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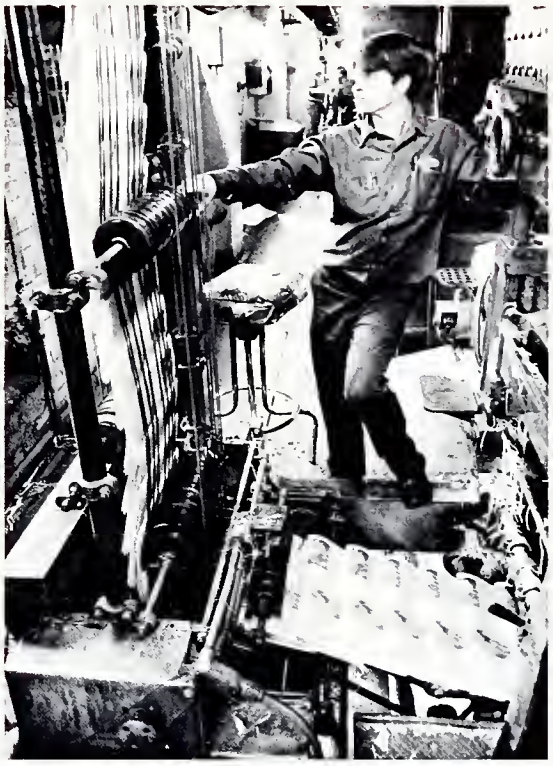

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Issues of Press and Government

Elmer R. Oettinger

IN THE PAPERS a few weeks ago we frequently saw photographs of Myron A. Farber. As you will recall, he is the reporter who went to jail rather than give a New Jersey judge his confidential materials relating to a trial that was going on then. Furthermore, his paper, the *New York Times*, was fined $5,000 for each day that he refused to give up the documents. Farber and the *Times* graphically represent the subject of this issue of *Popular Government*—the relationship between the press and government and the conflict that occurs so often between the two.

The conflict comes down essentially to the need to strike a balance between the public's right to know and the individual's rights of privacy and to a fair trial. In the United States a free press, guaranteed by the First Amendment to the Constitution, has been the traditional watchdog of government and infringements on personal liberties. Yet incidents have occurred when the press itself has encroached on the individual's rights. At such times government places restrictions on the press. The press may be denied access to certain information or required to divulge certain information. The problem is to walk a fine line, preserving rights and safeguarding precious interests.

The personal freedom that Americans have enjoyed for the last 200 years—freedom to live without fear, to worship, to think and speak and act—is a historical phenomenon. And the democratic society that makes it possible depends on an informed public—a public that knows what its government is doing and how it can change the course of government. The task of informing the people belongs to the press.

How do we manage this conflict? How do we give the people the information they need to participate in their government and to guard their liberties and at the same time assure that the press in its zeal will not jeopardize government or individual rights?

It is these questions that this issue of *Popular Government* addresses. The articles that follow have been written by people who have worked firsthand in government or in journalism or have taught these subjects. The various points of view they present afford an enlightening perspective on this real and present dilemma in American life.

The power of the press is explored in the first two pieces by Carol Reuss (p. 3) and Robert J. Gwyn (p. 6). The authors, who respectively teach journalism and broadcasting, take close looks at the nature, extent, and limits of press power. My article on *Free Press vs. Fair Trial: Confrontation or Cooperation?* (p. 10) portrays the continuing clash and accommodation of two vital constitutional guarantees: freedom of the press and fairness of the courts. Wade Hargrove, counsel for the state Association of Broadcasters, explains (p. 14) the spreading acceptance of televised trials and court processes in his examination of electronic media in the courtroom. A number of articles deal with the many facets, legal and practical, of news media access to information. These include *Protection of Confidential News Sources—An Unresolved Issue* (Bill F. Chamberlin, p. 18); *A Legal View of Press Access* (Joseph D. Johnson, p. 23); *Statutes and Regulations Governing Access to Information on Criminal History* (Robert L. Farb, p. 27); and *The Reporter's Right of Access to Public Information* (Nadine Cohodas, p. 29).

David Lawrence, Jr., gives us an editor's perspective of local government coverage by newspapers (p. 32). A more specific aspect of press and public access is the timely issue of the North Carolina open-meetings law addressed by David M. Lawrence (p. 35). My interviews with a state and a local government administrator provide opportunities for *Two Officials [to] Look at the News Media* (p. 37). Nancy Wolfe gives us the perceptions of a government information expert involved in *Governmental Public Relations—Keeping in Touch With People* (p. 46). If you think you have a *Right of Reply* (p. 49) to the press, my second article may surprise you. But you may have another recourse, as

William C. Lassiter discloses in *The Law of Libel* (p. 50), depending on whether you are a public official, a public figure, or a private citizen.

As you read this issue I hope you will ask yourself questions. How much power does the press really have? What kind of power? How much should the media have? Where should the balance be struck in preserving both a free press and the right of a fair trial? Is freedom of information endangered by insufficient protection of confidential news sources? Do the media and the public have too little or too much access to public information and records? Do officials need a measure of confidentiality to protect law enforcement intelligence files? What are the implications of electronic media coverage in the courtrooms and government meeting rooms? Should the trial judge have discretion to decide whether cameras should be ad-

(continued on p. 56)

ELMER R. OETTINGER is the Institute of Government's specialist in news media law and practice. We who are associated with *Popular Government* are happy to have this press-government issue not only because of the important questions it addresses but also because the issue calls attention to the distinguished career of Dr. Oettinger, who will retire from the Institute next July 1.

Elmer first came to the Institute in 1939 after receiving his law degree from the University of North Carolina law school. He served in the U.S. Navy during World War II. After the war, he practiced law for several years in his home town of Wilson, N.C., and then served as news director and commentator for radio stations in Wilson and Raleigh. In 1951 he returned to the University at Chapel Hill, where he took a Ph.D. in English. He taught in the English Department from 1952 to 1956 and in the Department of Radio, Television and Motion Pictures from 1956-60.

Elmer rejoined the Institute in 1960. He has concentrated on communications law—free press and fair trial, open meetings, privacy, copyright, libel, newsman's privilege, equal time, etc. He is regularly consulted by press, broadcasters, government, and public information officers on these matters. He also served as editor of *Popular Government* from 1961 to 1974.

Of particular note is Dr. Oettinger's work in organizing and leading the North Carolina News Media-Administration of Justice Council. This group has achieved national recognition for fostering understanding and developing standards to guide relationships between the press and the courts. Under the Council's sponsorship, Dr. Oettinger and C. E. Hinsdale of the Institute of Government and Superior Court Judge E. Maurice Braswell prepared and published the book *The News Media and the Courts*, which has received acclaim from judges and journalists throughout the country. Dr. Oettinger also serves on the American Bar Association's Fair Trial and Free Press Advisory Committee.

Elmer has made notable contributions in other fields as well. He served as a consultant to two Governor's Study Commissions on Automobile Liability Insurance and Rates (1969-71 and 1971-73) and to the General Assembly's Senate and House Insurance Committees (1971-72 and 1973-74). He also served as a consultant on state motor vehicle law during the 1960s and as a consultant to the Governor's Coordinating Committee on Aging in 1971-72. In 1977 Governor Hunt appointed him as North Carolina's Commissioner to the National Conference of Commissioners on Uniform State Laws. Dr. Oettinger is chairing the Commission's Special Committee to draft a uniform privacy act for state governments.—AJV

The Power of the Press: Newspapers

Carol Reuss

THE POWER OF THE PRESS: The phrase is familiar enough to us. Sometimes it has a ring of strength—a mystique suggesting that knowing about situations will somehow facilitate the common good. Other times it evokes fear or anger because the press offers a platform for capricious reporters, editors, and publishers bent on telling their versions of what they see and hear and believe and ignoring others.

This situation is not new. The fathers of the Massachusetts colony warned that the press needed "wholesome constraints" lest contentions and heresies arise. Some early Virginians held both the press and public schools suspect because, they reasoned, people without knowledge would be more obedient to the laws of the colony. Jefferson and others like him, on the other hand, saw the value of a free press as a platform for disseminating a variety of facts, opinions, and ideas. They regarded the press as necessary to citizen participation in a democracy.

Today some people love the press, some hate it, and some ignore it. Some read every page and argue with the selections made by the editors; they even write letters to complain or to compliment. Others don't even buy copies. Still, the thousands of daily and weekly newspapers in this country roll out almost 10 million tons of paper a year in their attempts to inform and entertain the nation. They laboriously comb the world and their neighborhoods for news. They ponder the serious and the silly in an attempt to tell readers what is happening and why. And they hope they have an influence on the decisions their readers make, though in today's complex world it is almost impossible to pinpoint their influence in any single situation.

Eugene Patterson, Jr., president of the American Society of Newspaper Editors, recently recounted the efforts he and his staff at the *Atlanta Constitution* made to open Atlantans' eyes and hearts to integration in the 1960s. The paper's biggest contribution, he said, was "to break the silence so people would discuss integration, even negatively."

An article in the last edition of the *Chicago Daily News* boasted that during the paper's top circulation years of the 1950s, an endorsement in the paper could bring 50,000 votes to a candidate for office. Research would probably indicate that those votes were not the direct result of the paper's endorsements because voters rarely, if ever, live in the isolation of one paper's offerings.

Donald L. Shaw and Maxwell E. McCombs, among others, have studied the agenda-setting function of the mass media—that is, the media's ability to transmit information telling the public what to think about, not what to think. They found that early newspaper coverage of the 1972 presidential campaign in Charlotte helped establish voters' consciousness of the issues involved in the election. It wielded long-term influence on citizens' thinking about the campaign as it progressed. There was no evidence that any newspaper or any other mass medium simply and directly persuaded voters one way or another. Thus, while the press has an agenda-setting role, the actions that result are as varied as the number and dispositions of the people who read the newspapers or are influenced by others who read them.

Except for a handful of papers that includes the *Wall Street Journal* and the *Christian Science Monitor*, every one of this nation's approximately 1,760 daily papers is edited for the locality in which it is published. The influence of some papers, however, extends beyond their locality because of editorial quality, syndication services, and the basic fact that newspaper staffs do not operate in social isolation. The *New York Times*, the *Washington Post*, and the *Los Angeles*

The author is an associate professor in the School of Journalism, University of North Carolina at Chapel Hill. One of her areas of interest is press-society relationships.

Times, for example, can afford to support large, mobile staffs of excellent reporters and writers. They syndicate selected articles to other papers just as they buy from other such organizations, and these are read by other reporters and editors around the nation and the world.

But most of the nation's daily newspapers are not like the *Times* or the *Post*: 85 per cent of them are small—less than 50,000 circulation—and present their readers with information gathered by their limited staffs and limited number of wire services and syndicates. Depending on their proximity to major news centers and readers' access to other news sources, most American dailies attempt to insure that their readers have access to a range of international, national, and area news, although emphasis is usually on local-interest material. They jealously allocate their limited space, conscious that readers' interests are the lifeblood of their papers.

THE PRESS will continue to cover government at all levels in this country, so people in government should be prepared to meet the press regularly and effectively. The following suggestions should be the starting point for public officials:

—Know the reporters who cover government and the deadline conditions under which they work.

—Know the legal bounds under which you and they operate: the open-meetings and open-records laws and the ramifications of free speech and free press in a democratic society.

—Be prepared to respond to reporters' questions: take time to explain situations clearly and precisely.

—Don't wait for crises to arise before discussing matters of potential importance with reporters.

—Reserve press conferences for situations that deserve the time and "show" of such gatherings. When you do call them, make sure you schedule them to meet the deadlines and photo requirements of the media. Be prepared to offer background material on the subject to be covered and to respond to reporters' inquiries.

—Be honest. If you cannot answer a question, say so, but know that reporters cultivate many other sources for infomation.

—In larger offices, charge knowledgeable staff members with the responsibility of working with the press and cooperate with them when further information, interpretation, or personal response is needed.

—Keep up with current press coverage and be willing to acknowledge good as well as poor press performance.

The *Durham Sun* and the *High Point Enterprise*, among others, include a tight budget or supply of national and international news but make sure that state and local news affecting their readers is well represented. Their feature articles tend to highlight local people and situations rather than the exploits of people at a distance. Publishers and editors give local government extensive coverage because they know that their papers are among the few continuing checks on the activities of the local governing bodies, and their readers appreciate this fact.

Sustained reader interest, in turn, is important to attract advertisers—most of them local—and to maintain the papers' financial stability. The interaction of audiences, content, and advertising brings in revenue. This combination supports the papers, their services to readers, and the general well-being of the communities they serve. It also supports the economic well-being of the owners. Even the most idealistic publishers have to face the economic facts of life at some point.

Nationally, approximately $10 billion were spent on newspaper advertising last year—30 per cent of the total spent for all media and by far the largest slice of the national advertising pie. Local retailers and users of classified advertising space spent almost $9.5 billion of this amount, which indicates the importance of local newspapers to sellers of goods and services in this country and also the extent of newspapers' reliance on locally oriented advertising. So, when the *Ayden News-Leader*, for instance, prints "No. 1 Booster for the Ayden and Winterville Communities" on the front page of every issue, or the *Asheville Citizen* prints "Dedicated to the Upbuilding of Western North Carolina," it is doubtless indicating its concern for the economy of its area as well as the integrity of its local government officials.

A significant benefit of the advertising dollars flowing to the newspapers is the improvement in the papers' ability to hire and retain capable reporters, editors, photographers, and other staff; to report more events more completely; to support the probing that is sometimes labeled "investigative reporting"; and to rely less on handouts from government offices, businesses, and others promoting special interests. This is important to readers and, indirectly, to persons with whom readers associate.

In areas where there is no apparent life in the local newspaper or newspapers—where news coverage is understaffed and has to be limited to a regurgitation of what the mayor tells the council or lists of approved resolutions—readers have little reason to anticipate the delivery of a new edition or to get involved in local activities. Sooner or later they will probably find other means for staying abreast of local news. Without readers, advertisers will probably be wooed by handbill

printers and other media, undermining even more the local paper's capacity for public service.

On the other hand, continued solid reporting and interpretation of local affairs, supported by a healthy advertising base, often enlivens a community. A live paper can give readers something to talk about, often with the preface "I read in the paper. . . ." A live paper is evidence of the power of the press to serve the public interest.

Newspapers in this country are, on the whole, financially attractive properties, and many people fear that before long almost all of them will be in the hands of powerful groups, chains, and conglomerates more intent on profit than the service capability of their papers. Some argue that such ownership stifles the editorial clout of papers because the owners, whose headquarters are often some distance from the papers, are so concerned with profits that they choke off funds for necessary staff functions. These people feel that groups and chains eradicate the independence of papers and leave many cities and towns with mediocre, uncommitted papers, staffed by hired hands who publish by a homogenizing formula and move from one paper to another as soon as better opportunities arise.

So far there is little evidence that such a result happens with *all* group ownership, although the possibility is a factor that must be considered. Some group owners do concentrate on financial return and promote an easy "don't rock the boat" sameness among the papers they own. But, for example, there is no solid evidence that all Knight-Ridder papers, which include the *Charlotte Observer* and the *Charlotte Times,* avoid state government coverage because of expense or hold back on investigating local problems. The *Camden* (N.J.) *Courier-Post,* one of 77 Gannett papers, recently assigned 10 reporters to study the municipal court system there. Their articles brought about a mandate for court reforms from the governor, the New Jersey Supreme Court, the Bar Association, and others involved in the administration of justice.

North Carolina has 52 daily newspapers, 22 owned by groups with headquarters outside of the state, nine by in-state organizations, and 21 by independent publishers. No city or town has two papers owned by competing organizations. Editorially strong papers and weak papers exist in each category—group-owned and independent.

The independent papers are all relatively small; many of them pride themselves on their independence and continue to ward off the lucrative advances made by chain and group owners. Some of these could surely increase their editorial staffs with infusions of outside money, but their owners prefer independence, a long-standing philosophy in the nation and the state. Militating against future independence, however, are the nation's tough inheritance taxes that penalize the heirs of anyone who has built a good newspaper and wishes to have his or her survivors continue the work. There is congressional interest in this problem but little promise of a speedy resolution. The hard-won influence and power of some of the best independent papers in North Carolina will be diluted if heirs must sell their properties rather than go into debt to pay inheritance taxes.

The state also has approximately 150 weeklies, bi-weeklies, and tri-weeklies, but combined ownership records are not available for them. Some of these, too, are excellent forums for their localities. Many may face extinction or dilution, however, because of the specter of inheritance taxes.

The power of the press in this country and in this state rests on newspapers' balancing their functions (to inform, interpret, entertain); their constituencies (readers, communities, advertisers, themselves); and their ideals (freedom, free enterprise, and fairness, to name a few). Strong papers are forums for discussing information and ideas. They are able to take a broad look and then select multiple views of complex subjects, permitting their readers to make their own decisions. Their influence, their power, is immeasurable because they are interactors in today's complex society, not dictators of policies and practices.□

THE TRADITION of this country's press is libertarian. Anyone with the wherewithal can establish a paper; the more the better. From a diversity of publications and information, the "truth" about matters of importance will surface.

During this century, however, the modifications titled "social responsibility" began to be evident in the U.S. press. The press performs a public service, the Commission on a Free and Responsible Press said in 1947, and should:

1. Provide a truthful, comprehensive, and intelligent account of the day's events in a context that gives them meaning.
2. Provide a forum for exchanging comment and criticism.
3. Provide a representative picture of the constituent groups in society.
4. Be responsible for presenting and clarifying the goals and values of society.
5. Provide full access to the day's intelligence.

Social responsibility builds on the earlier libertarian spirit of the nation's press and, while the Commission had no binding force and its work was less than well received by the press in the late 1940s, the blueprint the Commission offered is often reiterated today when serious discussions of press privileges and responsibilities are undertaken.

The Power of the Press: Broadcast Media

Robert J. Gwyn

THE BROADCAST MEDIA are a part of most Americans' lives. The statistics on the media are staggering: The United States has more radio sets than people (425 million sets, 216 million people). Nearly 72 million homes (97 per cent of all American homes) have television sets, and the A. C. Nielsen Company, a principal media polling service, reports that in over 63 per cent of these homes the set is turned on in the evening. In the average American home, the set is on over six hours each day.[1] A radio audience study reports that the total radio audience in each 24-hour period is nearly 24 million people over the age of 12.[2] Most communities have more radio stations than daily newspapers and large cities have more television stations than daily newspapers.

Television is apparently an irresistible force in the lives of many people. Researchers who recently studied what happens to people who are denied the use of television had great difficulty securing participants who would give up television for only two weeks, even for pay. Those who did participate cited TV as their primary source of information about current events, news analysis, and entertainment, and some said that they became disoriented without it.[3]

A British writer and television producer recently wrote about the impact of television on American society:

> American television, in the last fifteen years, has become a major unelective source of power, the cause of changes in social behavior, in the operations of the constitution, in the management of the economy, in the ordering, so to speak, of the nation's (and therefore international) agenda. American television is felt to have become a vast broker of social power.[4]

Surely if television has affected social behavior and had a major impact on the economy, we should be able to describe these effects and predict the consequences of the medium with some accuracy. One of the first efforts came in 1933, when a private foundation financed extensive studies on the psychological effects of motion pictures on children. Using measures of heat and respiration rates, galvanic skin response, and other devices, the researchers found that children's emotions changed as they reacted to changing action on a movie screen.[5]

These early studies of mass communication assumed that media content affected viewers and listeners as individual receivers of messages, not as persons functioning in a social context. Thus, the "Yale School" of psychologists, in the forties and fifties, conducted carefully controlled laboratory experiments. The results, which remain influential today, demonstrated how communication through the media could affect individuals, given the conditions of the experiment.[6] Other early survey research, which attempted to gather data in non-laboratory settings, still approached the audience as separate individuals rather than as members of social groups. Much market research still uses this approach.

The functionalist approach, which studies the consequences of an activity, event, or institution as a way of explaining it, was introduced to the study of the mass media in the forties and fifties. The aim was to determine how people used the media content in a real-life situation. In their studies of how information is diffused and how the media influenced such areas as voting and clothing styles, researchers used this approach to examine the combined effect of mass communication and face-to-face communication on mass media audiences. They found that personal influence works in conjunction with mass communication, creating a "two-step flow of information."[7]

The author is an associate professor in the Department of Radio, Television, and Motion Pictures at the University of North Carolina at Chapel Hill.

1. *Broadcasting Yearbook* (Washington: Broadcasting Publications, Inc., 1977), A-2.
2. "AM and FM Slice Up the Pie," *Broadcasting* 93, no. 4 (25 July 1977), 50.
3. Alexis S. Tan, "Why TV Is Missed: A Functional Analysis," *Journal of Broadcasting* 18, no. 3 (Summer 1977), 379.
4. Anthony Smith, " 'Just a Pleasant Way to Spend an Evening'—The Softening Embrace of American Television," *Daedalus* 107, no. 1 (Winter 1978), 195.
5. W. S. Dysinder and C.A. Ruckmick, *The Emotional Responses of Children in the Motion Picture Situation* (New York: Macmillan, 1933).
6. Carl I. Hovland, Irving L. Janis, and Harold H. Kelly, *Communications and Persuasion* (New Haven: Yale University Press, 1953).
7. Elihu Katz and Paul F. Lazarsfeld, *Per-*

After reviewing the previous 20 years of research on mass communications, many researchers concluded that "mass communications ordinarily does not serve as a necessary and sufficient cause of audience effects, but rather functions among and through a nexus [link] of mediating factors and influences."[8] In disillusionment at being unable to attribute certain effects directly to the mass media, some left the field of communications research. But beginning in the 1960s, younger scholars who reviewed the earlier work believed that mass communications does have an effect but is intricately entwined with other social influences. They looked at mass communications in a new way and studied the media as part of a larger social system.

IN THE LAST DECADE communications researchers have reached some agreement on what broadcasting can and does do and what it cannot do or does very poorly. First, mass communications (including television) affects individuals by functioning through this linking of interpersonal communications. Second, the media are much more efficient in communicating information than in persuading or affecting behavior. Third, the media tend to determine what issues, people, and events the viewers or listeners consider most significant: the "agenda-setting function." Fourth, the mass media, especially television, play an important role in socializing the young (that is, teaching children how to function in society).

Some early researchers and the general public regarded the media as all powerful, able to impress ideas on defenseless minds in an atomized mass audience connected to the mass media but not to each other.[9] This idea still persists with the public. But other studies discovered that the process of persuasion was much more complex and involved, not only in mass communication but also in interpersonal contact. A report of the 1940 presidential election said:

> This study went to great length to determine how the mass media brought about such changes. To our surprise, we found the effect to be rather small. ... People appeared to be much more influenced in their political decisions by face-to-face contact with other people . . . than by the mass media directly.[10]

Researchers have studied broadcasting as a transmitter of information. Broadcasting communicates an enormous amount of information on many levels, and some of the information picked up by viewers or listeners is incidental or unintended. The most successful category of intended messages communicated by radio and television is commercials. Commercials tend to serve two functions: fix the name and

Researchers who recently studied what happens to people who are denied the use of television had great difficulty securing participants who would give up television for only two weeks, even for pay.

What television program a person chooses and what commands his attention are determined by a variety of influences: peer pressure, psychological needs, and such demographic variables as socioeconomic class, education, age, and race. The impact of television is far from uniform. One person might find his values reinforced in television drama; another might feel his need to participate in public affairs satisfied through watching TV news; yet another might get information about a local institution that would be hard to get directly. Some viewers use TV shows as a "school of life," learning solutions to family problems from soap operas, medicine from "doctor" programs, and criminology from police shows.[11] Researchers have concluded that television provides much of what people talk about, especially among the poor, who tend to use television more than the rest of the population.[12]

some information about the product in the viewer's mind, and create in him a generally favorable mental attitude toward the product. Although television in political advertising is credited with few documented voter shifts, it serves the same functions as commercials. When a candidate is not known to the voters, TV campaigns can be critical. A case in point was the U.S. Senate race in Ohio between Howard Metzenbaum and Sen. Robert Taft, Jr. In 1970 Metzenbaum was virtually unknown in the state. After a massive TV campaign, he came within 70,000 votes of defeating the incumbent Taft. (Metzenbaum was later appointed to a vacancy in the other Ohio Senate seat.) Some researchers contend that 30-second TV political commercials do communicate information to the voters. First, they argue, people see the TV commercials, whereas they tend to avoid longer political programs and long printed articles. Second, through repetition of the entire advertising campaign, a fair amount of information on a variety of issues reaches the public over and over.[13]

Another radio and television role in disseminating information is in *determining* what are significant events, issues, and people: the media's agenda-setting function. It has been said that the media do not tell people what to think so much as tell them what to think

sonal Influence (New York: The Free Press, 1955).

8. Joseph T. Klapper, *The Effects of Mass Communication* (New York: The Free Press, 1960), p. 8.

9. Elihu Katz, "The Diffusion of New Ideas and Practices," in Wilbur Schramm, ed., *The Science of Human Communication* (New York: Basic Books, 1963).

10. Paul F. Lazarsfeld and Herbert Menzel, "Mass Media and Personal Influence," in Schramm, ed., *The Science of Human Communication.*

11. J. Robinson, "Toward Defining the Functions of Television," in E. Rubinstein, G. Comstock, and J. Murray, eds., *Television and Social Behavior, Television in Day-to-Day Life: Patterns of Use,* Vol. 4 (Washington: Government Printing Office, 1972).

