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## In this issue COVER STORY

“Failing *New York Times*”  
v. Trump: Is There a First  
Amendment Claim for Official  
Condemnation by Tweet? ..... 1

Notes from the Chair ..... 2

A New “Slant” on *Pacifica* ..... 6

*Animal Legal Defense Fund v. Wasden* and Newsgathering:  
More Significant Than It Appears  
12

The Neutral Reportage Doctrine:  
MIA. Doesn’t Good Journalism  
Demand It? ..... 14

Pro Bono Opportunities for  
Forum on Communications Law  
Members ..... 19

## “Failing *New York Times*” v. Trump: Is There a First Amendment Claim for Official Condemnation by Tweet?

BY FRANK D. LOMONTE AND LINDA RIEDEMANN NORBUT

S cornful condemnation from government officials is an accepted “cost of doing business” for journalists. Backlash from people in power can be a badge of honor signifying that the reporter’s work has struck a nerve. Name-calling by government authority figures is not normally regarded as a threat to the vitality of an independent press, much less an actionable constitutional violation.

But, as has been observed daily since the November 2016 election, these are not normal times. The vitriol directed toward specific journalists and news organizations by President Trump and his administration is of a duration and intensity rarely seen in contemporary public life. At times, the rhetoric has gone beyond just criticism, hinting at concrete acts of reprisal for unfavorable (or in the President’s preferred term, “fake”) coverage. These attacks have prompted some critics to question whether the President’s behavior is actually unlawful. After Trump directed an especially caustic tweetstorm at NBC News, press-freedom advocate Trevor Timm told CNN’s Brian Stelter:

[T]here’s a good argument that he is already violating the First Amendment just by making these threats. You know, there

[are] Supreme Court cases and appeals court cases around the country that talk about how government officials using their position of power can’t threaten or coerce private entities into censorship or self censoring themselves for cases that would otherwise be protected speech. And that’s exactly what we have here.<sup>1</sup>

Outside the rough-and-tumble of political reporting, it’s accepted that official acts short of actual punishment—including threats, intimidation and denunciation—can violate a speaker’s constitutional rights. The White House press corps is, of course, not the typical speaker. But neither is the president of the United States the typical regulator. Can presidential condemnation, especially when accompanied by the potential of retaliatory government action, violate the First Amendment rights of journalists? This article examines what it would take for words alone—even coming

Continued on page 21

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# Russia's Disinformation Campaign: The New Cold War

While President Trump continues to criticize investigations into Russian interference during the 2016 presidential election, Dan Coats, Director of National Intelligence, appeared before the Senate Intelligence Committee in February, not only confirming that Russia interfered in 2016, but also declaring that Russia is targeting the 2018 midterm elections. Coats' assessment was unanimously supported by the heads of the other major U.S. intelligence agencies who also appeared: CIA Director Mike Pompeo, FBI Director Chris Wray, NSA Director Adm. Michael Rogers, Defense Intelligence Agency Director Lt. Gen. Robert Ashley, and National Geospatial Intelligence Agency Director Robert Cardillo.

And lest there be any doubt, Robert Mueller, special counsel appointed by the Justice Department to investigate, just published his indictment of 13 Russian operatives for interfering with U.S. elections. The indictment details how the operatives' sophisticated use of social media successfully enabled them to spread fake news and to literally instigate social unrest in the United States.

Russia's tactics become critically important in light of a recent finding by the Pew Research Center that, as of August of last year, two-thirds of Americans get their news from social



Carolyn Y. Forrest

media sites and, among nonwhites, three-fourths use social media to get news. Even more surprising is that more than half of adults over 50 (55 percent) now go to social media for news, while almost 80 percent of those under 50 do. In a subsequent study, the Center found that, while a quarter of adults visit multiple sites for their news, more than half of Facebook's users get their news from Facebook alone.

So how were Russian operatives able to use social media to their benefit? Journalists investigating the interference (the *New York Times*, *Washington Post*, CBS News, and CNN, among others) have shed light on how the unique functionality of social media platforms enabled and even magnified the impact of the interference. Facebook's automated advertising platform, for example, allows advertisers to micro-target specific users with a message they would want to hear by gleaning users' interests by tracking their browsing history, likes, and posts. A Facebook advertiser could elect to send an anti-immigrant message only to users in a specific city who are politically conservative, over 35 years old, opposed to gun control, and blue collar.

Google also offers automated advertising based on key words, which can micro-target specific users. Russian operatives have learned to manipulate these functionalities to ensure their disruptive messages are sent to receptive audiences who will disseminate the messages so they

go viral or rank at the top of a user's newsfeed. The result is that disruptive disinformation spreads quickly and is given the appearance of validity and widespread acceptance, particularly to those who rely primarily on social media for news.

News reports of the investigations into Russian interference finally caused Congress to act, about a year after the presidential election. Last fall, social media companies were called to testify before three separate congressional committees investigating Russian interference in the 2016 presidential election and possible collusion between the Trump campaign and Russian officials. The Senate Judiciary Committee held the first hearing, followed by the Senate Intelligence Committee, which, according to the *Washington Times*, was characterized by sharp criticisms of the companies for their failures to adopt responsive measures and to investigate, among other things, whether 30,000 Kremlin-linked accounts that were removed during the French elections were

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active during the 2016 U.S. presidential election.

During the Senate Intelligence hearing, Facebook admitted that Russian-linked content reached 126 million Americans. Facebook identified 470 fake accounts linked to a company, Internet Research Agency, or IRA, with ties to the Kremlin, which spent more than \$100,000 on 3,000 ads focused on spreading disinformation on hot-button social issues. Twitter testified to identifying more than 2700 accounts that appeared to be connected to the Kremlin-linked company, Internet Research Agency. Altogether, these Russian-backed operatives garnered more than 414 million impressions of their propaganda on Facebook and Twitter between 2015 and 2017.

Facebook also identified an organized campaign to set up “Pages” on its platform to exacerbate societal divisions in the United States. More than 100 Pages appealing to special interest groups, such as a Page for the Black Lives Matter movement, another for southern nationalists, and still another for Christian fundamentalists, all designed to encourage discord. IRA spent months developing real networks of hundreds of thousands of followers of the Pages to spread disinformation and incite their followers.

One powerful example of how easily the American public was manipulated by these Pages was highlighted by the Senate Intelligence Committee chair, Richard Burr. He showed two of the Pages to the committee. One IRA-created Page for a fake organization called “Heart of Texas,” promoted anti-immigrant and anti-Muslim rhetoric. In May 2016, the Page promoted a public protest of the opening of a new library at the Islamic Da’wah Center in Houston, to “Stop Islamization of Texas.” One comment posted on the Page urged, the “Need to blow this place up. We don’t need this [expletive] in Texas.”

The other IRA-created Page coopted the name of a real organization, United Muslims of America, and promoted a “Houston Counter Rally Against Hate,” in support of the Center and its library on the same day as the Heart of Texas protest. The *Houston Press* reported that dozens of protesters from both sides verbally sparred. Although the protests did not escalate

to physical violence, they easily could have. Senator Burr commented that, at the time, supporters on both sides were unaware that their protests had been orchestrated by Russia.

The House Intelligence Committee held the last hearing. *USA Today* reported that the senior Democrat on the committee, Rep. Adam Schiff, said there is no question that the Russians used social media to support the Trump campaign. While he said it is unclear whether there was any collusion between the Trump campaign and the Kremlin, Schiff says Russians funded negative ads about Hillary Clinton and mounted an “independent expenditure campaign on behalf of Trump.”

In January of this year, Facebook finally submitted a written response to questions for which it had no answers during the Senate Intelligence Committee’s hearing last fall. Facebook wrote that its algorithm frequently recommended fake pages, like Heart of Texas, to people who followed similar pages, but also says it was unaware those pages were fake. Facebook estimated that holders of almost 350,000 U.S. accounts viewed Kremlin-backed pages, with more than 60,000 Americans responding on Facebook to participate in political events planted by the Russian operatives.

Russian interference has not stopped. Earlier this year, Congressional Republicans and Democrats clashed over whether to release a classified memo that Republicans allege detailed anti-Trump bias in the Justice Department, which also is investigating Russian interference. Republican demands to declassify the memo, written by Rep. Devin Nunes, the Republican chairman of the House Intelligence committee, were supported by a social media campaign, #ReleasetheMemo.

Democrats demanded that social media companies investigate whether and to what extent the hashtag campaign was fostered by Russian-linked accounts. Senator Diane Feinstein, a senior member of the Senate Intelligence Committee and a member of the Senate Judiciary Committee, and Rep. Adam Schiff, ranking Democrat on the House Intelligence Committee, wrote Twitter and Facebook requesting an in-depth forensic examination

of their platforms. When both companies provided what Feinstein and Schiff called inadequate and incomplete responses, the *Washington Post* quoted the two as saying, “We are no closer to understanding Russia’s continued interference . . . and cannot wait another year to learn how Kremlin-linked trolls and bots are currently exploiting [social media] platforms to influence debates going on in Congress today.”

Facebook’s response to the letter was that reports only identified the use of the hashtag on Twitter’s platform. Facebook did not address whether the hashtag trended on its own platform. Twitter responded saying its preliminary investigation, which focused on geographic data, did not reflect any significant activity with the hashtag connected to Russian accounts. However, a U.S.-based nonprofit group, the Alliance for Securing Democracy that examines foreign government’s interference with democracies, reported that the hashtag was frequently being tweeted by hundreds of Twitter accounts that had been used in other Russian disinformation campaigns. In fact, the *Washington Post* reports that the “ReleasetheMemo” hashtag was the top hashtag used by 600 pro-Russia accounts used on Twitter during a 48-hour period, which undermined the credibility of Twitter’s internal investigations.

Russia’s disinformation war is not limited to the United States. Last November, British Prime Minister Theresa May accused Russia of “weaponizing information” by spreading fake news and planting Photoshopped images to sow discord across the UK and other European countries. Reports in the *Guardian* quote May as saying that Russia meddled in elections in the west, including “hacking the Danish ministry of defence and the Bundestag [German parliament], among many others.” Although May did not go so far as to say that Russia interfered with the Brexit vote, members of the British Labour party are calling for a judge-led inquiry into whether Kremlin-operatives influenced the outcome.

So concerned are British officials about possible Russian influence that members of Parliament traveled to Washington, D.C., in early February to

hold a public hearing. This was the first time a House of Commons committee, its Digital, Culture, Media and Sport Committee broadcast a hearing live from outside of the UK. The committee questioned Facebook, Twitter, and Google and experts from tech companies, media researchers, and news industry executives.

According to the *Washington Post*, British lawmakers sharply criticized social companies during the hearing for what they perceive as a disconnect between the vast resources of the companies' advertising operations and the companies' inability to ascertain the scope of Russian meddling or to develop measures to combat it. Similar to the reactions of U.S. lawmakers during their hearings last fall, British lawmakers were frustrated by the companies' failures to complete their internal investigations into Russian influence in the UK before the hearing and suggested the companies were purposely withholding information. (Senator Elizabeth Warren, vice chair of the Senate Intelligence Committee, is quoted in *Buzz Feed* as saying Twitter's lackluster presentation before the committee last fall, "either shows an unwillingness to take this threat seriously or a complete lack of a fulsome effort.")

British lawmakers suggested that the only solution may be more legislation to increase transparency in online advertising and to better combat Russian disinformation campaigns. This is consistent with the bipartisan "Honest Ads Act" introduced in the House and Senate last November by Senator Mark Warner, a ranking member of the Senate Intelligence Committee who had a successful tech career before politics, and Senator John McCain. The Act would require social media companies to disclose who is paying for political ads on their sites, just as traditional media companies are legally required to do. They also would be required to establish a database of all ads placed on their site. (In fact, representatives of traditional media argue that the lack of regulation of political advertising on social media gives social media companies an unfair competitive advantage. Broadcasters are required to make more disclosures than those being proposed by the Honest Ads Act, including disclosures about ads in

support of candidates and issues ads, and are required to maintain a public file of political ads and expenditures. At the same time, social media companies provide news content to their users, content created by traditional media, without paying for it, delivering a double whammy to traditional media's bottom-line.)

The Honest Ads Act also would require social media companies to take "reasonable efforts" to ensure that foreign nationals are not purchasing political advertising. The Federal Election Campaign Act already prohibits foreign nationals who do not have a green card from making expenditures that benefit a candidate in a campaign or contributing to a U.S. campaign. However, election laws do not prohibit foreign nationals from spending money to speak out about a specific issue, as long as their speech is not "closely tied to the voting process."

Not surprisingly, social media companies have resisted the idea of legislation. The trade group that represents social media companies, Interactive Advertising Bureau (IAB), criticizes the Act as being too burdensome for social media companies. IAB urges that the burden of disclosing the money behind ads should be the campaigns themselves. Realizing the limitations of such an argument, it argues that, unlike broadcast companies, technology changes so quickly for social media companies that it would be a burden to try to remain in compliance as technology evolves. It also argues that smaller tech companies lack the resources to comply. IAB instead urges that the industry is better equipped to self-regulate and can do more than well-intended legislation. It says the industry can implement "supply-chain protections" to identify problematic ads.

To the IAB's point, Twitter announced an "Ad Transparency Center" last fall, in response to the congressional hearings. The Center would show all ads running on Twitter and disclose how long the ads had been running and information about who the ads had targeted. However, to date, Twitter has not launched the Center.

Facebook launched its own transparency effort where users can click on "view ads" on a Page and see all of the

ads currently running on Facebook, even if the user was not an intended target of the ad. It created a tool for American users to learn whether they have liked or followed a Facebook Page or Instagram account created by IRA, but the tool does not proactively notify users to advise that they have liked, shared, or commented on such Pages, ads, or posts.

It also announced a change to users' news feeds that will prioritize posts from "friends." And, randomly selected users will be asked whether they know a particular news outlet and, if so, they will be invited to rate its trustworthiness. User ratings, along with other metrics, will determine the news outlets ranking in news feeds.

Critics say allowing users to decide which Facebook news sources are trustworthy may result in their rating news that mirrors their own views higher, pushing legitimate news to the bottom of their feeds. Others say that relying on users could result in skewed results because people are likely to rate new sources that "sound" legitimate high, even if such sources are fake. The result could be that users would have no ability to discern which so-called "news" in their feed is true and which is propaganda. Facebook counters that aggregation of diverse user ratings would ensure the validity of the ratings.

Google has not yet announced plans to provide more information about the purchasers of ads on its platforms.

