>101</sup>

The *Federal Election Commission v. National Right to Work Committee* ruling in 1982<sup>102</sup> upheld a federal law<sup>103</sup> prohibiting corporations and labor unions from soliciting contributions for their political action committees from sources outside the committees' legally defined membership.<sup>104</sup> Writing for the majority, Justice Rehnquist characterized the statute as the culmination of a "careful legislative adjustment of the federal electoral laws . . . to prevent both actual and apparent corruption . . . [reflecting] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."<sup>105</sup> Justice Powell voted with the unanimous majority in the end, though his papers indicate he was somewhat reluctant<sup>106</sup> and considered dissenting.<sup>107</sup> He

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<sup>97</sup> 447 U.S. 530, 532-33 (1980).

<sup>98</sup> *Id.* at 535.

<sup>99</sup> *Consol. Edison*, 447 U.S. at 549-50 (Blackmun, J., dissenting).

<sup>100</sup> Conference Notes of Justice Powell (March 19, 1980) at 1 (in LFP Papers).

<sup>101</sup> *Consol. Edison*, 447 U.S. at 534 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566-568 (1980)).

<sup>102</sup> 459 U.S. 197 (1982).

<sup>103</sup> 2 U.S.C. § 441b (1971).

<sup>104</sup> 459 U.S. at 210-11.

<sup>105</sup> *Id.* at 209-10 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

<sup>106</sup> Conference Notes of Justice Powell (Nov. 3, 1982) at 1 (*Nat'l Right to Work Comm.*, 459 U.S. in LFP Papers).

<sup>107</sup> Personal Notes of Justice Powell (Nov. 29, 1982) at 1 (*Nat'l Right to Work Comm.*, 459 U.S. in LFP Papers).

did ask Justice Rehnquist to make changes in his majority opinion regarding the \$10,000 civil penalty imposed for willful violation of the statute,<sup>108</sup> but ultimately failed to persuade him to “go as far as I would like.”<sup>109</sup> In the case — the first in a series of rulings through which Justice Rehnquist would lead the Court toward a narrowing of *Bellotti* — he grounded his tightening solidly within that ruling’s affirmation of the enduring primacy of corrupt-practices acts, leaving Justice Powell little room to move away from the *National Right to Work Committee* majority without moving away from his own *Bellotti* opinion.<sup>110</sup>

Three years later, between oral arguments on *Federal Election Commission v. National Conservative Political Action Committee* and the circulation of the majority opinion in that case,<sup>111</sup> Justice Powell underwent prostate surgery that proved far more serious than anticipated.<sup>112</sup> He was still recuperating when he reviewed Justice Rehnquist’s majority opinion and Justice White’s dissent. Although he had expressed strong interest in the case to his clerk before it was argued,<sup>113</sup> his comments months later on the opinion drafts expressed no concerns over the direction in which Justice Rehnquist was continuing to reshape the Court’s jurisprudence on corporate political media spending. The majority opinion struck down limits on campaign expenditures by political action committees but clearly established that was because such expenditures did not represent the same threat of real or apparent corruption as those made directly by business corporations.<sup>114</sup> It emphasized that while the speech interests of individuals joined together for the purpose of expressing viewpoints were protected, such interests were very different from the economic interests represented by funds accumulated in corporate treasuries through the special advantages of the business corporate form. Justice Rehnquist sharply distinguished groups and associations “designed expressly to participate in political debate,” declaring they should be viewed for purposes of such regulation as “quite different from the traditional corporations organized for economic gain.”<sup>115</sup>

Justice Powell would resume a more active role the next term, playing the leading role in shaping the decision of a closely divided Court in 1986’s *Pacific Gas &*

<sup>108</sup> Letter from Justice Powell to Justice Rehnquist (Dec. 1, 1982) at 1 (*Nat’l Right to Work Comm.*, 459 U.S. in LFP Papers).

<sup>109</sup> Personal Notes of Justice Powell (Dec. 6, 1982) at 1 (*Nat’l Right to Work Comm.*, 459 U.S. in LFP Papers).

<sup>110</sup> 459 U.S. 197, 208-210 (1982).

<sup>111</sup> 470 U.S. 480 (1985).

<sup>112</sup> Jeffries, *supra* note 44, at 538-41. According to Jeffries, Justice Powell was “barely” alive after extreme internal bleeding extended an anticipated three-hour surgery to eight hours. “[F]ragile and exhausted” afterward, he was unable to resume full-time work for eleven weeks, returning a week after the *NCPAC* ruling was handed down and still suffering from complications that would require additional surgery a few months later.

<sup>113</sup> Memorandum from Lewis F. Powell, Jr., to Cammie R. Robinson (Oct. 12, 1984) at 1 (*Nat’l Conservative Political Action Comm.*, 470 U.S. in LFP Papers).

<sup>114</sup> *Nat’l Conservative Political Action Comm.*, 470 U.S. at 495-96, 500-01.

<sup>115</sup> *Id.* at 500.

*Electric Co. v. Public Utilities Commission of California*.<sup>116</sup> The question presented in the case was whether parties with different views should be allowed to include political inserts in billing envelopes containing such inserts from a utility corporation. The California Supreme Court had upheld a ruling of the state's Public Utility Commission to that effect.<sup>117</sup> The process that produced his plurality opinion suggests that Justice Powell pressed the clerk who worked with him on the case to develop justification for reversing the state decision, after the clerk had initially recommended affirming it.<sup>118</sup> In response, Powell asked for another memorandum on the case, stating, "I have no interest in the outcome of this particular case, and would be happy to find a way to dispose of it without creating a precedent that would raise . . . problems. I need your help."<sup>119</sup> That produced another analysis by the clerk that offered more equivocation but continued to recommend affirming the state decision.<sup>120</sup> Finally, in another memorandum five days later that began, "When last we spoke about this case, you asked me to give you a brief summary of how the court might reverse the Commission's compelled access ruling," the clerk suggested focusing on an argument that the PUC order unconstitutionally "deters

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<sup>116</sup> 475 U.S. 1 (1986).

<sup>117</sup> *Id.* at 4-7.

<sup>118</sup> Bench Memorandum by William J. Stuntz for Justice Powell (Sept. 27, 1985) at 27 (*Pac. Gas & Elec.*, 475 U.S. 1, in LFP Papers). In that memorandum, Stuntz wrote: "On the First Amendment question, the Court should ask whether the PUC's access restriction is one which might deter utilities from either speaking or creating fora for speech. The answer is no, so long as the access decision is viewpoint-neutral. On this record, I think the Court should take the PUC at its word, and hold that no viewpoint discrimination has as yet been shown."

<sup>119</sup> Memorandum from Justice Powell to Stuntz (Oct. 1, 1985) at 5 (*Pac. Gas & Elec.*, 475 U.S. 1, in LFP Papers). Elsewhere in that memorandum, Justice Powell noted that the problems he had in mind could in particular include giving the utility commission excessively broad authority over utility owned property. *Id.* at 1-4.

<sup>120</sup> Memorandum by Stuntz for Justice Powell (Oct. 2, 1985) at 9-10 (*Pac. Gas & Elec.*, 475 U.S. 1, in LFP Papers). In that memorandum, Stuntz wrote: "I've suggested that I think the Court should affirm, but that conclusion depends on a judgment that the Commission's access ruling was viewpoint-neutral. There is a very strong argument that I am wrong on that point. . . . If the Court so concludes, it should reverse, on the ground that non-neutral access decisions deter corporate speech. . . . As I've said, I think on balance the Court should affirm. Should you disagree, I think the Court could very easily limit the reach of its opinion by reversing on the ground that TURN [a consumer-interest organization] was granted access because of its anti-utility views."



corporate creation of fora.”<sup>121</sup> In the margin next to the passage in the memorandum that outlines that approach, Justice Powell wrote, “Yes.”<sup>122</sup>

Ultimately, Justice Powell’s opinion would rely on *Tornillo* to assert that the PUC order unconstitutionally burdened the utility’s First Amendment rights<sup>123</sup> by compelling it to associate with the viewpoints of other speakers.<sup>124</sup> Justice Powell’s files on the development of the *Pacific Gas & Electric* opinion document his efforts to help his clerk reach a finely nuanced interpretation of *Tornillo* — emphasizing that its meaning had evolved in light of his *Bellotti* opinion— that would counter other justices’ contentions on how greatly it differed from the case at hand.<sup>125</sup> His opinion managed to forge a five-vote majority for the judgment vacating the PUC order but not for his opinion. Justice Powell’s correspondence with other justices on *Pacific Gas & Electric* shows that extended discussions between him and, respectively, Justices Brennan, Sandra Day O’Connor, Marshall, Rehnquist, and Chief Justice Burger, were involved in his efforts to reach that majority. A particular point of contention that ran through much of Justice Powell’s negotiations with other justices on the case was a concern with the degree to which his opinion would provide precedent for equating corporations with human beings in terms of First Amendment protections. Justice Marshall focused on that issue in his concurring opinion, in which he provided the fifth vote for the judgment but emphasized: “I do not mean to suggest that I would hold, contrary to our precedents, that the corporation’s First Amendment rights are coextensive with those of individuals.”<sup>126</sup> In his dissent, Justice Rehnquist would address the matter even more forcefully, asserting

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<sup>121</sup> Memorandum by Stuntz for Justice Powell (Oct. 7, 1985) at 1, 5 (*Pac. Gas & Elec.*, 475 U.S. 1 in LFP Papers). In that memorandum, Stuntz wrote: “PG&E could presumably have chosen to send its bills in a smaller envelope, designed to hold less material. Granting TURN access to space which PG&E was free not to create gives corporations an incentive to avoid creating the tools for speech, lest those tools be expropriated for use by the corporation’s opponents. . . . Because the Commission’s order deters corporate speech, it is barred by *Miami Herald v. Tornillo*.” *Id.* at 5 (citing 418 U.S. 241 (1974), which had struck down a Florida law that granted political candidates a right-of-reply when criticized by newspapers).

<sup>122</sup> Notes in margin of Memorandum by Stuntz for Justice Powell (Oct. 7, 1985) at 5 (*Pac. Gas & Electric*, 475 U.S. 1 in LFP Papers). Regarding his work on *Pacific Gas & Electric*, Stuntz, now Henry J. Friendly Professor at Harvard Law School, said: “I don’t recall much about *PG&E*, save that the bench memo in that case was one of the first (maybe the first) I wrote for Justice Powell, and that he didn’t like it. For good reason, I’m sure: I was such a kid in those days. I’m sure I changed my mind if that’s what the file indicates, but the bigger change was in my perception of my job. Where the Justice had already taken a stand on a given issue, as he had on compelled speech, my job was to highlight that and follow it, giving him the analysis he would perform himself given the time. I had learned that lesson from my previous clerkship, but I forgot it on this case. I never forgot it again.” Stuntz, e-mail message to author, Dec. 3, 2009.

<sup>123</sup> *Id.* at 20-21.

<sup>124</sup> 475 U.S. 1, 9-18 (1986).

<sup>125</sup> Memorandum by Justice Powell to Stuntz (Oct. 30, 1985) at 2-3 (*Pac. Gas & Elec.*, 475 U.S. 1 in LFP Papers); Memorandum by Justice Powell to Stuntz (Nov. 9, 1985) at 1-3 (*Pac. Gas & Elec.*, 475 U.S. 1 in LFP Papers).

<sup>126</sup> *Pac. Gas & Elec.*, 475 U.S. at 25 (1986) (Marshall, J., dissenting).

that in the political messages in question a corporation would be “speaking” in an institutional capacity — not expressing the views of the actual individuals who constitute the corporation as employees and investors. Therefore, the expression involved had nothing to do with the liberty of a natural person, he argued. Extending First Amendment protection to corporations based on “individual freedom of conscience . . . strains the rationale . . . beyond the breaking point,” he wrote, a few months before he was confirmed as chief justice.<sup>127</sup>

## 2. Acceptance of MCFL’s Defining Principle

*Federal Election Commission v. Massachusetts Citizens for Life* in 1986 would be the last case on corporate political media spending before Justice Powell retired the following year. In that case, the Court held that regulation of independent political expenditures applied not to business corporations but to ideological corporations — formed to disseminate political ideas rather than to amass capital — were unconstitutional<sup>128</sup> and established a three-part test to distinguish between the two types of corporations.<sup>129</sup> Justice Powell not only joined the majority opinion in full, but, according a number of assertions in his private papers, he seemed to show no interest in expanding First Amendment rights for political spending by business corporations any further. Early in deliberations on *MCFL*, he expressed no disagreement with regulations limiting such expenditures to funds raised through corporate political action committees — rather than directly from corporate treasuries. In a memorandum dictated for his files “to refresh my recollection as to the issues,” he wrote that if the corporation before the Court “had created a separate segregated fund, derived from contributions of subscribers or sympathizers, that fund could be used without limit to publish the corporation’s views in support of, or in opposition to, any candidate. Thus, the burdening of First Amendment rights is — at most — quite limited.”<sup>130</sup> Justice Powell also expressed acceptance for

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<sup>127</sup> *Pac. Gas & Electric*, 475 U.S. at 33 (1986) (Rehnquist, J., dissenting).

<sup>128</sup> 479 U.S. 238, 259-63 (1986).

<sup>129</sup> *Id.* at 263-64 (“In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b’s restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.”).

<sup>130</sup> Personal notes by Justice Powell (Aug. 11, 1986) at 5 (*Mass. Citizens for Life*, 479 U.S. in LFP Papers).

broader principles justifying such regulation, writing “Yes”<sup>131</sup> in the margin of his clerk’s bench memorandum next to the statement: “There is a strong argument that unlimited expenditures by large corporations [in candidate elections] could indeed pose the danger of corruption.”<sup>132</sup> That passage went on to declare it “inconceivable that if Xerox spends a lot of money independently advancing an individual’s candidacy, that the fact is not brought to the individual’s attention. If a candidate knows of a large expenditure, it seems that the danger of corruption is there.”<sup>133</sup>

In another memorandum two months later, his clerk detailed guidelines that the public-interest group Common Cause proposed in an *amicus* brief for distinguishing between business corporations and ideological corporations, which focused on walling off the latter from financial support or influence by the former.<sup>134</sup> In the margin next to that passage, Justice Powell bracketed the guidelines and wrote, “Seems reasonable.”<sup>135</sup> Ultimately, the three-part test that the Court established for that purpose contained virtually the same elements as those proposed by Common Cause.<sup>136</sup> After the first draft of Justice Brennan’s opinion was circulated, a memorandum on it by Justice Powell’s clerk emphasized for Justice Powell that “[t]he major question for you is whether you agree with the principle set out . . . that organizations are properly subject to the requirement that they form a PAC when there is a danger that they will use funds gained from the economic arena to engage in speech in the political arena. . . . This would seem to be the principle from this opinion that will be applied to later opinions.”<sup>137</sup> When Justice Powell formally joined Justice Brennan’s opinion four days later, he made no comment or request for revisions of any kind.<sup>138</sup> The clerk’s analysis proved prescient, and although Justice Powell had retired by the time the Court most specifically applied that principle four years later in its most significant narrowing of the *Bellotti* holding in *Austin v. Michigan State Chamber of Commerce*, it was consistent with the opinion he joined in *Massachusetts Citizens for Life*.<sup>139</sup>

<sup>131</sup> Notes in margin of Memorandum from Leslie S. Gielow to Justice Powell (Aug. 19, 1986) at 21 (*Mass. Citizens for Life*, 479 U.S. in LFP Papers).

<sup>132</sup> Bench Memorandum by Gielow for Justice Powell (Aug. 19, 1986) at 21 (*Mass. Citizens for Life*, 479 U.S. in LFP Papers).

<sup>133</sup> *Id.* at 21.

<sup>134</sup> Memorandum by Gielow for Justice Powell (Oct. 9, 1986) at 6, *Mass. Citizens for Life*, 479 U.S. in LFP Papers).

<sup>135</sup> *Id.* (notes in margin).

<sup>136</sup> See note 129 for text and citation of the test established by the Court in *MCFL*.

<sup>137</sup> Memorandum by Gielow for Justice Powell (Nov. 6, 1986) at 2 (*Mass. Citizens for Life*, 479 U.S. in LFP Papers).

<sup>138</sup> Letter from Justice Powell to Justice Brennan (Nov. 10, 1986) at 1 (*Mass. Citizens for Life*, 479 U.S. in LFP Papers). Regarding her work on *MCFL*, Leslie Gielow Jacobs (now Professor of Law and Director of the Capital Center for Public Law and Policy at the McGeorge School of Law at University of the Pacific) was unable to provide additional insight into Justice Powell’s decisionmaking in the case. Jacobs, e-mail message to author, Feb. 18, 2010.

<sup>139</sup> 494 U.S. 652 (1990). Justice Marshall’s majority opinion declared that allowing corporations to use “‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace’ . . . is unfair because ‘[t]he resources in the treasury of a business

This analysis of Justice Powell’s work in the corporate political media spending cases finds that most of it suggests a determined effort to advance interests basically consistent with the theme of his “Attack on American Free Enterprise System” memorandum. His files on those cases document that even though his efforts often conflicted with the views of other justices, Justice Powell was able to prevail over considerable opposition in key cases, particularly *Bellotti* and to a more limited degree in *Pacific Gas & Electric* — while also accepting compromises in many instances as part of that process. Despite all that, Justice Powell’s files from his last corporate political media spending case, *Massachusetts Citizens for Life*, indicate that he might well have taken that body of case law as far as he believed it should go. For some two decades after his retirement, majorities at the Court agreed.<sup>140</sup> Indeed, the positions that Justice Powell endorsed with his vote and in his internal communications on the case — if maintained — almost certainly would have placed him at odds with the five justices who declared virtually all limits on expenditures by corporations in political campaigns unconstitutional in 2010’s *Citizens United v. Federal Election Commission*.<sup>141</sup>

Nevertheless, the indomitable presence of the cornerstone that he set in place with his hard-fought 1978 *Bellotti* opinion cast its long shadow across that decision, with

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corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.” *Id.* at 659 (quoting 479 U.S. at 257-58. The *Austin* Court reaffirmed the long established justification for legislative efforts to prevent actual and potential corruption of the political marketplace of ideas through wealth generated via the significant, state-conferred advantages of the corporate form (such as perpetual life, limited liability, and special tax advantages) in the economic marketplace. *Id.* at 660 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

<sup>140</sup> Over that time, the Court continued to reaffirm the line of holdings that justified limits on corporate political media spending in candidate campaigns, most comprehensively in 2003’s *McConnell v. Federal Election Commission*, which upheld the legislative efforts of the Bipartisan Campaign Reform Act that aimed at soft-money contributions and sham issue advertising, particularly corporate involvement in such practices. The majority opinion, written by Justices Stevens and O’Connor, emphasized Congress’s century-long efforts to restrain corporate political activity in campaign finance legislation “in order to prevent ‘the great aggregations of wealth, from using their corporate funds, directly or indirectly,’ to elect legislators who would ‘vote for their protection and the advancement of their interests as against those of the public.’” 540 U.S. 93, 115-16 (2003) (quoting *United States v. United Automobile Workers*, 352 U.S. 567, 571 (1957)).

<sup>141</sup> In that case, 130 S.Ct. 876 (2010), a five-to-four majority overruled the central holdings of both *Austin* and *McConnell*. The reconfiguration of the Court with Chief Justice John G. Roberts and Justice Samuel A. Alito, Jr., replacing the late Chief Justice Rehnquist and Justice O’Connor provided the majority for that ruling. Justice Anthony M. Kennedy authored the majority opinion, which was also joined by Justices Antonin Scalia and Clarence Thomas. (For more extensive analysis of the decision, see Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 153 (2010).

Justice Anthony M. Kennedy referencing it twenty-four times in its majority opinion. Declaring that “*Bellotti*’s central principle” means “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity,”<sup>142</sup> Justice Kennedy largely ignored the 1980s cases — *NCPAC*, *NRWC*, and *MCFL* — in which *Bellotti*’s author joined the majorities that asserted the constitutionality of just such restrictions. Justice John Paul Stevens challenged the legitimacy of the *Citizens United*’s majority neglecting those cases (and others) in rejecting “the possibility of distinguishing corporations from natural persons. . . . [I]t just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.”<sup>143</sup>

#### B. JUSTICE POWELL IN COMMERCIAL-SPEECH CASES

Justice Powell’s work in the commercial-speech cases in which he was involved reflects a relatively more cautious and nuanced approach than the rather unbridled single-mindedness that characterized particularly his early work in the cases on corporate political media spending. Whereas, especially in *Bellotti* and *Consolidated Edison*, he demonstrated virtually no hesitations over unleashing business interests to engage in spending on political advertising under the First Amendment free of government regulation, he proceeded very differently when it came to similarly freeing commercial advertising. And whereas his views on regulation of corporate political media spending were characterized by an apparent evolution that seemed to acknowledge the earlier diminution of regulation had gone far enough, his position on commercial speech remained more constant throughout his years on the bench. His private papers indicate that when the earliest commercial speech cases arrived at the Supreme Court, he held significant concerns over the potential for totally unregulated advertising to undermine the fair-bargaining process. He would maintain those concerns in his jurisprudence consistently over the years ahead, and he would successfully institutionalize that view in his *Central Hudson Gas and Electric v. Public Service Commission*<sup>144</sup> opinion.

Back when he was a young lawyer in 1942, the Court had disposed of the question of First Amendment protection for commercial speech almost dismissively, declaring unanimously in *Valentine v. Chrestensen* that a “purely commercial advertisement” merited no such protection from government regulation.<sup>145</sup> But in 1964, in reaching its landmark ruling that constitutionalized libel law in *New York Times v. Sullivan*, the Court qualified that sweeping statement, maintaining its relative disdain for purely commercial speech but acknowledging the facts of that case demonstrated that advertising format alone could not bar the speech involved from First Amendment

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<sup>142</sup> *Id.* at 902.

<sup>143</sup> *Id.* at 957 (Stevens, J., dissenting).

<sup>144</sup> 447 U.S. 557 (1980).

<sup>145</sup> 316 U.S. 52, 54 (1942).

protection.<sup>146</sup> That opened the door for cases to begin working their way toward the Court that would further press the question of precisely where the bar would be set concerning such protection. Justice Powell authored his first opinion on the subject shortly after joining the Court in one of the first of those cases, 1973’s *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, which he assessed early as “very close.”<sup>147</sup> The newspaper that brought the case, challenging a city regulation barring help-wanted advertisements segregated according to male or female interest, asked the Court to “abrogate the distinction between commercial and other speech.”<sup>148</sup> At conference, the justices were closely divided, with some arguing that the press should be free from such government interference.<sup>149</sup> Ultimately they would split five-to-four in favor of rejecting the newspaper’s argument, with Justice Powell’s majority opinion concluding that “[i]n the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement.” According to his analysis, the help-wanted ads did not express a position on “whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission’s enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.”<sup>150</sup>

*Pittsburgh Press* launched an era in which the Supreme Court would issue significant commercial-speech rulings every year almost through the end of Justice Powell’s time there. In 1974, the Court again divided even more closely over the constitutionality of a ban on political advertising on city buses in *Lehman v. City of Shaker Heights*. Five justices supported the judgment that the ban could stand, but agreement on a majority opinion could not be reached, with the plurality opinion by Justice Blackmun and the dissent by Justice Brennan each being joined by four justices.<sup>151</sup> Justice Powell joined the dissent, having expressed willingness at conference to accept regulation of excessively intrusive advertising, but arguing that print messages on city buses could not be so classified.<sup>152</sup> The next year, the same group of justices

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<sup>146</sup> 376 U.S. 254, 266 (1964). The Court sharply distinguished the *Sullivan* context from that of *Chrestensen*, with emphasis on the fact that the latter amounted to an effort “to evade” an ordinance regulating handbills in order to promote a commercial venture, while *Sullivan*’s purpose was advancing the cause of “a movement whose existence and objectives are matters of the highest public interest and concern.” *Id.*

<sup>147</sup> Personal notes by Justice Powell (March 20, 1973) at 1 (*Pittsburgh Press*, 413 U.S. in LFP Papers).

<sup>148</sup> *Pittsburgh Press*, 413 U.S. at 388 (1973).

<sup>149</sup> Conference Notes of Justice Powell (March 23, 1973) at 1, *Pittsburgh Press*, 413 U.S. in LFP Papers). Justices Blackmun, Stewart, and William O. Douglas in particular pushed for press rights, with Justice Stewart stating that government “can’t tell press what to accept, what to print, how to make up, etc.,” according to Justice Powell’s notes. *Id.*

<sup>150</sup> *Pittsburgh Press*, 413 U.S. at 385.

<sup>151</sup> 418 U.S. 298 (1974). Justice Douglas declined to join either opinion, but did support the judgment announced in Justice Blackmun’s opinion.

<sup>152</sup> Conference Notes of Justice Powell (March 1, 1974) at 1 (*Lehman*, 418 U.S. in LFP Papers).

demonstrated much greater consensus in signaling a willingness to extend First Amendment protections for commercial speech a good bit further. In *Bigelow v. Commonwealth of Virginia*, Justice Powell joined a seven-to-two majority for Justice Blackmun’s opinion declaring *Chrestensen*’s holding “distinctly a limited one” that did not provide “authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.”<sup>153</sup> It found that the advertisement in *Bigelow* on the availability of abortion services in New York “conveyed information of potential interest and value” that was protected, but refrained from actually going further at that point: “We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.”<sup>154</sup>

A year later, the Court was ready to take that step in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the landmark case establishing First Amendment protection for speech “which does ‘no more than propose a commercial transaction’”<sup>155</sup> — in this case, the advertising of prescription drug prices. Justice Powell was deeply involved in attempting to shape the ruling along lines he felt most appropriate for the form of expression involved. His papers indicate that he was decided early on regarding the judgment but that he wrestled longer with what he felt would be the best way to express constitutional support for commercial speech in terms that did not sweep aside “the state interest in protecting professional standards” or allow unlimited “advertising by lawyers, doctors, and other professionals,” in particular.<sup>156</sup> Indeed, while in cases such as *Bellotti*, *Consolidated Edison*, and *Pacific Gas*, he demonstrated no concerns that corporate managers might abuse the right to spend stockholders’ or ratepayers’ money on political advertising, he seemed quite doubtful that his fellow attorneys (and other professionals) could engage in commercial advertising responsibly. After seeing a draft of Justice Blackmun’s *Virginia Pharmacy* opinion that Justice Powell felt could “prevent a discriminating assessment — and balancing — of the public interest against the First Amendment rights when we have the medical and legal professions before us,” he wrote to request an additional passage: “Doctors and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced opportunity for confusion and deception if they were to undertake certain kinds of advertising [emphasis included].”<sup>157</sup> After Justice Brennan suggested avoiding use of the word “opportunity” in that manner, which he felt “connotes ‘ambulance chasers,’ and while I don’t doubt both professions

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<sup>153</sup> 421 U.S. 809, 819-20 (1975).

<sup>154</sup> *Id.* at 823, 825.

<sup>155</sup> 425 U.S. 748, 761 (1976) (quoting *Pittsburgh Press*, 413 U.S. at 385). A newspaper publisher had been convicted under Virginia law for publishing an advertisement on the availability of abortion in New York. *Id.* at 811-14.

<sup>156</sup> Personal notes by Justice Powell (Aug. 19, 1975) at 2 (*Va. State Bd. of Pharm.*, 425 U.S. in LFP Papers).

<sup>157</sup> Letter from Justice Powell to Justice Blackmun (March 29, 1976) at 1-2 (*Va. State Bd. of Pharm.*, 425 U.S. in LFP Papers).

have too many, I’d rather not get us into that fight,”<sup>158</sup> Justice Blackmun arrived at a more tactful phrasing that persuaded Justice Powell to join the opinion.<sup>159</sup> He also had formally joined Chief Justice Burger’s concurrence, which went even further, laying out the “quite different factors [that] would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law.”<sup>160</sup> But four days before the ruling was announced, Justice Powell requested that his name be removed from the concurrence because it would be “somewhat inconsistent” for him to join the assertions on that point of both Justice Blackmun and Chief Justice Burger.<sup>161</sup>

Justice Powell seemed markedly less invested in shaping 1977’s *Linmark Associates, Inc. v. Township of Willingboro*, in which the Court ruled unconstitutional a city ban on the posting of signs advertising homes for sale and found “no meaningful distinction between” it and “the statute overturned in *Virginia Pharmacy*.”<sup>162</sup> In his notes from the justices’ conference on the case, Justice Powell indicated that he found it an “[e]xtremely close case” to which he “probably would not dissent — either way” that the majority might go, because even after *Virginia Pharmacy*, he believed there were limits on commercial speech and that the city’s interest justifying the regulation in *Linmark Associates* was “very strong.”<sup>163</sup> Even after joining the majority opinion he remained

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<sup>158</sup> Letter from Justice Brennan to Justice Blackmun (March 31, 1976) at 1 (*Va. State Bd. of Pharm.*, 425 U.S. in LFP Papers).

<sup>159</sup> In the published opinion, Justice Blackmun said: “We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.” *Va. Pharm.*, 425 U.S. at 773, n. 25.

<sup>160</sup> *Id.* at 774, (Burger, C.J., concurring). Chief Justice Burger went on to declare: “‘The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.’ I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are ‘misleading’ and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases.” *Id.* at 775 (quoting *Semler v. Dental Examiners*, 294 U.S. 608, 612 (1935)).

<sup>161</sup> Letter from Justice Powell, Jr. to Chief Justice Burger (May 20, 1976) at 1 (*Va. State Bd. of Pharm.*, 425 U.S. in LFP Papers).

<sup>162</sup> 431 U.S. 86, 97 (1977). The ordinance was intended to promote racial integration by preventing “‘panic selling’ . . . by whites who feared that the township was becoming all black, and that property values would decline.” *Id.* at 88.

<sup>163</sup> Personal notes by Justice Powell (March 4, 1977) at 2 (*Linmark Assocs.*, 431 U.S. in LFP Papers).



rather equivocal, noting privately that he believed it was "written too broadly."<sup>164</sup> And yet some four months later, as he began to consider *Bellotti*, he would find it handy to put forth the ruling as authoritative in justifying First Amendment protection for corporate political media spending. In a memorandum he dictated as an "aid to memory" after reviewing the briefs filed in *Bellotti*, he wrote that *Linmark Associates* and *Virginia Pharmacy* "go a long way toward recognizing First Amendment rights of corporate entities."<sup>165</sup> That assertion required stretching the holdings of those cases creatively at best, and arguably beyond their actual reach, since neither involved corporate political media spending, and corporate involvement was no more than tangential to the resolution of either case.<sup>166</sup> Ultimately, in his *Bellotti* opinion, Justice Powell would write of how those cases "illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."<sup>167</sup>

### 1. Confronting the Chickens of *Bates* Come Home to Roost

In *Bates v. State Bar of Arizona* the next year, Justice Powell would discover that, despite his earlier efforts to wall off *Virginia Pharmacy* from advertising by physicians and lawyers, a majority of his brethren found insufficient basis to justify a total ban on advertising by attorneys.<sup>168</sup> "The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice 'that the First Amendment makes for us,'" Justice Blackmun's majority opinion said of *Virginia Pharmacy*. "Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance."<sup>169</sup> Ultimately, the majority concluded that what was in question in *Bates* was "whether the State may prevent the publication . . . [of] truthful advertisement concerning the availability and terms of routine legal services," and that it must "rule simply that the flow of such information may not be restrained."<sup>170</sup> Justice Powell again made clear, however, that he was much less comfortable with such a free flow of information when professionals such as his fellow attorneys were involved. The clerk who assessed the first draft of Justice Blackmun's opinion for Justice Powell wrote to him that he could "simply see no way

<sup>164</sup> Personal notes by Justice Powell (April 14, 1977) at 2 (*Linmark Assocs.*, 431 U.S. in LFP Papers).

<sup>165</sup> Memorandum by Justice Powell (Aug. 9, 1977) at 8 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>166</sup> *Virginia Pharmacy* was brought by an individual Virginia resident and two large-membership, nonprofit organizations, the Virginia Citizens Consumer Council, Inc., and the Virginia State AFL-CIO. *Va. Pharm.*, 425 U.S. at 753. In *Linmark*, the case was brought by a local Realtor and a business corporation that had listed for sale with him a home that was affected by the ban. *Linmark Assocs.*, 431 U.S. at 87.

<sup>167</sup> *Bellotti*, 435 U.S. at 783 (citing *Va. Pharm.*, 425 U.S. at 774, and *Linmark Assocs.*, 431 U.S. at 95).

<sup>168</sup> 433 U.S. 350, 379 (1977).

<sup>169</sup> *Id.* at 365 (quoting *Va. Pharm.*, 425 U.S. at 770).

<sup>170</sup> *Id.* at 384.

around [Justice Blackmun’s] distinction of the prior cases. The observations he made in [*Virginia Pharmacy*] are equally applicable here.” Because Justice Powell had joined *Virginia Pharmacy*, the clerk concluded that Justice Blackmun was “correct when he concludes that the framework for analysis [in *Bates*] was established in *Virginia Pharmacy*.”<sup>171</sup> Though Justice Powell called the clerk’s analysis a “[g]ood memo,” he also noted, “I’ll not buy a good deal of it.”<sup>172</sup> When he reviewed Justice Blackmun’s draft himself, he made extensive notes of his own<sup>173</sup> and then developed a dissent in which he insisted that “this result is neither required by the First Amendment, nor in the public interest.”<sup>174</sup>

When the Court decided *Ohralik v. Ohio State Bar Association* in 1978, Justice Powell declared it represented “*Bates’* chickens coming home to roost!”<sup>175</sup> in a case involving “classic examples of ‘ambulance chasing.’”<sup>176</sup> He was able to draw five other justices to join his majority opinion and unanimous support for its judgment that government “constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.”<sup>177</sup> Justice Powell clearly reasserted his belief that “[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”<sup>178</sup> He continued to firmly advance that assertion in 1979’s *Friedman v. Rogers*,<sup>179</sup> indicating very early in the Court’s consideration of the case that it should not extend First Amendment protection to trade names, as the lower court had in *Friedman*.<sup>180</sup> “[A] trade name is not speech,” he insisted, because it “is a *property* interest — not a 1<sup>st</sup> Amend. right. It conveys no information intrinsically — only by association [emphasis included].”<sup>181</sup> Ultimately, he authored a majority opinion that held just that.<sup>182</sup>

<sup>171</sup> Memorandum from Gene Comey to Justice Powell (June 10, 1977) at 1 (*Bates*, 433 U.S. in LFP Papers).

<sup>172</sup> Notes in margin of Memorandum from Comey to Justice Powell (June 10, 1977) at 1 (*Bates*, 433 U.S. in LFP Papers).

<sup>173</sup> Personal notes by Justice Powell (May 9, 1977) at 1-34 (*Bates*, 433 U.S. in LFP Papers).

<sup>174</sup> *Bates*, 433 U.S. at 389 (Powell, J., dissenting).

<sup>175</sup> Personal notes by Justice Powell (Sept. 7, 1977) at 1 (*Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) in LFP Papers).

<sup>176</sup> *Ohralik*, 436 U.S. at 469 (Marshall, J., concurring).

<sup>177</sup> *Id.* at 449.

<sup>178</sup> *Id.* at 456.

<sup>179</sup> 440 U.S. 1 (1979).

<sup>180</sup> *Rogers v. Friedman*, 438 F.Supp. 428, 431 (E.D. Tex. 1977).

<sup>181</sup> Personal notes by Justice Powell (Oct. 24, 1978) at 1 (*Friedman*, 440 U.S. in LFP Papers).

<sup>182</sup> *Friedman*, 440 U.S. at 13-16. Justice Powell wrote: “A trade name that has acquired such associations to the extent of establishing a secondary meaning becomes a valuable property of the business, protected from appropriation by others. . . . But a property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication. Accordingly, there is no First Amendment rule . . . requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information

2. The Forging of *Central Hudson*’s Enduring Influence

Thus, Justice Powell already had played a prominent role in shaping the Supreme Court’s vigorous development of its modern commercial-speech jurisprudence when the case arrived through which he would go even further and make his most influential and enduring contribution to that body of law. In 1980’s *Central Hudson Gas and Electric v. Public Service Commission*, a First Amendment challenge to a state ban on advertising that promoted the use of electricity, he faced the difficulty of drafting a majority opinion in a case in which seven justices had voted at conference to strike down the ban while disagreeing considerably on how to reach that conclusion.<sup>183</sup> Ultimately three other justices would each author a concurring opinion that offered his own rationale for the judgment.<sup>184</sup> Despite all that, what Justice Powell successfully contributed that would henceforth set *Central Hudson* apart as the most influential of all modern commercial-speech rulings was a standardized, four-part test<sup>185</sup> for determining whether a government regulation of advertising that was challenged on First Amendment grounds could withstand an intermediate level of scrutiny.<sup>186</sup> “Justice Powell was always concerned about what judges and lawyers would do with the opinion after the Court handed down its ruling, so he liked providing the clearest possible guidance for the future — without, of course, deciding future cases,” according to David O. Stewart, the clerk who worked with him most closely on *Central Hudson*.<sup>187</sup> Stewart worked closely with Justice Powell to develop the *Hudson* test, reasoning at the time that the “first commercial speech cases could not be especially rigorous in this way because they were still breaking free of the demons of *Valentine v. Chrestensen*. By now, however, it seems appropriate to try to

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can clarify or offset the effects of the spurious communication. There is no claim in this case that Rogers or other optometrists practicing under trade names have been deprived of property without due process of law, or indeed that their property has been taken at all.” *Id.* at 13.

<sup>183</sup> Conference Notes of Justice Powell (March 19, 1980) at 1 (*Cent. Hudson*, 447 U.S. in LFP Papers).

<sup>184</sup> Chief Justice Burger, and Justices Stewart, White and Marshall joined Justice Powell’s majority opinion. Justices Brennan (who had voted to affirm the regulation at conference), Blackmun, and Stevens each joined the judgment and authored a concurrence. Only Justice Rehnquist dissented.

<sup>185</sup> *Cent. Hudson*, 447 U.S. at 566 (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

<sup>186</sup> Justice Powell thus established the level of scrutiny for judicial review of regulation of commercial speech beneath the higher level of strict scrutiny applied to regulation of political expression but above the lower level of rational-basis scrutiny applied to regulations that do not infringe upon fundamental rights.

<sup>187</sup> David O. Stewart, e-mail message to author, Dec. 10, 2009. Stewart is now a veteran trial lawyer with the Ropes & Gray firm in Washington.

apply a disciplined approach instead of the more *ad-hoc* balancing methods used in the early cases.”<sup>188</sup>

Early in its development, Justice Powell expressed satisfaction that it was not “too ‘elaborate’ or ‘academic,’” and then characterized each prong of the test in turn. “The first step (whether the speech is ‘commercial’) usually will be simple. The second step (whether the governmental interest is substantial) presents a familiar question that usually is a judgment call,” he began. “The next two steps are: whether the regulation is related directly to the state interest, and whether it restricts expression unrelated to the state interest. These also are ‘judgment calls,’ and yet they are familiar ones, and the four together do contribute — I think — to an orderly, step-by-step analysis.”<sup>189</sup> Even as the author of the *Central Hudson* test was applying it to the facts at hand in that landmark case, however, he found it a very close call that gave him great “concern as to whether I am on the right side of this issue.”<sup>190</sup> In particular he worried over how to most practically apply the abstract question of the test’s fourth prong — whether the regulation in question was “not more extensive than is necessary” to serve the government’s interest justifying the regulation.<sup>191</sup> So great were his concerns that he made what he called a “bit of a ‘bombshell’” request that his clerk — who had completed one draft in which the regulation was found unconstitutional — to proceed with completing another “that ends up the other way.”<sup>192</sup> Justice Powell expressed to Stewart his fears of “further disorders and revolution among the Arab states by forces that are encouraged by the USSR and that are bitterly hostile to our country,” which could produce another crippling disruption in the nation’s petroleum supply like the embargo in 1973 that had led to enactment of the regulation challenged in *Central Hudson*.<sup>193</sup> He said he was wrestling with whether it was truly justified to declare “the regulation at issue invalid merely because it reaches beyond what appears to be the immediate problem, when it might be justified as a reasonable precautionary measure for the future.”<sup>194</sup>

And ultimately, it was part four of the test that Justice Powell resolved was dispositive in reaching his holding. He concluded that the regulation survived the first three prongs of the test,<sup>195</sup> but “reaches all promotional advertising, regardless of the impact . . . on overall energy use . . . [and] the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services” that were more energy efficient and thus could reduce total energy consumption. Finding “no

<sup>188</sup> Memorandum from Stewart to Justice Powell (April 25, 1980) at 1 (*Cent. Hudson*, 447 U.S. in LFP Papers).

<sup>189</sup> Memorandum from Justice Powell to Stewart (April 28, 1980) at 1-2 (*Cent. Hudson*, 447 U.S. in LFP Papers).

<sup>190</sup> *Ibid.*, p. 1.

<sup>191</sup> *Central Hudson*, 447 U.S. at 566.

<sup>192</sup> Memorandum from Justice Powell to Stewart (April 28, 1980) at 4 (*Cent. Hudson*, 447 U.S. in LFP Papers).

<sup>193</sup> *Id.* at 2.

<sup>194</sup> Memorandum from Justice Powell to Stewart (April 28, 1980) at 2-3 (*Cent. Hudson*, 447 U.S. in LFP Papers).

