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WHEN GOVERNMENT SHUTS OUT CRITICAL PRESS:
GOVERNMENT RETALIATION AND THE FIRST AMENDMENT

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MLRC 2005 REPORT ON SIGNIFICANT DEVELOPMENTS
WITH AN UPDATE ON CRIMINAL LIBEL DEVELOPMENTS

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INTRODUCTION

MLRC's year end *Bulletin* begins with a set of three articles on the troubling trend of government officials retaliating against members of the press for unfavorable press coverage by denying specific journalists and/or their papers interviews and access. With significant cases pending in Federal Courts of Appeal for both the Fourth and Sixth Circuits, in which a governor and a mayor respectively barred huge swaths of government employees from conducting ordinary professional discourse with members of the disfavored press, this is one of the most ominous new developments.

In "Anatomy of a First Amendment Retaliation Claim," Judith F. Bonilla, Rachel E. Fugate, Amy S. Mushahwar and Charles D. Tobin of Holland & Knight, discuss how journalists can state a claim for violation of their First Amendment rights.

In "Making Sense of the Reporter Boycott Cases," Kevin T. Baine, Adam L. Perlman and Zoe C. Scharff of Williams & Connolly, look at recent cases and the First Amendment principles that should limit the prerogatives of government office holders.

And in "Standing Issues in the Government Boycott Context," Maureen P. Haney of Frost Brown & Todd looks at the interesting question of whether journalists can raise public employees' First Amendment rights to speak to the press.

Part II of the Bulletin contains MLRC's annual review of the significant developments of the year in libel, privacy and related law as reported in MLRC's 50-State Surveys of MEDIA LIBEL LAW, MEDIA PRIVACY AND RELATED LAW, and supplemented by reports in the MEDIALAWLETTER.

And Part III contains an update on recent developments in criminal libel law.

Last year, in what was something of a surprise, the U.S. Supreme Court agreed for the first time in more than a decade to hear a libel case. The non-media case, *Tory v. Cochran,*[1] raised the issue of post-trial injunctions in libel cases and, indirectly, the opinion defense. The California appellate court had issued a post-trial injunction that essentially prohibited defendants from saying anything, good or bad, about plaintiff, lawyer Johnnie Cochran. In the end, only a very narrow decision issued. Johnnie Cochran died just a few days after oral argument. Writing for the Court, Justice Breyer, held that the "injunction, as written, has now lost its underlying rationale" and therefore constituted an "overly broad prior restraint upon speech." The decision leaves open whether injunctions can ever issue as a post-trial remedy in libel cases, but at a minimum it supports the proposition that such injunctions are presumptively unconstitutional prior restraints.

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[1] 125 S.Ct. 2108, 33 Media L. Rep. 1737 (U.S. 2005), *vacating*, No. B159437, 2003 WL 22451378 (Cal. Ct. App. Oct. 29, 2003) (unpublished). Defendant's petition for certiorari asked: Does a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violate the First Amendment?

Elsewhere on the libel front, one of the most interesting cases of the year involved the reporting of allegations. In *Hatfill v. New York Times Co.* 416 F.3d 320 (4th Cir. July 28, 2005), a divided Fourth Circuit panel reinstated claims against the *New York Times* for a series of op-ed articles discussing the FBI's anthrax murder investigation and the suspicions surrounding a bioweapons scientist, Stephen Hatfill.

A little more than a year ago, the district court granted a motion to dismiss, observing that reports of allegations of wrongdoing do not carry the implication of guilt.[2] Reversing, the Fourth Circuit panel held that the articles did not merely report allegations, but actually generated suspicion by implicating plaintiff in the murders. The court also reinstated plaintiff's intentional infliction of emotional distress claim, disregarding well-established law that the publication of newsworthy information cannot meet the standard for "outrageousness" as a matter of law. The entire Fourth Circuit rejected a motion for rehearing on a 6-6 vote which drew a strong dissent from Judge Wilkinson who warned that the decision "will restrict speech on a matter of vital public concern."[3]

On a more positive note, the Second Circuit held that under New York law a public figure libel plaintiff must prove falsity by clear and convincing evidence, providing additional support to this principle of libel law. *DiBella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005).

Showing that good facts can make good law, the Utah Court of Appeals adopted the neutral report privilege to affirm dismissal of a pro se libel suit against a newspaper that reported on the controversy surrounding plaintiff's history of filing dozens of frivolous lawsuits. *Schwarz v. Salt Lake City Tribune*, 2005 WL 1037843, 2005 UT App 206 (May 5, 2005).

In another interesting privilege decision, a federal district court held that the fair report privilege does not extend to foreign government reports. *OAO Alfa Bank v. Center for Public Integrity,* 387 F.Supp.2d 20, 33 Media L. Rep. 2410 (D.D.C. 2005). Extending the privilege to foreign government reports would place courts "in the untenable position of attempting to determine whether a foreign state exhibits the 'openness and reliability that warrant an extension of the privilege'" – a particularly apt concern, the court noted, where defendants sought to invoke the privilege for a Russian government document.

Several damage awards were addressed on appeal this year. In *West v. Media General Operations, Inc.,*120 Fed. Appx. 601, 33 Media L. Rep. 1321 (6th Cir. 2005), the Sixth Circuit reversed a $310,000 damage award, holding it was an error to give the jury a general verdict form on upwards of 14 alleged defamatory statements. A special verdict form, the court noted, "provides a useful check not only against

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[2] *See* 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D. Va. November 24, 2004).

[3] *See* 427 F.3d 253, 33 Media L. Rep. 2530 (4th Cir. Oct 18, 2005).

misconstruction of the actual malice standard, but also against a misunderstanding of Plaintiffs' allegations themselves."

The Oklahoma Court of Appeals reversed a $3.7 million jury award for libel and false light, holding that defendants' online republication of the state's sex offender registry was immune under § 230 of the Communications Decency Act. *Stewart v. Oklahoma Pub. Co.*, No. 100,099 (Okla. Ct. Civ. App. 2005) (unpublished).

The Kentucky Supreme Court reinstated a $2.97 million verdict over a series of television broadcasts concerning an accident at plaintiff's amusement park, finding sufficient evidence of actual malice to support the award. *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 2005 WL 2043633, 33 Media L. Rep. 2350 (Ky. Aug. 25, 2005). While the majority found the record "full of evidence" to support actual malice, a dissent called the result a "real tragedy."

And the Utah Supreme Court significantly reduced a $3.2 million damage award based on a hidden camera news report at a doctor's office, letting stand over $500,000 in damages for libel, false light, intrusion and eavesdropping. *Jensen v. Sawyers*, 2005 UT 81 (November 15, 2005).

On the privacy front, the hazard of hidden camera filming was also illustrated in *Pitts Sales, Inc. v. King World Productions, Inc., et al.*, No. 04-60664-Civ., 2005 WL 1515316 (S.D. Fla. June 28, 2005) where a news producer worked undercover at a magazine sales subscription company. Claims for wiretap and fraud were dismissed, but plaintiff had a triable claim for trespass (albeit for nominal damages). That claim then failed at a bench trial.

The perils of filming in hospitals was evident again this year. A divided Michigan Court of Appeals reinstated claims for private facts and intrusion against a broadcaster for videotaping inside a hospital emergency room for a documentary. *Stratton v. Krywko, et al.*, 2005 WL 27522 (Mich. App. Jan. 6, 2005).

In an very unusual case, a Kansas trial court judge issued a temporary restraining order barring a television station from reporting on information retrieved from a doctor's discarded computer on the ground that HIPAA privacy rights outweigh the station's First Amendment rights. *Monarch v. Meredith Corporation*, (Johnson County District Court, June 27, 2005).

Over the past year the reporters privilege issue continued to loom large. The D.C. Circuit affirmed findings of contempt against reporters Judith Miller and Matthew Cooper for refusing to disclose the identities of confidential sources to the Grand Jury investigating whether any government official(s) violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame. *In re Grand Jury Subpoena*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S.Ct. 2977.

Miller ultimately served 85 days in jail, Vice President Cheney's chief of staff was indicted for perjury and obstruction of justice and additional reporters have since been called before the grand jury. These issues are examined more thoroughly in a forthcoming set of year-end Bulletin articles. But reporters privilege was also an active issue in the libel context.

A Pennsylvania trial court, seemingly taking a cue from the Miller Cooper decisions, ordered a reporter to disclose her confidential source for an allegedly libelous report about two local politicians because the confidential source provided information about plaintiffs' testimony before a grand jury. *Castellani v. Scranton Times*, No. 05 CIV 69 (Pa. Ct. C.P., Lackawanna County June 3, 2005). The Pennsylvania shield law creates an absolute privilege protecting the identity of confidential sources even in libel cases against the press. But the trial court concluded that grand jury secrecy is of such paramount importance it outweighs any competing First Amendment or statutory right.

The Massachusetts Supreme Judicial Court affirmed a $2.1 million default judgment against the *Boston Globe* for its refusal to disclose the identity of confidential source(s) for a series of stories about a fatal medical overdose at a Boston hospital. *Ayash v. Dana Farber Cancer Institute*, 822 N.E. 2d 667 (Mass. 2005), *cert. denied,* 126 S.Ct. 397 (U.S.).

And in *Price v. Time*, No. 04-13027, 2005 WL 1653730 (11th Cir. July 15, 2005), the Eleventh Circuit suggested that media lawyers defending libel actions have an ethical duty to advise the court if a confidential source testifies falsely.

Finally, two foreign law decisions offered some good news for online publishing. In a closely watched case, the Ontario Court of Appeals held that Canada had no jurisdiction over the *Washington Post* in a libel case where the only publication in Canada was plaintiff's own downloading of the news article. *Bangoura v. Washington Post*, [2004] O.J. No. 284 (Ont. Sup. Ct. Jan. 27, 2004). The trial court had found that an internationally known newspaper like the *Post* should be prepared to defend libel actions anywhere in the world. The Ontario Court of Appeals disagreed, ruling that the action had no "real and substantial" connection to the forum.

The Court of Appeals of England & Wales also offered some hope to online publishers in *Yusuf Jameel v. Dow Jones & Co Inc* [2005] EWCA Civ 75. The court dismissed a libel action over an article that appeared only in the U.S. edition of the Wall Street Journal. Publication in England consisted only of a handful of downloads, most by plaintiff and his lawyers. Although such downloads technically satisfy the publication element of the tort under English law, the court held it would be an "abuse of process" to entertain a claim over such minimal publication.

These and other cases are discussed herein.

ANATOMY OF A FIRST AMENDMENT RETALIATION CLAIM

By Judith F. Bonilla, Rachel E. Fugate, Amy S. Mushahwar and Charles D. Tobin*

* The authors are with Holland & Knight LLP in Washington, D.C. and Tampa, FL. The firm represents the Baltimore Sun Co. and two journalists in a lawsuit brought against Maryland Governor Robert L. Ehrlich, based on his directive banning any comment from executive department and agency employees to the journalists. The newspaper's and journalists' appeal of the District of Maryland's dismissal of their lawsuit is pending in the Fourth Circuit, which heard oral argument on November 29.

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ANATOMY OF A FIRST AMENDMENT RETALIATION CLAIM

I. INTRODUCTION

Government administrations are spending more and more time on political public relations management. In an era where Karl Rove, Lanny Davis and Michael Deaver have become household names, public officials now seemingly devote as much energy to controlling their images as they do to running the government. To be sure, creating a message and staying on it have been part and parcel of American governance since President Thomas Jefferson battled a Federalist Congress. But thanks to the United States Constitution, the government's ability to control its spin is not limitless. Thus, the operative question becomes: When do image management and message control become First Amendment violations?

Courts continue to grapple with drawing the lines. Consider the following recently litigated fact patterns: a state governor bans executive employees from speaking with a pair of journalists whom he has charged with failing to "objectively report" on his administration;[1] a city mayor blacklists an entire newspaper that publishes stories criticizing his actions;[2] a sheriff and his deputies strategically attempt to buy out all copies of a newspaper that criticizes him and his political comrades.[3] Is this conduct fair control of the political message, or foul abuse of the First Amendment? These factual scenarios are just a few examples of a seemingly recent and alarming trend in efforts by government officials to directly suppress the dissemination of news or to indirectly alter press coverage.[4]

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[1] *Baltimore Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577 (D. Md. 2005), *appeal docketed,* Case No. 05-1297 (4th Cir. Mar. 21, 2005).

[2] *Youngstown Publ'g Co. v. McKelvey*, 2005 WL 1153996 (N.D. Ohio), *appeal docketed*, Case No. 4:05 CV 00625 (6th Cir. June 15 , 2005).

[3] *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003).

[4] *See also e.g., El Dia, Inc. v. Rossello*, 165 F.3d 106 (1st Cir. 1999) (newspaper brought § 1983 claim against the governor of Puerto Rico seeking damages and injunctive relief alleging that defendants withdrew government advertising from the newspaper because of past critical news reports.); *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652 (5th Cir. 1992) (newspaper sued county board of supervisors for withdrawing legal advertising from its paper in retaliation for negative stories about the board.).