12. Brenda Dervin and Bradley Greenberg, "The Communication Environment of the Urban Poor," in F. Gerald Kline and Phillip J. Tichenor, eds., *Current Perspectives in Communications Research* (Beverly Hills: Sage Publications, 1972), p. 203.

13. Thomas E. Patterson and Robert D. McClure, *The Unseeing Eye* (New York: G. P. Putnam Sons, 1976).

about. The agenda-setting function is especially critical in the area of national and international events. Few people have direct knowledge of these events and thus have little information with which to check television news. Also, the national media tend to follow the same agenda structure. Most media outlets get their national and international news from the press associations (AP and UPI). The agenda of the influential national media (the television networks, the *New York Times, Washington Post, Time, Newsweek*, etc.) tend to correspond very closely to one another and to the press associations' agenda.

Even in determining the related importance of local issues, the mass media have a significant influence. Many people have difficulty in processing the direct data they receive and in drawing conclusions from it—note, for example, the football fan with a transistor radio listening to a description of the game he is watching; he wants the sportscaster to tell him what was important about what he saw. And whether the event, issue, or person is national or local, having it reported by television bestows prestige.

The mass media's agenda-setting function is increasingly significant in political campaigns. Before designing their campaigns, many candidates conduct surveys to determine the voters' agenda of issues and then discuss those issues that the survey reveals to be uppermost in the voters' minds. These issues have become important to the voter because of earlier media coverage. Then, coming full circle, in reporting the campaign the media give increased emphasis to the agenda that it structured earlier.

In recent years we have seen efforts, often very dramatic, by individuals or groups to become established on the media agenda. Those who get television "exposure" are then reported by the print media, which can further open opportunities for more television appearances. This mechanism can be seen in the terrorist acts of the recent past. Office-seekers and office-holders stage "media events" especially designed for television that have a strong visual impact: President Carter walking down Pennsylvania Avenue after his inauguration, or farmers on tractors demonstrating around the White House. Even straightforward speeches by officials are carefully staged for television: Governor Hunt, when he announced his Wilmington Ten decision, engaged a television consultant to advise him on his presentation. Having mass media, and most particularly television, determine the social agenda has profound consequences and raises serious issues of social policy.

The most successful category of intended messages communicated by radio and television is commercials.

THE POSSIBLE ROLES of television in the socialization of children has become a source of major concern. There are various agents of socialization: parents, siblings, peers, teachers. This process continues into adulthood; spouses, work associates, friends, and children are all influential agents. While the precise contribution that television makes to the process is not completely understood, the potential is great for direct and incidental learning of values, roles, and behavior patterns. The preschool child watches an average of over 30 hours of television per week (one-third of his waking hours).[14] A school child watches more as he adds adult programs to his TV choices. Children from low-income families tend to see more television than children from higher-income families.[15]

Some learning from television by children is obvious: They can sing the commercial jingles, repeat the lines from advertising, and imitate favorite TV characters. While this is superficial learning, it appears likely that a massive amount of television viewing has an impact on a child's "view of the world." A child may not be able to articulate this view and might discount television as a source of learning—at an early age children become cynical about commercials and discount the reality of TV drama. Nevertheless the impact seems to exist, particularly among children from low-income homes.

Television, as a visual medium, is rich in nonverbal symbols. For TV viewers, watching a program is a shared experience, and they also share in being affected by many metaphors. Meanings are communicated in the kinds of persons who are heroes and villains, the message of the settings in which they appear, and the values expressed by the symbols.

The potential impact of violent programs on children continues to concern many parents. Numerous studies of the effects of TV violence have produced conflicting results. Researchers have demonstrated that children do copy some violent behavior after seeing selected films in short-run laboratory situations.[16] But other studies contend that rather than triggering violent behavior, violence on television serves as a catharsis for those experimental subjects who have little capacity for a fantasy life.[17] The Report to the Surgeon General on Television and Violence stated that while violent programs might not have an immediate effect on children's behavior, long-term exposure might interact with other forces in society to produce increased casualness about violence.[18]

For the last few years organized efforts have been made to describe and quantify some of the symbols communicated to the audiences by television.

14. A. H. Stein and L. K. Friedrich, "Television Content and Young Children's Behavior," in J. P. Murray, E. A. Rubinstein, and G. A. Comstock, eds., *Television and Social Behavior*, Vol. 2 (Washington: Government Printing Office, 1972), pp. 202-317.

15. Dervin and Greenberg, "The Communication Environment," p. 204.

16. Albert Bandura, "Imitation of Film-Mediated Aggressive Models," *Journal of Abnormal and Social Psychology* 66 (January 1963): 3-11; Leonard Berkowitz, "Film Violence and Subsequent Aggressive Tendencies," *Public Opinion Quarterly* 27 (Summer 1963), 217-29.

17. Seymour Feshbach and Robert D. Singer, *Television and Aggression* (San Francisco: Jossey-Bass, 1971).

18. G. Comstock and E. Rubinstein, eds., *Television and Social Behavior*, Vol. 1 (Washington: Government Printing Office, 1972).

The annual Television Violence Index prepared by the Annenberg School of Communications at the University of Pennsylvania provides a quantitative measure of the frequency of violent acts in TV programs. It will soon be joined by other efforts to measure such content as the presentation of elderly people and women in television. A number of organizations, most notably the Parent-Teacher Association and Action for Children's Television, have lobbied actively to reduce the number of television programs that contain violence.

The Federal Trade Commission (FTC) has been concerned recently with messages directed to children, particularly commercials. An FTC report suggests that the Commission consider banning all televised advertising directed to children under eight years, banning televised advertising of products that pose "the most serious dental health risks" to children under 12, and requiring advertisers of such products as sugared cereals to counter their own claims with "nutritional" and "health disclosures." Action for Children's Television would like to see a ban on *all* advertising directed to children.[19]

THE AMERICAN PEOPLE largely share a common experience in watching television. Although the American broadcasting system was created and is regulated on the basis of locally licensed stations, almost all TV programs are supplied by networks or syndicates. Network television acts as a central cultural force. A relatively small group of network programmers and advertisers hold the decision-making power. Although Americans are an exceedingly varied people, the symbols and metaphors presented to TV viewers each day are uniform across all regions, cultures, and classes.

Radio, although much of its content is national in origin (i.e., commercial recordings), seems to have a greater potential for projecting cultural diversity and the local community than television. The large number of local stations force specialized programming on commercial stations. In large urban areas, for instance, many minority interests are served by radio. Because of its simple technology, radio can respond rapidly to changing situations, as the invaluable service of radio during emergencies demonstrates.

Program decisions in television are removed from effective social control. Television program structure is established to fit the needs of advertising. The drive for higher ratings among the demographically most desirable audience determines the production values of television programs: structure, pacing, use of action, characterization, sound, and music. Program formats are designed to attract and hold the audience, and all creative effort must fit into the format. Viewers have an impact only through ratings, even though a program with insufficient ratings for network television might have an audience of millions. But viewers have little real choice without seeing all the possibilities, and they do *not* see all of them. Programs on commercial television are limited to those elements that fit the common experiences of the largest number of viewers; therefore the audience is not exposed to that which is beyond their experience and stretches their minds.

Despite a growing public concern tor television programming, the Federal Communications Commission is unable to influence TV programming significantly. The Communications Act of 1934 expressly forbids the FCC from regulating programs as a violation of the First Amendment. In recent years the U.S. Supreme Court has overruled the FCC when it did attempt some moderate regulation. Other federal agencies also have attempted to influence the priorities of television.

But recent evidence indicates that the audience itself is rejecting the narrow range of choice being offered by commercial broadcasting. In late 1977, the Nielsen ratings reported a 6 to 7 per cent decrease in the number of homes using television,[20] and another 1977 study of the television audience by a TV consulting firm concluded:

> During the last 10 years, the failure of the TV programmers to stay in step with the audience's maturation and to remain sensitive to the societal forces and functions of the medium, has caused a serious "loosening" of the audience commitment to the medium.[21]

The consultants noted that viewers increasingly are critical of TV news, believe that TV violence is harmful to children, object to TV's presentation of sex, and feel that public television and not commercial television presents what should be shown.

Despite the advice of the consultants and the survey research firms, there is little evidence that commercial television will stop trying to maximize its profits through mass-appeal programming, unless forced to do so by increased regulation. But for the more sophisticated viewers, television is becoming less of a magic box and merely another tool for living in a constantly changing world.□

The possible roles of television in the socialization of children has become a source of major concern. . . . The pre-school child watches an average of over 30 hours of television per week (one-third of his waking hours).

19. "FTC Takes Dead Aim at Kids Ads," *Broadcasting*, (27 February 1970), 27.

20. "In Search of Those Missing Daytime Viewers," *Broadcasting* (7 November 1977), 34.

21. "The Viewer's Ahead of the Medium, Says a Major Study," *Broadcasting* (6 June 1977), 35.

Free Press vs. Fair Trial: Confrontation or Cooperation?

Elmer R. Oettinger

FREE PRESS VS. FAIR TRIAL really is free press *and* fair trial. Both are guaranteed—free press in the First Amendment and fair trial in the Sixth Amendment to the federal Constitution. Yet the apparent conflict between the First Amendment promise of no abridgment of press freedom and the Sixth Amendment assurance of a speedy and impartial trial still is troublesome. Problems usually arise when the judge believes that the exercise of press freedom in reporting pretrial and trial information prejudices an accused person's right to a fair trial. The response of the court at times has been to issue judicial restrictive orders on the news media, lawyers, and others or to order the disclosure of confidential sources of information. The press response has varied from compliance to defiance. Confrontation remains the rule in bar press relations in certain states and in some court decisions. But the march of events is leading more and more to dialogue, cooperation, and coordination between the print and the broadcast press on the one hand and the lawyers, judiciary, and law enforcement on the other.

The Supreme Court has said that *both* amendments *can* and *must* be preserved and the rights guaranteed by each amendment protected.

Court decisions, professional standards, and intergroup guidelines and programs all reflect change in concepts. The courts have moved to ban almost all judicial restrictive ("gag") orders against the press and to limit their use against trial participants. An American Bar Association committee is proposing an end to prior restraints on reporting open court proceedings and a stricter standard of justification for any closing of judicial proceedings or sealing of court records. Both the bar and the press are undertaking an increasing number of joint educational programs at national, state, and local levels.

Court decisions

Two milestone cases illustrate the changes in approach and philosophy that have occurred. In the first case, *Sheppard v. Maxwell*[1] (1966), the United States Supreme Court found that a "Roman holiday" of prejudicial publicity required the overturn of the conviction in Ohio of an osteopath accused of killing his wife. The second, *Nebraska Press Association v. Stuart*[2] (1976), reversed a judicial restrictive order on the news media covering the case of an accused murderer of a Nebraska family. Before *Sheppard* the primary remedy for prejudicial publicity in criminal cases lay in review in the appellate courts after conviction. Unfortunately, the costs and inefficiency attached to that approach and the belated nature of the remedy brought extra hazards to the defendant's right to a fair trial. The expenses and delays of appeal and retrial were as unsatisfactory as the carnival atmosphere and news media excesses that some judges permitted in the courtroom. The *Sheppard* decision proposed prevention rather than an exacerbating, too-late cure.[3] In that decision Justice Clark wrote: "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighted against the accused."[4] Judges should take available steps at the outset of criminal proceedings, the Court said, to avoid letting publicity endanger a fair trial. The Court listed procedures that trial judges could invoke: (1) change of venue, (2) continuance, (3) voir dire,[5] and (4) sequestration of jurors. In this way news media coverage of the courts would be preserved, but excesses in manner of coverage could be anticipated and judicial action taken to ensure that the impact of publicity would not jeopardize the trial.

Some trial judges interpreted the *Sheppard* decision as authorizing both

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1. Sheppard v. Maxwell, 384 U.S. 333 (1966).

2. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

3. Dr. Samuel Sheppard served ten years in prison before an appeals court freed him because of prejudicial pretrial and trial publicity.

4. Sheppard v. Maxwell, *supra* note 1, at 362.

5. Literally, "to speak the truth." (1) Examination of prospective jurors to determine whether they are qualified to sit on the jury in the case being tried or (2) when a judge excuses the jury and examines a witness outside the jury's hearing. *Voir dire* is used often to determine whether a confession made by a defendant was voluntary.

direct court regulation of the press and some control of news media access to information about pending criminal cases. As a result, in the next decade (1966-1976), judicial restrictive orders against journalists and those involved in the trial process proliferated: Editors and reporters were subjected to contempt proceedings and sometimes jail terms. Some judicial proceedings were closed and court records sealed. The emphasis on protecting the rights of the accused resulted in press charges that the public was being deprived of a right to know. Questions were raised whether First and Sixth Amendment rights remained in balance—whether both were properly protected.

In 1976 the second landmark case, *Nebraska Press Association v. Stuart*, sought to clarify free press/fair trial concepts and rectify any imbalance. In this case the Supreme Court indicated that gag orders on the press are almost always invalid as prior restraints. The justices agreed that prior restraint on the news media is presumptively unconstitutional and a "heavy burden" imposed as a condition to securing a prior restraint. Citing past cases, Chief Justice Warren Burger wrote: "The thread running through all of these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights . . . . If it can be said that a threat of criminal or civil sanction after publication 'chills' speech, prior restraint 'freezes' it . . . . [D]amage can be particularly great when that prior restraint falls upon the communication of news and commentary on current affairs."[6]

If the Court took the stinger out of judicial orders against the press, it left it intact against trial participants. In *Sheppard* the Court said that: "The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff, nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[7] *Nebraska* agreed: Even though "pervasive, adverse" pretrial publicity "does not inevitably lead to an unfair trial," the majority said: "The capacity of the jury eventually impanelled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case in and out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity—measures described in *Sheppard* —may well determine whether the defendant receives a trial consistent with the requirement of due process."

Listing new measures available to a judge short of prior restraint of publication, the Court continued: "Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police and witnesses may say to anyone."[8]

Statutes

Usually efforts are made to bring state statutes into conformity with Supreme Court decisions. That process has begun following the *Nebraska* decision. North Carolina has amended its law to ban court orders that prohibit publication or broadcast of reports of open court proceedings or public records. The amended statute's import is unmistakable: "No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order."[9]

The General Assembly also moved to limit the application of criminal contempt to the media in such a way that contempt is unlikely to be invoked. Under the new law no person may be punished for publishing a truthful report of court proceedings.[10]

Extrajudicial approaches: standards, guidelines, liaisons, and programs

In 1964 the Warren Commission, which investigated the assassination of President J. F. Kennedy, recommended "that the representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."[11] From that time bar/bench/press groups began to meet and formulate free press/fair trial guidelines and principles at the state level. Professional organizations, such as the American Bar Association, the American Society of Newspaper Editors, the Radio and Television News Directors associations, judges' conferences, and law enforcement organiza-

6. Nebraska, *supra* note 2, at 539, 559.

7. Sheppard, *supra* note 1, at 333.

8. Nebraska, *supra* note 2, at 559-64. Judges still may consider closing or limiting coverage of pretrial proceedings. The Chief Justice suggested this option in a footnote to the *Nebraska* case, but he added that the Court was not addressing this precise issue.

9. N.C. GEN. STAT. § 7A-276.1 (Supp. 1977). The act became effective July 1, 1978, and applies "to all matters addressed by its provisions without regard for when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978." See N.C. Sess. Laws 1977, Ch. 711.

10. N.C. GEN. STAT. § 5A-11(5) (Supp. 1977).

11. The Warren Report, Recommendation 12 (Washington: Government Printing Office, 1964).

tions formulated concepts and standards. As the dialogues between judges, lawyers, newsmen, law enforcement officers, and educators grew intense, principles and guidelines of press/court relationships emerged. Often these guidelines were adopted statewide by the constituent groups, and sometimes they were cited by judges in formulating case law.[12]

The North Carolina Guidelines for Reporting Criminal Court and Juvenile Proceedings were established by the News Media-Administration of Justice Council in North Carolina. *Guidelines* permit the law enforcement officer, in an arrest, to tell the name, age, residence, employment, and marital status of the accused; the text and substance of the charge; the identity of the arresting and investigating agency and the length of the investigation; the circumstances immediately surrounding the arrest, including the time and place of the arrest, resistance, pursuit, and possession and use of weapons; and a description of items seized when the arrest was made.

These *Guidelines* are informal; they have no force of law but are recognized and sometimes cited by state and federal judges. In North Carolina and other states they provide an appropriate course of conduct to help those concerned with the court system and the administration of justice preserve the free press/fair trial concept. The News Media-Administration of Justice Council of North Carolina has helped to defuse the free press/fair trial controversy. It has created and endorsed standards of conduct and action and provided a forum for discussion in an atmosphere of good will rather than in a climate of antagonism. In other states where confrontation remains the rule, constructive action has proved difficult. The main free press/fair trial problem areas in the *Guidelines* concern the release and publication of pretrial information relating to confessions, prior criminal records, and test results and opinions concerning the character, reputation, guilt or innocence of the accused, or possible pleas or testimony. The *North Carolina Guidelines* caution that "the release of certain types of information by law enforcement or court personnel, the bench, the bar, or witnesses, and the publication of such information by the news media may tend to create dangers of prejudice without serving a significant law enforcement or public interest function."[13] The *Guidelines* note "the dangers of prejudice in making pretrial and during-trial disclosure" of alleged confessions or admissions and opinions relating to character, guilt, test results, and other matters mentioned earlier. They point out that publication of alleged confessions, for example, or opinions as to the character or guilt of the accused could bring about a mistrial and "contribute substantially to public prejudice and misunderstanding as well as cost and delay in the administration of justice."[14]

The *North Carolina Guidelines* further state that, since prior criminal charges and conviction are matters of public record, law enforcement officers and court officials should make them available to the news media. Responsibility for publication remains with the news media. In this case the responsibility is crucial in that to disclose the charges at certain times could be "highly prejudicial to the accused without any significant addition to the need of the public to be informed." The *Guidelines* also confirm the freedom of the news media to report anything done or said in the course of open judicial proceedings, noting that trials in open court are matters of public record. The media are advised to use "great care" in deciding whether to publish matter excluded from evidence or things said or done when the jury is out of the courtroom. The *Guidelines* reflect awareness of the *Sheppard* and *Nebraska* holdings, urging the bench to use available measures (other than gag orders)—including cautionary instructions, jury sequestration, and holding hearings on evidence after impaneling the jury—in order to ensure that jury deliberations are based only on evidence presented in court.

Unlike other bar/press groups, the News Media-Administration of Justice Council has delved deeply into press/courts conflicts that transcend the usual pretrial-reporting "gag" order purview. It has studied, acted on, and sometimes published and testified on a variety of crucial matters including confidential information and sources, publication of rape victims' names, juvenile justice, and privacy. Currently, the Council is studying the use of cameras in the courtroom and revising *Guidelines*. This North Carolina Justice Council has been hailed for its national leadership.

Judge Eugene A. Wright of the United States Court of Appeals, Ninth Circuit, Seattle, Washington, wrote: ". . . I know of no state that has done as much in the free press-fair trial area as has North Carolina. . . ." Superior Court Judge Donald R. Fretz of California in his book, *Courts and the Community*, extolled the leadership and "record of success" of the North Carolina Council.[15]

Standards

The ABA's newly adopted fair trial/free press *Standard*[16] makes a lawyer subject to disciplinary action for extrajudicial statements (made before a trial or case is disposed of) relating to prior criminal records, existence or contents of statements by the accused (e.g., confessions), exam or test performances or

12. In the *Nebraska* case Justice Blackmun stayed the "wholesale incorporation" of the Nebraska bar/press guidelines on the basis that guidelines are a "voluntary code" and "not intended to be mandatory." He further found that they did "not provide the substance of a permissible court order in the First Amendment area" because they were "sufficiently riddled with vague indefinite admonitions—understandably so in view of the basic nature of 'guidelines'. . . ." However, Justice Brennan, for the concurring members, recognized "voluntary codes such as the Nebraska bar-press guidelines" as "a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities" and encouraged continuation of such voluntary cooperative efforts between the bar and the media.

13. NEWS MEDIA-ADMINISTRATION OF JUSTICE COUNCIL OF NORTH CAROLINA, NORTH CAROLINA GUIDELINES FOR REPORTING CRIMINAL COURT AND JUVENILE PROCEEDINGS, (January 30, 1971).

14. *Id.*

15. Letter from Judge Wright to the author (Aug. 23, 1972); D. FRETZ, COURTS AND THE COMMUNITY 20 (2d ed. 1975).

16. AMERICAN BAR ASSOCIATION STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (2d ed. 1978). The author is a member of the ABA committee, chaired by Federal Circuit Court Judge Alfred Goodwin of Oregon, that drafted the revised STANDARDS.

refusal or failure to take a test by the accused; prohibits law enforcement officers from releasing or authorizing release of any extrajudicial statements for public dissemination if the statement poses a clear and present danger to the fairness of the trial; specifically forbids statements on confessions, admissions, or statements by the accused or the possibility of a plea of guilty or other disposition; and prohibits court personnel from disclosing to any unauthorized person information relating to a pending criminal case that is not part of the public record of the court and may be prejudicial to the right of the people or the defendant to a fair trial. The revised *Standard* also states that judges should refrain from conduct or statements that may be prejudicial to the right of the people or the defendant to a fair trial.

The *Standard* would completely eliminate judicial prior restraints on the reporting of open court proceedings. It states: "No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."[17] This would transform the apparent implications of the *Nebraska* holding into a firm rule prohibiting gag orders on the press.

The ABA Committee that revised the standard recognized that an end to media restrictive orders might well lead to more orders directed against others under the jurisdiction of the court, plus the closing of more trials and hearings and the sealing of court records. To help avoid these results, certain changes were included in the new standard. Among these are (1) establishing a stricter standard of justification as a prerequisite for closing judicial proceedings and sealing court records; (2) relaxing current restrictions on comment by attorneys and other participants in the trial; (3) giving standing to the news media to challenge the legality of orders or rules by judges that restrict press coverage of criminal proceedings; and (4) assuring quick appellate review for all orders relating to fair trial.

In adopting the standard, the ABA is moving to help close the gaps that remain between realization of both the free press and fair trial constitutional guarantees. When, in August, the prestigious American Bar Association approved the changed standards (deferring only one relating to courtroom television), a giant step was taken to reconcile press/court interests.

Recent cases

Despite these advances, new court decisions continue to illustrate the depth and complexity of press/court problems. Two very recent cases make the point. A police search of a student newspaper resulted in a Supreme Court ruling (5-3) that law enforcement officers with a warrant may make an unannounced search of private property to seek evidence of another's criminal activity.[18] In a recently decided case, reporter Myron Farber was jailed and the *New York Times* fined $5,000 a day for refusal, under subpoena, to turn over documents, including statements, pictures, recordings, and interview notes, to the court for inspection by the trial judge in chambers to determine whether they are needed for the purpose of cross-examining prosecution witnesses.[19] In the latter case, a New Jersey shield law that provided almost unqualified protection for confidential information was bypassed. Both cases have led to congressional activity to protect the press in such instances.[20]

Conclusion

The free press/fair trial equation is changing. Although confrontation remains the rule in many states, conciliatory patterns are emerging in the long conflict between those in the media who are responsible for informing the public and those in law and government who are responsible for the administration of justice. Court decisions, statutes, and guidelines are making for more clarity and certainty in law and procedures. Judges, lawyers, editors, police, broadcasters, and educators are meeting, talking, and sometimes agreeing on concepts and courses of action. Programs to inform all concerned and to implement and enhance understanding are increasing, many of them under joint sponsorship.[21] Clearly the courts and the press are determined to preserve both the First Amendment guarantee of press freedom and the Sixth Amendment guarantee of trial fairness.□

17. The committee also found that television, radio, and photographic coverage of court proceedings is not per se inconsistent with the right to a fair trial and should be permitted if the trial judge concludes that it will not be obtrusive or distract trial participants. For more on developments in courtroom photography, *see* the article by Wade Hargrove on page 14 in this issue.

18. Zurcher v. Stanford Daily, 3 MED. L. RPTR. 2377 (1978).

19. The New York Times Co. *et al.* v. Jascalevich, 4 MED. L. RPTR. 101 (1978).

20. Following the *Stanford* decision, Senators Bayh and Dole and Representative Drinan introduced bills to protect individuals and media from unannounced searches unless they are suspected of criminal activity or probable cause exists to believe that the evidence would be removed or destroyed. After Justices White and Marshall had declined to intervene in the Farber case, Senators Moynihan and Cranston and Representative Crane asserted a need for congressional legislation to bar or limit courts from issuing subpoenas for reporters' notes and records.

21. The American Bar Association and the American Society of Newspaper Editors have joined in promoting "Socratic dialogues" in a number of locations. The Institute of Government's news media seminars, conducted twice a year since 1962, are being projected as a model for other states by Sigma Delta Chi, the national journalism fraternity. The News Media-Administration of Justice Council of North Carolina recently was commended in a report to the annual meeting of the American Society of Newspaper Editors.