Dissatisfied with the response of social media companies, many are calling for legislation. While support for the Honest Ads Act bill has lagged in a Republican-led Congress, the Federal Election Commission announced in late January a plan to introduce new rules for political advertising on social media. Unlike regulations for broadcasters, the proposed rules focus only on ads that directly advocate for a particular candidate but do not require disclosure for "issue" ads. Critics say such rules do not go far enough to prevent the kind of meddling experienced during the 2016 presidential election and since then.

In fact, Mueller's indictment details that placing ads was only a small part of the IRA's playbook. Thus legislation, like the Honest Ads Act, would do little

to protect against the overall interference campaign that was mounted.

Taking a different approach, a California assemblyman has introduced a bill for the state requiring a disclaimer to be displayed on all automated or “bot” accounts on social media. The bill further would require social media companies to verify that all advertising on the sites is purchased by an actual person. It remains to be seen whether this bill will gain any traction.

Things also are changing internationally. In January, new legislation became effective in Germany that puts the onus squarely on tech companies to be responsible for policing and removing content from their sites. Unlike in the United States, where section 230 of the Communications Decency Act protects Internet service providers from liability for content published on their sites, the new German law will fine companies up to 50 million Euros if they fail to remove not only libelous content, but also propaganda and calls to violence. According to the *Wall Street Journal*, Facebook had to hire 1200 new employees to work as moderators within Germany to ensure its compliance with the new law. Germany represents less than 2 percent of all Facebook users. By contrast, Facebook employs only 7,500 people as moderators in the rest of the world.

In May, new privacy and data protection rules will take effect in the EU. The General Data Protection Regulation (GDPR), will require tech companies operating within the EU to advise European citizens what data is being collected about them by major tech companies, including data about citizens’ public posts. More importantly, tech companies will have to obtain consent from citizens to use the private information collected on their sites. The rules also make clear that terms of use written in legalese will not constitute permission to use citizen’s private data. Fines are in place for noncompliance. However, it is unclear the extent such a privacy law would help protect against Russian interference.

In the face of proposed legislation and widespread criticism, Facebook’s Civic Engagement product manager posted a commentary entitled, “Hard Questions: What Effect Does Social

Media Have on Democracy?” While the commentary acknowledges Facebook’s initial reluctance to examine the extent of Russian interference in U.S. politics by manipulating social media, the commentary raises more questions about how best to respond than it offers solutions. The answer given to the title question is that social media’s impact on democracy is “both good and bad” in that it allows users to express themselves, but it also allows for disinformation campaigns that corrode democracy.

Such a self-assessment begs for governmental regulation. The question, of course, is whether a regulatory scheme will protect the U.S. election process from being manipulated or influenced by foreign governments, and ensure that foreign governments cannot instigate social upheaval, without impinging on users’ free speech rights? A review of social media’s response to Russian interference reflects that the companies cannot be relied upon to police themselves.

On Friday, March 2, 2018, an expert panel led by David Bodney, a partner with Ballard Spahr in Arizona, will discuss “Fake News: Rights, Risks, and the Role of the Media in a Duplicitous World” during the 23rd Annual Conference of the Forum on Communications Law.

# A New “Slant” on *Pacifica*?

BY LEITA WALKER AND MICHAEL GIUDICESSI

To paraphrase one observer: somewhere up there, George Carlin is smiling.<sup>1</sup>

First, in June 2017, in *Matal v. Tam*,<sup>2</sup> the Supreme Court struck as unconstitutional the Lanham Act’s prohibition on the registration of “disparaging” trademarks, ruling that “[s]peech may not be banned on the ground that it expresses ideas that offend.”

Then, in December 2017, the Federal Circuit decided *In re Brunetti*,<sup>3</sup> striking a similar prohibition barring registration of “immoral” or “scandalous” marks—terms the court held were synonymous with “vulgar.” *Brunetti* held the government lacked a substantial interest in “suppressing speech because it is off-putting.” Even if it had such an interest, the court quipped, “[i]n this electronic/Internet age . . . it has completely failed.”

Actually, what Carlin would say—and, in fact did say, mercilessly and with bug-eyes—is, “There is no ‘up there’ for people to be smiling down from.”<sup>4</sup>

Moreover, he might point out that, while making these modern-day assessments of values and effectiveness, *Brunetti* also attempted to distinguish *FCC v. Pacifica Foundation*<sup>5</sup>—the case arising out of an afternoon radio broadcast of Carlin’s “Filthy Words” monologue. “The government’s interest in protecting the public from profane and scandalous marks is not akin to the government’s interest in protecting children and other unsuspecting listeners from a barrage of swear words over the radio

in *Pacifica*,” the Federal Circuit tried to explain.<sup>6</sup>

Even so, there’s hope for vulgarity-loving true believers (a small but fierce contingent, we imagine) that Carlin may freely shout his seven dirty words from the afterlife with the metaphysical knowledge that, “in this electronic/Internet age,” Federal Communications Commission (FCC) licensees may broadcast them without fear or sanction.

The hope stems in part from Associate Justice Ruth Bader Ginsburg’s public statement that *Pacifica* “was wrong when it issued” and should be revisited given “[t]ime, technological advances,” and recent rulings of the FCC.<sup>7</sup> Further, the sweeping, pro-speech declarations *Tam* and *Brunetti* relied on to invalidate prohibitions on the registration of disparaging and immoral and scandalous (i.e., vulgar) trademarks stand irreconcilable with *Pacifica* and its ruling that the FCC can regulate speech that, though not obscene, is “indecent.”

## I. Background on Recent Lanham Act Decisions

### A. *Matal v. Tam*

*Tam* arose after Simon Tam, lead singer of the rock group “The Slants,” sought federal registration of his band’s name—which he said he had adopted to “reclaim” the term and drain its denigrating force as a derogatory term for Asians.

The Patent and Trademark Office (PTO) denied Tam’s application under 15 U.S.C. § 1052(a), which prohibits the registration of trademarks that may “disparage . . . or bring . . . into contempt[t] or disrepute” any “persons, living or dead.” After Tam unsuccessfully contested the denial before the PTO’s Trademark Trial and Appeal Board (TTAB), he took his case to the Federal Circuit, which found the disparagement clause facially unconstitutional under the First Amendment.

Though its members diverged in their reasoning, the Supreme Court unanimously affirmed (Justice Gorsuch took no part in consideration or decision of the case).

The government raised three arguments in defense of the disparagement clause: (1) that trademarks are a form of government speech, rendering the First Amendment inapplicable, (2) that they are a form of government subsidy, and the government is not required to subsidize activities it does not wish to promote, and (3) that a new test—a “government-program” doctrine—should apply.<sup>8</sup> The Court unanimously rejected the first argument, stating that the government does not “dream up” these marks, “edit” them, or (outside of § 1052(a)) inquire into “whether any viewpoint conveyed by a mark is consistent with Government policy or . . . that expressed by other marks” already registered.<sup>9</sup> “If the federal registration of a trademark makes the mark government speech,” the Court said, “the Federal Government is babbling prodigiously and incoherently.”<sup>10</sup>

Only four justices—Alito, Thomas, Breyer, and Chief Justice Roberts—considered (and went on to reject) the government’s other two arguments. These justices also considered the argument that trademarks are commercial speech and thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*<sup>11</sup> They concluded, however, that they did not need to resolve this debate because the disparagement clause could not withstand even *Central Hudson* intermediate review.

The remaining justices—Kennedy, Ginsburg, Sotomayor, and Kagan—found no reason to wade into these issues, concluding instead that because the Court had unanimously held § 1052(a) constituted viewpoint discrimination, heightened scrutiny applied and was not satisfied.

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Justice Thomas also wrote separately. Although he agreed that the disparagement clause could not survive *Central Hudson* analysis, he wrote to express his belief that strict scrutiny should apply regardless whether the speech was commercial.<sup>12</sup>

### B. In re Brunetti

*Tam* did not address another prohibition in § 1052(a)—namely, one barring registration of marks that “consist[] of or comprise[] immoral . . . or scandalous matter.” However, after *Tam*, many predicted the demise of this clause, as well. And, indeed, six months after *Tam*, the Federal Circuit struck down the scandalous clause as unconstitutional.

At issue in *Brunetti* was an attempt to register the trademark “FUCT” for use on clothing. The TTAB affirmed the PTO’s refusal to register the mark under the scandalous clause. On appeal, the Federal Circuit agreed that the FUCT mark was vulgar and therefore immoral and scandalous but concluded that the bar on registration of such marks violated the First Amendment.

Because the meanings of “vulgar,” “immoral,” and “scandalous” are similar to, and perhaps synonymous with, the meaning of the FCC buzzword “indecent,” it is worth examining how the Federal Circuit defined these words. The court began with the undisputed point that the word “fuck” is vulgar and quickly concluded that FUCT, the phonetic twin of “fucked,” is also vulgar. It then went on to hold that a vulgar mark is a scandalous mark, thereby falling within the prohibition of §1052(a). In so holding, the court pointed to definitions of “scandalous” such as “shocking to the sense of truth, decency, or propriety,” “giving offense to the conscience or moral feelings,” or “disgraceful,” “offensive,” or “disreputable.”<sup>13</sup>

Having concluded that the TTAB did not err in finding the trademark “FUCT” to be immoral and scandalous, the Federal Circuit turned to the constitutional issues and began by assuming, without deciding, that the scandalous clause is viewpoint neutral. The government conceded that the scandalous clause was, however, a content-based restriction, and it did

not assert that the clause could survive strict scrutiny review. Rather, refining somewhat the position it took in *Tam*, the government argued that the clause did not implicate the First Amendment because trademark registration is either a government subsidy program or a limited public forum. Alternatively, it argued that trademarks are commercial speech implicating only *Central Hudson* review.<sup>14</sup> The court rejected all these arguments, concluding that strict scrutiny applied and that the scandalous clause could not survive intermediate scrutiny, anyway.

### II. Discussion

In *Pacifica*, the Supreme Court concluded nearly 40 years ago that the First Amendment permitted the FCC to “channel” broadcasting of indecent speech to the late-night hours. In so holding, the Court did not apply either strict or intermediate scrutiny, though it acknowledged that the “Commission’s objections to the broadcast were based in part on its content” and that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”<sup>15</sup>

Instead, it engaged in a contextual analysis, concluding that the FCC’s order was justified on two grounds. “First,” the Court said, “the broadcast media have established a uniquely pervasive presence in the lives of all Americans,” meaning that when indecent material is broadcast it “confronts the citizen, not only in public, but also in the privacy of the home, where the individuals’ right to be left alone plainly outweighs the First amendment rights of an intruder.”<sup>16</sup> “Second, it said, “broadcasting is uniquely accessible to children, even those too young to read.”<sup>17</sup> In the Court’s view, this fact, coupled with the government’s interest in “the well-being of its youth” and “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression.<sup>18</sup>

In 2018, when cable and Internet are as pervasive as broadcast radio and television, when toddlers know how to pull up YouTube videos on iPhones, and when our president drops linguistic bombs such as “shithole” and “pussy,” there is no shortage of attacks that could be

made on the logic of *Pacifica*. The recent Lanham Act decisions, however, put the decision on even shakier ground by suggesting that, one way or another, governmental regulation of scandalous and immoral—i.e., indecent—content merits strict scrutiny and under that test violates the Constitution. This article identifies two legal strategies that emerge from those decisions.

### A. Strategy No. 1: Arguing That the FCC’s Indecency Regime Discriminates Based on Viewpoint

In *Tam*, Kennedy, Ginsburg, Sotomayor, and Kagan were steadfast that strict scrutiny is automatic anytime there is viewpoint discrimination,<sup>19</sup> and in his separate concurrence Thomas expressed his belief that “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”<sup>20</sup> Meanwhile, Alito, joined by Thomas, Breyer, and Roberts acknowledged the possibility that *Central Hudson*’s intermediate scrutiny might apply, but only because trademarks have a commercial component.<sup>21</sup>

Unlike trademarks, the speech targeted by the FCC’s indecency regime is purely expressive. Thus, it seems a foregone conclusion that strict scrutiny would apply if the FCC’s indecency regime is deemed viewpoint based.

So, is a ban on dirty words viewpoint discrimination? The Federal Circuit found it unnecessary to decide this issue in *Brunetti*, though it did state that it “question[ed] the viewpoint neutrality of the immoral or scandalous provision.”<sup>22</sup> Meanwhile, it seems some Supreme Court justices—enough, with Ginsburg, to reverse *Pacifica*—might say “yes.”

“Giving offensive is a viewpoint,” Alito wrote in the plurality opinion in *Tam*.<sup>23</sup> The disparagement clause—he later called it a “happy-talk clause”<sup>24</sup>—may “evenhandedly prohibit[] disparagement of all groups,” but it “denies registration to any mark that is offensive to a substantial percentage of the members of any group” and “in the sense relevant here, that is viewpoint discrimination.”<sup>25</sup>

Commentators have questioned whether Alito and the three justices who joined him really meant what he said. Wrote Clay Calvert,

[O]ffense and viewpoint are not always the same. The word “fuck” is what gave offense in [*Cohen v. California*]<sup>26</sup>, not Paul Robert Cohen’s anti-draft viewpoint. Taking offense at a word (“fuck”) is not the same as discriminating against the viewpoint in which that word is used (“fuck the draft”). “Fuck,” standing alone without “the draft,” is not a viewpoint. Giving or taking offense therefore is not always a viewpoint.<sup>27</sup>

Further, there is no doubt that taking Alito at his word—and taking that word out of context—could lead to unintended consequences (or at least thorny questions). As the PTO argued in a letter brief to the Federal Circuit in *Brunetti*, to hold that the scandalous clause is anything other than viewpoint neutral might preclude the government “from restricting the use of graphic sexual images or profane language within a government program or in a nonpublic or limited-public forum”—such as advertisements on city buses.<sup>28</sup>

And yet, *Tam* is not the first time that Alito has defined viewpoint discrimination broadly, which suggests he was writing carefully, not carelessly. Most notable is his dissent (joined by Roberts, Scalia, and Kennedy) in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*<sup>29</sup>—the case holding that specialty license plates are government speech and that Texas could deny an application for a design featuring the Confederate flag.