This article provides an overview of the elements of a First Amendment retaliation claim, focusing on actions taken to punish the press.[5] Part II discusses retaliation generally and outlines the elements of a First Amendment retaliation claim. These elements inquire into whether: (1) the plaintiff engaged in constitutionally protected speech or activities; (2) the defendant's retaliatory conduct adversely affects First Amendment rights; and (3) there is a causal relationship between the protected activity and the defendant's conduct. Part II also addresses some of the nuances among the United States Circuit Courts of Appeals in their approaches to these elements – the greatest variation being the type of standard applied to the second prong of the retaliation test, the "adverse impact." Part III provides practical insight into a retaliation claim and tips on pleading a cause of action. Part IV concludes that the First Amendment retaliation action is the best weapon available to journalists to combat some government officials' latest efforts to coerce favorable coverage.

II. THE RETALIATION CAUSE OF ACTION

In a claim of unconstitutional retaliation, the violation alleged is that a government official took some form of action against a plaintiff for exercising his or her constitutional rights. Retaliation plaintiffs typically seek an injunction to halt the retaliatory conduct, damages against the individual officials who instituted the retaliation,[6] or both.

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[5] While this article focuses on plaintiffs who are either members of or individuals speaking to the press, the First Amendment retaliation cause of action applies to a far broader range of people. Federal employees may sue the government in a retaliation action if a firing, harassment or other employment limitations are motivated by the government's desire to retaliate against the employees' First Amendment protected speech. Prisoners may also sue if the government denies parole or transfers the inmate in retaliation for the prisoner's comments to the press or other outside entities. Educators may sue if the school board or university fires them, declines to renew their contracts, or denies them advancement for displeasure with their teaching material or expression of opinion. These examples are by no means exhaustive, and the list of potential plaintiffs is only growing as government officials find new ways to attempt to minimize their critics' opportunities to speak out.

[6] Counsel for plaintiffs who seek damages must be prepared for an immediate skirmish on the defense of qualified immunity, which shields government officials from individual liability for damages when their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. Qualified immunity protects government actors performing discretionary functions from being sued in their individual capacities. *See generally, Lassiter v. Ala. A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). The doctrine shields government officials from liability to the extent that "their conduct does not violate clearly established ... constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). For application of the qualified immunity defense in retaliation cases brought by journalists, *see McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996). *See also Raycom National, Inc. v. WUAB-TV*, 361 F. Supp. 2d 679 (N.D. Ohio 2004). *See also Snyder v. Ringgold*, 1998 WL 13528 (4th Cir. 1998) (unpublished decision).

A First Amendment retaliation action is triggered by a plaintiff's engagement in protected First Amendment activity, which draws a retaliatory act by a government officials that results in a chill of further First Amendment activity. In cases involving the press, plaintiffs have alleged First Amendment retaliation where the government actors have denied access to government information,[7] refused further advertising sales,[8] purchased all or nearly all of the offending publication preventing mass distribution,[9] defamed a journalist,[10] or denied a journalist access to a particular forum generally open to the press or public.[11]

A. Retaliation Generally

Procedurally, retaliation claims fall within the 42 U.S.C. §1983[12] jurisdictional umbrella. Adopted by Congress in 1871 during the Reconstruction era, §1983 created a cause of action for civil rights violations. Congress intended broad civil remedies for all federally-protected rights.[13] In enacting §1983, Congress was most concerned about violations of rights committed by government officials for failure to act where required by law, or conspiracies with private individuals to violate a person's civil rights. Therefore, §1983

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[7] *Baltimore Sun*, 356 F. Supp. 2d at 577; *Youngstown Publ'g*, 2005 WL 1153996 at *1.

[8] *See El Dia*, at 165 F.3d at 106.

[9] *See Rossignol*, 316 F.3d at 516.

[10] *McBride*, 100 F.3d at 457. In *McBride*, a reporter wrote critical reports about municipal government. The reporter alleged that in retaliation for her story a Michigan police officer repeatedly contacted her employer and urged them to take the journalist off her local government beat. The officer also contacted a potential employer of the journalist and told them not to hire her. Even retaliatory speech by a public official, however, will not always form the basis of an actionable claim. Indeed, a public official cannot be held liable for exercising his or her own free speech rights. *See Suarez Corp. Indus. v. McGraw*, 202 F.3d 676 (4th Cir. 2000). The public official's conduct must amount to more than name-calling or foul language. *See e.g., Block v. Ribar,* 156 F.3d 673 (6th Cir. 1998) (a sheriff's disclosure of the details of a rape case was not protected because it was intended to humiliate the plaintiff). Instead, only where a "public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation" will such speech have an adverse impact on First Amendment rights. *Suarez*, 202 F.3d at 687.

[11] *See, e.g., Borreca v. Fasi*, 369 F. Supp. 906, 907 (D. Haw. 1974) (granting preliminary injunction against mayoral directive that denied reporter access to news conferences, based on belief that reporter was "irresponsible, inaccurate, biased, and malicious in reporting on the mayor and the city administration").

[12] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[13] *See Monnell v. Department of Social Services of the City of New York*, 436 U.S. 659, 685 (1978).

protections apply not just to official, government action but also to any action taken "under the color of state law."[14] The U.S. Supreme Court has held that §1983 reaches any conduct that is "fairly attributable to the State."[15] However, the actions of private companies or individuals are not ordinarily liable under §1983.

Substantively, retaliation claims under §1983 have both a statutory[16] and constitutional genesis.[17] First Amendment retaliation, of course, is a constitutional claim applicable to the states via the Fourteenth Amendment incorporation doctrine.[18] The next section details the substantive elements for this type of claim.

B. Elements of a Retaliation Claim

First Amendment retaliation claims arise where the plaintiff has engaged in a form of protected expressive activity, and the government has taken action as a result of its displeasure with that activity. Supreme Court precedent generally tells us that actions taken to punish news coverage that displeases government are unconstitutional. "[U]sing government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government would run afoul of the First Amendment."[19] A §1983 First Amendment retaliation claim therefore is the procedural vehicle for a journalist seeking to vindicate his or her civil rights to report the news free from government coercion.

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[14] *Kern v. City of Rochester*, 93 F.3d 38, 43 (2d Cir.1996) (The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.")

[15] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Note, that Eleventh Amendment sovereign immunity prevents a state from being named as a defendant, however, the definition of 'person' under §1983 has been interpreted broadly to include virtually any government entity including cities, townships, municipal corporations, and local/regional entities.

[16] *See Causation in Retaliation Claims: Conflict Between the Prima Facie Case and the Plaintiff's Ultimate Burden of Pretext*, 81 WASH. U. L. Q. 152 (2003). A number of federal statutes, such as the Americans with Disabilities Act, Title VII, and the National Labor Relations Act, provide for various types of retaliation claims.

[17] *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) (retaliation action for violation of citizen's Fourth and Fourteenth Amendment rights). *See also Albright v. Oliver*, 510 U.S. 266 (1994) (retaliation plaintiff sued under a substantive due process deprivation of a liberty interest, generally). The *Albright* Court held that where an explicit textual reference to the Constitution is available it should be used, not the "generalized notion of substantive due process." *Id.* at 273.

[18] *Silkwood v. Kerr-McGee Corp.*, 460 F. Supp. 399, 409 (D. Okl. 1978) ("The guaranties of the First Amendment run only against the federal government, not private interference. By incorporation into the due process clause of the Fourteenth Amendment, these guaranties also run against the state. . . .").

[19] *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).("[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding as in other contexts.").

In the case of a press plaintiff, the government actor's retaliation can come in many forms. As detailed below, however, not all government actions constitute actionable retaliation under the First Amendment. Unfortunately, the courts will not interfere in every instance where a government official deliberately acts against a journalist in response to news coverage.

To allege a *prima facie* case of retaliation, a plaintiff must allege:

- the plaintiff was engaged in constitutionally protected speech;
- the defendant's retaliatory action adversely affects First Amendment activity; and
- a causal relationship exists between the protected speech and the retaliatory action.[20]

Some of these elements are easily established under the facts of a given case. Others are more elusive and require intensive analysis and careful argument. They are discussed individually below.

1. Plaintiff was engaged in constitutionally protected speech or activities.

This first element involves two inquiries: (1) is the activity at hand speech and, if so, (2) is the speech constitutionally protected? The First Amendment protects the written or spoken word, and those activities which can be classified as "symbolic speech."[21] Of course, in discrete circumstances defined by case law, certain speech will not receive First Amendment protection. Obscene speech,[22] false commercial speech,[23]

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[20] Pleading First Amendment retaliation is nuanced and is dependant upon the status of the plaintiff and defendant as well as the jurisdiction. For reference, a case from each federal circuit, reciting the elements of the retaliation claim there, appears below. Not all of these cases were brought by press plaintiffs, and the pleading requirements may differ slightly from the press retaliation context. First Circuit: *El Dia*, 165 F.3d at 109-111; Second Circuit: *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999); Third Circuit: *Johnson v. Lincoln University of Com. System of Higher Educ.*, 776 F.2d 443, 449 (3d Cir. 1985); Fourth Circuit: *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001); Fifth Circuit: *Gerhart v. Hayes*, 217 F.3d 320 (5th Cir. 2000); Sixth Circuit: *Gragg v. Kentucky Cabinet for Workforce Development*, 289 F.3d 958, 965 (6th Cir.2002); Seventh Circuit: *Lifton v. Board of Educ. of City of Chicago*, 416 F.3d 571, 575 (7th Cir. 2005); Eighth Circuit: *Cox v. Miller County R-I School Dist.* 951 F.2d 927 (8th Cir. 1991); Ninth Circuit: *Coszalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003); Tenth Circuit: *Schneider v. City and County of Denver*, 47 Fed.Appx. 517 (10th Cir. 2002); Eleventh Circuit: *Cook v. Gwinnett County School Dist.* 414 F.3d 1313 (11th Cir. 2005); District of Columbia Circuit: *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir.1994).

[21] *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is constitutionally protected symbolic speech).

[22] *Miller v. California*, 413 U.S. 15 (1973).

[23] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

fighting words,[24] and child pornography[25] are speech categories generally considered outside the protection of the First Amendment.

Political speech, on the other hand, is at the apex of protected First Amendment activity under the retaliation cause of action. For example, in *Bart v. Telford*,[26] the Seventh Circuit reversed the dismissal of a retaliation claim based on a public employee's allegations that she was subject to a pattern of petty harassment in retaliation for her views expressed during an election. The court stressed "[a] public endorsement of a candidate for public office is an expression of views that is within the protection of the First Amendment."[27] Because there was the suggestion that the subsequent campaign of petty harassments was motivated by the plaintiff's expression of her political views, the court found the complaint sufficient to survive a motion to dismiss.

Not every expression, however, qualifies as protected speech in retaliation cases even where uttered in a government context. In *Mezibov v. Allen*,[28] the plaintiff, a criminal defense attorney, argued that a prosecutor made defamatory comments about him in retaliation for filing motions and raising legitimate defenses on behalf of a client in court. The Sixth Circuit determined that filing motions and advocating for his client was not protected expression under the First Amendment: "[W]e hold that in the context of courtroom proceedings, an attorney retains no personal First Amendment rights when representing his client in those proceedings. Therefore, Mezibov has failed to allege that he was engaged in constitutionally protected conduct as the precipitating factor for his alleged retaliation[.]"[29]

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[24] *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[25] *New York v. Ferber*, 458 U.S. 747 (1982) (speech is unprotected without regard to the obscenity standard).

[26] 677 F.2d 622 (7th Cir. 1982).

[27] *Id.* at 625.

[28] 411 F.3d 712 (6th Cir. 2005).

[29] *Id.* at 720-721.

In retaliation claims by the press, courts readily accept that journalism is a First Amendment protected activity. For example, the First Circuit has held that the press has a constitutional right to report "critical news coverage".[30] As such, the Puerto Rico government could not withdraw public advertising contracts and revoke building permits in retaliation for news stories alleging fraud and waste in the governor's administration.[31] Similarly, in *Frissell v. Rizzo*,[32] a reader of the *Philadelphia Evening Bulletin,* sued the city's mayor for having withdrawn advertising from the newspaper for its critical coverage of the campaign. The Third Circuit dismissed the case for lack of standing because the plaintiff was a citizen and not the injured newspaper. Nonetheless, the Court recognized that the newspaper would have prevailed if it had brought the suit.[33] More recently, while an Ohio federal district court rejected a newspaper's cause of action on other grounds, it acknowledged that the news reportage about the mayor that provoked the retaliation "is a constitutionally protected activity."[34]

Thus, in this first element, not all speech – such as a lawyer arguing in a courtroom – will be considered a First Amendment protected activity capable of supporting a retaliation claim. Fortunately, there is no doubt in the case law that journalism is a First Amendment protected activity. Retaliation plaintiffs who bring claims based on press reports about government should have little trouble satisfying the first element of their claims.

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[30] *El Dia,* 165 F.3d at 106.