Electronic Media Coverage of the Courtroom

Wade H. Hargrove

> . . . [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.
>
> Justice John Harlan[1]

THE "RE-EXAMINATION" that Justice Harlan foresaw over a decade ago is now taking place. A growing number of states—twelve at the most recent count—allow cameras, recorders, and broadcast microphones in trial or appellate court proceedings.[2] The issue is under study in at least eight other states.[3]

The swiftness with which these changes have come about underscores the extent to which traditional opposition of the courts to electronic media coverage is undergoing a transformation. Eleven of the twelve states that now permit cameras and broadcast microphones in the courtroom have elected to do so within the last three years.

These changes are reflected in actions recently taken by the organized bar. At a meeting of the American Bar Association this year, the Adjunct Committee on Fair Trial-Free Press issued a report recommending an end to the Association's 41-year-old ban[4] on electronic media coverage of criminal trials. This ABA Committee, chaired by Judge Alfred T. Goodwin of the U.S. Court of Appeals for the Ninth Circuit, concluded that broadcast coverage of the courts is "not inconsistent with the right to a fair trial."[5] The report said such coverage,

> . . . should be permitted if the Court in the exercise of sound discretion concludes that it can be carried out unobtrusively and without affecting the conduct of the trial.[6]

At the same meeting, the Conference of Chief Justices of the State Supreme Courts approved a resolution calling for review and study of Canon 3A(7) of the Code of Judicial Conduct, which prohibits electronic media coverage of court proceedings.

These developments have not gone unnoticed in North Carolina. The North Carolina News Media-Administration of Justice Council, a group established in 1964 to study "fair trial-free press" matters in North Carolina, is currently reviewing North Carolina state and federal rules that prohibit the taking of photographs or use of microphones in the courtroom.[7] The Council is a voluntary group and has no enforcement powers. (The North Carolina Supreme Court has the power to issue appropriate rules permitting media coverage in the courtroom.) The members of the Council are judges, lawyers, news media representatives, and law enforcement officials. The Council's study is expected to be completed this year.

The author is a partner in Tharrington, Smith, and Hargrove and is General Counsel of the North Carolina Association of Broadcasters. Appreciation is extended to Steven L. Evans, who provided research for the article.

1. Estes v. Texas, 381 U.S. 532, 595 (1965) (concurring opinion).

2. *Coverage of trial and appellate proceedings:* Alabama, Colorado, Florida, Georgia, Montana, Nevada, Washington, and Wisconsin. *Trial coverage only:* Kentucky. *Appellate coverage only:* Texas, New Hampshire, and Minnesota.

3. Idaho, Illinois, Louisiana, Ohio, Oregon, Rhode Island, Vermont, and North Carolina.

4. The ABA's CODE OF JUDICIAL CONDUCT, Canon 3A(7) (1972), provides, "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions . . . ." Exceptions are permitted for preservation of evidence, ceremonial proceedings, and use by educational institutions.

5. *Final Draft Proposal of the ABA Legal Advisory Committee on Fair Trial and Free Press—Standards Relating to Fair Trial and Free Press—Sec. 3.6(a)*, issued February 11, 1978.

6. *Id.*

7. Rule 15 of the General Rules of Practice for Superior and District Courts, effective July 1, 1970, prohibits the taking of photographs in courtrooms, or in the corridors immediately adjacent thereto, during a judicial proceeding, or any recess thereof. Rule 15 also prohibits the transmission or recording of any judicial proceeding for broadcast by a radio or television station. The North Carolina Supreme Court has also adopted ABA Canon 3A(7), *supra* note 4.

Review of state court rules allowing electronic coverage

In 1956 Colorado became the first state to adopt rules allowing electronic coverage of trial proceedings. Regulations now in effect in the other states that permit cameras and microphones tend, for the most part, to track the Colorado rules.

In Colorado a presiding judge's decision to allow electronic media coverage is subject to veto by the defendant in a criminal trial or by any party in a civil proceeding. Court rules provide that the presiding judge should prohibit such coverage if it would detract from the dignity of court proceedings; distract witnesses in giving testimony; degrade the court; or otherwise materially interfere with the achievement of a fair trial.[8] The judge is required to prohibit photographs or broadcasts of witnesses and jurors who object.

Florida recently approved a one-year experiment and is one of the few states that permits electronic media coverage of trials without the parties' consent. The presiding judge may bar cameras and audio equipment only if the proceeding would be "disrupted" by their presence. The rules contain detailed provisions specifying the kind of equipment (silent cameras, etc.) that must be employed, and the chief judge in each county is responsible for establishing guidelines for operating the equipment.[9]

Alabama began permitting cameras and microphones in 1975. Electronic coverage is subject to approval by the presiding judge, all parties to the proceeding, and the jury. Their consent may be withdrawn at any time during the proceeding. Jurors may not be photographed in a manner that would permit them to be identified, and the overall coverage must not "impair the dignity" of the proceeding. Cameras and audio equipment are not permitted in juvenile delinquency or rape cases.[10]

Georgia began electronic coverage of its supreme court appellate proceedings on September 1, 1977. Prior approval of the court is required, attorneys for all parties must consent in writing to the coverage, and the coverage must not "distract from the dignity" of the proceeding. Lower courts may also allow electronic coverage if they adopt a plan for coverage and obtain prior approval from the supreme court.[11]

Opponents of electronic media coverage argue that cameras, microphones, and lights are, by their nature, disruptive (both physically and psychologically) to trial participants. . . .

On April 1, 1978, Montana began a two-year experiment. Presiding trial judges may deny electronic coverage if it would substantially and materially interfere with the court's primary task of resolving disputes fairly. Consent of the parties is not required. If electronic coverage is prohibited, the judge must state the reasons in the record of the case. The presiding judge has authority to control the extent, type, and positioning of the electronic equipment.[12]

The traditional view

The ban on cameras and microphones in the courtroom was a result of experiences during the Lindbergh trial in 1934.[13] The criminal trial for kidnapping and murder of Charles Lindbergh's child attracted international media coverage and became a spectacle of media excesses. Reporters were given a free hand in the courtroom and by all accounts exercised little restraint. Photographers "clambered on counsel tables and shoved their flashbulbs into the faces of witnesses." Observers reported that the trial judge "lost control of his courtroom and the press photographers lost control of their senses."[14] To prevent a recurrence, the American Bar Association adopted Canon 35 in 1937.[15] That served as a model for similar rules adopted by federal and state courts and local bar associations.

Opponents of electronic media coverage argue that cameras, microphones, and lights are, by their nature, disruptive (both physically and psychologically) to trial participants; that the accompanying electronic paraphernalia detract from the dignity of the judicial process; that witnesses, lawyers, and judges are more likely to "posture" and "showboat" in front of microphones and cameras; and most important, that the sensationalism and publicity flowing from radio and television coverage create a greater probability that prejudice will develop and that litigants will be denied a fair and impartial trial and appeal.

Writing in 1962, former U.S. Solicitor General Erwin N. Griswold said,

> A courtroom is not a stage, and witnesses and lawyers and judges and juries and parties, are not players. A trial is not a drama, and it is not held for public delectation or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if the process is broadcast or televised, it will be distorted.[16]

These arguments were confronted

8. THE COLORADO CODE OF JUDICIAL CONDUCT, Canon 3A(7)-(10).

9. CODE OF JUDICIAL CONDUCT OF THE STATE OF FLORIDA, Canon 3A(7); Order of the Supreme Court of Florida, January 14, 1977.

10. ALABAMA CANONS OF JUDICIAL ETHICS, Canon 3A(7)(A)-(B).

11. CODE OF JUDICIAL CONDUCT OF THE STATE OF FLORIDA, Canon 3A(8).

12. THE MONTANA CANONS OF JUDICIAL ETHICS, Canon 35.

13. Hauptmann v. New Jersey, 115 N.J.L., 412; 180 Atl. 809; *cert. denied* 296 U.S. 649 (1935).

14. *Cameras in the Courtroom—How to Get Them There* 1 (Associated Press Managing Editors Association Freedom of Information Report).

15. See C. W. GOLDSMITH, BROADCAST COVERAGE IN AMERICAN COURTROOMS: A CALL FOR OPENNESS 4 (Dec. 1, 1977).

16. Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615, 616 (1962).

and addressed by the United States Supreme Court in 1965 on appeal of the criminal conviction of Texas political and financial "wheeler-dealer" Billie Sol Estes.[17] The Estes scandal attracted intense national publicity, and the presiding judge permitted, under Texas state court rules, his pretrial hearing and the trial itself to be filmed and televised. The proceedings were a national "media event."

The Supreme Court reversed Estes' conviction on the grounds that the media exposure had created such a probability of prejudice at the pretrial hearing that the proceeding was inherently deficient in due process. The likelihood of prejudice was said to arise from the psychological effect of telecasting on jurors, witnesses, judges, and defendants. The Court said that the hearing participants were constantly in the focus of the camera and therefore were likely to be less attentive, straightforward, and impartial. It noted that at least a dozen cameramen had been present at the hearing, and "cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and counsel table."[18] Two television cameras were set up inside the lawyers' bar and four outside.

But the Court was divided, and the majority opinion by Justice Clark noted that a different result might have been reached had news media coverage of the trial been less obtrusive. He said,

> When the advances in these arts permit reporting by the printed press or by television without their present hazards to a fair trial we will have another case.[19]

Estes is, therefore, significant to the continuing debate on electronic coverage of the courts in two respects: While the Court rejected the notion that the First Amendment confers an absolute right to broadcast from the courtroom, it held that electronic coverage of the courtroom does not, in itself, violate due process.

Proponents . . . argue that court rules can and should be drawn to give the trial judge authority to control the nature and placement of equipment and to order its removal if its presence or usage should become distracting or disruptive.

The case for electronic coverage

Media groups argue that the presence of cameras and microphones in the courtroom need not be distracting or disparaging to the court's dignity. They point to recent technological advances in electronic equipment such as "low-light," hand-held mini-cameras and ultrasensitive microphones that can be operated without disrupting trial participants. The Alabama supreme court acknowledged the extent of these technical advancements in the commentary to its new Canons of Judicial Ethics, which allow cameras and microphones:

> The court was impressed with the arguments that modern, sophisticated equipment and technology are now available for broadcasting, televising, filming, and photographing which will not interfere with or distract from the dignity of a fair and impartial trial.[20]

Proponents also argue that court rules can and should be drawn to give the trial judge authority to control the nature and placement of equipment and to order its removal if its presence or usage should become distracting or disruptive. In *Nebraska Press Association v. Stuart*, Chief Justice Burger remarked that the "carnival atmosphere" of the Lindbergh kidnapping trial could have been prevented by a "vigilant trial judge."[21]

Chief Judge Edward Pringle of the Colorado supreme court recently stated the case for electronic coverage very convincingly:

> Approximately a year after the new provision was adopted in Colorado I tried the first case which was really televised to any extent. I thought it was handled with dignity and with no loss of decorum in the courtroom. I found neither the witnesses' nor the jurors' attention diverted by the camera . . . . I felt as I do now—that I would rather the public saw what was going on in its courtrooms as it happened and not as it was depicted in various entertainment programs not specifically designed to be a truthful representation of a courtroom proceeding . . . .
>
> I know the argument that some judges will tend to "showboat" if they are on television. I am not moved by that argument. What the media wishes to photograph has such widespread interest in the first place that there will undoubtedly be a great many people already in the courtroom and the opportunity to "showboat" will be there anyway. But, more importantly, if a judge is that kind of person, the general public ought to know about it. As a matter of fact, I think photography tends to provide more dignity than less in the proceedings . . . .
>
> It [photography] certainly is better than the distorted pictures of the people involved which come from the artists who sit in the courtroom drawing, and it does away at least here, with what I think is the unseemly and completely undignified situation of eight or nine microphones being thrust in people's faces as they leave the courthouse and being asked asinine questions which they don't answer anyway just in order to have something to accompany the photographic representation which the cameras are making . . . .
>
> As I often say, the time has come to end the treatment of judicial proceedings as the holy of holies

17. Estes v. Texas, 381 U.S. 532 (1965).
18. *Id.* at 536.
19. *Id.* at 540.
20. ALABAMA CANONS OF JUDICIAL ETHICS WITH COMMENTARY Canon 3A(7)(A)-(B).
21. Nebraska Press Association v. Stuart, 427 U.S. 539, 549 (1976).

> into which none may enter except the priests and they only with their shoes off. The courts belong to the people and they ought to know exactly what goes on in those courts and any method which accurately represents that situation ought to be encouraged rather than discouraged.[22]

Other judges have reported favorable experiences with electronic media coverage. Circuit Judge Robert Hodnette, Jr., of Mobile, Alabama, the first judge to allow broadcast coverage in Alabama of a murder trial, recently remarked: "They [the cameras] kept me on my toes . . . and they kept all the personnel in the courtroom on their toes."[23] He said broadcast coverage of the proceedings produced "absolutely no criticism."[24]

Perhaps the most highly publicized trial in which TV coverage was allowed in the courtroom was the 1977 first-degree murder trial in Miami of fifteen-year-old Ronny Zamora. The nine-day trial achieved notoriety because the defendant raised the novel defense that when the crimes were committed, he was under the influence of "intense, involuntary, subliminal television intoxication."[25] He claimed that he lived in a fantasy television world of *Kojak*, *Baretta*, and other TV action dramas, and in committing the crimes, he was merely acting out a make-believe television drama and was therefore not responsible for the crimes. The jury disagreed.

A Miami television station video-taped Zamora's trial in its entirety and televised extended portions each night. Presiding Judge Paul Baker said he was "horrified" at the outset at the thought of a televised trial but later changed his mind. He, along with Defense Attorney Ellis Rubin, said the coverage was not distracting to trial participants.[26]

Media advocates argue that, at the very least, appellate courts should be opened to electronic coverage. The obvious problems associated with the broadcast of trials do not exist in appellate proceedings, and reporters are quick to point to the need for greater public understanding of the important social and legal issues resolved by appellate courts. Which is more important, asks CBS Network News President Richard Salant: The chance for millions of Americans to see and hear the World Series on television or the chance to see and hear Supreme Court arguments on television in landmark cases such as *University of California v. Bakke*?[27]

The United States Supreme Court has acquired its own "in-house" aural tape-recording equipment to allow arguments of counsel to be recorded for subsequent review by the Court. Members of the public may listen to these tapes after three years have elapsed. Journalists contend that no good reason exists for not sharing this information with the American public by means of radio broadcast while the proceeding is in progress. Discussions on this very subject are taking place at the time of this writing between Chief Justice Warren Burger and National Public Radio officials.

IN SUMMARY, technological advances in cameras and microphones, coupled with the public's increasing insistence on its "right to know," have compelled a re-evaluation of the question of electronic media coverage of the courts.

The extent to which the reassessment now taking place in other states will influence the North Carolina courts remains to be seen. Although not directly on point, a recent decision of the North Carolina Court of Appeals is noteworthy. Vacating a superior court order that had permitted newspaper coverage of investigative hearings conducted by the High Point City Council but prohibited broadcast of the hearings by local radio and television stations, the North Carolina Court of Appeals observed,

> . . . radio and television coverage is reasonably consistent with the concept of a fully informed public, a concept which is receiving ever increasing support as the public becomes more fully informed.[28]□

22. *Cameras in the Courtroom—How to Get Them There*, *supra* note 14.

23. *Broadcasting Magazine* 36 (Dec. 20, 1976).

24. *Id.*

25. *Radio-TV News Directors Association Communicator* 4 (November 1977).

26. *Id.*

27. The New York Times, Nov. 16, 1977.

28. Leak v. High Point City Council, 25 N.C. App. 394, 398 (1975).

Protection of Confidential News Sources — An Unresolved Issue

Bill F. Chamberlin

IN APRIL, 1974, the *Fayetteville Times* published several stories claiming that local policemen were receiving kickbacks from wrecking service operators. The policemen, the paper asserted, were getting $5 to $10 each time they referred business to particular wrecking companies. Charges to the owners of towed cars were reported to be as high as $100.[1] Eventually a Cumberland County grand jury investigated the accusations and indicted two towing service operators. But neither man was convicted of bribery, and no police officer was even indicted—primarily because of a lack of evidence.

The newspaper articles had been based on undisclosed, or confidential, sources. *Times* reporters had written the stories after several Fayetteville policemen had signed affidavits alleging the irregularities. The officers, fearing criminal convictions or loss of jobs—or both—had provided the information on condition that their names not be revealed.

The public disclosure of the kickbacks would have been unlikely without the promise of confidentiality. However, because *Times* reporters refused to reveal the names of the men involved, Cumberland County authorities could do little. The public had been informed of police misconduct, but the guilty parties were never punished.

While the kickback scheme in Fayetteville does not represent scandal on a grand scale, it does illustrate a serious social dilemma. Sometimes news reporters are able to write about public problems only because they promise not to reveal their sources, or they are allowed to witness particular events if they promise not to tell everything they see. Yet these promises can keep newsmen from assisting in the prosecution of criminals or testifying in a civil suit.

Newsmen's privilege in North Carolina

As a matter of law in North Carolina, reporters like the Fayetteville newsmen can be found in contempt of court, and fined or jailed. State law specifies that anyone who refuses to testify in court, when that refusal is not "legally justified," can be punished.[2] North Carolina, like about half the other states, has no statute that excuses newsmen from answering questions in court.

There is no federal law that "shields" newsmen from testifying in either a state or a federal courtroom. Nor is there a common law tradition like the lawyer-client privilege that protects reporters.

The only protection available to a North Carolina newsman is a very limited privilege provided by the First Amendment, as interpreted by the U.S. Supreme Court in a 1972 decision.[3]

Despite the danger of a contempt charge, however, news reporters continue to guarantee confidentiality to their sources. And despite the law, North Carolina courts have thus far protected the newsman confidential source relationship—contrary to the results of well-publicized cases in New Jersey, California, and Idaho. In North Carolina, as in much of the country, the status of a reporter who refuses to testify (in an effort to protect his sources) is far from clear.

The relationship between a newsman and his confidential source often creates a bewildering conflict in the court-

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1. Information about the paper's stories and related grand jury activity was obtained through telephone interviews with Luke West (one of the reporters involved) on March 6 and 7, 1978, and Judge Edwin S. Preston, Jr., on March 9, 1978, and through the following *Fayetteville Times* articles: "Probe of Police, Patrol, Wreckers Under Way," April 2, 1975; "DA Wants Probe; Report Names 3," April 4, 1975; "Operators Say More Officers Involved," April 5, 1975; "Wrecker Fees Here Dearer Than in Similar N.C. Cities," May 14, 1975; "Grand Jury Initiates Police Investigation," July 14, 1976; "Jury Indicts Two In Wrecker Probe," September 1, 1976; "Jury Seeks News Sources," July 27, 1976; "Wrecker Probe Report Expected," September 14, 1976; "Witness Gone; Bribe, Tampering Trials End," March 30, 1977; and "D.A. Labels Officer Unreliable," December 20, 1977.

2. N.C. GEN. STAT. §§ 5A-11, -21 to -23; N.C. GEN. STAT. § 7A-273. *See also* N.C. GEN. STAT. § 8-55.

3. Branzburg v. Hayes, 408 U.S. 665 (1972).

room between First Amendment principles and the social obligation of each citizen to testify. A complete resolution of that conflict is nowhere in sight.

The issues: in favor of protection

The argument that news reporters ought to be protected from revealing confidential information usually is based on the premise that an uninhibited flow of information is in the public interest. Supreme Court Justice Potter Stewart, in the 1972 case *Branzburg v. Hayes*, said that "enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised."[4]

Advocates for reporters' protection claim that since the press should be free to say what it chooses, newsmen should be able to freely gather information. Justice Stewart said, "The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source."[5]

Many newsmen contend that the subpoena power to compel testimony frightens potential news sources into silence. The people who talk often have a lot to lose: Many are conscientious employees who might lose their jobs or find their families' safety threatened, and others are political radicals who might face harassment or imprisonment. These people could not be faulted if they were reluctant to talk because their safety depended on a newsman's willingness to go to jail. As Justice Stewart put it, "The potential source must . . . choose between risking exposure by giving information or avoiding the risk by remaining silent."[6]

The ability to protect these sources is particularly important, reporters claim, because they are needed frequently for the significant and controversial story. Confidential sources are often relied on for insights into radical political activities, corporate mismanagement, and government corruption. The most famous example, of course, is the crucial role played by "Deep Throat" in the *Washington Post*'s Watergate investigation.

Proponents for confidential source protection are concerned about the reporter's effectiveness, not just the availability of sources. Because most newsmen are committed personally to protecting the promise of confidentiality, they are regularly risking a possible contempt citation. Some, like William Farr in California, and M. A. Farber and Peter Bridge in New Jersey, have been jailed.[7] It would not be surprising if more than one newsman has backed off of a controversial story for his personal well-being.

Aside from the threat of jail is the problem of the "incapacitating worry and hassle"—the concern for ethical standards, personal safety, and the loss of time spent with attorneys.[8] Supporters of legal protection for newsmen claim that reporters should not have to endure these hardships as a result of providing information to the public.

The threat of a subpoena presents other serious implications for the news process: A newspaper or broadcast station may have to spend a considerable amount of time and money responding to charges by someone who has been legitimately "stung." The "victim" may sue for libel, perhaps to intimidate the media or to determine the confidential source. Also, government officials in particular have been accused of trying to use the threat to drive a wedge between a reporter and his source and to compel reporters, in effect, to be an investigative arm of government.

The issues: against protection

Opponents of guaranteed protection for confidential news sources contend that the right to gather news cannot be placed above the public interest in law enforcement and justice. Supreme Court Justice Byron R. White, for example, has ridiculed the idea "that it is better to write about crime than to do something about it."[9]

White and many others argue that protection for newsmen could hinder fair and effective law enforcement. Sometimes the reporter might be protecting a source from possible prosecution. At other times, public officials might be denied access to potential witnesses or to people who have evidence of criminal conduct. On the other hand, a confidential source might provide the only chance for the acquittal of an innocent person.[10]

Opponents of a broad privilege for reporters also feel that newsmen, like other citizens, have the obligation to testify when called on. If newsmen are given special protection, opponents argue, such professionals as teachers, authors, and pollsters might legitimately request the same treatment. Many contend that the privilege of reporter/confidential news source can be easily distinguished from the existing privileges extended to the doctor/patient and lawyer/client relationships. In the latter cases, privilege belongs to the one who has sought personal professional help, and the *message*, not the *identity* of the communicator, is protected.

Some opponents of a newsman's privilege suggest that reporters do not need special protection as much as they contend. Reporters should not be considered helpless victims of law and order, many argue, because they have the power of publicity to rally support. Few are jailed, and fewer are jailed for very long. Opponents contend that the news flow will not be damaged if there is no privilege. They point to the lack of privilege during the Watergate coverage, and also argue that potential confidential sources often desire publicity and

4. Dissenting opinion of Justice Stewart, *Id.* at 726.

5. *Id.* at 728.

6. *Id.* at 731.

7. William Farr, a reporter for the *Los Angeles Herald-Examiner* at the time, would not reveal the name of a lawyer who had given him information in violation of a court order (in the Charles Manson case). *New York Times* reporter M. A. Farber was sent to jail when he refused to provide his notes and other materials for judicial inspection in a New Jersey murder case. Peter Bridge refused to give a grand jury in New Jersey unpublished details of an interview with a Newark official. Bridge had quoted the official as asserting that she had been offered a bribe.

8. *See* Blasi, *Press Subpoenas: An Empirical and Legal Analysis*, 70 MICH. L. REV. 265-66 (1971).

9. 408 U.S. at 692.

10. The Sixth Amendment to the U.S. Constitution, of course, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

are willing to take risks in order to have their "story" told.

The establishment of a legal privilege, some claim, is a "license to lie." Many reporters recognize that it is easy to be "taken in" by sources—" 'taken in' anywhere from believing and printing lies, to tempering stories so as to avoid alienating a valuable source, to perceiving events much as the source does."[11] If a source can hide behind anonymity, he is not likely to be held responsible for what is reported. Unless reporters are particularly careful, their confidential sources can manipulate them for illegitimate personal gain.

The Supreme Court speaks

The conflict between the flow of information and an effective justice system has perplexed more than one legislative body. North Carolina's Senator Sam J. Ervin, Jr., after conducting extensive hearings on this issue in 1973, said, "This is the most difficult field I have ever tried to write a bill in since I have been in Congress."[12] Indeed, Congress has not passed a law in this area despite the attention it has given the problem in the 1970s. Some state legislatures have also unsuccessfully struggled with the matter, and many questions remain unsettled even in those states with newsmen's "shield" legislation.

This inability of the legislative branch to solve the problems posed by newsmen's protection of confidential sources has thrust the issue into the courts. At this point, it is too early to tell how the courts will ultimately resolve the conflict.

The first court fight over a newsman's privilege actually occurred before the Civil War. But most of the litigation has taken place only in the last two decades, after a common law privilege for newsmen had already been refused in several state and federal courts.[13] The First Amendment issue has only recently surfaced.

In 1972 the Supreme Court had its first say in the matter in the *Branzburg v. Hayes* opinion, which decided three similar disputes before the Court. One had developed after Paul Branzburg of the *Louisville Courier-Journal* witnessed, and wrote stories about, marijuana smoking and hashish production. He refused, before two grand juries, to identify the people involved in the incidents. Kentucky had a law protecting reporters from revealing story sources, but state judges said the statute did not apply when a reporter witnessed a crime.

In the second case, *New York Times* newsman Earl Caldwell, who had reported extensively on the Black Panthers, had refused to appear before a federal grand jury inquiring about that group's purpose and activities. He argued that simply his appearance in a closed grand jury room—regardless of what was said—would destroy his relationships with Black Panther leaders.