<sup>195</sup> *Cent. Hudson*, 447 U.S. at 566-69.

showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State’s interests,” his opinion declared the ban unconstitutional because it had failed to meet the standard required under the fourth prong of his *Central Hudson* test.<sup>196</sup> Justice Powell then suggested that the state might “further its policy of conservation” by regulations that would “restrict the format and content” of such advertising, for example, so as to “require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future.”<sup>197</sup> Thus, even in striking down a regulation on commercial speech, he recommended new regulation ostensibly more likely to be upheld under his four-part test.

Just a year later, the Court would manage a six-vote majority for the judgment striking down a city ban on most outdoor signs in *Metromedia, Inc. v. City of San Diego* but only a plurality for Justice White’s opinion announcing that judgment.<sup>198</sup> Justice Powell would join the plurality opinion, which found that the regulation survived the *Central Hudson* test but still was unconstitutional because it permitted signs advertising goods or services available on sites where signs were located but did not permit noncommercial messages on those signs.<sup>199</sup> The plurality opinion asserted that it was forced to apply *Central Hudson* in that manner because the San Diego regulation, by “affording a greater degree of protection to commercial than to noncommercial speech,” had “invert[ed]” the doctrine of “recent commercial speech cases [that] have consistently accorded noncommercial speech a greater degree of protection than commercial speech.”<sup>200</sup> Justice Powell also joined an even stronger affirmation of that distinction in 1983’s *Bolger v. Youngs Drug Products*, which supplemented part one of the *Central Hudson* test with a three-part test for distinguishing between commercial and noncommercial speech. In order to determine whether a condom manufacturer’s flyers and pamphlets promoting its products — but also discussing venereal disease and family planning — could be considered commercial messages subject to federal regulation, the Court developed the three-part test, which considers the combination of the advertising format of the messages, reference to a specific product, and the economic motivation for disseminating the messages.<sup>201</sup> Emphasizing that none of those three factors alone would necessarily prove dispositive, the Court concluded that, when considered in combination, “the informational pamphlets are properly characterized as commercial speech . . .

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<sup>196</sup> *Id.* at 570.

<sup>197</sup> *Id.* at 570-71.

<sup>198</sup> 453 U.S. 490 (1981).

<sup>199</sup> *Id.* at 503-17. The failure to include an exception for noncommercial speech on such onsite signs meant the regulation was unconstitutional on its face, the Court said, because “[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.” *Id.* at 513.

<sup>200</sup> *Id.* at 513.

<sup>201</sup> 463 U.S. 60, 66-67 (1983).

notwithstanding the fact that they contain discussions of important public issues.”<sup>202</sup> Justice White’s majority opinion invoked *Central Hudson* in its assertion that “[w]e have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”<sup>203</sup> With that element of the *Central Hudson* test resolved, the Court then proceeded to apply the rest of it to the facts at hand and concluded that a federal ban on unsolicited mailing of contraceptive advertisements was unconstitutional, because it was more extensive than necessary to advance the government’s asserted interests in protecting adults who might be offended and children from such mailings.<sup>204</sup>

So in the long chain of doctrine-defining commercial-speech cases during Justice Powell’s time on the Court, it is *Central Hudson* — and its structural role in distinguishing such expression from political expression — that stands as his most enduring legacy. Although he was active in shaping the doctrine in other significant ways, such as limiting protection for advertising by lawyers and physicians, *Central Hudson* is the opinion of his that holds a comparable place among commercial-speech cases to *Bellotti*’s place among those on corporate political media spending. The *Central Hudson* test has not survived the ensuing years without intense debate in more recent Supreme Court opinions<sup>205</sup> or in scholarly literature on the subject.<sup>206</sup> Yet more than

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<sup>202</sup> *Id.* at 67-68.

<sup>203</sup> *Id.* at 68. (quoting *Cent. Hudson*, 447 U.S. at 563).

<sup>204</sup> *Id.* at 69-75. Justice Powell also joined the majority opinion in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which upheld a ban on advertising in Puerto Rico that promoted the country’s casinos. The majority applied the *Central Hudson* test and found the ban to be constitutional in that its restriction on a form of commercial speech advanced a substantial government interest (promoting the public welfare by reducing demand for gambling) in a manner that was no more extensive than necessary. *Id.* at 340-44.

<sup>205</sup> For example, in a concurring opinion in 1993’s *Cincinnati v. Discovery Network*, which struck down a city ban on the use of newsracks on city streets to distribute commercial handbills, Justice Harry Blackmun wrote that he hoped the Court would ultimately “abandon *Central Hudson*’s analysis entirely” and replace it with “one that affords full protection for truthful, noncoercive commercial speech about lawful activities.” 507 U.S. 410, 438 (1993) (Blackmun, J., concurring). In the Court’s splintered 44 *Liquormart v. Rhode Island*, a six-justice majority agreed on the judgment striking down two Rhode Island statutes limiting advertisement of alcohol prices to the point of purchase, but the nine justices split into five alignments with varied memberships of three or four justices each to join selected parts of Justice Stevens’ eight-part principal opinion. 507 U.S. 410, 488-514 (1993). Two other justices joined his argument that more rigorous scrutiny than the *Central Hudson* intermediate scrutiny should be applied to regulations that entirely prohibit “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process.” *Id.* at 501. But four other justices specifically rejected any such departure from the *Central Hudson* test. *Id.* at 528-34 (O’Connor, J., concurring).

<sup>206</sup> For critique of the *Central Hudson* test, see, for example, Waters, “A Doctrine in Disarray;” Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the Central Hudson and O’Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723 (2001); Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in*

three decades later it remains the standard for determining through intermediate scrutiny the constitutionality of advertising regulations. It is routinely employed in the courts for that purpose, including in prominent recent cases upholding “do not call” restrictions on telemarketing<sup>207</sup> and lottery advertising,<sup>208</sup> and striking down regulations on advertising involving alcohol content<sup>209</sup> and prices<sup>210</sup> and tobacco billboards.<sup>211</sup> In 2001’s *Lorillard Tobacco v. Reilly*, when petitioners urged the Court to “reject the *Central Hudson* analysis and apply strict scrutiny” on the grounds that several justices had “expressed doubts about the *Central Hudson* analysis and whether it should apply in certain cases,”<sup>212</sup> the majority firmly replied the same way it had in another case two years before: “We see ‘no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.’”<sup>213</sup>

#### IV. CONCLUSION

Analysis of Justice Powell’s jurisprudence on the bodies of case law most closely related to his interests in advancing business influence in the marketplace of ideas — First Amendment cases involving corporate political media spending and commercial speech — shows that he indeed advanced those interests considerably during his time at the Court. Yet on balance, the arc of his efforts reflects a more nuanced understanding of the degree to which the business community’s freedom of expression should be balanced in order to preserve other societal interests.

The fulfillment of concerns that Justice Powell articulated in his “Attack on American Free Enterprise System” memorandum was most marked in his vigorous efforts to forge a five-vote majority in *First National Bank of Boston v. Bellotti*. In that case, he overcame significant opposition among other justices to establish in the case law an unprecedented basis for explicitly extending First Amendment protection to corporate political media spending. Despite years of subsequent efforts by the Court to narrow *Bellotti*’s reach, its essential holding and rationale remained intact enough over the course of three decades to provide the justification for another five-to-four majority in 2010 to extend its influence far beyond anything that Justice Powell could have achieved during his time at the Supreme Court. Indeed, there is evidence that in his latter years on the bench, even he had concluded the *Bellotti* line of case law already had been advanced as far as it should.

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*Commercial Speech Doctrine*, 9 *Comm. L. & Pol’y* 237 (2004); David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 *Case W. Res. L. Rev.* 1049, 1086 (2004).

<sup>207</sup> *Mainstream Marketing Services v. Federal Trade Commission*, 358 F.3d 1228, 1236 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004).

<sup>208</sup> *United States v. Edge Broadcasting*, 509 U.S. 418, 435 (1993).

<sup>209</sup> *Rubin v. Coors*, 514 U.S. 476, 491 (1995).

<sup>210</sup> *44 Liquormart v. Rhode Island*, 507 U.S. 410, 516 (1993).

<sup>211</sup> *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 567 (2001).

<sup>212</sup> 533 U.S. 525, 554 (2001).

<sup>213</sup> *Id.* at 554-55 (quoting *Greater New Orleans Broadcasting v. United States*, 527 U.S. 173, 184 (1999)).

In the great body of commercial-speech cases in which he participated, Justice Powell’s efforts consistently reflect even more restraint in terms of the extent to which the First Amendment should protect advertising. Certainly he contributed enthusiastically to the evolution of the Court’s doctrine during his years there that moved commercial speech from completely outside the First Amendment’s protections to squarely within them. But he strove just as staunchly — and successfully — to position and maintain those protections as distinctly more limited than those accorded to political expression. In his *Central Hudson* opinion, also handed down more than three decades ago, he firmly secured within commercial-speech doctrine a system of intermediate scrutiny that structurally serves to both maintain and constrain constitutional protection for advertising.

It may well be that by the time Justice Powell left the Court, he believed the ideas he advanced so vigorously in his famous “Attack” memorandum had been sufficiently fulfilled in terms of both those lines of jurisprudence. And he might even have resisted efforts to expand the influence of business in the marketplace of ideas any further. If so, what he wrought in the case law has to date proven more successful at preserving such restraint in commercial-speech jurisprudence. But on corporate political media spending, history has already demonstrated the potential for a justice’s progeny to exceed its creator’s intentions.



## DISCIPLINING THE BRITISH TABLOIDS: *MOSLEY V. NEWS GROUP NEWSPAPERS*

STEPHEN BATES

*In 2008, one of Rupert Murdoch's London tabloids, the News of the World, charged that Max Mosley had taken part in a Nazi-themed S&M orgy with five prostitutes. The allegations came in articles and photographs as well as a website video, filmed secretly by one of the prostitutes. The Nazi claim struck a familial chord: Mosley, the head of Formula 1 racing, is the son of a 1930s British fascist leader. But while admitting to the prostitutes and the S&M orgy, Mosley adamantly denied any Nazi element. When he sued for invasion of privacy, the judge held that the evidence supported his denial and awarded what appear to be record-setting damages. This article argues that in Mosley and the precedents underlying it, the British courts have erred by vastly expanding the scope of invasion of privacy over the past decade. Among other flaws, British privacy law applies a strict Meiklejohnian approach that views speech solely as an aid to self-government. The law thereby overlooks the legitimate public interest in a sex scandal, which can reveal abuse of power, hypocrisy, unreliability, unworthy role models, and breaches of public morality.*

keywords: privacy, Britain, scandal, tabloids, European Convention on Human Rights

### I. INTRODUCTION

On July 24, 2008, Britain's High Court of Justice, Queen's Bench Division, ruled that the *News of the World* had unlawfully invaded the privacy of Max Mosley, head of the Fédération Internationale de l'Automobile. In a published article and photographs, as well as a video posted on its website, the British tabloid had accused Mosley of participating in a Nazi-themed, sadomasochistic orgy with five prostitutes. Mosley responded that he had indeed participated in a sadomasochistic orgy with five prostitutes, but that there had been no Nazi element. The evidence supported his account. In *Mosley v. News Group Newspapers Ltd.*,<sup>1</sup> the judge balanced press freedom and privacy interests, concluded that privacy prevailed, and awarded Mosley £60,000, which appeared to be record-setting damages for a privacy case.

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<sup>1</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.).

The case holds troubling implications—implications that are much more consequential than whether Max Mosley’s orgy did or did not have a Nazi tinge. In the name of keeping journalists out of the bedroom, the British system now places judges in the newsroom, where they second-guess and sometimes overrule editors. Such interventions compromise the autonomy of the press. So, of course, do other features of British law, such as libel standards, prior restraints, and the Official Secrets Act. But this is new: courts have developed the privacy cause of action only since the Human Rights Act of 1998 took effect in 2000. A dozen years ago, British reporters were less vulnerable to invasion-of-privacy suits than American reporters.<sup>2</sup> Today, British reporters are far more vulnerable. Indeed, privacy lawsuits are outnumbering libel ones.<sup>3</sup> As a result, freedom of the press in Britain has been constricted.

The *Mosley* case has social and political import as well. Historically, the populist press has publicized those who transgress against a society’s moral code, including sexual morality. By publishing such material, the press has contributed to the process through which a society establishes, modifies, and reaffirms its mores. As some British journalists have charged, *Mosley* diminishes the press’s longstanding role here. The result may be to hide acts of public figures—government officials, celebrity role models, and others—that many people would judge significant and shameful. In the United States in 2009 and 2010, news coverage led to admissions of extramarital affairs by, among others, Senator John Ensign of Nevada, South Carolina Governor Mark Sanford, 2008 presidential candidate John Edwards of North Carolina, and golfer Tiger Woods. (The *National Enquirer*—a weekly tabloid, like the *News of the World*—was considered for a Pulitzer Prize for breaking the story of John Edwards’s out-of-wedlock child.<sup>4</sup>) Under British law, each of these men would have had a good chance of winning a lawsuit against the press for invading his privacy.<sup>5</sup>

Further, *Mosley* and its underlying precedents exhibit a crabbed and elitist view of the press. These cases view a proper press as one that pursues a narrowly defined public interest. Such a press fuels the popular debate on social and political issues—period. But that is only one function of news media. The press does more than help create informed, active citizens. It seeks not merely to serve the public interest; it also seeks to serve the public’s interests, including interest in celebrities and scandals. The news media entertain as well as inform, and they serve the working class—the principal audience of

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<sup>2</sup> Cf. T. L. Yang, *Privacy: A Comparative Study of English and American Law*, 15 INT’L & COMP. L.Q. 175, 175 (1966) (stating that “[t]he publication of private and personal affairs, often highly embarrassing and distressing, in the gossip columns of some newspapers is not controlled in any way by [British] law”).

<sup>3</sup> David Eady, speech at University of Hertfordshire, Nov. 10, 2009, <http://www.judiciary.gov.uk/NR/rdonlyres/1D20B7A7-62FB-461D-BA12-2437CB8CF61A/0/justiceeadyuniversiofhertfordshire101109.pdf> (last visited Aug. 22, 2010), at 13.

<sup>4</sup> See Stephanie Clifford, *The National Enquirer Earns Some Respect*, N.Y. TIMES, March 7, 2010 at B1.

<sup>5</sup> For an argument that British courts might in fact attempt to enforce privacy law against American media outlets, on the model of so-called libel tourism, see Stephen Bates, *More SPEECH: Preempting Privacy Tourism*, 33 HASTINGS COMM. & ENT. L. J. 379-405 (2011).

tabloids—as well as the middle and upper classes. Daniel Bell and Irving Kristol once wrote, “It is probable that as much mischief has been perpetrated upon the human race in the name of ‘the public interest’ as in the name of anything else.”<sup>6</sup> *Mosley* provides a powerful illustration of such mischief.

*Mosley* exemplifies a crabbed view of the press in another respect, too. The case and the precedents leading up to it treat photography and video as lower forms of journalism. When dealing with certain matters, under this case law, a newspaper may lawfully publish an article but be liable for damages if it accompanies the article with a photograph or a website video. In other words, it may be permissible to publish controversial allegations but not the visuals that could provide context, enliven the presentation, or corroborate the charges.

This article analyzes and criticizes *Mosley* and British privacy law. Part II presents the facts of the case. Part III sets forth the applicable doctrines of privacy law. Part IV summarizes the court’s reasoning in *Mosley*. Part V argues that the court erred in concluding that Max Mosley had a reasonable expectation of privacy. Part VI argues that the court erred in a second fashion, by concluding that the public interest did not justify publication of the article. Finally, Part VII suggests that *News of the World* behaved irresponsibly but not unlawfully.

## II. FACTS OF *MOSLEY*

Max Mosley was the elected president of the Fédération Internationale de l’Automobile (FIA) from 1993 to 2009.<sup>7</sup> The FIA sponsors Formula One racing. Mosley addressed a variety of issues as FIA head, including environmental concerns, tobacco advertising, and racism in Formula One.<sup>8</sup> In spring 2008, when the *News of the World* articles and video appeared, Mosley was 67 years old, married, and the father of two grown sons.<sup>9</sup> Significantly, in terms of the coverage of the allegedly Nazi-themed S&M session, Mosley is the son of the late Oswald Mosley, who founded the British Union of Fascists in the 1930s.<sup>10</sup> Oswald Mosley married Diana Mitford (Max Mosley’s mother) in 1936 at the home of Joseph Goebbels, with Adolf Hitler among the guests; the Führer gave the newlyweds a photograph of himself.<sup>11</sup>

<sup>6</sup> Daniel Bell & Irving Kristol, *What Is the Public Interest?*, 1 PUB. INTEREST 4 (1965).

<sup>7</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 1; Angelique Chrisafis, *Feel My Pain*, GUARDIAN, Oct. 20, 2008, <http://www.guardian.co.uk/media/2008/oct/20/mosley-privacy> (last visited April 3, 2010); Jonathan Harwood, *F1 Breakaway Off as Mosley Quits*, FIRST POST, June 24, 2009, <http://www.thefirstpost.co.uk/49513/people,sport,f1-breakaway-off-as-max-mosley-quits-formula-1-grand-prix-fia-fota-sport-motor-racing-ferrari-breakaway> (last visited April 3, 2010).

<sup>8</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 3 (action for injunction).

<sup>9</sup> Simon Edge, *Shame of the Mosleys*, DAILY EXPRESS, April 2, 2008, <http://www.express.co.uk/posts/view/39940/Shame-of-the-Mosleys> (last visited April 3, 2010).

<sup>10</sup> See generally STEPHEN DORRIL, BLACK SHIRT: SIR OSWALD MOSLEY AND BRITISH FASCISM (2006).

<sup>11</sup> *Id.* at 393; ROBERT SIDELSKY, OSWALD MOSLEY 341 (1975).

The other major player in the controversy, the *News of the World*, is a Sunday tabloid that Rupert Murdoch has owned since 1968.<sup>12</sup> Thomas Kiernan terms it “the granddaddy of sordid Sunday journalism in Britain.”<sup>13</sup> Writing of the *News of the World* in the late 1960s, Kiernan adds:

Its formula was a mix of sexual titillation and feigned moral outrage. With explicit detail that was usually exaggerated, or else invented, it flooded its main “news” pages with graphic yarns about bestiality, criminality, prostitution, and the sexual antics of the upper classes. Then, with great moral rectitude, it would bemoan the decline in the country’s moral standards.... It was a weekly peep-show and pulpit wrapped in a single slick package.<sup>14</sup>

The tabloid has been known for unethical and at times unlawful methods of newsgathering; at least one of its reporters hacked the voicemail of members of the royal family and other prominent Britons, which led to a scandal starting in 2006.<sup>15</sup>

Mosley had become acquainted with the five prostitutes involved in the sadomasochistic orgy during his previous (his word) “parties.”<sup>16</sup> One of the prostitutes got in touch with another, identified in court as Woman E, and invited her to an S&M session with Mosley.<sup>17</sup> Mosley knew Woman E, though less well than he knew the others.<sup>18</sup> Through her husband, Woman E contacted the *News of the World*, which outfitted her with a camera hidden in her tie and promised her £25,000, though it ultimately paid less than half of that.<sup>19</sup> Although recollections did not fully match, the

<sup>12</sup> NEIL CHENOWETH, RUPERT MURDOCH: THE UNTOLD STORY OF THE WORLD’S GREATEST MEDIA WIZARD 49 (2001).

<sup>13</sup> THOMAS KIERNAN, CITIZEN MURDOCH 90 (1986). On the history of the newspaper, see PETER BURDEN, NEWS OF THE WORLD? FAKE SHEIKHS AND ROYAL TRAPPINGS 58-62 (rev. ed.) (2009).

<sup>14</sup> KIERNAN, *supra* note 13, at 90. On the *News of the World* before Murdoch, see also WILLIAM SHAWCROSS, MURDOCH: THE MAKING OF A MEDIA EMPIRE 69 (1997); MICHAEL WOLFF, THE MAN WHO OWNS THE NEWS: INSIDE THE SECRET WORLD OF RUPERT MURDOCH 123 (2008); Claud Cockburn, *News for the Million*, ATLANTIC MONTHLY, Aug. 1955, at 73-75.

<sup>15</sup> See Don Van Natta Jr., Joe Becker, & Graham Bowley, *Tabloid Hack Attack*, N.Y. TIMES MAG., Sept. 5, 2010, at 30-35, 44, 46.

<sup>16</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 ¶ 1.

<sup>17</sup> *Mosley*, [2008] EWHC 1777 ¶ 5; Angela Levin, *My MI5 Husband DID Set Up Max Mosley, Admits Whip-Wielding Dominatrix*, DAILY MAIL, Aug. 3, 2008, <http://www.dailymail.co.uk/femail/article-1040975/My-MI5-husband-DID-set-Max-Mosley-admits-whip-wielding-dominatrix.html> (last visited April 3, 2010).

<sup>18</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 5.

<sup>19</sup> *Mosley*, [2008] EWHC 1777 ¶¶ 2, 5, 65, 108; Levin, *supra* note 17; Helen Pidd, *Mosley v. News of the World: Whips, Cups of Tea and a Cut-Price Exposé*, GUARDIAN, July 10, 2008, <http://www.guardian.co.uk/media/2008/jul/10/newsoftheworld.newsinternational> (last visited April 3, 2010); Helen Pidd, *NoW Editor: Max Mosley Orgy Had “Potential Criminal Flavour,”* GUARDIAN, July 9, 2008 [hereinafter Pidd, *NoW Editor*], <http://www.guardian.co.uk/media/2008/jul/09/newsoftheworld.privacy> (last visited April 3, 2010). In a curious twist, Woman

court ultimately concluded that the husband initially spoke only of S&M, later referred to a German theme, and then in a third conversation mentioned Nazism.<sup>20</sup>

On March 28, Woman E went to the basement of a flat that Mosley rented near his home in Chelsea, West London.<sup>21</sup> Over the next five hours, she recorded what happened with Mosley and the four other women.<sup>22</sup> Woman E wore a German military jacket, and Mosley spoke in German at times and in English with a faux German accent at other times.<sup>23</sup> At least one woman wore a striped prison outfit.<sup>24</sup> During the orgy, Mosley was whipped until blood was drawn, and he whipped the women.<sup>25</sup> One of the women inspected his head for lice, and one of them shaved his buttocks. Mosley and the women, the judge in the case later remarked, had “a bit of sex.”<sup>26</sup> Mosley paid the women £2,500 for the session.<sup>27</sup>

On March 30, 2008, the *News of the World* published the front-page headline “F1 BOSS HAS SICK NAZI ORGY WITH FIVE HOOKERS / Son of Hitler-loving fascist in sex shame.”<sup>28</sup> The text on the front page said:

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E proved to be married to an MI5 officer, who was forced to resign over his wife’s role in the scandal. Andrew Alderson & Sean Rayment, *Max Mosley Orgy Revelation Forces MI5 Agent to Quit*, TELEGRAPH, May 18, 2008, <http://www.telegraph.co.uk/news/uknews/1976775/Max-Mosley-orgy-revelation-forces-MI5-agent-to-quit.html> (last visited April 3, 2010); David Leppard, *MI5 Linked to Max Mosley Sex Scandal*, TIMES, May 18, 2008, <http://www.timesonline.co.uk/tol/news/uk/article3953837.ece> (last visited April 3, 2010). Checkbook journalism is above-board and well publicized at *News of the World*, whose website says: “We offer big bucks for tips, stories, pictures and videos. Buy a new kitchen, put the money towards a new car or treat your family to a holiday—your story could be worth a small fortune! Get in touch and sell us your story now.” <http://www.newsoftheworld.co.uk/news/4317/Earn-poundpounds-by-selling-your-story-its-easy-Just-click-below-for-all-you-need-to-know.html> (last visited April 3, 2010).

<sup>20</sup> *Mosley*, [2008] EWHC 1777 ¶¶ 153-156.

<sup>21</sup> *Id.* ¶ 1; Leppard, *supra* note 19; John F. Burns, *Trial About Privacy in Which None Remains*, N.Y. TIMES, July 9, 2008 at A1. Several of the women and Mosley had had an earlier “practice” session on March 8. *Mosley*, [2008] EWHC 1777 ¶¶ 55, 59, 66.

<sup>22</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 4; *Mosley*, [2008] EWHC 1777 ¶ 39.

<sup>23</sup> *Mosley*, [2008] EWHC 687 ¶ 18; Ian Burrell, *Max Mosley’s Case is the Frontline in a Legal Battle for Freedom of Expression*, INDEPENDENT, July 7, 2008, <http://www.independent.co.uk/news/media/max-mosleys-case-is-the-frontline-in-a-legal-battle-for-freedom-of-expression-861095.html> (last visited April 3, 2010); Andy McSmith, *I’ve Played with Mosley So Much I Know How Far to Push Him, Says S&M Mistress*, INDEPENDENT, July 9, 2008, <http://www.independent.co.uk/news/uk/home-news/ive-played-with-mosley-so-much-i-know-how-far-to-push-him-says-sm-mistress-862959.html> (last visited April 3, 2010).

<sup>24</sup> *Mosley*, [2008] EWHC 687 ¶ 19.

<sup>25</sup> Pidd, *NoW Editor*, *supra* note 19; McSmith, *supra* note 23.

<sup>26</sup> *Mosley*, [2008] EWHC 1777 ¶ 121. See also “Peeping Tom” Tabloid Spied on Mosley, Says QC, INDEPENDENT, July 7, 2008, <http://www.independent.co.uk/news/media/peeping-tom-tabloid-spied-on-mosley-says-qc-861655.html> (last visited April 3, 2010) [hereinafter “Peeping Tom”].

<sup>27</sup> Alderson & Rayment, *supra* note 19; Burns, *supra* note 21.

<sup>28</sup> *Mosley*, [2008] EWHC 1777 ¶ 1.

FORMULA One motor racing chief Max Mosley is today exposed as a secret sado-masochist sex pervert.

The son of the infamous British wartime fascist leader Oswald Mosley is filmed romping with five hookers at a depraved NAZI-STYLE orgy in a torture dungeon. Mosley ... barks ORDERS in GERMAN as he lashes girls wearing mock DEATH CAMP uniforms and enjoys being whipped until he BLEEDS.<sup>29</sup>

The article itself, by Neville Thurlbeck, said, “His Jew-hating father—who had Hitler as guest of honour at his marriage—would have been proud of his warped son’s command of German as he struts around looking for bottoms to whack.”<sup>30</sup>

The *News of the World* prepared a 90-second video showing highlights of the session, with the women’s faces pixelated and the participants’ breasts and genitalia blocked out.<sup>31</sup> The newspaper posted the video on its website on the same day, removed it a day later on demand of Mosley’s lawyers, and informed Mosley that it planned to repost it.<sup>32</sup> This led to a court hearing for an injunction, which Justice David Eady denied on the ground that the video was available on many other websites; “with some reluctance,” he concluded that “[t]he dam has effectively burst.”<sup>33</sup> The ruling did not mean that the video was lawful, only that it could not be enjoined. During the first day the video was available online, it was viewed 1,424,959 times.<sup>34</sup>

In response to the *News of the World* article, photos, and video, many people and organizations denounced Mosley.<sup>35</sup> Regarding the Nazi allegation, Formula One chief

<sup>29</sup> *Id.* ¶ 26.

<sup>30</sup> *Id.* ¶¶ 29, 31. One author writes that the *News of the World*, even before Murdoch bought it, specialized in, among other things, “sexual perversity of a particularly English kind (spanking).” WOLFF, *supra* note 14, at 123.

<sup>31</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 4.

<sup>32</sup> *Mosley*, [2008] EWHC 687 ¶ 6. Mosley’s solicitors advertise that they specialize in “Reputation Management.” According to their website:

The media’s feeding frenzy increases day by day. Companies and individuals may suffer the attentions of disgruntled ex-employees or former lovers. In such cases what is required is speedy protection from unwanted disclosure. At Steeles Law, we are equipped to minimise the damage that such attacks can cause and avoid the pitfalls that trap the unwary.

<http://www.steeleslaw.co.uk/services/rept-management.aspx> (last visited August 14, 2010).

<sup>33</sup> *Mosley*, [2008] EWHC 687 ¶ 36. *But see* *Douglas v. Hello! Ltd.*, [2005] EWCA Civ. 595 ¶ 105 (“[I]f a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of the photograph by a popular newspaper would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain.”).

<sup>34</sup> *Mosley*, [2008] EWHC 687 ¶ 7.

<sup>35</sup> *Id.* ¶¶ 10-11.

Bernie Ecclestone told a reporter, "If Max was in bed with two hookers, people would say 'Good for you' or something like that. But this, as it is, people find it repulsive."<sup>36</sup> Stephen Smith, director of the Holocaust Centre, said, "As Mr. Mosley has condemned the racism in motor sport he should live up to the standards he sets. This is an insult to millions of victims, survivors and their families.... He should resign from the sport."<sup>37</sup> BMW, Mercedes, Honda, and Toyota all issued statements distancing themselves from Mosley.<sup>38</sup> He wrote in a letter to FIA that the publicity given to his "highly personal and private activities" was "to say the least, embarrassing," but that the allegation of a Nazi theme was "entirely false."<sup>39</sup> In its next issue, the *News of the World* followed up with an interview in which Woman E affirmed that the orgy had had a Nazi theme and maintained that Mosley had ordered it.<sup>40</sup> The article began, "TODAY we expose Formula 1 chief Max Mosley as a LIAR as well as a pervert who revelled in a chilling Nazi-style sadomasochistic orgy with five hookers."<sup>41</sup>

Mosley proceeded to sue the *News of the World* for invasion of privacy—more precisely, misuse of private information and breach of confidence.<sup>42</sup> Such a case would be heard without a jury, unlike a libel suit.<sup>43</sup> The case was assigned to Justice Eady, who had earlier denied the injunction regarding the video. Despite that decision for the *News of the World*, the judge had repeatedly ruled against the news media in privacy cases.<sup>44</sup> In the injunction ruling, he had made clear his aversion for the *News of the World*, noting that he had "little difficulty" in concluding that no public interest justified the publication of the photos or the posting of the video: "The only reason why these pictures are of interest is because they are mildly salacious and provide an opportunity to have a snigger at the expense of the participants."<sup>45</sup>

As the trial began, Mosley said, "I can think of few things more unerotic than Nazi role play.... All my life, I have had hanging over me my antecedents, my parents, and the last thing I want to do in some sexual context is be reminded of it."<sup>46</sup> His defense

<sup>36</sup> Edge, *supra* note 9; McSmith, *supra* note 23.

<sup>37</sup> Ashling O'Connor & Ed Gorman, *FIA Chief Max Mosley Caught on Video in Bizarre "Nazi" Orgy*, TIMES, March 31, 2008, <http://www.foxnews.com/story/0,2933,343608,00.html> (last visited April 3, 2010).

<sup>38</sup> *Mosley*, [2008] EWHC 687 ¶ 12.

<sup>39</sup> Audrey Gillan, *Grand Prix Teams Tell Mosley He Is a Disgrace and Put Pressure on Him to Quit After Sex Video*, GUARDIAN, April 4, 2008, <http://www.guardian.co.uk/sport/2008/apr/04/motorsports.formulaone2> (last visited April 3, 2010).

<sup>40</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 40.

<sup>41</sup> *Id.* ¶ 38.

<sup>42</sup> *Id.* ¶¶ 2-3.

<sup>43</sup> Andrew Pierce & Caroline Gammell, *Max Mosley Orgy Ruling Will Allow "Adultery Without Fear of Exposure"*, TELEGRAPH, July 24, 2008, <http://www.telegraph.co.uk/news/newstopics/celebritynews/2455756/Max-Mosley-orgy-ruling-will-allow-adultery-without-fear-of-exposure.html> (last visited April 3, 2010).

<sup>44</sup> Burrell, *supra* note 23.

<sup>45</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 30. *See also id.* ¶ 36 ("[T]here is no legitimate public interest in [the material's] further publication.").

<sup>46</sup> "Peeping Tom," *supra* note 26.

was shaken somewhat when he turned over to the court DVDs of past S&M sessions, which he had recorded. In one session, a woman had said, “But we are the Aryan race, blondes.”<sup>47</sup> At trial, the woman—she had been one of the prostitutes at the March 28 orgy—said she was not aware of the meaning of *Aryan* and did not know why she had said it.<sup>48</sup> She and three of the other S&M prostitutes testified that the orgy had had no Nazi overtones.<sup>49</sup> Woman E, who had filmed the session for the *News of the World*, did not testify.<sup>50</sup> *News of the World* counsel said she was too distraught.<sup>51</sup> Woman E later publicly apologized for her actions and said that the orgy had not had any Nazi theme.<sup>52</sup>

On July 24, 2008, Justice Eady issued his 236-paragraph ruling. Mosley won. The judge awarded compensatory damages of £60,000, a seemingly unprecedented amount, but declined to award exemplary (punitive) damages.<sup>53</sup> The *News of the World* did have to pay £420,000 toward Mosley’s legal expenses as well as some half-million pounds for its own legal expenses.<sup>54</sup> The newspaper did not appeal the ruling.<sup>55</sup> In

<sup>47</sup> *Mosley*, [2008] EWHC 1777 ¶ 67.

<sup>48</sup> Dominic Kennedy, *Max Mosley Orgies and Missing Emails*, TIMES, July 25, 2008, <http://business.timesonline.co.uk/tol/business/law/article4388875.ece> (last visited April 3, 2010).

<sup>49</sup> *Mosley*, [2008] EWHC 1777 ¶ 44; *Mosley Fetish Women Deny Nazi Theme*, DAILY EXPRESS, July 8, 2008, <http://www.dailyexpress.co.uk/posts/view/51605/Mosley-fetish-women-deny-Nazi-theme> (last visited April 3, 2010).

<sup>50</sup> *Mosley*, [2008] EWHC 1777 ¶ 44; Jan Colley & Cathy Gordon, *Star Witness for News of the World’s Max Mosley Case Backs Out*, INDEPENDENT, July 11, 2008, <http://www.independent.co.uk/news/uk/home-news/star-witness-for-news-of-the-worlds-max-mosley-case-backs-out-865057.html?cmp=ilc-n> (last visited April 3, 2010).

<sup>51</sup> John Chapman, *Miss E Too Emotional to Appear in Mosley Case*, DAILY EXPRESS, July 11, 2008, <http://www.dailyexpress.co.uk/posts/view/52060/Miss-E-too-emotional-to-appear-in-Mosley-case> (last visited April 3, 2010).

<sup>52</sup> *Mosley Dominatrix Says Sorry*, SkyNews, July 26, 2008, [http://news.sky.com/skynews/Home/UK-News/Max-Mosleys-Dominatrix-Tells-Skys-Kay-Burley-Of-Her-Biggest-Mistake/Article/200807415056431?lpos=UK%2BNews\\_1&lid=ARTICLE\\_15056431\\_Max%2BMosley%2527s%2BDominatrix%2BTells%2BSky%2527s%2BKay%2BBurley%2BOF%2BHer%2B%2522Biggest%2BMistake%2522](http://news.sky.com/skynews/Home/UK-News/Max-Mosleys-Dominatrix-Tells-Skys-Kay-Burley-Of-Her-Biggest-Mistake/Article/200807415056431?lpos=UK%2BNews_1&lid=ARTICLE_15056431_Max%2BMosley%2527s%2BDominatrix%2BTells%2BSky%2527s%2BKay%2BBurley%2BOF%2BHer%2B%2522Biggest%2BMistake%2522) (last visited April 3, 2010); *Sorry, Says Dominatrix Who Betrayed Mosley*, BELFAST TELEGRAPH, July 26, 2008, <http://www.belfasttelegraph.co.uk/news/local-national/sorry-says-dominatrix-who-betrayed-mosley-13922047.html> (last visited April 3, 2010).

<sup>53</sup> *Mosley*, [2008] EWHC 1777 ¶ 236; Afua Hirsch, *Privacy Law Will Grow, Bar Chief Predicts*, GUARDIAN, Dec. 15, 2008, <http://www.guardian.co.uk/media/2008/dec/15/privacy-madonna-daily-mail> (last visited April 3, 2010); Leigh Holmwood & Stephen Brook, *Max Mosley Wins £60,000 in News of the World Privacy Case*, GUARDIAN, July 24, 2008, <http://www.guardian.co.uk/media/2008/jul/24/privacy.newsoftheworld2> (last visited April 3, 2010); *Mosley Wins Court Case Over Orgy*, BBC News, July 24, 2008, <http://news.bbc.co.uk/2/hi/7523034.stm> (last visited April 3, 2010); Helen Pidd, *Punishment That Was Not a Crime: Why Mosley Won in the High Court*, GUARDIAN, July 25, 2008, <http://www.guardian.co.uk/media/2008/jul/25/mosley.privacy> (last visited April 3, 2010).

<sup>54</sup> Joshua Rozenberg, *Private Lives*, 38(2) INDEX ON CENSORSHIP 98, 103 (2009).



general, the Court of Appeal defers to trial courts in fact-intensive invasion-of-privacy cases.<sup>56</sup>

Mosley subsequently sued *News of the World* for libel in England<sup>57</sup> as well as France<sup>58</sup> and Italy.<sup>59</sup> (In addition to the false Nazi allegation, the tabloid had called him a liar for denying it.) He also asked the European Court for Human Rights to require that editors notify people before publishing revelations about their private lives; the court declined to do so in May 2011.<sup>60</sup> Mosley told one reporter that he wished that England, like some other countries, had a criminal law protecting privacy against press invasion, so that editors might be imprisoned.<sup>61</sup> At his instigation, France and Italy launched criminal investigations of the *News of the World*.<sup>62</sup>

After Justice Eady's ruling came down, Mosley said, "It's not that I am ashamed of it in that I'm not ashamed of my bodily functions—but I don't want them on the front of a newspaper."<sup>63</sup> In an interview, Mosley told *The Guardian* that he was permitting his Formula One colleagues three jokes apiece, no more. "I mean, in the end, I did it, and it is funny," he said. "Sex is funny. Most people's sex lives, if you had the whole detail, would be quite funny. That's the point—why you don't have the detail—because it's not

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<sup>55</sup> Frances Gibb, *QCs Defend Justice Eady as Newspapers Accuse Him of Privacy Law Rulings*, TIMES, Nov. 11, 2008, <http://business.timesonline.co.uk/tol/business/law/article5126916.ece> (last visited April 3, 2010).

<sup>56</sup> *Murray v. Express Newspapers*, [2008] EWCA Civ. 446 ¶ 41; *Ash v. McKennitt*, [2005] EWHC 3003 (Q.B.) ¶¶ 45, 56; David Eady, *Privacy and the Press: Where Are We Now?*, speech to conference on justice, Dec. 1, 2009, <http://www.judiciary.gov.uk/docs/speeches/eady-j-justice-conf.pdf> (last visited April 3, 2010), at 4.

<sup>57</sup> Oliver Luft, *Max Mosley Launches Libel Action Against News of the World*, GUARDIAN, April 3, 2009, <http://www.guardian.co.uk/media/2009/apr/03/max-mosley-news-of-the-world> (last visited April 3, 2010). A question has been raised as to whether res judicata will apply: will *News of the World* be foreclosed from arguing that the video, in context, appears to show a Nazi-themed orgy? See Heather Rogers & Fiona Campbell, *Privacy: A Tort by Any Other Name*, 26 COMM. LAW. 1, 1 (Nov. 2008).

<sup>58</sup> Peter Burden, *Max Mosley: Revenge of the Named and Shamed*, INDEPENDENT, Jan. 11, 2009, <http://www.independent.co.uk/news/people/profiles/max-mosley-revenge-of-the-named-and-shamed-1299680.html> (last visited April 3, 2010).

<sup>59</sup> BURDEN, *supra* note 13, at 253-254.

<sup>60</sup> *Mosley v. United Kingdom*, app. no. 48009/08 (Eur. Ct. H. R. 2011); Eric Pfanner, *European Court Rejects a Bid to Limit Celebrity News*, N.Y. TIMES, May 11, 2011, at B7; *Steeles Law Takes F1 Chief's Privacy Battle to Europe*, LAW., Oct. 13, 2008. See generally Gavin Phillipson, *Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions*, 1 J. OF MEDIA L. 73-96 (2009). On the potential implications of such a requirement, including the demise of gossip columns, see Rozenberg, *supra* note 54, at 106.

<sup>61</sup> Burden, *supra* note 58.

<sup>62</sup> Culture, Media, and Sport Committee, House of Commons, *Press Standards, Privacy, and Libel*, vol. 2, oral and written evidence (Feb. 9, 2010), at 54-55, 64 (testimony of Max Mosley).