[31] *See also North Mississippi*, 792 F.2d at 1337. The *North Mississippi* and the *El Dia* cases were focused on the removal of advertising revenue in retaliation for critical reports. The advertising is not the speech that is examined for purposes of First Amendment protection. Rather, advertising removal is the retaliatory act, the dissemination of critical press reports was the protected speech activity. *Id.* ("[a]lthough the Times may have no 'right' to receive certain legal advertising from the County Board of Supervisors, it would violate the Constitution for the Board to withhold public patronage, in the form of its advertising, from the Times in retaliation for that newspaper's exercise of First Amendment rights").

[32] 597 F.2d 840 (3rd Cir.1979).

[33] *Id.* at 845. ("[W]ere the Bulletin to press a suit in its own behalf it could readily establish that its First Amendment rights have been violated. The chilling impact of money damages upon legitimate press activity protected by the First Amendment is a constitutional commonplace.")

[34] *Youngstown Publ'g*, 2005 WL 1153996 at *9.

2. Adverse Impact Test: Does the defendant's retaliatory conduct adversely affect First Amendment activities?

Some trial court decisions involving the press erroneously have carried the First Amendment analysis over into the second element of the retaliation cause of action – in which a plaintiff must allege that the government action has had an "adverse impact" on their rights.[35] Recent appellate law, however, makes clear that retaliation plaintiffs need not prove a constitutional right to what the government has taken away once the plaintiffs establish that a First Amendment activity provoked the retaliation.[36] Whatever its form, if the court will accept that the government's retaliatory action would chill most people from further expression, the plaintiff has established a *prima facie* claim of an adverse impact. Adverse impact is thus tied to the deterrence value the retaliatory act has on the First Amendment exercise that drew the government's ire.

But the courts will not deem every action taken by a government official, even when clearly taken in direct response to a plaintiff's First Amendment activity, an unconstitutional "adverse impact."[37] The retaliatory conduct must present more than what the courts will view, under the facts of a given case, as a *de minimis* inconvenience to the exercise of First Amendment activities.[38] For example, in *ACLU v. Wicomico County*, a Maryland county detention center removed an ACLU paralegal's contact-visit privileges with

[35] *See id.* at *8; *see also Baltimore Sun,* 356 F. Supp. 2d at 581; *Ringgold*, 1998 WL 13528. In each of these cases, the courts held that because journalists have no First Amendment right of access to oral discussions with officials in the executive branch of government, broad mandates by chief executives officials that prevented any comments to particular journalists did not constitute an "adverse impact" that would support First Amendment retaliation claims.

[36] The Fourth Circuit explained this principle in *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005):

> Of course, conduct that tends to chill the exercise of constitutional rights might not itself deprive such rights, and a plaintiff need not actually be deprived of her First Amendment rights in order to establish First Amendment retaliation. . . . We reject the defendants' suggestion that this inquiry depends upon the actual effect of the retaliatory conduct on a particular plaintiff. We have never held that a plaintiff must prove that the allegedly retaliatory conduct caused her to cease First Amendment activity altogether. The cause of action targets conduct that tends to chill such activity, not just conduct that freezes it completely.

Id. at 500.

[37] *See, e.g., Suarez,* 202 F.3d at 685 (4th Cir. 2000) (quoting *DeMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995)) (defamatory statements by state attorney general did not constitute sufficient adverse impact on plaintiff's First Amendment rights).

[38] *Id.*

prisoners, allegedly in response to the filing of a lawsuit against the center.[39] The Fourth Circuit rejected her retaliation claim, noting that all other paralegals were relegated to non-contact visits, and holding that withdrawal of the special arrangement that the plaintiff once enjoyed, although an inconvenience, "did not chill, impair, or deny [her] exercise of First Amendment rights."[40] In other words, as all paralegals were treated the same, the appellate court believed that the plaintiff had no reason to feel inhibited from continuing her First Amendment practices.

While the deprivation cannot be *de minimis*, the case law contains many examples of the types of government acts that have a sufficient chilling effect to constitute an "adverse impact".[41] For example, circuit courts have found that a plaintiff stated a sufficient adverse impact where the retaliatory conduct involved the removal of government advertising,[42] revocation of the use of a police scanner,[43] having one's name removed from the government's towing-referral log,[44] and a geographic job transfer to a position of equal rank and pay.[45] The following sections further explore how courts have determined whether a plaintiff has alleged an adverse impact.

a. The defendant's conduct and the standard for determining "adverse impact."

Federal circuits overwhelmingly apply an objective test for determining whether the defendant's action constitutes an adverse impact sufficient to support a retaliation claim. An objective test measures "adverse impact" in a manner similar to the reasonable person standard. In the retaliation context, if a "person of ordinary

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[39] *Id.* at 785.

[40] *Id.* at 786.

[41] *Kirby v. Elizabeth City*, 388 F.3d 440, 450 n.8 (4th Cir. 2004) ("[I]t is well established that even minor retaliation can have a chilling effect on future expression.") (citing *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990)).

[42] *El Dia,* 165 F. 3d at 106.

[43] *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995).

[44] *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990).

[45] *Johnson v. Bergland*, 586 F.2d 993 (4th Cir. 1978).

firmness" would be deterred from engaging in First Amendment activities as a result of the government's retaliation, then an adverse effect will be found. Some jurisdictions have stated that this objective standard still requires the court to perform a "fact intensive inquiry," examining the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator and the nature of the retaliatory acts.[46]

This objective test is generally expressed in the following language: "[a] plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights."[47] All federal circuits, except the Second Circuit, follow some variation of the "ordinary firmness" test.[48] The Fifth Circuit, in *Keenan v. Tejeda*[49] provided some examples of conduct which would deter "ordinary persons from criticizing government officials." Those actions include: a county withholding legal notice advertising from a paper due to displeasure with stories critical of the county board;[50] a sheriff releasing confidential details regarding a rape investigation in retaliation for the victims' negative statements about local law enforcement;[51] and the denial of a land use permit.[52]

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[46] *See, e.g., Suarez*, 202 F.3d at 686; *Thaddeus-X v. Blatter*, 175 F.3d 378, 397-98 (6th Cir. 1999).

[47] *Constantine,* 411 F.3d at 500 (4th Cir. 2005).

[48] The D.C. Circuit asks whether the defendant's actions would "inhibit an ordinary person from speaking." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576 (D.C. Cir. 2002) (*citing Crawford-EL v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) (*rev'd* on other grounds). The First Circuit finds an adverse impact "when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing party." *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989). The Third Circuit held that an adverse action "'sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights" is actionable. *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003). The Sixth Circuit held that "[r]etaliation . . . is actionable if it is capable of deterring a person of ordinary firmness from exercising his or her [constitutional rights.]" *Thaddeus-X* 175 F.3d at 397-98 (6th Cir. 1999). The Seventh circuit also uses the "ordinary firmness test" holding, "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). The Ninth Circuit found that a plaintiff may sustain a retaliation claim if official's actions would chill a person of ordinary firmness from future First Amendment activities. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000). Lastly, the Tenth Circuit found that "the alleged injury should be one that would chill a person of ordinary firmness from continuing to engage in that activity." *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).

[49] 290 F.3d 252 (5th Cir. 2002.)

[50] *North Mississippi*, 951 F.2d at 653-54.

[51] *Bloch*, 156 F.3d at 681.

[52] *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40-41 (1st Cir.1992).

The Eleventh Circuit most recently adopted the objective "person of ordinary firmness" test in *Bennett v. Hendrix.*[53] In *Bennett*, Georgia voters sued after the sheriff engaged in what was characterized as "a campaign of retaliation and intimidation."[54] The voters supported a referendum which would subordinate the sheriff to a county police department. The plaintiffs alleged that the sheriff and his staff recorded license plates of voters in a referendum-support rally, surveyed plaintiffs homes and businesses, stopped plaintiffs cars and issued sham traffic citation. The plaintiffs further alleged that the sheriff's retaliatory conduct prevented them from participating in subsequent elections to oust the Sheriff. The Eleventh Circuit, after exhaustively surveying the case law from other circuits, adopted the "ordinary firmness" test. That court explained that an objective test focusing on "ordinary" people – and not the subjective impact on the plaintiff before it – would better deter government excess at the same time as it would weed out claims of *de minimis* injury.[55]

By contrast, the Second Circuit uses both the objective standard and a subjective, "actual chill," standard for determining whether an adverse impact has occurred.[56] Precedent is clear that when private individuals criticize public officials, plaintiffs must demonstrate that they are actually chilled by the defendant's retaliatory conduct.[57] It therefore seems likely that, in most press-retaliation cases brought in the Second Circuit against the government, an actual chill standard will apply.[58]

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[53] 423 F.3d 1247 (11th Cir. 2005).

[54] *Id.* at 1249.

[55] *Id.* at 1250-1252. "[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity . . . There is no reason to 'reward' government officials for picking on unusually hardy speakers. At the same time, we recognize that government officials should not be liable when the plaintiff is unreasonably weak-willed or suffers only a de minimis inconvenience to her exercise of First Amendment rights. The 'ordinary firmness' test is therefore protective of the interests of both government officials and plaintiffs alleging retaliation." (internal citations omitted).

[56] *Gill v. Pidlypchak*, 389 F.3d 381-84 (2nd Cir. 2004) (recognizes that when no injuries independent of the First Amendment chilling are alleged, "actual chilling" is a necessary element.)

[57] *See Spear v. Town of West Hartford*, 954 F. 2d 63, 68 (2d Cir. 1992) (affirmed a dismissal on the grounds that the plaintiff had not admitted he had not changed his speech activities at all as a result of the town's retaliatory conduct). *See also Curley v. Village of Suffern*, 286 F.3d 65, 73 (2d Cir. 2001) (affirmed dismissal of retaliation claim because plaintiff's First Amendment speech was not actually deterred).

[58] In the case of public employees who sue in the Second Circuit, however, where their speech involves matters of public concern, they need not plead an actual chill. Rather, public employee plaintiffs must initially meet a three-factor, objective test: (1) that the employee spoke as a citizen on a matter of public concern and not an employee on a matter of personal interest; (2) that they suffered an adverse employment action; and (3) that the speech was at least a substantial

The Sixth Circuit, in *Mezibov*, signaled a somewhat dangerous willingness of a jurisdiction to modify its objective "person of ordinary firmness" standard to fit the subjective circumstances of the individual plaintiff. There, the court held that allegedly defamatory comments made by a prosecutor outside of the courtroom would not "deter *an ordinary criminal defense attorney* from vigorously representing his clients."[59] However, as journalists' First Amendment rights are coextensive with those of the general public,[60] it is highly doubtful that the courts could fashion a constitutionally supportable standard of a homogeneous class of "journalists of ordinary firmness" that would permit the same retaliatory acts against journalists, but not against others.

b. An otherwise lawful action can have an "adverse impact" when taken in retaliation for protected speech.

As stated previously, retaliatory action which is otherwise lawful may adversely impact First Amendment protected speech.[61] In *Rossignol v. Voorhaar*, the Fourth Circuit held that a deputy sheriffs' mass purchase of newspapers constituted an unconstitutional scheme to suppress and retaliate against a publisher because the sheriff disagreed with the newspaper's viewpoint. Although the deputies paid for each newspaper – *i.e.*, engaged in conduct that otherwise would be entirely lawful and benign – the Fourth Circuit determined that the express purpose to suppress the publisher's viewpoint converted the deputies' entirely lawful act into an unconstitutional government retaliation against free expression:

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or motivating factor in the adverse employment action. *Pidlypchak*, 389 F.3d at 382. The burden then shifts to the government to show "(1) the employer's prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the adverse employment action not in retaliation for the employee's speech, but because of the potential for disruption." *Id.* at 382 n. 2. If the government cannot then overcome its burden, the employee never has to engage in an actual chill analysis. But if the government can satisfy its burden, then the public employee must show that his or her speech was effectively chilled. *Id.* (citing *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996)).

[59] *Mezibov*, 411 F.3d at 723 (emphasis added).

[60] *See Houchins v. KQED*, 438 U.S. 1, 16 (1978); *In re Greensboro News Co.*, 727 F.2d 1320, 1322 (4th Cir. 1984).

[61] *See Rossignol,* 316 F.3d at 516. *See also Collopy v. City of Hobbs,* 27 Fed.Appx. 980 (10th Cir. 2001); *McCormick v. Farrar*, 2002 WL 31314681 (D. Kan. 2002) (unpublished opinion); *Garcia v. District of Columbia*, 56 F. Supp. 2d 1, 5 (D.D.C. 1998).

> The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own. If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance.[62]

Similarly, in *El Dia, Inc. v. Rosello*,[63] the First Circuit upheld a complaint where the plaintiff newspaper alleged that the Puerto Rico governor terminated advertising contracts with the newspaper in retaliation for critical articles.[64] The district court rejected the governor's qualified immunity defense, and the First Circuit affirmed that ruling, explaining, "It would seem obvious that using government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government would run afoul of the First Amendment."[65] The fact that the government was not legally obligated to buy advertising in the first place was immaterial to the First Circuit's analysis.