The third dispute involved Paul Pappas, a reporter-photographer for a Massachusetts television station. Pappas had been allowed into Black Panther headquarters as the group prepared for an expected raid by police. He promised the Panthers he would not disclose anything he saw or heard unrelated to the raid and later refused to answer certain questions posed by a grand jury.

All three reporters contended that the forced disclosure of confidential news sources seriously deterred news gathering. They argued that the First Amendment protects newsmen when the courts demand their testimony. The reporters said that testimony should not be required unless there are grounds for believing: (1) that a reporter has information relevant to a specific investigation, (2) that the information is unavailable elsewhere, and (3) that the need for the information is "sufficiently compelling" to override First Amendment interests.[14]

The Court rejected, by a 5-4 vote, the specific claims of Branzburg, Caldwell, and Pappas. The majority opinion, written by Justice Byron White, declared that the reporters had no First Amendment privilege when asked "relevant and material" questions during a "good-faith grand jury investigation." White said the cases involved "no prior restraint on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."[15]

The only issue before the Court, White said, was the obligation of reporters to appear before a grand jury and answer questions relevant to a criminal investigation: "Citizens generally are not constitutionally immune from grand jury subpoenas, and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence."[16]

The opinion conceded that the news-gathering process had some protection, noting that grand jury investigations not conducted in good faith "would pose wholly different issues for resolution under the First Amendment." Official harassment of the press undertaken to disrupt a reporter's relations with his news sources "would have no justification."[17]

One of the five justices who supported the decision—Lewis F. Powell, Jr.—wrote a concurring opinion that is significant since Powell represents the swing vote. He began by stressing "the limited nature of the Court's holding," and said that the courts were available to newsmen when "legitimate First Amendment interests" involving the safeguarding of sources required protection. Powell reiterated that grand jury investigations must be conducted in good faith and that "no harassment of newsmen will be tolerated." He stressed that reporters "would have access to the court" if asked for testimony that bore "only a remote and tenuous relationship" to the subject of the investigation and the testimony was not necessary to meet a "legitimate need of law enforcement."[18]

In other words, Powell's opinion seemed to suggest that he favored a privilege for newsmen at least slightly broader than implied in White's language. This is significant because the

11. Blasi, *op. cit. supra* note 8, at 248.
12. U.S. Senate, *Newsmen's Privilege, Hearings Before the Subcommittee on Constitutional Rights, Committee on the Judiciary*, 93 Cong., 1st Sess., S. 387.
13. *See* 408 U.S. at 685.
14. *Id.* at 680.
15. *Id.* at 708, 681.
16. *Id.* at 682.
17. *Id.* at 707.
18. *Id.* at 709, 710.

four minority members of the court supported a much broader privilege.[19]

The aftermath of Branzburg

If the lay observer is not quite sure what the *Branzburg* opinion really means, he is not alone. Since 1972 lower court opinions have demonstrated that judges themselves have different interpretations. But at the very least, lower court judges often allowed a qualified constitutional privilege for newsmen when the Branzburg case did not directly apply.

One writer, Mark Neubauer, suggested in 1976 that in cases in which courts have considered whether there ought to be a privilege in the face of a grand jury subpoena, the *Branzburg* majority has usually ruled. In other words, the privilege was denied on the basis of the state's interest in controlling crime. The same interest in law enforcement, Neubauer reported, applied to attempts by the prosecution to subpoena reporters during criminal trials.[20]

In contrast, a reporter's chance for protection seems to be improved when he has been subpoenaed by the defense. Then, Neubauer noted, the courts tend to apply a test similar to the one suggested by the reporters—and adopted by the court minority—in *Branzburg*. The defendant—not the reporter—is required to demonstrate: (1) that there is reason to believe the newsman has relevant evidence, (2) that there are no alternative sources for the information, and (3) that there is a serious threat of a miscarriage of justice.[21]

In civil trials, judges are not consistently following the lead of *Branzburg*. Neubauer reported that when newsmen were not directly involved in civil suits, judges often applied criteria similar to those mentioned above. Hence, in a civil suit arising from the Watergate break-in, reporters were not required to reveal sources. In that case, *Democratic National Committee v. McCord*, the Democratic Party sought to win damages for the break-in. Ten reporters from such publications as the *New York Times* and the *Washington Post* were issued subpoenas calling for them to take tapes, notes, letters, and other materials into court. On a motion by the reporters, the judge quashed the subpoenas, noting that the parties had not shown that alternative sources of information had been exhausted. Nor, said the judge, had anyone demonstrated the relevancy of the requested materials.[22]

The courts have taken a different approach in civil suits that involve the reporters themselves. In suits in which a reporter could use the confidential privilege to hide pertinent information, the judges have usually tried to determine whether the information relates to the "heart of the claim."[23] Earlier this year columnist Jack Anderson was told to reveal his sources after he had sued nineteen members of the Nixon Administration for conspiring to harass him. The defendants had asked that Anderson be compelled to reveal the names of certain sources, and the judge decided that the request was vital to their case. Anderson refused to provide the names, and ultimately the case was dismissed.[24]

Protecting confidentiality in North Carolina

A reporter's privilege to protect confidential sources has not been a serious legal issue in North Carolina. Apparently, no reporter has been cited for contempt of court in North Carolina for refusing to reveal his source, though reporters have been subpoenaed on a few occasions. Sometimes the subpoena was quashed or the trial dispute settled before the reporters were required to appear in the courtroom. In one exception, *Charlotte Observer* reporters Bill Bancroft and Marion Ellis appeared before a grand jury investigating possible police wiretapping and related cover-up. The reporters refused to reveal the sources for stories they wrote that were related to the investigation. Neither reporter was cited for contempt.[25]

One of the reporters in the Fayetteville case mentioned earlier was required to appear before the county grand jury, but declined to reveal the names of the policemen who talked to him. The judge sided with the reporter and did not cite him for contempt.[26]

The fact that no reporter in the state has been jailed for failure to reveal a source does not relieve the uneasiness felt by many newsmen. They are concerned that perhaps the next time they promise confidentiality they will be cited for contempt. As one reporter commented: "It just depends on who the judge is—it's a matter of a toss of a coin."[27]

Should there be statutory protection?

Not surprisingly, many reporters who rely on confidential sources want at least some protection. Passing "shield" statutes is a quicker and more direct way to achieve that protection than

19. Justice Douglas said that only an absolute privilege would adequately protect First Amendment interests. Justice Stewart, in an opinion supported by Justices Brennan and Marshall, supported a qualified privilege similar to the privilege argued for by the three reporters in the case. *Id.* at 743.

20. *See* Neubauer, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 176-77 (1976).

21. Neubauer, *op. cit. supra* note 20, at 178.

22. Democratic National Committee v. McCord, 356 F. Supp. 1394 (1973).

23. Neubauer, *op. cit. supra* note 20, at 179-80.

24. Anderson v. Nixon, 3 MED. L. RPTR. 1687, 2050 (1978). The converse of this case may give newsmen even more trouble. In 1977 an Idaho judge would not recognize a newsman's privilege when the reporter's newspaper was being sued for libel. *See* Caldero v. Tribune Publishing Co., 562 P.2d 791, *cert. denied*, 96 S.Ct. 418 (1977). Unless judges are careful with this kind of case, a newspaper or broadcast station could be sued for the sole sake of discovering confidential sources through the subpoena process. However, even in "legitimate" libel suits, the media may have to face a major problem. They may risk the loss of a libel suit if they fail to reveal their sources.

25. Interviews with Bill Bancroft, in Charlotte, February 15, 1978, and by telephone on March 8, 1978, and interview by telephone with Charlotte attorney Osborne Ayscue, Jr., March 8, 1978. Also see "Grand Jury to Begin Police Wiretap Probe," Charlotte Observer, March 25, 1977, p. 1C.

26. Interviews with Luke West and Judge Preston, *supra* note 1.

27. Interview with Luke West.

waiting for courtroom precedent to be established. But even journalists disagree about whether statutory protection is appropriate.

Many newsmen are concerned that encouraging legislatures to pass a law is inviting the fox into the chicken coop. If legislators can pass laws protecting the reporter source relationship, the argument often goes, they also have the authority to pass laws that restrict the privilege.[28]

In fact, the very act of passing a shield law can limit the privilege. As *Washington Post* publisher Katharine Graham once commented in speaking about Congress, "Any shield law which a majority of both houses would endorse would be limited, qualified, or hedged."[29] Legislators can somewhat arbitrarily limit who would qualify for the privilege, under what circumstances the privilege would apply, and what questions a reporter would have to answer in court. Sometimes these qualifications slip into the law merely by the need to define terms. In Alabama, the state shield law defines "newsman" as anyone employed by a newspaper, radio station, or television station and does not mention authors of magazine articles and pamphleteers.[30]

Besides the dangers presented by statutes, many argue, the laws often do not provide as much protection as they seem to promise. Of the state laws already passed, many protect a reporter only from divulging a source. A reporter who has witnessed a crime, like Paul Branzburg, is not protected. Even "absolute" shield laws often limit the privilege by definition, as outlined above. Although the shield does indeed provide some protection, the risks involved could make that protection very expensive.

Another way . . .

An alternate answer to the problem of protecting the source is a combination of three approaches: (1) continued use of the courts, (2) formal cooperation between newsmen and public officials, and (3) informal cooperation between newsmen and public officials.

The U.S. Supreme Court already has strongly hinted that there is a qualified privilege through the First Amendment. The court has suggested that even in regard to grand juries, the newsmen have some constitutional protection. Lower courts have demonstrated their willingness to look at the circumstances of individual cases before declaring a privilege to be inappropriate.

The second of the three approaches involves establishing state guidelines for handling cases that involve confidential news sources. Ideally, this should be accomplished through cooperative efforts by representatives of the media, the state bar association, state law enforcement agencies, and state judges. Such organizations already exist in many states, including North Carolina, and have helped resolve disputes among the participating groups.

The guidelines could be modeled after those established by former Attorney General John Mitchell and since incorporated into federal regulations.[31] Although the effectiveness of guidelines depends on the attitudes of public officials, they can have the effect of law when followed and can serve as a standard against which performance can be judged. Finally, the process of developing guidelines often creates an atmosphere for future informal cooperation, the third approach suggested.

The value of informal cooperation cannot be overestimated in solving the difficulties discussed in this article. The conflicts that have been pointed out present difficult problems—problems that are not usually solved by inflexible rules or an arbitrating agency. They are best solved when the people involved consider their actions in the light of the major values at stake—an adequate flow of information and an effective judicial system.

This final suggestion may appear to be impractical idealism. However, the differences between opposing interests in this issue tend to be exaggerated. Reporters are frequently willing to cooperate with law enforcement agencies when serious crime is involved.[32] Many attorneys, law enforcement officers, and judges often voluntarily avoid issuing subpoenas to reporters.[33]

Both sides in this issue have a lot to gain from a spirit of cooperation. Many reporters have said that it is the "poi-

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28. Indeed, earlier this year the Senate passed S. 1437, the Criminal Code Reform Act of 1977, which among other things would make it a felony to refuse to testify or produce documents for Congress or a federal court unless "the defendant was legally privileged." See S. 1437, *Chapter* 13, *Subchapter* D, § 1333. At this point, of course, there is limited "legal privilege" for newsmen.

29. Quoted in 15 *FOI Digest* 2 (March-April 1973).

30. *See* ALA CODE tit. 11 § 12-21-152 (1975). Of course, the current court-made law involving newsmen's privilege is qualified, or limited. However, the courts can tailor a decision on the basis of only the facts before them. They do not have to fashion general principles that will apply in any future instances. For example, a court could decide whether a particular pamphleteer in particular circumstances was protected under the First Amendment. It need not describe all of the circumstances under which a pamphleteer would be protected and then describe who qualified as a pamphleteer.

31. Employees of the Justice Department are required first to try to settle any dispute through negotiations. No subpoena is to be issued without the approval of the Attorney General. Justice Department officials, before requesting a subpoena, are supposed to: (1) determine that there is evidence from nonmedia sources that a crime has occurred; (2) determine that there is evidence that the information sought is essential to a successful investigation; (3) attempt to obtain the information from nonmedia sources; (4) normally limit the use of the subpoenas involving newsmen to the verification of published information; (5) treat all subpoenas of newsmen with care to avoid claims of harassment; (6) direct subpoenas at a limited subject for a limited amount of time and avoid requiring the production of large amounts of unpublished materials; (7) give reasonable and timely notice. 928 C.F.R. § 40.10 (1976).

32. For example, *Fayetteville Times* reporter Luke West tried to convince at least a few of his confidential sources that they should talk to the grand jury. *See supra* note 1. *See also* Blasi, *op. cit. supra* note 8, at 253-64.

33. David Gordon, *Newsman's Privilege and the Law* (Columbia, Mo.: Freedom of Information Center, 1974) 37-43. Several reporters have told me that they—or a colleague—had been asked for information by North Carolina officials but were not subpoenaed when they said they would not reveal their source.

A Legal View of Press Access to Public Information and Records

Joseph D. Johnson

THE RIGHT OF THE PRESS to report news and opinions fully without fear of censorship is a fundamental, well-established principle embodied in the First Amendment to the Constitution. This principle, which prevents government censorship of the press, has been much debated and analyzed. After all, most people, including public officials, seek to avoid unfavorable publicity. However, in day-to-day reporting, the press's major problems emerge in being denied access to publicly held information rather than in direct government attempts at censorship after the press acquires information. If government officials can deny the press access to information in the first place, a less blatant but effective form of censorship has already been achieved, seemingly without any abridgment of the First Amendment's freedom of the press.

Although many people may be unaware (as the absence of appellate decisions in this area suggests) of its existence, North Carolina has a broad if somewhat vague statute establishing the public's right to inspect records held by government agencies,[1] a right recognized by American common law at least as early as 1823.[2] Despite the lack of judicial interpretation and clarification of this state's public records statute, when one examines decisions from other states that have statutes like North Carolina's, one finds that the state courts substantially agree about the meaning of such a statute. On the assumption that the North Carolina courts will agree with the general principles adopted by other courts, this article will explain the right of access to public information arising under the North Carolina public records statute.

Who has the right of access?

While this article focuses on the press's right to inspect public information and records, the North Carolina statute grants the right to "any person." As a rule, the press enjoys no special rights of access not shared by the public generally. But as a practical matter, a reporter is the person most likely to be interested in gaining access to public information, and it is therefore important to consider his special needs and problems in explaining the right of access to public information.

What is a public record?

For purposes of the right of access, a public record is defined broadly enough to include not only those records required by law to be made or received by public officials but also all records actually used and kept in public offices in carrying out their lawful duties. More specifically, public records are defined in the North Carolina statute as all public "documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics."[3] The phraseology indicates that no record is excluded merely because of its physical form. For example, a public official may not deny access to public information simply because the information is stored on a computer tape. Instead, when properly asked, the official must convert the desired material into usable form. Depend-

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1. N.C. GEN. STAT. Ch. 132 (1974 and Supp. 1977).

2. People *ex rel.* Palmer v. Vail, 1 Cow. 589 (N.Y. Sup. Ct. 1823), *enforced*, 2 Cow. 623 (N.Y. Sup. Ct. 1824).

3. N.C. GEN. STAT. § 132-1 (Supp. 1977).

ing on the agency's facilities, he may have to provide a print-out or perhaps a duplicate of the tape.

The definition applies to the records of "any agency of North Carolina government or its subdivisions," and the term "agency" is defined to include "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government."[4] This expansive definition of "agency" clearly reflects the statute's broad coverage.

Denying access to public information

Although the definition of public records includes almost every record kept in a public office, the right of access does not extend to *all* public information. Courts in other states have concluded that access to public information may be denied for any of three reasons: (1) because access to some records may be denied by a specific statute; (2) because confidentiality is required as a matter of public policy; (3) because the information is privileged.

Statutory exemptions. North Carolina has a number of statutes that differentiate between public records that are open to inspection and those that are confidential. For example, the right of access to personnel records of public employees is tightly regulated by specific statutes. The information contained in personnel files of state, city, and county employees is closed to members of the press and the public, except for the employee's name, age, date of original employment by the agency, current position title, current salary, date of the most recent change in position classification, and the office to which the employee is now assigned.[5]

Even though no statute directly and explicitly limits the right of the press to certain public records, another statute may indirectly limit access to these records. For example, the right of access to juvenile arrest records appears to be controlled in this way. North Carolina has no statute specifically granting or denying access to juvenile arrest records. But it appears that police departments should withhold these records from the press because the law requires that all juvenile court records be withheld from public inspection.[6] Although a police record of a juvenile arrest is not a juvenile court record, the law surrounds juvenile court proceedings with confidentiality. This policy would clearly be frustrated if police departments were required to make public the names of arrested juveniles.

Confidentiality as public policy. Courts have consistently indicated that access to public information may also be denied if confidentiality is required as a matter of public policy.[7] This reason is not mentioned in the public records statute, but in the absence of more specific statutory descriptions of confidential information, in certain instances public policy should be recognized as the controlling standard (which is, granted, rather nebulous and subject to conflicting interpretations). While the North Carolina courts have yet to decide a case in which public policy might require confidentiality, the various state courts that have tried to apply this standard have agreed to a surprising extent, establishing some generally accepted principles and, in some cases, fairly predictable answers.

One of the oldest public policy exemptions, recognized by many courts, requires that certain police records be withheld from public inspection. This exemption does not extend to every record maintained by the police. For example, arrest records, except for those pertaining to juveniles, must be available to the public and the press. On the other hand, files and other records relating to active criminal investigations are clearly excluded from public access. Such exemptions encourage the police to enter information in their reports freely, avoid tipping off the subjects of investigation, and protect confidential investigative techniques.

Public policy also requires the protection of government's sources of information at times in both criminal law enforcement and corrections and in other administrative areas. Private parties often resist providing information to government agencies unless the agency assures confidentiality. But the mere fact that a public official promised confidentiality does not necessarily mean that access to the information may be denied. Public officials may not use such promises to avoid granting public access to the information. If confidentiality, measured by an objective standard, is actually necessary, the official's promise will be honored. Otherwise, access to the information must be permitted despite the promise.[8]

In cases involving public access to land appraisals made before government agencies have purchased or condemned the land, some courts have created exemptions to public access if the transactions were not complete.[9] These cases suggest that exemptions may be created if disclosure would harm the government's fi-

4. *Id.*

5. N.C. GEN. STAT. §§ 126-22 to -28 (Supp. 1977); N.C. GEN STAT. § 153A-98 (1978); N.C. GEN STAT. § 160A-168 (1976).

6. N.C. GEN STAT. § 7A-287 (1969).

7. *See, e.g.*, Lee v. Beach Publishing Co., 127 Fla. 600, 173 So. 440 (1937); Stack v. Borelli, 3 N.J. Super. 546, 66 A.2d 904 (Super. Ct. Law Div. 1949).

8. Papadopoulos v. State Board of Higher Education, 8 Or. App. 445, 494 P.2d 260 (1972).

9. Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833 (1967); Sorley v. Lister, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (N.Y. Sup. Ct. 1961).

nancial interests and give unfair competitive advantage to whoever is doing business with the government. Courts that have considered such an exemption have been inconsistent in treating this issue, leaving the status of this potential exemption somewhat confused.[10]

As the store of government-held information on private citizens has increased, legitimate privacy interests have been recognized. Some courts have exempted records when disclosure would result in an unjustified invasion of personal privacy. The North Carolina courts have not yet faced this issue under the public records statute, but the State Court of Appeals has recognized that the fundamental right to personal privacy justified a superior court order prohibiting public disclosure of information submitted to the Attorney General in connection with a criminal investigation.[11]

Privileged information. Access to government-held information may also be denied if the information is privileged. The states have used different approaches to reach this result, but the uniform result has been that information arising within privileged relationships, such as attorney-client and doctor-patient, may be withheld from public inspection.

North Carolina's statute specifically regulates access to information arising within one privileged relationship: There is a three-year privilege for certain confidential communications made by legal counsel to a public board or agency.[12] Although the statute does not say so, communications made by the agency to its counsel are also privileged, and it seems that public access to such communications could also be denied.

Access to information must be permitted if the privilege has been waived. (Privilege claims must be viewed narrowly by looking for inapplicability or waiver of the privilege.) If an agency employee discloses information to anyone outside the agency, this is sufficient to constitute waiver if the privilege exists for the benefit of a public agency or board.[13] The doctor-patient privilege, however, exists for the patient's benefit, and disclosure of hospital or medical records would require his permission.[14]

Open information

The law presumes that the press has a right of access to all public information. Access may be denied only if there is a substantial, legitimate justification for withholding the information; the harm of disclosure must outweigh the substantial public benefit derived from access to public information.

A substantial number of records are open to inspection by the press and others. Probably the most obvious example of information that may not be withheld is public financial information. Except for some tax records, a governmental body must permit access to almost all records relating to its financial affairs. These records include audits and budgetary documents as well as records pertaining to receipts, expenditures, purchases, and cash deposits. A school board, for example, has no authority to deny a reporter access to the school system's budget. All contracts entered into by a governmental unit must be open for public inspection, as must engineering reports and other records pertaining to public works. Ballots are secret, but election officials must permit access to other election records, including registration records, poll books, and voter petitions.

Agencies sometimes choose to permit access to information other than the information they are required to make available. In a few situations the agency is not permitted to do so. For example, the agency may not waive the doctor-patient privilege: access to some groups of records must be denied because of the language of special statutes; and confidentiality may be mandatory if disclosure would violate anyone's constitutional right of privacy. With these possible exceptions, an agency may properly disclose information when it is not legally required to do so. But once the information has been disclosed, the agency may not later claim that the material is exempt from public access.

There are exceptions to this rule preventing selective disclosure of information. The law may permit a public agency that maintains records on individuals to allow the subject, and no one else, to inspect his records. However, equal right of access must be granted to all persons similarly situated, and an agency may not permit one reporter, for instance, to inspect some records while denying the same rights of inspection to another reporter.

How may public information be obtained?

When one desires public information, he must find out whom to ask for it. The statute is quite specific on this point: the custodian of the records is the person who must grant access and supervise the inspection;[15] the custodian is the official in charge of the agency's record files. If the custodian is uncertain about the status of a particular record, he should check quickly

10. A Florida court has rejected such an exemption. Gannett Co. v. Goldtrap, 302 So.2d 175 (Fla. Dist. Ct. App. 1974).

11. *In re* Investigation by Atty. Gen., 30 N.C. App. 585, 588, 227 S.E.2d 645, 647 (1976).

12. N.C. GEN. STAT. § 132-1.1.

13. Coldwell v. Board of Public Works, 187 Cal. 510, 202 P. 879 (1921).

14. *See* N.C. GEN. STAT. § 8-53 (Supp. 1977).

15. N.C. GEN. STAT. §§ 132-2, -6 (1974).

with his supervisor, but the process of obtaining approval for disclosure should not be used to unreasonably delay, and perhaps effectively deny, access to the information—it is the custodian who has the duty to permit inspection of records, not the supervisor, and it is he who will be subject to contempt if a court orders disclosure.

The North Carolina public records statute does not specify a procedure for requesting access to records, but the custodian must honor promptly any request—oral or written—for public information if it is definite and enables the custodian to locate the records. The form of the request is unimportant, but the official may require that it be fairly specific, rather than permitting whoever made the request to simply search through the files.

Once the custodian locates the desired records, he must let the person who requested them inspect personally the original records in their usual location unless the records are in a form that will not permit such an inspection. If records are stored in files that are easily lost or misplaced, the custodian may choose to retrieve the requested records himself rather than permitting the reporter to search for the records. Also, if records like computer tapes are not maintained in a usable form, the custodian must provide a print-out or otherwise convert the records to a usable form. In any event, the custodian must permit reasonable access, and he must provide necessary assistance and supervision, but he is not required to interpret the records or analyze them.

If an agency official needs to use the records, he may temporarily take priority over the public's right of access, but the agency's needs may not be used as an excuse to delay or deny access unreasonably. Certainly, access to the records may not be denied for this reason unless the particular records are actually being used at the time rather than simply lying on someone's desk for future use.

The right of access includes not only the right to inspect and examine public records, but also the right to make copies.[16] For ordinary paper records, the person who is inspecting the records is entitled to make his own copies by hand, typewriter, or photocopier, though the custodian may require that photocopies be made only on the agency's machines. If the records consist of computer tapes or voice recordings, the custodian may also require that copies be made as arranged by the agency. Depending on the request, he must then make print-outs or copies of computer tapes available, and he must provide copies of magnetic voice recordings.

No fee may be charged for the inspection or retrieval of the records if someone simply inspects public records or if he makes his own copies. Even if information obtained from the records is sold for private gain, no fee may be charged unless the agency performs genuinely extraordinary services. If it provides copies of the records, it may charge a reasonable fee. The right of access is predicated on the belief that it provides substantial benefits to everyone, even to those who never exercise this right. Therefore, the copying fee must be reasonable to avoid placing unnecessary burdens on the right of access. A reasonable fee for uncertified copies would permit the agency to recover no more than the actual costs of reproduction. North Carolina's statute does not address this point, but at least one court has held that the agency cannot recover the labor costs incurred in making copies.[17]

What to do if access is wrongfully denied

The North Carolina public records statute clearly gives the press and everyone else a broad right of access to public information. At times, however, information that the press and the public have a right to inspect is denied. Whether the denial results from a misunderstanding of the law, mere indifference, or an actual desire to avoid disclosure, steps must be taken to correct the official's mistake. Here the most serious weakness of the North Carolina statute becomes painfully apparent to the person seeking the information. Enforcing the right of access tends to be both slow and expensive. Suppose a small city contracts with an engineering firm to design a new sewer system. After the signing, a reporter on the city's weekly newspaper receives an anonymous, unsubstantiated tip that the contract contains some clearly illegal provisions. Intrigued by the tip, the reporter goes to city hall in an effort to verify the tip. The custodian of the city's public works records refuses to let the reporter see the contract. The public records statute clearly gives the reporter the right to do so, but what can he do to enforce that right?