<sup>63</sup> Sam Marsden & Tom Morgan, *"Nazi Orgy" Case Cost £30,000 and My Dignity, Says Mosley*, INDEPENDENT, March 10, 2009, <http://www.independent.co.uk/news/media/press/nazi-orgy-case-cost-pound30000-and-my-dignity-says-mosley-1641627.html> (last visited April 3, 2010).

right to laugh at people in that way.”<sup>64</sup> He testified before the House of Commons committee, “No matter how long I live, no matter what part of the world I go to, people will know about it.”<sup>65</sup>

A few months after the *Mosley* ruling, Paul Dacre, editor of the *Daily Mail*, castigated Justice Eady.<sup>66</sup> England, Dacre said in a widely covered speech to the Society of Editors, “is having a privacy law imposed on it,” not from Parliament, “but from the arrogant and amoral judgements—words I use very deliberately—of one man.” Justice Eady had undermined newspapers’ “age-old freedom to expose the moral shortcomings of those in high places,” and thereby was “allowing the corrupt and the crooked to sleep easily in their beds.” To “most people,” Mosley’s actions had been “perverted, depraved, the very abrogation of civilised behaviour of which the law is supposed to be the safeguard,” yet Justice Eady had deemed them “merely ‘unconventional.’” Mosley had “exploit[ed]” the women, Dacre said, and wondered if Justice Eady would “feel the same way ... if one of those women had been his wife or daughter.”<sup>67</sup>

Justice Eady adopted a philosophical perspective. “[T]here being little opportunity for an appeal,” he said in a speech in 2009, “the media have nowhere to vent their frustrations other than through personal abuse of the particular judge who happens to have made the decision.”<sup>68</sup>

### III. BRITISH PRIVACY LAW

Parliament considered legislation that would have restricted the press in matters of privacy starting in the 1960s but never adopted a statute.<sup>69</sup> Under common law, the

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<sup>64</sup> Chrisafis, *supra* note 7.

<sup>65</sup> Culture, Media, and Sport Committee, House of Commons, *Press Standards, Privacy, and Libel* (Feb. 9, 2010), at 28 ¶ 78, <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf> (last visited April 3, 2010).

<sup>66</sup> Paul Dacre, *Society of Editors: Paul Dacre’s Speech in Full*, PRESS GAZETTE, Nov. 9, 2008, <http://www.pressgazette.co.uk/story.asp?storycode=42394> (last visited April 3, 2010).

<sup>67</sup> *Id.* In 2010, a Parliamentary committee disputed Dacre’s assertion that Justice Eady was dominating British privacy law. Culture, Media, and Sport Committee, *supra* note 65, at 25-27 ¶¶ 68-76.

<sup>68</sup> Eady, *supra* note 56, at 4. In 1996, Eady (not yet a judge) argued for Parliament, rather than the judiciary, to create a right of privacy, in part because such law made by judges “renders them liable to personal criticism or attack in the press ... which invariably tends to undermine confidence in the administration of justice.” David Eady, *A Statutory Right to Privacy*, 1996 E.H.R.L.R. 243, 247.

<sup>69</sup> Culture, Media, and Sport Committee, *supra* note 65, at 12 ¶ 10; CHARLES WINTOUR, PRESSURES ON THE PRESS: AN EDITOR LOOKS AT FLEET STREET 68 (1972); Comment, *The Right to Privacy Is Coming to the United Kingdom: Balancing the Individual’s Right to Privacy from the Press and the Media’s Right to Freedom of Expression*, 21 HOUS. J. INT’L L. 531, 566 (1999); Kathryn F. Deringer, *Privacy and the Press: The Convergence of British and French Law in Accordance with the European Convention of Human Rights*, 22 PENN. ST. INT’L L. REV. 191, 201 (2003); Laura Lee Mall, *The Right to Privacy in Great Britain: Will Renewed Anti-Media*

cause of action closest to invasion of privacy was an equitable suit for breach of confidence.<sup>70</sup> Breach of confidence required three showings: the information at issue must appear to be confidential; it must have been imparted (from the confider to a confidant or from the confidant to a third party) in a fashion that made clear its confidential nature; and it must have been used in an unauthorized fashion by a party bound by an obligation of confidence.<sup>71</sup> The breach of confidence action, which tended to involve commercial information rather than personal information, thus generally required a relationship encompassing a duty of confidentiality.<sup>72</sup>

That requirement was criticized in the 1991 case *Kaye v. Robertson*.<sup>73</sup> There, a television actor named Gordon Kaye was hospitalized after brain surgery stemming from an automobile accident. A *Sunday Sport* reporter and photographer sneaked into his hospital room, ignoring signs that prohibited unauthorized visitors, and photographed and purported to interview the barely conscious actor. The court ruled for Kaye on a minor point, barring the newspaper from saying that he had consented to the interview, under the doctrine of malicious falsehood. Beyond that, Kaye had no remedy. "It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy," Lord Justice Glidewell wrote. "The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."<sup>74</sup>

Soon after the *Kaye* ruling, Parliament's Committee on Privacy, known as the Calcutt Committee, released its report.<sup>75</sup> The attorneys on the committee favored a privacy statute.<sup>76</sup> One of them, David Eady—who as a judge would hear *Mosley*—

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*Sentiment Compel Great Britain to Create a Right To Be Let Alone?*, 4 ILSA J. INT'L & COMP. L. 785, 795-800 (1998).

<sup>70</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 7. In *Wainwright v. Home Office*, [2003] UKHL 53, the House of Lords said that no independent tort for invasion of privacy exists. An excellent overview of British privacy law is Rogers and Campbell, *supra* note 57, at 1-7.

<sup>71</sup> *Stephens v. Avery*, [1988] Ch. 449; RAYMOND WACKS, *PRIVACY AND PRESS FREEDOM* 50 (1995).

<sup>72</sup> *Campbell v. MGN Ltd.*, [2004] UKHL 22 ¶¶ 45-48 (Lord Hoffmann); WACKS, *supra* note 71, at 55; Eady, *supra* note 68, at 246; Tom Welch, *Can Our Courts Handle Human Rights?*, 12(4) BRIT. JOURNALISM REV. 49, 50-51 (2001). Lord Goff of Chieveley, though, wrote of "certain situations, beloved of law teachers," such as a case in which "an obviously confidential document is wafted by an electric fan out of a window into a crowded street"; he would have imposed a duty of confidence in such circumstances. *Attorney-General v. Observer Ltd.*, [1990] 1 AC 109.

<sup>73</sup> *Kaye v. Robertson*, [1991] FSR 62.

<sup>74</sup> Kaye did not plead breach of confidence, probably because he knew he could not establish the requirements. WACKS, *supra* note 71, at 62.

<sup>75</sup> DAVID CALCUTT, *REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS* (1990). See generally Martin Cloonan, *Privacy and Media Intrusion in a Democratic Society: Britain and the Calcutt Reports*, 5(2) DEMOCRATIZATION 62 (1998).

<sup>76</sup> Adrian Bingham, "Drinking in the Last Chance Saloon": *The British Press and the Crisis of Self-Regulation, 1989-1995*, 13(1) MEDIA HIST. 79, 82 (2007); Justice David Eady, speech, Gray's

believed that the *Kaye* case indicated “a serious gap in the jurisprudence of any civilized society if that can happen without redress.”<sup>77</sup> Eady proposed a statute that would have excluded from its protection anything that happened in a public place.<sup>78</sup> But the journalists on the committee opposed a statute, viewing it as a threat.<sup>79</sup> At their urging, the committee called for a self-regulatory Press Complaints Commission instead of a privacy statute.<sup>80</sup>

The next step involved the European Convention on Human Rights (ECHR). The United Kingdom had helped draft the Convention after World War II and had been the first nation to ratify it.<sup>81</sup> Article 8 of the ECHR provides in part, “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>82</sup> (The authors of the provision, one commentator writes, “were not thinking about prying journalists, venal ex-lovers, and prurient readers. It was 1950 and they were thinking about the informant next door, the secret police, and the knock in the night.”<sup>83</sup>) Under Article 10, however, “Everyone has the right to freedom of expression.”<sup>84</sup> *Mosley* and many other cases sought to balance the two rights.<sup>85</sup>

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Inn, Dec. 12, 2002, <http://web.archive.org/web/20030220083804/www.media-ent-law.co.uk/articles/121202-privacy.html> (last visited April 3, 2010).

<sup>77</sup> Eady, *supra* note 76.

<sup>78</sup> Culture, Media and Sport Committee, *supra* note 62, at 479 (speech of Sir David Eady to the Intellectual Property Lawyers’ Association, Feb. 18, 2009).

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

<sup>80</sup> See generally Bingham, *supra* note 76, at 79-92.

<sup>81</sup> Lauren B. Cardonsky, *Towards a Meaningful Right to Privacy in the United Kingdom*, 20 B.U. INT’L L. J. 393, 403 (2002). On the Convention, see generally Les P. Carnegie, *Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom*, 9 DUKE J. COMP. & INT’L L. 311 (1998).

<sup>82</sup> Article 8 reads in its entirety:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>83</sup> Lord Justice Sedley, Foreword to *THE LAW OF PRIVACY AND THE MEDIA* vii (Michael Tugendhat & Iain Christie eds. 2002). See also Eady, *supra* note 3, at 2.

<sup>84</sup> Article 10 reads in its entirety:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

An international agreement has no independent effect in the United Kingdom; Parliament must incorporate it into domestic law before domestic courts will enforce it.<sup>86</sup> Doing so took decades, owing to what one commentator terms “the unwillingness of the Conservative Party to relinquish one iota of parliamentary control.”<sup>87</sup> Incorporation would shift power from Parliament to the courts.<sup>88</sup> Finally, the Labour Government of Tony Blair incorporated the Convention into British law through the Human Rights Act of 1998, which took full effect in 2000.<sup>89</sup> The Human Rights Act makes it unlawful for a public authority “to act in a way which is incompatible with a Convention right.”<sup>90</sup> The Act also requires the courts to “take into account” rulings of the European Court of Human Rights.<sup>91</sup>

The European Court of Human Rights, which sits in Strasbourg, France, hears cases alleging that national governments have failed to abide by the Convention.<sup>92</sup> These cases can challenge any sort of action by a state, including a judicial decision. Through this ability to dispute court rulings in cases between private parties, the Convention applies “horizontally” as well as “vertically.” That is, individuals or companies can claim

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2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>85</sup> One commentator suggests that the balancing test is inherently flawed. “[T]hese values may be incommensurable: how can the individual’s interest in privacy be thought more or less valuable than the public’s right to be informed?” Eric Barendt, *Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court*, 1 J. OF MEDIA L. 49, 52 (2009). Barendt goes on to note the virtues of categorical rules over ad hoc balancing tests. *Id.* at 55-56. *See also* Loren A. Smith, *Law and Magic: An Introduction Out of a Hat*, in LAW AND MAGIC: A COLLECTION OF ESSAYS (Christina A. Corcos ed.) (2010) (“These scales, which every balancing [test] must have, are invisible, incorporeal, metaphysical or just plain don’t exist. It would be really nice to have one, but 22 years on the bench has gotten me no closer to their location or manufacturer or supplier. In fact, there are no systems of weights and measures for using them even if the scales could be found. Does this bit of evidence weigh 12 pounds of truth?”).

<sup>86</sup> K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 83 (1999); Carnegie, *supra* note 81, at 329.

<sup>87</sup> Comment, *supra* note 69, at 540.

<sup>88</sup> Ewing, *supra* note 86, at 79.

<sup>89</sup> Comment, *supra* note 69, at 540; Cardonsky, *supra* note 81, at 402-403.

<sup>90</sup> Human Rights Act, Article 6(1), 6(3).

<sup>91</sup> Human Rights Act, Article 2(1). The Act does not state that domestic courts are *bound* by rulings of the European Court. Where a European Court ruling conflicts with a decision of the House of Lords, British courts are obliged to follow the House of Lords. *Murray v. Express Newspapers*, [2008] EWCA Civ. 446 ¶ 20; *Ash v. McKennitt*, [2005] EWHC 3003 (Q.B.) ¶ 62.

<sup>92</sup> Many decisions of the Court can be found on its website, <http://www.echr.coe.int>.

its privacy protections in domestic litigation involving other individuals or companies, and not solely in litigation with the government.<sup>93</sup>

Some in the press raised questions about the Human Rights Act before its passage. In particular, they voiced the fear that it would produce a legally enforceable right to privacy, which could impinge on freedom of the press.<sup>94</sup> One group of journalists sought immunity from invasion-of-privacy suits;<sup>95</sup> others sought a statutory assertion that Article 10 would trump Article 8.<sup>96</sup> Parliament did not go that far, but it did include a provision, Section 12(4), directing courts to “have particular regard to the importance of the Convention right to freedom of expression.”<sup>97</sup> Although some anticipated that Section

<sup>93</sup> *Reklos & Davourlis v. Greece*, app. no. 1234/05 (Eur. Ct. H. R. 2009) ¶ 35. The Naomi Campbell case established this proposition in British domestic law. *Campbell v. MGN Ltd.*, [2004] UKHL 22 ¶¶ 17-18 (Lord Nicholls), ¶ 50 (Lord Hoffman); *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 9. The Council of Europe in 1998 also stated that individuals have a right of privacy against private entities and not merely against the government. Council of Europe, Resolution 1165, Right to Privacy (1998), <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm> (last visited April 3, 2010). On “horizontal,” see Ian Leigh, *Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?*, 48 INT’L & COMP. L. Q. 57 (1999); Jonathan Morgan, *Privacy, Confidence and Horizontal Effect: “Hello” Trouble*, 62 CAMBRIDGE L. J. 444-473 (2003).

<sup>94</sup> Ewing, *supra* note 86, at 93. See Stephen Tierney, *Extra Protection for the Press*, 9(2) BRIT. JOURNALISM REV. 66, 67 (1998).

<sup>95</sup> Jonathan Heawood, *Press Freedom: The Great Debate*, GUARDIAN, March 24, 2009, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/mar/24/human-rights-press-freedom> (last visited April 3, 2010).

<sup>96</sup> THE LAW OF PRIVACY AND THE MEDIA 398 (Michael Tugendhat & Iain Christie eds. 2002); Gavin Phillipson & Helen Fenwick, *Breach of Confidence as a Privacy Remedy in the Human Rights Act Era*, 63 MOD. L. REV. 660, 686 (2000).

<sup>97</sup> Human Rights Act, Article 12(4); *In re S (A Child)*, [2004] UKHL 47 ¶ 16; Carnegie, *supra* note 81, at 339. Article 12 “applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.” Human Rights Act, Article 12(1). Section 12(2) bars most ex parte proceedings for relief against the press. Section 12(3) states that prior restraints should not be granted pre-trial “unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.” Section 12(4) reads as follows:

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

Human Rights Act 1998, Article 12(4). On Section 12, see also Culture, Media, and Sport Committee, *supra* note 65, at 14-19 ¶¶ 26-39.

12(4) would shift the balance in favor of freedom of expression,<sup>98</sup> the provision has had little practical effect.<sup>99</sup> Notwithstanding Section 12(4), British courts treat the right to privacy under Article 8 and the right to free expression under Article 10 as equivalent.<sup>100</sup>

Photography was a major concern motivating Samuel D. Warren and Louis D. Brandeis to write their famed article on privacy,<sup>101</sup> and many of the leading cases construing the ECHR, at both the British and the European Court levels, have involved photographs.<sup>102</sup> The most important British case was brought by the model Naomi Campbell.<sup>103</sup> In 2001, the *Daily Mirror* published photographs showing Campbell outside a Narcotics Anonymous meeting, as well as articles on the topic. She filed suit for breach of confidence, citing the Article 8 right to privacy. By a vote of three to two in 2004, the

<sup>98</sup> See, e.g., Culture, Media, and Sport Committee, *supra* note 65, at 16 ¶ 26; Dennis Morris, *The Human Rights Act 1998: Too Many Loose Ends?*, 21 STAT. L. REV. 104, 105 (2000); Alec Samuels, *The Rights of Privacy and Freedom of Expression: The Drafting Challenge*, 20 STAT. L. REV. 66, 71 (1999).

<sup>99</sup> One law Lord has said that “you cannot have particular regard to art 10 without having equally particular regard at the very least to art 8.” *Campbell v. MGN Ltd.*, [2004] UKHL 22 ¶ 111 (Lord Hope of Craighead). Some commentators view Section 12(4) as something of a dead letter. E.g., Carnegie, *supra* note 81, at 339-340; Ewing, *supra* note 86, at 93; Culture, Media, and Sport Committee, *supra* note 62, at 84 (testimony of Tom Crone, Legal Manager, News Group Newspapers).

<sup>100</sup> *Campbell* ¶ 55 (Lord Hoffmann); *Ash v. McKennitt*, [2005] EWHC 3003 (Q.B.) ¶ 47; *Mosley*, [2008] EWHC 1777 (Q.B.) ¶ 10. See also Council of Europe, Resolution 1165 (freedom of expression and right to privacy are “of equal value”); Robert Deacon, *Privacy After Max Mosley: A Practical Summary of the New Privacy Law*, autumn 2008, <http://www.11sb.com/pdf/privacyaftermaxmosley.pdf> (last visited April 3, 2010), at 5.

<sup>101</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193-220 (1890). See *id.* at 195 (“Instantaneous photographs ... have invaded the sacred precincts of private and domestic life.... For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons....” (footnote omitted)); *id.* at 211 (noting that “the latest advances in photographic art have rendered it possible to take pictures surreptitiously”); *id.* at 213 (stating that “the simplest case” for extending existing remedies to cover invasion of privacy concerns “[t]he right of one who has remained a private individual, to prevent his public portraiture”).

<sup>102</sup> See *MGN Ltd. v. United Kingdom*, app. no. 39401/04 (Eur. Ct. H. R. 2011) ¶ 143 (stating that “although freedom of expression ... extends to the publication of photographs, this is an area in which the protection of the rights and reputation of others takes on particular importance”). See generally Kirsty Hughes, *Photographs in Public Places and Privacy*, 2 J. OF MEDIA L. 159-171 (2009); Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N. Y. L. SCH. L. REV. 205-236 (2005-2006).

<sup>103</sup> *Campbell v. MGN Ltd.*, [2004] UKHL 22. See STEPHEN WHITTLE & GLENDA COOPER, *PRIVACY, PROBITY AND PUBLIC INTEREST* 9 (2009) (noting that the *Daily Mirror*’s publication of the Campbell photo “proved to be one of the most important developments in the law relating to privacy in the last ten years”); Amber Melville-Brown, *Shooting Stars: Privacy Claims in the UK*, in *INTERNATIONAL LIBEL AND PRIVACY HANDBOOK* 417 (Charles J. Glasser Jr. ed.) (2d ed. 2009) (“Any discussion about privacy without reference to Naomi Campbell’s case is like a treatise on the history of English literature ignoring Shakespeare.”).

House of Lords concluded that her privacy rights had been violated by the photographs and some details of her treatment (though not by the revelation of her addiction itself). The court reached this conclusion despite the fact that Campbell had no confidential relationship with the photographer or the newspaper, which, as noted, had frequently been a requirement for a litigant to recover damages.<sup>104</sup> The common-law action for breach of confidence thus absorbed Articles 8 and 10,<sup>105</sup> though one court observed that it required “shoe-horning” to do so.<sup>106</sup> Lord Nicholls proposed that the action be renamed “misuse of private information.”<sup>107</sup> With *von Hannover v. Germany*, decided shortly after *Campbell*, the European Court of Human Rights went even further.<sup>108</sup> It ruled that photos of Princess Caroline of Monaco, showing her “engaging in sport, out walking, leaving a restaurant [and] on holiday,”<sup>109</sup> invaded her Article 8 right to privacy. Such intrusions are improper even in public places, the court said.<sup>110</sup> They serve merely “to satisfy the curiosity of a particular readership,” which “cannot be deemed to contribute to any debate of general interest to society.”<sup>111</sup>

As it has developed in cases, the British cause of action for invasion of privacy, or, in Lord Nicholls’s phrase, misuse of private information, imposes a two-step test. The first inquiry is whether the claimant had a reasonable expectation of privacy. The expectation will generally be triggered by matters related to, among other things, health,<sup>112</sup> finances,<sup>113</sup> conversations in the home,<sup>114</sup> and—though, as will be seen below,

<sup>104</sup> *Campbell*, [2004] UKHL 22 ¶ 14 (Lord Nicholls), ¶¶ 45-48 (Lord Hoffmann), ¶ 85 (Lord Hope of Craighead). The obligation had begun to evaporate earlier. Phillipson & Fenwick, *supra* note 96, at 671. One commentator terms this “[t]he most important development in the English law of confidentiality in recent years.” Elspeth Reid, *No Sex, Please, We’re European: Mosley v. News Group Newspapers Ltd.*, 13 EDINBURGH L. REV. 116, 117 (2009).

<sup>105</sup> *Campbell*, [2004] UKHL 22 ¶ 17 (Lord Nicholls).

<sup>106</sup> *Douglas v. Hello Ltd.*, [2005] EWCA Civ. 595 ¶ 96.

<sup>107</sup> *Campbell*, [2004] UKHL 22 ¶ 14 (Lord Nicholls). See *Ash v. McKennitt*, [2005] EWHC 3003 (Q.B.) ¶ 8(iv). Another case involving photography from English courts is *Murray v. Express Newspapers*, [2008] EWCA Civ. 446 (allowing an invasion-of-privacy case to proceed to trial concerning a photograph taken in public of the one-year-old son of author J. K. Rowling without the parents’ permission).

<sup>108</sup> *Von Hannover v. Germany*, app. no. 59320/00 ¶ 58 (Eur. Ct. H. R. 2004).

<sup>109</sup> *Id.* ¶ 61.

<sup>110</sup> *Id.* ¶ 77.

<sup>111</sup> *Id.* ¶ 65. The princess “represents the ruling family at certain cultural or charitable events” but “does not exercise any function within or on behalf of the State of Monaco or any of its institutions.” *Id.* ¶ 62. Two justices, concurring, said that Princess Caroline is a public figure with a diminished expectation of privacy. *Id.* (concurring opinion of Judge Cabran Barreto); *id.* (concurring opinion of Judge Zupancic). Other European Court cases involving photography include *Egeland & Hanseid v. Norway*, app. no. 34438/04 (Eur. Ct. H. R. 2009) (finding no violation of Article 10 where Norway penalized journalists for publishing photos of a criminal defendant, taken in public) and *Reklos & Davourlis v. Greece*, app. no. 1234/05 (Eur. Ct. H. R. 2009) (finding a violation of Article 8 where a photographer had taken a photograph of an infant in the hospital without the parents’ permission).

<sup>112</sup> *McKennitt v. Ash*, [2005] EWHC 3003 (Q.B.) ¶¶ 142, 158.



the issue is not clear-cut—sexual relations.<sup>115</sup> If that *prima facie* showing is not made, the case comes to an end. If, by contrast, the claimant does demonstrate a reasonable expectation of privacy, the court proceeds to balance the Article 8 right to privacy against the Article 10 right to free expression, with an intense focus on the facts of the case.<sup>116</sup> In particular, the court asks whether the revelation was a matter of public interest and, if so, weighs that public interest against the interest in privacy, for even a “genuine public interest” may have to yield to heightened concerns of privacy.<sup>117</sup> Proportionality is at the heart of the inquiry. For example, the public interest may permit publication of the fact of an illicit sexual relationship but not the details.<sup>118</sup>

Justice Eady is responsible for several privacy cases in addition to *Mosley*. Indeed, *The Times* reported in 2008 that “Mr. Justice Eady has created almost single-handedly what is now a privacy law in Britain.”<sup>119</sup> In *Beckham v. MGN*, Justice Eady granted an injunction barring the publication of photographs of the claimant’s home.<sup>120</sup> In *Holden v. Express Newspapers*, the judge granted an interim injunction against publication of photos of the claimant alongside a hotel swimming pool, taken from another property using a telescopic lens.<sup>121</sup> In *McKennitt v. Ash*, Justice Eady issued an

<sup>113</sup> *Campbell*, [2004] UKHL 22 ¶ 93 (Lord Hope of Craighead).

<sup>114</sup> *Browne v. Associated Newspapers Ltd.*, [2007] EWHC 202 (Q.B.) ¶ 45.

<sup>115</sup> *CC v. AB*, [2006] EWHC 3083 (Q.B.) ¶ 8. *Cf.* *Stephens v. Avery*, [1988] Ch. 449 (holding that a sexual relationship could be the basis of a breach-of-confidence action).

<sup>116</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶¶ 10-11.

<sup>117</sup> *McKennitt*, [2005] EWHC 3003 (Q.B.) ¶ 57.

<sup>118</sup> *See Theakston v. MGN Ltd.*, [2002] EMLR 22 (allowing publication of an article about a TV personality’s visit to a brothel but prohibiting publication of photographs). The case is discussed in Section V, below. *See also* Eady, *supra* note 68, at 252 (“just because there may be an arguable ‘public interest’ defence on the basis of hypocrisy or unsuitability on the part of some public official, because of the way he is conducting his private life, it should not mean that every intimate detail of that conduct can also be published for the sake of prurience”).

<sup>119</sup> Frances Gibb, *How Red-Top Lawyer Mr. Justice Eady Became Privacy Judge*, *TIMES*, July 25, 2008, <http://business.timesonline.co.uk/tol/business/law/article4393286.ece> (last visited Aug. 14, 2010). In 2010, Justice Eady was not reappointed as senior judge in charge of assigning media cases to other judges, though he remains a judge specializing in such cases. *See* Press Release, Judiciary of England and Wales, Appointment of New Judge in Charge of the Queen’s Bench Jury and Non-Jury Lists (Sept. 13, 2010), <http://www.judiciary.gov.uk/media/media-releases/2010/news-release-2510> (last visited May 27, 2011); Carline Binham & Jane Croft, *Twitter Fuels Debate Over Super-Injunctions*, *FIN. TIMES*, May 9, 2011, <http://www.ft.com/cms/s/0/2d4ec938-7a2b-11e0-bc74-00144feabdc0.html#axzz1NLSv0R9> (last visited May 29, 2011); *Judge Behind “Backdoor Privacy Law” and Footballer Super-Injunctions to Step Down*, *DAILY MAIL*, Sept. 15, 2010, <http://www.dailymail.co.uk/news/article-1312114/Mr-Justice-Eady-Judge-backdoor-privacy-law-step-down.html> (last visited May 27, 2011).

<sup>120</sup> *Beckham v. MGN*, June 28, 2008 (unreported). *See* Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act*, 66 *MOD. L. REV.* 726, 727 & n.6 (2003) (citing case).

<sup>121</sup> *Holden v. Express Newspapers*, June 7, 2001 (unreported). *See* Phillipson, *supra* note 120, at 727 & n.8 (citing case).

injunction barring publication of intimate information about the Canadian folk singer Loreena McKennitt;<sup>122</sup> the Appeal Court dismissed the appeal and “pa[id] tribute to the judgment of Eady J and to his handling of the case.”<sup>123</sup> In *X & Y v. Persons Unknown*, Justice Eady modified but left in place an injunction barring disclosure of information about a celebrity couple’s troubled marriage.<sup>124</sup> In *CC v. AB*, a married woman had had an affair with a married man; Justice Eady enjoined the woman’s husband from revealing the affair to the media.<sup>125</sup> In *Browne v. Associated Newspapers*, Justice Eady imposed a limited injunction preventing the press from publishing certain revelations from an oil-company executive’s homosexual relationship.<sup>126</sup> In 2009, after *Mosley*, Justice Eady granted a secret injunction to bar publication of any images of the golfer Tiger Woods naked or involved in sexual activity.<sup>127</sup> In 2011, he granted another injunction, this one to prevent the media from revealing that a soccer star, Ryan Giggs, had had an affair with a contestant on a reality-TV show; controversially, Justice Eady refused to lift the injunction even after thousands of users had announced Giggs’s identity on Twitter and other websites.<sup>128</sup> Justice Eady asked: “Should the court buckle every time one of its orders meets widespread disobedience or defiance? In a democratic society, if a law is deemed to be unenforceable or unpopular, it is for the legislature to make such changes as it decides are appropriate.”<sup>129</sup>

The result of these developments in the case law is a well-established right to privacy. One commentator goes so far as to assert that “the English courts have gone

<sup>122</sup> McKennitt v. Ash, [2005] EWHC 3003 (Q.B.).

<sup>123</sup> Ash v. McKennitt, [2006] EWCA Civ. 1714 ¶ 81. *See also id.* ¶ 88 (Longmore, L.J.) (Justice Eady’s “careful (and correct) judgment has made the task of this court much easier than it might otherwise have been.”).

<sup>124</sup> X & Y v. Persons Unknown, [2006] EWHC 2783 (Q.B.). Where claimants seek an injunction to bar publication of allegedly invasive material, British courts assign them pseudonymous initials rather than identifying them by name. Rogers & Campbell, *supra* note 57, at 5.

<sup>125</sup> CC v. AB, [2006] EWHC 3083 (Q.B.).

<sup>126</sup> Browne v. Associated Newspapers Ltd., [2007] EWHC 202 (Q.B.).

<sup>127</sup> Afua Hirsch, *Tiger Woods Uses English Law to Injunct New Revelations*, GUARDIAN, Dec. 11, 2009, <http://www.guardian.co.uk/sport/2009/dec/11/tiger-woods-law-injunction-media> (last visited April 3, 2010); Jason Lewis, *Tiger Woods’ Lawyers Act Over Nude Photos That Don’t Exist*, DAILY MAIL, Dec. 13, 2009, <http://www.dailymail.co.uk/news/article-1235251/Tiger-Woods-lawyers-act-nude-pictures-dont-exist.html> (last visited May 11, 2010). Justice Eady’s order in *Woods v. X & Y* is available at [http://tmz.vo.llnwd.net/o28/newsdesk/1210\\_schillings\\_doc\\_wm.pdf](http://tmz.vo.llnwd.net/o28/newsdesk/1210_schillings_doc_wm.pdf) (last visited May 11, 2010).

<sup>128</sup> CTB v. News Group Newspapers Ltd., [2011] EWHC 1326 (Q.B.); CTB v. News Group Newspapers Ltd., [2011] EWHC 1232 (Q.B.); Sarah Lyall, *Parliament Joins the Fray as Twitter Tests a Law*, N.Y. TIMES, May 24, 2011, at A4; Sue Reisinger, *Twitter GC Joins UK Free Tweets Debate*, CORP. COUNSEL, May 31, 2011, [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202495359323&Twitter\\_GC\\_Joins\\_UK\\_Free\\_Tweets\\_Debate](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202495359323&Twitter_GC_Joins_UK_Free_Tweets_Debate) (last visited May 27, 2011).

<sup>129</sup> CTB v. News Group Newspapers Ltd., [2011] EWHC 1326 (Q.B.), ¶ 16.

from having no law of privacy to the present situation where the duty of confidence now protects more than Warren and Brandeis ever contemplated.”<sup>130</sup>

#### IV. THE *MOSLEY* RULING

In his carefully reasoned but troubling opinion, Justice Eady dealt briskly with the threshold issue of whether Max Mosley had a reasonable expectation of privacy: “[O]ne is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy—especially if it is on private property and between consenting adults (paid or unpaid).”<sup>131</sup> In light of British and European Court precedents, the judge concluded that Mosley did have a reasonable expectation of privacy in his sexual activity.<sup>132</sup>

The next issue was whether “some countervailing consideration of public interest may be said to justify any intrusion which has taken place.”<sup>133</sup> Broad generalizations were of no help, Justice Eady said, citing as examples “Public figures must expect to have less privacy” and “People in positions of responsibility must be seen as ‘role models’ and set us all an example of how to live upstanding lives.”<sup>134</sup> It was a matter of proportionality, with the judge asking “whether the intrusion, or perhaps the degree of the intrusion, into the claimant’s privacy was proportionate to the public interest supposedly being served by it.”<sup>135</sup> In this analysis, “‘political speech’ would be accorded greater value than gossip or ‘tittle tattle.’”<sup>136</sup> The hierarchy of speech values, he said, requires judges to undertake “an evaluation of the use to which the relevant defendant has put ... his or her right to freedom of expression.”<sup>137</sup>

Justice Eady turned to the visual images—the photographs and the online video. Clandestine recording in and of itself may violate the Article 8 right to privacy.<sup>138</sup> “Once such recording has taken place, however, a separate issue may need to be considered as to the appropriateness of onward publication....”<sup>139</sup> Again, the issue was proportionality.<sup>140</sup>

<sup>130</sup> John Francis Curry, *Fame and Privacy: Mutually Exclusive? A Comparative Analysis*, 5 U. C. DUBLIN L. REV. 155, 171 (2005).

<sup>131</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 98. *See also* *CC v. AB* ¶¶ 8, 39.

<sup>132</sup> *Mosley*, [2008] EWHC 1777 ¶¶ 104, 232.

<sup>133</sup> *Id.* ¶ 11.

<sup>134</sup> *Id.* ¶ 12.

<sup>135</sup> *Id.* ¶ 14. Thus, the publication of “highly offensive” revelations would require a strong public interest justification. Deacon, *supra* note 100, at 12. *But see* Barendt, *supra* note 85, at 71 (noting uncertainty as to whether proportionality test remains valid).

<sup>136</sup> *Mosley*, [2008] EWHC 1777 ¶ 15. *See also* *CC v. AB* ¶ 19 (referring to “celebrity tittle-tattle in which there is no real public interest”); *Browne v. Associated Newspapers Ltd.*, [2007] EWHC 202 (Q.B.) ¶ 59 (referring to dinner-party conversation as “vapid tittle-tattle” lacking any public interest).

<sup>137</sup> *Mosley*, [2008] EWHC 1777 ¶ 15.

<sup>138</sup> *Id.* ¶ 17.

<sup>139</sup> *Id.* ¶ 17.

Where revelation of a sexual relationship is justified, such as by allegations of favoritism, “the addition of salacious details or intimate photographs would be disproportionate and unacceptable.”<sup>141</sup> Consequently, “it should not be assumed that, even if the subject-matter of the meeting on 28 March *was* of public interest, the showing of the film or the pictures was a reasonable method of conveying that information.”<sup>142</sup> The judge cited *Theakston v. MGN*, a case holding that although verbal descriptions of a public figure’s visit to a brothel could not be enjoined, photographs could be.<sup>143</sup>

As for the public interest, Justice Eady said that if a Nazi theme existed, “there could be a public interest in that being revealed at least to those in the FIA to whom [Mosley] is accountable.... It would be information which people arguably should have the opportunity to know and evaluate.”<sup>144</sup> The judge here referred to disclosure “at least” to the FIA and then to “people” in general; the former would not necessarily be consistent with news reporting but the latter would be.<sup>145</sup> He did not clarify the ambiguity.

But no Nazi theme existed, Justice Eady concluded; rather, the orgy had featured standard S&M elements such as “domination, restraints, punishment and prison scenarios.”<sup>146</sup> Woman E had worn a jacket reminiscent of a Luftwaffe uniform, but not

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<sup>140</sup> *Id.* ¶ 21.

<sup>141</sup> *Id.* ¶ 20 (citing *Campbell v. MGN Ltd.*, [2004] UKHL 22 ¶ 60 (Lord Hoffmann)). See also *id.* ¶ 16 (“Sometimes there may be a good case for revealing the fact of wrongdoing to the general public; it will not necessarily follow that photographs of ‘every gory detail’ also need to be published to achieve the public interest objective.”).

<sup>142</sup> *Id.* ¶ 21 (emphasis in original).

<sup>143</sup> *Id.* ¶ 23 (citing *Theakston v. MGN Ltd.*, [2002] EMLR 22). *Theakston* is discussed further in Section V. See also *Campbell* ¶ 60 (Lord Hoffmann) (if the public interest argues for disclosure of a sexual relationship, such as one between a politician and someone she has appointed to office, the publication of intimate photographs would be “too intrusive and demeaning” and therefore “unacceptable”).

<sup>144</sup> *Mosley*, [2008] EWHC 1777 ¶ 122. An editor later mocked Justice Eady’s reasoning:

[Justice Eady] said[,] “We are a grown up cosmopolitan country, whatever we do behind doors is entirely up to us—unless there are Nazis in it, and then [disclosure] is in the public interest.” Is it? The judgment makes no sense. Is [it] your right to dance about as a Nazi private? Or is it you are only allowed to dance about as a German officer? It is a silly case.

Culture, Media, and Sport Committee, *supra* note 62, at 195 (testimony of Ian Hislop, Editor, *Private Eye*).

<sup>145</sup> See WACKS, *supra* note 71, at 109 (“[D]isclosure, though in the public interest, ought to be sanctioned only when it is made to an appropriate body (and this will normally not include the press).”); Deacon, *supra* note 100, at 11 (“[T]he public interest might well be satisfied with limited disclosure (and not necessarily disclosure to the media). If so, it will not be in the public interest to exceed that limit.”). The *News of the World* did give a copy of the sex tape to members of the FIA senate, who oversee Formula One racing. Cliff Hayes, *News of the World Hands Max Sex Video to FIA Senate*, NEWS OF THE WORLD, April 6, 2008, at 68.

<sup>146</sup> *Mosley*, [2008] EWHC 1777 ¶ 48. This represented a rare case, Justice Eady later said, where the truthfulness of allegations played a role in a privacy case. “[O]rdinarily a claimant can

specifically a Nazi uniform—as *News of the World* reporter Neville Thurlbeck knew, because he had borrowed it to install the hidden camera.<sup>147</sup> The lice inspection had had no Nazi tinge.<sup>148</sup> The convict uniforms had had horizontal stripes rather than, as was typical for concentration camps, vertical ones.<sup>149</sup> Mosley had spoken German because one of the women testified that “she was turned on by the thought of being interrogated, while she was in a submissive role, by people using a foreign language which she did not understand”; further, German “is perceived as having a harsh and guttural sound and is thought to be more suitable for use by those playing a dominant role in S and M scenarios than (say) French or Italian.”<sup>150</sup> The tabloid had neglected to get the German remarks translated, which *News of the World* editor Colin Myler acknowledged had been a mistake.<sup>151</sup> “It contained a certain amount of explicit sexual language ... but nothing specifically Nazi, and certainly nothing to do with concentration camps.”<sup>152</sup> True, Mosley had been shaved. But inmates at concentration camps “had their *heads* shaved,” whereas Mosley, “for reasons best known to himself, enjoyed having his bottom shaved.”<sup>153</sup>

Did some other element of the public interest justify the invasion of privacy? Justice Eady considered the defense that Mosley had committed criminal actions. If true, he wrote, “any such intrusion should be no more than is proportionate.”<sup>154</sup> In his view, “Would [the defense of a criminal act being committed on private property] justify installing a camera in someone’s home ... in order to catch him or her smoking a spliff? Surely not.”<sup>155</sup> (Prostitution was not an issue, because it is legal in England.<sup>156</sup>) The judge rejected the argument that Mosley had conspired with the others to bring harm to himself—“[o]ne must try not to lose all touch with reality,” he curtly wrote<sup>157</sup>—and dealt likewise with the argument that Mosley had harmed the women.<sup>158</sup> Even if such acts technically violated the law, “[i]t would hardly be appropriate to clutter up the courts with cases of spanking between consenting adults taking place in private property and

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legitimately expect that intrusive allegations about personal matters, such as sexual or family relationships, would found a cause of action without his having to go into detail as to how much is, or is not, true.” Eady, *supra* note 3, at 14.

<sup>147</sup> *Mosley*, [2008] EWHC 1777 ¶¶ 50-51, 163.

<sup>148</sup> *Id.* ¶ 52.

<sup>149</sup> *Id.* ¶ 58.

<sup>150</sup> *Id.* ¶ 59.

<sup>151</sup> *Id.* ¶ 62; Pidd, *NoW Editor*, *supra* note 19.

<sup>152</sup> *Mosley*, [2008] EWHC 1777 ¶ 62.

<sup>153</sup> *Id.* ¶ 53 (emphasis in original).

<sup>154</sup> *Id.* ¶ 111.

<sup>155</sup> *Id.* ¶ 111.

<sup>156</sup> BBC News, *Q&A: UK Prostitution Laws*, Nov. 19, 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/7736436.stm](http://news.bbc.co.uk/2/hi/uk_news/7736436.stm) (last visited April 3, 2010).

<sup>157</sup> *Mosley*, [2008] EWHC 1777 ¶ 113.

<sup>158</sup> *Id.* ¶ 114.

without disturbing the neighbors.”<sup>159</sup> And even if prosecutors did proceed in such cases, lawbreakers do not forfeit their privacy rights.<sup>160</sup>

Justice Eady then considered the argument that Mosley had committed immoral and adulterous acts. “The modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations.”<sup>161</sup> The judge added:

Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behavior are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose.... Where the law is not breached ... the private conduct of adults is essentially no-one else’s business. The fact that a particular relationship happens to be adulterous, or that someone’s tastes are unconventional or “perverted,” does not give the media *carte blanche*.<sup>162</sup>

He continued, “I was referred by Mr. Price to the judgment in *CC v. AB*,” and proceeded to quote three paragraphs of the decision—neglecting to mention that it was his own decision. The quoted passages included the following:

[T]here is a strong argument for not holding forth about adultery, or attaching greater inherent worth to a relationship which has been formalised by marriage than to any other relationship.... No doubt many people, especially those with a strong religious faith, will disapprove of adultery. Many others, on the other hand, will not give it a second thought, while moving easily through a series of medium or short-term relationships as they feel it appropriate. With such a wide range of different views in society ... one must guard against allowing legal judgments to be coloured by personal attitudes.<sup>163</sup>

The judge noted that *CC v. AB* had been condemned for moral relativism, but added that critics had misunderstood the task confronting judges under the Human Rights Act.<sup>164</sup>

Justice Eady next asked whether he should defer somewhat to the newspaper’s assessment of the public interest, an issue that he believed depended on whether the

<sup>159</sup> *Id.* ¶ 117. See generally Matthew Weait, *Harm, Consent and the Limits of Privacy*, 13 FEMINIST LEGAL STUD. 97-122 (2005).

<sup>160</sup> *Mosley*, [2008] EWHC 1777 ¶ 118-119.

<sup>161</sup> *Id.* ¶ 125.