As well, in *Chicago Reader v. Sheahan*,[66] a reporter successfully alleged a retaliation claim where corrections officials, under no obligation to permit her special access to the jail, removed the access they had given her in response to an article on litigation over strip searches. The court stated, "[t]he DOC may not have had a legal obligation to admit [the reporter]. But it may not refuse to do so because she exercised her First Amendment rights."[67]

3. There was a causal relationship between the protected activity and the defendant's conduct.

A §1983 retaliation claim, because it is a tort claim, has causation as a necessary and final ingredient. In First Amendment retaliation claims, some circuits do not follow the traditional models of "but for" proximate causation and legal causation. The Fourth Circuit, for example, demands something less than direct causation. The Third Circuit requires an inference of causation or further factual arguments supporting causation if the

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[62] *Id.* at 527-28.

[63] *See El Dia*, 165 F.3d at 106.

[64] *Id.* at 108.

[65] *Id.* at 109 (citing *Rosenberger v. Rector*, 515 U.S. 819 (1995)).

[66] 141 F. Supp. 2d 1142 (N.D. Ill. 2001).

[67] *Id.* at 1146.

inference cannot be made. The Third Circuit has spoken of strong and weak inferences of causation that arise depending on the duration of time between the First Amendment activity and the retaliatory action alleged. And some courts, like the Seventh Circuit, only require a simple showing of "but for" causation.

The Fourth Circuit has found a sufficient link between protected conduct and retaliatory acts with little direct evidence of a causal connection. For example, in *Trulock v. Freeh*,[68] the plaintiff alleged that in retaliation for his magazine article criticizing the federal government, the FBI searched his home and computer. Federal agents conducted the search weeks after the article was published, there was no criminal referral (as is usually required) to commence the investigation, and the FBI did not have a search warrant – even though an FBI official told the plaintiff there was a search warrant, and the same official told plaintiff that if he brought a lawsuit he would deny making the statement.[69] The court found these allegations sufficient to support plaintiff's claims of improper motive and retaliation.[70]

In the Third Circuit, a factual or presumptive inference of causation is needed. *Estate of Smith v. Marasco*[71] establishes that a causal link may be inferred based on the time between the protected activity and the alleged retaliation:

> The timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir.1997). Thus, in recognition of that principle, we have held that such an inference could be drawn where two days passed between the protected activity and the alleged retaliation, *see Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir.1989), but not where 19 months had elapsed.[72]

In those cases in which the timeframe was not "unduly suggestive," the court held in *Smith*, other causation evidence may be used.[73] The *Smith* court rejected the survivors' suggestion, however, that the knowledge

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[68] 275 F.3d 391 (4th Cir. 2001).

[69] *Id.* at 405.

[70] *Id.*

[71] 318 F.3d 497 (3d Cir. 2003).

[72] *Id.* at 512.

[73] *Id.* at 512 (citing *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (3d Cir. 2000)); *see also C.M. v. Board of Educ. of Union County Regional High School Dist.*, 98 F.3d 989 (7th Cir. 1996) (concluded that a three month time gap between the protected activity and the retaliatory speech did was not so close to be "unusually suggestive").

of a number of officers of the decedent's complaints "contributed to the [alleged retaliatory] events" and, thus, constituted evidence of causation.[74]

In the Seventh Circuit, a plaintiff must demonstrate that the defendant "would not have taken the adverse action 'but for' the protected expression."[75] Plaintiff bears the burden, as the movant, of pleading and proving causation.[76]

The recent journalist-blacklisting cases in Baltimore[77] and Youngstown[78] presented no challenge for the parties or the courts on the causation element. There, state or municipal high officials banned entire government bureaucracies from speaking with specific journalists. In each case, the face of the official pronouncement of the retaliation made plain that the First Amendment activity caused the retaliation.

In most instances the officials are not as bold, and the retaliatory edict therefore is more obscured. As these other examples illustrate – because of the weight courts may give to inferences favoring plaintiffs in the absence of direct evidence, or the force of public policy arguments advanced by the defense – causation in a §1983 action is not as straightforward as in a simple negligence or battery tort.

III. SOME SPECIAL CONSIDERATIONS IN BRINGING PRESS RETALIATION CLAIMS

The case law teaches that, in drafting a retaliation complaint, it is essential for press plaintiffs to establish that their First Amendment protected activity drew the retaliation, and to stress from the outset that they *need not* also establish a First Amendment right to what the government took away in response. Because access to government information outside of the courts context is not absolute,[79] retaliation defendants will

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[74] *Id.* at 513.

[75] *Rundle v. Village of Round Lake Beach*, 2001 WL 1414532 (N.D. Ill. 2001).

[76] *Id.* (In the employment retaliation context, the plaintiff had the burden of showing that her suspension, administrative leave, and disparately stringent punishment resulted from department retaliation.)

[77] *Baltimore Sun,* 356 F. Supp. 2d 577.

[78] *Youngstown Publ'g,* 2005 WL 1153996.

[79] *Houchins, 438 U.S.* at 11 ("There is an undoubted right to gather news from any source by means within the law, but that affords no basis for the claim that the First Amendment compels others – private persons or governments – to supply information." (internal quotations omitted)). *Pell v. Procunier*, 417 U.S. 817, 834 (1974). *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

attempt to reframe journalists' claims as petitions for access to information that is beyond the reach of the First Amendment.

For example, in *Youngstown Publ'g Co. v. McKelvey*, a newspaper brought a §1983 claim alleging that the mayor retaliated against the paper for publishing news reports questioning the actions of government officials. The retaliatory act was the implementation of a policy that prohibited city employees from speaking with representatives of the paper. In rejecting the newspaper's retaliation claim, the court confused the protection accorded to the speech that drew the retaliation with the retaliatory act itself. The court determined that the "assertion that accessing the comments of City employees is a constitutionally protected activity cannot form the basis of a retaliation claim."[80]

Yet case law is clear that "a plaintiff alleging retaliation [need not] show that the action taken in response to her exercise of constitutional rights independently deprives her of a constitutional right."[81] Indeed, "[s]uch a rule would make a cause of action wholly redundant of the protections provided by the Constitution itself."[82] However, as the *Youngstown Publishing* case demonstrates, it is easy for a court to conflate the retaliatory act to constitutional proportions by confusing the initial protected speech with the subsequent retaliatory act. Counsel must keep the court's constitutional focus on the right element of the claim.

Additionally, the adverse impact portion of a retaliation claim can also be tricky to plead – even in circuits employing the objective standard. As the Fourth Circuit has stated, "[d]etermining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a *fact intensive* inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator and the nature of the retaliatory acts."[83] Indeed, "the definition of adverse action is not static across contexts. Prisoners may be required to tolerate more than public employees, who may be required to

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[80] *Youngstown Publ'g*, 2005 WL 1153996 at *9.

[81] *ACLU*, 999 F.2d at 786 n.6.

[82] *Id.*

[83] *Suarez*, 202 F.3d at 686 (emphasis added).

tolerate more than average citizens before an action taken against them is considered adverse."[84] While the objective "person of ordinary firmness" standard by definition should not focus exclusively on the person before the court – and should look more broadly to the tendency to chill others' speech as well – to be safe, all press plaintiffs should still attempt to establish a direct harm to the exercise of their own abilities to engage in free expression.

IV. CONCLUSION

Seditious libel laws, repressive tax codes, withdrawal of advertising, and buyouts of entire press runs all are government actions that courts have recognized as veiled attempts to impermissibly control the official message. Blacklisting of journalists by entire governments is the latest device concocted by certain officials to chill the voices of their critics. The retaliation cause of action, carefully and properly litigated, hopefully will prove to be a potent weapon in our legal arsenal to protect journalists from the violation of their most basic rights as citizens.

[84] *Thaddeus-X*, 175 F.3d at 398.

MAKING SENSE OF THE REPORTER BOYCOTT CASES

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MAKING SENSE OF THE REPORTER BOYCOTT CASES

In the State of Maryland, the Governor issued an edict that "no one in the Executive Department or Agencies is to speak" with two journalists, or to "return calls or comply with any requests" from them, because the Governor's Press Office "feels that currently both are failing to objectively report" on the Ehrlich Administration.[1] In Youngstown and Cleveland, Ohio, the Mayors issued similar directives to city officials instructing them not to speak with specific news organizations because of their negative coverage.[2]

These efforts were startling to members of the press. But were they different in kind or only in degree from what goes on every day in the interactions between reporters and government officials? There is nothing new about officials trying to control the content and "spin" of the news. Politics involves a contest of ideas, and government involves a contest of politicians. Politicians routinely seek to define the contours and content of public debate, and those in power routinely seek to ensure favorable coverage of their actions. Government officials seek to cultivate relationships with journalists—and to identify those who are either more sympathetic to their political agendas or more susceptible to the flattery of attention. Journalists, in turn, compete with each other to gain better access to those who are in a position to inform the public. There is, and always will be, a struggle to obtain information from the government, and in that struggle there is no guarantee that the press in general, or that any reporter in particular, will succeed.[3]

But are there no rules to the contest? Instinctively, everyone would agree that, as a general matter, a government official may play favorites. He may return phone calls from some reporters, but not others. He may grant exclusive interviews. He may call on some reporters and not others at press conferences. But are there any limits to even these forms of favoritism? May the official refuse to acknowledge the reporter at a press conference out of retaliation for critical coverage? Our instinct says yes, but is our instinct right? And if the official may ignore the reporter at the press conference, may he exclude the reporter from the press

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[1] *See The Balt. Sun v. Ehrlich*, 356 F. Supp. 2d 577, 579 (D. Md. 2005).

[2] *See Youngstown Publ'g Co. v. McKelvey*, 2005 WL 1153996 (N.D. Ohio, May 16, 2005); *Raycom Nat'l Inc. v. Cambell*, 361 F. Supp. 2d 679 (N.D. Ohio, 2004).

[3] Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 636 (1974-75).

conference altogether or revoke his credentials in retaliation for critical coverage? Our instinct says no, but is our instinct right? May the Governor not only refuse to return a reporter's phone calls, but also instruct his subordinates not to do so? What does our instinct tell us about that? And what would the law instruct?

To answer these questions, we must first return to basics—to defining the role of the press, the First Amendment's limitations on the government, and the prerogatives of the office holder.

I. The Governing Principles

A. The Role of the Press under the First Amendment.

The role of a free press in a democratic society is clear enough. The Constitution places sovereignty in the hands of the people, not those who hold the reins of power, and it establishes a free press as a vehicle to inform the people about the affairs of their government. That informative role, in turn, has a twofold effect: it simultaneously guards against abuse by government officials and provides the people with the means to control their government and its policies. As the Supreme Court observed in *Mills v. Alabama*:

> The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.[4]

The Supreme Court elaborated upon the press's informative role in *Grosjean v. American Press Co.*:

> The predominant purpose of [the free press guarantee] was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[5]

As James Madison wrote: "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both."[6]

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[4] 384 U.S. 214, 219 (1966)

[5] 297 U.S. 233, 250 (1936)

[6] 9 WRITINGS OF J. MADISON 103 (G. Hunt ed. 1910).

Because of the importance of the role assigned to the press in our constitutional system, the First Amendment protects the "pivotal function of reporters to collect information for public dissemination."[7] Thus, the Supreme Court and numerous Courts of Appeals have recognized that the newsgathering process itself enjoys constitutional protection. "[W]ithout some protection for seeking out the news," the Supreme Court has noted, "freedom of the press could be eviscerated."[8]

So the press has "some protection" for seeking out the news. But that protection is quite limited. It is well-established that that there is no general First Amendment right of access to information in the hands of the government.[9] The most that the courts have said about the press's general right of access is that the press has a right of access to places and sources of information that are accessible generally to the public.[10] But as a general matter, the press cannot demand, based on the First Amendment, that records be provided, that phone calls be returned, that questions be answered, or that interviews be granted.

These principles do little to answer the questions that we posed at the outset—whether a government official may discriminate among members of the press. At most, they simply establish that restrictions on newsgathering implicate the First Amendment interests and rights of the press. But that is an important point of departure: if the First Amendment is implicated at all in restrictions on access, then there is surely some limitation on the ability of a government official to limit access based on the content or, worse, the viewpoint of a reporter's coverage. There must be some limit on the ability of the government official to retaliate against a reporter on that basis. Otherwise, the government, through its officials, could effectively decide who gets to report on the affairs of government. The obvious question is how to define that limit.

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[7] *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999) (quotations and citation omitted).

[8] *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *see also, e.g., Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 576 (1980) (quoting *Branzburg*); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) ("It is true that there are 'First Amendment interests in newsgathering.'") (quoting *In re Shain*, 978 F.2d 850, 855 (4th Cir. 1992) (Wilkinson J., concurring)); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (noting "the protection afforded newsgathering under the first amendment guarantee of freedom of the press"); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (recognizing "society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public").

[9] *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).

[10] *See Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (finding that press was not entitled to access prisons, which were not opened generally to the public).