The law provides no formally established administrative procedures as a remedy. If the custodian is determined to deny access to the contract, and if the supervisor will not intervene on the reporter's behalf, the reporter's only recourse is to obtain a court order compelling the recalcitrant official to permit inspection of the records. The reporter's paper probably will not want to become involved in such a lawsuit. Litigation is expensive and slow, and the desired record—the sewer contract—has little inherent monetary value, particu-

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16. N.C. GEN. STAT. § 132-9 (Supp. 1977); Fuller v. State *ex rel* O'Donnell, 154 Fla. 368, 17 So.2d 607 (1944); Marsh v. Sanders, 110 La. 726, 34 So. 752 (1903).

17. Moore v. Board of Chosen Freeholders, 39 N.J. 26, 186 A.2d 676 (1962).

Statutes and Regulations Governing Access to Information on Criminal History

Robert L. Farb

A GOOD REPORTER always tries to find out as much as he can about newsworthy people—and, whether they are candidates for public office or defendants arrested for murder, their criminal records are important background information to him. Here, as in other areas of a reporter's work, he finds that the law contains provisions that may impede him but protect either the privacy of the person he wants to write about or a law enforcement agency's legitimate need for confidentiality. A complex relationship between federal and state statutes and regulations governs access to records of a person's criminal history—that is, information about his arrest, charges, court proceedings, sentence, and prison record.

The laws and regulations concerning access are complex—and sometimes irrational and confusing.

North Carolina law on access

Public records. North Carolina law makes a great many records open to the public. The following criminal history records are all accessible.

(1) Arrest records maintained by local law enforcement agencies. These records include the person's name and personal description and the criminal offense for which he was arrested. They are considered public records whether or not a court disposition is noted on them. For example, though a person arrested for murder in 1960 was found not guilty at trial, his arrest record is available for public inspection even though it has not been updated with a notation of the not-guilty verdict.

(2) Court records (excluding juvenile records).

(3) Traffic offense records maintained by the Division of Motor Vehicles.

(4) Police blotters that report arrests on a chronological basis.

Nonpublic records. According to North Carolina law, these documents are not public records:

(1) Investigation reports and criminal intelligence files of local law enforcement agencies.

(2) Arrest records, investigation reports, and criminal intelligence files of the State Bureau of Investigation (SBI). The Attorney General interprets G.S. 114-15, which deals with SBI records, to mean that arrest records as well as investigation reports and criminal intelligence files maintained by the SBI are not public records. Thus the odd result of G.S. 114-15 and the public records law is that a local law enforcement agency's arrest records are public records but SBI arrest records, which mostly contain information supplied by local agencies, are not public records.

(3) Prison and probation records.

Federal regulations

It is important to note that the federal regulations discussed here do not change North Carolina law on access and dissemination of public or nonpublic records.

In 1973 federal law[1] was amended to require that, to the maximum extent feasible, information on criminal history collected, stored, or disseminated with federal funds contain disposition data—that is, what happened in court—in addition to arrest data whenever arrest data is collected. It also required that such information be kept current and be used only for law enforcement, criminal justice, and other lawful purposes and that one who has a criminal history record have the right to review, challenge, and correct information in his record.

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1. See 42 U.S.C. § 3771 (b).

In May 1975 the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice issued regulations[2] to implement this law. These regulations were amended twice (March 19, 1976, and December 5, 1977) since then because of the states' opposition to some substantive aspects of the regulations. For example, the amendments removed all restrictions on dissemination of conviction information and court records and authorized each state to establish how much nonconviction data, discussed below, would be disseminated. Implementation of the regulations also has been delayed because the states have needed more time to comply with them.

Who is affected by the regulations? The regulations apply to any state or local agency whose collection, storage, or dissemination of data from criminal history records have been funded in whole or in part by federal funds since July 1, 1973. In North Carolina the regulations affect the SBI and most major local law enforcement agencies. In addition, any agency or person who receives information from an agency subject to the regulations must also comply with the regulations in regard to that information. If a person or agency fails to comply with the regulations, it is subject to a maximum $10,000 fine and/or a cut-off of LEAA funds.

When do the regulations take effect? The regulations concerning administrative security and individual access, challenge, and review became effective on July 31, 1978. All other regulations are subject to state-by-state requests for delay in compliance. The North Carolina state agency responsible for requesting delays in compliance is the Criminal Justice Information System (CJIS) Security and Privacy Committee of the Governor's Crime Commission. Last March, this committee requested[3] certain delays, discussed below, but as of September, 1978, LEAA has not acted on the request. Until it does so, the regulations are not in effect.

What the regulations require

1. *Individual access, challenge, and review.* Effective July 31, 1978, any individual must have the right to review the criminal record an agency maintains on him, challenge its accuracy, require appropriate corrections to be made, and have the corrected record sent to those criminal justice agencies that have received a faulty record—such as courts, law enforcement agencies, and district attorneys' offices.

Although it could be argued that a custodian of criminal records has the common law duty to correct an inaccurate record, this regulation clearly requires the correction. In addition to sending corrected records to criminal justice agencies, the agency that has custody of any faulty records on an individual must provide, on his request, a list of all agencies outside the criminal justice field—such as private employers—that have received the erroneous record. Presumably, the person would then contact these agencies.

2. *Limits on dissemination.* This regulation does not forbid releasing (1) conviction information or (2) arrest information when the case is still pending in the court system. The major restriction on dissemination concerns the release of "nonconviction data," which includes: (1) arrest information if no disposition is shown, the arrest occurred more than a year ago, and no active prosecution is pending; and (2) all information on arrests that culminated in a dismissal or not-guilty verdict. Nonconviction data may be given only to criminal justice agencies and other specified groups and "for any purpose authorized by statute." Since arrest records maintained by local law enforcement agencies in North Carolina are considered public records under the state public records law, whatever nonconviction data appear on the arrest record will be available to the public. Thus the provision allowing dissemination for "any purpose authorized by statute" effectively undercuts any attempt to limit dissemination of nonconviction data.

The CJIS Security and Privacy Committee has not requested a delay in implementing this regulation.

3. *Audit.* Under the regulation the state must conduct annual audits of state and local criminal justice agencies, randomly chosen to verify adherence to the regulations. The audit would help to determine whether only authorized persons and agencies are receiving criminal history record information. The CJIS Security and Privacy Committee has requested a two-year delay in complying with this regulation on the ground that more money will be needed to audit local agencies and some state agencies.

4. *Administrative security.* Effective July 31, 1978, the regulation imposed detailed requirements concerning computer operations and oversight of employees to prevent unauthorized access to computers and manual files that contain information on criminal history.

5. *Physical security.* Agencies must adequately guard against fire, theft, sabotage, and similar incidents in places where records on criminal history are stored. The CJIS Security and Privacy Committee has requested a two-year delay in complying with the regulation on the ground that both the state and local agencies will need more money to provide adequate physical security.

2. See 28 C.F.R., Part 20.

3. Letter of March 1, 1978, from CJIS Staff Director Harold P. Greene to Harry Bratt, Assistant Administrator, National Criminal Justice Information and Statistics Service, LEAA. A letter of March 10, 1978, to Mr. Bratt updated some information contained in the letter of March 1, 1978.

6. *Completeness and accuracy.* This regulation is the heart of the regulatory scheme since one major goal of the 1973 amendment to the federal law was the maintenance of accurate and up-to-date information on criminal history. The central repository of criminal history record information—in North Carolina, the Identification Section of the SBI—is the main instrument for accomplishing this goal. The goal is for the central repository to receive arrest information from law enforcement agencies, disposition information from the courts, and probation and prison data from the Department of Correction. With all of these data, the central repository could provide accurate and up-to-date information on criminal history to criminal justice agencies through Police Information Network (PIN) computer terminals located throughout the state.

The regulation requires that an arrest record maintained at the central repository contain information on how the case turned out within ninety days after it was disposed of. With limited exceptions, a criminal justice agency must query the central repository for up-to-date disposition data before releasing any information on criminal history unless it is sure it has the most up-to-date data. In addition, a criminal justice agency must notify all recipients of materially inaccurate information when it discovers the error.

Local law enforcement agencies are not now required to send arrest information to the SBI Identification Section. As a result, the SBI receives arrest information on a voluntary basis for only about 25 per cent of the total arrests in this state and disposition data for only 40 per cent of the reported arrests. The Department of Correction supplies approximately 80 per cent of the disposition data; the rest comes from local law enforcement agencies. The courts are not required to forward disposition data information to the SBI, and the SBI receives practically none on a voluntary basis. The Administrative Office of the Courts is now establishing a computer system that will provide disposition information to the Identification Section, but the system will probably not be completely operational for four to six years. The Department of Correction now sends conviction data to the Identification Section on all inmates who enter the state prison system and information about major changes in their status, including when they are paroled. Information about persons placed on probation is not forwarded unless a judge orders the probationer fingerprinted when he is placed on probation.

Providing the trained personnel needed at both the state and local levels to keep information on arrests and dispositions up-to-date and to check the central repository before dissemination will be costly. Although the SBI Identification Section already complies with the regulation requiring notification of those who have received incorrect information, most local law enforcement agencies do not; they will require more money and people to keep dissemination logs that are required to implement the regulation effectively.

As a result of these problems, the CJIS Security and Privacy Committee has requested a six-year delay in complying with regulations governing completeness and accuracy.

Police Information Network

The North Carolina Department of Justice's Police Information Network (PIN) maintains a computerized network linking local, state, and national criminal justice agencies that collect, organize, and retrieve data on criminals and crimes. A local law enforcement agency with a PIN terminal may receive information on criminal history from the SBI Identification Section and from the FBI National Crime Information Center (NCIC).

Only criminal justice agencies can use information from a PIN terminal; the data are not accessible to the public. A paradoxical result occurs when a local law enforcement agency queries PIN to obtain a disposition for an arrest noted on an arrest record maintained by the agency. Although an agency's arrest record is a public record, the agency cannot update that record with disposition information from PIN unless it restricts that disposition information to only criminal justice agencies. As a result, the public may inspect only the arrest data and not the disposition data, even though the disposition is otherwise publicly available in court records.

IN SUM, the interrelationship between federal and state statutes and regulations that govern access to information on criminal history needs to be examined. Agencies will need substantial federal and state money in order to comply with the federal regulations. This state may need to re-examine its public records law concerning state and local collection and dissemination of data on criminal history in an effort to be more consistent in releasing information to the public.

Complete, accurate, instantly available information on criminal history through PIN terminals located throughout the state could be very helpful to criminal justice agencies. Law enforcement agencies could focus on "career" criminals who escape detection because of currently inadequate record-keeping. We need to preserve public access so that the news media can keep the public informed about the criminal justice system. On the other hand, protecting an individual's privacy and employment opportunities requires that criminal history records be accurate and that nonpublic information be released to only authorized personnel.□

The Reporter's Right of Access to Public Information

Nadine Cohodas

IN MY YEARS of reporting the news in North Carolina, I have always felt that the press and government ought to have an adversary relationship. I do not mean that they must be enemies. Rather, reporters should maintain a healthy distance from the government officials they cover. We should not have a vested interest in making the government look good, nor should we continually strive to write or broadcast stories that embarrass or deride the government when the facts do not justify such treatment.

As reporters, we are in a unique and enviable position. We do not choose sides in gathering information, though it is rare that we do not have ideas about what is occurring. Our job is to report what happens and represent views from all sides. On the other hand, government officials—like officials in private enterprise—are interested in presenting the positive side of what they do and making light of—or perhaps hiding—the problems that may exist in their agencies or companies.

The reporters' ability to get information seems to be directly related to what the information reveals. No reporter will have difficulty getting documents and quotes that explain a useful, efficient, and creative program. But if the information might prove embarrassing to an official or might be confidential under a state law, then reporters are likely to find their questions unanswered.

The possibility that information could prove embarrassing and the confidentiality provisions of state laws work together: The more sensitive an issue is politically, the more a government official tries to find a law that will make the information confidential.

Several laws provide for confidentiality. They are based on the theory that public benefit by disclosure is outweighed by the harm to the individual—such as damaged reputation. (State Bureau of Investigation reports, certain welfare records kept by county departments of social services, and some state personnel records are classic examples of confidential information.)

I do not suggest that every government worker seeks to withhold information just to be arbitrary. Many workers feel bound by the laws that may apply to them and are concerned about acting illegally and unethically. There are situations, however, in which individuals seem deliberately to stretch the law to avoid having to disclose information that the public is entitled to know. When this occurs, the public may be uninformed about key events or issues.

To illustrate: In late 1976 the North Carolina Attorney General's office obtained a court order barring release of an autopsy report in the death of a Virginia state trooper. The trooper was killed in a shootout involving the North Carolina Highway Patrol after the patrol set up a roadblock to stop the trooper's abductor, Reuben "Sonny" Conley, who had commandeered the trooper's car and ordered him to drive south.

In this case, the autopsy report was withheld on grounds that its release could prejudice Conley's trial, despite a 1974 Attorney General's opinion calling autopsy reports public records. Finally, the court order barring release was lifted a month later after much of the report had trickled out during a preliminary court proceeding in the matter.

The autopsy report suggested that the nature of the fatal wounds indicated that Conley killed the trooper. There had been speculation that the Virginia trooper had died from a North Carolina patrolman's bullets and not from shots fired by Conley, who had been crouched on the floor of the trooper's car.

Conley eventually was convicted of murder. His conviction was overturned by the state Supreme Court,

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however, because of certain evidence—his statement to an FBI agent—used in court. The Court found that Conley had not waived his right to an attorney when interviewed by the agent.

One highway patrolman was discharged for opening fire on the car, and another was reprimanded.

The public finally learned what happened during the shootout, but not until six weeks after the event. The situation poses an interesting question: Was the concern for preserving the defendant's right to a fair trial more important than the public's right and need to know quickly how key state law enforcement officials performed under pressure?

Given the fact that obstacles exist in trying to obtain information, reporters need to know how they can be overcome, if at all. In my view, a reporter's first duty is to be well-informed on the law that applies to each news-gathering situation. If he is denied a request for information, a reporter should be able on the spot to argue on his behalf and cite an authority to support the request. He could, on occasion, change a recalcitrant official's mind.

Sometimes a government worker withholds information simply because he does not know the law. The reporter's solution is to check with the Attorney General's office, which can direct the release of information.

In sensitive situations, like the Conley case, a full-blown dispute over what is public and what is not may develop. At that point, I think, the matter is out of a particular reporter's hands and becomes a legal debate for the courts to resolve if necessary.

NOT EVERY REQUEST for information, even sensitive matter, has to turn into a battle of wits between the reporter and the government. A reporter's relationship with the people he or she covers is extremely important. It can mean the difference between a struggle over every piece of information, confidential or not, and easy access to information clearly meant for the public.

The relationship between reporter and source ought to be based on respect for one another's roles and professionalism. It should not be a personal friendship. The reason is obvious—conflict of interest. The source may give the reporter some information because of favoritism, but a time will come when some tough reporting has to be done about the official or the official's agency. Through friendship a certain kind of loyalty develops. Then it is difficult to report unfavorably on someone who has come to be a personal friend. Furthermore, the press is quick to pounce on anyone in government suspected of conflict of interest. It should not hold itself to a different standard.

Even though a reporter has a good working relationship with a source, there will still be times when it will be difficult to get information—particularly when the government perceives its interests as different from those of the press. This is inherent in an adversary relationship in which reporters, outside the system, ask penetrating questions of officials in the system. The answers depend on the source—whether he will disclose sensitive information—and the laws that apply to the particular information.

Some of the legal obstacles can be overcome only if the laws are changed. That, to be sure, is a slow process, and the legislature will need to be convinced that the reasons for the rules prohibiting disclosure are no longer valid.

In constantly probing for information, reporters find themselves asking their sources to violate the law. At times, the sources will provide the information, even though they know they should not. It is discomforting to ask someone to violate a law, but in my experience there is always a reason: The government, by its actions has raised questions whether something is amiss. Perhaps nothing is, but if reporters have legitimate doubts, we must ask questions even if, by law, we are not entitled to all the answers.□

Newspaper Coverage of Local Government: Why It's Worth Reading

David Lawrence, Jr.

WHAT WE WANT TO DO in the newspaper business is make local government coverage worth reading. That's not easy, and we don't achieve it often enough. None of us.

We look for the same sort of balance in local government reporting that we strive for throughout our newspaper. In that process, we never are satisfied; we seek to edge closer to our own ideals. On good days, we do.

We try to avoid the dull or, better yet, make it interesting (the theory, of course, being that there are no dull subjects or dull people, just dull writers). We try to write about good people and good deeds as well as bad people and misdeeds.

Already, of course, I've made it sound too easy. The pursuit of good newspapering is the toughest task in the world. We *never* get good enough to satisfy really good newspaper people. We do it seven days a week, 365 days a year, under a lot of pressure (both self-imposed and imposed from without). Usually, we do it in good faith, with most people in our profession caring mightily about both accuracy and fairness.

We are not educated enough. We are human, ergo, imperfect. We are a profession founded on generalist principles (we always have said, in theory, that any one of us can cover *anything*), although we know that what we cover has become much more complex, especially in the past decade.

There are always "eight million stories in the Naked City," and we have a relative handful of folks to cover them.

If our reading public feels sometimes we're inadequate, we *know* oftentimes we are. Yet, even in despair over such musings, we are worthwhile. We are imperfect, constantly striving, but very much needed in a free society.

With some considerable assistance from our metropolitan editor, Joe Distelheim (the fellow at the *Observer* who's responsible for more than thirty local and Piedmont reporters), herewith are some thoughts on covering local government:

- There's a lot less corruption in local government than inefficiency. This is particularly true in North Carolina, still a very rural state sprinkled with small- and medium-sized cities. Most readers care more about having the garbage picked up than they do about some guy in the building inspection department on the take.

But which story does practically every reporter want his byline on? And which story is practically every newspaper more likely to put on the front page?

- The 1978 General Assembly strengthened our state open-meetings law, and we have, with few exceptions, a strong open-records law. Generally, we don't bother to take advantage of them.
- Local government—like newspapers, college faculties, the restaurant business, whatever other field of human endeavor—has lots of folks who don't like to answer questions and who don't like persistent questioners. It's easiest not to ask the question at all. It's also pleasant not to have to question the answer: "The sun rises in the west?" "Thank you, Mr. Mayor."

We need to seek out and expose wrongdoing. We need to get an even better open-meetings law. We need to make known our feelings to and about closed-mouth public officials.

More important, though, we need to examine our own priorities and our own skills.

At the *Observer* we mostly cover government the way other newspapers do. We go to meetings and write down what people say and how they vote; then we come back and write that information into the newspaper. Sometimes we go further: We ask public offi-

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cials for their positions on what we or someone else perceives as a current issue. Then we put what they say into the newspaper. On rare occasions, we're led to believe a public servant may be breaking the law. We assign reporters; then, if we find the story is true, we play it with very large headlines. And, yes, we'd like to win prizes for that sort of reporting.

All that is traditional. All that is proper. All that is probably even necessary. But we have other important things we need to be doing on the subject of local government. Sometimes we do those things. Four examples:

The airport

In 1975 Charlotte needed a new airport terminal. Everybody said so. The city was growing. Airport business was thriving. A consultant hired by the city said Douglas Municipal was "an airport of destiny." He said the city ought to have a terminal three times the size of the present one. Voters had defeated a referendum on the question of a new terminal only months before, but city fathers were working very hard to find another way to finance the building. A former mayor wrote this newspaper to say that criticism of the airport project "only tends to further break down public confidence in local government and gives comfort and aid to the dissidents... who constantly try to impede progress."

Who, then, was to question that Charlotte needed a new airport terminal? *Observer* editors decided it *was* a question worth asking. A reporter spent six weeks seeking answers. His main story began:

"Officials of every major airline using Douglas Municipal Airport—and the airport consultant—say Charlotte won't need to build a new $28.2 million passenger terminal as soon as city officials and the public have been told." Facts and quotes and figures bolstered an authoritative set of stories.

No one in city government had broken the law. The issue was not one of decisions made stealthily in smoke-filled rooms. But this was a story that was important to readers/citizens.

No one issued a press release on the subject. The reporter didn't gather his information at a meeting. The reporter observed, and gathered figures, and asked questions: Why? How many? What if? He learned how airports work and how airport planners plan.

Now, two-and-a-half years later, city fathers are saying again that we need a new airport terminal. And what we have been able to find out suggests the situation is different now—that a strong case can be made at the present time for a new terminal.

The traffic lights

It wasn't a scandal. It wasn't even a big thing. It was just an irritation to every Charlottean who had to drive on the city's thoroughfares: The traffic lights weren't synchronized.

We reported that. We also reported that the city traffic engineer said things were getting better fast, mostly because of a new $1.4 million computer. By the next month, he said, motorists would notice a real difference.

That month, when things were no better, we asked again. The next month, said the traffic engineer. We asked some more questions. The problem, it turned out, was not so easily reconcilable: There was a contract dispute between the city and the computer company. They negotiated: motorists waited at traffic lights.

The delays continued. The stories continued. The City Council got interested, and called the traffic engineer to appear and explain. The computer program went into effect, the *Observer* tested it, and the reporter wrote a story that began: "Charlotte's $1.4 million computer, designed to eliminate red lights and undue delays for downtown motorists, doesn't work." In that story, the traffic engineer admitted the problem was with the programming done in his office.

A city councilman vowed to get "the whole story." The *Observer* found a local man who had offered his services free to the city two years before to work on the traffic computer. The man had an impressive list of academic and practical credentials. His offer had been rejected.

Seven months after the *Observer* began writing about traffic lights, a reporter was dispatched with a stopwatch to retrace three downtown routes timed four months before. There was no improvement.

Finally, the next month, a computer operator began punching buttons to activate the system. An *Observer* reporter was there. An *Observer* reporter also was with the traffic engineer when he took his city car onto the streets to test the lights. They seemed to work. Two weeks later, the *Observer* made its last stopwatch tour.

"Some motorists might call it a miracle," the reporter wrote. "But after almost 10 months of frustration and

failure. Charlotte's controversial traffic light computer is finally working."

Maybe the traffic lights would have begun working properly if the *Observer* had not pursued and persevered. Maybe. What do you think?

The crime lab

Like most newspapers, we carry a number of police stories—robberies, killings, traffic accidents, rape, cats-caught-in-trees, cops in trouble—and also a number of stories about police officers doing good. The police reporter gets these stories the same way the city hall reporter does: by reading reports, watching, and writing down what people say.

Sometimes police change the way they do things, as the Charlotte Police Department did when it adopted a "team-policing" concept. This concept replaces the usual vertical administrative setup and specialized teams (for example, vice)—with 10 (now 15) teams of generalists, assigned to geographic chunks of the city. When the change was made, Charlotte police announced it amid great fanfare, citing testimony of police experts across the country. We reported all that.

But would it work? Who could tell? Effectiveness of an administrative structure is difficult to quantify. Because that's so, newspapers generally don't try. Arrests and accidents are easier, so we tend to concentrate on those sorts of things.

One way to attack such a problem is a piece at a time, as our police reporter did recently. One squad that was disbanded when the team system began was the crime-scene search team, which worked with the police crime lab to collect and analyze physical evidence of crimes. Our reporter started asking questions —not about the whole team system, but about this single change. We wound up with a story that did not answer the broad "Is it working?" question (which may be unanswerable), but answered a piece of it.

That piece, citing examples, said police and prosecutors are losing cases because inexperienced, untrained officers are bungling evidence collection. They're messing up fingerprints, fouling up photographs, erring on the witness stand.

No corruption. No secret meetings. But a good story no one in the police department was going to announce at a press conference.

The belt road

It's been "on the drawing boards" for years. The fat books prepared by the consultants who chart Charlotte-Mecklenburg's future contain map after map showing our city someday surrounded by a high-speed highway, an almost perfect circle allowing motorists to bypass city traffic as motorists do around Washington.

The plan didn't raise dissent until planners began to get down to specifics (such as through whose backyard or whose planned subdivision would come the belt-road's first segment). Suddenly, people who live just north of N.C. Highway 51 noticed that the plans show the road going through *their* backyards. They went to public hearings and protested, and we covered that.

Politicians reacted. They asked for a study of a route south of N.C. 51. Trouble was, that route would go through other people's backyards. *They* protested, and we covered that.

It was a good story as it was, with plenty of passions and affecting plenty of people. But we would not be doing our job by simply recording those words.

We assigned two reporters to the story full-time, and another part-time. They spent five weeks, not only talking to all sides, but digging into the facts: Origin and destination studies. Traffic projections. The county's comprehensive plan. Real estate records. Planning studies. The reporters became as familiar with the pros and cons of the two routes—and the belt-road idea itself—as most planners. Because they were, they were able to ask questions that elicited answers that never came out in all the public meetings and hearings on the question.