In the dissent, Alito analogized license plates to “mini billboards” and wrote, “what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.”<sup>30</sup> Alito pointed out that the Confederate flag means different things to different people—for some,

it “evoke[s] the memory of their ancestors and other soldiers who fought for the South;” to others, “it symbolizes slavery, segregation, and hatred.”<sup>31</sup> But, he wrote, “[w]hatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.”<sup>32</sup>

Interesting questions follow about whether Alito would force Texas to print “Fuck the Draft” on a license plate—or whether he would compel it to print a stylized logo of just the F-word. To pick up on Calvert’s point, the argument that the government is engaged in viewpoint discrimination would seem to be at its nadir when the only “statement” at issue is comprised of a mere four letters. On the other hand, it seems obvious that a stand-alone profanity conveys *something*—perhaps, as with Brunetti’s FUCT mark, a particularly “subversive” or “in-your-face” worldview.<sup>33</sup> Those confronted by a license plate or t-shirt that says “fuck” may not fully understand the speaker’s intent and may reach different conclusions about her viewpoint. But according to Alito, that doesn’t matter.

In any event, FTC indecency regulation—which rarely if ever involves profanities uttered in a vacuum—would seem to present an easier case for Alito and those who align with him than a stand-alone profanity on a government-issued license plate. Carlin’s monologue was a *monologue*. Though perhaps assaultive to some listeners, it was more than just the f-word droned over and over. And recent enforcement actions have involved use of profane language *emotively*, to punctuate statements about *other things*: “F\*\*\* ’em,” said Cher about her critics, in one enforcement action, while Nicole Riche asked an audience, “Have you ever tried to get cow s\*\*\* out of a Prada purse? It’s not so f\*\*\*ing simple.”<sup>34</sup>

These statements are hardly on par with the Gettysburg Address, but they do express a viewpoint—Cher was celebrating her staying power while dismissing her critics, while Riche was challenging the stereotype that rural life is really “simple.” And their

use of profanity perhaps conveyed their viewpoints in ways more “decent” language could not. As the Supreme Court stated in *Cohen*:

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. . . . [I]n the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.<sup>35</sup>

Likewise, in his dissent in *Pacifica*, Justice Brennan called “transparently fallacious” the “idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression.”<sup>36</sup>

Thus, regardless whether “giving offense” is always a viewpoint, when offensive speech is used to express a viewpoint, it is all but impossible to disentangle vulgarity from viewpoint without changing, at least to some degree, the larger message itself. In the case of Cher and Richie, stripping their statements of the four-letter words they chose would have rendered them (at least to some) less triumphant, disdainful, funny, and rebellious—and thus less impactful. It seems unavoidable that by regulating indecent speech, the FCC is regulating the viewpoint such speech conveys. And at that point, the justices agree, strict scrutiny kicks in.



## ***B. Strategy No. 2: Arguing That the Indecency Regime Is Unconstitutional Even If It Is Viewpoint Neutral***

Although the Supreme Court's decision in *Tam* turned on the unanimous conclusion that the disparagement clause discriminated based on viewpoint, the Federal Circuit previously had subjected the disparagement clause to strict scrutiny as "either a content-based or viewpoint-based regulation of expressive speech."<sup>37</sup> Likewise, in *Brunetti*, the Federal Circuit found no reason to decide whether the scandalous clause discriminated based on viewpoint, concluding that because it regulated the expressive components of trademarks and discriminated based on content strict scrutiny applied.<sup>38</sup>

Thus, if a viewpoint discrimination attack on the FCC's indecency regime were to fail, the obvious fallback position would be: It doesn't matter. The FCC's indecency regime is indisputably content based,<sup>39</sup> and strict scrutiny is thus required regardless.

That said, the Federal Circuit in *Tam* and *Brunetti* made its pronouncement that strict scrutiny always applies to content regulation in the context of the Lanham Act, not FCC indecency regulation. Meanwhile, it's never been entirely clear what sort of scrutiny should apply to the FCC's regime. Indeed, *Pacifica* does not discuss that issue at all.<sup>40</sup>

Thus, any advocate for overturning *Pacifica* would need to pursue a third argument as well—namely, that the indecency regime cannot even survive intermediate scrutiny. The *Brunetti* opinion is helpful on this point, as well. But before discussing why the scandalous clause failed to withstand even intermediate scrutiny (and why the indecency regime might, as well), it is worth pausing to briefly consider whether the "public forum" arguments rejected in both *Tam* and *Brunetti* might fare better in a challenge to *Pacifica*. After all, the air waves belong to the public, and, in his dissent in *Pacifica*, Brennan characterized the majority's opinion as approving "time, place, and manner" regulation of broadcasters.<sup>41</sup>

## **1. Analogizing the Air Waves to a Limited Purpose Public Forum Subject to Reasonable Restrictions on Speech Poses Serious Doctrinal Issues**

As it turns out, the idea that the public air waves constitute a limited public forum is highly problematic, as highlighted in *Arkansas Educ. Television Comm'n v. Forbes*.<sup>42</sup> Indeed, the United States appeared as *amicus curiae* in that case, arguing that the Court's forum precedents should be of little relevance in the context of broadcasting.<sup>43</sup>

*Forbes* arose from exclusion of a third-party political candidate from a debate broadcast by a public (i.e., state-owned) television station. The Court of Appeals held that his exclusion violated the First Amendment, applying public forum precedent. In reversing, the Supreme Court began by considering whether public forum principles applied at all, ultimately concluding that they were not a good fit, even in the context of a *public* broadcast.

The public forum doctrine arose in the context of streets and parks, the Court explained, where open access and viewpoint neutrality is "compatible with the intended purpose of the property."<sup>44</sup> However, in the case of television broadcasting, "broad rights of access for outside speakers would be antithetical . . . to the discretion that stations and their editorial staff must exercise to fulfill their journalist purpose and statutory obligations."<sup>45</sup> This discretion, the Court continued to explain, inevitably results in choosing among speakers and viewpoints—i.e., in viewpoint discrimination.<sup>46</sup>

But of course, even in a limited public forum, viewpoint discrimination is unconstitutional.<sup>47</sup> Thus, although a holding that the public airwaves are some sort of limited public forum might mean that the FCC would face a less demanding degree of scrutiny when imposing restrictions on its licensees, such holding would also mean that no viewpoint discrimination can occur on said air waves.<sup>48</sup> And that holding would, in turn, "obstruct the legitimate purposes of television broadcasters" and would require courts "'to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or

group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired."<sup>49</sup>

This level of government interference/oversight simply would not be consistent with Congress' goals in adopting the modern system of broadcast regulation.<sup>50</sup> Along similar lines, any rule that encourages licensees to "exclud[e] partisan voices" and present views "in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.'"<sup>51</sup>

Thus, although the *Forbes* court ultimately concluded that certain constitutional constraints were applicable in the context of a political debate sponsored by a public broadcaster, it went out of its way to state that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine."<sup>52</sup> The same is certainly true of private broadcasting, which even the FCC recognized more than 30 years ago is a different medium than at the time of *Red Lion*.<sup>53</sup>

## **2. *Brunetti's* Conclusion That the Scandalous Clause Could Not Survive Intermediate Scrutiny Suggests the FCC's Indecency Regime Cannot, Either**

Turning back to *Brunetti's* discussion of intermediate scrutiny, the Federal Circuit applied the four-factor test applicable to commercial speech under *Central Hudson*: whether (1) the speech concerns lawful activity and is not misleading, (2) the asserted government interest is substantial, (3) the regulation directly advances that government interest, and (4) the regulation is no more extensive than necessary.<sup>54</sup> That test is not a perfect fit for the noncommercial speech regulated by the FCC's indecency regime; nevertheless, the court's analysis of the factors suggests that the FCC's regime would have difficulty surviving intermediate scrutiny, much less strict scrutiny.

The *Brunetti* court characterized the government's interest in prohibiting the registration of scandalous marks as "protecting public order and morality" and then deemed such interest not sufficiently substantial.<sup>55</sup> The Federal Circuit explained,

Supreme Court precedent makes clear that the government's general interest in protecting the public from marks it deems "off-putting," whether to protect the general public or the government itself, is not a substantial interest justifying broad suppression of speech. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."<sup>56</sup>

It then went on to conclude that even if the government had a substantial interest in protecting the public from scandalous or immoral marks, the government could not establish that its ban on the registration of such marks advanced that interest:

Regardless of whether a trademark is federally registered, an applicant can still brand clothing with his mark, advertise with it on the television or radio, or place it on billboards along the highway. In this electronic/Internet age, to the extent that the government seeks to protect the general population from scandalous material, with all due respect, it has completely failed.<sup>57</sup>

Finally, the Federal Circuit concluded that the scandalous clause was not narrowly tailored because it gave too much discretion to the examining attorney at the PTO, noting that "[n]early identical marks have been approved by one examining attorney and rejected as scandalous or immoral by another."<sup>58</sup>

As noted above, the *Brunetti* court attempted to distinguish *Pacifica*, in which the articulated government interest was to protect Americans, especially children, from indecency in the privacy of their own homes, given the "uniquely pervasive presence" of radio. From the outset, the dissenting justices disputed that such interest was sufficient to justify the outcome in *Pacifica*. But even if protecting solicitude and children is a substantial interest, it is hard to see how, in 2018, the regime advances that interest in a narrowly tailored way.

Over-the-air, broadcast radio (or

television, for that matter) no longer has a "uniquely pervasive presence" in American life. It now competes—or perhaps has been usurped by—YouTube, Internet radio, satellite radio, podcasts, Facebook, cable television, and other media where all sorts of profanities and perversions are readily available.<sup>59</sup> The FCC does not regulate these media. Thus, its regulation of broadcast radio and television does little to advance its purported interest.

Meanwhile, what is indecent—just like what is scandalous—is subject to the whims of regulators. As the Second Circuit wrote in its first opinion in the *Cher/Richie* case:

Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous." Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, but irrelevant in evaluating a rape scene in another fictional movie. The use of numerous expletives was "integral" to a fictional movie about war, but occasional expletives spoken by real musicians were indecent and profane because the educational purpose of the documentary could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." The "S-Word" on *The Early Show* was not indecent because it was in the context of a "bona fide news interview," but "there is no outright news exemption from our indecency rules."<sup>60</sup>

In sum, even if safeguarding solicitude and protecting children from indecent speech are substantial government interests, *Brunetti's* acknowledgement of the realities of modern life and the idiosyncrasies of

regulators apply as much to indecent broadcasts as to scandalous marks. It is difficult to see how the FCC's regime advances the government's interest in a narrowly tailored way any more than the scandalous clause did.

### III. Conclusion

The call to apply strict scrutiny to the FCC's indecency regime is hardly new. Indeed, the Second Circuit said more than seven years ago in the *Cher/Richie* case that it can "think of no reason why" strict scrutiny should not apply . . . except, of course, the binding precedent of *Pacifica*.<sup>61</sup> The recent Lanham Act decisions suggest that the Supreme Court is more ready than ever to strike that precedent down, and they provide free-speech advocates with an arsenal of arguments to use in pursuit of that objective.

### Endnotes

1. Scott Graham, "Federal Circuit Wrestles with Vulgar Trademarks in 'FUCTION' Case," Corporate Counsel (Aug. 30, 2017), <https://www.law.com/insidetrade/2017/08/30/federal-circuit-wrestles-with-vulgar-trademarks-in/?srlreturn=20171118170233>.
2. 137 S. Ct. 1744, 1751 (2017).
3. 877 F.3d 1330, 1352–53 (Fed. Cir. 2017).
4. See <https://www.youtube.com/watch?v=3PiZSFIVFiU> for Carlin's thoughts on death and the afterlife.
5. 438 U.S. 726 (1978).
6. *Brunetti*, 877 F.3d at 1353.
7. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring).
8. 137 S. Ct. at 1757.
9. *Id.* at 1758.
10. *Id.*
11. 447 U.S. 557 (1980).
12. 137 S. Ct. at 1769 (Thomas, J., concurring).
13. *Brunetti*, 877 F.3d at 1339.
14. *Id.* at 1340.
15. *Pacifica*, 438 U.S. at 744, 745.
16. *Id.* at 748. This rationale mirrors the justifications cited in *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine based on characteristics of broadcasting as the "new media" and a scarcity theory).
17. *Id.* at 749.
18. *Id.* at 749–50 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).
19. 137 S. Ct. at 1750.
20. *Id.* at 1769 (Thomas, J., concurring).