<sup>162</sup> *Id.* ¶¶ 127-128. See also *id.* ¶ 233 (“I accept that such behaviour is viewed by some people with distaste and moral disapproval, but in the light of modern rights-based jurisprudence that does not provide any justification for the intrusion on the personal privacy of the Claimant.”).

<sup>163</sup> *Id.* ¶ 129 (quoting *CC v. AB*, [2007] EMLR 11 ¶ 25). See also Eady, *supra* note 56, at 6 (asserting that in a privacy case, a judge must not distinguish between marital and extramarital sex).

<sup>164</sup> *Mosley*, [2008] EWHC 1777 ¶ 130.

tabloid had practiced “responsible journalism.”<sup>165</sup> He concluded that it had not done so. The *News of the World* did not consider less intrusive means of getting the story than secret recording, as the Press Complaints Commission Code required.<sup>166</sup> The German dialogue was not translated before publication.<sup>167</sup> The editor and reporter had believed that Nazi role-playing was involved, “not least because that is what they wanted to believe,”<sup>168</sup> but they had reached that conclusion irresponsibly, without “rational analysis of the material before them.”<sup>169</sup>

Consequently, the tabloid had invaded Mosley’s privacy under Article 8. Next, Justice Eady considered damages. He concluded that exemplary damages were not available, partly because no authority existed in their favor<sup>170</sup> and partly because the editor and reporter, though irresponsible, had not behaved with indifference to the legality of their conduct.<sup>171</sup> In calculating compensatory damages, he said that “[t]he scale of the distress and indignity ... is difficult to comprehend. It is probably unprecedented.”<sup>172</sup> Indeed, Mosley “is hardly exaggerating when he says that his life was ruined.”<sup>173</sup> But, Justice Eady added, Mosley’s own behavior ought to be taken into account. “There is no doctrine of contributory negligence. On the other hand, the extent to which his own conduct has contributed to the nature and scale of the distress *might* be a relevant factor on causation.”<sup>174</sup> The judge elaborated:

Many would think that if a prominent man puts himself, year after year, into the hands (literally and metaphorically) of prostitutes (or even professional dominatrices) he is gambling in placing so much trust in them. There is a risk of exposure or blackmail inherent in such a course of conduct.... To a casual observer, therefore, and especially with the benefit of hindsight, it might seem that the Claimant’s behaviour was reckless and almost self-destructive. This does not excuse the intrusion into his privacy but it might be a relevant factor to take into account when assessing causal responsibility for what happened.<sup>175</sup>

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<sup>165</sup> *Id.* ¶ 140. “Responsible journalism” can be a defense in defamation cases. *See* Jameel v. Dow Jones & Co., [2006] UKHL 44; Reynolds v. Times Newspapers Ltd., [2001] 2 AC 127. Justice Eady wrote that “I am not in a position to rule that this is the correct test to apply, but I propose to consider it in case it should be later so held.” *Mosley*, [2008] EWHC 1777 ¶ 143.

<sup>166</sup> *Id.* ¶¶ 144-145.

<sup>167</sup> *Id.* ¶ 146.

<sup>168</sup> *Id.* ¶ 169.

<sup>169</sup> *Id.* ¶ 170.

<sup>170</sup> *Id.* ¶¶ 184, 186, 192, 197. Justice Eady later said that “it would seem that punitive (or exemplary) damages will not be recoverable in privacy claims (although so far that is based only on first instance authority).” Eady, *supra* note 56, at 7.

<sup>171</sup> *Mosley*, [2008] EWHC 1777 ¶ 208-210.

<sup>172</sup> *Id.* ¶ 216.

<sup>173</sup> *Id.* ¶ 236.

<sup>174</sup> *Id.* ¶ 224 (emphasis in original).

<sup>175</sup> *Id.* ¶¶ 225-226.

Justice Eady assigned damages of £60,000.<sup>176</sup>

In closing, the judge sought to minimize the import of the case. “[T]here is nothing ‘landmark’ about this decision,” he wrote. “It is simply the application to rather unusual facts of recently developed but established principles.” He stressed that the ruling would not affect “serious investigative journalism into crime or wrongdoing, where the public interest is more genuinely engaged.”<sup>177</sup>

## V. REASONABLE EXPECTATION OF PRIVACY

### A. ARTICLES

*Campbell* and *von Hannover* leave little doubt that the video and photographs invaded Max Mosley’s privacy (though I will argue below that the precedents are misguided). But the articles are a different matter.<sup>178</sup> Justice Eady did not analyze the articles separately from the photos and video. Instead, he concluded without any discussion that the *News of the World* had lacked justification for publishing “even the information conveyed in the verbal descriptions.”<sup>179</sup> Three factors argue that Mosley did not have a reasonable expectation of privacy vis-à-vis the articles.

First, Justice Eady cited Mosley’s reckless behavior as one factor in concluding that exemplary damages were inappropriate, but said nothing about that behavior in determining whether a reasonable expectation of privacy existed. As the judge wrote, for a “prominent man” to place his trust in prostitutes, “year after year,” suggests behavior that “might seem ... reckless and almost self-destructive.”<sup>180</sup> This pattern of behavior suggests that Mosley’s expectation of privacy was less than reasonable, even taking into account the ordinary duty of confidentiality within a sexual relationship.<sup>181</sup> He hired not one but five prostitutes.<sup>182</sup> Sharing information risks disclosure; it can negate one’s

<sup>176</sup> *Id.* ¶ 236. A Parliamentary committee concluded that additional damages ought to be available when, as in *Mosley*, the news outlet publishes an article that invades someone’s privacy without first notifying the person. Culture, Media, and Sport Committee, *supra* note 65, at 31 ¶ 93.

<sup>177</sup> *Mosley*, [2008] EWHC 1777 ¶ 234.

<sup>178</sup> See WHITTLE & COOPER, *supra* note 103, at 60 (noting that “[a]n accurate factual report of an orgy without the intrusive images would have been easier for the *News of the World* to defend”).

<sup>179</sup> *Mosley*, [2008] EWHC 1777 ¶ 134.

<sup>180</sup> *Id.* ¶¶ 225-226. Mosley disputed the charge that he had behaved recklessly. “The reality is [public disclosure] was very unlikely and therefore I felt quite safe.” Culture, Media, and Sport Committee, *supra* note 62, at 60.

<sup>181</sup> See *Mosley*, ¶ 105.

<sup>182</sup> The European Court of Human Rights once observed that, in light of the “considerable number of people involved”—up to 44—as well as the videotapes of sexual activities, “[i]t may ... be open to question whether the sexual activities of the applicants fell entirely within the notion of ‘private life.’” *Laskey, Jaggard & Brown v. United Kingdom*, [1997] 109/1995/615/703-795 (Eur. Ct. H. R.) ¶ 36. Subsequently, however, the Court stressed that the *Laskey* observation was dictum and concluded that an applicant’s videotaped sexual activities with four other men remained private.



otherwise-reasonable expectation of privacy. One might have a reasonable expectation of privacy in financial records kept in her house, for example, but not once she surrenders the records to an accountant.<sup>183</sup> Justice Eady should have held at the outset that the articles did not implicate Mosley's Article 8 rights because, with his "reckless and almost self-destructive" behavior, he lacked a reasonable expectation of privacy.

Second, Justice Eady noted that *Theakston v. MGN* distinguished photographs from a verbal description of the claimant's visit to a brothel, but failed to discuss the court's reasoning as to why the verbal description could not be enjoined.<sup>184</sup> This was a description, it should be noted, of the claimant's encounter with three prostitutes in the basement of a brothel outfitted for S&M—close to the facts in *Mosley*.<sup>185</sup> The *Theakston* judge, unlike Justice Eady, took into account the Article 10 right to free expression of the would-be informant, in this case (as in *Mosley*) a prostitute.<sup>186</sup> Moreover, the judge expressly declined to hold that all private sexual activity is imbued with confidentiality, by contrast to Justice Eady.<sup>187</sup> In the *Theakston* court's view, marital relations merit the greatest privacy protection, with "a one-night stand with a recent acquaintance in a hotel bedroom" protected somewhat less, and "[a] transitory engagement in a brothel ... yet further away."<sup>188</sup> The judge went on to note, as factors arguing for minimal privacy expectations, elements that were also present in *Mosley*: "More than one prostitute was involved. The relationship, if it can indeed be called a relationship without stretching the word to the point of depriving it of meaning, lasted no longer than was necessary for the sexual activity to be undertaken with an allowance for necessary and ancillary matters."<sup>189</sup> He noted, as a factor in doubting the confidential nature of the relationship, that it seemingly had no "purpose beyond sexual activities."<sup>190</sup> Had Justice Eady applied

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*ADT v. United Kingdom*, [2000] 31 EHRR 33 (Eur. Ct. H. R.) ¶¶ 21, 37. Justice Eady cited *ADT* in rejecting the contention that Mosley "forfeited any expectation of privacy partly because of the numbers involved." *Mosley*, [2008] EWHC 1777 ¶ 109.

<sup>183</sup> *Couch v. United States*, 409 U.S. 322 (1973).

<sup>184</sup> *Mosley*, [2008] EWHC 1777 ¶ 23; *Theakston v. MGN Ltd.*, [2002] EWHC 137 (Q.B.). A post-*Mosley* case reaching a similar conclusion is *Callaghan v. Independent News & Media Ltd.*, [2009] NIQB 1 (Q.B.) ¶ 79 (allowing newspaper to publish the name but not the unpixelated photograph of a convicted sex offender).

<sup>185</sup> *Theakston*, [2002] EWHC 137 (Q.B.) ¶¶ 1, 10.

<sup>186</sup> *Id.* ¶¶ 25, 31. Justice Eady referred only in passing to Woman E's Article 10 rights. *Mosley*, [2008] EWHC 1777 ¶ 10. In a speech, Justice Eady remarked that a focus on the Article 10 rights of a lover may be incompatible with *von Hannover*. Eady, *supra* note 56, at 6; *see also* Eady, *supra* note 3, at 15.

<sup>187</sup> Compare *Theakston* ¶ 63 and *Mosley*, [2008] EWHC 1777 ¶ 98.

<sup>188</sup> *Theakston* ¶ 60. *See also id.* ¶ 64 ("The relationship between a prostitute in a brothel and the customer is not confidential of its nature and the fact that they participate in sexual activity does not in my judgment constitute a sufficient basis by itself for the attribution to the relationship, if such it be, of confidentiality.").

<sup>189</sup> *Id.* ¶ 62. *See also id.* ¶ 64 (finding relevant the fact that this had been "a fleeting transaction for money").

<sup>190</sup> *Id.* ¶ 74.

*Theakston*, he would have concluded that Mosley's session with the prostitutes did not support a reasonable expectation of privacy.

Finally, *A v. B*—an Appeal Court ruling, which Justice Eady did not cite at all—is to much the same effect as *Theakston*. A soccer player sued to prevent revelation of his affairs with two women, who had sold their stories to a newspaper.<sup>191</sup> His wife and two children were unaware of the extramarital relationships.<sup>192</sup> The player, later revealed to be Garry Flitcroft, was issued an injunction that remained in place for a year.<sup>193</sup> The Appeal Court withdrew the injunction. As in *Theakston* but not in *Mosley*, the judge noted the Article 10 rights of the women, not merely those of the newspaper,<sup>194</sup> and said, with particular relevance to *Mosley*, “While recognising the special status of a lawful marriage under our law, the courts ... have to recognise and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship, the greater will be the significance which is attached to it.”<sup>195</sup> The court proceeded to find fault with the lower court's handling of the injunction—and the lower court's reasoning matches Justice Eady's in *Mosley*:

[The judge] states, undoubtedly correctly, that confidentiality applies to facts concerning sexual relations within marriage but then adds that “in the context of modern sexual relations, it should be no different with relationships outside marriage.” This approach is objectionable because it makes no allowance for the very different nature of the relationship that A had, on his own account, with C and D from that which would exist within marriage. Quite apart from the recognition which the law gives to the status of marriage, there is a significant difference in our judgment between the confidentiality which attaches to what is intended to be a permanent relationship and that which attaches to the category of relationships which A was involved with here.<sup>196</sup>

The judge quoted *Theakston* on the categories of privacy, with marital relationships at the zenith and “transitory engagement[s] in a brothel” entitled to minimal protection.<sup>197</sup> “Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the

<sup>191</sup> *A v. B* PLC, [2002] EWCA Civ. 337, [2002] 1 FLR 1021.

<sup>192</sup> *Id.* ¶ 13.

<sup>193</sup> Simon Chester, Jason Murphy, & Eric Robb, *Zapping the Paparazzi: Is the Tort of Privacy Alive and Well?*, 27 *ADVOC. Q.* 357, 379-380 (2003).

<sup>194</sup> *A v. B*, [2002] EWCA Civ. 337, [2002] 1 FLR 1021 ¶¶ 11 (xi), 43 (iii). See *CC v. AB*, [2006] EWHC 3083 (Q.B.) ¶ 32 (“It is clear from *A v B plc* that the court will be less inclined to protect the rights of one party to a sexual relationship if the other party wishes to reveal what happened.”) (Eady, J.).

<sup>195</sup> *A v. B* ¶ 11 (xi).

<sup>196</sup> *Id.* ¶ 42 (ii).

<sup>197</sup> *Id.* ¶ 43 (ii) (quoting *Theakston v. MGN Ltd.*, [2002] EWHC 137 (Q.B.) (unreported) 14 Feb. 2002 ¶ 60).

relationships do not want them to remain confidential.”<sup>198</sup> Like *Theakston*, *A v. B* should have driven Justice Eady to conclude that Mosley had no reasonable expectation of privacy concerning this extramarital relationship with five prostitutes.

In a 2002 speech, Justice Eady took issue with *Theakston*’s and *A v. B*’s distinction between marital and extramarital relationships. He said: “There is no longer, if there ever was, a generally agreed code of sexual morality. Marriage no longer appears to have the particular status it used to be accorded.”<sup>199</sup> In a 2009 speech, Justice Eady denigrated *A v. B*’s distinction between marital and extramarital relationships as having “no logic” behind it but said that “[t]his is quite a recent development” in the law (*A v. B* is a 2003 case).<sup>200</sup> In another speech in 2009, Justice Eady mocked the notion that different types of sexual relationships ought to be accorded different levels of privacy.<sup>201</sup> But those were speeches. In *Mosley*, Justice Eady did not criticize the two cases. Instead, as noted, he cited *Theakston* only in passing, for the proposition that photography invades privacy to a greater extent than verbal descriptions, and he neglected to cite *A v. B* at all.

In sum, Justice Eady should have concluded that Max Mosley had no reasonable expectation of privacy with regard to the articles. Mosley’s behavior was reckless, as Justice Eady recognized elsewhere in his analysis; an aspect of the recklessness was placing his trust in Woman E, who, like the women in *Theakston* and *A v. B*, had an

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<sup>198</sup> *Id.* ¶¶ 44-45. The court went on to say that “[f]ootballers are role models for young people and undesirable behavior on their part can set an unfortunate example,” and it suggested that the public’s interest in a topic amounts to the public interest. *Id.* ¶ 43 (vi). The Court of Appeal subsequently, however, indicated that these arguments in *A v. B* “cannot be reconciled with *Von Hannover*.” *Ash v. McKennitt*, [2006] EWCA Civ. 1714 ¶ 62; see also Basil Markesinis, Colm O’Cinneide, Jörg Fedtke, & Myriam Hunter-Henin, *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 208 (2004) (asserting that *Von Hannover* “puts the final nail in the coffin” of the *A v. B* equation of what interests the public and the public interest).

<sup>199</sup> Eady, *supra* note 76. See also *CC v. AB*, [2006] EWHC 3083 (Q.B.) ¶ 22 (saying, concerning whether a one-night sexual encounter merits less privacy protection than a long-term relationship, that “[t]his is an uncertain area, because it is by no means fully determined how appropriate it is for individual judges to apply moral evaluation to such encounters”).

<sup>200</sup> Eady, *supra* note 56, at 6. See also Eady, *supra* note 68, at 248 (referring to “rapidly changing social and moral values,” particularly “in the matter of sexuality”).

<sup>201</sup> Justice Eady said in part:

The mind did indeed begin to boggle at how such intricate jurisprudence was to be applied in practice—and particularly when a judge was confronted by an urgent application [for an injunction] over the telephone. Where on the “scale or matrix” would the judge have to place a tent at Glastonbury or the back of a car which had run out of diesel deep in the New Forest? Since it was a relevant factor on this sliding scale to consider “the degree of intimacy” and the “location,” would the law afford greater protection for a married couple in a Ford Fiesta than to a newly engaged pair in the back of a Range Rover?

Eady, *supra* note 3, at 3.

Article 10 right to tell her story. In addition, Mosley's relationship with prostitutes, like a "transitory engagement in a brothel," was entitled to minimal confidentiality under those two precedents.

## B. PHOTOGRAPHS AND VIDEO

If, under the ECHR, photographs of Princess Caroline shopping are unlawful, the video of Mosley and the prostitutes would seem to be doomed. Even *Theakston*, which allowed a verbal description of a claimant's activities in a brothel, drew the line at photographs. But the precedents fail to take into account the visual nature of the newspaper, especially the tabloid newspaper, and the value of photography.

In and out of the newsroom, photographs have long been viewed as inferior to words. In 1901, *The New York Times* reported that a new owner had "transformed The Philadelphia Times from a discredited freak to a sane newspaper" by means of a list of newsroom prohibitions, including "[n]o pictures."<sup>202</sup> In the 1930s, a British editor acknowledged that news photographers did important work, but added that "it is *not* journalism, and I am not prepared to receive them as journalistic colleagues."<sup>203</sup> To many critics, photos were among the most offensive features of tabloid newspapers.<sup>204</sup> Aben Kandel predicted that tabloids would "enfeeble [people's] minds, dull their thinking, rob them of any remnant of intellectual initiative, and worse—even make them forget how to read."<sup>205</sup> The audience would forget how to read, it was said, because tabloids rely heavily on photos and graphics to attract readers.<sup>206</sup> Photos were thought, like sensationalism itself, to bypass the rational faculties and appeal directly to emotion, making photography "a threat to reason, and to the journalistic institution's

<sup>202</sup> *A New Code for Dailies*, N.Y. TIMES, June 29, 1901, at A10.

<sup>203</sup> Barbie Zelizer, *From the Image of Record to the Image of Memory: Holocaust Photography, Then and Now*, in PICTURING THE PAST: MEDIA, HISTORY, AND PHOTOGRAPHY (Bonie Brennen & Hanno Hardt eds.) 101 (1999) (emphasis in original). On newsroom hostility to photographs, see also ROBERT TAFT, PHOTOGRAPHY AND THE AMERICAN SCENE: A SOCIAL HISTORY, 1839-1889, at 446 (1938); Karin E. Becker, *Photojournalism and the Tabloid Press*, in JOURNALISM AND POPULAR CULTURE 130, 130 (Peter Dahlgren & Colin Sparks eds.) (1992).

<sup>204</sup> Aben Kandel, *A Tabloid a Day*, FORUM 378, 378 (March 1927); George Jean Nathan, *Clinical Notes*, AM. MERCURY 363, 363 (March 1926); Oswald Garrison Villard, *Are Tabloid Newspapers a Menace? Tabloid Offenses*, FORUM 485, 486 (April 1927). For an overview of criticism, see Douglas Bicket & Lori A. Packer, *An Early "Denial of Ekphrasis": Controversy Over the Breakout of the Visual in the Jazz Age Tabloids and the New York Times*, 3(3) VISUAL COMM. 360-379 (2004).

<sup>205</sup> Kandel, *supra* note 204, at 380. See also Villard, *supra* note 204, at 489 (referring to tabloid readers as "mentally underdeveloped").

<sup>206</sup> FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY, 1690-1960, at 673 (3d ed.) (1962); Richard G. de Rochemont, *The Tabloids*, AM. MERCURY 187, 189 (Oct. 1927); Dick Rooney, *Thirty Years of Competition in the British Tabloid Press: The Mirror and the Sun, 1968-1998*, in TABLOID TALES: GLOBAL DEBATES OVER MEDIA STANDARDS (Colin Sparks & John Tulloch eds.) 91 (2000).

Enlightenment heritage.”<sup>207</sup> A commentator asserted in 1938, “Having joyfully advanced backwards to the language of pictures, ... we may not be as far as we think from the Stone Age of human intelligence.”<sup>208</sup>

The courts would not go to that extreme, but the British and the European Court of Human Rights precedents reflect the same general antipathy toward the photograph. Justice Eady in *Mosley* quoted another case, *Douglas v. Hello! (No. 3)*, where the Court of Appeal spoke of photographs as “not merely a method of conveying information that is an alternative to verbal description,” but as a means of “enabl[ing] the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun.”<sup>209</sup> The photo in this view is sneaky, even subversive. Recall Warren and Brandeis: “[i]nstantaneous photographs ... have invaded the sacred precincts of private and domestic life.”<sup>210</sup>

To be sure, photographs do differ from text—which is part of their power. At their best, photos capture reality in a way that words cannot.<sup>211</sup> As Susan Sontag puts it, photos “do not seem to be statements about the world so much as pieces of it.”<sup>212</sup> Photographs have the virtue of concision; they “can tell in a moment what might require many moments, or even hours, to describe in writing,” writes historian Robert Taft.<sup>213</sup> Moreover, Taft adds, a photo “can fix mentally more vividly, completely, and indelibly than can the printed word.”<sup>214</sup>

Photographs (and web videos) not only illustrate, moreover; they corroborate. *The Telegraph* noted a dilemma facing the post-*Mosley* press: “In exposing wrongdoing, journalists will seek to guard against libel actions by obtaining taped or photographic

<sup>207</sup> Becker, *supra* note 203, at 130.

<sup>208</sup> J. L. Brown, *Picture Magazines and Morons*, AM. MERCURY 408 (Dec. 1938). See also WALTER LIPPMANN, PUBLIC OPINION 92 (1922) (describing photographs as “the most effortless food for the mind conceivable”); TAFT, *supra* note 203, at 449 (“the reader glances hastily at one picture—looks but does not see or think—and passes on to the next in the same manner”). On the early stigma of photographs in newspapers, see also MITCHELL STEPHENS, THE RISE OF THE IMAGE, THE FALL OF THE WORD 31 (1998); LAURA VITRAY, JOHN MILLS JR., & ROSCOE ELLARD, PICTORIAL JOURNALISM 4 (1939); Becker, *supra* note 203, at 130; William E. Berchtold, *More Fodder for Photomaniacs*, N. AM. REV. 19, 20 (Jan. 1935); Zelizer, *supra* note 203, at 101.

<sup>209</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 19 (quoting *Douglas v. Hello! Ltd. (No. 3)*, [2006] Q.B. 125 ¶ 84).

<sup>210</sup> Warren & Brandeis, *supra* note 101, at 195. Paparazzi date back to the turn of the 20th century. Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43(1) AM. Q. 24, 31 (1991).

<sup>211</sup> But cf. *Kelley v. Post Publishing Co.*, 98 N.E.2d 286, 287 (Mass. 1951) (stating that “[a] newspaper account or a radio broadcast setting forth in detail the harrowing circumstances of the accident might well be as distressing to the members of the victim’s family as a photograph of the sort described in the declaration”).

<sup>212</sup> SUSAN SONTAG, ON PHOTOGRAPHY 4 (1990). See also SIMON MICHAEL BESSIE, JAZZ JOURNALISM: THE STORY OF THE TABLOID NEWSPAPERS 236 (1938) (stating that photos “are vivid beyond everything except actual participation”).

<sup>213</sup> TAFT, *supra* note 203, at 449.

<sup>214</sup> *Id.*

evidence—only to find this leaves them open to charges of breach of privacy.”<sup>215</sup> Some judges have proposed that journalists gather photographic proof but refrain from publishing it. In the action for an injunction against posting the orgy video on *News of the World*’s website, Justice Eady suggested that the newspaper was free to dispute Mosley’s denial of Nazi sex play “without displaying the edited footage of bottoms being spanked,” assuming that the video did show Nazi elements.<sup>216</sup> In *Campbell*, similarly, Baroness Hale wrote that the editor ought to have held the photos in case Campbell challenged the Narcotics Anonymous allegation, “but there was no need to publish them for this purpose.”<sup>217</sup>

Plainly, though, a media outlet ought to be free, and perhaps even ethically obliged, to proffer proof of its assertions—a matter that touches on both the public interest in publishing information as well as the claimant’s expectation of privacy. Indeed, in a case where a newspaper had published copies of tax documents, the European Court of Human Rights said, “The extracts from each document were intended to corroborate the terms of the article in question. The publication of the tax assessments was thus relevant not only to the subject matter but also to the credibility of the information supplied.”<sup>218</sup> In *Campbell*, Lord Hoffmann, dissenting, similarly wrote that the photographs of Naomi Campbell outside the addicts’ self-help meeting “carried the message, more strongly than anything in the text alone, that the *Mirror*’s story was true.”<sup>219</sup>

Concededly, photographs (and videos) can be uniquely intrusive. As Justice Eady said, photographs sometimes will intrude on privacy when a verbal description would not do so.<sup>220</sup> In an American case, Judge Posner observed: “Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating.”<sup>221</sup> But the facts in *Campbell* and *von Hannover* hardly approach that level. The photos in *von Hannover* showed Princess Caroline engaged in shopping and other mundane activities. The photos in *Campbell* showed Naomi Campbell on a public street, albeit outside a Narcotics Anonymous meeting.

<sup>215</sup> *Judge Has Hampered Freedom of Expression*, TELEGRAPH, July 25, 2008.

<sup>216</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 32. In 1973, the *News of the World* did secretly photograph sex acts to get proof of the allegations—a Member of Parliament’s relationship with prostitutes—with no intent of publishing the photos, or so the editors insisted. GEORGE MUNSTER, *A PAPER PRINCE: RUPERT MURDOCH* 144 (1985).

<sup>217</sup> *Campbell v. MGN Ltd.*, [2004] UKHL 22 ¶ 156 (Baroness Hale of Richmond). *See also id.* ¶ 170 (Lord Carswell).

<sup>218</sup> *Fressoz & Roire v. France*, app. no. 29183/95, 31 EHRR 28 (Eur. Ct. H. R. 1999) ¶ 55.

<sup>219</sup> *Campbell*, [2004] UKHL 22 ¶ 77 (Lord Hoffmann). *Cf. Theakston v. MGN Ltd.*, [2002] EMLR 22, ¶ 69 (“It is insufficient ... to say that the newspaper could take its information to [the celebrity’s employer]. The free press is not confined to the role of a confidential police force; it is entitled to communicate directly with the public for the public to reach its own conclusion.”).

<sup>220</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 18.

<sup>221</sup> *Haynes v. Knopf*, 8 F.3d 1222, 1230 (7th Cir. 1993). *See also id.* at 1233 (stating that “[p]hotographic invasions of privacy usually are more painful than narrative ones”).

And in *Mosley*? In the injunction action, Justice Eady referred to “[t]he very brief extracts” of the hours-long orgy video that the *News of the World* posted to its website, and wrote that they “seemed to consist mainly of people spanking each other’s bottoms.”<sup>222</sup> Genitalia as well as the women’s faces were blocked or pixelated.<sup>223</sup> “Mosley then took part in sex acts with several of the vice girls”—a caption on the video—was as graphic as the material got.<sup>224</sup> None of the sex acts were shown. Likewise in the newspaper, as Justice Eady wrote, “any parts of the photographs revealing anybody’s private parts are discreetly blocked out—including in one instance by a chequered flag.”<sup>225</sup>

The published photos showed Mosley, dressed, swinging a leather paddle at the posterior of one of the women; Mosley, again dressed, between two of the women; Mosley, shirtless and seen from the chest up, being questioned by one of the women; Mosley, seen from the shoulders up, being inspected for lice by the same woman; Mosley lying face-down on the bed, his ankles chained to his wrists; Mosley bending over, seemingly naked, with a checkered flag superimposed over his genitals and chest, as one of the women whips his buttocks; Mosley watching as one of the women blindfolds another; and Mosley drinking tea after the orgy.<sup>226</sup> Although they raise closer questions than the articles, the photos and the video appeared to corroborate the newspaper’s incendiary allegations about Mosley (of course, the court ultimately concluded that it was an S&M orgy but not a Nazi one). Under a proper understanding of the role of newspaper photography—an understanding not reflected in *von Hannover* or *Campbell*—the photos and video should not have been deemed to breach Mosley’s reasonable expectation of privacy.

### C. PRIVACY EXPECTATION

For the reasons discussed above, Max Mosley lacked a reasonable expectation of privacy. As to the articles, Justice Eady failed to take into account Mosley’s reckless behavior as it related to the expectation of privacy; and he failed to follow the analysis of two cases, *Theakston* and *A v. B*, which assign a minimal expectation of privacy to fleeting encounters with prostitutes. As to the photographs and video, Justice Eady followed precedents from the European Court of Human Rights and from British courts, but the precedents are flawed. They reflect a longstanding antipathy toward photography, especially photography in tabloid newspapers. Instead, the courts ought to recognize photographs as legitimate illustration and corroboration.

<sup>222</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 4.

<sup>223</sup> *Id.*

<sup>224</sup> The video, formerly available at <http://www.youtube.com/watch?v=zQf9MmRE5L4>, has been removed.

<sup>225</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 30. Justice Eady does not describe the photographs, but he does reprint the captions. *Id.* ¶ 27.

<sup>226</sup> Neville Thurlbeck, *The Pits*, *NEWS OF THE WORLD*, March 30, 2008, at 4-5. Smaller photos show Mosley with his Formula One colleague Bernie Ecclestone; Mosley’s wife; his father; and Hitler. *Id.*

## VI. THE PUBLIC INTEREST

### A. MEIKLEJOHN AND *MOSLEY*

*Mosley* implicitly embraces the most prominent consequentialist theory of freedom of expression, which holds that the purpose of free expression is to facilitate democratic self-government.<sup>227</sup> This theory is most closely identified with Alexander Meiklejohn, who wrote that the American First Amendment protects above all “ideas about the common good.”<sup>228</sup> In Meiklejohn’s view, “The primary purpose of the First Amendment is ... that all the citizens shall, so far as possible, understand the issues which bear upon our common life.”<sup>229</sup> Though he first appeared to limit his theory to what Rodney A. Smolla terms “relatively ‘hard-core’ political speech,”<sup>230</sup> Meiklejohn ultimately concluded that many forms of speech fulfill that requirement: philosophy, science, literature, and the arts, among others.<sup>231</sup>

*Mosley* and the precedents underlying it, from both British courts and the European Court, are consistent with Meiklejohn.<sup>232</sup> In Justice Eady’s analysis, *Mosley*’s

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<sup>227</sup> On theories of free expression, see generally MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* (2001); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

<sup>228</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 28 (1960). Cf. WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 40 (1955) (defining the public interest as “what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently”).

<sup>229</sup> MEIKLEJOHN, *supra* note 228, at 75.

<sup>230</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 15 (1992).

<sup>231</sup> Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME CT. REV. 245, 257. Meiklejohn seemingly did not envision a libertarian, hands-off approach to this high-value speech, for he famously wrote, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.” MEIKLEJOHN, *supra* note 228, at 26.

<sup>232</sup> Phillipson & Fenwick, *supra* note 96, at 683-684. In a case concerning a ban on press interviews for prisoners, though, Lord Steyn did set forth other justifications for free speech:

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.



reasonable expectation of privacy was breached, so the outcome of the case came down to a balancing of the Article 8 right to privacy against the Article 10 right to free expression. The weight of the Article 10 interest depended on the public interest, which in turn depended on the nature of the speech. “[G]enerally speaking ‘political speech’ would be accorded greater value than gossip or ‘tittle tattle’....”<sup>233</sup> Justice Eady quoted *von Hannover* and asked, Would the information “make a contribution to ‘a debate of general interest’? That is, of course, a very high test.”<sup>234</sup> He went on to stress that “titillation for its own sake could never be justified.”<sup>235</sup>

In *Campbell*, Baroness Hale sketched a more detailed hierarchy of speech. Some forms of speech, she wrote,

are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals’ potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.<sup>236</sup>

She added, “The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring [sic] over the intimate details of a fashion model’s private life.”<sup>237</sup>

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R. v. Sec’y of State for Home Dep’t, [2000] 2 AC 115, ¶ 126 (citations omitted).

<sup>233</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 15. *But see* *Reynolds v. Times Newspapers*, [2001] 2 AC 127, 204 (“[I]t would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern.”) (Lord Nicholls).

<sup>234</sup> *Mosley*, [2008] EWHC 1777 ¶ 131 (*quoting* *Von Hannover v. Germany*, app. no. 59320/00 ¶¶ 60, 76 (Eur. Ct. H. R. 2004)).

<sup>235</sup> *Id.* ¶ 132. The judge deemed “quite unrealistic” the argument that viewers of the tabloid’s online video of Mosley and the prostitutes “were prompted by a desire to participate in a ‘debate of general interest.’” *Id.*

<sup>236</sup> *Campbell v. MGN Ltd.*, [2004] UKHL 22 ¶ 148 (Baroness Hale of Richmond). *See also* *Phillipson & Fenwick*, *supra* note 96, at 684 (discussing special protection accorded political speech in Strasbourg and British domestic law).

<sup>237</sup> *Campbell*, [2004] UKHL 22 ¶ 149 (Baroness Hale of Richmond). *But see* *Mills v. News Group Newspapers*, [2001] EMLR 957 ¶ 32 (“The newspaper has the right to freedom of expression.

The European Court of Human Rights in *von Hannover* ruled that the private life of Princess Caroline, a person with no official duties, did not constitute a part of any legitimate public debate.<sup>238</sup> It characterized this realm of proper public discussion variously as “matters of public interest,”<sup>239</sup> “the dissemination of ideas,”<sup>240</sup> “a debate of general interest,”<sup>241</sup> “considerations of public concern,”<sup>242</sup> “matter[s] of general importance,”<sup>243</sup> and “facts ... capable of contributing to a debate in a democratic society.”<sup>244</sup> In another case, the European Court distinguished between “reporting facts—even if controversial—capable of contributing to a debate in a democratic society and making tawdry allegations about an individual’s private life.”<sup>245</sup> Elsewhere, the European Court declared flatly that “the publication of ... photographs and articles, the sole purpose of which is to satisfy the curiosity of a particular readership regarding the details of a public figure’s private life, cannot be deemed to contribute to any debate of general interest to society despite the person being known to the public.”<sup>246</sup>

*Von Hannover*, *Campbell*, and *Mosley* make clear that news of celebrities’ sex scandals falls outside the realm of public-interest speech under a Meiklejohnian interpretation of Article 10. This approach fails in several interrelated respects.

To begin with, political speech is broader than the courts recognize. Some have argued that private matters and public affairs overlap too substantially for the distinction to be valuable. C. Edwin Baker, for example, writes that “[b]oth may and often do reflect civic values as well [as] self-interested concerns.”<sup>247</sup> The criticism that tabloids neglect politics, according to Henrik Örnebring and Anna Maria Jönsson, rests on “a somewhat limited notion of what *political* means, a notion that does not include cultural recognition nor participation outside the arenas of traditional politics as major elements with an

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That includes the right to impart information, and it has that right even if the information is little more than gossip of a trivial nature.”).

<sup>238</sup> *Von Hannover*, app. no. 59320/00 ¶ 76. One commentator faults the Court for imposing a unitary vision of a proper public debate, rather than deferring somewhat to local authorities. Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT’L L. J. 211, 244-245 (2008).

<sup>239</sup> *Von Hannover*, app. no. 59320/00 ¶¶ 58, 63.

<sup>240</sup> *Id.* ¶ 59 (internal quotation marks omitted).

<sup>241</sup> *Id.* ¶¶ 60, 76.

<sup>242</sup> *Id.* ¶ 60 (internal quotation marks and citation omitted).

<sup>243</sup> *Id.* (internal quotation marks and citation omitted).

<sup>244</sup> *Id.* ¶ 63.

<sup>245</sup> *Biriuk v. Lithuania*, app. no. 23373/03 (Eur. Ct. H. R. 2008) ¶ 38. *See also* *Verlagsgruppe News GMBH v. Austria*, app. no. 10520/02 (Eur. Ct. H. R. 2006) ¶ 40 (in balancing Articles 8 and 10, Court “has always stressed the contribution made by the photos or articles published in the press to a debate of general interest”).

<sup>246</sup> *MGN Ltd. v. United Kingdom*, app. no. 39401/04 (Eur. Ct. H. R. 2011) ¶ 143. *See also* *Leempoel v. Belgium*, app. no. 64772/01 (Eur. Ct. H. R. 2006) (French), translated and quoted in Richard Spearman Q.C., “Privacy—The Swinging Pendulum,” [http://www.4-5.co.uk/uploads/docs/section5/Privacy\\_The\\_Swinging\\_Pendulum.pdf](http://www.4-5.co.uk/uploads/docs/section5/Privacy_The_Swinging_Pendulum.pdf) (last visited April 3, 2010), at 15.

<sup>247</sup> C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 33 (1989).

importance of their own.”<sup>248</sup> They propose that we view the tabloid as “an alternative public sphere,”<sup>249</sup> which “may provide new opportunities for representation and recognition for groups outside the mainstream.”<sup>250</sup>

Specifically, much tabloid journalism can be seen as a form of rebellion against status and power, in the view of Ian Connell.<sup>251</sup> “[F]undamentally these stories turn on what are perceived to be abuses of privilege.... These are political stories, even although their ‘structure in dominance’ ... is not evidently political.”<sup>252</sup> The world as seen through these stories is divided into haves and have-nots, Connell writes, with the occasional implication that the haves enjoy their wealth and status at the expense of the have-nots.<sup>253</sup> Such articles “can and do undermine the authority of those who would place themselves apart.”<sup>254</sup> Following this reasoning, it could be argued that Max Mosley’s encounter with prostitutes reveals something about the difference in power between wealthy men and working-class women in British society—a fundamentally political topic.<sup>255</sup>

At a more basic level, the Meiklejohn approach itself is perilous. When a case implicates Articles 8 and 10, Justice Eady said in a 2009 speech, the judge must often “investigat[e] the defendant’s motive for using the right of free speech and grad[e] those motives (as between at one extreme e.g. ‘political speech’ and at the other what has been called in the House of Lords ‘tittle tattle’).”<sup>256</sup> This is precisely what the courts, in a society that truly values free expression, should refrain from doing.<sup>257</sup> By linking free expression to political debate, the Meiklejohn principles require judges to determine what qualifies as a proper topic for public debate. A branch of government decides what citizens may discuss in the political process of constituting and directing the

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<sup>248</sup> Henrik Örnebring & Anna Maria Jönsson, *Tabloid Journalism and the Public Sphere: A Historical Perspective on Tabloid Journalism*, 5(3) JOURNALISM STUD. 283, 293 (2004) (emphasis in original).

<sup>249</sup> *Id.* at 284 (emphasis omitted).

<sup>250</sup> *Id.* at 293.

<sup>251</sup> Ian Connell, *Personalities in the Popular Media*, in JOURNALISM AND POPULAR CULTURE 74 (Peter Dahlgren & Colin Sparks eds.) (1992).

<sup>252</sup> *Id.* at 81.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 82.

<sup>255</sup> Cf. Julie Hilden, *Are Accounts of Consensual Sex a Violation of Privacy Rights? The Lawsuit Against the Blogger “Washingtonienne,”* FindLaw, June 21, 2005, <http://writ.news.findlaw.com/hilden/20050621.html> (last visited April 3, 2010) (treating a blog recounting the sex life of its author, a congressional aide, as inherently political).

<sup>256</sup> Eady, *supra* note 56, at 4. See also *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 15.

<sup>257</sup> Cf. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 346 (1974) (noting the “difficulty of forcing state and federal judges to decide on an *ad hoc* bases which publications address issues of ‘general or public interest’ and which do not—to determine ... ‘what information is relevant to self-government’”) (citation omitted). But cf. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (distinguishing “the publication of truthful information of public concern” from “disclosures of trade secrets or domestic gossip or other information of purely private concern”).

government.<sup>258</sup> As the U.S. Supreme Court has said, “We doubt the wisdom of committing this task to the conscience of judges.”<sup>259</sup> Judges are likely to err and potentially constrict the sphere of public discourse.<sup>260</sup> In striving to protect the public from the press, the state may compromise the press’s ability to protect the public from the state.

Further, the individual is a citizen, yes, but he or she is also many other things—identities that the press, ideally, will foster. In Lee C. Bollinger’s words, the press supplies “the information and ideas the people will use to exercise their roles as citizens, consumers, investors, entertainment-goers and the like.”<sup>261</sup> Individuals, moreover, may identify more strongly with the non-political roles than with the political one.<sup>262</sup> The U.S. Supreme Court said in 1975 that one’s “concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”<sup>263</sup> The individual’s concern for other forms of speech, including celebrity gossip, may likewise loom large. Diane L. Zimmerman writes of gossip as “a normal and necessary part of life for all but the rare hermit among us,” and argues that it “contributes directly to the first amendment ‘marketplace of ideas.’”<sup>264</sup>

Survey evidence suggests that tabloids, notwithstanding their popularity, are viewed with considerable skepticism by the British public. In 2008, 86 percent of Britons agreed that tabloids “look for any excuse to tarnish the name of politicians,” and 89 percent agreed that tabloids “are more interested in getting a story than telling the truth”; just 19 percent of respondents agreed with these two statements when it came to broadsheet newspapers.<sup>265</sup> It seems, thus, that readers are not necessarily being duped into believing tabloids’ exaggerations and falsehoods.