And because they got these answers, they were able to write a story stating that the favored route, $60 million worth, was so far from where most people live that some experts even said it might be no more useful than no road at all.

Those answers did not come easily. They would never have come at all without a great deal of informed, persistent questioning by our reporters.

We could have covered the belt-road controversy solely by going to all the meetings, all the press conferences, all the announcements, making sure we understood what was being said, then saying, "Thank you, Mr. Commissioner (Madame Chairman, Mr. Mayor, Mr. Planning Director)."

But if we had, our readers never would have known that the sun does not rise in the west.□

Some Recent Changes in the Open Meetings Law

David M. Lawrence

THE PAST EIGHTEEN MONTHS have been unsettled ones for North Carolina's open-meetings statute, and the ferment promises to continue for at least another year.

The story begins with HB 522 of the 1977 General Assembly. This bill proposed a complete revision of the 1971 open-meetings statute. Coverage was expanded, even extending the law to any nonprofit corporation that receives public funds. The permitted occasions for executive sessions were narrowed. Denials of access to proceedings, such as conference telephone calls, were expressly banned, and an elaborate procedure for public notice of meetings was devised. Each of these major elements of the revision, however, created opposition to the bill as a whole, and by the end of the session, it had become obvious that HB 522 was going nowhere. To save the chance for revision of the law, the bill was transformed into one that established a commission to study the open-meetings law, prepare any needed revisions, and report to the 1978 session of the General Assembly.

The study commission, however, did not get an early start; not until February, 1978, did it hold its first meeting. In the months between the adjournment of the 1977 session of the General Assembly and the commission's first meeting, events had changed the commission's task. In December, 1977, the Supreme Court decided *Student Bar Association v. Byrd*, 293 N.C. 594. The Court held that the faculty of the University of North Carolina law school was not covered by the open-meetings law. Moreover, the Court indicated that the law's coverage was decidedly narrower than had been generally considered and (in effect overruling an earlier decision of the Court of Appeals) that the statute imposed on those boards still subject to it no obligation to give public notice of their meetings. As a result of its late start plus this decision of the Court, the study commission decided to concentrate on two matters: the coverage of the statute and public notice of open meetings. Its recommendations in these two areas were in essence enacted by the General Assembly this June as Chapter 1191 of the 1977 Session Laws (1978 Session).

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Coverage of the statute

The original open-meetings law extended coverage to all "governing and governmental bodies" in the state. In the *Byrd* decision the Court held that to be subject to the statute, a body must be both a "governing body" and a "governmental body," and it interpreted those words rather narrowly. As a result, at the local level, it was clear that city councils and county commissioners were subject to the law; it was probable that school boards were subject to it; but it was at best questionable whether any other boards were. Chapter 1191 moves away from the phrase "governing and governmental" and instead provides that the law extends to all "public bodies," a phrase that it defines. That definition contains the following elements:

1. A "public body" is a group with at least two members. Single officials are not subject to the statute.

2. A "public body" is part of either state or local government. That a private body—such as a chamber of commerce, a sheltered workshop, or a private university—receives public funds is not sufficient to subject that body to the law.

3. A "public body" exercises one or more of the following functions: legislative, policy-making, quasi-

judicial, administrative, or advisory. Only the judicial function is omitted.

4. A "public body" has been established by one of a number of rather formal means: (1) by the state Constitution (such as the State Board of Education); (2) by action of the General Assembly (such as a county or most state executive agencies); (3) by action of a state agency authorized to establish a local public corporation (such as a sanitary district or metropolitan water district); (4) by action of the governing board of a local government (such as a planning commission); or (5) by executive order of the Governor or action by the head of a state executive department or division (such as the new Local Government Advocacy Council).

In addition, "public body" includes a committee of a public body (except for nonpolicy-making committees of public hospital boards) but does not include meetings of an agency's staff.

These changes in coverage took effect on October 1, 1978.

Public notice of open meetings

The original open-meetings law contains no explicit requirement that a board give anyone notice of a meeting required to be open. In 1976, however, the North Carolina Court of Appeals held that such a requirement was implicit in the act, indicating that at the very least six hours' public notice should be given of any special meeting required to be open. That case was not appealed to the Supreme Court, and so most observers thought the law was settled. But in the *Byrd* decision, the Court brought the matter up on its own and held that absence of a notice provision in the statute meant that public notice was simply unnecessary. The effect was that the statute now prohibited closed meetings but not secret meetings. Chapter 1191 remedies this gap in the statute with a comprehensive notice requirement. The details of the notice provision are as follows:

Regular meetings. If a public body has established a schedule of regular meetings, it is required to keep that schedule on file in a central location. State agencies are to file their schedules with the Secretary of State, county agencies with the clerk to the board of county commissioners, city agencies with the city clerk, and all other agencies either with their own clerk or secretary or with the clerk to the board of county commissioners in the county where the body normally meets. This filing requirement applies only to public bodies that have established schedules of regular meetings; it does not require all public bodies to establish such a schedule and does not apply to a body that has no such schedule. If a body has no schedule of regular meetings, all its meetings would in effect be special meetings and subject to the notice requirements of special meetings.

Adjourned or recessed meetings. Often boards will adjourn or recess one meeting to a future date, to be completed at that date. The adjourned or recessed portion of the meeting is considered a continuation of the first meeting rather than a separate meeting. The notice provisions recognize this practice and provide that if the time and place of an adjourned or recessed meeting is set at the first meeting, and if proper notice had been given of the first meeting, no further notice of the adjourned or recessed meeting is necessary.

Special meetings. If a public body holds a meeting at a time or place other than that shown on its filed schedule of regular meetings and that meeting is not an adjourned or recessed meeting, then two forms of special notice must be given of the meeting. First, notice must be *posted* in a public place. The first choice is the principal bulletin board of the public body. If the body has no such bulletin board, then the notice must be posted at the door of its usual meeting place. Second, notice must be *mailed or delivered* to any news medium—newspaper, wire service, radio station, or television station—requesting it. Both the posting and the mailing or delivery must occur at least 48 hours before the special meeting.

Emergency meetings. Occasionally a public body will have to meet on less than 48 hours' notice, and the act provides for such occasions. If a body must meet to deal with an emergency—defined as "generally unexpected circumstances that require immediate consideration by the public body"—it may do so as fast as the members can be brought together. Public notice is satisfied by giving notice of the meeting, as soon after the members are notified as possible, to each local news medium that has requested emergency notice. This may be done by telephone or by the same method used to notify the members of the body. Such an emergency meeting is limited to consideration of business connected with the emergency.

The notice provisions also became effective October 1, 1978.

The future

Finally, Chapter 1191 extended the life of the open-meetings study commission into 1979, directing it to report to the 1979 Session of the General Assembly. In the months to come, the commission will have before it a review of the remaining provisions of the open-meetings law. Among the broad areas it probably will be addressing are the proper occasions for executive sessions, the list of groups completely exempt from the statute, indirect denials of access, and remedies.□

Two Officials Look at the News Media

The State Official

Editor's Note: Institute faculty member Elmer Oettinger interviewed **Joseph W. Grimsley**, *Secretary of the North Carolina Department of Administration. Mr. Grimsley has had a number of years' service in state government, and in 1976 he was Governor Hunt's campaign director.*

Oettinger: Secretary Grimsley, you've had background and experience in both federal and in state government, and now as head of a major state agency. What are your impressions of the actual and desired relationship between news media and public officials? What do you conceive to be problem areas? Let's start with your first awareness of the news media.

Grimsley: Well, of course my first recollections were living on a farm and having the newspapers tossed out of the carrier's car about 3 o'clock in the afternoon and everybody rushing to read the sports page, primarily.

Oettinger: You say you enjoyed the sports page. So do lots of others. Yet polls indicate that perhaps that only about 5 per cent of the public read the *editorial* page. If most people do read sports pages and comic pages, rather than news and opinion pages, what does that mean to the public official?

Grimsley: Most people read the headlines on the front page, and then flip to the sports page or the local news section. I would say that the last thing that anyone reads is the editorial page, except maybe the opinion leaders themselves. Editorial writers don't have much influence on the people as a whole. News stories have a great deal more impact than their editorials do. To some degree they can influence the influential—and I suspect that's what their aim is—to reach the thought leaders of the community.

Oettinger: Is there something amiss in a democracy if only a few people read an editorial page?

Grimsley: No, I don't think so. If reporters are doing a good job, the information they provide permits the individual reader to write his own editorial in his own mind. There's no reason to let somebody tell you what you should think if you are really gathering information yourself. That's the benefit of democracy—you have that choice.

Oettinger: So the private citizen can have a sort of casual attitude to the press. He reads the papers, listens to radio, and views TV; he might get to know a reporter or an editor as a member of a club or church. But he doesn't have the same sort of interest, impact, or interaction that a public official has. Is that right?

Grimsley: Well, I think the public has become alienated and skeptical by what they see in the news media. Look at the Vietnam War. Television went right into your living room covering the war. The next morning you read another version of the war through a newspaper. People have to feel skeptical when they get different perspectives from different media. You see something on television and get one view of it; then you read a different account of the same thing in a paper, and you don't get the same view of it. You begin to be skeptical.

That was certainly my frame of mind in '72, starting with the gubernatorial campaign I was dealing with. The press would take a statement of mine that I fully believed and it would wind up in print very different from what I had said, and different from what I had intended. The translation of a person's comments that takes place through the reporter or the editorial writer is very likely to build skepticism. People who sympathized with President Nixon got very upset with the press because the message they felt and the message they were seeing and reading were not the same.

Oettinger: Couldn't those people have had a misconception of their own—yet blamed the news media for reporting something different from their own preconceptions?

Grimsley: Well, I am not sure the press was totally right. Certainly Nixon was not right, but I am analyzing how one becomes skeptical of the news system. I think that comes because the citizen gets news from several sources—radio, television, newspapers, magazines. So he gets four different messages. Well, he begins to mistrust one or two of them—or three of them. That has been my reaction as a political campaign director as well as government official. One message is reported differently by the various media. And the official becomes skeptical of them.

The thing that bothers me about the reporting of government by the capitol press corps is that, while some reporters are extremely careful about their reporting techniques, others are not. It is important for a reporter to check out information with both sides on an issue, or three sides, if there are that many. I know that a daily newspaper works under pressure,

Joseph W. Grimsley

but most reporters write only one or two stories a day, and they can take time to pick up the phone and verify information or gather some extra facts. Some reporters are very conscientious about doing this, but some will write a completely one-sided story and never call you. The national coverage of the Joan Little trial is one recent example.

Oettinger: A national news author consulted Miss Little or her attorney but did not ask our correctional people for the other side of the picture?

Grimsley: Right. And some capitol press corps reporters would do the same thing. Probably on a day-to-day basis they do check stories out adequately, but some become editorialists more than necessary. An editorial writer has that right, but by-line reporters shouldn't editorialize.

AP and UPI reporters are most professional at checking things out, getting both sides and trying to present a balanced story. Younger reporters tend to be much more conscientious than older ones, maybe because their editors check on them more thoroughly. Senior reporters, even in the wire services, begin to take liberties.

Oettinger: You indicated earlier that your relationship with the press has undergone change over the years that you have been in governmental service and that there is a distortion of information in the press. Why this distortion?

Grimsley: I see very few radio and television people. They don't call on me, and I don't hold press conferences that much. Most of my relationships with the press are really about stories on me personally. Most of the stories on me are profiles. In such pieces you get out of the story whatever the reporter came to get. If he felt I was doing a good balanced job, I got a good balanced article. If he had already written several critical articles on things I had done, the new article would probably be very critical.

Oettinger: Are you saying that the press relies on preconceptions? And that there is a viewpoint staked out in advance?

Grimsley: Absolutely. The individual reporter has as much personal interest in his story as any one else. If I have prejudices and biases as I handle my management role here and carry them into my work, the reporter does the same thing in writing his story.

Oettinger: Let's say you release a story to the press—perhaps you announce the appointment of

new members to a certain board. That kind of article normally would be factual.

Grimsley: Right. The minor boards and commissions may be reported factually, but if you release the names of appointees to the Transportation Board or the Economic Development Board, reporters may attempt to tie the appointment to a political relationship with a headline like "Major Contributors to Hunt Appointed to the Board."

Oettinger: Should a headline editorialize?

Grimsley: The newspaper reader has a right to have the story accurately interpreted in the headlines. There are magazines and newspapers whose job it is to get that ten or twenty cents at the newstand—they merchandize. That is not high journalism. A paper that wants to have credibility must have editorial and headline writers who do not draw you into a story by a headline that misinterprets it.

Oettinger: What sort of relationship should an official have with a newsman? Should you have some sort of personal relationship with the reporter who covers your agency or with his editor?

Grimsley: Well, I believe in interaction. I do not think that familiarity breeds contempt—it's more likely to breed understanding. Among the capitol press corps, for example, there are very close personal relationships between certain reporters and state officials. We all make some attempt to develop better relationships with the press, and some press people also try to develop better relationships with state officials for mutual benefit. My great concern about the press covering North Carolina state government is that there is too little coverage of government and too much coverage of politics. I think the capitol press corps primarily covers personalities rather than issues. They are interested in incidents and controversies rather than significant areas of higher common goals. If we don't have a united society in North Carolina and in America, it is partially attributable to the press.

Oettinger: In what way?

Grimsley: Well, it's a part of the American desire to make a buck first and foremost. The drive for profit—selling a newspaper—obviously has great impact on what the press does. If the press is privately owned, it has to make a profit.

Oettinger: The press answer might be that it wants to print what the public wants to read and, if that means profits, so be it.

Grimsley: Maybe. But I don't think we can accept that explanation. It may be good business, but it's not good journalism. The press is trying to appeal to my lesser instincts rather than to my more intellectual instincts. They are really not necessarily contributing to good citizenship. The media are private enterprise; they literally have to sell to make it go.

Oettinger: Suppose a story when published or broadcast does not convey what you intended or thought you said. Do you feel that it is necessary to get a correction? Do you feel that it is important to people to have the perspective or the meaning you thought you gave? What can you do about it?

Grimsley: If you just want to be sure you get in print, you can write a letter to the editor. North Carolina editors generally will carry the response of a prominent official about an issue that they have editorialized on. I've even seen good-sized by-line articles published in response to stories.

But there are other ways to tackle a very biased article. If statements are totally wrong—and this is the way we handled the Joan Little case—you *can* speak out and say: "Here are the errors." Sometimes government officials in a friendly way will call up the editorial director and say: "Let me tell you what was wrong with that." Or you can say: "This issue was not handled right. Here are the facts that really weren't covered." It helps the reporter, especially if he has a bias, to know that there is a legitimate other side to the story. Several times over the last few years, we have called the editor and said: "Look, your reporter didn't check this thing out. Why didn't you get our opinion of the story—because it's completely wrong." The editors usually appreciate the information. They generally do discuss the matter with the news editor or the reporter in an attempt to prevent it from happening again.

Oettinger: Do news or background conferences help? Or releases?

Grimsley: Reporters around here don't do that much background—most of their background discussions are among themselves. The reporters are a clique; they gather information from each other more than from scurrying around and getting it from the people involved. If their contacts were with a broader range of people than primarily with themselves, they would have a greater sense of the total picture. Of course, some reporters do an excellent job. But then they slip—a reporter may write five or six good stories and then he doesn't dig deep enough the next time. You wonder why on earth he would write something like that.

Oettinger: The Department of Administration and most state agencies and some local governments have public information officers. These PIOs often have been in the news media before they went to work for government. What is their role? Are they helpful to you and to the press as a liaison in getting out information? Or are they a barrier to the reporter in his efforts to talk to the official?

Grimsley: The government information official has two roles. One is getting out hard facts that need to be presented to the public—the ongoing actions of the government. Grinding out press releases, providing information on what's happened—a schedule of board meetings, what the board did this week, new appointments. That type of activity is necessary—providing information, since the newspapers cannot gather it themselves.

The second role helps public officials interact with the press. My press person and the Governor's press person do that, and I think as a whole this administration has a good press. But if a reporter is writing a story and he has received a press release that generates an interest, he wants to check it out. Our public information officer's job is to help him contact the right people to get the information he needs for his story. It is important, though, that the information office serve as a liaison with the press. If reporters start digging down into every level of government, that's another matter—it disrupts people's work, and it's not fair for the average employee to be drilled by the press in an area that I'm responsible for. I think, therefore, that there ought to be some protection from the press for the state employee at certain levels, though not at policy levels.

Oettinger: The Supreme Court has said that the press has not only the right but the responsibility to scrutinize government and to expose corruption. How do you feel about that?

Grimsley: I have absolutely no problem with the press's scrutinizing anything in government and politics, but I want it to do so factually. When the press uses guesswork, innuendo, or attack by association, it is irresponsible.

Oettinger: Libel laws make it tougher for a public official or a public figure to recover from the press than for a private citizen. Since the *New York Times* decision in 1967, a public official has to prove actual malice in order to win a libel suit. How do you feel about that?

Grimsley: No public official, movie star, elected or nonelected public employee, or opinion leader should be subject to the kind of abuse that a negative media exposure can bring on a person. I can see why *government* itself can be attacked. The news media have every right to do that. "Politics," techniques, funding, and things can be attacked in any way one wants to. But the *individuals* involved should not face the level of animosity from the press that they do.

Not just public officials. I'm talking about *all* individuals. Through press activities, people get hurt personally who are really innocent bystanders. The press has no right to bring a lot of private people, one time in their lives, into public situations. That's why rape victims should not necessarily be identified in the press. Why let everybody know that Joe Blow's wife was raped, totally against her will?

Oettinger: Once again, the Supreme Court has held that the press has a right to publish the name of rape victims. Are you saying that there is a press responsibility in an individual community—a sensitivity—that may require something different.

Grimsley: That's right. Certain personal things need not be put into the press. They should be in the court records—they should not be hidden. But the individual should not be held up as a personal example of the news that is being covered.

Oettinger: Why do you feel that the press sometimes goes overboard in coverage?

Grimsley: I think it's fear of loss of the First Amendment—they fear that any limitation is the beginning of more limitation. Talking with my friends in the electronics and press media, I get the impression that First Amendment rights are a religiously defended concept for fear that somebody might impose restrictions on the free press.

Oettinger: Let me be sure I understand you. This fear causes the press to go beyond what you believe are proper limits in reporting and editorializing to be sure there are no limits?

Grimsley: That's right. I think all the media are doing it for that reason, and doing it for more money. They test that right every time the question might be raised to be sure there are no restrictions.

Oettinger: Let's look at something a little more specific. The state open-meetings law has been interpreted recently by the Supreme Court rather narrowly. Should meetings be open?

Grimsley: All board and commission meetings of both state and local government should be open. We are seriously looking at the Public Policy Research Group's recommendations for open meetings of the Council of State and how this would affect property negotiations. The question is whether openness gets in the way of actual negotiations or affects property costs and values. We have just about decided that nothing happens in the Council of State meeting that affects property values because we have largely negotiated matters ahead of time. We lay the agenda out in public before the meeting and the results immediately after the meeting. The owner already knows what he will be offered. He knows what he has been quoted on. So our basic feeling is that open Council of State meetings on property acquisition would have no negative effects on our ability to do our jobs.

Oettinger: If you were asked to make suggestions to the press and to government to improve relationships and ways of getting the news out and to reach people, what would you say?

Grimsley: I would say, Let's have more trust in what the governmental official is saying. I am not saying complete trust. I'd say, Have more trust that the press statements that we send out are factual, containing good information.

Trust and credibility are essential between the public official and the press because the citizen already is feeling alienated in a system of government that requires some trust—and a democratic press depends on a democratic society. The press needs to understand that if the people become alienated from government, they also are going to become alienated from the press. What happens to government is going to affect the press. The press is part of the whole. It has a role; it has a certain adversary role—but not to the point of driving deep wounds into the system. You know, when people get extremely skeptical, both the press and the public official ought to be looking for ways to heal.

The Local Government Official

In the following interview, Oettinger also talks with **Bruce Boyette**, *the city manager of Wilson, North Carolina.*

Oettinger: Any public official has to have a perspective on his responsibilities as they relate to the public. As a city manager, what is your perspective?

Boyette: Well, first, that an informed public is the best support that a public official can have. As you know, this is a city manager state. All North Carolina cities of any size have managers. Yet, if there is any fault with the city management form of government in North Carolina, it is that the public is not well enough informed about it. They sometimes simply don't understand how the manager system works.

Oettinger: How do you try to overcome that?

Boyette: Primarily through the press—and by "press" I mean radio and TV as well as newspapers. You can communicate directly with the citizens through the mail or in speeches as a supplement to the press, but if you try to *substitute* a managed form of release of public information for public consumption, it's automatically suspect. So the press—already established and accepted by the public whether they agree with it or not—is the only way to go.

I personally don't much seek out the press as a method of conveying thoughts to the public. I'm appointed, not elected, and therefore don't have the need that an elected official might feel to communicate with his constituents. But I do know that an informed public is a cooperative public. It's a matter of mutual confidence. One of the first things that a new manager going into a city must do is establish confidence in himself and in his office. If that is not done—if some bias or misunderstanding exists in the media about the manager and his office or the city or county administration—then everything loses credibility and is put in a wrong perspective.

Oettinger: Would you be comfortable if the media left you alone—if it didn't cover government?

Boyette: No. Because then I would have to try to inform the public on my own. I would like to have a public information officer. A city the size of Wilson with the budget we have and with our utilities operation—city-owned except for telephone—needs a public information officer.

Oettinger: What kind of person would you like a city public information officer to be?

Boyette: We need a person responsible for seeing that news media—whether print or broadcast—have access to appropriate information: a person who could

establish mutual respect and have a more personal relationship with the news media than the manager can possibly have in view of all of his other duties.

Oettinger: Is a media background for such a person a requisite or just desirable?

Boyette: Desirable but not a requisite. It certainly would be helpful because the PIO would know both sides of the relationship. Someone with a press background would know how the press sees local government officials and how to deal with it best.

Oettinger: If you had a public information officer, would that person serve as a buffer preventing reporters from seeing you? Would it make you less accessible to the media?

Boyette: No. Otherwise, I would in no way consider employing a PIO.

Oettinger: Do you have now any rules about who may give out information?

Boyette: No. There's a tacit understanding in the departments that only people in responsible positions should talk with the press. But if our building inspector were to come up with a recommendation on a school, for example, he doesn't have to come through my office to make that release. I don't have to approve what he's going to say. I have a very competent staff, and I wouldn't think of doing that; I know some managers who do because of some unfavorable reaction to certain reports that were not presented factually or not in the right light.

Bruce Boyette

Oettinger: Have you had any problems with having your people make statements or get into areas where they have only partial responsibility or where more than one agency is involved?

Boyette: Not that so much as having a person who is not accustomed to being interviewed think an interview is over and then, in casual conversation, make a statement that is quoted verbatim later in the wrong light.

Oettinger: Could you illustrate that?

Boyette: Yes. Recently a minimum housing inspector who had been on the job for just two or three months told me that he was going to be interviewed about his activities. I said, "Fine. It's a good way to introduce you to the community." This man had held a responsible position with the military and I felt very fortunate to have him. After he had given a very good interview and the tape-recorder had been cut off, he relaxed, and the reporter leaned back and said he just wanted to talk on a friendly basis. He asked the new inspector how he was getting along in the community, about his military experiences, and that sort of thing. And he inquired: "How do you get along with the absentee landowners? How do you get along with rental agents? This job must be a little difficult, particularly for a black dealing with white people who own substandard dwellings occupied by blacks. There could be resentment." The inspector replied: "Well, I don't have any particular problems. My military experience has taught me that when you run into opposition, you don't just back up and walk away from it. You have a duty and a responsibility to go through with it."

As that was reported in the press, it read as if it were an open declaration of war. And I got quite a few calls from people asking: "What kind of person have you hired?" "What are you doing at city hall?" And it was all the result of misunderstanding.

Oettinger: Under the state's open-meeting law, there are a few situations in which meetings may be closed, but it's entirely the council's option. What's the policy in Wilson?

Boyette: Well, sir, our meetings are open, though a motion has been made several times in open meeting that the Council go into executive session to discuss a personnel matter or some matter between the city attorney and the council. The statute permits closed sessions for personnel matters and attorney/client discussions, as you know. We do have a problem with the open-meetings law. Some matters just need to be handled in privacy for the public good. Managers therefore sometimes use the simple expedient of a written memorandum that goes only to the members of the council. This, in my mind, makes all of those parties guilty of circumventing the law—and it should not be that way. The manager who hands a confidential memorandum to councilmen to inform them of something they need to know that should not be made public at the time should not have to feel guilty.

But generally, I find that if you have an open, above-board relationship with the media, they reciprocate. If you try to take advantage of them, they resent it and you will regret your action.

Oettinger: You commented earlier that newspeople are underpaid and consequently move from job to job very often. From your standpoint, what problems does this turnover create?

Boyette: Well, you have to keep starting from scratch. You get a green reporter and after awhile you and he begin to understand each other. He begins to know more about government and things are going fine. He's asking better questions and writing better articles. Then he leaves and you get a green one again. What has taken quite a bit of time to establish is torn down: mutual confidence in one another and understandings of individual attitudes, interpretations, and shortcomings.