21. *Id.* at 1749.
22. *Brunetti*, 877 F.3d at 1341. Later in its opinion, however, the Federal Circuit seemed to take a narrower view of viewpoint discrimination when it discussed *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and stated that the parody of Jerry Falwell’s “first time” did “not clearly involve the expression of beliefs, ideas, or perspectives.” *Brunetti*, 877 F.3d at 1352.
23. 137 S. Ct. at 1763.
24. *Id.* at 1765.
25. *Id.* at 1763.
26. 403 U.S. 15 (1971).
27. Clay Calvert, “Beyond Trademarks and Offense: *Tam* and the Justices’ Evolution on Free Speech,” Cato Institute: Supreme Court Review at 53 (2016–17), available at <https://www.cato.org/supreme-court-review/2016-2017>.
28. PTO Letter Brief at 3, *In re Brunetti*, No. 2015-1109 (Fed. Cir. July 20, 2017); see also *id.* at 14.
29. 135 S. Ct. 2239 (2015).
30. *Id.* at 2255–56 (Alito, J., dissenting) (emphasis added); see also *id.* at 2262 (Alito, J., dissenting) (“The Board rejected Texas SCV’s design, “specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable.’ . . . These statements indisputably demonstrate that the Board denied Texas SCV’s design because of its viewpoint.”).
31. *Id.* at 2262 (Alito, J., dissenting).
32. *Id.* (emphasis added).
33. *Brunetti* Letter Brief at 9, *In re Brunetti*, No. 2015-1109 (Fed. Cir. Aug. 9, 2017).
34. *Fox*, 567 U.S. at 247.
35. *Cohen*, 403 U.S. at 25–26.
36. *Pacifica*, 438 U.S. at 773 (Brennan, J., dissenting).
37. *Brunetti*, 877 F.3d at 1340 (citing *In re Tam*, 808 F.3d 1321, 1339 (Fed. Cir. 2015)) (emphasis added).
38. *Id.* at 1342, 1348–49.
39. *Pacifica*, 438 U.S. at 744 (“The words of the Carlin monologue are unquestionably ‘speech’ within the meaning of the First Amendment. It is equally clear that the Commission’s objections to the broadcast were based in part on its content.”).
40. Some commentators seem to take for granted that strict scrutiny applies and always has. See Lili Levi, “The FCC’s Regulation of Indecency,” First Amendment Center: First Reports at 7 (2008), available at <http://www.newseuminstitute.org/first-amendment-center/publications/>
- (“Ultimately, the FCC’s indecency regime must pass strict scrutiny under the First Amendment because it is fundamentally content-based regulation.”). Courts, however, have expressed doubt. See, e.g., *Fox Television Stations v. FCC*, 489 F.3d 444, 464 (2d Cir. 2007) (*Fox I*) (recognizing “some tension in the law regarding the appropriate level of First Amendment scrutiny”), *rev’d and remanded*, 556 U.S. 502 (2009); see also *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010) (*Fox II*) (“While *Pacifica* did not specify what level of scrutiny applies to restrictions on broadcast speech, subsequent cases have applied something akin to intermediate scrutiny.”), *vacated and remanded*, 567 U.S. 239 (2012). Meanwhile, the FCC itself has taken the position that broadcasting is different than other media and that “something less than First Amendment strict scrutiny should apply to the review of the agency’s indecency regulation.” *Levi, supra*, at 42.
41. *Pacifica*, 438 U.S. at 763 (Brennan, J., dissenting).
42. 523 U.S. 666 (1998).
43. *Id.* at 672.
44. *Id.* at 673 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).
45. *Id.*
46. *Id.* at 673–74.
47. *Tam*, 137 S. Ct. at 1764; *Brunetti*, 877 F.3d at 1346 (“As with traditional and designated public forums, regulations that discriminate based on viewpoint in limited public forums are presumed unconstitutional.”).
48. See, e.g., *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 140 (1973) (Stewart, J., concurring) (“If, as the dissent today would have it, the proper analogy is to public forums—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers.”); *id.* at 143 (“Were the Government really operating the electronic press, it would, as my Brother Douglas points out, be prevented by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of ‘fairness’ to deny time to any person or group on the grounds that their views had been heard ‘enough.’ Yet broadcasters perform precisely these functions and enjoy precisely these freedoms under the Act.”).
49. *Forbes*, 523 U.S. at 674 (quoting *CBS*, 412 U.S. at 127).
50. See *CBS*, 412 U.S. at 110 (reviewing legislative history and concluding that “Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations”).
51. *Id.* at 112 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).
52. *Forbes*, 523 U.S. at 675.
53. See *Inquiry into § 73.910 of the Comm’n’s Rules & Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 FCC 2d 143 (1985).
54. *Brunetti*, 877 F.3d at 1350.
55. *Id.*
56. *Id.* at 1351 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).
57. *Id.* at 1353.
58. *Id.*
59. See, e.g., *Fox II*, 613 F.3d at 326 (“[W]e face a media landscape that would have been almost unrecognizable in 1978.”).
60. *Fox I*, 489 F.3d at 463 (citations omitted).
61. *Fox II*, 613 F.3d at 327.

# Animal Legal Defense Fund v. Wasden and Newsgathering: More Significant Than It Appears

BY AL-AMYN SUMAR

In a decision released in January 2018, *Animal Legal Defense Fund v. Wasden*,<sup>1</sup> the Ninth Circuit held portions of Idaho's so-called "ag-gag" statute—a law designed to thwart undercover investigation of the agricultural industry—unconstitutional under the First Amendment. Among other things, the court invalidated a provision of the statute criminalizing the making of audio and video recordings without the consent of a facility's owner. *Wasden*'s implications are significant, and not confined to the ag-gag context. The decision appears to mark the first time a federal circuit has extended constitutional protection to core newsgathering activities beyond recording police activity in public and could portend a serious reshaping of First Amendment newsgathering jurisprudence.

## The Background and Decision

Idaho's Interference with Agricultural Production Law, like "ag-gag" laws in several other states, is designed to impede undercover investigation of the agricultural industry. The impetus for Idaho's legislation was public disclosure of video surreptitiously taken by an animal rights activist at a dairy farm in 2012, which captured several disturbing incidents of animal abuse.<sup>2</sup> The video led to the firing of several farm employees, operational changes at the farm, an investigation by local law enforcement authorities, and ultimately the conviction of one employee for animal cruelty.<sup>3</sup>

The Idaho legislature responded in February 2014 with a law criminalizing "interference with agricultural production."<sup>4</sup> Four provisions of the statute were at issue in the litigation: (i) entering "an agricultural production facility by force, threat, misrepresentation or

trespass," unless employed there; (ii) obtaining the records of such a facility, by the same means; (iii) obtaining employment at such a facility by force, threat, or misrepresentation, with the intent to cause economic or other injury; and (iv) entering such a facility "not open to the public and, without the facility owner's express consent" or other legal authorization, making "audio or video recordings of the conduct of an agricultural production facility's operations."<sup>5</sup> The statute defines "agricultural production" broadly,<sup>6</sup> and makes the crime punishable by up to one year in prison or a fine not in excess of \$5,000, or both.<sup>7</sup>

The Animal Legal Defense Fund and others brought suit in March 2014.<sup>8</sup> They challenged misrepresentation as a basis for liability under the statute's first three provisions, as well as the fourth provision in its entirety, under the First and Fourteenth Amendment.<sup>9</sup> The district court sided with the plaintiffs, granting their motion for summary judgment and permanently enjoining the challenged provisions.<sup>10</sup>

The Ninth Circuit affirmed in part and reversed in part.<sup>11</sup> The court's First Amendment analysis of the statute's first three provisions focused on the constitutionality of criminalizing false statements.<sup>12</sup> The court explained that false statements constitute protected speech, unless they are made for material gain or inflict harm.<sup>13</sup> On that basis, the court held (over a dissent) that the prohibition on entry of an agricultural production facility by misrepresentation implicated protected speech—the entry, in the court's view, is not necessarily for *material* gain—and could not withstand constitutional scrutiny.<sup>14</sup> In contrast, the second and third provisions, regarding obtaining the records of and employment at an agricultural production facility, implicated only unprotected speech, and therefore did not engage the First Amendment.<sup>15</sup> The court therefore reversed the lower court and upheld these provisions as

constitutional.<sup>16</sup>

Most significantly, however, the Ninth Circuit held that the provision of the statute criminalizing the making of audio and video recordings of an agricultural production facility's operations violates the First Amendment.<sup>17</sup> It concluded that the act of making a recording "is itself an inherently expressive activity" and "inextricably intertwined" with the recording itself.<sup>18</sup> Moreover, the court held that the provision imposed a content-based restriction on speech meriting strict scrutiny, because its prohibition on recording applied only to "the conduct of an agricultural production facility."<sup>19</sup> In the court's view, the provision was not narrowly tailored: it was both under-inclusive (it did not prohibit the taking of photographs, or recording matters other than facility operations) and over-inclusive (suppressing more speech than necessary to further the state's goals of protecting privacy and property).<sup>20</sup> The court accordingly struck down this provision.<sup>21</sup>

## Analysis

*Wasden* did not frame itself as a newsgathering decision, but that is how it is best understood. Six years ago, in *ACLU of Illinois v. Alvarez*,<sup>22</sup> the Seventh Circuit potentially revolutionized the law of newsgathering by affording First Amendment protection to the act of making audiovisual recordings of police officers performing their official duties in public. *Wasden* marks the first time a circuit court has extended the right to record outside this context.

*Wasden*'s significance is perhaps best appreciated when viewed against the backdrop of the Supreme Court's larger First Amendment jurisprudence. The Court has erected impressive, powerful protections for the press against liability for *publication* of speech. But the Court has declined to recognize any special constitutional protection for core *newsgathering* activities—that is, the *conduct* involved in gathering

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information for subsequent *publication*. As the Court put it in 1991 in *Cohen v. Cowles Media Co.*, “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>23</sup> Since *Cohen*, courts have fashioned some important First Amendment protections against newsgathering liability, but they have not strayed from this basic principle or extended direct protection to core newsgathering activities.

Two examples are illustrative. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,<sup>24</sup> the Fourth Circuit barred Food Lion’s attempts to recover reputational, “defamation-type” damages suffered from the publication of a news report through “non-reputational tort claims,” without satisfying the strict constitutional standards that apply to defamation claims. Doing so, in the court’s view, would constitute an impermissible “end-run around First Amendment strictures.” And in *Bartnicki v. Vopper*,<sup>25</sup> the Supreme Court held that the First Amendment precludes liability for merely publishing information bearing on a matter of public concern, even if the information was obtained unlawfully by a third party. Still, neither case created direct protection for the core newsgathering activity at issue. *Food Lion* did not challenge the proposition that the defendants could be held liable for non-reputational damages flowing from tortious conduct committed in the course of newsgathering. And though *Bartnicki* afforded the press constitutional protection for the *publication* of information, it did not relieve it from potential liability in cases where it plays a role in its unlawful *obtaining*.

The Seventh Circuit’s decision in *Alvarez* was something of a watershed precisely because it broke from this jurisprudence. In holding that Illinois’s eavesdropping statute could not be constitutionally enforced against those who record police officers performing official duties in public,<sup>26</sup> the court brought a core newsgathering activity under the umbrella of First Amendment protection. (Five other circuit courts now recognize the same right.<sup>27</sup>) Part of *Alvarez*’s rationale was that the act of recording is itself expressive, and that the right to make a recording is

necessarily implied by the right to disseminate it. But the court’s opinion ventured more widely. Latching onto the Supreme Court’s statement in *Branzburg v. Hayes* that “news gathering is not without its First Amendment protections,”<sup>28</sup> the court embraced the theory that the liberties of speech and press are “intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government.”<sup>29</sup> *Alvarez* is important, then, because it *both* constitutionalized a right to record and made newsgathering the explicit basis of that right.

*Wasden*’s contribution is its application of *Alvarez* outside the narrow context of recording police officers performing their official duties in public. The newsgathering rationale appears nowhere in the text of the court’s opinion, perhaps because it is not a theory that the Supreme Court has entirely embraced. But *Wasden* is fundamentally a newsgathering case, even more so than *Alvarez*. The law it partially invalidated did not have a merely incidental or indirect effect on newsgathering; its very purpose was to stymie investigation into the agricultural industry. Moreover, *Wasden* recognized constitutional protection for newsgathering in circumstances where *Alvarez* does not obviously apply: to non-governmental actors, on private property. That is a major expansion of the right to record—one that, though its precise contours are not entirely clear, has potentially important implications for other kinds of laws that impose liability for engaging in newsgathering activities.

Following *Wasden*, it is not difficult to envision constitutional protections for newsgathering expanding in the 21st century the same way that they did for defamation in the 20th. In 1964, in *New York Times Co. v. Sullivan*,<sup>30</sup> the Supreme Court constitutionalized libel law by holding that public officials (specifically, in *Sullivan*, a police official) cannot prevail on a defamation claim directed at speech about their performance of their official duties without proof of actual malice. As every media lawyer knows, subsequent cases, like *Curtis Publishing Co. v. Butts*<sup>31</sup> and *Gertz v. Robert Welch, Inc.*,<sup>32</sup> erected a robust defamation jurisprudence on *Sullivan*’s foundation. It now appears

that *Alvarez* may be for newsgathering what *Sullivan* was for defamation—and *Wasden* may be the first brick on its foundation.

## Endnotes

- 1 878 F.3d 1184 (9th Cir. 2018).
- 2 *Video Shows Alleged Criminal Abuse of Bettencourt Dairy Cows in Idaho*, CBS News (Oct. 11, 2012), <https://www.cbsnews.com/news/video-shows-alleged-criminal-abuse-of-bettencourt-dairy-cows-in-idaho>.
- 3 *Wasden*, 878 F.3d at 1190.
- 4 Idaho Code § 18-7042.
- 5 *Id.* (quoting Idaho Code § 18-7042(1)).
- 6 *Id.* (citing Idaho Code § 18-7042(2)).
- 7 *Id.* (citing Idaho Code § 18-7042(3)).
- 8 *Wasden*, 878 F.3d at 1192.
- 9 *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200 (D. Idaho 2015).
- 10 *Id.* at 1209.
- 11 *Wasden*, 878 F.3d at 1205.
- 12 *Id.* at 1194–1203.
- 13 *Id.* at 1194.
- 14 *Id.* at 1194–99.
- 15 *Id.* at 1199–1203.
- 16 *Id.*
- 17 *Id.* at 1203–05.
- 18 *Id.* at 1203.
- 19 *Id.* at 1204.
- 20 *Id.* at 1204–05.
- 21 *Id.* at 1205.
- 22 679 F.3d 583 (7th Cir. 2012).
- 23 501 U.S. 663 (1991).
- 24 194 F.3d 505 (4th Cir. 1999).
- 25 532 U.S. 514 (2001).
- 26 *Alvarez*, 679 F.3d at 586–87.
- 27 See *Fields v. City of Philadelphia*, 862 F.3d 353, (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).
- 28 *Alvarez*, 679 F.3d at 598 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)).
- 29 *Id.* at 599.
- 30 376 U.S. 254 (1964).
- 31 388 U.S. 130 (1967).
- 32 418 U.S. 323 (1972).

# The Neutral Reportage Doctrine: MIA. Doesn't Good Journalism Demand It?

BY NAOMI SOSNER AND GEORGE FREEMAN

Senator Charles Schumer tells you mid-interview that Senator Mitch McConnell is taking bribes in exchange for rallying certain legislation. When you call McConnell, seeking a response, he informs you that Schumer is having an affair with an underage girl. You, a seasoned political correspondent, believe neither of them. But the fact that the senators said these things about one another is obviously newsworthy. You report their statements, and, in the article, explain that there is no evidence in support of either accusation.

You could be liable for it under libel law. And the context you gave readers—the explanation that the senators' statements are unsupported—would be used against you to show actual malice.

This is where good journalism and the law diverge. The neutral reportage doctrine is a possible solution to the problem, but the doctrine has not been recognized in most states.

Justice William Brennan, writing for the Supreme Court in *NAACP v. Button*,<sup>1</sup> pointed to the protections necessary for First Amendment freedoms—rights belonging to the individual but that define the nation and are, in Brennan's words, supremely precious, as well as delicate, and vulnerable.<sup>2</sup> The First Amendment, like fire, needs air to live: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."<sup>3</sup> This idea of "breathing space" became fundamental to the evolution of First Amendment jurisprudence, appearing in fifty subsequent opinions.