One alternative to the Meiklejohn approach is the theory that free expression fosters individual self-fulfillment. Thomas I. Emerson writes: “The proper end of man is

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<sup>258</sup> Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3, 30-32 (1990). Cf. *R. v. Central Independent Television*, [1994] Fam. 192 (Hoffmann, L. J.) (“[A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom.”).

<sup>259</sup> *Gertz*, 418 U.S. at 346.

<sup>260</sup> C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOCIAL PHIL. & POL’Y 215, 264 (2004); Estlund, *supra* note 258, at 49.

<sup>261</sup> Lee C. Bollinger, *The Press and the Public Interest: An Essay on the Relationship Between Social Behavior and the Language of First Amendment Theory*, 82 MICH. L. REV. 1447, 1451 (1984).

<sup>262</sup> See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 440 (1970-1971).

<sup>263</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). See also *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 764 (1976) (stating that disclosure of prescription drug prices “may be of general public interest”).

<sup>264</sup> Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 334 (1983).

<sup>265</sup> Committee on Standards in Public Life, *Survey of Public Attitudes Towards Conduct in Public Life 2008*, [http://www.public-standards.gov.uk/Library/SOPA\\_bookmarked.pdf](http://www.public-standards.gov.uk/Library/SOPA_bookmarked.pdf) (last visited Oct. 10, 2010).

the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature."<sup>266</sup> Critics of the self-fulfillment theory note that there seems to be no reason to limit the principle to speech. Many other activities can foster self-fulfillment; why should they, too, not be accorded a high level of constitutional protection?<sup>267</sup> Martin H. Redish, however, proposes a compelling theory that combines self-fulfillment with Meiklejohnian self-governance. In Redish's view, free expression ought to be protected because it strengthens the intellect and builds knowledge, which in turn help the citizen participate more intelligently in politics.<sup>268</sup>

As Meiklejohn himself recognized in extending his theory to literature, the arts, and other realms, the "issues which bear upon our common life" are larger than the customary sphere of politics. Citizens need novels, in his view, "because they will be called upon to vote."<sup>269</sup> The novel is, he wrote, "a powerful determinative of our views of what human beings are, how they can be influenced, in what directions they should be influenced by many forces, including, especially, their own judgments and appreciations."<sup>270</sup> Literature serves not only to divert, entertain, educate, and sometimes challenge, but also to illuminate human nature—and nothing can be more political than an understanding of human nature. James Madison's famous phrase from *Federalist* 51—"[a]mbition must be made to counteract ambition"—reflects one view of human nature; the Antifederalists' emphasis on the importance of virtue to self-government reflects another.<sup>271</sup> As Madison put it, "[W]hat is government itself but the greatest of all reflections on human nature?"<sup>272</sup> Scandal news, like literature, illuminates human nature. The Max Mosley scandal of 2008, like the Tiger Woods scandal of 2009 and 2010, shows the potential effect of power and riches on a man of stature and responsibility.

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<sup>266</sup> EMERSON, *supra* note 227, at 6. See also Roscoe Pound, *Interests of Personality*, part 2, 28 HARV. L. REV. 445, 453 (1915) ("[F]ree exercise of one's mental and spiritual faculties is a large part of life. As civilization proceeds it may become the largest part. No one who is restrained in this respect may be said to live a full moral and social life."). See generally BAKER, *supra* note 247.

<sup>267</sup> See, e.g., SMOLLA, *supra* note 230, at 9.

<sup>268</sup> Redish, *supra* note 262, at 438-439. Redish also argues that individuals ought to be free to gather the information with which to govern their own lives, and not merely the collective life. *Id.* at 442.

<sup>269</sup> Meiklejohn, *supra* note 231, at 263 (internal quotation marks omitted). In the view of one critic, "[T]he idea that literature's claim to first amendment protection depends upon its relevance to political life simply does not ring true." STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 48 (1990).

<sup>270</sup> Meiklejohn, *supra* note 231, at 262.

<sup>271</sup> See generally HERBERT STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION* (1981).

<sup>272</sup> *Federalist* 51.

Finally, the Meiklejohn approach as reflected in *Mosley* has a disproportionate impact on tabloids, which appeal to a less-educated, lower-status audience.<sup>273</sup> The approach thus privileges media that appeal to elites over those that appeal to the working class. Notably, too, tabloids often criticize elites or at least voice disrespect toward them.<sup>274</sup> Maximal freedom is granted to elite speech and denied to speech that is often anti-elite.

For these reasons, Justice Eady in *Mosley*, like other British judges and European Court of Human Rights judges, erred in implicitly embracing the Meiklejohn distinction between political speech and other speech.

## B. THE APPETITE FOR SEX SCANDALS

Why do articles about others' sex lives appeal to the public?<sup>275</sup> The values served by privacy have been discussed widely,<sup>276</sup> but less has been said about the values on the

<sup>273</sup> Colin Sparks, *Introduction: The Panic Over Tabloid News*, in *TABLOID TALES: GLOBAL DEBATES OVER MEDIA STANDARDS* (Colin Sparks & John Tulloch eds.) 29 (2000); EDWIN EMERY, *THE PRESS AND AMERICA: AN INTERPRETATIVE HISTORY OF THE MASS MEDIA* 557 (3d ed.) (1972). *See also* S. Elizabeth Bird, *Tabloid Newspapers*, in 4 *ENCYC. OF JOURNALISM* 1362 (Christopher H. Sterling ed.) (2009) (tabloids in Britain have always reflected "a strong sense of proletarian identity, a feature that was largely absent in the U.S. context"); Stephen Harrington, *Popular News in the 21st Century: Time for a New Critical Approach?*, 9(3) *JOURNALISM* 266, 274 (2008) (suggesting that tabloid news can be viewed as "a popularizing and democratizing force, promoting social and cultural inclusion, whereas the idealized public sphere of the Enlightenment was criticized for its *exclusion* of both women and the less-educated") (emphasis in original).

<sup>274</sup> *See* MARTIN CONBOY, *TABLOID BRITAIN: CONSTRUCTING A COMMUNITY THROUGH LANGUAGE* 13 (2006) (stating that tabloid stories often "demonstrate directly or indirectly a disrespect for those in certain positions of social authority"); Sofia Johansson, *Gossip, Sport and Pretty Girls: What Does "Trivial" Journalism Mean to Tabloid Newspaper Readers?*, 2(3) *JOURNALISM PRAC.* 402, 409 (2008) (noting that tabloid coverage of celebrities' misfortune "provide[s] a temporary vindication of injustices"). *Cf.* Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 *LAW & CONTEMP. PROBS.* 281, 293 (1966) ("This desire to know 'scandalous things' about the mighty was a desire to be in proximity to the mighty, the famous, the glorious, the authoritative, and to derogate them at the same time.").

<sup>275</sup> *See Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 114 (acknowledging that the Mosley story interested the public but doubting that it was a matter of public interest). The appetite for celebrity and scandal news helps some news outlets thrive. Several commentators have mentioned that, in the words of one, "[i]t is at least possible that taking the right to privacy seriously and enforcing it stringently might 'kill' the free press by limiting its appeal to a public that feeds on lurid gossip and sensation." Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, 46 *TEX. L. REV.* 611, 628 (1968). *See also* *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir. 1958) ("Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account.") (footnote omitted);

other side. Particular information may help satisfy people's curiosity about the lives of others. Or it may demonstrate misbehavior of some sort, which can play out in five respects. The disclosure may amount to an abuse of power on the part of a public figure.<sup>277</sup> It may contrast with the person's public stance in such a way as to reveal hypocrisy. It may cast doubt on the individual's reliability and trustworthiness. It may demonstrate that the individual does not deserve his or her position as a role model. Finally, and most significantly for *Mosley*, it may show a violation of public morality. Justice Eady, however, has denied that *any* public interest can exist in cases of "sexual shenanigans."<sup>278</sup> This section considers the possible reasons for disclosing information about someone's sex life, and, for each reason, whether it would qualify as a matter of public interest in England, particularly under *Mosley* and Justice Eady's other jurisprudence and public statements.<sup>279</sup>

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A v. B PLC, [2002] EWCA Civ. 337, [2002] 1 FLR 1021 ¶ 11 (xii) ("The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest."); Dacre, *supra* note 66 ("[I]f mass-circulation newspapers, which also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process."). According to this argument, the public interest in having a thriving press argues for minimizing privacy rights. As one might make a parallel point about libel, antitrust, or many other areas of the law touching on the news media, I do not rely on this argument.

<sup>276</sup> The classic work is ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967). See also SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* (1983); LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* (2007); FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* (2009); JANNA MALAMUD SMITH, *PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE* (1997); ROBERT ELLIS SMITH, *BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET* (2000).

<sup>277</sup> By "public figure" I mean, consistent with American libel law, a prominent person. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967). The Court has spoken of public figures as including people who attain prominence "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention." *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 343 (1974). The person often wields public or private authority or influence, at least obliquely; celebrities, for example, can set fashion trends. See *id.* at 345 (stating that public figures "assume[] roles of especial prominence in the affairs of society" and "invite attention and comment"; involuntary public figures are "exceedingly rare").

<sup>278</sup> See David Eady, *Launch of New "Centre for Law, Justice & Journalism*, speech delivered at City University, London, March 10, 2010, <http://www.judiciary.gov.uk/NR/rdonlyres/A49A9837-1D07-496D-934B-2379879EFAD8/0/eadyjcityuniversity10032010.pdf>, at 11 ("most applications [for injunctions] in privacy cases concern sexual shenanigans of one sort or another where there is no public interest argument available") (last visited April 3, 2010).

<sup>279</sup> Given Justice Eady's pivotal role in developing British privacy law, it is appropriate to canvass his publicly stated views generally, and not just his reasoning in *Mosley*.

## 1. Public Curiosity

Max Mosley erred in asserting that “[n]o reasonable adult will ever object to (or even be interested in) what others do in their bedrooms provided it is consensual, lawful and in private.”<sup>280</sup> On the contrary, many people are intensely curious about the lives of others, including their sex lives. Edward Shils writes, “Few indeed are those who will adamantly refuse to hear about the personal private affairs of others whom they know or know about.”<sup>281</sup> In C. Edwin Baker’s view, “Gossip is an essential means of communication.”<sup>282</sup> Knowledge of the intimate facets of others’ lives may help individuals understand their own lives and their place in society.<sup>283</sup> The philosopher Ronald de Sousa writes of “our appalling ignorance of how people really work,” and notes that the Kinsey Report discovered that most people considered themselves abnormal; they seemingly believed that “most other people never did what they themselves mostly did.”<sup>284</sup>

*Mosley* indicates that what interests the public does not automatically constitute a matter of the public interest.<sup>285</sup> More is required. *Von Hannover* likewise states that photos and articles whose “sole purpose” is “to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life[] cannot be deemed to contribute to any debate of general interest to society.”<sup>286</sup> Public curiosity ought to be kept in mind as a factor that helps explain the appetite for news of sex scandals, but, illimitable as it is, it cannot constitute a public interest that justifies publication of invasive material.

The other five rationales for disclosing information about someone’s sex life relate to misbehavior of some sort. What level of misbehavior? In *McKennitt v. Ash*, Justice Eady asserted that “a very high degree of misbehavior must be demonstrated”<sup>287</sup>

<sup>280</sup> Max Mosley, *My Sex Life Is of Interest to No One But This Squalid Industry*, GUARDIAN, Nov. 12, 2008, <http://www.guardian.co.uk/commentisfree/2008/nov/12/comment-mosley-dacre-press-privacy> (last visited April 3, 2010). As one commentator observed, “This is an uplifting sentiment but it is, as a factual matter, false. People were fascinated by Mr. Mosley’s doings, whether you measure it through newsstand sales or internet search requests for the video. If Mr. Mosley were correct, then the category of adults called ‘reasonable’ would be dangerously narrow—certainly too narrow to base a democracy on.” Christopher Caldwell, *Righteous Peeping Toms*, FINANCIAL TIMES, Nov. 15, 2008, <http://www.ft.com/cms/3ab74a7e-b281-11dd-bbc9-0000779fd18c.html> (last visited April 3, 2010).

<sup>281</sup> Shils, *supra* note 274, at 304.

<sup>282</sup> Baker, *supra* note 260, at 261.

<sup>283</sup> Aaron Ben-Ze’ev, *The Vindication of Gossip*, in GOOD GOSSIP (Robert F. Goodman & Aaron Ben-Ze’ev eds.) 15 (1994).

<sup>284</sup> Ronald de Sousa, *In Praise of Gossip: Indiscretion as a Saintly Virtue*, in GOOD GOSSIP (Robert F. Goodman & Aaron Ben-Ze’ev eds.) 32, 31 (1994). See *Haynes v. Knopf*, 8 F.3d 1222, 1234-1235 (7th Cir. 1993) (stating that “[t]he public has a legitimate interest in sexuality”) (Posner, J.).

<sup>285</sup> See *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 114.

<sup>286</sup> *Von Hannover* ¶ 65.

<sup>287</sup> *McKennitt v. Ash*, [2005] EWHC 3003 (Q.B.) ¶ 98.



in order to trigger a public-interest defense—an assertion that prompted the Appeal Court to say, “As an entirely general statement, divorced from its context, that may well go too far.”<sup>288</sup> It remains unclear just how great the misbehavior must be for the Article 10 right to free expression to trump the Article 8 right to privacy in a given set of circumstances.

## 2. Criminality or Abuse of Power

The easiest case for revealing a public figure’s sexual activities arises when the activities give rise to a crime or an abuse of power. The public figure may be sexually involved with a minor, breaching the criminal law. The person may be involved with or pursuing subordinates, raising possibilities of pressure for sexual favors or on-the-job rewards for inappropriate reasons.<sup>289</sup> The public figure may be abusing official or corporate resources, or neglecting his or her regular duties, or sharing inside information with a romantic partner, or risking blackmail.<sup>290</sup>

*Mosley* did not raise issues of abuse of power. Given the probable presence of a public-interest defense, information showing potential abuse of power on the part of public officials ought to be publishable under *Mosley*.<sup>291</sup> It would be the sort of political speech that the Meiklejohn approach enthrones.

It is unclear whether the same would be true for public figures outside of government. *Browne v. Associated Newspapers* suggests that no reasonable expectation of privacy may exist where a claimant has misused company resources.<sup>292</sup> For its part, the European Court of Human Rights has said that political figures “inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large,”<sup>293</sup> but the Court has not yet applied the same standard to non-political public figures.<sup>294</sup> One commentator observes that the European Court takes the approach of “recognising that there is an increased public interest in the lives of public figures but then defining ‘public figure’ narrowly.”<sup>295</sup> As Stephen Whittle and Glenda Cooper observe, however, “[T]he public interest is not confined to the state’s institutions, but also to private corporations and to voluntary organizations which—as nearly all do—require

<sup>288</sup> *Ash v. McKennitt*, [2006] EWCA Civ. 1714 ¶ 69.

<sup>289</sup> *Cf. Peckham v. Boston Herald Inc.*, 719 N.E.2d 888, 893 (Mass. App. 1999) (referring to “a workplace liaison between an employee and her superior” as a topic “of general modern public interest”).

<sup>290</sup> See Note, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 884, 884 n.122 (1992).

<sup>291</sup> See *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 15. See also *X and Y v. Persons Unknown*, [2006] EWHC 2783 (QB), ¶ 25 (noting that proposed revelations did not reveal “criminal misconduct or anti-social behaviour”) (Eady, J.).

<sup>292</sup> *Browne v. Associated Newspapers Ltd.*, [2007] EWHC 202 (Q.B.) ¶¶ 43, 61.

<sup>293</sup> *Craxi v. Italy*, app. no. 25337/94 (Eur. Ct. H. R. 2003) ¶ 64.

<sup>294</sup> N. A. Moreham, *The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination*, 2008 E.H.R.L.R. 44, 62.

<sup>295</sup> *Id.* at 61.

the public's trust."<sup>296</sup> Accordingly, Article 10 ought to justify sexual revelations that disclose criminality or abuse of power on the part of public figures, and not just on the part of public officials.

### 3. Hypocrisy

Before the Nazi allegations unraveled, *News of the World* cited hypocrisy as the justification for its coverage of Mosley: "In public he rejects father's evil past, but secretly he plays Nazi sex games...."<sup>297</sup> For his part, Mosley said he would have resigned from FIA "the same day" had he been caught driving while intoxicated, because it would have conflicted with his position as an advocate of safe driving.<sup>298</sup> Elsewhere, however, Mosley doubted that the press ought to have a right to expose a bishop who fathers a child, assuming that it did not affect his work.<sup>299</sup>

Several British cases suggest that a news outlet may be able to defend itself in a privacy case by citing the public interest in spotlighting hypocrisy or disingenuousness in public figures. Naomi Campbell conceded that her drug addiction was not private information because she had lied about it in the past.<sup>300</sup> Lord Nicholls wrote in that case, "[W]here a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight."<sup>301</sup> Elsewhere, however, Lord Buxton suggested that more than a casual untruth is required: "[I]t was the fact that Ms. Campbell had not merely said that she did not take drugs but had gone out of her way to emphasise that she was in that respect unlike other fashion models that deprived otherwise private material of protection."<sup>302</sup> In another case, a court said, in ruling that a newspaper had violated Article 8 in publishing excerpts of Prince Charles's journal, that "[t]here was no question of exposure of any kind of wrongdoing or of hypocrisy"<sup>303</sup>—suggesting that the act might have been lawful had it revealed hypocrisy. The British Press Complaints Commission's Code of Practice similarly allows otherwise-forbidden actions, such as clandestine recording, where the public interest is implicated, including "[p]reventing the public from being misled by an action or statement of an individual or organisation."<sup>304</sup>

<sup>296</sup> WHITTLE & COOPER, *supra* note 103, at 76.

<sup>297</sup> Mosley v. News Group Newspapers Ltd., [2008] EWHC 1777 (Q.B.) ¶ 27.

<sup>298</sup> Neville Thurlbeck, *My Nazi Orgy with FI Boss Max Mosley*, NEWS OF THE WORLD, April 6, 2008.

<sup>299</sup> Culture, Media, and Sport Committee, *supra* note 62, at 62-63, Q146 (testimony of Max Mosley).

<sup>300</sup> Campbell v. MGN Ltd., [2004] UKHL 22 ¶ 24 (Lord Nicholls), ¶¶ 42, 58 (Lord Hoffmann).

<sup>301</sup> *Id.*, ¶ 24 (Lord Nicholls). See also *id.* ¶ 58 (Lord Hoffmann), ¶¶ 82, 117 (Lord Hope of Craighead), ¶¶ 151-152 (Baroness Hale of Richmond); DFT v. TFD, [2010] EWHC 2335 (Q.B.), ¶ 24.

<sup>302</sup> Ash v. McKennitt, [2006] EWCA Civ. 1714 ¶ 69 (Lord Buxton).

<sup>303</sup> HRH The Prince of Wales v. Associated Newspapers Ltd., [2006] EWHC 522 (Ch) ¶ 137.

<sup>304</sup> Press Complaints Commission, *Editors' Code of Practice*, [http://www.pcc.org.uk/assets/111/Code\\_A4\\_version\\_2009.pdf](http://www.pcc.org.uk/assets/111/Code_A4_version_2009.pdf) (last visited April 3, 2010). On the Commission, see

In a 1977 case, *Woodward v. Hutchins*, Tom Jones, Englebert Humperdinck, and Gilbert O'Sullivan sued when their former press agent published damning articles about their private lives in the *Daily Mirror*.<sup>305</sup> The singers sought an injunction against further articles. The lower court granted it; the Court of Appeal overturned the ruling. One of the appellate judges noted that the singers had sought positive publicity for their private lives, and added: "If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them.... As there should be 'truth in advertising,' so there should be truth in publicity. The public should not be misled."<sup>306</sup> *Woodward*, however, has been criticized,<sup>307</sup> and other cases have rejected the notion of "zones" of privacy—i.e., the notion that when one publicly addresses a topic, privacy is thereby waived regarding other matters related to the topic.<sup>308</sup>

In *Mosley*, Justice Eady spoke of a public interest in "prevent[ing] the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)."<sup>309</sup> He said in a 2002 speech: "[I]f a politician or cleric holds forth on standards of personal morality, and is shown not to apply them in his or her own public life, the element of hypocrisy justifies exposure ... so that the public are not misled."<sup>310</sup> In *McKennitt v. Ash*, however, he referred to the correcting-the-record justification with a caveat: failing to live up to one's publicly stated standards need not implicate the public interest. "The mere fact that a 'celebrity' falls short from time to time, like everyone else, could not possibly justify exposure, in the supposed public interest, of every peccadillo or foible cropping up in day-to-day life."<sup>311</sup> Perhaps surprisingly, Justice Eady told an interviewer that a news

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Carnegie, *supra* note 81, at 324-327; Press Complaints Commission, *About the PCC*, <http://www.pcc.org.uk/about/index.html> (last visited April 3, 2010).

<sup>305</sup> *Woodward v. Hutchins*, [1977] 1 WLR 760.

<sup>306</sup> *Woodward* (judgment of Lord Denning). See also *id.* (judgment of Bridge, L.J.) ("It seems to me that those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light."); *Murray v. Express Newspapers*, [2008] EWCA Civ. 446 ¶ 38 (noting as relevant whether parents had sought publicity or privacy for their young son).

<sup>307</sup> *Ash*, [2006] EWCA Civ. 1714 ¶¶ 33-36; WACKS, *supra* note 71, at 99-100, 122.

<sup>308</sup> *Egeland & Hanseid v. Norway*, app. no. 34438/04 (Eur. Ct. H.R. 2009) ¶ 62 ("[T]he fact that B had cooperated with the press on previous occasions could not serve as an argument for depriving her of protection against the publication by the press of the photographs in question."); *Ash*, [2006] EWCA Civ. 1714 ¶ 55 ("If information is private property, it is for me to decide how much of it should be published. The 'zone' argument completely undermines that reasonable expectation of privacy."); *X & Y v. Persons Unknown*, [2006] EWHC 2783 (Q.B.) ¶ 65 ("Individuals appear to be permitted some degree of control over how much information is released.").

<sup>309</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 131. See also *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 31; *X & Y*, [2006] EWHC 2783 (Q.B.) ¶ 49.

<sup>310</sup> Eady, *supra* note 76. See also *CC v. AB*, [2006] EWHC 3083 (Q.B.) ¶ 52.

<sup>311</sup> *McKennitt v. Ash*, [2005] EWHC 3003 (Q.B.) ¶ 97.

outlet can legitimately report on otherwise private matters if justified by hypocrisy across generations—if, for example, a prominent politician takes a strong anti-narcotics position and his son is arrested for possession of illegal drugs. Children, the judge said, “in those circumstances are fair game, even if it’s cruel.”<sup>312</sup>

In sum, it appears that Justice Eady would find a public-interest justification where hypocrisy is flagrant, such as in the case of a moralizing yet promiscuous politician or preacher, but not necessarily where the hypocrisy is subtler. The distinction seems valid. If a celebrity is photographed or interviewed with her husband and then is found to be unfaithful, no hypocrisy results. If, by contrast, she flaunts her purportedly perfect marriage, then infidelity could give rise to charges of hypocrisy. As for hypocrisy once removed—a public figure’s child who contravenes the public figure’s well-known stance on an issue—Justice Eady for once understates the value of privacy. Individuals should be judged by their behavior, not by that of their children. And a minor’s privacy should not be diminished simply because a parent is a public figure.<sup>313</sup>

#### 4. Judgment and Reliability

Publishing information about public figures’ private lives may be justified on other grounds as well. In *CC v. AB*, Justice Eady referred to the John Profumo scandal: “The fact that the then Minister for War had a mistress in common with a Russian diplomat or defence attaché, at the height of the cold war, would plainly be of legitimate public interest.”<sup>314</sup> Profumo’s recklessness may have threatened national security, making it an easy case. What of infidelity as marker of unreliability? The former Archbishop of Canterbury, Lord Carey, wrote after Justice Eady issued his *Mosley* ruling, “If a politician, a judge, a bishop or any public figure cannot keep their promises to a wife, husband, etc., how can they be trusted to honour pledges to their constituencies and people they serve?”<sup>315</sup> Compulsive sexual activity might also cast doubt on a public figure’s judgment.<sup>316</sup>

*Mosley* does not address judgment and reliability, other than in noting the “recklessness” of Mosley’s behavior—which casts doubt on his judgment and reliability, but Justice Eady did not factor this into his public-interest calculus. Of course, Mosley’s authority was private; Justice Eady might, as suggested above, accord greater privacy to those who wield unofficial power than to those in government. *Mosley* thus may suggest that the judgment and reliability of a prominent figure who holds no official position are

<sup>312</sup> WHITTLE & COOPER, *supra* note 103, at 21. *Cf.* *Kapellas v. Kofman*, 459 P.2d 912, 924 (Cal. 1969) (stating that the loss of privacy of political candidates’ children “is one of the costs of the retention of a free marketplace of ideas”).

<sup>313</sup> See *Murray v. Express Newspapers*, [2008] EWCA Civ. 446.

<sup>314</sup> *CC*, [2006] EWHC 3083 (Q.B.) ¶ 37. See generally ANATOMY OF A SCANDAL: A STUDY OF THE PROFUMO AFFAIR (1963).

<sup>315</sup> *Mosley Privacy Win “Endangers Free Speech,”* BELFAST TELEGRAPH, July 27, 2008, <http://www.belfasttelegraph.co.uk/breaking-news/world/europe/mosley-privacy-win-endangers-free-speech-13922164.html> (last visited April 3, 2010).

<sup>316</sup> See Note, *supra* note 290, at 883 n.118.

not the press's concern. If, by contrast, Justice Eady would not draw a line between public and private authority, then he would seem to believe that the publication of sexual activities cannot be justified on the grounds that they illuminate a public figure's judgment and reliability, unless perhaps the activities threaten national interests. The better approach would recognize a public-interest justification whenever sexual activities cast doubt on the reliability or judgment of anyone wielding public or private power. Note that this rationale, unlike some of the others, would not apply to, for example, prominent actors unless they exercised authority, such as heading a film studio. The public interest does not extend to the judgment and reliability of what might be called mere celebrities, absent a showing of criminality, hypocrisy, or one of the other factors discussed here.

### 5. Role Models

Other rationales may extend to mere celebrities, though, most notably the rationale that they act as role models.<sup>317</sup> The failings of role models can be newsworthy, even aside from any intimation of hypocrisy.<sup>318</sup> In 2009, many commentators condemned President Obama's nomination of an overweight woman, Regina M. Benjamin, to be Surgeon General.<sup>319</sup> The Surgeon General is expected to model as well as advocate a healthy lifestyle. Tiger Woods, too, was charged with betraying his position as a role model, a position he had publicly embraced.<sup>320</sup> In *A v. B*, the judge said, "Footballers are role models for young people and undesirable behavior on their part can set an unfortunate example."<sup>321</sup>

It should be noted that who constitutes a role model varies from culture to culture. In its 2010 report *Press Standards, Privacy and Libel*, the House of Commons Culture, Media, and Sport Committee recounts visiting journalists at *La Vanguardia* in Spain. They said that they would publish an article the extramarital affair of a soccer star, but not one about that of a politician, based partly on reader interest.<sup>322</sup> Soccer stars, it seems, are role models there in a way that political figures are not.

<sup>317</sup> See Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 395-396 (1978) ("Gossip columns recount the personal lives of wealthy and successful people whose tastes and habits offer models—that is, yield information—to the ordinary person making consumption, career, and other decisions. \* \* \* [T]he lives of the poor do not provide as much useful information in patterning our own lives.").

<sup>318</sup> LAW OF PRIVACY AND THE MEDIA, *supra* note 96, at 361-362.

<sup>319</sup> Susan Donaldson James, *Critics Slam Overweight Surgeon General Pick, Regina Benjamin*, ABC NEWS, July 21, 2009, <http://abcnews.go.com/Health/story?id=8129947&page=1> (last visited April 3, 2010).

<sup>320</sup> Woods once said, "I think it's an honour to be a role model." Roy Greenslade, *Tiger Woods Cannot Plead Privacy Now to Escape Media Storm*, LONDON EVENING STANDARD, Dec. 12, 2009, <http://www.thisislondon.co.uk/markets/article-23781504-tiger-woods-cannot-plead-privacy-now-to-escape-media-storm.do> (last visited April 3, 2010).

<sup>321</sup> *A v. B* PLC, [2002] EWCA Civ. 337, [2002] 1 FLR 1021, ¶ 43 (vi). See also *id.* ¶ 11 (xii).

<sup>322</sup> Culture, Media, and Sport Committee, *supra* note 65, at 13 ¶ 12.

Justice Eady addressed the issue in *Mosley* only obliquely, by saying that the role-model argument was an unhelpful generalization.<sup>323</sup> Perhaps he did not confront the issue more directly because Mosley did not function as a role model; he was not held up as someone who could “show others how their lives should be lived.”<sup>324</sup> In his 2002 speech, however, Justice Eady disputed the idea that role models should expect less privacy than others whatsoever. “I do not believe that people should be classified as ‘role models’ ... if that means that the law does not apply equally to them.”<sup>325</sup> In his view,

Because someone happens to play football or snooker, or darts, is it right that he should have a judicially imposed label which requires him to behave with the rectitude of a bishop? ... [A]m I being unduly naïve or flippant to suggest that, if a football or darts player is truly setting an “unfortunate example” to young people by his sexual behaviour, this is an argument against rather than in favour of giving it wider publicity?<sup>326</sup>

But this misses the point. A public figure who misbehaves is shown to be unworthy of the position of role model. By policing the behavior of role models, the press helps ensure that that public’s respect is not misdirected. Accordingly, the public interest in a privacy case ought to extend to reporting the unworthy deeds of role models.

## 6. Public Morality

In denouncing Justice Eady, Paul Dacre spoke of the tradition of “public shaming,” and added: “For hundreds of years, the press has played a role in that process. It has the freedom to identify those who have offended public standards of decency—the very standards its readers believe in—and hold the transgressors up to public condemnation.”<sup>327</sup>

Gossip and condemnation can serve a number of purposes. They can reaffirm the dominant morality or begin the process of changing it.<sup>328</sup> In the words of one

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<sup>323</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.), ¶ 12.

<sup>324</sup> WHITTLE & COOPER, *supra* note 103, at 79.

<sup>325</sup> Eady, *supra* note 76. Justice Eady made the same point in a 2009 speech. Eady, *supra* note 3, at 15.

<sup>326</sup> Eady, *supra* note 76. See also *CC v. AB*, [2006] EWHC 3083 (Q.B.), ¶¶ 51-52; David Howarth, *Privacy, Confidentiality and the Cult of Celebrity*, 61 CAMBRIDGE L. J. 264, 267 (2002) (“[H]ow does it *improve* public morals to inform young men that someone they are allegedly likely to emulate is an adulterer?”) (emphasis in original).

<sup>327</sup> Dacre, *supra* note 66. Tom Crone, legal manager of News International, similarly said, “[Invasion-of-privacy] judgments risk outlawing the traditional role of the media in exposing the moral shortcomings of those who wield power. This is an unhealthy development in any democracy.” Gibb, *supra* note 55.

<sup>328</sup> Baker, *supra* note 260, at 262; Roy F. Baumeister, Liqing Zhang, & Kathleen D. Vohs, *Gossip as Cultural Learning*, 8(2) REV. OF GENERAL PSYCHOLOGY 111, 113 (2004); James Lull & Stephen Hinerman, *The Search for Scandal*, in MEDIA SCANDALS: MORALITY AND DESIRE IN THE

ethnographer, “Gossip is a primary metacultural tool, an activity through which people examine and discuss the rules they espouse.”<sup>329</sup> Gossip and condemnation can also help police the moral code and thereby demonstrate who can be trusted.<sup>330</sup> They can help unify a group.<sup>331</sup> They can facilitate cultural learning of the moral code: “By hearing about the misadventures of others, we may not have to endure costs to ourselves because we will have successfully avoided making the mistake they made.”<sup>332</sup> They can constitute a “widely practiced method of participation in collective life” that is “also a relatively democratically distributed form of power to participate, and it is often used against people in positions of authority, sometimes bringing down or at least humbling them.”<sup>333</sup> Some evolutionary psychologists argue that scandal news served the survival interests of our ancestors: “The content of sensational news is often precisely what one needs to keep track of persons with whom one might be in competition for resources.”<sup>334</sup> For all of these reasons, one could argue that news of public figures’ breaches of morality qualify as “issues which bear upon our common life,” and thus satisfy even Meiklejohn’s criteria.

Some commentators, however, maintain that matters of morality are irrelevant in public life. In a thoughtful monograph on the British news media and privacy, Stephen Whittle and Glenda Cooper argue that public virtue and private morality are generally unrelated.<sup>335</sup> In their view,

[A]n individual is to be judged for his/her public acts, not private ones. In this case, “private” should be taken to mean all issues to do with personal relations, personal communications, beliefs of all kinds, past affiliations—always assuming these are within the law. However much these should appear to others, even to an overwhelming majority, to be deviant, or immoral, or bizarre, the test is always the public statements, policies and above all actions.<sup>336</sup>

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POPULAR CULTURE MARKETPLACE (James Lull & Stephen Hinerman eds.) 3, 5 (1997); John B. Thompson, *Scandal and Social Theory*, in MEDIA SCANDALS: MORALITY AND DESIRE IN THE POPULAR CULTURE MARKETPLACE (James Lull & Stephen Hinerman eds.) 34, 41 (1997).

<sup>329</sup> JOHN BEARD HAVILAND, GOSSIP, REPUTATION, AND KNOWLEDGE IN ZINACANTAN 170 (1977).

<sup>330</sup> Baumeister, Zhang, & Vohs, *supra* note 328, at 115; Frank T. McAndrew, *Can Gossip Be Good?*, 19(5) SCI. AM. MIND 26 (Oct.-Nov. 2008).

<sup>331</sup> Baumeister, Zhang, & Vohs, *supra* note 328, at 112; Robert F. Goodman, introduction, GOOD GOSSIP (Robert F. Goodman & Aaron Ben-Ze’ev eds.) 3 (1994); Max Gluckman, *Gossip and Scandal*, 4(3) CURRENT ANTHROPOLOGY 307, 308 (1963).

<sup>332</sup> Baumeister, Zhang, & Vohs, *supra* note 328, at 112.

<sup>333</sup> Baker, *supra* note 260, at 262. *See generally* Steve Cross and Jo Littler, *Celebrity and Schadenfreude*, 24 CULTURAL STUDIES 395-417 (2010).

<sup>334</sup> Hank Davis & S. Lyndsay McLeod, *Why Humans Value Sensational News: An Evolutionary Perspective*, 24 EVOLUTION & HUMAN BEHAVIOR 208, 214 (2003). *See also* Posner, *supra* note 317, at 395-396 (“Gossip columns open people’s eyes to opportunities and dangers; they are genuinely informational.”).

<sup>335</sup> WHITTLE & COOPER, *supra* note 103, at 67, 77.

<sup>336</sup> *Id.* at 77 (2009). *Cf.* LARRY SABATO, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS 3 (1991) (lamenting that “scandal coverage is no longer

One cannot assume, in their view, that a public figure's participation in a sadomasochistic relationship or belief in UFOs (their examples) reflect on the person's behavior in office.<sup>337</sup>

But such a rule goes too far. What of the authority figure, whether public or private, who, unlike Mosley, does engage in Nazi-themed sex play? Justice Eady indicated that at least some disclosure would be appropriate in such a case.<sup>338</sup> What of a corporate executive who collects Nazi memorabilia and holds birthday parties for Hitler? Ralph Engelstad, who ran the Imperial Palace Hotel and Casino in Las Vegas, was ordered to pay \$1.5 million to the Nevada Gaming Control Board in 1989 after word got out that he had a private room in his casino filled with Nazi-related objects, including a painting of himself in a Third Reich uniform, and that he had held parties to mark Hitler's birthday.<sup>339</sup> What of a federal judge who posts sexually explicit material on his personal website—as Chief Judge Alex Kozinski of the Ninth Circuit did? Did the Judicial Council exceed its proper authority in reprimanding him in 2009?<sup>340</sup> What of French Culture Minister Frederic Mitterrand, who in 2009 was pressured (unsuccessfully) to resign after he seemingly disclosed having had sex with young boys in Thailand?<sup>341</sup> Such cases cast doubt on Whittle and Cooper's Eady-like assertion that “[t]here is no longer a consensus on what constitutes ‘immoral’ behaviour.”<sup>342</sup>

The state has traditionally taken a stance on many matters of morality. Indeed, Article 8(2) of the European Convention on Human Rights expressly states that a public authority may lawfully interfere with the right of privacy “for the protection of health or morals,” a provision that Justice Eady did not address in *Mosley*.<sup>343</sup> Most Britons disapprove of extramarital sex, as did the judges in *Theakston* and *A v. B*. Many consider adultery to be—categories that Justice Eady suggested *would* create a matter of public interest, such that it could be revealed despite claims of privacy—“disgraceful[]”<sup>344</sup> and

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restricted to ... inadequacy or malfeasance in a *public* role; it extends to purely *private* misbehavior”) (emphasis in original).

<sup>337</sup> WHITTLE & COOPER, *supra* note 103, at 77.

<sup>338</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶ 122. As noted above, Justice Eady did not clearly indicate whether publication would be justified, or merely notification of Mosley's superiors.

<sup>339</sup> Robert Reinhold, *Nevada Draws the Line: No Hitler in the Casinos*, N.Y. TIMES, April 3, 1989, at A10.

<sup>340</sup> In re: Complaint of Judicial Misconduct, Judicial Council of the Third Circuit, mem. (June 5, 2009), <http://www.ca3.uscourts.gov/opinarch/089050p.pdf> (last visited April 3, 2010).

<sup>341</sup> Angelique Chrisafis, *French Culture Minister Denies Paying for Underage Sex in Thailand*, GUARDIAN, Oct. 8, 2009, <http://www.guardian.co.uk/world/2009/oct/08/france> (last visited April 3, 2010). Mitterrand maintained that when he wrote, in his autobiography, of sex in Thailand with “young boys,” he did not mean minors. *Id.*

<sup>342</sup> WHITTLE & COOPER, *supra* note 103, at 78.

<sup>343</sup> European Convention on Human Rights, Art. 8(2).

<sup>344</sup> *McKennitt v. Ash*, [2005] EWHC 3003 (Q.B.) ¶ 96.



“anti-social behaviour.”<sup>345</sup> According to British divorce lawyers, adultery remains the major cause of divorce.<sup>346</sup> In a 1994 survey, 90 percent of Britons disapproved of extramarital sex, as did 94 percent of Americans.<sup>347</sup> For comparison’s sake, just 18 percent of Britons in 2006 said that homosexual relations are always wrong.<sup>348</sup>

In *Mosley*, Justice Eady said that adulterous and even “depraved” or “perverted” behavior—he embedded the words in quotation marks—did not justify the *News of the World*’s actions.<sup>349</sup> In a speech given in 2009, Justice Eady asserted that “family life” under Article 8 now covers “a ‘broad church of sexual enthusiasms,’ including “[a]dulterous and even sadistic activities.”<sup>350</sup> While warning in *Mosley* that judges must not be swayed by “moral or religious teaching,”<sup>351</sup> however, Justice Eady was applying his own morality, a morality in which consensual sexual relationships are private regardless of whether they are marital or extramarital, whether they are paid or unpaid, and whether they involve single partners or multiple partners.<sup>352</sup> This is a moral judgment. It is not somehow supra-moral. Nor is it a least-common-denominator morality, acceptable to all; it is a particular morality that many others do not share. Justice Eady did not merely express this morality as one of a range of options, moreover; he imposed it on others by denying them the information—the sort of material published in the *News of the World*—with which they could make judgments applying different moral templates. The court essentially imposed a libertarian code to supplant the more conservative code that dominates many sectors of the society and some sectors of the press. *Mosley* thus leaves no room for considerations of any more restrictive form of public morality.

Here above all, Justice Eady applied an unduly constricted vision of the public interest. The press ought to be free to provide information with which the public can make moral judgments on public figures.

<sup>345</sup> X & Y v. Persons Unknown, [2006] EWHC 2783 (Q.B.) ¶ 25.

<sup>346</sup> Clare Dyer, *Mid-Life Crises Pushing Couples to Divorce, Survey of Lawyers Finds*, GUARDIAN, Feb. 25, 2008, <http://www.guardian.co.uk/lifeandstyle/2008/feb/25/familyandrelationships.law> (last visited April 3, 2010).

<sup>347</sup> Jacqueline Scott, *Changing Attitudes to Sexual Morality: A Cross-National Comparison*, 32 SOCIOLOGY 815, 833, Table 5 (1998).

<sup>348</sup> Simon Duncan & Miranda Phillips, *New Families? Tradition and Change in Modern Relationships*, in NATIONAL CENTRE FOR SOCIAL RESEARCH, BRITISH SOCIAL ATTITUDES 19 (Alison Park et al. eds.) (24th ed. 2008).

<sup>349</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.) ¶¶ 124, 128.

<sup>350</sup> Eady, *supra* note 3, at 3.

<sup>351</sup> *Mosley*, [2008] EWHC 1777 ¶ 128.

<sup>352</sup> See Stephen Glover, *No-One Has Voted for a Privacy Law—But That Is Exactly What We’re Getting*, MAIL, July 25, 2008 (“In effect, the judge is applying his own moral norms to a newspaper, and determining on subjective moral, rather than strictly legal, grounds what may, and may not, be published.”), <http://www.dailymail.co.uk/news/article-1038479/STEPHEN-GLOVER-No-voted-privacy-law--exactly-getting.html> (last visited April 3, 2010).