Also, sometimes newspeople have biases about other public officials so that they're skeptical of anything that you say to them. Frankly, I have to say that the journalism schools foster the idea that governmental officials are either incompetent or corrupt and have to be exposed. That's probably the result of Watergate. Nevertheless, this attitude makes it very hard to start with a new reporter, especially when you've had a good relationship with a predecessor who had confidence that you know what you're talking about.

I have a deep respect for a public official who is ready and willing to seek public office and to serve the public and to be as misunderstood as these officials are at times.

Oettinger: You've said that the turnover rate makes it hard to establish a knowledge of government among reporters that permits officials to have confidence in the news media. We change officials, too—elected and appointed. New people come in constantly who might not be as knowledgeable as you or the news media would want them to be. Isn't there a reverse problem here?

Boyette: Yes, there is. Hiring department heads, under the model council-manager form of government, is the manager's responsibility. With new personnel, especially administrative personnel, you have to be careful to find out what their feelings about the media are, what their experiences with media have been—just as much as what their practices in former office have been. For example, I've just hired a new police chief, and I am extremely interested in what the news media in his hometown thought of him and vice versa.

Oettinger: What press coverage does Wilson have?

Boyette: We have a local evening paper, and the Raleigh *News and Observer* covers events here sometimes. There are also three radio stations in town. We don't have any television stations, but some of the nearby ones cover us pretty regularly. We also have local CATV, including news.

Oettinger: Do you treat these different media differently? First of all, is treating them all the same way fair? Or does the very fact that they are different and, therefore, have different demands require you to treat them differently to be fair?

Boyette: I try to treat them all fairly, but that doesn't mean exactly equally as to time releases and that sort of thing.

Oettinger: Why?

Boyette: I try to keep from releasing news through this office. I sincerely try. I don't call press conferences as such. I think that that is the proper function of an elected official such as the mayor. But you and I know that information does flow from this office because Wilson has no public information officer and because it is necessary that information be made available to all of the news media and to the public. As for fairness, there are some matters I have no control over. For example, a radio station reporter may bring a tape recorder in here and then a few minutes later I may hear myself on the air. But it's impossible for a reporter from the *Wilson Daily Times* sitting here to publish what I say at that moment and then, if it's after

press time for that afternoon's paper, the news is old before the next afternoon's paper comes out. I don't manage releases. I am aware that media operate on time differences, but if something of importance needs to be released, it's released.

Oettinger: Does the newspaper understand this?

Boyette: Yes. I said I didn't manage news—still. I try to take the newspaper's time problem into consideration so that if an item is not of major importance, it might be released in such a way that it is not two-day-old news in the paper. If this is managing news, then I guess I am guilty of it to a certain extent. But these instances are few and far between.

Oettinger: What about releases? Should they be prepared with thought of newspapers or radio or television's needs?

Boyette: I don't try to phrase things the way that they'll come out on the air nor how they'll be printed in the paper. I try to give factual data. The media representatives write it up in their own individual ways. Releases from this office or any other office in this city are given importance through the media, not through us. I find that one radio station, for example, will give a lot of time to a particular story that neither the newspaper nor another radio station thinks is that important.

Oettinger: Are you and other people in local government invited to speak over the radio or appear on TV? And do you accept?

Boyette: I've done so and enjoyed it. But that was at a time when the council and the mayor were saying, "You are the one to appear because you are into these matters every day and have more facts than we do. We would prefer that you handle these things rather than send them to an elected official." In the last four years, however, I have tried to stay away from that because I have felt that the local elected officials want to make such statements and appearances. And they are entitled to do so.

Oettinger: That raises another point. You're an administrator employed by the council, which is elected. So do you have to get the news out the way they want it?

Boyette: Absolutely. The difference is in dealing with different councils. An election can result in a complete turnover and a completely different council with a completely different attitude; an election can also displace only one council member and still result in completely new official attitudes in that body. Sometimes the new person can entirely reorient how the council deals with its manager, with the press, and with the public.

Oettinger: What would an appointed official do if he were told specifically not to talk to the press about a particular subject.

Boyette: I've never been given an order like that by a mayor or a council member. I have certainly been made aware in general conversation: "Mr. Manager, we feel that it is the business of the elected official to be the official spokesman of council and if it is convenient for him to do so, we would prefer it to be done this way." A paid administrator of any elected body who doesn't understand that and who doesn't make it convenient for that body to release information as it pleases is asking for trouble.

Oettinger: Suppose you uncovered something radically wrong within government—that someone had been corrupt or had neglected duties, for example. Would you publicize it?

Boyette: Of course I would publicize it. It's public business and the public has a right to know about it. The greatest mistake I could possibly make would be to try to cover it up. I would act in this order: I would first notify council and then immediately notify the press. The officials of this city couldn't keep me from notifying the press, nor would they try. Don't get me wrong, I wouldn't be trying to inflame or seek notoriety, but trying to cover up a mistake—honestly or dishonestly made—is wrong. You'll only make it bigger.

Oettinger: Suppose that accurate information is reported in a way that you deem to be distorted and you think it needs correcting. How would you go about getting a correction?

Boyette: I'd go to the official who gave the information and tell him that I think either he or I should ask the reporter for a correction. But that would be under exceptional circumstances. Getting a correction doesn't usually work. When the error is brought to press attention, the correction doesn't receive the same space, length, or prominence as the original story. Nor does everyone who saw or heard the original story see or hear the retraction. The next time the reporter came in for a story, I'd just tell him that I didn't like the way he handled the last one.

Oettinger: Are press goals different from yours? Is there a difference in the press's perspective on the one hand and the government's on the other and, therefore, perhaps a difference in the way each feels it serves the public?

Boyette: Yes. The press has an absolute responsibility to keep the public currently informed. But the city administration has an absolute responsibility to provide certain services in the most expeditious and most economical way. These responsibilities are not necessarily always compatible.

I feel very much divided about this matter. There's no question in my mind about the right and the responsibility of people to know and to be correctly informed—though I do have doubts about timing sometimes. Yet if the timing is allowed to be delayed by law, it can become an indeterminate time and the public never informed. At the same time, it's very hard to conduct the public's business in a normal and sensible way when every action, every word of debate, every posturing of an elected or appointed official is a matter of news. The press should not feel morally obliged to print every word and every maneuver of an official. A more restrained approach makes so much more sense than what is now evident in some media coverage. The public's right to know does not excuse the journalist from using judgment in selecting what deserves publication.

Oettinger: You feel there's a conflict sometimes.

Boyette: Definitely. An understanding between the press and the public body, whether appointed or elected, is essential. I don't mind having the press sit in on any discussion at any time. I do resent having it sit in on a study session and report the differences and the posturings instead of the objectives sought and reached.

Oettinger: Some states have open-meetings (sunshine) laws that are more open than ours. Do you object to that?

Boyette: Yes, I do. Say, for example, a North Carolina city manager becomes interested in a job opening in Florida but doesn't want to say anything to his council until he checks out the prospect. Still, he goes down for an interview. In Florida the press can even sit in on the interview and report who was there and what was said. Of course, word gets back to his council that he wants to move. It could influence his entire career in the city where he works. This kind of circumstance is unfair and foolish. The public has a right to know and to be properly informed, but not to that extent.

Oettinger: Now the press might say that it's appropriate to leave the discretion to the news media in such cases—as of course the Florida Sunshine Act would.

Boyette: To some persons and papers, yes; and to some, no. And you also can't leave to just any city manager's discretion when and how certain items are reported. *Somebody* has to have this discretion and perhaps the press is the right one—or perhaps it should be divided. What I'm saying is that if the press properly exercised that discretion, generally there'd be no problem.

Oettinger: You've spoken about the dedicated public official. But the journalist sees his role as a service role, too. What about the journalists you know?

Boyette: Those I have known who are experienced, I respect deeply. But not the fly-by-nights who come in here and stay thirty days and then go somewhere else. I object to editorializing in news stories. I have seen one or two reporters who displayed certain biases and had approaches very different from mine. But I agree, most reporters are dedicated—only dedication (certainly not their pay) would keep them at their jobs. On the whole, we have had very good factual press coverage.

Oettinger: So it comes down to human relations in government and press practices. How would you sum up?

Boyette: Press and administration inevitably will have different approaches and different goals. When the goals of the press become the goals of the administration, then you've got either a controlled press or a controlled administration, and neither is healthy. There *must* be this difference. However, I do not like to see differences stressed so much. Press and government ought to have an unspoken understanding about the need to inform the public and about how and when to do so.□

Governmental Public Relations — Keeping in Touch with the People

Nancy B. Wolfe

WHEN A LOCAL GOVERNMENT organizes a program specifically labeled as a public information or specifically gives one official the responsibility for public information, it is saying that it is committed to telling its citizens what is going on in government.

When governments rely solely on the media to carry their messages, they are surprised when school issues are defeated, water bonds are rejected, or planning hearings are unattended. Residents often say, "We've never heard of this project before. How come you've kept us in the dark?" Elected officials may wonder why the public rejects projects. They ask themselves whether the public has seen the TV news, heard the radio programs, or read the newspapers.

At this point, many governments realize that they need some continuing, systematic way to keep the public informed—a program that not only answers questions but anticipates the questions. They recognize that informing the public should take place regularly and not just at election times, when bond issues are at stake, or when programs must be adopted. They know that the public is usually unwilling to be a rubber stamp or absentee stockholder.

Governments should have a defined policy regarding media relationships, a policy that will vary from unit to unit. It may be an open-door policy that allows reporters free access to any person at any time; or it may be closed (particularly regarding personnel matters) and require reporters to talk with only one individual. What is vital is that a policy exist and that it be effective for the particular governmental unit.

In issuing information, however, governments have a larger constituency than just the media. This is why many governments have developed auxiliary channels to reach the citizens they serve. Thus communications programs have developed not because there are problems between government and the media but because government has recognized the functions and responsibilities of media and government are quite different. Governments are concerned with providing information from the beginning to the end of a program. The media, on the other hand, are inclined to be crisis- or confrontation-oriented, more interested in the news of the moment than in the routine neighborhood watch or monthly parent-teacher meetings that may be important to the residents. They select not only what but also how events will be covered, and this is as it should be.

When governments realize that the media cannot be expected to "promote" coming events or governmental programs, they consider developing a public information program. Some of these programs fail, because the governmental unit believes that simply having an information officer will guarantee good press relations and instant community support. The truth is that the public relations function should report on programs as they actually are; if the governmental unit is ineffective, no amount of public relations or wordage will correct that situation.

Sound public information programs foster understanding, cooperation, and support by telling the citizens about governmental philosophies, positions, and activities and the successes and problems encountered in serving the public. These programs go by many names—public affairs, community relations, public information, community service, public relations, or citizen service. Whatever the label, they all tell their citizens that their government is systematically reaching out to them to build a continuing relationship.

A full-scale PR program may encompass four kinds of communications—interpersonal, oral, written, and

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visual—plus a fifth activity, research. All five serve the external public—as individuals or as groups through the media—and the internal public—employees and elected officials.

Among the activities that may arise under interpersonal communication are dedications, tours, conferences, mediation between citizens and government, open houses, news conferences, special events, hotlines for information or complaints, bond referenda, budget hearings, mobile governmental offices, board orientations.

Oral communication uses speakers' bureaus, speechwriting, and (for larger governments) radio programming and television production—particularly in those areas with cablevision or public TV discussion programs.

Written communication includes news releases, news backgrounds, brochures, employee and neighborhood citizen newspapers, and much more.

Visual communication concerns the physical presentation of a message—an audiovisual slide show or program, the design of a report's cover, photography, exhibits, displays, and advertisements—even logos, letterheads, and forms.

Research is necessary in public relations because what government says is true *must* be true. Research also seeks to determine citizen desires through surveys, direct interviews, clip files, and personnel data sheets.

GOVERNMENTS UNDERTAKE A PROGRAM of public relations because they believe that they must be accessible to and understood by the public they serve—not sporadically or when convenient, but continuously. They understand the importance of telling everything—good news and bad, failures and successes.

These governments realize that every employee is a public spokesman, but they also know the importance of having someone to direct a communication program if it is to be accountable and effective.

The program itself is different from government to government. It may be a full-service, five-point program as outlined above or a selected activity program, depending on government's resources and public relations needs. In smaller units, the function may be sustained by the mayor, city manager, assistant city manager, or an outside public relations firm serving as a consultant. The larger North Carolina cities, counties, and school systems consolidate the public relations function under one director rather than having information officers scattered through the various departments. Such consolidation cuts personnel needs, duplication of effort, and down-time.

A public relations office should serve all agencies within the government, either on request or by its own suggestion. And it serves all the public, including the media.

The PR office also initiates approved government-wide programs, just as other departments launch programs approved by the policy-makers.

The success of any public affairs program rests with its delegated responsibility and authority. Its director provides layman's insight into technical matters that may be overlooked by technical professionals and may serve as the public's referee or arbitrator.

The director may also advise management or elected officials about pending actions and community attitudes and develop position papers or statements on programs. The effective director, as part of upper management, is involved in administrative decision-making and can act effectively and confidently when he must.

A large-scale public information program is not for amateurs. The director of such a program should be trained, experienced, and professionally qualified. The PR officer should be equal in rank to other department heads and have direct access to the chief administrator. Such a relationship prevents "catch-up" operations. An informational program that is constantly putting out fires or mending fences is one that had no part in planning the project. Such a program is a waste of taxpayers' dollars.

WHAT DOES A PROFESSIONAL PR PROGRAM COST? As much or as little as the unit wishes to spend. The key ingredient is a seasoned professional who can perform or supervise the entire function. Salaries should be commensurate with those of other department heads, and they will vary from community to community. Besides personnel costs, a PR program will also have costs for printing, typesetting, graphics, and research. Capital items may range from a single sophisticated typewriter to a television studio, depending on the program's scope. Capital spending should not be excessive, but an accountable professional will have legitimate need for some capital requests.

What are the benefits or savings from such a program? What can be expected from public information/relations? In a word, much. From one perspective, time is money, and personnel costs represent the largest single item in any governmental budget. How expensive, for example, is it to have to draw and redraw certain programs because the public "did not know" these plans were emerging? Suppose these programs are stalled. What is the effect? How much does it cost to hold referendum after referendum?

A public relations program has as its prime assignment the job of preventing problems—to anticipate and identify the problems that may occur as governmental policy develops. By seeking community understanding,

it attempts to forestall the expensive and time-consuming process of redoing a complicated program. It realizes that the old, the young, men, women, black, red, white, yellow, rich, and poor all have different questions about their government. The PR program seeks to meet their needs for information so that all become involved in their government or at least are aware of what it is doing.

IN 1969 Winston-Salem and Charlotte became the first North Carolina cities to adopt defined public relations programs. Since then, five other cities, three counties, and twelve school systems have followed suit. These programs range in scope from providing comprehensive services to a selected operation staffed by only one professional.

Furthermore, many groups—the Public Relations Society of America and its North Carolina chapter, the International City Management Association, the National Training and Development Service, the National Association of Counties, the National School of Public Relations Associations and its North Carolina chapter, the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and the Institute of Government—have programs or sections attuned to governmental public relations needs.

Why such an interest in governmental public relations? Because it is effective. Public relations fosters continuing, open communication with the public. The public has a right to know of the progress, setbacks, successes, and failures of its government so that citizens can react with knowledge and understanding. They can throw out or re-elect officeholders and see that programs are stopped, continued, expanded, or curtailed. Such an idea is not new. It is based on the admission that the citizen is the stockholder in government. That is why many governments today go beyond fielding reporters' questions or providing answers on an information hotline.

When all is said and done, government serves best when it anticipates the people's need to know and then provides a way to meet that need that is direct, open, and far more than a minimal response.□

Press Access to Public Records

(continued from p. 26)

larly since the reporter can give the newspaper very little assurance that the sewer contract will contain anything of interest. The reporter's information came from an anonymous source, who may or may not be telling the truth. The newspaper can hardly be criticized for refusing to invest substantial amounts of time and money on a lawsuit amounting to little more than a fishing expedition. Even if the newspaper successfully challenged the custodian in court and discovered that the contract did indeed contain illegal provisions, it may have provided a public service but cannot recover the expenses incurred in the litigation.

On the other hand, the custodian probably has little to fear by refusing to permit inspection of the contract. Although the statute requires him to perform his duty, he probably will not suffer for his defiance of the law. He appears subject to criminal prosecution for willful failure to perform the duties of his office,[18] but as a practical matter it seems unlikely that he would actually be prosecuted. He is not otherwise subject to any judicial sanctions until the newspaper obtains a court order compelling him to disclose the contract. If he refuses to obey that order, he may then be punished for contempt of court, but the court may not punish him until the order has been issued and access has again been denied.

The right of access, therefore, often can be effectively and permanently denied by simple delays and even outright refusals to permit inspection. Most government officials are willing to comply with the disclosure requirements of the public records statute, but this illustration shows that a custodian can, if he chooses, violate the statutory requirements, secure in the knowledge that he is unlikely to be punished for not complying with the statute until a court orders him to comply.

Conclusion

Despite this flaw in the statute, the right of access to public information should not be ignored. When public officials are made accountable and the individual reporter is ensured his right of inspection, the general public is the ultimate beneficiary.□

18. N.C. GEN. STAT. § 14-230 (Supp. 1977).

Right of Reply

YOU WRITE A LETTER to the editor. The paper doesn't publish it. Do you have a right to have it published? The United States Supreme Court says not.[1] Why? Because the paper retains control of its content. Otherwise, its First Amendment rights would be violated.

As a practical matter, newspapers publish most letters to the editor. A long-standing controversy about right of reply exists, however, and proponents urged a legal right of access to the press as a compelling need. Some pointed out that a right of reply commonly exists in Europe and South America.[2] Many saw an inequality in the power to communicate ideas between the private citizen and the paper. They cited opinions of justices that might indicate that the Court would be sympathetic to their cause. ". . . [T]he framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest."[3]

Proponents of a right of reply have claimed that newspapers are big business, no longer competitive, fewer in number, and enormously powerful, with the "capacity to manipulate popular opinion and change the course of events."[4] The result, the proponents said, has been "to place in a few hands the power to inform the American people and shape public opinion."[5] And they argued that, without a right of reply, the public has lost any power of response or ability to contribute meaningfully to any discussion of issues.

The issue came to a head in 1974, when a Miami newspaper published articles criticizing a candidate for state office but refused to print his letter responding to the criticism. The candidate brought and won an action seeking declaratory and injunctive relief and monetary damages under a Florida statute that gave a political candidate a right to equal space in responding to newspaper criticism.

The United States Supreme Court, reversing the State Supreme Court, found that the Florida statute violated the First Amendment guarantee of a free press because (1) the U.S. Constitution does not mandate press responsibility, (2) editors and publishers cannot be compelled to publish anything that "reason" tells them should not be published, (3) a First Amendment purpose is to protect free discussion of governmental affairs, which includes the discussion of candidates, and (4) the statute intrudes into the function of editors.

For the unanimous Court, Chief Justice Burger wrote: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[6] He concluded: "A newspaper is more than a passive receptacle or a conduit for news, comment and advertising. The choice of material to go into a newspaper, the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistently with First Amendment guarantees of a free press as they have evolved to this time."[7]

Broadcasting by its very nature and circumstances invokes differences in laws and values from printed publications. A right of reply in broadcasting relates to the "fairness" doctrine, which requires that issues be presented fairly, with coverage of competing views.[8] A broadcaster is required (by the FCC under the mandate of Congress) to furnish reply time on the air to an individual who has been personally attacked in a broadcast.[9] Similarly, political opponents of candidates for public office endorsed by a broadcaster's editorial are entitled to reply. Broadcasters sought, but were denied, the same application of the First Amendment to the right of reply that was granted to newspapers.[10] The Court sees the fairness doctrine as part of a broadcaster's obligation to operate in the public interest and its application as an enhancement rather than an abridgment of First Amendment rights.—*Elmer R. Oettinger*

1. The Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
2. French law permits a reply to contain a statement or point of view. German law limits a reply to correcting factual misstatements.
3. Black, J. in Weiman v. Updegraff, 344 U.S. 183, 194 (1952). For another relevant quotation, see Douglas, J. in Terminiello v. Chicago, 337 U.S. 1, 4 (1949): "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."
4. Miami Herald v. Tornillo, *supra* note 1, at 736.
5. *Id.*
6. *Id.* at 740.
7. *Id.* at 741.
8. The Fairness Doctrine (47 U.S.C. Section 151 et seq., Capital Communications Section 10.5), imposed on radio and television broadcasters by the Federal Communications Commission, is distinct from the "equal time" requirement (47 U.S.C. Section 315) requiring that equal time be allotted all qualified candidates for public office.
9. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
10. *Id.*

The Law of Libel

William C. Lassiter

LIBEL IS WRITTEN or printed defamation as distinguished from oral defamation, which is slander. Libel may be in the form of written or printed words, cartoons, pictures, caricatures, signs, or other graphic representations of a defamatory nature;[1] libel may also occur in television or radio broadcasting.[2]

This discussion will be confined to civil libel.

To constitute a libel for which a civil action for damages will lie, it is not necessary that the publication impute the commission of crime, infamous or otherwise; it is a libel to make a false publication which holds one up to public hatred, obloquy, contempt, or ridicule, or which is calculated to injure one in his trade, business or profession, by imputing dishonesty, fraud, indirect dealing, incapacity or other disgraceful conduct.[3]

Libel *per se* is a false and unprivileged publication which, upon its face, considered alone without innuendo, charges a person with criminal, dishonest, or immoral conduct, or charges one with having an infectious disease, or tends to subject one to ridicule, contempt, or disgrace or tends to impeach one in his trade or profession.[4] If the injurious character of the published statement appears not on its face but only in consequence of extrinsic, explanatory facts showing its injurious effect, the publication is said to be actionable only *per quod*. In such cases the injurious character of the words must be pleaded and proved, and to recover monetary damages there must be allegation and proof of some special injury and damage to the plaintiff.[5]

It is not necessary that one defamed be referred to by name. It is sufficient that the description or reference in the libelous publication should identify him.[6]

Where there is a mistake in name or description so that an innocent person is identified as the subject of defamatory charges, it is no defense that the mistake was made without malice or ill will.[7] Where a private person, through no fault of his own, has been exposed to serious injury to his reputation by the negligent failure of a publisher sufficiently to identify another person to whom the publisher intended to refer, the publisher is liable to the individual so defamed.[8]

Law of libel federalized

In North Carolina and in the other 49 states, the law of libel has been radically changed during the past 14 years. Beginning in 1964, the Supreme Court of the United States has "constitutionalized" the law of libel. Thus, the basic principles of law applicable to defamatory publications have been established by decisions of the Supreme Court.

Public officials as plaintiffs

In *New York Times Company v. Sullivan*,[9] it was held by a unanimous Court as a matter of constitutional law under the First and Fourteenth Amendments that a plaintiff in a libel action who is a public official cannot recover damages for the publication of a defamatory falsehood unless he proves with "convincing clarity" that the publication was made with actual malice—that is, with knowledge of its falsity or with reckless disregard of its truth or falsity. (See page 53 for a discussion of actual malice.) The plaintiff, an elected municipal commissioner, sought damages for libel based on a paid "editorial" advertisement. A judgment on a verdict for $500,000 was reversed. In the opinion of the court, Mr. Justice Brennan asserted that the case was considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[10] The rule was stated as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . .

The *Times-Sullivan* rule has been applied in two cases reaching the appellate courts of North Carolina (summary judgments for defendants affirmed),[11] and numerous federal and state court decisions have applied the rule to a

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Footnotes at end of article.

variety of public officials, elective and appointive, state and local.[12]

Candidates for public office

In *Monitor Patriot Company v. Roy*,[13] the U.S. Supreme Court applied the *Times-Sullivan* standard of liability to a former congressman who was a candidate for the United States Senate. The defendant newspaper published a column describing the candidate as a "former small-time bootlegger." The alleged derogatory conduct had occurred thirty years previously. The Court held "as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*."[14]

Public figures

Three years after *New York Times-Sullivan*, the Supreme Court extended the constitutional privilege to defamatory publications concerning public figures.[15] Thus, for a public figure to recover damages for defamatory falsehood, he must allege and prove by clear and convincing evidence that the defendant published with knowledge of its falsity or with reckless disregard for its truth or falsity.

Who is a public figure? The North Carolina appellate courts have not been faced with the issue. It is a constitutional question, and decisions of the U.S. Supreme Court are controlling. In *Gertz v. Robert Welch, Inc.*,[16] Mr. Justice Powell defined public figures as follows:

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

Justice Powell, also in *Gertz*, made the following additional comments:[17]

> . . . We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In *Gertz*, the plaintiff was held *not* to be a public figure. Gertz was a lawyer employed to handle civil litigation involving a person who had been killed by a policeman (convicted of murder). He attended but did not participate in the coroner's inquest, took no part in the criminal prosecution, never discussed the criminal or civil litigation with the press, and was never quoted as having done so. (Although as a lawyer the plaintiff was "an officer of the court," he was held not to be a public official; he did not hold any governmental position.)

In *Time, Inc. v. Firestone*,[18] the plaintiff, the wife of a scion of a wealthy industrial family, brought an action for alleged defamatory reports of the result of domestic relations litigation between the plaintiff and her husband. She was the defendant in the judicial proceedings ("not the sort of 'public controversy' referred to in *Gertz*"); she did not "freely choose to publicize issues as to the propriety of her married life"; and she had been "compelled to go to court." The Supreme Court held that Mrs. Firestone was not a public figure. The court rejected the defendant's contention that the divorce proceedings constituted a "cause celebre."