Among them was *New York Times Co. v. Sullivan*,<sup>4</sup> in which the Court, overturning precedent and revolutionizing defamation jurisprudence, ruled that the First Amendment proscribes the outer bounds of state defamation law.<sup>5</sup>

It did so in recognition of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"<sup>6</sup>—of the individual's right to discuss and rebuke government, and the press as central to that process. In the Court's view, the Constitution demands the process be safeguarded. For that reason, *Sullivan* established, media defendants are not liable for false and defamatory statements published about public officials—and, by subsequent extension, public figures<sup>7</sup>—unless the defendant acted with "actual malice"—meaning, knew the statements were false or showed a reckless disregard of their verity.<sup>8</sup> The risk of a lower liability bar is that, for fear of punishment, financial or otherwise, the press will "make only statements which 'steer far wider of the unlawful zone.'" Libel law has since tended to track good journalistic practices because it has developed with these precepts in mind. The unlawful zone is constrained to avoid overcautious self-censorship.

The neutral reportage doctrine, also known as the neutral reportage privilege, is an exception to the tendency. First recognized, in 1977, by the Second Circuit in *Edwards v. National Audubon Society, Inc.*,<sup>10</sup> the doctrine has since received a hopscoched treatment in defamation law—it has only been accepted in a few jurisdictions, rejected in many others, and remains unaddressed by the rest.<sup>11</sup> New York is split; federal courts have accepted it under *Edwards*, but it has been rejected at the state level.<sup>12</sup> Though the privilege varies according to the

pronouncements of the recognizing court, in broad strokes the neutral reportage doctrine protects a report's republication of defamatory accusations against a public figure (or organization) in controversies of public interest, even when the reporter knows or suspects the accusations are false<sup>13</sup>—an exception to the ordinary republication theory, because of the newsworthy quality of the reported statement.

Consider the following scenarios; assume all reports published are, or aspire to be, neutral.

- In anticipation of the upcoming Academy Awards, and in light of the ever-brighter spotlight being shown on sex-power disparity in Hollywood, the Academy of Motion Picture Arts and Sciences releases the results of a study it commissioned to analyze the makeup of this year's nominees relative to that of comparable award ceremonies. Time's Up, the newly formed organization founded and spearheaded by famous and powerful women, disputes the results. An official Time's Up publication rejects the study and identifies three Academy members, by name, as "paid liars." *The New York Times*, reporting on the controversy, republishes the Time's Up accusation, the names of the Academy members, and those individuals' denials. The three Academy members sue the *Times* for defamation.
- During a Senate vote on an appropriations bill, a senator from Wisconsin (for the bill) launches an attack on a senator (against the bill) from Florida. The attack is lurid, personal, racist, and anti-Muslim. The Florida senator is accused, among other things, of being a terrorist and financially aiding terrorist organizations. After

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the Senate session is recessed, the Wisconsin senator leaves the chambers and, outside his office door, continues to rant for an audience of at least ten. Among them is a reporter, who recounts the affair for an article in *The Wall Street Journal*. Voters, horrified, opt to unseat the Wisconsin senator in the next election. The *Journal*, which published the Wisconsin senator's remarks made during and after the vote, is sued by the Florida senator for defamation.

- Stephen Bannon, erstwhile Presidential advisor and ex-executive chairman of Breitbart News, is quoted by *Vice* as detailing, at length, how Michael Cohen, President Trump's personal lawyer, conspired with Russia to secure Trump's election. *Vice* includes the statement in an article that contains Cohen's denials and notes, in an editorial introduction, that Bannon's claims are not verified. Cohen sues *Vice* for defamation.

In each scenario, good journalism would command: publish. The outrageousness of the defamatory statement does not doom the point; it likely is the point, in these cases. But the media outlet that quotes the alleged libel is the media company that violates two established principles of defamation law. The Restatement (Second) of Torts' caution that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it]"<sup>14</sup> reflects a tradition well-entrenched in common law: republication, that "tale bearers are as bad as tale makers." Separately, *Sullivan's* actual malice standard is protective of the media up until that line only. The result is that, absent the neutral reportage privilege to a defamation claim, a newspaper may be liable for reporting genuinely newsworthy statements made by a public figure. The liability risk is only increased if the media defendant informs its readers—as good journalism would dictate—of the dubious verity of the statement at issue, for instance, or is otherwise shown later, by sufficient evidence, to have known the

statement was false, or suspected as much.

The result can approach the absurd, as illustrated by *Norton v. Glenn*,<sup>15</sup> the 2004 Pennsylvania case from which the second hypothetical above was drawn. *Norton* concerned "heated exchanges" between members of a Pennsylvania borough council. In short, one councilmember, Glenn, accused the two others of being homosexuals, and alleged that one lunged at his penis; Glenn said he had a duty to make public his accusations as the two councilmembers had "access to children."<sup>16</sup> *The Chester County Daily Local* published an article, entitled "Slurs, insults drag town into controversy," that quoted Glenn's attacks inside the council chambers and outside, where they had continued. The editors' rationale—that Glenn was an elected official, the public should know of his behavior, and the statements illustrated the "dysfunctional state of local government"<sup>17</sup>—was, in fact, borne out by the voters' decision, in the next election, to remove Glenn from office and retain the other two councilmembers.<sup>18</sup>

Nonetheless, the two councilmembers sued Glenn and the *Daily Local* for defamation. The trial court recognized the neutral reportage doctrine as mandated by the First Amendment, concluded that the media defendant was entitled to invoke the neutral reportage privilege as to its reporting of all of Glenn's comments, and granted summary judgment in the *Daily Local's* favor.<sup>19</sup> On appeal, the Superior Court ruled that there was no constitutional or statutory basis for the neutral reportage doctrine, and reversed.<sup>20</sup> Pennsylvania's Supreme Court affirmed. Neutral reportage, though in possession of "visceral appeal," had no home in either the United States or Pennsylvania constitutions.<sup>21</sup> Sadly, the case settled before trial.

The result, in *Norton*, is that the *Daily Local* could argue that the widely accepted fair report privilege—a defense to defamation for reporting any official action or proceeding and any meeting open to the public<sup>22</sup>—protected its republishing Glenn's comments made inside the council's chambers, but was liable for reporting

the accusations Glenn lodged outside chamber doors. But in an imbroglio between public officials, the newsworthiness of Glenn's allegations—made inside and outside the chamber walls—is obvious.

Newsworthiness, however, does not determine the constitutional protection accorded the media. In *Gertz v. Welch*, the Supreme Court ruled that the category of fault required for liability purposes is determined by the status of the plaintiff;<sup>23</sup> in so doing, the Court underlined that society's interest in a vibrant, dogged free press must be balanced with its interest in protecting individuals from reputational harm.<sup>24</sup> The courts that reject neutral reportage doctrine mainly cite the same two reasons: their determination that *Edwards*, the seminal Second Circuit decision, is inconsistent with the balance struck in *Gertz*, and, second, that the doctrine circumvents the absolute malice ceiling established in *Sullivan*.<sup>25</sup>

The first is open to dispute. *Edwards*, which is the basis for the *Time's Up* hypothetical, concerned a *New York Times* article reporting on a DDT-related controversy. The National Audubon Society had published an editorial that referred to certain scientists voicing support for the chemical industry as "paid liars." The Audubon publication didn't identify the scientists, but a *Times* reporter had elicited names from an Audubon member. The article the *Times* published contained Audubon's "paid liars" accusation, the names provided, and denials from the named scientists. Three of the scientists brought defamation claims, arguing that the newspaper was dutybound to determine whether the "paid liar" accusation was true. On appeal, the Second Circuit ruled that even if actual malice were to be found, a constitutional privilege of neutral reportage protected the *Times* from liability.<sup>26</sup> Noting that "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them[.]" Judge Kaufman, who had a strong First Amendment record—perhaps

an offering of sorts to the liberal community after sentencing the Rosenbergs to death—wrote, on behalf of the Second Circuit, that

when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation.<sup>27</sup>

In articulating the neutral reportage doctrine, *Edwards* “did not attempt precise definition of its contours[,]”<sup>28</sup> though emphasized that the plaintiff was a public figure, the defendant a “responsible, prominent” organization, and the article at issue a neutral—“accurate and disinterested”—reporting of the allegedly defamatory statement. None of this is inconsistent with *Gertz*. To the extent *Edwards*’ “newsworthiness” rationale is inconsistent, that is dicta and not an element of the privilege.

Which is not to say that *Edwards* is problem-free. As others have discussed at length, the Second Circuit cited as precedent two cases, *Time, Inc. v. Pape*<sup>29</sup> and *Medina v. Time, Inc.*,<sup>30</sup> which, in fact, do not support the neutral reportage doctrine.<sup>31</sup> Nonetheless, other courts have taken their cue from *Edwards* in articulating neutral reportage doctrines that they contend are consistent with *Gertz* and constitutionally mandated. In *Barry v. Time, Inc.*,<sup>32</sup> for example, the court discussed neutral reportage at length before formulating what is perhaps the most expansive version of the privilege. *Barry* involved two

*Sports Illustrated* articles concerning the University of San Francisco’s investigation of its basketball team’s alleged illegal recruiting methods. The articles focused on charges that Quintin Dailey, a former USF star player who later played professionally for the Chicago Bulls, received improper payments from a USF supporter in violation of National Collegiate Athletic Association rules. Dailey accused the former USF head basketball coach, Pete Barry, of personally transmitting the money to Dailey. *Sports Illustrated*, in writing about the controversy, reported Dailey’s accusations and Barry’s denials. The articles also mentioned that Dailey had recently pled guilty to unrelated aggravated assault charges. Barry sued Dailey for slander and *Sports Illustrated*, owned by defendant Time, for libel.

The court, after deciding that Barry was a limited purpose public figure in this context, ruled that summary judgment in favor of Time is required by “the constitutional privilege of neutral reportage,” recognizing the doctrine in a matter of first impression in the Ninth Circuit.<sup>33</sup> According to the *Barry* court, the doctrine can be harmonized with *Gertz*: under *Gertz* and its progeny, courts must already assess whether the plaintiff is a public figure, and that assessment precedes the application of neutral reportage. The doctrine does not entail evaluating the newsworthiness of a subject. Moreover, neutral reportage serves an underlying value of the First Amendment: self-government. The court noted:

Recognition of the public’s ‘right to know’ that serious charges have been made against a public figure is an important application of the Supreme Court’s concern that ‘debate on public issues be uninhibited, robust, and wide-open.’ If a republisher may be held liable for passing on newsworthy but defamatory information to the public, it is likely that he will decline to publish this information for fear that his doubts will later be characterized as ‘serious’ and therefore actionable. Even if he does not fear ultimate liability, the mere threat of costly and time-consuming inquiry into his state of mind

may cast a chilling effect on publication. In this way, the public will be deprived of the opportunity to make informed judgments with respect to public controversies.<sup>34</sup>

In elucidating the doctrine, the judge in *Barry* expanded it beyond its expression in *Edwards*. The neutral reportage privilege recognized by *Barry* applies where the defamed person is a public figure who is involved in an existing controversy, the defamatory statement is made by a party to the controversy, and the republication is “accurate and neutral.”<sup>35</sup> According to the court, this is the more sensible approach: it nullifies the court’s need to evaluate the trustworthiness of a source, and is better suited to the aim of providing the public with “full information” regarding a public controversy.<sup>36</sup> Moreover, it aligns journalistic responsibility—here, revealing to readers information that casts doubt on Dailey’s reliability—with the need for neutrality.<sup>37</sup> What otherwise may be regarded as evidence of actual malice is instead recognized as a best practice.

That interplay between journalistic responsibility and journalistic liability underlines the logic of neutral reportage doctrine. Neutral reportage, unlike the absolute malice standard, applies regardless of the defendant’s state of mind. As a result, the privilege allows for faster resolution of a dispute because the case can be decided on summary judgement— inquiry into scienter is unnecessary. A second, overarching point is that neutral reportage doctrine is useful because, in republication, there are two relevant “truths”—a core and a husk. The core is the truth of the republished statement; the husk is the truth that the statement was said. Both provide information to a reader. Whether the benefit in that information’s conveyance outweighs the detriment to an individual defamed by it is a legal determination. But ignoring the reality of the husk is nonsensical. It leads to cases in which lawyers’ arguments and court decisions both seem to stretch a little to reach a conclusion the privilege should allow—or, in any event, injects uncertainty about how a judge will rule on opinion vs fact, or some other potentially applicable defense, that



would be unnecessary if the privilege stood.

The intuitive logic supporting the neutral reportage doctrine has led some courts to perform judicial gymnastics to dismiss a case on other grounds. Consider, for example, *Gorilla Coffee, Inc. v. New York Times Co.*,<sup>38</sup> involving a staff dispute in a Park Slope cafe. The Times, reporting on the dispute, republished, in full, a statement employees made accusing the owners of Gorilla Coffee of creating a “perpetually malicious, hostile, and demeaning work environment[.]”<sup>39</sup> The owners sued the Times for defamation. New York state has rejected the neutral reportage doctrine that the Second Circuit has recognized, rendering the privilege unavailable.<sup>40</sup> The Times contended that the employees’ statements were opinion, which argument the court adopted in granting summary judgment for the newspaper.<sup>41</sup> Although relying on opinion under these circumstances would seem dubious, a likely explanation is that the judge did so because he recognized that the Times’ responsibly reported newsworthy events and thought it proper to dismiss this case. The court’s discussion of the statement’s context—relevant to the opinion/fact inquiry—stressed, among other things, the neutrality of the article.<sup>42</sup> If the neutrality reportage doctrine were available, which it was not, the analysis could have been more straightforward.

On a national level, the contours of the neutrality reportage doctrine remain unfixed.<sup>43</sup> Logic demands it be seriously reintroduced into the legal landscape. True, the privilege is likely inapplicable in many contexts, and may be available in situations in which good journalism may counsel against republishing something. Consider, for example, the third and last hypothesis sketched above. This is the easy version of Michael Cohen’s defamation case against Buzzfeed, currently pending: an imaginary situation in which Vice publishes Stephen Bannon’s quote, defaming Cohen. The neutral reportage doctrine would likely protect Vice in jurisdictions, such as the Second Circuit, that allow the defense. The harder case is reality: Buzzfeed posted a dossier of

unverified claims about President Donald Trump. Many media organizations declined to do the same, fearing legal liability or beholden to the tradition of liability for republication, especially with such rather flimsy charges.

But editorial discretion is a matter distinct from self-censorship. The neutral reportage doctrine can relieve a news outlet of worrying, with good reason, that to provide its readers with “full information”—of accusations against a public figure, of reason to be skeptical of the accuser, of relevant context for evaluating the accusation—is to build a case against itself for defamation. The privilege narrows the zone of unlawful publication. It provides breathing space that is eminently logical, and perhaps especially well-suited to an age of dissolving political norms and the symbiotic pressurecooker of culture-media-politics—all intensified by the whipsnap of technology. Many now bemoan the difficulty the media faces in relaying facts. Allowing the media to share with the public important information, and to point out how it is and is not supported, may be part of a solution.