## 7. Proportionality

Yet as Justice Eady stressed in *Mosley*, proportionality remains key.<sup>353</sup> Abuse of power, hypocrisy, breach of public morality, or some other factor in a given case may justify some loss of privacy, but nothing justifies a total loss. The disclosure of private information, in text, photographs, and videos, must be proportionate. As one commentator observes, it may be in the public interest to disclose that a Cabinet Minister is neglecting his duties because of an affair, but not to disclose the particulars of the couple's sexual activities.<sup>354</sup> Another writes: "[E]ven in the case of the hypocritical politician there may be a point beyond which [journalists] cannot go without infringing on the politician's right to privacy or the right to privacy of his family."<sup>355</sup>

The *News of the World* would properly have been liable for invading Mosley's privacy had it published a graphic description of the orgy or posted a sexually explicit video.<sup>356</sup> But the newspaper neither published nor posted anything sexually explicit. As noted above, Justice Eady wrote in his injunction opinion, "The very brief extracts which I was shown [i.e., the website video, excerpted from the hours-long video] seemed to consist mainly of people spanking each other's bottoms."<sup>357</sup> No genitalia were visible.<sup>358</sup> To be sure, the images (still and moving) raise a closer question than the articles. But under the circumstances, the newspaper acted proportionately, given Mosley's reduced expectation of privacy and the public interest in revealing breaches of public morality.

## C. CLARITY

As a member of the Calcutt Committee investigating privacy and the press, David Eady argued that Parliament ought to adopt a privacy statute rather than leave the matter up to judges.<sup>359</sup> Later, in a speech in 2002, he argued that the approach of

<sup>353</sup> See, e.g., *Mosley*, [2008] EWHC 1777 ¶ 14.

<sup>354</sup> Cloonan, *supra* note 75, at 76. See also Phillipson & Fenwick, *supra* note 96, at 690.

<sup>355</sup> Hon. Mrs. Justice Arden DBE, *The Future of the Law of Privacy*, 9 K.C.L.J. 1, 16 (1998-1999). See also LAW OF PRIVACY AND THE MEDIA, *supra* note 96, at 364-365.

<sup>356</sup> Cf. *Haynes v. Knopf*, 8 F.3d 1222, 1232 (7th Cir. 1993) (suggesting that a plaintiff might prevail against a defendant who had "publish[ed] a photo of a couple making love"); *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998) (stating that "[i]t is difficult if not impossible to articulate a social value that will be advanced by dissemination" of a sex video featuring Bret Michaels and Pamela Lee Anderson).

<sup>357</sup> *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.) ¶ 4.

<sup>358</sup> *Id.*

<sup>359</sup> See generally Eady, *supra* note 68. In a 2009 speech, however, Justice Eady said that a statute would still have left a great deal of leeway for judges: "It would be hopeless to try to get down to the level of micro-management and try to anticipate every situation that is likely to come before the courts.... No legislator could possibly think them up in advance. So, however it is done, there is no other practical way of developing a means of protecting Article 8 rights than by leaving judges to weigh up the competing interests of the parties concerned." Eady, *supra* note 56, at 5. See also Eady, *supra* note 278, at 7 ("No Parliamentary draftsman could have dreamt up in

incorporating the ECHR through the Human Rights Act had created too much uncertainty: “It is seriously undermining the rule of law if citizens find themselves in the position of simply having to ask the lawyers ‘What do you think we can get away with?’”<sup>360</sup> Conflicts between free expression and privacy invariably require case-by-case judging, “but one does need the assistance, I would suggest, of clear guidelines and principles to point the way.”<sup>361</sup> He went on to say that the “public interest” in particular must be defined. “Even if it does not have the sanction of the legislature, there must be some degree of clarity. It should never depend on what the judge had for breakfast.”<sup>362</sup> In a 2010 speech, Justice Eady no longer called for Parliament to act, but he did speak of “unpredictability and uncertainty” in privacy law, and acknowledged that “it inhibits freedom of action.”<sup>363</sup> He added: “[I]t may be quite difficult to anticipate the assessment the judge will make. There is quite often no right or wrong answer. That is integral to the process.”<sup>364</sup>

As Justice Eady acknowledged, British privacy law lacks clarity. Kelvin MacKenzie, former editor of *The Sun*, told *The Times*, “[T]he difficulty is that nobody knows where the line is before publication.”<sup>365</sup> With unpredictable outcomes, media attorney Mark Stephens said, the privacy test “chill[s] investigative journalism because if you get your decision on public interest wrong you are going to pay a hefty price.”<sup>366</sup> Consider the complexity of the analysis now required of journalists, according to the *International Libel and Privacy Handbook*:

It is suggested that a prudent approach by the media would involve identifying each element of arguably private information in the proposed publication; deciding whether in relation to each such element the subject of the article would have a reasonable expectation of privacy; considering whether in the case of any such element there is a public interest justification for the proposed publication (such as the correction of a false denial or disclosure of crime or other serious wrongdoing) and

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advance the facts of the *Mosley* case—or at least, if he did, he should have been doing it in his own time.”).

<sup>360</sup> Eady, *supra* note 76.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> Eady, *supra* note 278, at 5.

<sup>364</sup> *Id.* at 6. He added: “I understand, for example, that one or two people even disagreed with the result in the *Mosley* trial.” *Id.* Cf. *JIH v. News Group Newspapers Ltd.*, [2011] EWCA Civ. 42 (Ct. App.) ¶ 3 (stating that a court’s task in balancing privacy and free expression “can involve a significant degree of subjectivity”).

<sup>365</sup> Dan Sabbagh, *Max Mosley Case Is Bad News for Tabloid Editors*, *TIMES*, July 25, 2008, [http://business.timesonline.co.uk/tol/business/industry\\_sectors/media/article4393267.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/media/article4393267.ece) (last visited April 3, 2010).

<sup>366</sup> *Mosley Wins Court Case Over Orgy*, *supra* note 53. See also Culture, Media, and Sport Committee, *supra* note 65, at 24 ¶ 62. The Parliamentary committee opposed a statute, arguing that, perhaps with “some considerable time,” privacy law would “become clearer.” *Id.* at 25 ¶ 67.

in relation to any element where there is no public interest justification weigh the value of the free speech right against the value of the privacy right. In the case of photographs, which have a particularly intrusive quality, these should be considered separately from the story by reference to the above criteria.<sup>367</sup>

The judgments are many and subjective. Little wonder that in the aftermath of *Mosley*, newspapers settled privacy cases brought by Sienna Miller, Madonna, and Ashley Cole, according to *The Guardian*.<sup>368</sup>

The European Court of Human Rights has said that “national law must be formulated with sufficient precision to enable the persons concerned—if need be with appropriate legal advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>369</sup> British privacy law, post-*Mosley*, falls far short. *Mosley* thus employs a mode of legal analysis that is so indefinite and unpredictable that it chills free expression.

## VII. CONCLUSION

For four principal reasons, *Mosley* was wrongly decided. First, Max Mosley lacked a reasonable expectation of privacy when he consorted with five prostitutes. Second, *Mosley* and its underlying precedents slight the newspaper as a visual medium, including the capability, if not the obligation, to provide proof of controversial allegations; this too affects Mosley’s expectation of privacy. Third, *Mosley* adopts a crabbed, Meiklejohnian view of the public interest. In particular, the case incorrectly denies the existence of public morality and disregards the role of the press as defender of that morality. Finally, *Mosley* fails to lay down clear lines and thereby exerts a chilling effect.

This is not to defend the *News of the World*. Far from it. The tabloid’s ethics are indefensible.<sup>370</sup> The newspaper published an incendiary and false accusation, and labeled Max Mosley a liar when he denied it. Mosley, moreover, was not a Member of Parliament or a government minister. He was not a household name outside auto-racing circles. Nor was he renowned for moralizing or even, a la Tiger Woods, for living an upright life. The payoff of Woman E and the clandestine filming, further, represent the lowest form of journalism. Little wonder that the deputy editor of the *Daily Mirror* in

<sup>367</sup> INTERNATIONAL LIBEL AND PRIVACY HANDBOOK, *supra* note 103, at 280 (footnote omitted).

<sup>368</sup> Afua Hirsch, *Judge in Max Mosley Trial Hits Back at Criticism Over Privacy Cases*, GUARDIAN, Dec. 1, 2009, <http://www.guardian.co.uk/uk/2009/dec/01/david-eady-privacy-trials-media> (last visited April 3, 2010).

<sup>369</sup> Goodwin v. United Kingdom, App. No. 17488/90 (Eur. Ct. H. R. 1990).

<sup>370</sup> Invasion of privacy cases are often intertwined with concepts of media ethics. See JOHN C. WATSON & MELVIN I. UROFSKY, JOURNALISM ETHICS BY COURT DECREE: THE SUPREME COURT ON THE PROPER PRACTICE OF JOURNALISM 109 (2008) (“Invasion of privacy holds the distinction of being the only category of torts created with the specific purpose of holding journalists accountable for unethical practices.”).

London has written that the *News of the World* and Murdoch's other tabloid, the *Sun*, "have taken a machete to the reputation of us all."<sup>371</sup>

For its misfired Mosley exposé, the *News of the World* deserves condemnation, picketing, a boycott. The public can assess, in Justice Eady's words, the newspaper's "motive[s] for using the right of free speech"<sup>372</sup> and denounce such sleazy articles. People should exercise their Article 10 rights by castigating the tabloid's exercise of its Article 10 rights. But evaluating the *News of the World* is no job for officialdom. For all its sins, the *News of the World* serves to remind us of an essential principle of free expression, a principle now compromised by Justice Eady's *Mosley* decision. In the words of the playwright Tom Stoppard, "Junk journalism is the evidence of a society that has got at least one thing right, that there should be nobody with the power to dictate where responsible journalism begins."<sup>373</sup>

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<sup>371</sup> Bill Hagerty, *Popping the Tabloid Myth*, 2(2) BRIT. JOURNALISM REV. 10, 11 (1990). See generally BURDEN, *supra* note 13.

<sup>372</sup> Eady, *supra* note 56, at 4.

<sup>373</sup> TOM STOPPARD, NIGHT AND DAY 66-67 (1979).

# THE SECONDARY EFFECTS DOCTRINE SINCE *ALAMEDA*: AN EMPIRICAL RE-EXAMINATION OF THE JUSTIFICATIONS FOR LAWS LIMITING FIRST AMENDMENT PROTECTION

CHRISTOPHER SEAMAN AND DANIEL LINZ

*Since 1976, states and municipalities have been given the authority by the United States Supreme Court to regulate the time, place, and manner in which erotic communication, such as dancing, and sexually explicit communication such as magazines and movies may be expressed. The justification for these regulations is based on the idea that the government has a “substantial interest” in limiting expression within a community because adult businesses are associated with so-called “adverse secondary effects”—most prominently, criminal activity. This empirical study indicates that there are stronger correlations between crime and geographical location for liquor-serving establishments that do not feature adult entertainment than for either adult bookstores or adult cabarets.*

Keywords: secondary effects, sexual speech, First Amendment

## I. INTRODUCTION

### A. REVIEW OF SECONDARY EFFECTS LAW

Despite the guarantee of the First Amendment of the Constitution that Congress shall “...make no law abridging the freedom of speech” and the subsequent extension of that prohibition to the states through the Due Process Clause of the Fourteenth Amendment, governmental restrictions on sexually explicit speech have had a long history in United States law. The focus of this study is on the “time, place, and manner” restrictions placed upon businesses offering sexually oriented entertainment.

The first important case decided by the Supreme Court dealing with the regulation of adult businesses in the community was the 1976 case of *Young v. American Mini Theatres*.<sup>1</sup> In *Young*, the Court upheld a Detroit ordinance that prohibited any adult theaters within 1,000 feet of any other adult theater or within 500 feet of a residential area. The Court reasoned that the ordinance was not intended to eliminate adult

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<sup>1</sup> 427 U.S. 50 (1976).

entertainment altogether, but rather to mitigate the “negative secondary effects,” such as increases in crime and urban “blight,” that adult businesses cause. The Court drew upon *United States v. O’Brien*,<sup>2</sup> asserting that the ordinance did not have the intent, or the effect, of suppressing the sexual expression itself, and the city had a substantial government interest in dispersing adult businesses.

The issue of negative secondary effects was raised again in *City of Renton v. Playtime Theatres Inc.*<sup>3</sup> As in *Young*, the court upheld a zoning ordinance in the city of Renton, Wash., that prohibited adult businesses within 1,000 feet of any residential area, church, park, or school. The court reaffirmed the previous ruling in *Young*, and set out a three-prong test to determine whether an ordinance was constitutional. The Court said that the ordinance must: a) be content neutral and aimed only at curbing secondary effects, b) provide alternate avenues of communications, and c) further a substantial government interest.

In addition, the *Renton* Court ruled that cities that wished to regulate adult businesses were not required to provide evidence of adverse secondary effects in their own community, but rather could rely on the evidence provided by other cities to justify an ordinance. Further, the standard for applying this evidence was set at an extremely low level. The *Renton* Court said that as long as the evidence borrowed from other cities is “reasonably believed to be relevant” to the problem the city faces, then such evidence is sufficient. As a result of this decision, most cities have relied upon a core set of studies conducted by certain municipalities, some conducted as long as 30 years ago, to justify regulating adult businesses within their own community.

Until 1991, the Court had only specifically addressed city-wide ordinances that imposed distance requirements that kept adult businesses away from each other and away from other so-called “sensitive” land use areas, such as residences, churches and schools. However, in the Supreme Court case *Barnes v. Glen Theatre, Inc.*<sup>4</sup> the scope of permissible regulations was extended to laws that banned nudity *within* adult businesses (adult cabarets) themselves. In *Barnes*, the Court upheld Indiana’s public indecency law that prohibited dancers from performing nude, requiring them to wear at least pasties and G-strings. Rather than viewing the ordinance as a content-based restriction (a finding which would have invalidated the law), the Court viewed the statute banning nudity as a reasonable time, place, and manner restriction. The plurality opinion, written by Chief Justice Rehnquist, argued that the law did not ban erotic dancing outright, and that Indiana had a substantial government interest in protecting societal order and morality. Justice Souter in this case maintained that prohibiting nude dancing would limit the adverse secondary effects he believed were associated with adult cabarets (a position he would recant in the next opinion).

In *City of Erie v. Pap’s A.M.*<sup>5</sup> the Supreme Court revisited the legality of nudity ordinances when the Court upheld an Erie, Pa., restriction on nude dancing in adult

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<sup>2</sup> 391 U.S. 367 (1968).

<sup>3</sup> 475 U.S. 41. (1986).

<sup>4</sup> 501 U.S. 560 (1991).

<sup>5</sup> 529 U.S. 277 (2000).

cabarets. A majority of the Court agreed that the government had a significant government interest in combating adverse secondary effects assumed to be caused by adult businesses. However, only a plurality ruled that the city of Erie had shown evidence that such effects existed. In his partial dissent, Justice Souter questioned the quality of the evidence used by cities to justify their regulations. In doing so he noted a brief submitted by the First Amendment Lawyers Association with an attachment authored by Daniel Linz that argued that many of the studies routinely used by cities to justify their regulations were methodologically flawed and inconclusive.<sup>6</sup>

### 1. *Los Angeles v. Alameda Books*

The evidentiary standard applied to the regulation of adult businesses was further refined by the Court in *Los Angeles v. Alameda Books, Inc.*<sup>7</sup> While the plurality held that the city had met the standards set forth in the earlier *Renton* decision, Justice O'Connor, delivering the opinion of the Court, wrote:

This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.<sup>8</sup>

Justice Kennedy suggested a practical way for municipalities to proceed so that they could address the presumed secondary effects while protecting the First Amendment rights of adult businesses. This is referred to as "Justice Kennedy's cost-benefit standard." Justice Kennedy put it this way in *Alameda Books*:

Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech;

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<sup>6</sup> Daniel Linz, *Paper on the "Secondary Effects Studies" Relied Upon by Governmental Bodies When Enacting Legislation to Regulate "Adult" Businesses*, in Brief and Appendix of The First Amendment Lawyers Association as Amicus Curiae in Support of Affirmance, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (No. 98-1161), 1999 WL 805047, app. at A1.

<sup>7</sup> 535 U.S. 425 (2002).

<sup>8</sup> *Id.* at 426.



perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to speech whatsoever, and both the city and the speaker will have their interests well served.<sup>9</sup>

In summary, despite the burden-shifting approach that allows for the introduction of evidence for and against secondary effects, the *Alameda* decision established some, but only minimal, evidence requirements for municipalities attempting to justify regulation. The decision did not change the evidentiary standards for initially enacting an ordinance set out in *Renton*. The *Alameda* decision did, however, allow adult businesses to challenge the evidence and reasoning provided by the municipality concerning secondary effects. With the *Alameda* decision, then, several points of contention have arisen across the country where state and local governments have attempted to regulate adult businesses. Essentially, these contested areas since *Alameda* concern the quality of evidence used by municipalities to support their ordinances: at what point can it be fairly said that a municipality's evidence is shoddy and when is the municipality's theory of secondary effects overturned by plaintiff's evidence?

## 2. *Annex Books, Inc. v. City of Indianapolis*

One of the most important cases to arise from the Circuit Courts since the *Alameda* decision is *Annex Books, Inc. v. City of Indianapolis*.<sup>10</sup> In this decision the U.S. Court of Appeals for the Seventh Circuit struck down an amendment to an ordinance in Indianapolis that required any business with 25% or more of its floor space or revenue coming from adult materials to have extra lighting and to close on Sunday and between midnight and 10 A.M. on all other days. The Seventh Circuit's decision to strike the ordinance rested on the court's belief that the evidence provided by Indianapolis did not fully address the important secondary effects issues relating to the ordinance amendment. The city had merely reported the number of arrests for public lewdness at the adult location that had on-site booths. The court noted that this evidence ignored the three adult businesses that did not have on-site entertainment, and, more importantly, the city failed to explain the relationship between these arrests and the legislation to regulate the *times* the businesses were permitted to open.

Judge Easterbrook commented on the standards for a methodologically sound demonstration of adverse secondary effects. First, he articulated the general principle that to prevail, the city needs evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech. Further, this evidence must be more than just "reasonable" belief on the part of the government that there is a relationship between adult businesses and secondary and adverse effects. Easterbrook wrote:

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<sup>9</sup> *Id.* at 452-53 (Kennedy, J., concurring).

<sup>10</sup> 581 F.3d 460 (7th Cir. Sept. 3, 2009).

Indianapolis has approached this case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city. That might be so if the rational relation test governed, for then all a court need do is ask whether a sound justification of a law may be imagined. But because books (even of the “adult” variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted.<sup>11</sup>

Second, the court said that the crime data must be relevant to the type of business for which secondary effects are being alleged. The court noted in that misdemeanors in adult business with viewing booths cannot be used as evidence of secondary effects for adult businesses that have no booths.

The City’s only evidence about the four plaintiffs is that during 2002 the police made 41 arrests for public masturbation at Annex Books, the only plaintiff that offers private booths. (The masturbation was “public” in the sense that officers could see what customers were doing inside the booths.) The district court thought this datum enough, by itself, to support the 2003 amendments. *Yet it is hard to grasp how misdemeanors committed in single-person booths justify the regulation of book and video retailers that lack such booths.*<sup>12</sup>

Third, the court recommended the use of census units as an acceptable unit of analysis. The court referred to a study by Linz, pointing out that he first examined the relation between crime and adult establishments in Indianapolis, using smaller units than the city had done and found little evidence for secondary effects. Linz used census tracts, while the city used whole city blocks or larger districts, and he found little relation between crime and adult establishments.<sup>13</sup>

Fourth, the court insisted that a comparative analysis be undertaken so that crime in and around adult businesses could be put into some perspective relative to crime at other businesses in the community. The court even went so far as to suggest that alcohol-serving businesses would serve as the best control or comparison points. The court noted in *Annex Books*:

Nor can we tell whether 41 arrests at one business over the course of 365 days is a large or a small number. *How does it compare with arrests for drunkenness or public urination in or near taverns*, which in Indianapolis can be open on Sunday and well after midnight? If there is more

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<sup>11</sup> *Id.* at 463.

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

<sup>13</sup> *Id.* at 464.

misconduct at a bar than at an adult emporium, how would that justify greater legal restrictions on the book- store—much of whose stock in trade is constitutionally protected in a way that beer and liquor are not.<sup>14</sup>

Finally, Judge Easterbrook made a specific recommendation for statistical analysis noting that multivariate regression analysis may provide a better foundation for determining secondary crime effects than either a time series or a cross sectional analysis.

In summary, the court in *Annex Books* required that pertinent data must be gathered regarding the type of ordinance being enacted and the subclass of business being regulated. It also required that data being used to support regulation be collected in a scientifically valid manner. Otherwise, the municipal ordinance may be unconstitutional, and a trial may be necessary to determine whether the ordinance is fairly supported by the evidence.

Specifically, the court stated that taverns and bars are appropriate comparison points. The court also advocated a specific analytic technique: multivariate regression for assessing secondary effects. This study will use multivariate regression in assessing the relative impact of adult businesses upon crime, compared to other business locations (alcohol serving and selling) and against other variables known to be associated with crime.

### 3. “Subclasses” of Adult Businesses

The Fifth, Seventh and Tenth Circuit federal courts are split regarding the meaning of the *Alameda* decision for municipalities that enact ordinances restricting various types of adult businesses. Specifically, the split revolves around the application of evidence of secondary effects to conclusions about certain subtypes of adult businesses, such as “on-site” and “off-site” businesses, cabarets and bookstores.<sup>15</sup>

In *Encore Videos, Inc. v. City of San Antonio*,<sup>16</sup> the Fifth Circuit struck down an ordinance in San Antonio requiring sexually oriented businesses to stay 1,000 feet from residential areas. The court said that the evidence used by the city did not distinguish between “on-site” and “off-site” sexually oriented businesses. The Fifth Circuit said that it was reasonable to assume that “off-site” sexually oriented businesses would be associated with less crime because the patrons are not present at and around the location of the business for as long as they would be at “on-site” businesses. Therefore, the Fifth Circuit ruled that municipalities “must provide at least some evidence of secondary effects specific to adult businesses that sell books or videos solely for off-site entertainment. Because there is no such evidence in the record, we must strike down the zoning provision of (the ordinance).”<sup>17</sup>

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<sup>14</sup> *Id.* at 463.

<sup>15</sup> See Brigman L. Harman, *Is a Strip Club More Harmful Than A Dirty Bookstore? Navigating A Circuit Split In Municipal Regulation Of Sexually Oriented Businesses*, 2008 BYU L. REV. 1603.

<sup>16</sup> 330 F.3d 288 (5th Cir. 2003).

<sup>17</sup> *Id.* at 291.

Furthermore, also noted above, the Seventh Circuit specifically required the city to provide evidence that off-site adult businesses are associated with negative secondary effects. In *Annex*, as well as in a subsequent decision in *New Albany DVD, LLC v. City of New Albany*,<sup>18</sup> the cities and municipalities relied only upon studies that examined the impact of adult businesses with live entertainment or on-site viewing booths. In *New Albany DVD*, the city's expert witness admitted that he knew of no studies that examined the differences between subclasses of adult businesses (such a study has since been conducted, and is discussed below). Therefore, the Seventh Circuit, in two separate cases, held that the issue of "subclasses" is important and, in order to regulate "off-site" adult businesses, the cities must provide good evidence that these types of businesses are associated with negative secondary effects.

In contrast, in the case *Doctor John's, Inc. v. City of Roy*<sup>19</sup> the court upheld the constitutionality of an ordinance in Roy, Utah. As in *Encore*, the plaintiffs argued that the city's evidence did not distinguish between "on-site" and "off-site" sexually oriented businesses, and therefore the city did not have sufficient evidence to link Doctor John's, an "off-site" sexually-oriented business, to any potential secondary effects. The Tenth Circuit rejected the plaintiffs argument, stating that "*Alameda Books* reiterated that a city does not face a 'high bar' in meeting its initial obligation to show an ordinance is narrowly tailored towards a significant interest; it need only show that its evidence 'fairly support[s]' its rationale." Thus, in the court's opinion, the burden of proof rested with the sexually-oriented business to demonstrate that the city's evidence was not relevant to off-site businesses, and the Tenth Circuit said that Doctor John's failed to do this.<sup>20</sup>

#### B. SOCIAL DISORGANIZATION THEORY

Underlying the issues raised by the court opinions above are a variety of assumptions about the relationship between adult businesses and criminal activity in the community. The social disorganization theory of crime is an approach that has been used as a guide to variables that must be controlled for in order to investigate the relationship between adult businesses and crime.

The theory posits that the level of crime in a particular neighborhood is a function of the "social disorganization" in that neighborhood. A community is considered "disorganized" if there is a lack of social solidarity, social cohesion, and integration among the residents of that community.<sup>21</sup> Without these cohesive characteristics informal social control cannot be established. It is this informal social control that deters crime in a community. Specifically, social disorganization theory predicts that the ecological characteristics of a community can inhibit the development of social control with that community.<sup>22</sup> Indeed, studies have shown that certain structural aspects of the

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<sup>18</sup> 581 F.3d 556 (7th Cir. 2009).

<sup>19</sup> 465 F.3d 1150 (10th Cir. 2006).

<sup>20</sup> *Id.* at 1169.

<sup>21</sup> See CHARIS E. KUBRIN ET AL., RESEARCHING THEORIES OF CRIME AND DEVIANCE (2009).

<sup>22</sup> *Id.*

community, such as poverty and racial heterogeneity, are strongly related to the amount of crime in that community.<sup>23</sup>

Most important for research on negative secondary effects of adult businesses is the consideration of control variables suggested by the theory as important determinants of crime. Several variables have been found to be important as predictors of crime activity. These include measures of population density, racial composition, and neighborhood characteristics. Variables that have been investigated and have been found to be most important as predictors of crime activity include measures of racial composition (number of African Americans and racial heterogeneity), family structure (as measured by number of single-parent households, female-headed households), economic composition (as measured family income), the presence of motivated offenders, primarily males between the ages of 18 and 25, and socioeconomic status as measured by level of education.

In addition, the theory suggests it is necessary to control for neighborhood business and housing characteristics that may contribute to social disorganization such as the presence of vacant houses and lots and rental housing units and measures of neighborhood integration such as number of owner occupied housing units. Specific land uses are not only important in themselves but they also operate in interaction with variables that are indicative of social disorganization.

## II. HYPOTHESES

As noted above, one issue that is currently unresolved is whether or not there are differences in crime at and around certain “subclasses” of adult businesses. This has been framed in terms of the differences between adult cabarets, which offer live entertainment in the form of dancers, and bookstores where no such live entertainment is offered.

Further, as Rice and Smith<sup>24</sup> and Sherman et al.<sup>25</sup> point out, the amount of traffic and number of customers and passersby at any business will have an effect on the amount of criminal activity that occurs there. McCleary and Meeker<sup>26</sup> also note that any increase in economic or social activity will result in increases in crime. Thus, there is theoretical reasoning to support the idea that there will be significant differences in the amount of criminal activity at and around bookstores and adult cabarets. From this reasoning, the following is hypothesized:

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<sup>23</sup> See Robert J. Sampson and W. Byron Groves, *Community Structure and Crime: Testing Social Disorganization Theory*. 94 AM. J. SOC. 774 (1989).

<sup>24</sup> See Kennon Rice and William R. Smith, *Testing Routine Activity and Social Disorganization Theory: Socio-Ecological Models of Automobile Theft*. 39 J. RES. IN CRIME & DELIQUENCY, no. 3, 304 (2002).

<sup>25</sup> See Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*. 27 CRIMINOLOGY 27 (1989).

<sup>26</sup> See Richard McCleary and James W. Meeker, FINAL REPORT TO THE CITY OF GARDEN GROVE: THE RELATIONSHIP BETWEEN CRIME AND ADULT BUSINESS OPERATIONS ON GARDEN GROVE BOULEVARD (1991).

**H1:** The geospatial relationship between crime and adult cabarets will be higher than the geospatial relationship between crime and adult bookstores.

As stated above, *Annex* suggested that there must be some adequate control locations against which to compare the adult businesses; simply knowing how much crime is around an adult business gives no indication of whether that is a high or low number. Specifically, the court in *Annex Books* suggested that alcohol-serving businesses that do not offer adult entertainment, such as bars and taverns, are appropriate comparisons for adult businesses and will aid the courts in assessing the likelihood of secondary effects. Therefore, the following is hypothesized:

**H2a:** The geospatial relationship between crime and adult cabarets will be lower than the geospatial relationship between crime and business establishments providing liquor service but no adult entertainment.

**H2b:** The geospatial relationship between crime and adult bookstores will be lower than the geospatial relationship between crime and business establishments providing liquor service but no adult entertainment.

### III. METHOD

#### A. MEASURING CRIMINAL ACTIVITY

This empirical study of three cities, Richmond, Va., Milford, Conn., and East Hartford, Conn., was undertaken to address these hypotheses. Criminal activity was measured using crime incident data gathered with Incident Based Reporting (IBR) procedures. These data were obtained from the police departments in each city. The IBR crime reporting system involves comprehensive data collection at the incident level. The information collected includes features of the crime incident location, offense(s), offender(s), victim(s), property, and arrestee(s).

The crime data for Milford spanned the years 2000-2008, the East Hartford data included the years 2005-2008, and the Richmond crime data covered the period March 2007 to September 2008. These data were then aggregated into specific “types” of crime. Robberies, murders, assaults, and similar crimes were aggregated into a “Person Crimes” category. Burglaries, criminal mischief, shoplifting, auto thefts and other property crimes were aggregated into a “Property Crimes” category. Crimes that involved alcohol or drug intoxication, possession of narcotics, prostitution, etc. were aggregated into the category “Vice and Disorder Crimes.” Finally, indecent exposure, sexual assaults, lewd and lascivious behavior were combined into a “Sex Offenses” crime category.

## B. ADULT BUSINESS LOCATIONS

Both adult cabarets and adult bookstores were located by using a combination of information provided by the liquor control boards and public directories in the states in which the cities were located.

In East Hartford, there are two cabarets, Kahoots and Venus Lounge, which are located at 639 Main Street and 1268 Main Street, respectively. There are also two adult bookstores, Aircraft Book & News and Video Lane, which are located at 349 Main Street and 775 Silver Lane, respectively. It should be noted, however, that Venus Lounge was not an adult business during the full period of crime observations in the study. In 2008 the Venus Lounge was closed and reopened as the Main Street Café and was operated as a bar that does not feature adult entertainment.

In Milford, there are five adult bookstores: Milford Book and Video, located at 784 Boston Post Road; Penthouse Books, located at 9 Banner Drive, Romantix, located at 120 Boston Post Road; Video Pleasures, located at 110 Bridgeport Ave; Vinny's Adult Superstore, located at 753 Boston Post Road. There is also one cabaret, Keepers, which is located at 354 Woodmont Road.

In Richmond, there are seven cabarets: two Paper Moon Gentleman's Clubs located at both 6710 Midlothian Turnpike and 3300 Norfolk Street; Daddy Rabbit's, located at 3206 Broad Rock Road; Pure Pleasure, located at 68 Labrook Concourse; Candy Bar, located at 3904 Hull Street Road; Velvet, located at 3 S 15<sup>th</sup> Street; Richard's Restaurant, located at 1732 Altamont Ave. There are also four adult bookstores in Richmond: Broadway Books, located at 5100 Midlothian Tpke # A; B&T Adult Books, located at 1203 W Broad St; Quality Books, located at 8 S Crenshaw Ave; and Triangle Bookstore, located at 1001 N Boulevard.

## C. LOCATING LIQUOR SERVING BUSINESSES

Liquor-serving businesses that did not feature adult entertainment were located using records obtained through the alcohol control boards in Connecticut and Virginia. For both East Hartford and Milford these records included information on bars and restaurants that served liquor on the premises. Also included were "off-site" businesses, like liquor stores, which sold packaged liquor that could be taken home. For Richmond, the records did not allow us to distinguish between "off-site" liquor-serving businesses and those that only sold beer and wine. Only on-site liquor-serving establishments were included in the Richmond analysis.

## D. CONSTRUCTING CRIME MAPS USING ARCGIS

The locations of the crime events were assigned latitude and longitude coordinates through geo-coding in the WGS1984 coordinate system and then plotted on to a map using ArcGIS. In order to have the corresponding maps of the cities in ArcGIS, TIGER Lines provided by the U.S. Census were downloaded and added to the data file. Because the TIGER Lines were provided in a different coordinate system (NAD83),

crime events were re-projected into NAD83 coordinates in order to have all elements in the data file in the same coordinate system.

#### E. SECONDARY EFFECT ANALYSES AND SOCIAL DISORGANIZATION THEORY

Many ecological studies of crime use standard metropolitan statistical areas, such as census blocks, as their unit of analysis.<sup>27</sup> The advantage to using census blocks in tests of social disorganization theory is that the U.S. Census provides demographic information for each of the blocks. Using census blocks as the unit of analysis allow for the inclusion of demographic characteristics essential to social disorganization theory and these features may be included as variables in the construction of statistical models.

Drawing upon other studies using a social disorganization theory approach,<sup>28</sup> the following demographic variables were included in the multiple regression model for each census block: population, number of African-Americans, number of single parent households (both male and female), number of housing units, number of vacant units, and number of owner-occupied units. In addition to these variables, the number of liquor serving establishments (both on-site and off-site for Milford and East Hartford) in the census block was included in the model. Finally, the presence or absence of an adult bookstore and the presence or absence of an adult cabaret were included in the regression.

#### F. CONTROLLING FOR SPATIAL DEPENDENCY

One of the problems associated with a multiple regression analysis using data collected from geographically proximal locations is “spatial dependency.” Any social phenomenon located in geographical space, such as crime activity, is not confined to the arbitrary boundaries of the researcher’s unit of analysis.<sup>29</sup> It is generally assumed that crime occurring within one census block will be related to the crime within adjacent census blocks. Because the unit of analysis is arbitrarily separated from other units nearby, failure to correct for this spatial dependence in the regression models can cause spatial autocorrelation in the residuals. As Collins et al. explain, “Spatial autocorrelation, identified by the non-zero covariance between a pair of observations that are related in space, can cause inefficient estimation of the standard regression model parameters, and inaccuracy of the sample variance and significance tests.”<sup>30</sup>

One way to statistically control for spatial autocorrelation is to introduce a spatial lag term in the regression model. The GeoDa Center, which provides spatial statistics software programs, defines a spatial lag as

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<sup>27</sup> See Robert J Bursik Jr. and Harold G. Grasmick, *NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL* (1993).

<sup>28</sup> See Rice & Smith, *supra* note 24.

<sup>29</sup> See Krista Collins et al., *Treatment of Spatial Autocorrelation in Geocoded Crime Data*, in *PROC. AM. STAT. ASS’N, SURV. RES. METHODS SEC.* (2006) (CD-ROM).

<sup>30</sup> *Id.* at 2864.



“...a variable that essentially averages the neighboring values of a location (the value of each neighboring location is multiplied by the spatial weight and then the products are summed). It can be used to compare the neighboring values with those of the location itself. Which locations are defined as neighbors in this process is specified through a row-standardized spatial weights matrix in GeoDa.”<sup>31</sup>

Using GeoDa, a spatial lag was included as a term in the regression model using a rook weights matrix (which defines neighbors as those with shared borders, but not shared vertices). Finally, the crime frequency for each census block was adjusted upward by .5 and then logged in order to help reduce heteroscedasticity (which preliminary analyses revealed was quite high). The social disorganization theory variables were screened for multicollinearity in each city data set, and any variables that tended to correlate highly ( $r > .85$ )<sup>32</sup> with other variables were removed from the analysis. This led to the removal of the variables “number of African-Americans” and “female-headed households” in the Richmond analyses; the removal of “housing units” and “owner-occupied houses” in Milford; and the removal of “number of African-Americans,” “female-headed households,” and “number of housing units” in East Hartford. All variables were standardized in order to produce beta weights instead of unweighted b values. Finally, all variables were entered into separate multiple regressions for each crime type within each city.

#### IV. RESULTS

Tables 1, 2, 3, and 4 display summaries of the regression analyses while Tables 5-16 show the full regression models for each crime type within each city. The spatial lag term was entered into the regression equation in order to control for spatial dependency and was highly significant in virtually every regression model. This indicates that there was spatial dependency among crime events in neighboring census blocks. The introduction of the spatial lag term greatly improved the fit of the regression model. Specific demographic variables were less consistent in predicting crime within all three cities and across the four types of crime. Generally, population, number of single parent households (both male and female), number of housing units, and vacant units emerged as significant predictors of crime events in most of the regression models. Population in particular was often the strongest predictor of crime at the census block level. With the caveat that the census data used in the present study is now rather dated and therefore potentially be unreliable, the results of the regression analyses were generally consistent with the predictions of social disorganization theory.

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<sup>31</sup> GeoDa Center for Geospatial Analysis and Computation, *Glossary of Key Terms* (Nov. 24, 2009), available at <http://geodacenter.asu.edu/node/390> at Spatial Lag.

<sup>32</sup> See Mary Ann Schroeder, *Diagnosing and Dealing With Multicollinearity*, 12 W. J. NURSING RES., no. 2, 175 (1990).

Looking across all of the three cities and the four types of crime, the presence of an adult bookstore in a census block was only a significant predictor of crime for one crime type, vice/disorder crime, in one city, Milford. Moreover, the beta coefficients for the presence of an adult bookstore were consistently smaller than the coefficients for the presence of an adult cabaret in every single city for every type of crime, except for sex crimes in East Hartford. In some cases, there was actually a negative, albeit statistically insignificant, correlation between adult bookstores and crime. These results provide strong support for H1 and H2b.

The cabarets were overall significant predictors of crime at the census block level across the three cities for the four types of crime. The one exception was in East Hartford, where cabarets did not significantly predict sex crimes. However, in every instance, with the exception of sex crimes in Richmond, the on-site liquor serving establishments had higher beta coefficients than the adult businesses. Furthermore, the beta coefficients for the cabarets were often lower than the off-site liquor serving establishments in East Hartford and Milford. Therefore, H2a was supported in the spatial regression analysis.

## V. DISCUSSION

Hypothesis 1 stated that the geospatial relationship between crime and adult cabarets would be stronger than the geospatial relationship between crime and adult bookstores. This hypothesis was clearly supported. Consistently, the presence of an adult bookstore did not significantly predict crime at the census block level. In the one instance where adult bookstores did significantly predict crime (vice/disorder crime in Milford), the beta coefficient was nevertheless lower than that observed for the adult cabarets.

These results have important implications for the current split between the Fifth, Seventh, and Tenth Circuit Court of Appeals regarding subclasses of adult businesses and secondary effects. Specifically, results of the current study contradict the decision in *Doctor John's Inc v. City of Roy*, in which the Tenth Circuit Court of Appeals indicated it was permissible for a municipality to presume that adult businesses that offer "on-site" entertainment will be associated with the same adverse secondary effects as a business that does not offer "on-site" adult entertainment. In the present study, we found that "off-site" adult bookstores are less associated with criminal activity than are "on-site" adult cabarets, indicating that any assumption of secondary effects equivalence between "on-site" and "off-site" adult businesses by a municipality may be an instance of "shoddy reasoning" and that relying on studies that are limited to one class of businesses to justify regulation of other classes of adult businesses may constitute reliance on "shoddy data."

Hypothesis 2a stated that the geospatial relationship between crime and adult cabarets would be weaker than the geospatial relationship between crime and business establishments with liquor service but no adult entertainment. Hypothesis 2b stated that the geospatial relationship between crime and adult bookstores would be weaker than the geospatial relationship between crime non-sex-oriented establishments with liquor service. Both of these hypotheses were supported. The presence of either an adult bookstore or an adult cabaret in a census block was statistically less well related to crime than the presence of on-site liquor serving establishment. While adult cabarets were

found to be associated with ambient crime in the census block, the strength of this association was generally no greater than that of the liquor serving establishments and more often on-site liquor serving establishments were stronger predictors of criminal activity at the census block level than adult cabarets. These findings suggest that the relationship between cabarets and crime may not be due to the presence of adult entertainment per se, but rather due to the presence of liquor service provided at the adult site.

In *Annex Books v. City of Indianapolis*, Justice Easterbook opined that simply reporting on the frequency of crime at and around an adult business does not provide evidence of adverse secondary effects. In order to put the impact of an adult business on crime into perspective, the crime in the area surrounding the adult business must be compared with suitable control locations. Judge Easterbook suggested that taverns and bars might be suitable comparisons to adult businesses. The findings of the present study suggest that adult businesses produce no greater negative impact than liquor-serving establishments. Liquor-serving establishments were consistently stronger predictors of crime at the census block level than adult businesses. Because erotic communication enjoys First Amendment protection, the results of the current study imply that municipalities and other governmental bodies may be regulating adult businesses through zoning regulations in a fashion that is unconstitutional.

## **VI. STUDY LIMITATIONS**

There are several limitations to the current study. The cities examined in the study do not constitute a representative sample of municipalities and thus generalizing the results from cities in the current study to other municipalities may be unwarranted. These cities were chosen on the basis of convenience due to the availability of crime data in a usable format. This is an obvious issue that is endemic to secondary effects research. However, given the difficulties associated with getting quality, usable crime data for even one city, attempting to undertake a representative random sample of cities for this analysis would be too large in scope.