B. The Limitations on the Government

"[A]bove all else," the Supreme Court has said, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] Well, almost. Subject matter restrictions have been upheld in limited public forums. Obscenity, defamation and fighting words may be restricted because of their content. But the prohibition on *viewpoint* discrimination is surely at the core of the First Amendment. That is what the Supreme Court had in mind when it stated in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995), that "[d]iscrimination against speech because of its message is presumed to be unconstitutional."

If newsgathering is entitled to "some protection" under the First Amendment, then viewpoint discrimination in the form of restrictions on newsgathering must be presumed to be unconstitutional as well. In an analogous line of cases, the Supreme Court has held that even when the government need not open a particular forum of communication to the public, once it does so it may not "discriminate against speech on the basis of its viewpoint." *Id.* at 819. The same principle would appear to apply in the context of newsgathering: although the government need not provide access to a particular channel of communication, or a particular source of information, once it does so in general it may not discriminate on the basis of viewpoint.[12] It may not engage in "an effort to suppress expression merely because public officials oppose the speaker's view."[13] Exclusion of a reporter from the ordinary channels by which the government communicates with the press, merely because a government official disagrees with the views expressed by that reporter, seems clearly to violate this principle.

But what if the official claims that the exclusion is based not on the reporter's point of view, but rather on his past inaccuracies or, to quote Governor Ehrlich, "fail[ure] to objectively report" on his

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[11] *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

[12] *See, e.g., Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 43, (1999) (Ginsberg, J., concurring) ("To be sure, the provision of address information is a kind of subsidy to people who wish to speak to or about arrestees, and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed. California could not, for example, release address information only to those whose political views were in line with the party in power.")

[13] *Id.*

administration? There are obvious difficulties of proof in such a case. Is it believable that an official would exclude a reporter based on inaccuracies that were favorable to his position? Can it really be demonstrated that viewpoint did not enter into the decision at all? These questions are obviously serious ones. But it is difficult to support a constitutional rule that turns on the resolution of such factual questions. For there are more basic problems with the idea that government officials could impose a test of objectivity or position themselves as arbiters of accuracy—especially in press reports about themselves. For one thing, the idea behind the First Amendment is that the best remedy for "falsehood and fallacies" is "more speech, not enforced silence."[14] In this country, we don't rely upon the government to determine who can be trusted to speak or report the truth. There is obviously something special to fear when the official who purports to make such a determination "is himself the subject of the news reporting which he purportedly wishes to purify of inaccuracy."[15] And when the judgment is a predictive one—not merely that a past report was inaccurate, but that future reports are likely to be inaccurate—the judgment takes on some of the more offensive features of a prior restraint.

Based on these principles, it seems rather clear that a chief executive may not deny a reporter access altogether to the normal channels of communication that are open generally to the press, based on the content of the reporter's prior coverage. But may the chief executive take less extreme action? That requires consideration of his own First Amendment rights.

C. The Prerogatives of the Office Holder

One of the difficulties that these "retaliation" cases pose is in reconciling the rights of the press with the prerogatives of the office holder. Surely the politician, who has First Amendment rights and is unencumbered by First Amendment obligations when he runs for office, does not lose all of his First Amendment rights when he is elected.[16] Nor does he *become* in all respects the government. The individual

[14] *Whitney v. Cal.*, 247 U.S. 357, 377 (1926).

[15] *See Times-Picayune*, 15 Media L. Rep. at 1719-20, 1988 WL 36491, at *10 (holding that the Sheriff of Jefferson County's could not deny certain information and access to particular members of the press in order to ensure the "accuracy" of their reporting without violating the Constitution).

[16] *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

government official can have his own agenda—and an elected official's administration can seek to advance that agenda. One way the official can advance his or her agenda is by speaking to the press—even by using or manipulating the press. The First Amendment, which seeks to encourage political debate, cannot tie the hands of those who are engaged in it. But neither can it give those in power the means to stifle others. Given that the government itself cannot discriminate on the basis of viewpoint, and that the government can only act through individual officials, there must be some limit on the ability of a government official to control press coverage through discriminatory access. The President could not revoke the press credentials of all but those who swear allegiance to his political agenda. So what are the limits?

Courts have given broad leeway to individual officials to choose when to speak, when not to speak, to whom to speak, and to whom not to speak. Those decisions can probably be made for almost any reason at all—so long as there is nothing more involved than an individual decision to speak or not to speak. No official should ever be compelled to return a reporter's phone call, to grant an interview, or even to call upon a particular reporter at a press conference. The First Amendment frowns upon compelled speech, and there is no reason why a public official can be compelled to engage in any communication with any reporter.

The difficulty arises in determining what, if anything, public officials can do to control their subordinates' interactions with the press. Does every press-related directive from a chief executive to his subordinates constitute state action that needs to meet a First Amendment test? If so, can a viewpoint-based directive of any kind be sustained? Can the chief executive direct the press secretary to favor certain reporters and to disfavor others? Doesn't a chief executive retain some ability to enlist his subordinates in his effort to communicate his policies in the most effective way possible—through the reporters who can be trusted to get the story right and even spin the story in the administration's favor?

Some guidance can perhaps be gained from the cases assessing claims by government employees that their First Amendment rights have been violated by restrictions on their speech. Even patronage employees have First Amendment rights to speak their minds.[17] But a government official can exercise control over the

[17] *See Elrod v. Burns*, 427 U.S. 347, 361 (1976).

speech of employees in policymaking positions.[18] That "policymaker exception" has a practical foundation: An administration has a "legitimate interest in securing employees who will loyally implement its policies."[19] And to make and communicate policies effectively, an administration must be able to speak with one voice. This notion might be invoked to support the idea that a chief executive can tell those in the position of communicating policies to whom they can and cannot speak. But can the speaking-with-one-voice rationale really extend that far? We think not.

It is one thing to insist on a consistent message from those in the administration who are charged with communicating the administration's message; it is quite another to insist that only those outside the administration who support the message will be given information about what is going on in the government. Policymakers sign on to the administration's agenda; journalists do not. They are more like the non-policy makers who are entitled to be free from discrimination based on the views they express. Indeed, they are in an even stronger position. They are not part of the government at all; their role is to inform the public about the affairs of government and to guard against corruption in the government. Permitting official boycotts, however limited, of those who are critical of those in power directly undermines that constitutionally protected role.

The strong presumption must be, then, that a chief executive may not instruct another official, whatever his position, to boycott a reporter because of the views the reporter has expressed or the biases he has revealed. It is difficult to see that as anything other than state action, and it is difficult to identify any overriding interest in allowing such a boycott.

That leaves the question of granting favored access. May a chief executive instruct his subordinates to favor particular reporters because of their sympathetic coverage—to grant an interview to such a reporter or to make sure that that reporter's calls are always returned promptly? Here the threat to the First Amendment seems less severe. Indeed, it is unclear that the direction to grant an interview or to return a call amounts to a denial of anything to anyone else. And here the interest in effective communication of the

[18] *McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996); *Rose v. Stephens*, 291 F.3d 917, 922 (6th Cir. 2002).

[19] *Rose*, 291 F.3d at 921 (citing *Elrod*, 427 U.S. at 367).

administration's message seems more compelling. As long as no one is excluded from the ordinary channels of communication, what is the harm to First Amendment interests in allowing an administration to grant some reporters special access? Seemingly very little.

D. Two Guiding Principles

To sum up, there must be limits on a public official's ability to deny access to a reporter based on the reporter's perceived viewpoints or bias. The bases for defining the limits, we suggest, lie in two distinctions. First is the distinction between personal actions that involve only the individual official's own speech and actions that purport to restrict the speech of others. And second is the distinction between an official's seeking to advance his own agenda and seeking to squelch the opposition—between favoring reporters who are considered sympathetic and disfavoring those who are not, between granting special access to the former and denying normal access to the latter. Of course, these are, to some degree, imprecise and fuzzy lines. But they are nonetheless real. And they define two general principles that seem to stand up fairly well under any hypothetical case that can be imagined.

1. An individual government official may choose to speak or not to speak to any reporter for almost any reason, but does not enjoy the same freedom to restrict the speech of other, subordinate officials.

2. A government official may seek to secure the advantages of granting favored access to reporters for almost any reason, including perceived support for the official's positions, but an official may not exclude a reporter from the ordinary channels through which the government communicates to the press in general, based on the reporter's perceived hostility to the official's positions.

Thus, for example:

- An official may grant exclusive interviews and return whatever phone calls he likes. The official's own speech must remain essentially uninhibited.

- An official may call on whatever reporters he pleases at a press conference. He may choose not to call on a particular reporter for reasons of personal pique or political differences.

- An official may not exclude disfavored reporters altogether from a press conference. Press conferences are open to the press in general—or at least to credentialed reporters—and excluding reporters because of their perceived hostility inhibits criticism of official action.

- An official may instruct his subordinates to grant favored access to some reporters, but may not instruct his subordinates to deny disfavored reporters access to information and channels of communication that are available to reporters in general. He may not, for example, instruct officials who would have occasion to speak to reporters never to speak to a particular reporter. He may not instruct his press officer not to respond to inquiries from a particular reporter.

- Finally, the position of public information or press officer probably requires an additional rule. Because that official has an assigned responsibility to communicate with the press, he is situated somewhat differently from other officials. When he decides not to speak to a particular reporter, he is acting on behalf of the government in a special way, and his own First Amendment rights are necessarily curtailed. The public information officer ought not to be able, even on his own accord, to decide not to respond to a particular reporter's inquiries based on disagreement with his coverage.

II. The Decided Cases

How well do these principles hold up against the decided cases? Some decisions are entirely consistent with these principles:

- In *Borreca v. Fasi*, the Mayor of Honolulu ordered that a reporter be excluded from his press conferences, after concluding that his reporting was irresponsible, inaccurate and biased.[20] The court invalidated the exclusion, explaining that "[r]equiring a newspaper's reporter to pass a subjective compatibility-accuracy test as a condition precedent to the right of that reporter to gather news is no different in kind from requiring a newspaper to submit its proposed news stories for editing . . . ."[21]

- In *Sherrill v. Knight*, the D.C. Circuit held that the Secret Service's selective granting of White House press passes violated the First Amendment.[22] The court recognized that neither the press nor the public has a free-standing right to access the White House. Nonetheless, the court held, once the White House's "press facilities are made publicly available as a source of information for newsmen, the protection afforded newsgathering under the first amendment guarantee of freedom of the press, requires that this access not be denied arbitrarily or for less than compelling reasons."[23]

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[20] 369 F. Supp. 906 (D. Hawaii, 1974).

[21] *Id.* at 909-10.

[22] 569 F.2d 124 (D.C. Cir. 1977).

[23] *Id.* at 129.

- In *Times Picayune Publishing Co. v. Lee*,[24] the Sheriff of Jefferson Parish, having concluded that the coverage of the *Times-Picayune* was inaccurate and systematically biased against him, ordered that the newspaper was not to be notified in advance or permitted to attend press conferences, was not to be given notification of newsworthy events as other news organizations were, and unlike other news organizations, must submit all inquiries to the Public Information Office in writing. The court struck down these restrictions, explaining that the First Amendment "includes, at a minimum, a right of access to information made available to the public or made available generally to the press."[25] "A policy that discriminates against particular reporters or news organizations by public officials who are dissatisfied with the contents of news coverage is unconstitutional," the court held, "unless the policy furthers a compelling state interest and is the least restrictive means available to achieve the asserted governmental purpose."[26]

- In *The Chicago Reader v. Sheahan*, a reporter published a negative article about a prison facility that had, up to that point, permitted her and some other members of the press access to the prison and various sources of information about the prison.[27] Based on the content of the negative article, the prison denied the same reporter's request to observe a particular class attended by inmates. The court held that even though the reporter had no "right" of access, the denial of access based on the content of her article violated the First Amendment. "[D]enial of even discretionary perquisites," the court explained, "if motivated by plaintiffs' views, violates the First Amendment."[28]

Other decisions have been more mixed—acknowledging a general right of nondiscriminatory access to information made available to all members of the press or to press conferences to which all members of the press are invited, but permitting broad orders prohibiting government officials from speaking at all to particular members of the press on a one-to-one basis:

- In *Snyder v. Ringgold*, the Director of Public Affairs of the Baltimore Police Department took a number of actions against a reporter based on his conclusion that she was not "objective" in her coverage of the department.[29] He told her employer that he would refuse to talk to her about any story; he said that a television crew would be denied access to headquarters if it included her; and he told new officers not to

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[24] 1988 WL 36491 (E.D. La. 1988),

[25] *Times Picayune Publishing Co.*, 1988 WL 36491, at *9.

[26] *Id.* at *10.

[27] 141 F. Supp. 2d 1142 (N.D. Ill. 2001).

[28] *Id.* at 1146.

[29] 40 F. Supp. 2d 714 (D. Md. 1999).

trust her and never to go off the record with her. On the other hand, after these actions, the Police Commissioner did grant Snyder a telephone interview about new department policies.