#### Endnotes

1. 371 U.S. 415 (1963).
2. *Id.* at 433.
3. *Id.*
4. 376 U.S. 254 (1964).
5. *Id.* at 276–69.
6. *Id.* at 270.
7. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), *reh’g denied*, 389 U.S. 889 (1967) (overruled by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).
8. *New York Times Co. v. Sullivan*, 376 U.S. at 279–80.
9. *See id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).
10. 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).
11. A 2006 survey of cases identified seventeen jurisdictions that adopt some version of neutral reportage privilege and thirteen that reject it. *See* Jennifer J. Ho, Annotation, Construction and Application of the Neutral Reportage Privilege, 13 A.L.R. 6th 111(2006). However, as one law review author notes, “a precise count of jurisdictions is difficult because courts a) have been circumspect about whether they actually are adopting neutral

reportage, b) tend to confuse the neutral reportage privilege with the fair report privilege, c) have endorsed or rejected the neutral reportage privilege but only in dicta, and d) are sometimes split within states.” Dan Laidman, *When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 85 (2010) (citing cases).

12. *See Hogan v. Herald Co.*, 84 A.D.2d 470, 478–79, 446 N.Y.S.2d 836, 842 (4th Dep’), *aff’d on op. below*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982). That said, the New York Court of Appeals has also ruled that a defendant who would otherwise escape liability under neutral reportage may be protected by New York’s *Chapadeau* standard. *See Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 594–95, 549 N.E.2d 453, 456–57, 550 N.Y.S.2d 251, 254–55 (1989); *accord Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 105 n.11 (2d Cir. 2000).

*Chapadeau* established that “where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover” if he or she can establish “by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

13. *See Edwards*, 556 F.2d at 120.

14. Restatement (Second) of Torts § 578 (1977).

15. 860 A.2d 48 (Pa. 2004).

16. *Id.* at 50.

17. *See* Dan Laidman, *When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 86 (2010) (citing Kathleen Brady Shea, *Defamation Suit from 1995 Settled: A Newspaper was Sued Over Quoted Epithets*, PHIL. INQUIRER, July 14, 2006, at B1).

18. *See id.* at 86.

19. *Glenn*, 860 A.2d at 50–51.

20. *Id.* at 51.

21. *Id.* at 57–58.

22. Restatement (Second) of Torts § 611 (1977).

23. *See Gertz v. Welch*, 418 U.S. 323, 347–51 (1974). In contrast to a public figure plaintiff, who must show absolute malice, a private plaintiff at a minimum

must show negligence. *See id.* at 346.

24. *Id.* at 343.

25. *See Barry v. Time, Inc.*, 584 F. Supp. 1110, 1124 (N.D. Cal. 1984) (citing cases).

26. *Edwards*, 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

1. *Id.* at 120 (internal citations omitted).

28. *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 68 (2d Cir. 1980).

29. 401 U.S. 279 (1971), *reh'g denied*, 401 U.S. 1015 (1971).

30. 439 F.2d 1129 (1st Cir. 1971).

31. *See, e.g., Barry v. Time, Inc.*, 584 F. Supp. 1110, 1123 n.15 (N.D. Cal. 1984) (noting neither case is generally regarded as adopting a constitutional privilege of neutral reportage); David McCraw, *The Right to Republish Libel*, 25:2 AKRON L. R., 335, 339 (1991).

32. *Barry v. Time, Inc.*, 584 F. Supp. 1110.

33. *Id.* at 1113. The court also rejected

Barry's argument that Time had a heightened duty to investigate Dailey's claims because Time was clearly aware that Dailey was a convicted felon and thus an unreliable source. Looking to Ninth Circuit precedent, the court concluded Barry's allegations failed to show actual malice because "a publisher's knowledge of a source's disreputable character is not necessarily sufficient to put him on notice of probable falsity, and the publisher acts responsibly by not concealing from the reader facts which tend to impugn the source's credibility[.]" *See id.* at 1121–22.

34. *Id.* at 1125 (internal citations omitted).

35. *Id.* at 1127. In *Edwards*, the alleged defamer must be "responsible" and "prominent." *See Edwards*, 556 F.2d at 120.

36. *Barry*, 584 F. Supp. at 1126.

37. *See id.* at 1127.

38. 32 Misc. 3d 1230(A), 936 N.Y.S.2d

58 (Sup. Ct. Kings Cnty. 2011).

39. *Id.* at \*\*\*4.

40. *See supra* note 12.

41. *See id.* at \*\*\*2, \*\*\*4.

42. *See id.* at \*\*\*13 ("Furthermore, the statement must be viewed in context of the entire post. The Times Defendants presented the workers' statement as part of an ongoing labor dispute. The article presented the opinions of management first, and then that of the workers. It did not state or imply one side's position to be factual or more credible than the other.")

43. The last time the Supreme Court seems to have addressed it was in 1989, by way of footnote. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 660 n.1 (1989). In contrast, a variant of the doctrine was recently codified in the United Kingdom. *See* Section 4 of the Defamation Act 2013, available at <http://www.legislation.gov.uk/ukpga/2013/26/section/4/enacted>.

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# Pro Bono Opportunities for Forum on Communications Law Members

BY DAVID GREENE

Communications and media law have at their heart a fundamental civil liberty, the freedom of expression. Attorney pro bono work is thus a special priority for the ABA Forum on Communications Law and its members. The Forum created its Nonprofit and Public Interest Committee in part to promote pro bono work and help its members find pro bono opportunities where they can use their specialized expertise.

Several nonprofit legal organizations actively participate in the Forum and many of them frequently need private-practice lawyers to assist them. These organizations have numerous pro bono opportunities for Forum members, at all levels of legal practice, and in a variety of subject areas within communications law.

Here is a sample of some of the organizations that are always on the lookout for lawyers looking for pro bono work and how to register your interest with them.

## **Reporters Committee for Freedom of the Press**

As a leading nonprofit organization defending the legal rights of journalists and news organizations in the courts, Reporters Committee attorneys frequently partner with outside counsel to draft and file amicus briefs in state and federal courts around the country, as well as in direct litigation matters. In addition, the Reporters Committee relies on pro bono legal research and other pro bono assistance from outside attorneys to prepare many of their online guides and other legal resources for journalists. Attorneys who are interested in pursuing pro

bono opportunities with the Reporters Committee should contact the organization's Litigation Director, Katie Townsend, at [ktownsend@rcfp.org](mailto:ktownsend@rcfp.org)

## **Electronic Frontier Foundation**

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows. EFF works with volunteer lawyers in many capacities—as local counsel, as co-counsel in larger matters, and as primary authors for some amicus briefs—in state and federal courts across the country. EFF also receives many requests for legal assistance from others every day. In order to try to find help for as many people as possible, we maintain a post-only email list that attorneys can join called the Cooperating Attorneys list. The list receives anonymized requests for help, both directly on EFF cases and on cases where the EFF cannot offer assistance. If you are an attorney who is interested in joining the list, please contact the Legal Intake Coordinator at [info@eff.org](mailto:info@eff.org) with the subject line, “Cooperating Attorney List Inquiry.” More general information about the list can be found on our Legal Assistance page.

## **National Press Photographers Association**

The NPPA is an active advocate for the legal rights of visual journalists and vigorously promotes freedom of the press in all its forms. We work tirelessly advocating to protect the First Amendment, as well as visual

journalists' rights to earn a living from their work. Our work includes issues connected to First Amendment access, drone regulations, copyright, access and credentialing, cameras in court, “ag-gag” laws, unlawful assault on visual journalists and cases that affect the ability to record events and issues of public interest. Professional members turn to the Advocacy committee for support and advice when problems arise. The NPPA frequently needs pro bono lawyers to represent it as an amicus curiae in cases in courts around the country, and to assist NPPA members who find themselves in need of legal services, and to be on-call and legal observers at large public events, such as political conventions, where the rights of photojournalists are frequently threatened. Email the NPPA's General Counsel, Mickey Osterreicher at [lawyer@nppa.org](mailto:lawyer@nppa.org).

## **National Public Radio and Local Member Stations**

NPR is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of about 100 million people a month through our radio programs, digital properties, and podcasts. NPR licenses programming to more than 260 NPR Members, each of which are independent nonprofit entities operating noncommercial public radio stations. NPR welcomes pro bono services that may be offered. In particular, NPR is interested in hearing from lawyers who can handle access or newsgathering issues in their state. NPR is also interested in connecting qualified pro bono counsel with local Member stations in need; stations may need support, in particular, with regulatory and intellectual property issues, as well

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as with general business and media law matters. If you are interested in helping NPR or a Member station with legal services, please email Ashley Messenger, [amessenger@npr.org](mailto:amessenger@npr.org).

#### First Amendment Coalition

The First Amendment Coalition (FAC) defends and promotes the rights of free speech, a free press and access to government records and meetings. It does so through four primary program areas: (1) a free legal hotline, (2) strategic litigation, (3) public education and advocacy, and (4) legislative oversight. FAC relies on counsel willing to represent the organization pro bono in cases under the California Public Records Act and Freedom of Information Act. FAC also relies on pro bono counsel for a variety of more limited, “one off” matters such as drafting advocacy letters to the Legislature or government agencies, representing reporters subpoenaed for their confidential notes or sources, and participating in our expert panels on issues relating to First Amendment issues. If you are interested in working with FAC on any of these matters, please contact executive director David Snyder at [dsnyder@firstamendmentcoalition.org](mailto:dsnyder@firstamendmentcoalition.org) or (415) 460-5060. To learn more about FAC, visit [www.firstamendmentcoalition.org](http://www.firstamendmentcoalition.org).

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# “Failing *New York Times*” v. Trump cont’d

Continued from page 1

from the world’s most powerful leader—to give rise to a triable constitutional claim.

## The Chilling Effect Doctrine

It is boilerplate First Amendment law that a concretely adverse action by a government official against a speaker based on the content of speech violates the First Amendment. So when a speaker is arrested, fired from government employment or otherwise deprived of a benefit or privilege because of legally protected speech, the constitutional violation is self-evident.<sup>2</sup> The issue becomes murkier when the injury is not the tangible loss of liberty or employment, but the intangible loss of being effectively denied full freedom to speak as a result of official intimidation—known as the chilling effect.

At its core, the chilling effect is an act of deterrence. In the law, the basis of deterrence is generally the fear of punishment, whether it be a fine, imprisonment, imposition of civil liability, or deprivation of a governmental benefit. Specifically in the First Amendment context, the chilling effect can occur not only when constitutionally protected speech is actually silenced but also when it is unduly discouraged.

The first time that the Supreme Court used the term “chill” in a First Amendment case was in 1952,<sup>3</sup> and the phrase “chilling effect” was subsequently introduced in 1963.<sup>4</sup> Two years later, the Court explained that it was the “threat of prosecutions of protected expression” that created the chilling effect on speech, even in light of “the prospect of ultimate failure of such prosecutions.”<sup>5</sup>

In *Laird v. Tatum*,<sup>6</sup> a case challenging military surveillance of civil-rights advocates, the Court noted that, “constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”<sup>7</sup> The Court held that “governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise

of First Amendment rights.”<sup>8</sup> Under the *Laird* standard, a speaker challenging government action that inhibits speech must establish “specific present objective harm or a threat of specific future harm.”<sup>9</sup> An actual chill of protected speech is not necessary to state a First Amendment violation. The proper inquiry is whether a government official’s acts would chill or silence a person of “ordinary firmness” from future activities protected by the First Amendment.<sup>10</sup> As a general matter, a speaker can make out a *prima facie* First Amendment case by showing (1) an interest protected by the First Amendment; (2) adverse action by a government defendant substantially motivated by the exercise of that right, and (3) a chill on the exercise of that right.<sup>11</sup>

## Where Intimidating Speech Crosses the Line

On several occasions, the Court has confronted First Amendment challenges arising not out of official government restraints on speech, but government condemnation of particular speech or speakers that could have a deterrent effect either on the speaker or on audience members. These “denunciation” cases are instructive in assessing whether tweets from a sitting president’s account can cross the line from protected political expression to forbidden governmental coercion. Two Supreme Court cases provide an instructive starting point.

In *Bantam Books, Inc. v. Sullivan*,<sup>12</sup> a Rhode Island review board (the “Commission”) sent book distributors a blacklist of books identified as “objectionable” for sale to minors, with the strongly implied threat that continued sale of the books would result in a referral to prosecutors. Even though the Commission itself had no prosecutorial power, and its notices purported to be merely “advising” booksellers of their legal rights, the Court had no difficulty enjoining the notices as a violation of the First Amendment. The Court found that the Commission’s purpose and effect was to suppress the distribution of publications that (whatever their suitability for children) were lawful for adults to buy and read,

such that the warning system “was in fact a scheme of state censorship effectuated by extralegal sanctions.”<sup>13</sup> The opinion built on earlier rulings in which movie theaters were subjected to onerous pre-screening approvals and licensing conditions. An important factor in *Bantam Books* was that the Commission’s threats included a notice that the list of “objectionable” books was being shared with local police, so merchants reasonably feared arrest if they continued stocking the books.<sup>14</sup>

Two years later, in *Lamont v. Postmaster General*,<sup>15</sup> the Court invalidated a federal statute directing the Postal Service to intercept mail originating from a list of hostile countries, which would be delivered only if the addressees sent back a card indicating their desire to receive “communist political propaganda.” Even though no one was actually prevented from speaking, imposing this stigmatizing additional step in the delivery process was, in the justices’ view, analogous to imposing a tax or license on speech based on its disfavored political content, and therefore an unconstitutional burden.<sup>16</sup> *Lamont* thus stands for the proposition that publishers have a right to be free of untoward government interference even when the government’s coercion targets the audience (that is, making the subscriber more reluctant to accept delivery of the literature) and not the speaker.

In other words, the Supreme Court has established that government action that deters speech may be unconstitutional even if the government does not directly prohibit that speech. As the Court has stated, “indirect coercive pressure” can be as effective in deterring speech as direct prohibition: “Under some circumstances, indirect ‘discouragements’ . . . have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.”<sup>17</sup>

Applying *Bantam Books*, lower courts have at times found coercive speech by government officials to be a violation of the speaker’s First Amendment rights even without proof that the official had authority to make good on an implied threat of adverse

action.