It should be noted here that cities greatly vary in the quality of their crime data. Some cities even refuse to provide sufficient amounts of data in formats that allow researchers to easily conduct an adequate spatial analysis of crime. Therefore, performing a random sample of cities would likely yield data sets of widely variable quality, with many cities refusing to comply with the request for data.

Further, many cities only have recent crime data accessible in a usable format, or will only accommodate requests within a very narrow range of dates, arguing that including too long a range of dates for crime events would impose an unreasonable burden on them. As a result of this, the current study examined different time periods. Ideally, future research needs to be done in which cities included in secondary effects analyses are sampled representatively and crime events are examined during identical time periods. To the author's knowledge, however, no study on secondary effects has yet managed to provide a representative sample as part of their analysis. At the very least, a

broader range of different cities and towns needs to be analyzed and compared in order to determine if there are any specific differences in secondary effects.

Another limitation of the current study lies in difficulty in trying to argue for null effects. Not finding evidence of an effect for adult businesses is not the same as finding evidence that no such effect exists. In hypothesis testing, not rejecting the null hypothesis does not mean that the null hypothesis is supported. Indeed, other researchers<sup>33</sup> have often asserted that the failure to find statistical significance results in secondary effects studies may occur not because the effect does not exist, but rather these null findings are due to lack of statistical power or other methodological factors. This study is somewhat immune from this criticism. We found that there were, indeed, statistically significant differences between adult bookstores and adult cabarets, as well as statistically significant differences between all adult businesses and liquor serving establishments that do not offer adult entertainment. While we cannot conclude that adult bookstores are not related to crime at all, we can say with confidence that, at least in the cities we examined, adult bookstores are less strongly associated with crime than are adult cabarets and adult businesses, generally, and are less strongly associated with crime than liquor-serving establishments.

## VII. CONCLUSIONS

The current study extends the knowledge of secondary effects caused by adult businesses in order to test the assumptions made by legal actors in justifying the regulation of the display and sale of sexually explicit communication within cities and municipalities. This applies not only to the general question of whether sexually-oriented businesses are associated with crime, but also more specific empirical questions raised by disagreements between federal appellate courts, such as the controversy concerning subclasses of adult businesses such as adult cabarets and bookstores and adverse secondary effects.

The current study is congruent with prior research on the secondary effects of adult businesses. Specifically, several past studies have found that, when compared to controls, adult businesses are not significant sources of crime in the surrounding community.<sup>34</sup> The lack of an association between adult businesses and crime is even clearer when alcohol-serving businesses are utilized as controls.<sup>35</sup> Further, those prior

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<sup>33</sup> See RICHARD MCCLEARY, CRIME-RELATED SECONDARY EFFECTS: SECONDARY EFFECTS OF "OFF-SITE" SEXUALLY-ORIENTED BUSINESSES (2008) (commissioned by Texas City Attorneys Ass'n).

<sup>34</sup> See Daniel Linz et al., *An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 L. & SOC. REV. 69 (2004); Linz et al. *Peep Show Establishments, Police Activity, Public Place, and Time: A Study of Secondary Effects in San Diego, California*, 43 J. SEX RES., no. 2, 182 (2006).

<sup>35</sup> See Enriquez et al., *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 J. GENDER, SOC. POL'Y, & L. 1 (2007); Linz et al., *Testing Supreme Court Assumption in California v. la Rue: Is There Justification for*

studies that have claimed to find a significant relationship between adult businesses and crime have been shown to have serious methodological flaws that limit the strength of their conclusions.<sup>36</sup> The current study has replicated past findings demonstrating that adult businesses are no more associated with crime than liquor-serving establishments.

The results of this study confirm that demographic variables suggested by social disorganization theory are significant predictors of crime at the census block level.<sup>37</sup> The current study illustrates the necessity of including these ecological characteristics within the study of the secondary effects of adult businesses. Without eliminating the “noise” created by these important factors, trying to isolate the unique effect of a sexually oriented business in research will be difficult.

There are implications of this study for First Amendment jurisprudence and the doctrine of secondary effects. In Justice Souter’s dissent in *Alameda* he opined:

The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.<sup>38</sup>

Justice Souter further said that sound empirical investigations of presumed adverse secondary effects are helpful in guarding against unconstitutional restrictions on sexual speech. Lacking solid empirical proof of their own, cities and municipalities across the country may be regulating sexually oriented businesses out of disapproval for the content of their expression rather than mitigating any sort of harmful secondary effects, such as crime. This, of course, would be a form of content discrimination and a violation under the First Amendment.

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*Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?*, 43 COMM. L. REV., no. 2, 7 (2007).

<sup>36</sup> See Paul et al. *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*. 6 COMM. L. & POL’Y 355 (2001).

<sup>37</sup> See Enriquez et al., *supra* note 35.

<sup>38</sup> 535 U.S. 425 (2002) at 457 (Souter, J., dissenting).

## Appendix

Table 1: Summary Table for Person Crime Regressions

Variable	$\beta$ (East Hartford)	$\beta$ (Milford)	$\beta$ (Richmond)
OFFSITE LIQ	0.194***	0.139***	N/A
ONSITE LIQ	0.154***	0.382***	0.117***
BOOKSTORES	0.009	0.039	-0.002
CABARETS	0.108***	0.14***	0.041***

Notes: \*p < .05. \*\*p < .01. \*\*\*p < .001

Table 2: Summary Table for Property Crime Regressions

Variable	$\beta$ (East Hartford)	$\beta$ (Milford)	$\beta$ (Richmond)
OFFSITE LIQ	0.154***	0.120***	N/A
ONSITE LIQ	0.112***	0.294***	0.112***
BOOKSTORES	-0.041	0.047	-0.005
CABARETS	0.077**	0.068**	0.058***

Notes: \*p < .05. \*\*p < .01. \*\*\*p < .001

Table 3: Summary Table for Vice/Disorder Crime Regressions

Variable	$\beta$ (East Hartford)	$\beta$ (Milford)	$\beta$ (Richmond)
OFFSITE LIQ	0.223***	0.112***	N/A
ONSITE LIQ	0.175***	0.333***	0.125***
BOOKSTORES	0.072*	0.070**	0.016
CABARETS	0.154***	0.095***	0.032*

Notes: \*p < .05. \*\*p < .01. \*\*\*p < .001

Table 4: Summary Table for Sex Crime Regressions

Variable	$\beta$ (East Hartford)	$\beta$ (Milford)	$\beta$ (Richmond)
OFFSITE LIQ	0.171***	0.029	N/A
ONSITE LIQ	0.105***	0.304***	0.012
BOOKSTORES	0.061	-0.031	-0.004
CABARETS	0.032	0.128***	0.035*

Notes: \*p < .05. \*\*p < .01. \*\*\*p < .001

Table 5: Person Crime Regression Results for East Hartford, CT

Variable	SE( $\beta$ )	$\beta$	Z	Sig (p)
SPATIAL LAG	0.032	0.408	12.649	0.000
CONSTANT	0.026	-0.109	-4.120	0.000
OFFSITE LIQ	0.027	0.194	7.173	0.000
ONSITE LIQ	0.027	0.154	5.512	0.000
POPULATION	0.066	0.620	49.338	0.000
MHH_CHILD	0.049	-0.173	-3.543	0.000
VACANT	0.041	0.059	1.461	0.144
OWNER OCC	0.043	-0.149	-3.470	0.001
BOOKSTORES	0.028	0.009	0.319	0.750
CABARETS	0.026	0.108	4.102	0.000

Notes:  $R^2 = 0.556$ 

Table 6: Property Crime Regression Results for East Hartford, CT

Variable	SE( $\beta$ )	B	z	Sig (p)
SPATIAL LAG	0.032	0.485	15.069	0.000
CONSTANT	0.028	-0.154	-5.558	0.000
CABARETS	0.028	0.077	2.792	0.005
BOOKSTORES	0.030	-0.041	-1.393	0.163
OWNER OCC	0.046	0.046	1.008	0.313
VACANT	0.043	0.062	1.452	0.146
MHH_CHILD	0.052	-0.080	-1.543	0.123
POPULATION	0.070	0.417	5.967	0.000
ONSITE LIQ	0.030	0.112	3.797	0.000
OFFSITE LIQ	0.028	0.154	5.424	0.000

Notes:  $R^2 = 0.507$

Table 7: Vice/Disorder Crime Regression Results for East Hartford, CT

<b>Variable</b>	<b>SE(<math>\beta</math>)</b>	<b><math>\beta</math></b>	<b>Z</b>	<b>Sig (p)</b>
SPATIAL LAG	0.035	0.265	7.468	0.000
CONSTANT	0.028	-0.067	-2.399	0.016
CABARETS	0.028	0.154	5.757	0.000
BOOKSTORES	0.030	0.072	2.432	0.015
OWNEROC	0.046	0.228	-4.969	0.000
VACANT	0.043	0.164	3.828	0.000
MHH_CHILD	0.051	-0.227	-4.422	0.000
POPULATION	0.070	0.591	8.474	0.000
ONSITELIQ	0.029	0.175	5.955	0.000
OFFSITELIQ	0.028	0.223	7.876	0.000

Notes:  $R^2 = 0.510$ 

Table 8: Sex Crime Regression Results for East Hartford, CT

<b>Variable</b>	<b>SE(<math>\beta</math>)</b>	<b><math>\beta</math></b>	<b>z</b>	<b>Sig (p)</b>
SPATIAL LAG	0.038	0.205	5.331	0.000
CONSTANT	0.031	-0.060	-1.965	0.049
CABARETS	0.030	0.024	0.814	0.415
BOOKSTORES	0.032	0.061	1.874	0.061
OWNEROC	0.050	-0.148	-2.985	0.002
VACANT	0.046	0.068	1.456	0.145
MHH_CHILD	0.056	-0.107	-1.923	0.054
POPULATION	0.076	0.606	8.014	0.000
ONSITELIQ	0.032	0.105	3.271	0.001
OFFSITELIQ	0.031	0.171	5.540	0.000

Notes:  $R^2 = 0.422$



Table 9: Person Crime Regression Results for Milford, CT.

Variable	SE( $\beta$ )	$\beta$	Z	Sig (p)
SPATIAL LAG	0.037	0.122	3.281	0.001
CONSTANT	0.027	-0.029	-1.067	0.286
OFFSITE LIQ	0.028	0.139	5.011	0.000
ONSITE LIQ	0.028	0.382	13.853	0.000
POPULATION	0.044	0.207	4.743	0.000
BLACKS	0.035	-0.067	-1.916	0.055
MHH_CHILD	0.037	0.047	1.247	0.212
FHH_CHILD	0.043	0.088	2.038	0.042
VACANT	0.028	0.056	2.006	0.045
BOOKSTORES	0.028	0.039	1.426	0.154
CABARETS	0.027	0.140	5.202	0.000

Notes:  $R^2 = 0.323$ 

Table 10: Property Crime Regression Results for Milford, CT

Variable	SE( $\beta$ )	B	z	Sig (p)
SPATIAL LAG	0.029	0.286	9.156	0.000
CONSTANT	0.026	-0.085	-3.320	0.000
CABARETS	0.025	0.068	2.686	0.007
BOOKSTORES	0.026	0.047	1.839	0.066
VACANT	0.026	0.055	2.086	0.037
FHH_CHILD	0.040	0.056	1.395	0.163
MHH_CHILD	0.035	0.039	1.126	0.260
BLACKS	0.033	0.005	0.162	0.871
POPULATION	0.042	0.345	8.370	0.000
ONSITE LIQ	0.026	0.294	11.347	0.000
OFFSITE LIQ	0.026	0.120	4.610	0.000

Notes:  $R^2 = 0.401$

Table 11: Vice/Disorder Crime Regression Results for Milford, CT

<b>Variable</b>	<b>SE(<math>\beta</math>)</b>	<b><math>\beta</math></b>	<b>Z</b>	<b>Sig (p)</b>
SPATIAL LAG	0.035	0.191	5.496	0.000
CONSTANT	0.027	-0.055	-2.040	0.041
CABARETS	0.026	0.095	3.577	0.000
BOOKSTORES	0.027	0.070	2.574	0.009
VACANT	0.027	0.037	1.352	0.176
FHH_CHILD	0.042	0.063	1.492	0.136
MHH_CHILD	0.037	0.066	1.797	0.072
BLACKS	0.034	0.001	0.017	0.986
POPULATION	0.043	0.266	6.194	0.000
ONSITELIQ	0.027	0.333	12.257	0.000
OFFSITELIQ	0.027	0.112	4.141	0.000

Notes:  $R^2 = 0.345$ 

Table 12: Sex Crime Regression Results for Milford, CT.

<b>Variable</b>	<b>SE(<math>\beta</math>)</b>	<b><math>\beta</math></b>	<b>Z</b>	<b>Sig (p)</b>
SPATIAL LAG	0.041	-0.006	-0.130	0.896
CONSTANT	0.030	0.001	0.040	0.968
CABARETS	0.029	0.128	4.410	0.000
BOOKSTORES	0.029	-0.031	-1.044	0.296
VACANT	0.030	-0.016	-0.518	0.604
FHH_CHILD	0.046	0.119	2.563	0.010
MHH_CHILD	0.040	0.087	2.155	0.031
BLACKS	0.038	-0.032	-0.852	0.394
POPULATION	0.047	0.165	3.50	0.000
ONSITELIQ	0.030	0.304	10.228	0.000
OFFSITELIQ	0.030	0.029	0.991	0.321

Notes:  $R^2 = 0.213$

Table 13: Person Crime Regression Results for Richmond, VA.

Variable	SE( $\beta$ )	$\beta$	Z	Sig (p)
SPATIAL LAG	0.016	0.406	25.536	0.000
CONSTANT	0.013	-0.057	-4.516	0.000
MIXEDBEVERAGE	0.013	0.117	9.112	0.000
POPULATION	0.024	0.171	7.135	0.000
MHH_CHILD	0.018	0.095	5.296	0.000
HSE_UNITS	0.029	0.046	1.604	0.108
VACANT	0.019	0.060	3.197	0.001
OWNEROCC	0.015	0.004	0.325	0.745
CABARETS	0.013	0.041	3.211	0.001
BOOKSTORES	0.013	-0.002	-0.153	0.878

Notes:  $R^2 = 0.314$

Table 14: Property Crime Regression Results for Richmond, VA.

Variable	SE( $\beta$ )	$\beta$	Z	Sig (p)
SPATIAL LAG	0.016	0.411	25.862	0.000
CONSTANT	0.013	-0.065	-5.011	0.000
BOOKSTORES	0.013	-0.005	-0.381	0.703
CABARETS	0.013	0.058	4.475	0.000
OWNEROCC	0.015	0.074	4.884	0.000
VACANT	0.019	0.067	3.559	0.000
HSE_UNITS	0.029	0.077	2.626	0.009
MHH_CHILD	0.018	0.062	3.411	0.000
POPULATION	0.024	0.110	4.555	0.000
MIXEDBEVERAGE	0.013	0.112	8.576	0.000

Notes:  $R^2 = 0.291$

Table 15: Vice/Disorder Crime Regression Results for Richmond, VA.

Variable	SE( $\beta$ )	$\beta$	z	Sig (p)
SPATIAL LAG	0.017	0.436	26.194	0.000
CONSTANT	0.013	-0.053	-4.135	0.000
BOOKSTORES	0.013	0.016	1.259	0.207
CABARETS	0.013	0.032	2.496	0.012
OWNEROCC	0.015	-0.014	-0.942	0.346
VACANT	0.019	0.073	3.817	0.000
HSE_UNITS	0.029	-0.004	-0.121	0.903
MHH_CHILD	0.018	0.076	4.168	0.000
POPULATION	0.024	0.154	6.335	0.000
MIXEDBEVERAGE	0.013	0.125	9.609	0.000

Notes:  $R^2 = 0.288$ 

Table 16: Sex Crime Regression Results for Richmond, VA.

Variable	SE( $\beta$ )	$\beta$	z	Sig (p)
SPATIAL LAG	0.022	0.024	1.107	0.268
CONSTANT	0.015	-0.002	-0.113	0.910
BOOKSTORES	0.015	-0.004	-0.290	0.771
CABARETS	0.015	0.035	2.281	0.023
OWNEROCC	0.018	-0.009	-0.498	0.618
VACANT	0.023	0.030	1.315	0.188
HSE_UNITS	0.035	0.038	1.09	0.275
MHH_CHILD	0.022	0.007	0.338	0.735
POPULATION	0.029	0.044	1.530	0.126
MIXEDBEVERAGE	0.015	0.012	0.798	0.425

Notes:  $R^2 = 0.125$

# PLAINTIFF'S STATUS AS A CONSIDERATION IN MISREPRESENTATION AND PROMISSORY ESTOPPEL CASES AGAINST THE MEDIA

JASMINE MCNEALY

*False statements or unfulfilled promises made to news sources can be a source of legal liability for news organizations for fraudulent misrepresentation and promissory estoppel. Both torts require the plaintiff to have reasonably relied upon statements made by the defendant, among other elements. Unlike libel and privacy torts, however, there is no formal inquiry as to the status of the plaintiff. This article examines the effect of imposing an inquiry as to the status of the plaintiff in relation to the defendant or the circumstances in newsgathering cases. The article argues that such an inquiry should be required and finds that it could significantly change the jurisprudence concerning false statements made by journalists.*

**Keywords:** journalist, fraud, misrepresentation, promissory estoppel

## I. INTRODUCTION

While receiving treatment for a medical condition at the Mayo Clinic in Rochester, Minn., Sara Anderson signed a media consent form that authorized the hospital to disclose her name, as well as information about her medical treatments, to “media representatives selected by Mayo Clinic.”<sup>1</sup> A Forum Communications news station, located in Anderson’s hometown, later broadcast a Mayo-produced, videotaped interview of Anderson discussing her condition. Anderson sued both the hospital and the news station. Although acknowledging that she did, indeed, sign the consent form, Anderson claimed that her consent was vitiated because it had been fraudulently induced, and therefore Mayo and Forum had invaded her privacy.

According to Anderson, the doctor from whom she had obtained treatment told her that the video would be used to “educate patients about the condition and treatment options available to them.”<sup>2</sup> Anderson claimed that this meant that the hospital would only disclose her information to other patients. The trial court denied Mayo’s motion for judgment on the pleadings, concluding that there were genuine issues of material fact as

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<sup>1</sup> Anderson v. Mayo Clinic, 36 Media L. Rep. 2249, 2250 (Minn. Ct. App. 2008).

<sup>2</sup> *Id.* The court never specified the exact nature of Anderson’s condition.

to whether the hospital fraudulently induced Anderson's consent; the court also denied Forum Communications' motion for indemnity.<sup>3</sup>

The Minnesota appellate court reversed, finding two reasons why Anderson's fraudulent inducement claim failed: she had not alleged misrepresentation of fact, and the language of the written waiver precluded reasonable reliance on the doctor's statement as a matter of law.<sup>4</sup> Even assuming the doctor told Anderson that the video would only be shown to other patients, his statements amounted to nothing more than statements of future intent. Such statements cannot support a claim for fraudulent inducement.<sup>5</sup> Further, Anderson could not have relied on the doctor's oral statements because these statements directly contradicted the language of the waiver, which indicated that in signing, the patient was granting Mayo permission to disclose her personal information to the media.<sup>6</sup> Because Anderson could not demonstrate that Mayo had fraudulently induced her to sign the waiver, her claim failed.

Anderson had made an identical claim against Forum, which did not appeal the trial court's denial of its motion for summary judgment.<sup>7</sup> Had Forum appealed, the appellate court would almost certainly reached the same conclusion: that Anderson had not been fraudulently induced into consenting to the broadcast of her private information.

The Minnesota appellate court's reasoning regarding misrepresentation and Anderson's reasonable reliance on the doctor's statements are particularly interesting with regard to news media. The crux of the decision appears to be that Anderson could not have reasonably relied on the doctor's statements because there were indications that what he said was inaccurate. In this case, those indications came from the very text of the waiver she signed, which contradicted the doctor's statements that the video would only be shown to other patients. One can generalize, then, that a plaintiff cannot reasonably rely on the defendant's statements if there are indications that the statements are incorrect.

In reaching its conclusion, however, the Minnesota appellate court seems to have ignored the dynamics of the relationship between doctor and patient, a relationship given legal protection. Patients depend upon doctors to provide them with accurate information and rely on the fact that doctors have expertise within certain areas. From the first visit to a doctor regarding an illness, or certainly over an extended course of treatment, patients establish rapport with their doctors and reliance on the doctors' diagnoses. With this in mind, why would Ms. Anderson doubt the oral statements made to her by her treating physician? If Ms. Anderson's status as a patient were considered in relation to the doctor who made the statements to her, the court could have found that her reliance upon those statements was reasonable.

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<sup>3</sup> *Id.* at 2249.

<sup>4</sup> *Id.* at 2251.

<sup>5</sup> *Id.* "It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place." *Id.* (citing *Vandeputte v. Soderholm*, 216 N.W.2d 144, 147 (Minn. 1974)).

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

<sup>7</sup> *Id.* at 2252.

Journalists' false statements or unfulfilled promises made to news sources can be a source of legal liability for news organizations. The best known example of this is *Cohen v. Cowles Media*, in which the U.S. Supreme Court ruled that the First Amendment did not preclude journalists from liability for violating the generally applicable law of promissory estoppel.<sup>8</sup> Both fraudulent misrepresentation and promissory estoppel require the plaintiff to have reasonably relied upon statements made by the defendant, among other elements. Unlike libel and privacy torts, however, there is no formal inquiry as to the status of the plaintiff.

This article examines the effect of imposing an inquiry as to the status of the plaintiff in relation to the defendant or the circumstances in newsgathering cases. The article argues that courts deciding these cases should undertake a more critical measurement of reasonableness when deciding whether the plaintiff reasonably relied on statements made by the journalist. Reasonableness should be measured, in part, by examining the relationship between the plaintiff and the journalist, as well as the plaintiff's level of "media savvy."

Section II explores misrepresentation as it runs through tort and contract law, specifically delving into the requirements of reasonableness and causation that applies in both areas of law. Section III examines the support provided in defamation law and administrative policy for using the plaintiff's status in determining reasonableness as a consideration. The article then reexamines *Cohen v. Cowles Media* using the status of the plaintiff as a consideration in deciding whether the newspapers should have been held liable for promissory estoppel. The article ends with an analysis of the limitations of requiring an inquiry into the plaintiff's status and the public policy implications of using such a standard.

## **II. MISREPRESENTATION AND ESTOPPEL IN TORT AND CONTRACT LAW**

A misrepresentation is a false statement of a past or present fact, including a false characterization of one's opinion or intention at the time the statement was made. Fraudulent misrepresentation is a cause of action involving a misrepresentation that the speaker knows to be false and that is intended to induce reliance. Promissory estoppel is a cause of action that arises when one makes a promise with the intention to induce reliance on the part of another; to prevail, the other must reasonably rely on the promise and suffer an injury when the promise is broken. Both situations may arise in a newsgathering context.

Private individuals have sued journalists for fraudulent misrepresentation when journalists have made false statements about their identity, or their intentions, in order to gather information. In these cases, the plaintiff must prove five things in order to recover damages for misrepresentation: the journalist made a false statement, the journalist knew the statement was false, the journalist intended to induce the plaintiff to rely on the false

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<sup>8</sup> 501 U.S. 663 (1991).

statement, the plaintiff reasonably relied on the false statement, and the plaintiff was damaged as a consequence of relying on the false statement.<sup>9</sup>

The plaintiff may not recover damages without proving each of these elements. In *Ramirez v. Time*,<sup>10</sup> for example, the New York Supreme Court dismissed a misrepresentation claim against *Time Magazine* after a plaintiff failed to allege that she was actually injured by a reporter's misrepresentation.<sup>11</sup> The case arose after the mysterious disappearance and death of a well known veterinarian. The local media speculated widely as to the cause of, and motive for, the veterinarian's death and disappearance. A reporter for *Time* called the veterinarian and left a message on her answering machine stating that he knew of a witness who had seen the dead veterinarian alive the day after she had disappeared.<sup>12</sup>

Upon hearing this message, a representative of the veterinarian's estate went to the reporter's office hoping to dispel speculation that the doctor had been killed because of her connections to organized crime.<sup>13</sup> Instead, the reporter admitted that the message he left was false. He then used the information obtained from the representative as part of an article. The representative claimed the article "distorted their information, and, 'in reckless disregard of the truth,' spread a 'false story across the country,' allegedly foreclosing government law enforcement action on behalf of the" veterinarian's family.<sup>14</sup> The estate sued for defamation and fraudulent misrepresentation.<sup>15</sup>

The court found that in order to state a cause of action for fraud, the estate had to demonstrate "representation of a material existing fact, falsity, scienter, deception and injury. There must also be detrimental reliance by the party to whom the misrepresentation was made."<sup>16</sup> Although the estate based its fraud claim on the reporter's false statement that he had a witness who saw the decedent alive, the court ruled that the plaintiff had not alleged any actual injury arising from that false statement.<sup>17</sup> "Other than meeting with [the reporter]," the court said, "plaintiff fails to allege that she did anything whatsoever in reliance upon his alleged misrepresentation."<sup>18</sup> Because the estate did not allege any injury derived from its reliance on the reporter's misrepresentation, the court dismissed the claim.<sup>19</sup>

Misrepresentation can also arise in a situation involving a breach of contract.<sup>20</sup> In contrast to misrepresentations, which are false statements of past or present fact, contracts

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<sup>9</sup> See W. PAGE KEETON, PROSSER AND KEETON ON TORTS §105 (5<sup>th</sup> ed. 1984).

<sup>10</sup> 12 Media L. Rep. 2230 (N.Y. Sup. Ct. 1986).

<sup>11</sup> *Id.* at 2231.

<sup>12</sup> *Id.* at 2230.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2231. Allegedly, the police ended their search for the veterinarian because of the claims in the article. *Id.*

<sup>15</sup> *Id.* The defamation claim not relevant to this study.

<sup>16</sup> *Id.* (citations omitted)

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2232.

<sup>20</sup> Prosser, *supra* note 25 at § 105.



“are created to enforce promises which are manifestations not only of a present intention to do or not to do something, but also of a commitment to the future.”<sup>21</sup> The elements of a valid contract have been said to include an offer, and acceptance of that offer, consideration defined as the bargained for legal benefit or detriment, mutuality of obligation between the parties, and a meeting of the minds as to the essential terms of the agreement.<sup>22</sup> Breach of contract signifies the failure of a party to fulfill a legally binding promise.

Plaintiffs have sued journalists for breach of contract many times in cases in which the journalists have promised to keep the plaintiff's name confidential in exchange for information.<sup>23</sup> For example, in *Doe v. ABC, Inc.*,<sup>24</sup> two rape victims and one of their boyfriends sued a broadcast station for breach of contract after the station failed to keep their identities anonymous. The station had approached the rape victims for interviews as part of its special report on rape and gave repeated assurances that during the broadcast neither their faces or voices would be recognizable.<sup>25</sup>

During a commercial for the special report and during the report itself, both the voices and faces of the women were identifiable. After the special report aired, the women received calls from employers and family members.<sup>26</sup> The trial court denied the station's motion for summary judgment on the women's claim, and the court of appeals affirmed.

In other cases in which the media defendant breached a promise to preserve a source's confidentiality, the courts have favored the defendants. In a New York case decided one year after *Doe*, the state appellate court ruled that in order for a plaintiff to recover against a journalist for breaking a promise of confidentiality, the plaintiff had to demonstrate the reporter violated a constitutional standard of care.<sup>27</sup> In *Virelli v. Goodson-Todman Enterprises*, Louis Virelli sued a newspaper after it published an article entitled “Tormented by a Drug-Crazed Daughter.” A reporter had promised Virelli that his family would not be identifiable in her story.<sup>28</sup> Although the reporter used fictitious names, Virelli claimed that his family was clearly identifiable and that at least 38 people identified the story as being about the Virelli family.<sup>29</sup>

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<sup>21</sup> *Id.* See also 1-1 MURRAY ON CONTRACTS § 2 (2001), which defines a contract as a “promise, or group of promises, that the law will enforce, or the performance of which it in some way recognizes as a duty.” *Id.*

<sup>22</sup> *Bishop v. Blackstone Acad.*, 477 F. Supp. 2d 876, 885 (S.D. Ohio 2007) (citing *Kostelnik v. Helper*, 770 N.E.2d 58 (2002)).

<sup>23</sup> For a discussion of journalists and liability related to contracts with news sources, see Laurence B. Alexander, *Civil Liability for Journalists Who Violate Agreements or Confidentiality with Source*, 14 NEWSP. RES. J. 45 (1993); and Paula S. Horvath-Neimeyer, *Contracts and Confidential Sources: The Implications of Cohen v. Cowles Media*, 67 JOURN. Q. 1078 (1990).

<sup>24</sup> 152 A.D.2d 482 (N.Y. Sup. Ct. App. Div. 1989).

<sup>25</sup> *Id.* at 483.

<sup>26</sup> *Id.*

<sup>27</sup> *Virelli v. Goodson-Todman Enter.*, 159 A.D.2d 23, 25 (N.Y. Sup. Ct. App. Div. 1990).

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.*

The court dismissed this claim, ruling that Virelli had not proven that the newspaper was “grossly irresponsible without due consideration for appropriate news-gathering and reporting standards in allegedly disclosing plaintiffs’ identities in the subject article.”<sup>30</sup> *Doe* and *Virelli* demonstrate that the courts may rule either way when a promise of confidentiality is broken.

Whether the broken promise to preserve confidentiality constitutes fraudulent misrepresentation depends on whether the journalist making the promise intended to keep it. If the plaintiff can prove there was no intention to keep the promise, fraudulent misrepresentation can be a powerful weapon, because punitive damages may be available. If not, the claim may be limited to breach of contract and compensation for actual losses. Whether that claim prevails will depend on the enforceability of the agreement under traditional contract law. But even where the promise falls short of a binding contract, plaintiffs may seek relief through the doctrine of promissory estoppel, an equitable remedy for a broken promise if the promise induced the plaintiff to act and enforcing it is the only way to avoid an injustice.<sup>31</sup>

In both the *Doe* and *Virelli* cases, the plaintiffs could have tried to invoke promissory estoppel in order to recover damages for the journalists’ broken promises. All three claims can, and have been alleged against journalists who have made promises or misrepresentations while in pursuit of information. But in both fraudulent misrepresentation and promissory estoppel claims, the plaintiff must prove reasonable reliance on journalists’ false statements or broken promises.

#### A. THE REASONABLENESS STANDARD

If the *Anderson* court’s reasoning were applied to the press in misrepresentation and other cases, it could mean that sources of information and the subjects of news should never rely on statements made to them by journalists seeking information. Indeed, that was precisely the message of the U.S. Court of Appeals for the Seventh Circuit in *Desnick v. ABC*.<sup>32</sup> In *Desnick*, reporters from the popular show *PrimeTime Live* sent fake patients armed with hidden cameras to a chain of eye clinics owned by Dr. James H. Desnick to investigate claims that the clinics were prescribing unnecessary cataract operations. The ABC investigative team originally contacted Desnick, who allowed a camera crew to film the main eye clinic in Chicago, allowed access to a cataract removal surgery, and permitted interviews of various doctors, eye clinic staff and patients on the promise that ABC would not conduct ambush interviews or undercover surveillance. Desnick sued ABC for fraud, among other things, after *PrimeTime Live* broadcast the hidden camera segments juxtaposed with interviews with former eye clinic patients, staff and experts on ophthalmology.<sup>33</sup>

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

<sup>31</sup> See RESTATEMENT (SECOND) CONTRACTS § 90 (1981).

<sup>32</sup> 44 F.3d 1345 (7<sup>th</sup> Cir. 1995).

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

Judge Richard Posner, writing for the majority, delivered what could be considered both an indictment of journalists and also a warning to those who become involved with a journalistic investigation. The court ruled ABC had no scheme to defraud Desnick, and that if ABC had indeed committed fraud, the kind of fraud committed was the kind for which the law provides no remedy:

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.<sup>34</sup>

Posner seems to advocate that news sources should utilize a form of self-help with regard to their dealings with reporters, specifically, that because of the historical use of deception in investigative reporting, news sources should take journalists' promises with a grain of salt. Those news sources who fail to do so should not be allowed to seek a remedy for the journalist's broken promises in a court of law. In *Desnick*, the Seventh Circuit also could not find how ABC's false promises had harmed the doctor, and acknowledged that had the *PrimeTime Live* investigators informed the doctor that they would be conducting undercover investigations, Desnick would have refused to speak with them.

Central to Posner's statement in *Desnick* and the *Anderson* decision is the question of reasonableness. Both opinions are fact-specific with respect to the courts' analysis of whether the plaintiffs could have reasonably relied on statements made to them. Was it reasonable for the medical patient, who had presumptively read the consent form, to then rely on statements by a doctor that contradicted the written document? The *Anderson* court decided it was not. Was it reasonable for the doctor in *Desnick* to rely on statements by ABC that it would not use hidden cameras, even though he was told that the news program was conducting an investigative report, and presumably the doctor knew the nature of the *PrimeTime Live* program? According to the Seventh Circuit, the doctor could not have reasonably relied on the producers' promise. The *Desnick* opinion appears to implicitly state that the use of false promises and deception are routine for journalists, and that news sources should be aware of this when relying on their promises.

The objective standard courts must consider with respect to whether the defendant's misrepresentation is actionable is whether the plaintiff reasonably or justifiably relied upon the statements the defendant made.<sup>35</sup> Promissory estoppel, too, requires reasonable reliance on the promise.<sup>36</sup> Reliance is not justifiable unless "the

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<sup>34</sup> *Id.* at 1354.

<sup>35</sup> Restatement (Second) Torts § 537.

<sup>36</sup> Restatement (Second) Torts § 90. See also Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 Willamette L. Rev. 263, 289 (1996), and Jean F. Powers, *Promissory Estoppel and Wagging the Dog*, 59 Ark. L. Rev. 841 (2009).

matter misrepresented is material.”<sup>37</sup> Reasonableness is a fact-specific consideration, and courts have come to different conclusions as to whether plaintiffs could have reasonably relied upon statements journalists made in misrepresentation and promissory estoppel cases. “In determining whether reliance is justifiable with respect to a fraud claim, courts consider the various circumstances involved in the particular transaction, such as ‘the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age and mental and physical condition of the parties, and their respective knowledge and means of knowledge.’”<sup>38</sup>

One measure of whether reliance by a plaintiff was reasonable in promissory estoppel cases examines whether the promise was definite enough to be actionable. In *Ruzicka v. The Conde Nast Publications, Inc.*,<sup>39</sup> for example, the Eighth Circuit found that a journalist’s promise not to identify a woman in a magazine story was definite enough to be actionable under promissory estoppel.<sup>40</sup> *Ruzicka* arose after Claudia Dreifus, a writer for *Glamour*, published identifiable information of a source in an article on therapist-patient sexual abuse.<sup>41</sup> Jill Ruzicka agreed to speak with Dreifus on the condition that she was not “identified or identifiable” in the article.<sup>42</sup> Although Dreifus used a fictitious name for her source in the article, Ruzicka claimed that the information Dreifus provided about the source clearly identified her.<sup>43</sup>

According to the Eighth Circuit, in determining whether a plaintiff has been identified, “[t]he test is neither the intent of the author nor the apprehension of the plaintiff that the article might disclose the identity of the plaintiff, but rather the reasonable understanding of the recipient of the communication.”<sup>44</sup> The court, therefore, overturned the district court’s grant of summary judgment to the magazine publisher, finding that it was for a jury to decide whether injustice would result in not enforcing the doctrine of promissory estoppel for revealing information that made Ruzicka identifiable.<sup>45</sup>

In contrast, the First Circuit ruled that a trucking company owners’ misrepresentation claim against NBC could not stand because the promise of favorable portrayal was “too vague to be actionable.”<sup>46</sup> In *Veilleux v. NBC*,<sup>47</sup> the owners of a

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<sup>37</sup> Restatement (Second) Torts § 538.

<sup>38</sup> *W.D.I.A. Corporation v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612 (S.D. Ohio 1998), *Finomore v. Epstein*, 481 N.E.2d 1193, 1196 (1984), *Feliciano v. Moore*, 412 N.E.2d 427 (1979).

<sup>39</sup> 999 F.2d 1319 (8<sup>th</sup> Cir. 1993).

<sup>40</sup> *Id.* at 1320.

<sup>41</sup> *Id.*

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

<sup>43</sup> *Id.* at 1322. The article identified its source as “Jill Lundquist, a Minneapolis attorney,” but added that the attorney served on a state task force that wrote a law prohibiting therapist-patient sex. Ruzicka was, however, the only female attorney on that task force. *Id.*

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

<sup>45</sup> *Id.* at 1323.

<sup>46</sup> *Id.*

<sup>47</sup> 206 F.3d 92 (1<sup>st</sup> Cir. 2000).

trucking company sued NBC for misrepresentation, among other things, alleging that the broadcast company made false promises that it would not include an organization critical of the trucking industry, and that NBC would positively portray trucking in a investigative report in which the trucking company agreed to participate.<sup>48</sup>

A producer for NBC contacted the trucking company stating that he wanted to make a trip with a long-distance trucker to gather information on truck driver experiences and in order to provide a counter viewpoint to the publicity that Parents Against Tired Truckers (PATT) was getting.<sup>49</sup> The owners of the trucking company agreed to allow the producer to ride along with a trucker provided that PATT would not be included in the broadcast. The producer did not disclose to the owners, however, that he had already interviewed members of PATT.<sup>50</sup> NBC later broadcast a story including the interviews with PATT, footage taken on the trip with the trucker, and statements made by the trucker that he violated federal trucking regulations.<sup>51</sup> The trial court awarded the trucking company owners damages for negligent and fraudulent misrepresentation under Maine law.<sup>52</sup>

On appeal, the U.S. Court of Appeals for the First Circuit reversed this judgment in part. According to the court, the company owners' misrepresentation claims could not stand because the promise of favorable portrayal was "too vague to be actionable."<sup>53</sup> The claim of misrepresentation for the promise not to include PATT in the news story was, however, actionable.<sup>54</sup> The court determined that a reasonable jury could find that NBC concealed their intention to include PATT in the broadcast, and that the owners' reliance on this promise was reasonable.<sup>55</sup>

With regard to the promise to portray the trucking industry positively, the court found that these statements should be viewed as "puffing," for which there could be no recovery under a theory of fraud.<sup>56</sup> Quoting the Seventh Circuit in *Desnick*, the court found that such puffery was common in investigative reporting.<sup>57</sup> According to the First Circuit, the Maine courts would "think that defendants' 'positive' assurances were simply too vague and laconic to inspire, on the part of a reasonable person, the reliance necessary for a misrepresentation claim."<sup>58</sup>

Another consideration as to whether a plaintiff's reliance on statements made by a journalist was reasonable is whether the law contradicts reliance on the statements. In

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<sup>48</sup> *Id.* at 102.

<sup>49</sup> *Id.* at 103.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 104.

<sup>52</sup> *Id.* at 119.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* The court also found that allowing such a claim did not violate the First Amendment.

<sup>55</sup> *Id.* at 120.

<sup>56</sup> *Id.* at 122.

<sup>57</sup> *Id.* (quoting *Desnick*, 44 F.3d at 1354). The First Circuit quoted Posner's paragraph on the wages of not viewing journalists with a modicum of skepticism.

<sup>58</sup> 206 F.3d at 122.

*Pitts Sales, Inc. v. King World Productions*<sup>59</sup> the owners of a magazine sales company sued King World Productions after a story aired on *Inside Edition* examining the business practices of traveling magazine sales companies. A producer for *Inside Edition* secured a job with Pitts Sales by misrepresenting personal information on the job application. While working for the company, he recorded the day-to-day activities of the magazine sales staff with a hidden camera and microphone.<sup>60</sup> Portions of the film footage and recordings the producer acquired while working for the magazine sales company were used during a news report that showed the treatment, abuse, and inadequate supervision given to young sales agents.

Pitts Sales claimed that the journalists committed fraud by making misrepresentations and omissions, upon which the company relied, in order to gain employment with the company.<sup>61</sup> The court ruled that Florida law allowed fraud claims against those who omit information and “places on one who undertakes to disclose material information a duty to disclose that information fully.”<sup>62</sup> Although Pitts Sales argued that the producer knowingly made misrepresentations or omissions that injured the company, the court ruled that in order to recover damages for injury, Pitts Sales’ reliance on the misrepresentations had to be reasonable.<sup>63</sup>

The court found, however, that Pitts Sales’ reliance on the producer’s misrepresentations was not reasonable.<sup>64</sup> The court applied *Food Lion v. Capital Cities/ABC*, in which the grocery store claimed that it incurred damages relating to the administrative costs of hiring reporters who were working undercover. In that case, the Fourth Circuit determined that in order for the grocery store to recover damages related to the hiring of the reporters, the store had to prove that it reasonably relied on the misrepresentations the journalists made on their employment applications and because of this it had incurred administrative costs related to hiring the reporters.<sup>65</sup>

The *Food Lion* court found that the reporters had not made representations that they would be working for longer than one or two weeks, and Food Lion had not asked for this information.<sup>66</sup> Further, North Carolina and South Carolina, the states in which the journalistic investigations occurred, were at-will employment states, meaning either the employer or the employee could terminate employment at any time. The court concluded it was, therefore, unreasonable for Food Lion to believe that the reporters would work for a long period of time.<sup>67</sup> The court also found that Food Lion could not recover wages paid to the reporters because it had paid them for the work they actually

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<sup>59</sup> *Pitts Sales, Inc. v. King World Prod.*, 383 F. Supp. 2d 1354, 1363-1364 (S.D. Fla. 2005).