The district court initially entered an injunction requiring the Public Affairs Director to give the reporter access to any information or interviews that are given to any other members of the media. That injunction was clearly too broad if it meant that no one else could have an exclusive interview or make an individual request for information without it resulting in the dissemination of the same information to everyone in the media. And that is precisely how a different judge interpreted the injunction when he dissolved it two years later on a motion for reconsideration. (In the interim, the Fourth Circuit had reversed the district court's order denying qualified immunity on the damage claims.)[30] In dissolving the injunction, the court explained that it meant that "if a member of [the police department] were to grant an exclusive interview to Barbara Walters or Diane Sawyer, an interview would also have to be granted to Terri Snyder," and if the department were to provide certain off-the-record information to a news reporter who had proven particularly trustworthy in the past, he or she would have to provide that information to Terrie Snyder, but not to any other member of the news media."[31] In that respect, the court observed, the injunction "rather than simply ensuring that [the reporter] will receive equal treatment, unfairly provides her with preferential treatment that is not afforded to all other members of the media." That aspect of the court's decision seems fair enough, as does the following important observation: "If [the department] holds a general press conference or opens files or records to members of the media, then whether it can exclude [the reporter] presents an entirely different question."[32]

The problem with the decision, it seems to us, is in how the court addressed the actual claims that the reporter had made. The court observed that the Director "did not deny [the reporter] 'information generally available' or 'freely given to other members of the news media.' The policies . . . merely exercised [the Director's] right not to answer questions from or meet with particular representatives of the news media."[33] But that is not all the Director had done: he had also barred a camera crew from entering the headquarters if she was present, and he had instructed new officers not to go off the record with her. These facts appear to have been ignored by the court.

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[30] *Snyder v. Ringgold,* 133 F.3d 917 (4th Cir. 1998).

[31] *Id.* at 718.

[32] *Id.*

[33] *Id.* at 717.

- In *McBride v. Village of Michiana*, village officials displeased with a reporter's coverage were alleged to have taken a variety of retaliatory measures against her.[34] Among the allegations that survived the village's summary judgment were claims that village officials warned her employer that they "could not guarantee [her] physical safety at public meetings of the Village Council," attempted to coerce her employer to fire her, removed her from a "press table" and then removed the press table altogether, and mishandled her FOIA requests—all in retaliation for her unfavorable coverage. The court's conclusion that such factual allegations could state a claim follows from the principles we have suggested. But another conclusion does not. The reporter alleged that the Village Clerk had "instruct[ed] Village employees not to talk to [her] (without regard to whether the employee chose to talk to [her] or not) about public affairs."[35] The court found no constitutional problem with such an order, "because the press has no right of access to officials and the Village was exercising its First Amendment right not to speak with the press."[36] Of course, the Village has no First Amendment rights. And while the court would have been correct if it was ruling on the Clerk's decision not to talk to the reporter herself, it is difficult to accept the invocation of the speaker's First Amendment rights when the allegation was that officials were prohibited from speaking to the reporter whether or not they wanted to.

- In *Raycom National, Inc. v. Campbell*, the Mayor of Cleveland issued an edict prohibiting city officials and employees from speaking with or providing information to a television station's reporters, except through formal record requests under the public records law.[37] The Mayor took the action because of the station's "irresponsible conduct," particularly in the way it had treated and shown the Mayor's children. Thereafter, when reporters called the police, fire and public affairs departments on routine inquiries, they were told that officials were prohibited from speaking with them. The court found no constitutional violation, but its explanation was hardly persuasive. It observed first that "the Mayor may exercise her right not to speak with certain reporters that, in her opinion, she views as untrustworthy or irresponsible,"[38]– a point with which we would agree. It then added that "as a high-level executive with a broad range of discretionary authority, [she] may make the determination that City administrators and employees may not comment on behalf of the City to members of the media,"[39]– a comment with which we might agree if it means "to members of the

[34] 30 F.3d 133, 1994 WL 396143 (6th Cir. 1994)

[35] *Id.* at *10.

[36] *Id.*

[37] 266 F. Supp. 2d 679 (N.D. Ohio 2004).

[38] *Id.* at 683.

[39] *Id.* at 684.

media in general."[40] But of course, if that is all the Court meant, the observation hardly solves the case, because City officials had not been instructed not to comment to members of the media in general. They had been told to discriminate against one particular media entity. It is, therefore, difficult to comprehend the court's next observation that the requested injunction "would have the effect of conferring preferential status" on the station.[41] In the final analysis, the court probably posed the correct question – whether the station had been denied "access to information generally available to other members of the media."[42] It simply answered that question incorrectly.

- In *Youngstown Publishing Co. v. McKelvey*, the Mayor of Youngstown, Ohio, issued a directive forbidding City employees from communicating with *Business Journal* reporters and representatives about any City business.[43] The court found that the directive denied *Business Journal* reporters "the ability to conduct one-on-one interviews with and receive comments from City employees." But it found no constitutional violation because, in its view, the press's "limited constitutional right of access applies only where comments by government officials are offered in a forum effectively open to all members of the press." The fact that city employees routinely offered comment by telephone and in one-on-one interviews was irrelevant, the court felt, because such a practice did not establish a "forum" for communication. The problem here, it seems to us, is in an unduly rigid application of the notion of a forum. Only by ignoring the fact that these reporters were denied the *kind* of access other reporters were given could the court conclude that "right of access sought by the *Business Journal* . . . is a privileged right of access . . . ."[44]

- Finally, in a recent case that is now on appeal to the Fourth Circuit, Maryland Governor Robert Ehrlich sent a memorandum to all employees of the Executive Department directing them not to speak with two *Baltimore Sun* reporters or to comply with any requests from them, because they had "fail[ed] to objectively report on any issue dealing with the Ehrlich-Steele Administration."[45] Thereafter, state government employees who regularly spoke to the reporters in the past refused to do so, and one of the reporters was excluded from a press briefing that the Governor held for 10 to 12 reporters. But not all access was cut off: the reporters' public information requests were answered, and they were not denied entrance to

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[40] Presumably a high executive may limit those who are authorized to speak "on behalf of the City." If, however, employees were prohibited from speaking not only "on behalf of the City," but on their own behalves, they would have First Amendment claims.

[41] *Id.*

[42] *Id.* at 683.

[43] 2005 WL 1153996 (N.D. Ohio, May 16, 2005).

[44] *Id.* at *7.

[45] *The Balt. Sun Co.*, 356 F. Supp. 2d 577.

press conferences. The court dismissed the *Sun's* challenge to the Governor's edict, explaining that there is no "right to have equal access to public information and to be treated the same as other journalists."[46] As the court saw it, "a government may lawfully make content-based distinctions in the way it provides access to information not available to the public generally."[47] And the Governor's memorandum, in the court's view, had been implemented "in a way that is reasonably calculated to ensure the Sun's access to generally available public information."[48]

In other words, in the district court's view, it is fine to order everyone not to speak to a reporter because of the viewpoints he expresses, as long as the reporter has access to information that is generally available *to the public*. But a reporter's job is not simply to take what is given to the public generally; it is to seek out the news. The court's opinion seems to permit a government official to deny that ability to a reporter based on the views he expresses, and that seems clearly to offend the First Amendment.

III. Conclusion

For the most part, the decided cases are faithful to the principles we suggest. Even the cases that deny reporters' claims often state something close to an appropriate standard. The principal problem seems to come in the court's failure in some cases to distinguish between the prerogative of the office holder to decide for himself with whom to speak and the attempt to prohibit others from speaking to reporters to whom they would be perfectly willing to speak, or the failure to distinguish between the perfectly appropriate decision to grant favored access to some reporters and the inappropriate attempt to deny disfavored reporters minimum access to the kinds of normal courtesies and channels of information that are extended to the press in general. Issues of semantics sometimes obscure issues of substance in these opinions. When the reporter complains that government officials have been instructed not to talk to him, is he asserting a claim of *equal* access or one of *privileged* access? We think it is neither. The reporter is not seeking any privilege not made available generally to members of the press (as opposed to members of the public). Nor is he seeking equal access in the sense of participation in other reporters' one-on-one interviews, or even the ability to interview the same officials that others have been able to interview. All the reporters are asserting in these cases is a claim of

[46] Id. at 581.

[47] *Id.*

[48] *Id.* at 582.

minimal access to the kinds of basic forms of communication that are generally available to members of the press—the ability to speak to the public information officer who is assigned the responsibility of communicating with the press and to speak with any other official who, left to his own judgment, would be willing to speak with him.

There are genuine concerns that motivate the decisions that deny this basic right of minimal access to the normal channels of communication based on a reporter's past coverage. But if the courts are a little more careful in focusing on the distinctions we have suggested, and on the minimal claim that is properly being presented, those genuine concerns can be accommodated without sacrificing the rights of journalists who disagree with those in power.

STANDING ISSUES IN THE GOVERNMENT BOYCOTT CONTEXT

DOES THE PRESS HAVE STANDING TO RAISE PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS?

By Maureen P. Haney*

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STANDING ISSUES IN THE GOVERNMENT BOYCOTT CONTEXT: DOES THE PRESS HAVE STANDING TO RAISE PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS?

As media plaintiffs have grappled with dismissal-proof ways of addressing and eradicating public officials' "freeze-out" of their reporters, one avenue of relief that has been pursued is a claim based on the violation of the First Amendment rights of government employees who are themselves "gagged" by an official ban on communicating with select media. That is, in addition to a claim for retaliation against the media for the publication of critical and/or unflattering information, media plaintiffs may also assert a wholly separate claim for violation of the First Amendment rights of government employees. This claim is premised on the notion that government employees have a First Amendment right to speak to reporters, particularly on matters of public concern, and that this right cannot be violated by way of an official edict prohibiting those employees from speaking with a particular media entity. Assertion of such a claim is also premised on the notion that the media plaintiff can permissibly advance the rights of unnamed and otherwise unidentified government employees. The question is, of course, Does a media plaintiff truly have standing to assert the First Amendment rights of non-party government employees?

Fortunately for those who wish to assert free speech claims, flexibility appears to be a hallmark of the standing requirement in the context of First Amendment claims. As held by the United States Supreme Court, "in the First Amendment context, '[l]itigants...are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'"[1]

Several federal cases have applied the principle that overly broad governmental actions can be challenged on the grounds that they impinge on the First Amendment rights of individuals or groups not

[1] *Virginia v. American Booksellers*, 484 U.S. 383, 392-393 (1988), citing *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 956-957 (1984), which in turn is quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973); *North Olmsted Chamber of Commerce v. North Olmsted*, 86 F. Supp. 2d 755 (N.D. Ohio 2000).

before the court, without running afoul of technical standing requirements.[2] As one court has put it, "were it otherwise, newspapers, radio stations, movie theaters and producers – often those with the highest interest and the largest stake in a First Amendment controversy – would not be able to challenge government limitations on speech as substantially overbroad."[3]

The rationale for relaxing the standing requirement in the First Amendment context has also been explained as a means of protecting individuals or groups who might be too fearful of punishment to challenge a statute, and whose speech is therefore chilled:

> Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.[4]

What this case law can be assumed to mean, moreover, is not just that the media can assert claims based on an official's violation of non-party employees' rights as a general matter, but that there need not even be an allegation – let alone proof – that actual employees have in fact suffered *actual* injury from the effects of an official government boycott.[5]

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[2] *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ("the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity"); *Lakewood v. Plain Dealer Publishing Co.* , 486 U.S. 750 (1988) ("A facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) ("we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers -- often those with the highest interest and the largest stake in a First Amendment controversy -- would not be able to challenge government limitations on speech as substantially overbroad.").

[3] *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

[4] *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-957 (1984)

[5] This issue was recently briefed in the *Youngstown Publishing Company v. McKelvey* case, wherein the mayor attempted to argue that the First Amendment claim asserted on behalf of city employees was subject to dismissal based on the fact that the plaintiffs in that case failed to specifically allege that any city employees were opposed to the mayor's edict, or had suffered harm as a result. In response, the newspaper pointed to the language in *North Olmsted Chamber of Commerce v. North Olmsted*: "in the First Amendment context, a plaintiff may challenge a law on its face because

The Supreme Court decision in *Virginia v. American Booksellers Association* provides guidance on this issue. At issue was a Virginia statute[6] making it unlawful for any person to knowingly display reading materials that, as defined in the statute, were "harmful to minors" in a manner in which minors could view and examine them. It was alleged that the practical results of the enforcement of the statute would affect bookbuyers' ability to peruse and acquire materials, in addition to the affects the law would have on the sellers.

In that case, despite the fact that the state had not yet enforced the statute at issue against any individual booksellers, and thus no bookbuyers could have experienced any effects from that enforcement, the Court noted that it was "not troubled by the pre-enforcement nature of the suit."[7] Rather, because there was the threat of enforcement against booksellers, and booksellers would feel bound to take significant compliance efforts or risk prosecution, the First Amendment rights of bookbuyers were sufficiently implicated – bookbuyers whose rights, it need be noted, were being asserted in the case by organizations whose members were made up of booksellers.