The most recent and detailed exposition came from Seventh Circuit Judge Richard Posner in the 2015 case of a county sheriff who pressured credit-card companies to stop doing business with a website, Backpage.com, accused of hosting prostitution ads.<sup>18</sup> Posner explained how a government official, making threats, can violate the First Amendment:

[T]he fact that a public-official defendant lacks direct regulatory or decisionmaking authority over a plaintiff, or a third party that is publishing or otherwise disseminating the plaintiff's message, is not necessarily dispositive. . . . What matters is the distinction between attempts to convince and attempts to coerce. A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.<sup>19</sup>

Posner discounted Sheriff Tom Dart's argument that a government official is free to express disapproval of speech, noting that Dart was unmistakably speaking in his law enforcement role and not his citizen role in sending letters to MasterCard and Visa that contained thinly veiled threats of liability for facilitating sex trafficking: "The First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands."<sup>20</sup> It was immaterial, Posner wrote, that Dart had no actual authority to arrest or prosecute the credit-card issuers:

By writing in his official capacity, requesting a "cease and desist," invoking the legal obligations of financial institutions

to cooperate with law enforcement, and requiring ongoing contact with the companies, among other things, Dart could reasonably be seen as implying that the companies would face some government sanction—specifically, investigation and prosecution—if they did not comply with his "request." This is true even if the companies understood the jurisdictional constraints on Dart's ability to proceed against them directly.<sup>21</sup>

The *Backpage* decision built on a handful of comparable rulings, including the Second Circuit's *Okwey v. Molinari*,<sup>22</sup> in which the Staten Island borough president sent a letter to a billboard company to complain about some billboards with Bible verses aimed at denouncing homosexuality. The letter categorized the billboards' messages as "unnecessarily confrontational and offensive," and said the message of intolerance was "not welcome in [the] Borough." The letter merely pleaded for the company to act "as a responsible member of the business community," but fell short of making any threats of legal action.<sup>23</sup> The court nonetheless found the letter to be a First Amendment violation. Even absent an explicit threat or any direct regulatory authority over the billboard company, the court found that the company could reasonably have believed that the borough president intended to use his official power to retaliate if the company did not respond favorably to his appeal.<sup>24</sup>

Consistent with the standard set forth in *Laird*, the reasonable apprehension of retaliation—even if the retaliation does not come directly from the government authority that condemns the speech—has been a pivotal point in establishing a First Amendment violation.<sup>25</sup>

#### **The Meese Cases: Dissuasion Is Not Coercion**

While speakers have succeeded in challenging government dis-endorsement that is accompanied by either a wrongful threat of enforcement action against the speaker or interference with distribution of the speech, a challenge is less promising if the

government merely stigmatizes the speech or the speaker, without more.

In *Meese v. Keene*, film distributors challenged a federal statute requiring agents of non-U.S. entities to file paperwork with the Justice Department when exhibiting films that qualified as "political propaganda."<sup>26</sup> The challenged injury was the reputational harm of being federally characterized as a distributor of propaganda, which the exhibitors believed might make audiences reluctant to attend their showings. The Court found that, while stigmatization was enough of an injury to confer standing, the statute did not unconstitutionally burden speech. To the contrary, the justices decided, the requirement to make additional disclosures when showing a "propaganda" film actually gave the audience more information, which the exhibitor was free to supplement with counter-speech vouching for the film's virtues.<sup>27</sup> The Court expressly distinguished the *Lamont* case — on which the film distributors principally relied — by noting that in *Lamont*, there was actual interference with the delivery of the speaker's message, not just discouragement.

In a parallel case again involving the Reagan Justice Department, *Penthouse Int'l, Ltd. v. Meese*,<sup>28</sup> publishers of adult magazines were denied First Amendment redress against a federal commission that distributed a memo to retailers interpreted as pressure to stop carrying the magazines. The Attorney General's Commission on Pornography warned the retailers that, by virtue of stocking *Penthouse* and other adult publications, they would be named in an upcoming Commission report as purveyors of pornography and were being given a chance to respond. Distinguishing the *Bantam Books* line of cases, the D.C. Circuit stated that nothing in the Commission's correspondence could be understood as a threat of prosecution, and "the Supreme Court has never found a government abridgment of First Amendment rights in the absence of some actual or threatened imposition of governmental power or sanction."<sup>29</sup>

We do not see why government

officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. . . . If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.<sup>30</sup>

As a result of the *Meese* cases, it would be difficult for a news organization to mount a First Amendment claim against a government critic if the criticism did no more than discourage viewership.

### Religious Dis-endorsement and the First Amendment

While cases about coercive government speech are somewhat rare in the realm of media, they are much more common in the context of religion and religious speech. The courts have been called on repeatedly to determine when mere government speech about religion or religiosity, without any concrete accompanying official act, can itself constitute a First Amendment violation. In that context, courts have held that the government has violated the Establishment Clause when it has either endorsed or expressed "disapproval" of religion.<sup>31</sup> The driving principle is that government has no legitimate role in judging the religious beliefs of people "either by praise or denunciation."

The U.S. Supreme Court's case *Lemon v. Kurtzman*<sup>32</sup> remains the controlling authority on Establishment Clause cases. Under *Lemon*, government speech or action constitutes a violation when the government: (1) has a predominantly religious purpose, (2) has a principal or primary effect of advancing or inhibiting religion, or (3) fosters excessive entanglement with religion. Applying *Lemon*, courts have held that the government has violated the Establishment Clause even when no official act has been taken against a religion. For instance, in the

Ninth Circuit case of *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, a non-binding resolution opposing a Vatican directive that Catholic archdiocese stop placing children for adoption with same-sex couples was held to be an unconstitutional condemnation of Catholicism. The court dispensed with the idea that no "actual" harm came to Catholic adherents, opining that even "[t]hrough it is hard to imagine that government condemnation of the Catholic Church would generate a pogrom against Catholics as it might at another time or for a religion with fewer and more defenseless adherents, the risk of serious consequences cannot be disregarded."<sup>33</sup> It further provided examples of such possible ramifications, including fear that "[v]andals might be emboldened by knowledge that their government agrees that the Catholic Church is hateful and discriminatory," or that "[p]arishioners might be concerned about driving their car to Mass for fear that it might be keyed in the parking lot." In other words, it is the mere creation of fear through the use of official governmental condemnation—that is, fear that the non-Catholic recipients of such speech will be encouraged to turn on Catholic adherents—that runs afoul of the First Amendment.<sup>34</sup>

These cases, however, are of only limited value in understanding where judges might draw the line on government denouncement of a news organization. As understood by the Supreme Court, the Establishment Clause contemplates an affirmative right to be free of government speech condemning one's religion or religiosity, in a way that the speech and press clauses of the First Amendment do not. Government speakers are free to express disapproval of media coverage or media outlets as part of political give-and-take on issues of public concern, so wherever the line exists for anti-media speech, more will be required to sustain a First Amendment violation than merely showing that government authorities criticized a speaker's beliefs or message.

### Stigmatization and Due Process

The Due Process Clause can come into play when government speech inflicts severe reputational harm. Due Process

claims based on loss of reputation are often brought and evaluated in tandem with First Amendment claims, because both share a core concern that government condemnation will interfere with a speaker's ability to effectively exercise his rights. In recent years, this strain of due process jurisprudence has had a workout, thanks to claims by would-be travelers mistakenly placed on federal terrorism "watch lists" and at times denied privileges, including the ability to board planes. The initial wave of these cases has produced diverging views as to whether appearing on a "no-fly" list is a sufficiently serious deprivation to trigger the protection of the Due Process Clause.<sup>35</sup>

In a 1976 case involving a man mistakenly pictured on a police warning poster identifying shoplifters, *Paul v. Davis*, the Supreme Court declined to "constitutionalize" the tort of defamation.<sup>36</sup> The justices announced what has become known as a "stigma-plus" standard for due process claims arising out of harm to reputation, and found that the plaintiff's discomfort at being publicly accused of shoplifting insufficient to support a constitutional claim absent evidence of lost employment or other tangible harm.<sup>37</sup> The Court distinguished the accused shoplifter's case from successful due-process challenges in which government stigmatization was accompanied by the loss of a constitutionally recognized liberty or property interest, such as suspension from school or disqualification from government employment.

Have journalists or news organizations suffered a deprivation of constitutionally protected interests traceable to condemnation by President Trump? None of those the President has singled out as deserving of firing, including *The New York Times*' Dave Weigel and Fox's Megyn Kelly, has actually been fired. (Kelly took what was arguably a promotion to NBC-TV's "Today" show after the 2016 campaign, saying that Trump's harassment on Twitter confirmed, but did not initiate, her interest in leaving the combative cable news arena.<sup>38</sup>) Major national news outlets do not appear to be suffering economically from presidential disapproval; in fact, subscriptions are rising.<sup>39</sup>

At the same time, public distrust

of news media is worsening in parallel with, and arguably driven by, the President's rhetoric. A Poynter Institute survey published in December 2017 found that only 19 percent of Republicans expressed confidence that the media fairly and accurately reports the news, and that 44 percent of Americans believe the press manufactures unfavorable stories about President Trump.<sup>40</sup> The President's undisguised objective is to undermine belief in mainstream news reporting, as expressed in a celebratory tweet on Oct. 22, 2017, after the release of a survey comparable to Poynter's: "It is finally sinking through. 46% OF PEOPLE BELIEVE NATIONAL NEWS ORGS FABRICATE STORIES ABOUT ME. FAKE NEWS, even worse! Lost cred." Nevertheless, it would be challenging for a media plaintiff to establish an actionable cause-and-effect between particular statements by the President and a loss of public trust sufficiently concrete to deprive the plaintiff of a constitutionally protected interest.<sup>41</sup>

#### Possible Claims Against President Trump

A recent analysis published by *Columbia Journalism Review* examining tweets posted to the @realDonaldTrump account since the start of the Trump presidential campaign in June 2015 found 990 that could be considered critical of the media or of particular journalists.<sup>42</sup> The comments run the range from name-calling ("the most dishonest human beings on Earth") to more pointed calls for especially disliked journalists to be fired.<sup>43</sup> The President takes special pleasure in jabbing at *The New York Times*, which he has repeatedly claimed (in a distortion of history) "apologized" for anti-Trump bias in its campaign coverage. A favorite condemnation tactic is to characterize a news organization as "failing" or "ratings starved," suggesting a cause-and-effect between the organization's declining audience (whether the decline is real or imagined) and its unenthusiastic coverage of Trump.

A media plaintiff could readily satisfy most of the threshold prerequisites for a First Amendment claim. First, there is state action. The White House and President Trump's attorneys have taken the position that

tweets posted to @realDonaldTrump represent statements of official Administration policy.<sup>44</sup> Second, the challenged government action is substantially motivated by the exercise of First Amendment rights. The President plainly is responding to (and at times specifically referencing) news reports, and even news reports that turn out to be inaccurate are protected by the Constitution. The uncertainty, then, is in establishing that the condemnation was sufficiently severe as to chill speech. This requires analyzing what the President has said and its foreseeable effect on a speaker of reasonable firmness.

In a handful of instances, the President has gone beyond mere criticism and has hinted at adverse official action in response to journalists' protected speech.

Probably the most-debated sequence of posts came on Oct. 11, 2017, in response to an NBC News report indicating that Trump startled his top national-security aides by saying in a private meeting that he wanted a massive increase in nuclear weapons. After that report aired, Trump tweeted this series:

- "Fake @NBCNews made up a story that I wanted a "tenfold" increase in our U.S. nuclear arsenal. Pure fiction, made up to demean. NBC = CNN!"
- "With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!"
- "Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!"

Although NBC as a network is not an FCC-licensed entity, its affiliate local stations are, and the President's tweets could reasonably be understood as a "call to action" to rescind the affiliates' licensure. While FCC members are statutorily independent of the Administration, they owe their appointments to the President. A speaker could reasonably assume that a presidential directive ("must be challenged and, if appropriate, revoked") will carry, at the least, substantial influence. Even if the FCC could not legitimately remove a station's license because of

perceived bias in news reporting, it is not necessary for purposes of a First Amendment claim that the threatened government action be well-founded. As the doctrine of retaliatory threat speech was set forth in the *Bantam Books* cases—in particular, in the Seventh Circuit's explication in *Backpage.com*—the foundational ingredients for a First Amendment claim exist: Condemnation of an identifiable speaker, accompanied by a threat to use government authority to deter or penalize protected speech.<sup>45</sup>

In a less direct threat, on March 30, 2017, the President's account retweeted a *New York Post* opinion column sharply critical of *The New York Times* and then added, "The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?" This tweet, like the broadside directed at NBC News, hints at official action that might be within the scope of presidential authority (if only indirectly, since significant rollbacks in the constitutional protections for media defendants would require the Supreme Court to reconsider half a century of precedent). The March 30 tweet capped a string of 13 anti-*Times* posts following the inauguration, including tweets in which the President identified the *Times* and other disfavored news outlets as "the enemy of the American people," repeatedly accused the paper of fabrication, and called for the *Times* to be sold to a new owner who will "either run it correctly or let it fold with dignity!"

The threat of adverse action toward the *Times* was more remote than in the case of NBC, as the removal of federal licensure poses a direct and immediate threat to a station's existence, while changing libel laws poses a danger only in the subsequent event of a lawsuit. Moreover, while instigating a groundless FCC de-licensure proceeding is wrongful, it is less clear that it is wrongful to initiate a change in the legal standard for proving libel, which is an issue of legitimate debate. Since the President is within his authority to seek to change the law, it is uncertain whether a reviewing court would look searchingly behind such a proposal (if made) to its motives.

In a third instance, the President again connected animus toward the



media with adverse government action by tweeting on Oct. 5, 2017: “Why isn’t the Senate Intel Committee looking into the Fake News Networks in OUR country to see why so much of our news is just made up-FAKE!” The President could reasonably be perceived as having sufficient influence with Congress to provoke an investigation. But the tweet by itself cannot support a First Amendment claim, because it fails to identify a target with sufficient particularity to confer standing (although the post might be relevant in a hypothetical claim brought by NBC, as it came a day after two especially hostile anti-NBC tweets calling the network’s reporting “dishonest” and demanding an apology).

Short of this handful of direct or implied threats, prevailing First Amendment doctrine appears to insulate the President against liability for merely venting hostility toward media outlets, even if done with the hope of driving down viewership.

Most of the President’s post-election tweets about journalists are variations on the theme of “fake news,” a term he used in 100 posts from Inauguration Day through the end of 2017. While undoubtedly some Trump followers understand the message literally — that mainstream outlets actually fabricate stories critical of the President to advance a liberal agenda—“fake” is increasingly a meaningless term used interchangeably with “biased.”