In the following cases, the plaintiffs were held to be public figures: (a) *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[19] (Wally Butts, well-known college football coach, attained status "by position alone"; General Walker, who had become involved in a civil rights controversy on a Mississippi college campus, was held to be a public figure because he had purposefully thrust himself into the "vortex" of an important public controversy.) (b) *Greenbelt Cooperative Publishing Association v. Bresler*.[20] (The plaintiff, a "deeply involved" real estate developer and builder in Greenbelt, was engaged in negotiations with city council for zoning variances to allow him to construct high-density housing on his land; there were "several tumultuous city council meetings" in connection with the controversy, attended by many citizens and the meetings were reported at great length by the local newspaper; the Supreme Court stated: "Bresler's status thus clearly fell within the most restrictive definition of a 'public figure.' " The plaintiff had conceded his status.)

A corporation has been held to be a public figure. In *Martin Marietta Corp. v. Evening Star Newspaper*[21] the plaintiff corporation, "the nation's 20th largest defense contractor," had "constantly attempted to improve its position by entertaining military personnel" and had maintained a hunting lodge for that purpose. The corporation's activities had been investigated by a congressional subcommittee; numerous newspaper articles had linked the corporation with "entertaining and the Northrop scandal"; and Martin Marietta regularly distributed news releases through 317 outlets in the U.S. and Canada, and issued a release on the article giving rise to the libel action. The D.C. district court held that Martin Marietta was clearly "a public figure for the range of the issues" discussed in the *Evening Star's* article.[22]

Private individuals

In *Gertz v. Robert Welch, Inc.*[23] the Supreme Court radically changed the law of libel in all of the states controlling civil actions by private individuals based on defamatory falsehood. As a matter of constitutional law, the Court in that case established the following rule applicable to plaintiffs in libel

actions who are not public officials or public figures:[24]

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. . . .

Justices, concurring and dissenting in *Gertz*, made it clear that the concept of negligence had been introduced into the law of libel involving private individuals.[25]

Thus, under *Gertz*, a plaintiff in a civil action for libel, if he is a private citizen and not a public official, can recover only if he alleges and proves fault on the part of the defendant publisher—at least *negligence* in publishing false and defamatory statements.

Prior to *Gertz*, when a publication was held to be libelous *per se*, both malice and actual damages were presumed.[26] That is no longer the law of North Carolina or of any other state. Under *Gertz*, there is no presumption of malice or damages, and fault (at least in the form of a negligent publication) must be alleged and established by a private citizen who seeks to recover for a defamatory falsehood.

In *Walters v. Sanford Herald, Inc.*,[27] the North Carolina Court of Appeals applied the *Gertz* rule and affirmed a dismissal of a libel action brought by a private individual. Judge Robert Martin, for a unanimous panel, said: "The plaintiff made no allegation or showing of fault upon the part of the defendant either in the form of negligence or actual malice."

The Supreme Court in *Gertz* also laid down the following rules applicable to civil actions for libel when a private individual is the plaintiff:

> . . . [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.[28]
>
> . . . .
>
> . . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.[29]

In many cases, it becomes difficult to determine whether the plaintiff is a public figure or a private individual.[30]

Libelous publications in labor disputes

Defamatory falsehood published by a party to a labor dispute is actionable only upon proof by the plaintiff that the defendant published the defamatory statements with knowledge of their falsity or with reckless disregard to their truth or falsity.[31]

Fair comment and expression of opinion

Everyone has a right to comment on matters of public interest and concern provided the comment is fair and is made with honest purpose. Such comments or criticisms are not libelous unless they are written maliciously. Proof of falsity and malice is necessary to defeat this defense.[32]

Prior to the decision of the Supreme Court in the *New York Times-Sullivan* case, the courts of a majority of the states held that the privilege of fair comment did not embrace publications containing misstatements of fact as distinguished from expressions of opinion.[33]

In *Kapiloff v. Dunn*[34] "two major effects" of the *Times-Sullivan* decision upon the defense of fair comment were stated by the Maryland Court of Special Appeals as follows:

> First, it created a qualified privilege for false statements of fact concerning public officials and their activities. [sic] Second, by creating this constitutional privilege, it extended the defense of fair comment to include even opinion based upon false facts provided that such facts were not stated with actual malice, i.e., with knowing falsity or with reckless disregard of their truth.

In the majority opinion in *Gertz*,[35] Mr. Justice Powell asserted: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Of course, expressions of "ideas" or "opinions" must be distinguished from "false statements of fact," which are not given constitutional protection when published with actual malice in the constitutional sense.[36] In *Hotchner v. Castillo-Puche*,[37] the Second Circuit Court of Appeals, citing *Gertz*, said: "An assertion that cannot be proved false cannot be held libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." It is a question of law to be decided by the judge as to whether a published statement is "fact" or "opinion."[38]

In *Kapiloff*,[39] the Maryland Court of Special Appeals summarized the present status of the law on fair comment and expression of opinion as follows: "Fair and honest opinions which are based upon *true* facts and which have some relation to or connection with those facts are . . . absolutely privileged. Opinions based on false facts are protected if the publisher was not guilty of actual malice with regard to these supportive facts." As the Second Circuit Court of Appeals said in *Hotchner*,[40] "[O]pinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts."

A public-official or public-figure plaintiff has the burden of proving by clear and convincing evidence that the facts underlying a published opinion are false and that the publisher made the publication with actual malice in the constitutional sense.[41]

Actual malice: constitutional standard

In expressing the standard of liability in libel actions involving public officials or public figures as plaintiffs, or in defining the right of a private individual or other plaintiff to recover presumed damages or punitive damages, the words "actual malice" are used in the constitutional sense. Thus, a defendant's ill will toward the plaintiff, his bad motives or hatred, spite, or an intent or desire to injure the plaintiff—malice in the traditional, common law sense—are not elements of the *New York Times-Sullivan* standard.[42]

Actual malice in the constitutional sense is limited to publishing with knowledge of the falsity of a defamatory falsehood or with reckless disregard for truth or falsity.[43]

In proving actual malice, the Supreme Court has held that recovery is limited to cases in which the evidence shows "false statements made with a high degree of awareness of their probable falsity"[44] or that "the publisher was aware of the likelihood that he was circulating false information" or that he "in fact entertained serious doubts as to the truth of his publication."[45] Neither negligence nor a failure to investigate is sufficient to establish actual malice.[46]

Furthermore, it is fully established that the existence of actual malice must be demonstrated by evidence of "convincing clarity," rather than by a mere preponderance,[47] or, as most frequently expressed, by "clear and convincing evidence."[48] *The failure to publish a retraction* is not evidence of actual malice.[49]

Negligence standard

The several opinions in *Gertz*[50] make it clear that "fault" to be established by a private individual plaintiff in a libel action *may* be in the form of actual malice or negligence. The standard of liability is left to the various states so long as it is based upon fault.

In *Walters*,[51] the North Carolina Court of Appeals held that the action was properly dismissed because there was "no allegation or showing of fault . . . in the form of negligence or actual malice." It should be noted that the court did not decide that North Carolina has adopted the negligence standard in libel cases because a determination of that issue was not essential for the disposition of that case. Since *Gertz*, at least three states have "rejected the negligence test in favor of retaining the malice test."[52]

There must be a further decision by the North Carolina Court of Appeals or the Supreme Court of North Carolina on the question of whether mere negligence is sufficient under the law of North Carolina to justify a recovery by a private individual for defamatory falsehood concerning a subject of general or public interest.

Without any "jurisprudential ancestry" (Chief Justice Burger, in *Gertz*), the new negligence theory for liability for the publication of defamatory falsehood has not been developed sufficiently to indicate the ultimate "parameters" of the "doctrine as applied to the news media."

In *Time, Inc. v. Firestone*,[53] holding that the plantiff was a private individual and not a public figure, the Supreme Court reaffirmed the principles laid down in the *Gertz* decision. However, the Court was divided significantly on several issues. Although five opinions were filed in *Firestone*, none sets forth any definitive guide for proving "fault" in the form of negligence. There are references to "journalistic negligence" (used by the Florida Supreme Court) and to "whether *Time* exercised due care under the circumstances," and the majority opinion points to the trial court's failure to submit to the jury "the question of fault." (*Firestone* seems of little significance as a precedent because one justice did not participate, three justices dissented, and Justice Powell, joining four justices to create a bare majority, did that in order "to avoid the appearance of fragmentation.") *Gertz*, which created the new negligence doctrine for libel actions, was decided by a 5 to 4 vote. Justice Blackmun, who joined four other justices to make a bare majority, indicating that if his vote "were not needed to create a bare majority," he would "adhere to" his "prior view,"[54] in which he had described the Court as "sadly fractionated."[55]

Thus, so far, the Supreme Court has furnished no real assistance on how negligence is to be established in defamation cases.

Negligence: the necessity for expert testimony

It is logical and reasonable to assert that to prove "journalistic malpractice," just as in medical malpractice, there must be expert testimony. The private individual plaintiff in a libel action, as a basis for the recovery of damages, should be required to prove that the defendant publisher was guilty of unreasonable conduct constituting a departure from the standards of investigation and reporting ordinarily adhered to by reasonably careful and responsible reporters, editors, and publishers in the community or in similar communities under similar circumstances.[56]

In *Gobin*, the Kansas Supreme Court said[57] that ". . . the standard to be applied in determining such negligence is the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances. . . ."

In *Butts*,[58] a plurality of the U.S. Supreme Court suggested that a public figure should be allowed to "recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

This standard of negligence would require a plaintiff to establish "malpractice" on the part of the editor, the reporter, and the publisher by the testimony of editors, publishers, reporters, or other experts familiar with proper standards of investigating, reporting, editing, and publishing followed by newspapers (or broadcasters) in the community or in similar communities under similar circumstances. Otherwise, a jury would be without significant guidelines for reaching a verdict.

Privilege of reporting public proceedings

The publication of a report of judicial proceedings or proceedings of a legislative or administrative body, or proceed-

ings of a semipublic educational institution or similar organization is qualifiedly privileged. Even though the published report contains defamatory falsehood, there is no liability, in the absence of actual malice, if the report is fair and accurate.[59]

When the qualified privilege (a question of law) has been established, the plaintiff has the burden not only to prove the falsity of the publication but also to prove actual malice.[60]

Substantial accuracy is all that is required of a report of a public proceeding.[61]

In *Time, Inc. v. Firestone*[62] the Supreme Court rejected the defendant's "claim for automatic extension of the *New York Times* privilege to all reports of judicial proceedings." The majority opinion indicated that such reports must be accurate for the privilege to apply. Justice Marshall, dissenting, was critical of the majority on this point.[63]

Privilege of reporting public records

The publication of a fair and accurate report of a public record is privileged although it contains defamatory matter.[64] The U.S. Supreme Court has held that ". . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. . . ."[65]

Defamatory matter in civil complaints

Privilege will attach to pleadings read in open court, but there is a division of judicial opinion as to whether privilege applies to a news report of defamatory matter in pleadings or other papers filed in civil actions before they are acted upon in open court. The common law rule established by the courts of a majority of state courts that have considered the question denies this privilege.[66]

The courts of other states have held that the filing of a complaint in a civil suit constitutes a part of the "judicial proceeding" and that the publication of the contents of such pleadings is privileged if the conditions attached to the privilege are satisfied.[67]

The appellate courts of North Carolina have never had this question presented. Under North Carolina rules of civil procedure, an action is commenced when the complaint is filed. The complaint is a part of the judicial proceeding and, independently of the civil procedure rules, is a public record open to public inspection upon filing.[68] Therefore, an accurate report of the contents of a filed complaint is privileged.

Truth as a defense

In a civil action for libel, a defendant may plead and prove truth as a defense.[69] Truth is a complete and absolute defense.[70] It must be pleaded, and the defendant has the burden of proving truth.[71]

The burden is not upon the defendant, however, to prove truth in libel actions brought by public officials or public figures. Such plaintiffs have the burden of proving by clear and convincing evidence that the defamatory publication "was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true."[72]

When it becomes necessary for a defendant to establish truth as a defense or the accuracy of defamatory statements under the rule of privilege, it is only required that the "gist," "thrust," or the "sting" of the published matter be proven.[73]

Disposition of libel actions by summary judgment

The courts have held that summary judgment procedure is particularly appropriate for the disposition of actions for libel.[74] Summary judgment refers to dismissal of a case by the judge without a trial; for this to occur the defendant must establish that there is no genuine issue of any material fact for determination by a jury and that the defendant is entitled to dismissal as a matter of law.

Libel actions in *Cline, Walters, Dellinger,* and *Towne* were all disposed of by summary judgment.[75]

In the *Keogh* case,[76] Circuit Judge Wright expressed the principle as follows:

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harrassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the *Post* to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harrassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."[77] □

FOOTNOTES

1. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).
2. Greer v. Skyway Broadcasting Co., 256 N.C. 382, 124 S.E.2d 98 (1962); Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 158 S.E.2d 578 (1968).
3. Flake v. Greensboro News Co., 212 N.C. 780, 786, 195 S.E. 55,60 (1938).
4. *Id.* at 787, 195 S.E. at 60.
5. Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955); Robinson v. Nationwide Insurance Co., 273 N.C. 391, 394-95, 159 S.E.2d 896, 899 (1968); *see* 48 N.C. LAW REV. 798-801 (1970).
6. Carter v. King, 174 N.C. 549, 94 S.E. 4 (1917); GATLEY ON LIBEL AND SLANDER 108-9 (5th ed. 1960).
7. Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940).
8. Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976).

9. New York Times v. Sullivan, 376 U.S. 254 (1964).

10. *Id.* at 270.

11. Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1974), *cert. denied* 286 N.C. 412, 211 S.E.2d 793 (1975) (plaintiff deputy sheriff); Dellinger v. Belk, 34 N.C. App. 488, 238 S.E.2d 788 (1977) (plaintiff police officer-taxicab inspector).

12. Numerous federal and state court decisions have applied the rule to a variety of public officials, elective and appointive, state and local: *Former Supervisor of County Recreation Area*— Rosenblatt v. Baer, 383 U.S. 75 (1966); *Deputy Sheriff*— St. Amant v. Thompson, 390 U.S. 727 (1968); *U.S. Army Captain*— Medina v. Time, Inc., 439 F.2d 1129 (1st Cir. 1971); *Marine Corps Colonel*— McNeill v. Columbia Broadcasting System, Inc., 66 F.R.D. 22 (D.C. 1975); *Supervisor and Senior Administrator of a City Post Office*— Silbowitz v. Lepper, 299 N.Y.S. 2d 564 (N.Y. Sup. App. Div. 1969); *Manager of Community Center of Municipality*— Brown v. Kitterman, 443 S.W.2d 146 (Mo. 1969); *Secretary to Town Public Works Director*— Grzelak v. Calumet Pub. Co., Inc., 543 F.2d 579 (7 Cir. 1975); *Township Tax Assessor*— Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075 (N.D. Ind. 1976), *aff'd* 557 F.2d 107 (7th Cir. 1977); *City Policeman*— Oswalt v. State-Record Co., 158 S.E.2d 204 (S.C. 1967); *Township Auditor*— Kernick v. Dardanell Press, 236 A.2d 191 (Pa. 1967); *Secretaries Employed by Secretary of State of South Dakota*— Hackworth v. Larson, 165 N.W.2d 705 (S.D. 1969); *Member of County Board of Supervisors*— Tagawa v. Maui Publishing Co., 448 P.2d 337 (Hawaii 1968); *Police Captain*— McCarthy v. Des Moines Register and Tribune Co., 239 N.W.2d 152 (Iowa 1967); *Director of Public Welfare, Louisiana Parish*— Bienvenu v. Angelle, 211 So.2d 395 (La. App. 1968); *City Delinquent Tax Collector*— Ryan v. Dionne, 248 A.2d 583 (Conn. Super. 1968); *Architect Employed to Design a New County Building*— Tyrley v. W.T.A.X., Inc., 236 N.E.2d 778 (Ill. App. 1968); *Former Mayor*— Lundstrom v. Winnebago Newspapers, Inc., 169 N.E.2d 369 (Ill. App. 1960), *aff'd* 206 N.E.2d 525 (Ill. 1965); *Justice of the Peace*— Ross v. News-Journal Co., 228 A.2d 531 (Del. 1967); *County Surveyor*— Foster v. Laredo Newspapers, Inc., 530 S.W.2d 611 (Tex. App. 1975); *Police Captain*— Thuma v. Hearst Corporation, 340 F. Supp. 867 (D. Md. 1972); *Principal of Public School*— Reaves v. Foster, 200 So.2d 453 (Miss. 1967); *Student Duly Elected Member of Student Senate of State University*— Klahr v. Winterble, 418 P.2d 404 (Ariz. 1966). *See also* Annotation (Who Is Public Official), 19 A.L.R.3d 1361.

13. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

14. *Id.* at 277.

15. Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967); *see also* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

16. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

17. *Id.* at 352.

18. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

19. Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967).

20. Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

21. Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947 (D.D.C. 1976).

22. *See also* Reliance Insurance Co. v. Barron's, 424 F. Supp. 1341 (S.D. N.Y. 1977).

23. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

24. *Id.* at 346-47.

25. Blackmun, J., *id.* at 353-54; Burger, C.J., at 354-55; Brennan, J., at 366; White, J., at 376.

26. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

27. Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976).

28. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

29. *Id.* at 349-50.

30. *See* Time, Inc. v. Firestone, 424 U.S. 448, 484-90 (1976), particularly Mr. Justice Marshall, dissenting.

31. Old Dominion Branch, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966); R.H. Bouligny v. United Steelworkers of America, 270 N.C. 160, 154 S.E.2d 344 (1967).

32. Yancey v. Gillespie, 242 N.C. 227, 87 S.E.2d 210 (1955); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).

33. *See* A.S. Abell Co. v. Kirby, 176 A.2d 340, 342 (Md. 1961); Restatement of the Law of Torts § 606 (1938).

34. Kapiloff v. Dunn, 343 A.2d 251, 261 (Md. App. 1975).

35. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

36. Buckley v. Littell, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied* 97 S. Ct. 785 (U.S. 1977).

37. Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977).

38. Letter Carriers v. Austin, 418 U.S. 264 (1974); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1306 (N.Y. 1977).

39. Kapiloff v. Dunn, 343 A.2d 251, 262-63 (Md. App. 1975).

40. Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977).

41. Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1305-6 (N.Y. 1977); Kapiloff v. Dunn, 343 A.2d 251, 262 (Md. App. 1975); Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir. 1977).

42. Rosenblatt v. Baer, 383 U.S. 75 (1966); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 9-11 (1970); Letter Carriers v. Austin, 418 U.S. 264, 281-82 (1974).

43. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974).

44. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

45. St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968).

46. New York Times v. Sullivan, 376 U.S. 254, 288 (1964); St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968).

47. New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964).

48. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

49. New York Times v. Sullivan, 376 U.S. 254, 286 (1964); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976); Kinloch v. News and Observer Publishing Co., 314 F. Supp. 602 (E.D. N.C. 1969), *aff'd* 427 F.2d 350 (4th Cir. 1970), *cert. denied* 403 U.S. 905 (1971).

50. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

51. Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976).

52. Taskett v. King Broadcasting Co., 546 P.2d 81, 92 (dissenting opinion) (Wash. 1976). *See also* Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo. 1975); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974); Commercial Programming, Unlimited v. CBS, Inc., 367 N.Y.S.2d 986 (N.Y. Sup. Ct. 1975).

53. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

54. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

55. Gertz v. Robert Welch, Inc., 418 U.S. 323, 354 (1974).

56. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); Gobin v. Globe Publishing Co., 531 P.2d 76, 84 (Kan. 1975); and *see* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571 (1975), and Goldman v. New York Post, 396 N.Y.S. 2d 399 (N.Y. Sup. App. Div. 1977).

57. Gobin v. Globe Publishing Co., 531 P.2d 76, 84 (Kan. 1975).

58. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

59. RESTATEMENT OF THE LAW OF TORTS 2d, § 611 (1977); Kinloch v. News and Observer Publishing Co., 314 F. Supp. 602 (E.D. N.C. 1969), *aff'd* 427 F.2d 350 (4th Cir. 1970), *cert. denied* 403 U.S. 905 (1971)

(report of State ABC Board proceeding); Gattis v. Kilgo, 140 N.C. 106, 52 S.E. 249 (1905); same case, other appeals: 128 N.C. 402, 38 S.E. 931 (1901); 131 N.C. 199, 42 S.E. 584 (1902) (report of proceedings of board of trustees of private but semipublic college).

60. Ponder v. Cobb, 257 N.C. 281, 299, 126 S.E.2d 67, 80 (1962), and cases cited; Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410, 414 (1971).

61. Kinloch v. News and Observer Publishing Co., 314 F. Supp. 602 (E.D. N.C. 1969) *aff'd* 427 F.2d 350 (4th Cir. 1970), *cert. denied* 403 U.S. 905 (1971); and *see* Time, Inc. v. Pape, 401 U.S. 279 (1971).

62. Time, Inc. v. Firestone, 424 U.S. 448 (1976) (a 5-3 decision).

63. *Id.* at 490.

64. Kinloch v. News and Observer Publishing Co., 314 F. Supp. 602 (E.D. N.C. 1969), *aff'd* 427 F.2d 350 (4th Cir. 1970), *cert. denied* 403 U.S. 905 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971) (magazine article about a Civil Rights Commission report); Piracci v. Hearst Corp., 263 F. Supp. 511 (D. Md. 1966), *aff'd* 371 F.2d 1016 (4th Cir. 1967) (arrest docket and log); Francois v. Capital City Press, 166 So.2d 84 (La. 1964) (police log book); and *see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (court records; privacy action).

65. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975); principle reaffirmed in Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

66. Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318 (1884) (leading case).

67. Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927).

68. N.C. GEN. STAT. § 7A-109; N.C. GEN. STAT. §§ 132-1 and -6.

69. Rule 9 (i), (2), N.C. Rules of Civil Procedure.

70. Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942); 50 AM. JUR. 2d 682, *Libel and Slander* § 179.

71. Bryant v. Reedy, 214 N.C. 748, 200 S.E. 896 (1939); Elmore v. A.C.L. Railroad Co., 189 N.C. 658, 127 S.E. 710 (1925).

72. Rosenblatt v. Baer, 383 U.S. 75, 84 (1966); *see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489-90 (1975).

73. I. HANSON, LIBEL AND RELATED TORTS, § 99, p. 82; Gantry Construction Co., Inc. v. American Pipe and Construction Co., 122 CAL. RPTR. 834 (Cal. App. 1975); Turnbull v. Herald Co. 459 S.W.2d 516 (La. App. 1970); McCracken v. Evening News Assoc., 141 N.W.2d 694 (Mich. App. 1966); Rosen v. Capital City Press, 314 So.2d 511 (La. App. 1975).

74. Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) *cert. denied* 385 U.S. 1011 (1967); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-65 (5th Cir. 1970); Time v. McLaney, 406 F.2d 565, 566 (5th Cir. 1969); Hanks v. Beckley Newspapers Corp., 172 S.E.2d 816 (W. Va. 1970); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075-76 (N.D. Cal. 1969).

75. Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1975), *cert. denied* 286 N.C. 412, 211 S.E.2d 793 (1975); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976); Dellinger v. Belk, 34 N.C. App. 488, 238 S.E.2d 788 (1977); and Towne v. Cope, 32 N.C. App. 660, 233 S.E.2d 624 (1977), all disposed of by summary judgment.

76. Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966).

77. Smith v. People of State of California, 361 U.S. 147 (1959).

Protection of Confidential News Sources

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soned atmosphere" created by a lot of unnecessary and ineffective subpoenas more than the lack of an absolute privilege that drives sources into hiding.[34] The willingness of conscientious citizens to expose corruption through the press is to the advantage of most public officials.

The issue of confidential sources will create, at times, major conflicts between the media on one hand and law enforcement and the judiciary on the other. But as one scholar has said already, it is important that this small number of cases—as sensitive as they often are—not prevent cooperative efforts toward some accommodation on this complex issue.[35]□

34. Blasi, *op. cit. supra* note 8, at 261-62 and 277-86.

35. Gordon, *op. cit. supra* note 32, at 48.

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(continued from p. 2)

mitted into a trial or hearing? Do cameras and microphones create a danger of inhibiting some who testify and, at the same time, create a public platform for others in the courtroom? Do televised trials and proceedings serve a valid public information purpose?

Is the state's policy of open meetings well served by its Sunshine Law? What government records about individual citizens should be maintained and who should have access to the records? What differences must be considered in access to different types of records—e.g., criminal justice information, health and medical records, personnel and employment records, educational records, social services records, bank records, credit records, and insurance records? Can public officials and the news media have an objective view about each other? Should they have? How do their purposes and needs relate and differ? How does a government keep in touch with the people it serves? What is the role of the public information officer in serving that purpose? What right of response do you have to the news media? What right of legal action? How do the changes in the laws of libel and privacy affect a citizen's right to sue and be sued and the chances for recovery of damages?

If this issue of *Popular Government* focuses attention on the challenge of accurate reporting and interpretation in a democratic society, it will have served a highly useful purpose. It may be asking too much for any of us to see things unfalteringly and see them whole, but at least we can strive to see things in that way.□

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