The Court in *American Booksellers Association* concluded that "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them."[8] Because the law may have been enforced against booksellers, the First Amendment rights of bookbuyers were a concern. In this particular context then the harm, it seems, can be speculative: it is enough that it "may" come to pass; that the threat of enforcement of an overbroad policy exists.[9] As stated by the Supreme Court: "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."[10]

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it is content based, or because it *might* chill the First Amendment rights . . . of others not before the court." In stating that certain others "might" be harmed, the newspaper argued, the court recognized that no government employee need have registered his or her disapproval with the official action as a preliminary matter. *See* Brief of Appellants, *Youngstown Publishing Co. v. McKelvey*, at p. 20.

[6] Va.Code § 18.2-391(a) (Supp.1987)

[7] *Virginia v. American Booksellers Association*, 484 U.S. 383, 393 (1988).

[8] *Id.*

[9] *Id.*

[10] *NAACP v. Button*, 371 U.S. 415, 433 (1963)

In attempting to remedy official policies designed to cut off all government communication with a particular media entity, counsel are advised to consider the inclusion of a claim in their complaint to vindicate the rights of any government employees who are subject to the policy. While the extent to which a government employee has the right to unfettered First Amendment expression in connection with his or her employment has certainly been the subject of its own litigation,[11] it is generally true that a public official cannot impose a blanket ban on all communication – even communication in the public interest – without satisfying a number of constitutional requirements.[12] While the scope of those requirements are beyond the breadth of this article, counsel for a media plaintiff would do well to consider the rights of government employees when pursuing a claim based on a government boycott. If the goal is eradication of an unconstitutional policy, then a claim for violation of the First Amendment rights of government employees may well provide another arrow in the quiver for reporters and their media employers.

[11] *See, e.g., Pickering v. Bd. Of Education*, 391 U.A. 563 (1968); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Belcher v. City of McAlester*, 324 F.3d 1203 (10th Cir. 2003); *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995); *Harman v. City of New York*, 140 F.3d 11 (2d Cir. 1998); *Tucker v. Cal Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996); *Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Township*, 246 F. Supp. 2d 734 (E.D. Mich 2003).

[12] *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

MLRC 2005 REPORT ON SIGNIFICANT DEVELOPMENTS

WITH AN UPDATE ON CRIMINAL LIBEL DEVELOPMENTS

A. MEDIA LIBEL LAW

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1. Defamatory Meaning

Among the interesting decisions on defamatory meaning over the past year, the First Circuit affirmed dismissal of a libel claim over a miscaptioned photo that allegedly implied plaintiff was homosexual. *Amrak Productions, Inc. v. Morton*, 410 F.3d 69 (1st Cir. 2005). The photo appeared in a tell-all book about pop singer Madonna and showed her walking together with an openly gay dancer who was inaccurately identified in the caption as the plaintiff, James Albright – a former bodyguard/boyfriend of Madonna. Albright sued, alleging that he had been defamed because the man in the photograph is an "outspoken homosexual." As reported last year, the federal district court in Massachusetts dismissed the complaint, concluding that (1) the publication did not imply plaintiff was a homosexual, and (2) that homosexuality is no longer capable of a defamatory meaning. *See* 321 F. Supp. 2d 130, 135-36, 32 Media L. Rep. 1769 (D. Mass. 2004). The First Circuit affirmed on the former ground and declined to address whether the false suggestion that a person is homosexual is still capable of a defamatory meaning.

A prom photo in a magazine article about casual and promiscuous sex among high school students was capable of a defamatory meaning because even in today's environment, "statements falsely suggesting that a person is sexually promiscuous or sexually licentious are generally actionable as defamation." *Stanton v. Metro Corp.*, 357 F. Supp. 2d 369 (D. Mass. 2005). But the magazine publisher was saved by a disclaimer that "directly contradict[ed] the otherwise-defamatory connection between the photograph and the text." The disclaimer stated that individuals photographed were "unrelated" to the people and events in the story.

A New York state trial court refused to dismiss a libel claim by an ex-girlfriend of rock star Gene Simmons and Viacom over a profile of the KISS frontman. *Ward v. Klein,* No. 100231-05, 2005 WL 2997758 (N.Y.Sup. Nov. 9, 2005). Photographs of plaintiff, together with commentary describing Simmons' legendary promiscuity, could create the defamatory implication that "plaintiff was available to satisfy Simmons's desire for a casual sexual encounter at his whim."

A divided Ninth Circuit panel affirmed dismissal of a libel claim by Evel Knievel and his wife against ESPN over a photo caption that referred to Knievel as a "pimp." *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005). The photograph depicting Knievel with his right arm around his wife and left arm around another young woman. The caption stated: "Evel Knievel proves that you're never too old to be a pimp." Plaintiffs contended that the picture and caption were defamatory "because they accused Evel of soliciting prostitution and implied that [his wife] was a prostitute." The court indicated that it would be disposed to find that the word "pimp" as used in this context was not "reasonably capable of sustaining a defamatory meaning" and, indeed, "was most likely intended as a compliment." But it found it unnecessary to "definitively resolve" the issue. Instead, it applied the *Milkovich* standard to conclude that the statements were protected opinion.

In a twist on an old theme, a black football player sued the makers of a video game for libel and false light for mistakenly using his picture with the description of a like-named white football player. *Neal v. Electronic Arts, Inc.*, 374 F.Supp.2d 547 (W.D. Mich. 2005). The court held that as a matter of law a misidentification of the plaintiff's race is not defamatory. "Plaintiff's argument that the use of his picture in place of a Caucasian player is highly offensive to a reasonable person is simply contrary to the well-established history of the judiciary not to condone theories of recovery which promote racial prejudice or effectuate discriminating conduct."

Relying on Illinois' innocent construction rule, the Seventh Circuit affirmed dismissal of a defamation action over a newspaper column that allegedly implied plaintiff was a prostitute. *Knafel v. Chicago Sun-Times,* 413 F.3d 637, 2005 WL 1523209 (7th Cir. June 29, 2005). The column discussed plaintiff's palimony-style litigation with basketball star Michael Jordan, stating, among other things, plaintiff was "making herself sound like someone who worked in a profession that's a lot older than singing or hair designing." Affirming dismissal on the pleadings, the court reasoned that while the reference to the "oldest profession" implied a reference to prostitution, it could be innocently interpreted to mean that plaintiff was demeaning herself for money, and not actually selling sex.

A divided Illinois appellate court affirmed dismissal of a libel claim brought by a prominent criminal defense lawyer against the author and publisher of a nonfiction book about organized crime. *Tuite v. Corbitt*, 830 N.E.2d 779, 33 Media L. Rep. 1967 (Ill. App. June 7, 2005). The book reported that plaintiff's mafia clients believed that by hiring a "big shot" lawyer with a one million dollar retainer their acquittals were "a done deal" and plaintiff "had it all handled." Plaintiff alleged these statements were euphemisms for "bribery" and "corruption." The court disagreed, finding that in context the statements could be innocently construed to mean that plaintiff's clients simply wanted "better representation" from "a high-priced and experienced attorney." The dissent argued that the book "used a kind of code, apparently recognizing there are legal limits to what can be said about a lawyer. But the code is transparent." The dissent concluded that there was no reason to discuss plaintiff in "a book about 'unbridled corruption'" unless it was to describe him as corrupt.

And an Illinois federal district court applied the innocent construction rule to dismiss on the pleadings a car dealer's claims over a radio news report about murder charges against his brother. *Mancari v. Infinity Broadcasting East, Inc.*, 2004 WL 2958765, at *4-5 (N.D. Ill. Nov. 25, 2004). The plaintiff, Frank Mancari, a suburban car dealer, sued over a broadcast that erroneously described his brother Bruno Mancari as "the suburban car dealer back in court ... in his trial for murder." The broadcast explained that "Prosecutors allege Mancari had Russo killed over fears he would tell police about an illegal chop shop operation at the car dealerships." The court held that taken as a whole the broadcast could reasonably be construed to refer only to Bruno Mancari and, thus, Frank Mancari's defamation and false light claims must be dismissed. The court also dismissed claims on behalf of the dealership over the reference to "an illegal chop shop" since that could be construed as the prosecutor's "theory of the case" and not "an express accusation of illegal activity" against plaintiff.

Defamation by Implication or Innuendo

In *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. July 28, 2005), a divided Fourth Circuit panel reinstated claims for libel and intentional infliction of emotional distress filed by a former government

bioweapons scientist who alleged that a series of op-eds by columnist Nicholas Kristoff implied he is the anthrax murderer. The columns, which criticized the FBI's "lethargic" investigation of the post 9/11 anthrax attacks, were "based," the panel wrote, "on factual assertions concerning Hatfill." One column, for example, stated: "It must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional physical evidence linking him to the attacks. Still, Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax 'fall guy.' The authorities' interest in Dr. Hatfill arises from a range of factors, including his expertise in dry biological warfare agents, his access to Fort Detrick labs where anthrax spores were kept (although he did not work with anthrax there) and the animus to some federal agencies that shows up in his private writings." A later column stated: "there is reason to hope that the [F.B.I.] may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."

As reported last year, the district court dismissed the complaint, holding that it failed to state a claim because the columns in their entirety could not reasonably be read to accuse Hatfill of being guilty; that claims concerning discrete statements were not sufficient to constitute defamation; and that commentary on a matter of public concern could not support a claim for emotional distress. *See* 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D. Va. November 24, 2004). Reversing, the Fourth Circuit held that the columns were capable of defamatory meaning because they did not merely report others' suspicions; they actually generated suspicion by asserting allegedly false facts that implicated plaintiff in the murders.

Citing *Milkovich*, the panel held that "[j]ust as a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with the words 'in my opinion,' ... neither can it escape liability simply by pairing a charge of wrongdoing with a statement that the subject must, of course, be presumed innocent." Thus the defamatory implication that Hatfill is responsible for the anthrax attacks is provably false.

In this regard, the Court stated in a footnote that "it is immaterial" whether Kristof actually intended the defamatory implication because Hatfill alleged that both the implication and the underlying factual basis

for the implication were false. The requirement that the defamatory implication be intended or endorsed, the Court reasoned, only applied to claims based on "literally true" facts. *Citing Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993) ("a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are *literally true*. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.")

The dissent found that nothing in the columns could reasonably be read to accuse Hatfill of the anthrax murders. The columns' purpose, he wrote, was "to put into operation prosecutorial machinery that would determine whether Dr. Hatfill committed the crimes." Even assuming the columns contained some factual inaccuracies, "[r]eporting suspicion of criminal conduct ... does not amount to an accusation of criminal conduct as necessary to support Dr. Hatfill's claims." An evenly divided Fourth Circuit denied a motion for rehearing on banc, which included a lengthy dissent that similarly warned that "this case will restrict speech on a matter of vital public concern." *See* 427 F.3d 253 (Wilkinson, J. dissenting). The New York Times plans to file a petition for certiorari to the U.S. Supreme Court.

In another lawsuit by Stephen Hatfill over press reports about his suspected role in the Anthrax matter, a New York court found that a magazine article written by a specialist in literary forensics, "unmistakably implies that Hatfill is guilty of the anthrax murders." *Hatfill v. Foster*, No. 04 Civ. 9577, 2005 U.S. Dist. LEXIS 26794, (S.D.N.Y. Nov. 2, 2005). The article suggested that the FBI should focus its anthrax investigation on Hatfill and noted that he "is no Richard Jewell." In particular, the judge found this reference to Richard Jewell "more than sufficient for me to conclude, as a matter of law, that Foster intended to imply that Hatfill was the anthrax murderer."

In an interesting contrast, a Colorado court dismissed a libel suit over a news report marking the sixth anniversary of the unsolved murder of JonBenet Ramsey. *Ramsey v. Fox News Network, L.L.C.*, 351 F.Supp.2d 1145 (D. Colo. 2005). Among other things, the report stated that police "had good reason to

suspect the Ramseys," that plaintiffs and their son "were the only known people in the house the night [JonBenet] was killed" and "there has never been any evidence to link an intruder to her brutal murder." As a whole, the broadcast was not defamatory because it "no more suggests that plaintiffs are blameworthy than it suggests that a stealth intruder covered his or her tracks well, the investigation to date had a 'Keystone Kops' flavor to it or a new crime-solving effort ... may well lead to the 'real killer.'"

A libel complaint over a newspaper editorial survived a motion to dismiss where the trial court found that literally true statements could be read to imply that plaintiff violated a school spending statute. *Jackson v. Landmark Communications, Inc., d/b/a Virginian-Pilot*, No. CL05-657, 2005 WL 1862620 (Cir. Ct. Va. June 20, 2005). The editorial stated in relevant part: "It was on his watch that the schools went millions of dollars in the red, a disaster that took years to overcome. Jackson was indicted for malfeasance, but was exonerated, then resigned. Jackson has given us no reason why voters should forgive this blot on his record." While the editorial accurately reported that plaintiff was exonerated, plaintiff argued that it nevertheless implied he was guilty of violating Va.Code § 22.1-91 – a state statute that makes it a crime for school officials to overspend budgets without express permission. The court agreed, finding that "The average reader could have understood the whole of Defendant's editorial to say that Jackson is an unfit candidate for office because of his failure to comply with the budgetary restrictions, and consequent violation of Va.Code § 22.1-91." But the court did note that a libel by implication claim would require that the newspaper intended or endorsed the defamatory inference. *Citing Lamb v. Weiss*, 62 Va. Cir. 259, 262 (2003) ("liability for libelous implications drawn from true facts attaches where there is by the particular manner or language in which the true facts are conveyed ... affirmative evidence suggesting that the defendant intends or endorses the defamatory inference.").