<sup>60</sup> *Id.* at 1356.

<sup>61</sup> *Id.* at 1362.

<sup>62</sup> *Id.* (citing *Gutter v. Wunker*, 631 So.2d 1117, 1118-19 (Fla. 4<sup>th</sup> DCA 1994)).

<sup>63</sup> 388 F. Supp. 2d at 1362-1363.

<sup>64</sup> *Id.* at 1363.

<sup>65</sup> *Food Lion v. Capital Cities/ABC*, 194 F.3d 505, 513 (4<sup>th</sup> Cir. 1999).

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

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

completed, and not based on the misrepresentations the reporters made during the hiring process.<sup>68</sup>

Using the Fourth Circuit's reasoning in *Food Lion*, the *Pitts Sales* court ruled that the magazine company could not prove that the producer's misrepresentations, made to get hired, proximately caused Pitts Sales administrative costs.<sup>69</sup> The producer did not state that he planned on staying with the company for an extended period. Further, under Florida law, "employment contracts without a definite term are generally terminable at will by either party."<sup>70</sup> The court also found that Pitts Sales regularly experienced a high employment turnover, and that the company did not assume how long a sales agent would work.<sup>71</sup> Therefore, Pitts Sales could not prove it was damaged by the producer's misrepresentations, nor could it recover the commissions it paid to the producer because the commissions were not based on the misrepresentations that the producer made to get hired.<sup>72</sup>

#### B. SPECIAL RELATIONSHIP AS CREATING REASONABLE RELIANCE

Although the *Pitts Sales* court cited *Food Lion* for the conclusion that, as a matter of law, the magazine sales company could not have reasonably relied upon the statements the producer made to gain employment with the company, *Food Lion* is also useful for another reasonableness consideration. Though the *Food Lion* court would ultimately rule that the grocery store could not have relied upon statements the journalists made on their employment applications with respect to how long they would work at the stores, the court found that the store did reasonably rely on the journalists to complete the duties they agreed to as terms of their employment.<sup>73</sup> This reasoning is partially based on the idea of the "special relationship." The Special Relationship Doctrine establishes liability for an individual whose actions create, or could possibly create, an injury to another person. In essence, if one individual relies on another individual because of an association—like the employment relationship in *Food Lion*—or other relationship, a contract, past conduct, creation of peril, etc., the second individual is said to have a duty to the first. If the second individual breaches this duty, and the first is harmed, the second could be held liable.<sup>74</sup>

*Food Lion v. ABC* arose after two reporters for ABC's *PrimeTime Live* gained employment in the deli sections of two different Food Lion grocery stores by falsifying

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

<sup>69</sup> 383 F. Supp. 2d at 1364.

<sup>70</sup> *Id.* (quoting *Iniguez v. American Hotel Register Co.*, 820 So.2d 953, 955 (Fla. 3d DCA 2002)).

<sup>71</sup> 383 F. Supp. 2d at 1364.

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

<sup>73</sup> 984 F. Supp. 923 (M.D.N.C. 1997).

<sup>74</sup> For a more detailed explanation of the special relationship doctrine and affirmative duties in negligence law, see FRANCIS H. BOHLEN, *THE BASIS OF AFFIRMATIVE OBLIGATIONS IN THE LAW OF TORT* (1905), and Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949).

parts of their employment applications.<sup>75</sup> While working in the stores, both reporters secretly recorded hidden camera footage of meat handling practices. The footage was then used, along with interviews of ex-Food Lion employees, as part of an investigative report on the Food Lion grocery chain. Food Lion sued ABC for fraud and breach of fiduciary duty, among other things.<sup>76</sup>

The federal appellate court deciding the case reiterated the principle of agency law that states that an employee owes a duty of loyalty to his employer.<sup>77</sup> In North and South Carolina, where the ABC journalists worked for Food Lion stores, employee disloyalty was considered tortious in three contexts: when an employee directly competed with his employer, when “the employee misappropriate[d] her employer’s profits, property or business opportunities,” and “when the employee breaches her employer’s confidences.”<sup>78</sup> The Fourth Circuit found that the journalists’ actions in surreptitiously recording the grocery store’s meat handling practices “verged on the kind of employee activity that has already been determined to be tortious.”<sup>79</sup>

ABC’s interests were adverse to those of Food Lion despite the fact that the broadcaster and the grocery store were not in direct competition. The reporters served ABC’s interest in exposing Food Lion’s unsanitary and deceptive practices at the expense of the grocery store, all while accepting payment from Food Lion. “In doing this, [the journalists] did not serve Food Lion faithfully, and their interest (which was the same as ABC’s) was diametrically opposed to Food Lion’s.”<sup>80</sup> The Fourth Circuit also noted that the ABC journalists intended to go against the interests of Food Lion in favor of ABC. Because of this, the court ruled that the district court was correct in not setting aside the jury verdict that the journalists had breached their duty of loyalty.<sup>81</sup>

Other courts have similarly considered special relationship reasonable reliance with respect to journalists in misrepresentation cases. In *Deteresa v. ABC, Inc.*,<sup>82</sup> the Ninth Circuit ruled that, because a plaintiff and a member of the press did not have a relationship that created a duty of disclosure, there was no fraud when a producer failed to inform the woman that she was being recorded on audio and videotape.<sup>83</sup> *Deteresa* arose after a producer from ABC visited the home of Beverly Deteresa, an attendant on

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<sup>75</sup> Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1217, 1218 (M.D.N.C. 1996).

<sup>76</sup> *Id.* Food Lion also pleaded claims for civil conspiracy and negligent supervision. *Id.* A jury found ABC liable for trespass and awarded Food Lion nominal damages of \$1.00 for the journalists’ breach of loyalty. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 516 (M.D.N.C. 1998). The jury awarded Food Lion \$5,545,750 in total damages, which were reduced by the trial court and reduced again on appeal to nominal damages. *Id.* at 516.

<sup>77</sup> *Id.* at 515.

<sup>78</sup> *Id.* at 515-516.

<sup>79</sup> *Id.* at 516.

<sup>80</sup> *Id.* The court was careful, however, to note that its ruling did not apply in all instances where an employee works two jobs. *Id.*

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

<sup>82</sup> 121 F.3d 460 (9<sup>th</sup> Cir. 1997).

<sup>83</sup> *Id.* at 467.



the flight that O.J. Simpson had taken after the murder of his ex-wife.<sup>84</sup> Deteresa never allowed the producer into her home, saying she did not want to be interviewed for the news program. She did, however, continue to talk to the producer at her door and explained that she was “frustrated” with hearing some of the false news reports being published about what occurred on the flight with O.J. and explained to the producers some of the details about what really occurred.<sup>85</sup> The next day, the producer called Deteresa to ask her if she would appear on camera; she declined. While the producer spoke with Deteresa, a camera crew filmed her from a public street. The producer also surreptitiously recorded their conversation. That night, ABC broadcast a clip of the conversation on the news program *Day One*.

The court found that under California law, there were four circumstances in which nondisclosure or concealment would constitute fraud: when there is a fiduciary relationship; when the defendant knows a material fact that the plaintiff does not; when the defendant conceals a material fact from the plaintiff; and when the defendant discloses some information but also conceals material facts.<sup>86</sup> According to the court, these situations “presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.”<sup>87</sup> The Ninth Circuit agreed with the district court, which found that there was no evidence that Deteresa and the producer had a relationship that required the producer to disclose that he was taping her.<sup>88</sup>

In contrast to the Ninth Circuit’s ruling in *Deteresa*, a Minnesota appellate court in *Special Force Ministries v. WCCO TV*,<sup>89</sup> ruled that a reporter may have committed fraud by failing to disclose that she worked for a television station when she applied to be a volunteer at a care facility.<sup>90</sup> *Special Force Ministries*, a care facility for handicapped persons, sued the television station, for trespass and fraud, after a journalist for the station obtained a volunteer job at the facility and secretly recorded footage while she worked.<sup>91</sup> The station used the journalist’s footage in a report on patient care at the facility.<sup>92</sup> The station argued that *Special Force* could not prove fraud because the reporter had no duty to disclose that she worked for the station.<sup>93</sup> The court found, however, that “a duty is imposed when disclosure is ‘necessary to clarify information already disclosed, which would otherwise be misleading.’”<sup>94</sup> The court found that the reporter not only failed to disclose that she was employed by the station, but that she also indicated that she was unemployed. Her references also failed to disclose that she worked for the station.<sup>95</sup>

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<sup>84</sup> *Id.* at 462.

<sup>85</sup> *Id.* 462-463.

<sup>86</sup> *Id.* at 467 (quoting *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997).

<sup>87</sup> 121 F.3d at 467 (quoting *LiMandri*, 60 Cal. Rptr. 2d at 543).

<sup>88</sup> 121 F.3d at 467.

<sup>89</sup> 584 N.W.2d 789 (Minn. Ct. App. 1998).

<sup>90</sup> *Id.* at 793-794.

<sup>91</sup> *Id.* at 791.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 793.

<sup>94</sup> *Id.* (quoting *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989)).

<sup>95</sup> 584 N.W.2d at 793.

Further, the court rejected the claim that Special Force could not show damages because, “[h]ad Special Force known Johnson worked for WCCO, it would not have given Johnson the volunteer position and placed her in a position of trust working with its vulnerable residents.”<sup>96</sup> The court denied the station’s motion for summary judgment.<sup>97</sup>

A California appellate court, in comparison, found that reporters had no duty to disclose that they were recording two men with whom they were having a business meeting.<sup>98</sup> *Wilkins v. NBC, Inc.* arose from a *Dateline* NBC investigation of the “pay-per-call” industry.<sup>99</sup> Two producers for NBC contacted SimTel, a pay-per-call company, in response to a national advertisement and arranged a lunch meeting with company representatives.<sup>100</sup> The producers brought two additional people to the meeting, which took place on the patio of a restaurant. The company representatives did not inquire into the identities of the two additional people.<sup>101</sup> During the meeting the SimTel representatives explained how their pay-per-call system worked. The producers recorded the meeting using hidden cameras and later broadcast excerpts from the recording.<sup>102</sup>

The SimTel representatives pleaded three theories of fraud: that the reporters made “affirmative misrepresentations to them on which they relied;” the reporters failed to disclose that they were journalists, and they were legally obligated to do so; and that NBC committed “deceptive acts in connection with a contract” and was therefore liable to the SimTel representatives under the California fraud statute. The court found, however, that no fraud could be proved under any theory of misrepresentation because the representatives could not prove that they relied on the reporters’ statements to their detriment.<sup>103</sup> The representatives admitted that they would have answered any questions about the telephone scheme if they had known they were speaking with reporters, and “that ‘the gist of what [he] was saying would have been exactly the same,’ but that he ‘might have worded’ some of his remarks a little differently.”<sup>104</sup> The representatives also admitted that their jobs required them to distribute information about the company and that 97 percent of the people who inquire about SimTel never enter into a business relationship with the company.<sup>105</sup>

The court also disagreed with the representatives’ assertion that the journalist had committed fraud by not disclosing their identities and the fact that they were investigating the company using hidden cameras.<sup>106</sup> Using the Ninth Circuit’s ruling in *Deteresa*, the court ruled that the representatives had to demonstrate that they were in some kind of

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<sup>96</sup> *Id.* at 794.

<sup>97</sup> *Id.*

<sup>98</sup> *Wilkins v. NBC, Inc.*, 84 Cal. Rptr. 2d 329, 339 (Cal. Ct. App. 1999).

<sup>99</sup> *Id.* at 332. Pay-per-call is the “practice of charging for services on so-called ‘toll-free’ 800 lines, often without the knowledge of the persona billed for the services.” *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 338.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 339.

relationship with the journalists that required disclosure.<sup>107</sup> The representatives failed to do so, and because of this, the court ruled that the journalists' nondisclosure did not constitute fraud.<sup>108</sup> The court also ruled that because there was no contract between the representatives and the journalists, the representatives could not recover damages for fraud under state law, which applies to "fraud 'committed by a party to the contract...with intent to deceive another party thereto, or to induce him to enter into the contract.'"<sup>109</sup>

Inherent in all of these special relationship cases is the inquiry into whether the plaintiff should have reasonably expected the defendant to fulfill his duty. The federal district court found it reasonable for the grocery chain to believe that its employees would not breach their duty of loyalty. Likewise, the Minnesota court found that it was reasonable for a prospective employer like Special Force, to rely on the information provided by a job applicant. Both the *Food Lion* and *Special Force* cases happened in the employment setting. It is easy to see the relationship an employer would have with its employees in that context. But where there was no relationship, as in *Wilkins* and *Deteresa*, the court found no duty on the part of the defendant. Therefore, the plaintiffs' had unreasonably relied on the defendants' statements.

### III. AN ADDITIONAL REASONABLENESS CONSIDERATION

Because reasonableness is a fact-specific determination, adding a new factor to consider would not be overly burdensome on a court or jury. The rulings above demonstrate that in misrepresentation and breach of promise cases against the media, the courts already examine the relationship between the journalist and news source, as well as whether, under the law, the plaintiff should have known better than to rely on statements made to them. If these considerations are taken a step further, the courts could also examine how media savvy the plaintiff is, or should be.

The basis for this examination is an inquiry into the plaintiff's status. Is the plaintiff an unwitting medical patient relying, as in *Anderson*, on the words of a trusted physician? Or perhaps the patient is a well-educated doctor, as in *Desnick*, who knows that the journalist is conducting an investigation, and who should have "maintain[ed] a minimum of skepticism" about what the journalist told him? From a public policy standpoint, the plaintiff's status should matter with respect to whether she should recover damages for reliance on statements made. Libel law and administrative regulations provide guidance as to how the courts could examine the plaintiff's status.

#### A. LIBEL LAW CONSIDERATIONS

Libel law uses the well-established principle that the status of the plaintiff is of paramount consideration with respect to the plaintiff's burden of proving the defendant's

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

degree of fault. This principle was first established in *New York Times v. Sullivan*<sup>110</sup> in which the U.S. Supreme Court ruled that the First Amendment required public officials to prove actual malice, that is, knowing falsity or reckless disregard for the truth, when suing for defamation. This ruling was based on the “principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>111</sup> *Sullivan* arose after the *New York Times* printed an advertisement from a civil rights organization. The advertisement contained false statements, which Sullivan, a Montgomery, Ala., commissioner, claimed libeled him. According to the Supreme Court, without the heightened burden of proof for public officials, speakers would be unjustifiably censored with respect to discussion of public and government officials.<sup>112</sup>

The Court extended the actual malice principle to public figures in *Curtis Publishing Co v. Butts*, an opinion that consolidated two cases, one in which an athletic director and coach sued a newspaper, the other in which a former Army General and segregationist sued the Associated Press.<sup>113</sup> Both the athletic director and the segregationist were ruled public figures; one because he was a well-known celebrity football coach the other because he “thrust himself into the vortex of [a public] controversy.”<sup>114</sup> The Court found that both men commanded the public interest and also had access to the media to rebut statements made about them.<sup>115</sup>

In *Gertz v. Robert Welch Inc.*, however, the Supreme Court held that a lawyer in a controversial case was a private person and not a public figure. In *Gertz*, the Court articulated the policy reasons why state governments might want to offer a different level of protection for private individuals than for public figures.<sup>116</sup> Private individuals are less able than public figures and officials to have access to the media and, therefore, to have the ability to correct any false information published about them.<sup>117</sup> Moreover, public figures and officials, in general, assume the risk of public scrutiny, while private individuals do not.<sup>118</sup> After *Gertz*, private figure plaintiffs must still generally prove a degree of fault, typically negligence, to prevail.

Courts deciding common law privacy cases at times also considered the plaintiff's status when deciding the defendant's liability for invasion of privacy. The U.S. Supreme Court extended the *N.Y. Times* actual malice standard to plaintiffs in false light invasion of privacy cases in *Time Inc. v. Hill*,<sup>119</sup> at least where the issues involve were of interest to the public. Even before the *Hill* decision, the courts accorded less privacy protection for public figure and public official plaintiffs. In *Sidis v. F-R Publishing*

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<sup>110</sup> 376 U.S. 254 (1964).

<sup>111</sup> *Id.* at 270.

<sup>112</sup> *Id.* at 282-283.

<sup>113</sup> 388 U.S. 130 (1967).

<sup>114</sup> *Id.* at 146.

<sup>115</sup> *Id.* at 154-55.

<sup>116</sup> 418 U.S. 323 (1974).

<sup>117</sup> *Id.* at 344.

<sup>118</sup> *Id.* at 344-345.

<sup>119</sup> 385 U.S. 374 (1967).

*Corporation*,<sup>120</sup> in which a former child prodigy sued a publication after it published an exposé of his then current life, the court found that those who hold public office sacrifice some of their privacy.<sup>121</sup> And the court did not limit its ruling to public officials; the court ruled that “limited scrutiny” of the private life of “any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a ‘public figure’” was not actionable as invasion of privacy.<sup>122</sup>

The inquiry into whether plaintiffs are public figures or officials, and their ability to then recover damages in libel and privacy suits, concerns the plaintiff’s relationship to the public through the media. If, as stated by the *Sidis* court, a plaintiff has achieved a certain level of fame or notoriety so as to be of interest to the public, the courts have placed a higher burden upon that plaintiff to prove an actionable claim. A similar categorization of plaintiffs could be implemented in misrepresentation and promissory estoppel cases.

Rather than the public/private figure inquiry, this examination would categorize plaintiffs as media-savvy or not. This would be a fact-specific inquiry, perhaps best decided by a jury. A media-savvy plaintiff like Dr. Desnick, for example, should know better than to trust the promises of an investigative reporter, and therefore could not prove reasonable reliance as a matter of law. Plaintiffs who are not media-savvy or who have no idea that they are dealing with the media, as in *Food Lion*, would be permitted to prove as a matter of fact that they reasonably relied on the reporters’ statements, unless prohibited by some other operation of law.

#### B. FEDERAL TRADE COMMISSION POLICY ON DECEPTION

When considering whether an advertisement could be deceptive, the Federal Trade Commission examines whether a consumer’s interpretation of the ad was reasonable. Congress granted the FTC the authority to regulate “unfair or deceptive acts or practices in commerce” that injure consumers. The Commission’s power extends to regulate ads that are false, deceptive or misleading.<sup>123</sup> In examining whether an ad is deceptive, the FTC assess three elements: 1) there was a “representation, omission or practice that is likely to mislead the consumer,” 2) the deception is misleading “from the perspective of a consumer acting reasonably in the circumstances,” and 3) the deception is material.<sup>124</sup>

When analyzing whether an action is likely to mislead, the FTC considers the consumers’ expectations with regard to a product or activity. If the Commission finds the

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<sup>120</sup> 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

<sup>121</sup> *Id.* at 809.

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

<sup>123</sup> 15 U.S.C. § 45(m)(l).

<sup>124</sup> FTC Policy Statement on Deception, appended to *Ciffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (Oct. 14, 1983), available at <http://ftc.gov/bcp/policystmt/ad-decept.htm> (last accessed June 2, 2010).

expectations unreasonable, it may find there was no evidence of deception.<sup>125</sup> Further, the allegedly deceptive statement, omission or practice has to be material, that is, important to the consumer's decision-making process. The FTC considers certain categories of information material, including information about "purpose, safety, [and] efficacy."<sup>126</sup> The Commission also presumes that express claims are material.

Undergirding both the inquiry into deceptiveness and materiality is the legal fiction of the "reasonable consumer." "The test is whether the consumer's interpretation or reaction is reasonable."<sup>127</sup> An ad is presumed reasonable if the consumer's interpretation is the message that the company meant to communicate. The test used is "whether the interpretation is reasonable in light of the claim."<sup>128</sup> That said, the Commission will not consider puffery, or claims based on subjective standards like taste, feel, appearance, or smell, to be deceptive.<sup>129</sup>

But reasonableness is not conditioned upon the most gullible consumer. The oft-quoted example is that the FTC would not find a company's advertisement for Danish pastry misleading because the pastry did not actually come from Denmark.<sup>130</sup> Nor does the Commission find reasonableness based upon the understanding of the ad by the most advanced consumer. The FTC does, however, consider the target audience for the advertisement. The Commission will consider whether a reasonable member of a subgroup could have been misled. Ads targeting those suffering from illness and other vulnerable groups are examined under a higher level of scrutiny. The rationale for this is that members of certain groups, like the terminally ill, are susceptible to particular kinds of deception. Those suffering from some disease may be more susceptible to misleading advertisements claiming to offer a cure for their sickness. Those wanting to lose weight may be more susceptible to claims by the makers of diet drugs that their new product is a wonder drug.<sup>131</sup>

Falling under particular scrutiny are those ads aimed at children who the Commission deems "unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue."<sup>132</sup> One such example involved Audio Communication, which ran television ads for its 900 numbers directed

<sup>125</sup> See, e.g., Leonard Porter, 88 F.T.C. 546, 626, n.5 (1976) (dismissing a complaint alleging consumers were misled by the sale of unmarked products).

<sup>126</sup> FTC Policy Statement, *supra* note 124.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (quoting *Nat'l Dynamics*, 82 F.T.C. 488, 524, 548 (1973), *aff'd*, 492 P.2d 1333(2d. Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued* 85 F.T.C. 39-1 (1976).

<sup>129</sup> FTC Policy Statement, *supra* note 124. See also the discussion of *Veilleux v. NBC*, *supra* text accompanying notes 47-58.

<sup>130</sup> See Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).

<sup>131</sup> See Porter & Dietsch, 90 F.T.C. 770, 864-865 (1977), 605 F.2d 194 (7<sup>th</sup> Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

<sup>132</sup> *Ideal Toy Corp.*, 64 F.T.C. 297, 310 (1964).

at children. The FTC reached an agreement with the company that the ads would explain that the calls cost money and that the children should seek their parent's permission.<sup>133</sup>

In sum, the FTC assesses the status of the targeted consumer in considering whether the consumer's interpretation of the advertisement, and subsequently his expectations for the product or service, is reasonable. However, the Commission will not consider an ad deceptive if a person outside of the sub-group targeted by the company is misled. Therefore, if a layperson is misled by an advertisement aimed at a doctor, lawyer, or someone with some specific knowledge or set of skills, the FTC will not find the ad deceptive. The idea is that members of a sub-group with a certain level of skill or training would, or should, be better able to interpret the advertisements or statements, and understand the message the company had specifically created targeting that sub-group. In the same way, individuals who are media savvy, and possess the "minimum of skepticism about journalistic goals and methods," may be better able to understand the methods used by journalists to gather information. This may include misrepresentation.

The very idea of using considerations from the law of advertising seems to contradict traditional First Amendment jurisprudence granting news a higher level of protection than advertising. The U.S. Supreme Court has stated the rationale for giving advertising a lower level of protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, when it noted that the "hardiness of commercial speech," perhaps, "make[s] it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."<sup>134</sup> In contrast, social and political speech, as news is considered, receives the highest level of First Amendment protection. It would stand to reason, then that the application of test for reasonableness used for a kind of speech receiving a lower level of First Amendment protection would be prohibited.

But misrepresentation and promissory estoppel cases against journalists are generally not based on what the journalists published. Instead, plaintiffs claim that the journalists misrepresented themselves or broke promises while gathering information. The journalists' misrepresentations, then, are a part of their newsgathering activities. Although granted First Amendment protection, and considered an integral part of publication, newsgathering does not receive the same level of constitutional protection as publication.<sup>135</sup> Therefore, the application of the new standard does not overly burden journalists' ability to gather news. It may, instead, remove liability for certain statements made while newsgathering.

#### **IV. APPLYING THE NEW STANDARD: RETHINKING *COHEN V. COWLES MEDIA***

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<sup>133</sup> *In re* Audio Communications, Inc., FTC File No. 892-3231 (consent order to cease and desist) (April 2, 1991).

<sup>134</sup> 425 U.S. 748, 772 n. 24 (1976).

<sup>135</sup> See e.g., *Pell v. Procunier*, 417 U.S. 817 (1974), *Saxbe v. Washington Post*, 417 U.S. 843 (1974), and *Branzburg v. Hayes*, 408 U.S. 665 (1972).

It is difficult to know exactly how the courts would use the proposed additional reasonableness inquiry. The facts of *Cohen v. Cowles Media*, however, provide an opportunity to test the new standard. Although billed as only a promissory estoppel case, the lower court rulings also discuss the plaintiff's claim of misrepresentation against the newspapers.

#### A. Facts in Brief

On the eve of the 1982 Minnesota gubernatorial election, Dan Cohen, the director of public relations for an advertising company, and an associate of the Wheelock Whitney campaign, contacted reporters from the *Minneapolis Star Tribune* and the *St. Paul Pioneer Press* with information about Marlene Johnson, the opposition candidate for governor. Cohen had been chosen to contact the press by a group of Whitney supporters because "he had the best rapport with the local media."<sup>136</sup> Cohen offered to provide the information upon the promise that the reporters not disclose his name as the source of the information.<sup>137</sup> Both reporters promised to keep Cohen's identity secret without disclosing that their promise of anonymity was subject to approval by their editors.<sup>138</sup> Cohen provided the reporters with copies of public court records concerning Johnson.

The first was a 13-year-old case against Johnson for unlawful assembly for protesting the city's discriminatory construction hiring practices, which was later dismissed; the second was a conviction for petit theft for leaving a store with \$6 worth of sewing materials during a time when Johnson was grieving over her father's death. That case, too, was later vacated.<sup>139</sup> After receiving this information, both newspapers interviewed Johnson, and further investigated the court records. Independently, the editors of the newspapers decided to publish Cohen's name in conjunction with a story about Johnson's arrests.<sup>140</sup>

The next day, both newspapers published stories about the arrests citing Cohen as the source of the information. The same day, Cohen was fired from his job as a public relations officer.<sup>141</sup> Cohen sued both newspapers for fraudulent misrepresentation and breach of contract. The trial jury awarded him \$200,000 in compensatory damages and \$500,000 in punitive damages.<sup>142</sup> The Minnesota appellate court affirmed the trial court's ruling that the First Amendment was not implicated because there was no

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<sup>136</sup> 445 N.W. 2d 248, 252 (Minn. Ct. App. 1989).

<sup>137</sup> *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 201 fn. 2.

<sup>140</sup> *Id.* at 201. According to the Minnesota Supreme Court, there was a great debate among the staffs at the two newspapers as to whether to publish Cohen's name. Some reporters contended that the Johnson story, as a whole, was not newsworthy. Others viewed the story about the arrests as newsworthy and argued that the story should be published along with Cohen's name. Both original reporters objected to revealing Cohen's identity. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*



government action, and that even if the newspapers' First Amendment rights were implicated, compelling state interests outweighed those rights.<sup>143</sup> The appellate court set aside the punitive damage award, ruling that Cohen had not proven misrepresentation.<sup>144</sup> To prove misrepresentation, Cohen had to prove that the reporters misrepresented a past or present fact, and not that they simply failed to keep a future promise.<sup>145</sup> Because he was unable to do this, the appellate court reversed the trial court's ruling.

The Minnesota Supreme Court affirmed the appellate court's ruling to set aside the punitive damage award based on misrepresentation.<sup>146</sup> The court disagreed, however, with the appellate court's award of damages for breach of contract. Although noting the significant role that anonymous sources play in gathering news and the great importance that journalists place on the protection of these sources, the court found that the protection of anonymous sources was an ethical question and not based on the law. "The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral or ethical obligation. The two obligations are not always coextensive."<sup>147</sup>

According to the court, "the law [] does not create a contract where the parties intended none."<sup>148</sup> Nor did the law make every promise legally binding, especially when neither of the parties were thinking in terms of a legal obligation.<sup>149</sup> The court found that both parties understood the promise not to publish Cohen's name to be a moral duty and not a legal contract.<sup>150</sup> The court concluded that a breach of contract action was inappropriate for the newspapers breaking the promise to Cohen that he would remain anonymous.<sup>151</sup>

The court also ruled that a finding in favor of Cohen under a theory of promissory estoppel would violate the newspapers' First Amendment rights.<sup>152</sup> The newspapers had argued that any state imposed sanction for their printing of Cohen's name would violate their rights of freedom of speech and the press. The intermediate court of appeals ruled, using a contract approach that focused on whether there was a binding promise that the newspapers made and breached, found that the application of "neutral principles" of contract law did not invoke the First Amendment.<sup>153</sup> The Minnesota Supreme Court found, however, that promissory estoppel was not neutral toward the First Amendment, but required that the court "weigh the same considerations

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<sup>143</sup> *Id.*

<sup>144</sup> *Cohen v. Cowles Media Co.*, 455 N.W.2d 248, 259.

<sup>145</sup> *Id.*

<sup>146</sup> *Cohen*, 457 N.W.2d at 202.

<sup>147</sup> *Id.* at 203.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* "We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract." *Id.*

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

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 205.

<sup>153</sup> *Id.* at 204 (citing *Cohen*, 445 N.W.2d at 254-57).

that are weighed for whether the First Amendment has been violated.”<sup>154</sup> The court had to balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.<sup>155</sup>

The court was skeptical that an injustice could only be avoided by enforcing the newspapers’ promise to Cohen, although Cohen’s reliance on that promise proved to be detrimental. According to the court, it was not enough to note that a promise was broken; the application of promissory estoppel required an inquiry into why the promise was broken.<sup>156</sup> Such an inquiry might entail “second-guessing the newspaper editors” and the court would have to answer questions best left to them.<sup>157</sup>

On appeal, the U.S. Supreme Court reversed the Minnesota Supreme Court’s decision and held that the First Amendment did not prohibit Cohen from recovering damages under promissory estoppel.<sup>158</sup> In doing so, the Court expressly declined to follow the principle followed in many of its previous cases that, “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”<sup>159</sup> The Court distinguished its previous cases from *Cohen*, noting that an important criterion in that principle required that the information to be published must be lawfully obtained.<sup>160</sup> The majority expressed uncertainty as to whether the newspapers lawfully obtained Cohen’s name.<sup>161</sup>

Instead, the Court found that the case was controlled by a line of precedent establishing that laws of general applicability did not violate the First Amendment if the law’s effect on the freedom of the press was only incidental to the law’s enforcement.<sup>162</sup> As such, the Court noted that these laws were not subject to strict scrutiny, meaning that the laws did not have to serve a compelling state interest, in order to be found constitutional.<sup>163</sup> The Court concluded that the Minnesota law of promissory estoppel

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<sup>154</sup> 457 N.W.2d at 205.

<sup>155</sup> *Id.* at 205.

<sup>156</sup> *Id.* at 204.

<sup>157</sup> *Id.*

For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough? The witnesses at trial were sharply divided on these questions. Under promissory estoppel, the court cannot avoid answering these questions, even though to do so would mean second-guessing the newspaper editors.

*Id.*

<sup>158</sup> *Cohen*, 501 U.S. at 665.

<sup>159</sup> *Id.* at 668-669 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103(1979).

<sup>160</sup> 501 U.S. at 669.

<sup>161</sup> *Id.* at 671. The Court noted that the reporters in this case obtained Cohen’s name only by making a promise that they did not fulfill. *Id.* The Court did not note, however, that the reporters’ promise was unfulfilled after the reporters knew Cohen’s name, not in order to obtain the name.

<sup>162</sup> *Id.* at 669.

<sup>163</sup> *Id.* at 670.

was a law of general applicability. The law did not target the press and applied to all the citizens of that state. Nor did the First Amendment prohibit the application of promissory estoppel to members of the press.<sup>164</sup> Any effect on newsgathering as a result of the enforcement of the law would be incidental and "constitutionally insignificant."<sup>165</sup> Because general laws did not implicate the Constitution, the Court was not required to apply a greater level of scrutiny.<sup>166</sup>

On remand and after considering the U.S. Supreme Court's ruling, the Minnesota Supreme Court, ruled in Cohen's favor.<sup>167</sup> If the additional reasonableness inquiry were applied, a different result may have occurred.

#### B. *COHEN* RE-EXAMINED

Whether a plaintiff should be categorized as media-savvy is a fact-specific inquiry. In *Cohen*, one of the most important facts about the plaintiff is that he was a public relations professional. The Minnesota Supreme Court, on remand, also noted that Cohen had worked in journalism. Further, the lower court noted that he had been chosen to contact the press with the information on the opposition candidate because he had developed a relationship with the press. These facts indicate that Cohen knew the workings of journalism and could not have reasonably relied on the promise made to him by the journalist. The opposite conclusion is also possible. Because he knew the workings of journalism, his reliance on the journalists' promises was justified.

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<sup>164</sup> *Id.* The court noted cases in which it ruled that the press was not exempt from laws of general applicability:

Similarly, the media must obey the National Labor Relations Act, *Associated Press v. NLRB*, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937), and the Fair Labor Standards Act, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193, 90 L. Ed. 614, 66 S. Ct. 494 (1946); may not restrain trade in violation of the antitrust laws, *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969); and must pay non-discriminatory taxes, *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 87 L. Ed. 1292, 63 S. Ct. 870 (1943); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-583, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). Cf. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201-202, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990). It is, therefore, beyond dispute that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."

*Id.* (citations omitted).

<sup>165</sup> *Id.* at 672 (Blackmun, J. dissenting).

<sup>166</sup> *Id.* at 670.

<sup>167</sup> 479 N.W. 2d 387 (Minn. 1992).

Maintaining confidential sources “was a long-standing journalistic tradition that Cohen . . . relied upon in asking for and receiving a promise of anonymity.”<sup>168</sup>

But there is more to the story than just someone relying on journalistic ethics. Cohen contacted the journalists and offered to provide at least one of the reporters with “political dynamite.”<sup>169</sup> The information turned out, instead, to be a dud. The information on the candidate’s arrest was incomplete, and did not contain the proper context, which the reporters obtained after interviewing the candidate herself.<sup>170</sup> It would be safe to say that as a journalism veteran, Cohen would know the editors’ reactions to being burned by a source. Further, Cohen knew that the information was incomplete, and gave it to the journalists in hopes of initiating a last minute smear campaign against an opposing candidate. In light of this, was it reasonable for Cohen to rely on the promises made to him by the journalists? At least one court, post-*Cohen*, has ruled that a plaintiff in a breach of contract case who does not act in good faith cannot recover damages.

In *Steele v. Isikoff*,<sup>171</sup> Julie H. Steele sued Michael Isikoff and *Newsweek Magazine* for breach of contract, fraud, promissory estoppel and breach of fiduciary duty, after the magazine published her name in an article on then-President Bill Clinton’s alleged affair with Kathleen Willey.<sup>172</sup> Steele alleged that Isikoff promised that their conversations, about the matter were off the record, but that when pressured by his editors, Isikoff published her name and the information that she provided.<sup>173</sup> Isikoff argued that the First Amendment barred Steele’s claims.<sup>174</sup>

The court disagreed with Isikoff’s assertion that the First Amendment required dismissal of the suit. The court did, however, dismiss Steele’s breach of contract claim. Using the Minnesota Supreme Court’s analysis of the breach of contract claim in *Cohen*, the *Steele* court ruled “a reporter-source confidentiality arrangement is more appropriately viewed as a moral commitment.”<sup>175</sup> According to the court, the laws of the District of Columbia and Virginia did not elevate moral obligations to contracts: “Accordingly, because a reporter’s promise of confidentiality is a moral obligation, not a contractual requirement, and because a moral obligation does not give rise to express or implied contractual duties, there is no contractual relationship between Steele and Isikoff.”<sup>176</sup> The court also ruled that if it were to decide that the confidentiality agreement between a reporter and a source was contractual, Steele’s claim of a contract would fail because a contract entailed “a covenant of good faith and fair dealing.”<sup>177</sup> Because Steele intended to lie to Isikoff about what she knew about the president’s

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<sup>168</sup> *Id.* at 392.

<sup>169</sup> 445 N.W. 2d 248, 252.

<sup>170</sup> 457 N.W.2d 199, 201 at n. 2.

<sup>171</sup> 130 F. Supp. 2d 23 (D.D.C. 2000).

<sup>172</sup> *Id.* at 26-27.

<sup>173</sup> *Id.* at 27. Steele apparently lied about her knowledge of Willey’s relationship with Clinton, at the prompting of Willey.

<sup>174</sup> *Id.* at 28.

<sup>175</sup> *Id.* at 31.

<sup>176</sup> *Id.* at 31-32.

<sup>177</sup> *Id.* at 32 (quoting *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988)).

relationship, she was acting in bad faith, which would relieve Isikoff of any duty he had under their contract.<sup>178</sup>

The court dismissed Steele's claim for damages under a theory of promissory estoppel because "Virginia law does not recognize the doctrine."<sup>179</sup> The court also dismissed her claim that Isikoff was unjustly enriched by making the promise not to publish her name, which led to her reliance on the promise.<sup>180</sup> Courts in the District of Columbia prohibit claims of unjust enrichment from plaintiffs who acted without good faith:

In an action in equity, 'he who asks relief must have acted in good faith. The equitable powers of the court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make the court the abettor of iniquity.' . . . Thus, while 'equity does not demand that its suitors shall have led blameless lives, . . . it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.'<sup>181</sup>

Because Steele intended to lie to Isikoff, she acted with deceit, barring her from recovery under unjust enrichment.<sup>182</sup>

It is arguable whether Cohen was deceptive in providing the partial information to the newspaper reporters. The Minnesota appellate court noted, however, that at trial, his supervisor testified to being upset by Cohen's "unscrupulous practices."<sup>183</sup> But a court could find that he acted in bad faith because he knew the information that he was providing was incomplete, and the arrests were later vacated. Under the *Steele* court's analysis, such deception would preclude a finding that Cohen had reasonably relied upon the promise made by the journalists. Bad faith, then, dissolves the special relationship created by a contract. Without that special relationship, the newspaper in *Cohen* had no duty not to publish Cohen's name, and Cohen could not be said to have reasonably relied on the reporters' promise.

## **V. LIMITATIONS OF THE NEW STANDARD**

The argument for an additional consideration into whether a plaintiff in a misrepresentation or promissory estoppel case against the press is media-savvy, had a relationship with the media, or should have known how journalists operate is not a call to

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 33.

<sup>180</sup> *Id.* at 34.

<sup>181</sup> *Id.* (quoting *Synanon Found., Inc. v. Bernstein*, 503 A.2d 1254, 1264 (D.C. 1986)(citations omitted)).

<sup>182</sup> 130 F. Supp. at 34.

<sup>183</sup> 445 N.W. 2d 248, 252.

bar recovery for actual misrepresentation or promissory estoppel by members of the media. Instead, it is a call for further examination into the reasonableness of the plaintiff's reliance on statements made by a journalist. According to the *Desnick* court, people should be very skeptical of promises investigative journalists make to them. That the producers told the doctor that they were conducting an investigation makes Judge Posner's assertion that Dr. Desnick should have been skeptical of the producers' promise not to use undercover reporting and ambush interviews all the more salient.

In addition, the consideration does not carve out protection for journalists against the application of general laws. In fact, this standard could be extrapolated to all plaintiffs in misrepresentation cases. The relevant inquiry, then, would be into the relationship the plaintiff had with defendant. Was it a relationship that would prompt the plaintiff to reasonably rely on the defendant's statements, or a relationship that should have inspired uncertainty on the part of the plaintiff with regard to the defendant's statements or promises? In the *Anderson* case mentioned above, for instance, a court could reasonably find that the doctor-patient relationship is such that a patient could reasonably rely on the statements made by the doctor, in spite of information to the contrary in the waiver.

Further, under this standard, journalists would not be absolved from liability for misrepresentation or breach of contract when they use certain surreptitious methods of newsgathering. The journalists in a case like *Food Lion*, for instance, that use undercover methods or fail to reveal that they are journalists would most likely be found liable for damages. The relevant inquiry is the relationship of the plaintiff with the person making the statements. If the plaintiff does not know, and the journalist does not disclose that he is a member of the media, the plaintiff is unable to protect herself against relying on any of the journalist's statements. The *Food Lion* and *Special Force* courts indicated neither of the organizations would have hired the defendants had they known that they were journalists. The grocery chain and the aid organization could not be categorized as media-savvy in these instances because they did not know that they were dealing with a representative of the media.

The proposed standard uses well-established areas of tort and administrative law as guidance as to how a plaintiff's status or relationship with the media can influence their ability to recover damages. Libel law provides that different categories of plaintiffs should have to prove different criteria in order to win their cases. Courts in these cases differentiate among plaintiffs because certain categories of individuals have exposed themselves to the media or created relationships with the public through the media. Those individuals are more able to use self-help in the form of access to the media, which allows them to correct any false information. The FTC uses a similar inquiry into the group targeted by advertisements in examining whether the ad is misleading. If a reasonable member of a group would not be misled, then the ad is not deemed deceptive.

Similar policy considerations underlie the inquiry into the plaintiff's status in misrepresentation and promissory estoppel. In cases involving a media defendant, courts should use similar considerations. If the plaintiff knows how the media operate, she is better able to utilize self-help in not relying on statements journalists make to her. Such a plaintiff should then be required to use the skills she has to protect herself from injury.

Courts in these cases could ensure this by refusing to award damages unless the plaintiff's reliance on the defendant's statements was truly reasonable.

*Jasmine McNealy*

*Plaintiff's Status in Misrepresentation Cases*