In the context of contentious political debate, a mere accusation of bias is unlikely to satisfy the threshold for a constitutional claim. Even where the President has arguably defamed an individual or a business—for instance, claiming that a news organization intentionally publishes falsehoods—we know from the *Paul* case that the Supreme Court does not regard defamation as a constitutional matter.

Moreover, none of these posts calls on anyone to take any adverse action or can reasonably be understood as threatening government reprisal. The President obviously is in no position to use governmental authority against those in his Twitter audience who read the *Times* or watch NBC. The *Meese* cases indicate that merely discouraging the public from purchasing a publication falls short of conduct

violating the First Amendment.

Under a traditional First Amendment analysis, then, few if any of the President’s tweets would qualify as actionable violations of a media plaintiff’s rights. But the @realdonaldtrump tweets present unique constitutional concerns beyond the *Bantam Books/Meese* line of precedent.

First, unlike in typical “disendorsement” cases, the President is seeking to discredit or silence core political expression addressing matters of public concern, not speech at the margins of obscenity where government suppression battles are typically fought. A court might justifiably put a thumb on the journalist’s side of the scale when the government is seeking to intimidate news organizations that fail to adhere to the sitting administration’s viewpoint.

Second, unlike in typical “disendorsement” cases, the President’s commentary on the way his administration is covered does not advance any colorably legitimate government interest. No public purpose is served by undermining trust in news organizations or denigrating journalists. This scenario thus diverges from cases such as *Meese*, in which the Justice Department was seeking to call attention to the perceived social ills of pornography. The validity of the government’s justification is not explicitly made an element of the *Bantam Books* cases, but in traditional First Amendment analysis of content-based speech regulations, it is a decisive consideration.

### Threshold Hurdles to a Constitutional Claim

Even given ample precedent that government denunciation can give rise to a constitutional claim, powerful practical hurdles make a constitutional challenge to presidential tweets unlikely.

In the first place, President Trump’s well-established record of wildly hyperbolic statements on social media would make it difficult to establish that a reasonable audience member takes his invective literally. A recent libel plaintiff ran into this very obstacle in the case of *Jacobus v. Trump*,<sup>46</sup> in which a Republican strategist and Trump critic alleged she was defamed by presidential tweets belittling her as an embittered job-seeker who

“begged” Trump’s campaign to hire her. The judge observed that, while the tweets were clearly demeaning, they were not defamatory in the context of a heated exchange of insults on Twitter, a forum in which readers expect to encounter “imprecise and hyperbolic” statements in the nature of a “schoolyard squabble.” “Indeed,” the judge remarked, “to some, truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck’s back.”

Further, speakers have been most successful in challenging government condemnation where they can show that the condemnation actually interfered with their ability to distribute speech to the intended audience, such as making retailers more reluctant to sell certain books or magazines. This was the decisive point in the Eighth Circuit’s determination that a Minnesota college professor’s condemnation of literature as genocide-denial propaganda did not inflict a constitutional injury on the publisher.<sup>47</sup> Although being targeted for government denunciation was enough to confer standing on the publisher, there was no showing that the condemnation actually resulted in the material being less accessible to students. Absent proof of such interference, the mere allegation that students might be less likely to believe the literature could not sustain a First Amendment claim.

No television network or newspaper is likely to take the position that it refrained from candid commentary about the President or avoided stories unflattering to his administration out of fear of reprisal resulting from social-media invective. Indeed, those most aggressively singled out for condemnation—the *Times*, CNN and NBC News—show no outward indication of having altered their coverage or avoided critical commentary in fear of adverse presidential action.<sup>48</sup>

Nevertheless, courts have held that even if a speaker is heroically courageous, the chilling effect is not measured by the subjective standard of that speaker’s unusually thick skin, but by an objective standard of the reasonable speaker. As the Ninth Circuit aptly put it, “it would be unjust to allow a defendant to escape

liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity. . . . [T]he proper inquiry asks ‘whether an official’s acts would chill or silence a person of ordinary firmness from future First Amendment activities.’”<sup>49</sup>

Even if the elements of a constitutional claim could be established, the question of remedy remains. Injunctive relief can provide effective redress when a speaker challenges the enforceability of a government enactment that interferes with each successive attempt at expression, such as a burdensome permit requirement or tax. But when the challenged government conduct amounts to sporadic insults, it is not at all clear that a court could craft effective injunctive relief.

The other potential remedy for a First Amendment violation, money damages, is foreclosed by *Nixon v. Fitzgerald*,<sup>50</sup> in which the Supreme Court held that presidents are immune for civil damages in federal court for acts taken during their time in office, even years after leaving office (in that case, arranging for a Pentagon official to lose his job in retaliation for embarrassing congressional testimony). Although the *Nixon* case leaves open the possibility that a president can be held liable for acting beyond the “outer perimeter of his official responsibility,”<sup>51</sup> it would be a challenging tightrope act for a media plaintiff to establish that the President’s social-media speech was “state action” (a necessary prerequisite for a constitutional claim) and yet at the same time beyond his official responsibilities.

## Conclusion

The government has a recognized interest in participating in the marketplace of ideas as a speaker, even when the speech involves attempting to influence public opinion—for instance, persuading women to choose childbirth over abortion, which the Supreme Court legitimized in *Planned Parenthood of S.E. Pa. v. Casey*.<sup>52</sup> Still, the government’s dissuasion power is circumscribed by the Constitution in a way that a private “market participant’s” is not. If the president of the United States makes an official pronouncement that particular speakers are unworthy of being

heard or believed with the purpose of deterring speech, the speaker’s constitutional rights are implicated. And condemnation can inflict cognizable injury even if the president has no intent or authority to act on the condemnation.

Presidential denunciation of news coverage, or even of particular journalists, is nothing new. During the early days of America’s military involvement in Vietnam, President Kennedy infamously called the Washington bureau chief of *The New York Times*, trying (unsuccessfully) to get war correspondent David Habersham fired.<sup>53</sup> The Nixon administration ferociously criticized Washington journalists and in particular the *Washington Post*, which Vice President Agnew and the President’s press secretary repeatedly accused of fabrication.<sup>54</sup> What makes the bombardment by President Trump seem to represent an escalation is both the tone (at times lapsing into crude personal insults) and the venue (a universally accessible social-media platform through which anyone can rebroadcast the message).

Social-media posts from an account with Trump’s 45 million-strong following are qualitatively different from an Illinois sheriff’s letter to a credit-card company—and the distinction is a double-edged one. Trump tweets are, in one respect, more influential because they are seen by a worldwide audience and capable of inciting vast numbers of people into action, in a way that a private letter is not. But the sheriff’s letter in *Backpage* carried a gravity that a 280-character outburst on a platform known for jokey informality does not. Realistically, the letter would place a speaker in greater fear of imminently adverse government action than the tweet.

A constitutional challenge to presidential condemnation on social media would present difficult and perhaps prohibitive practical obstacles, but a solid doctrinal foundation exists in the law of government disendorsement. Nevertheless, it should not take an injunction for a sitting president to exercise restraint and judgment in using the digital bully pulpit. The most persuasive argument on behalf of journalists singled out for presidential approbation is not that the speech violates the Constitution, but that it

violates the norms of a civil society in which unsubstantiated charges of falsity and fabrication devalue the public discourse.

## Endnotes

1. “CNN Reliable Sources,” CNN, Oct. 15, 2017, *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/171015/rs.01.html>.

2. “Generally, standing is found based on First Amendment violations where the rule, policy or law in question has explicitly prohibited or proscribed conduct on the part of the plaintiff.” *Parsons v. United States Dept. of Justice*, 801 F.3d 701, 711 (6th Cir. 2015).

3. *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring).

4. *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 556–57 (1963).

5. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

6. 408 U.S. 1 (1972).

7. *Id.* at 11.

8. *Id.* at 12–13.

9. *Id.* at 13–14.

10. *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005).

11. *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001).

12. 372 U.S. 58 (1963).

13. *Id.* at 72.

14. In the view of Yale’s Robert Post, the realistic fear of imminent criminal prosecution distinguishes the *Bantam Books* scenario from that of the contemporary news publishers the President attempts to intimidate via social media. Robert Post, *Friends, Enemies, and Trump’s First Amendment Violations*, TAKECAREBLOG.COM (Sept. 26, 2017), *available at* <https://takecareblog.com/blog/friends-enemies-and-trump-s-first-amendment-violations>.

15. 381 U.S. 301 (1965).

16. *Id.* at 307.

17. *American Communications Ass’n v. Douds*, 339 U.S. 382, 403 (1950).

18. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230–131 (7th Cir. 2015).

19. *Id.* at 230–31 (quoting Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003)).

20. *Id.* at 231.

21. *Id.* at 236 (quoting *Backpage v. Dart*, 127 F.Supp.3d 919, 928–29 (N.D. Ill. 2015)).

22. 333 F.3d 339 (2d Cir. 2003).

23. *Id.* at 341–42.

24. *Id.* at 344. *See also* *Skywalker Records v. Navarro*, 798 F. Supp. 578 (S.D. Fla. 1990) (finding that sheriff

committed an unlawful prior restraint of a popular rap album when his deputy obtained an advisory court opinion that the record was obscene, which the sheriff then disseminated to music stores, causing them to pull the album from their shelves). (The ruling was reversed on other grounds, 960 F.2d 934 (11th Cir. 1992), when the Eleventh Circuit disagreed with the trial court's conclusion that the record was obscene.)

25. See *Rattner v. Netburn*, 930 F.2d 204, 208 (2d Cir. 1991) (noting that there is a valid claim for violation of First Amendment rights “where comments of a government official can *reasonably be interpreted* as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.”) (emphasis added). See also *Zieper v. Metzinger*, 474 F.3d 60 (2d Cir. 2007) (finding a triable First Amendment claim where FBI agents visited film distributor's home and led him to believe that other FBI agents were on the way, to coerce him to pull film about dramatized terrorism attack off the web, but nevertheless granting judgment for government defendants on qualified immunity grounds).

26. 481 U.S. 465 (1987).

27. *Id.* at 480.

28. 939 F.2d 1011 (D.C. Cir. 1991).

29. *Id.* at 1015.

30. *Id.* at 1015–16.

31. *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1053–54 (9th Cir. 2010).

32. 403 U.S. 602 (1971).

33. *Id.* at 1059.

34. As this article goes to publication, President Trump is in fact being sued by three counter-demonstrators who say his invective from the podium during a campaign rally provoked attendees to assault them. See *Nkwanguma v. Trump*, No. 3:16-cv-247-DJH-HBB, 2017 WL 3430514 (W.D. Ky. Aug. 9, 2017) (dismissing plaintiffs' negligence claims but reaffirming earlier ruling that plaintiffs can proceed on a theory of incitement).

35. *Compare Tarhuni v. Holder*, 8 F.Supp.3d 1253 (D. Ore. 2014) (no “stigmatization” claim for plaintiff of Libyan dissent placed on “no-fly” list, because list was made available only for airlines' internal use and not distributed to the public) with *Latif v. Holder*, 28 F.Supp.3d 1134 (D. Ore. 2014) (different Oregon district judge concludes that “no-fly” listing is actionable

under the Due Process Clause, because employees at departure gate and surrounding passengers became aware of plaintiff's status, causing them to suspect him of disloyalty to America).

36. 424 U.S. 693 (1976).

37. *Id.* at 712.

38. Erin Nyren, *Megyn Kelly Says She Left Fox News Because of Trump*, VARIETY (Sept. 21, 2017).

39. Ken Doctor, *Trump Bump Grows Into Subscription Surge—and Not Just for the New York Times*, THE STREET.COM (Mar. 3, 2017), available at <https://www.thestreet.com/story/14024114/1/trump-bump-grows-into-subscription-surge.html>.

40. Indira Lakshmanan, *Half of America Thinks We're Making It Up*, THE POYNTER INSTITUTE (Dec. 22, 2017), available at <https://www.poynter.org/news/half-america-thinks-were-making-it>.

41. In addition to Due Process, Prof. Nelson Tebbe has theorized that “hateful” government speech can, even in the absence of concrete action, constitute an Equal Protection violation—for example, if the government were to establish a differently named form of “marriage” reserved for same-sex couples so as to stigmatize those marriages as being of lesser value, even if all of the tangible legal benefits were exactly the same. See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (Dec. 2013).

42. Jonathan Peters, “Trump Twitter Spreadsheet Tracks ‘a Perpetual Campaign against the Press,’” COLUMBIA JOURNALISM REVIEW (Dec. 21, 2017), available at [https://www.cjr.org/united\\_states\\_project/trump-twitter-spreadsheet-press-attacks.php](https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php).

43. A PDF of the spreadsheet, compiled by a New York University student researcher for the Committee to Protect Journalists, is posted at <https://www.dropbox.com/s/glwr6uart3ralh4/Spreadsheet%20for%20CJR%20%28Updated%29.pdf?dl=0>.

44. Lorelei Laird, *DOJ Says Trump's Tweets are Official Presidential Statements*, ABA JOURNAL (Nov. 14, 2017).

45. One of many complications such a case would present is whether parent NBC-TV (the non-licensed entity that was threatened) can establish an injury based on a “hostage theory” that its affiliates might face FCC sanction. Conceivably, the network could establish injury by showing a reasonable belief that local stations will hesitate to join or remain in the network if carrying NBC news programming puts their licensure at risk.

46. 45 Media L. Rep. 1097 (N.Y. Sup. Ct. Jan. 9, 2017).

47. *Turkish Coalition of America, Inc. v. Bruininks*, 678 F.3d 617 (8th Cir. 2012).

48. In a comparable case involving a state prosecutor's intimidating phone call to the publisher of a local newspaper, the newspaper lost its First Amendment case because no evidence showed that the call actually caused the paper to alter its coverage. See *Zherka v. DiFiore*, 412 Fed. Appx. 345, 348 (2d Cir. 2011) (unpublished) (“Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech”) (quoting *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)).

49. *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). See also *Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005).

50. 457 U.S. 731 (1982).

51. *Id.* at 756 (internal quotes omitted).

52. 505 U.S. 833, 807–08 (1992).

53. Jon Finer, *A Dangerous Time for the Press and the Presidency*, THE ATLANTIC (Feb. 20, 2017).

54. See Oscar Winburg, *When It Comes to Harassing the Media, Trump Is No Nixon*, THE WASHINGTON POST (Oct. 16, 2017).



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