The Second Circuit Court of Appeals reinstated libel claims against a local newspaper and broadcaster over their news reports about an auditor's report on cost overruns in the renovation of a golf course. *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 33 Media L. Rep. 2281 (2d Cir. 2005). The news reports accurately summarized the auditor's finding that plaintiff "conducted his official duties in a casual

and irregular way that exposed him to just criticism." But the news reports could also be read to go further and falsely imply that the audit blamed plaintiff for diverting public funds to benefit private interests. This defamatory tendency was not "offset" by including plaintiff's side of the story because that "may blunt, but do[es] not correct" the implication.

A divided Washington Supreme Court reinstated summary judgment for media defendants in a libel by omission case, finding that the private figure plaintiff failed to make a prima facie showing of falsity. *Mohr v. Grant*, 108 P.3d 768 (Wash. 2005), reversing, 68 P.3d 1159 (Wash. App. 2003). The defendants broadcast four news reports about an altercation between plaintiff, a local store owner, and Glenn Burson, a mentally retarded man. The first reports presented a very sympathetic portrait of Burson, describing him as gentle and harmless. After complaining about the report, plaintiff appeared in a follow up report to say that Burson had prior arrests for threatening the plaintiff, had been warned by police not to enter the store and that he did not want Mohr prosecuted but simply restrained from threatening him and his wife. The trial court granted summary judgment for defendants finding the broadcasts contained no false statements of fact. The appellate court reversed, ruling in a case of first impression under Washington law that plaintiff could have a claim for "defamation by omission." Reinstating summary judgment, the court found that any defamatory implication was negated by plaintiff's appearance in the later broadcast where he told his side of the story. The court also noted that the reporter did not have the additional facts about Burson's threatening history at the time of the first broadcast, suggesting that the defendants could not have intended a defamatory implication.

Of and Concerning

In *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. 2005), the court also considered the "of and concerning" issue. Three out of the four columns at issue identified plaintiff only as "Mr. Z," and only the final column identified him by name. In reversing dismissal of the lawsuit, the Fourth Circuit panel noted that "all of the columns at issue 'concern' Hatfill," even though only one names him. It is sufficient to show

that the publication would lead those who know or know of the plaintiff to believe that the article at issue was intended to refer to him, the panel said. A plaintiff may rely on statements made before his actual identification, the panel said, as long as those statements are made by the same defendant concerning the same subject or event over a short period of time.

In a *per curiam* opinion adopting the reasoning of the trial court, the Fifth Circuit affirmed the dismissal of a lawsuit brought against *60 Minutes* concerning a news report on large damage awards in tort suits in Mississippi state courts. *Gales v. CBS Broadcasting Inc.*, Fed. Appx. 275, 33 Media L. Rep. 1353 (5th Cir. 2005). The court agreed with the district court below that, taken as a whole and in context, the *60 Minutes* report entitled "Jackpot Justice" was not "of and concerning" the plaintiffs, former jurors in state tort suits, noting that "general references to a comparatively large group do not constitute actionable defamation."

A New York court affirmed dismissal of a libel suit against the author and publisher of the book *Primary Colors*, a fictional book inspired by the 1992 presidential candidacy of Bill Clinton. *Carter-Clark v. Random House, Inc.*, 793 N.Y.S.2d 394 (NY App. 2005). Plaintiff claimed that a character in the book was based on her and damaged her reputation by falsely implying she had a sexual liason with then-candidate Clinton. The court affirmed that the book was not "of and concerning" plaintiff. "Although the book was inspired by real-life personalities and events, it was still fiction, and must be analyzed as such in this libel suit.

In an interesting variation on the theme of libel in fiction, a Georgia appeals court considered whether statements made in a scripted feud in the world of professional wrestling could support a defamation claim. The court held that in this context statements made about "Hulk Hogan" were not "of and concerning" Terry Bollea, the individual who portrays the character. *Bollea v. World Championship Wrestling, Inc.*, 610 S.E.2d 92, Media L. Rep. 1827 (2005).

A news report that a deceased couple were brother and sister was not "of and concerning" their children and therefore the children's libel action failed. *Johnson v. KTBS, Inc.*, 889 So. 2d 329, 333, 32 Media L. Rep. 2582 (La. App. 2d Cir. 2004) ("the general rule precludes a person from recovering for a

defamatory statement made about another, even if the statement indirectly inflicts some injury upon the party seeking recovery").

Dismissing a pro se libel complaint against a bible publisher for alleged defamatory statements in the Bible, a New York federal court took "judicial notice of the fact that the most recent portions of Bible are not less than 1900 years old. Having predated the birth of plaintiffs by almost two thousand years, it is apparent that plaintiffs cannot establish the first of the five elements, i.e., statements of fact of and concerning plaintiffs." *Truong v. American Bible Soc'y*, 367 F. Supp. 2d 525 (S.D.N.Y. 2005).

Group Libel

In a non-media case, the Eighth Circuit reinstated a libel claim brought by 58 union members against their employer who held a press conference announcing he was filing a RICO complaint against them. *Ball v. Taylor*, 2005 WL 1790125 (8th Cir. July 29, 2005). The district court dismissed the claim on the "group libel" doctrine. Reversing, the Eighth Circuit noted that although defendant did not individually name any employees at the press conference he handed out copies of the complaint that identified each plaintiff individually. Under these circumstances defendant's statement specifically referenced each of the plaintiffs.

Publication

The Michigan Court of Appeals reinstated a company's claims for defamation and injurious falsehood against a professor who posted an allegedly defamatory paper on web. *Ben-Tech Industrial Automation v. Oakland University*, No. 247471, 2005 WL 50131 (Mich. Ct. App. Jan. 11, 2005). The court, not surprisingly, found that posting the paper on the web satisfied the publication element of the claim and that plaintiffs did not need to identify someone to whom the defamatory statements were published.

In the employment context, an Illinois appellate court held that communications between employees or officers of the same corporation constitute "publications to a third party" for defamation purposes. *Popko v. Continental Casualty Company et al.* 823 N.E.2d. 184, 189 (Ill. App. 2005). The court rejected what other

courts have called the "nonpublication rule," under which intracorporate communications are not deemed to be publication for purposes of defamation law. *Compare Atlanta Multispecialty Surgical Assocs., LLC v. DeKalb Medical Ctr.*, Inc., 2005 Ga. App. LEXIS 504 (2005) (circulation of memorandum among hospital administrators did not constitute publication).

2. Opinion

Decisions involving the defense of opinion in the wake of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), continue to provide interesting analyses as courts attempt to distinguish between fact and opinion.

The Sixth Circuit affirmed dismissal of a libel claim over the lyrics of a rap song, finding them to be typical hyperbole of the genre. *Boladian v. UMG Recordings, Inc.*, No. 03-2148, 2005 WL 14981 (6th Cir. Jan. 3, 2005). The record executive plaintiff sued over lines such as "*Hes a discrase to the species in to his face with some feacies Big nose mothafucka got it comin.*" This was "loose, figurative" language protected under *Milkovich*, and represented the kind of "puerile taint that, for better or worse, is typical of rap music." *See also Bailey v. Mathers*, No. 252123, 2005 WL 857242 (Mich. Ct. App. Apr. 14, 2005) (dismissing on grounds of substantial truth a false light claim against rapper Eminem for lyrics stating that plaintiff "*beat me into submission/ He banged my head against the urinal til he broke my nose/ Soaked my clothes in blood, grabbed me and choked my throat*").

A divided Ninth Circuit panel affirmed dismissal of a libel claim by Evel Knievel and his wife against ESPN over a photo caption that referred to Knievel as a "pimp." *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005). The photograph depicting Knievel with his right arm around his wife and left arm around another young woman. Below the picture a caption stated "Evel Knievel proves that you're never too old to be a pimp." Rejecting a literal interpretation, the court examined the "broad context" of the statement and found that the content is "lighthearted, jocular, and intended for a youthful audience" and that a "reasonable viewer exposed to the main page would expect to find precisely that type of youthful, non-literal language on . . . the site." Turning to the "specific context," the court emphasized the "context of the

satirical, risqué, and sophomoric slang found in the rest of the site" and concluded that "the word 'pimp' cannot reasonably be interpreted as a criminal accusation." The dissenting judge characterized the majority's decision that no reasonable viewer would regard "pimp" as a criminal allegation as entirely unsupported because it focused entirely on the interpretation of ESPN's youthful targeted audience and ignored other potential viewers (including "those dowdy corporate bourgeois who are Knievel's clients and who allegedly have abandoned him because of the photograph and caption"). According to the dissent, "One also has to consider not only who was *targeted*, but who was *hit*."

The Eighth Circuit affirmed summary judgment in favor of an aircraft safety ratings company, in part on the ground that the rating were "a subjective conclusion about aviation safety." *Aviation Charter, Inc. v. Aviation Research Group*, Civ. No. 04-3040, 2005 WL 1691643 (8th Cir. 2005).

In an interesting case involving the standards applicable to defamation claims based on anonymous reviewer ratings and comments, a New York appellate court affirmed summary judgment in favor of Zagat Survey, LLC, publisher of the well-known restaurant guide. *Themed Restaurants, Inc. v. Zagat Survey, LLC*, No. 2005 WL 2298234 (N.Y.A.D. 1 Dept. Sept. 22, 2005). A restaurant owner sued the publisher over reviewer comments such as that "God knows 'you don't go for the food,'" and "weary well-wishers suggest they 'freshen up the menu- and their makeup.'" In a typically brief decision, the New York court affirmed that there is no reason to depart from the traditional legal analysis applied when assessing defamation claims simply because a review is an edited summary of multiple anonymous consumer opinions. The court concluded that the restaurant review was a matter of opinion, adding that "restaurant ratings and reviews almost invariably constitute expressions of opinion."

A Washington appellate court affirmed dismissal of a defamation claim against a weekly newspaper, finding as a matter of law that in the context of a heated litigation the use of the word "extortion" and related remarks were all non-actionable opinion. *Pinney v. Nordstrom, Inc.*, 2004 WL 2651521 (Wash. Ct. App. Nov. 22, 2004).

A Georgia federal court dismissed libel and related claims brought by creationism advocates over a cable television show that mocked them and criticized their views. *Brock v. Viacom*, 2005 WL 3273767, 33 Media L. Rep. 1764 (N.D. Ga. 2005). Mocking gestures and comments by magicians Penn & Teller, including ridiculing one plaintiff's wig and calling others "un-American" and "mentally unsound" were protected opinions as a matter of law.

Oregon's federal district court applied the state's anti-SLAPP statute, ORS § 31.150 – 31.155, to dismiss libel and related claims against Tom Martino, the host of a syndicated radio talk show that focuses on resolving consumer complaints, and his distributors, Westwood One and Clear Channel. *Gardner v. Martino,* 05-CV-769-HU (D. Or. Dec. 13, 2005 adopting magistrates recommendation 33 Media L. Rep. 2541 Sept. 19, 2005). In discussing a caller's complaint, Martino stated that plaintiffs, a recreational vehicle dealer and its owners, "went back on their word," were "lying" and "suck." The magistrate judge concluded that in context the statements were non-actionable opinion, noting that "listeners of talk radio may expect a certain amount of ranting and opinionated rhetoric."

In an action by a columnist against his former employer, a New York appellate court held that an editor's expression of his view that plaintiff "had fabricated the premise of one of his columns" was "non-actionable since it amounted to no more than an expression of opinion based on disclosed facts." *Zion v. NYP Holdings, Inc.*, 18 A.D.3d 376 (1st Dep't 2005).

In a non-media case, the Missouri court of appeals held that statements in flyers referring to a company as "trash terrorists" were protected statements of opinion that simply conveyed the writer's "staunch opposition" to a proposed trash transfer station and did not mean that plaintiff was engaged in terrorist activities. *State ex rel. Diehl v. Kintz*, 162 S.W.3d 152 (Mo. App. E.D. 2005). The trial court had denied a motion to dismiss the complaint, but the appeals court granted the extraordinary remedy of a writ of prohibition as a vehicle to hear an immediate appeal and dismiss the case.

An Illinois trial court dismissed a libel complaint against a newspaper for publishing an allegedly anti-Semitic advertisement. *Imperial Apparel Ltd. et al v. Cosmo's Designers Direct Inc. and Chicago Sun-Times, Inc.,* 05 L 677 (Cir. Ct. Cook Ct. IL (July 29, 2005). At issue was an advertisement by a clothing store targeting one of its competitors that stated in part: "WARNING! Beware of Cheap Imitators Up North . . ." "stop copying your neighbor's concepts or a hail storm of frozen matzo balls shall deluge your 'flea market style warehouse.'" The advertiser also referred to itself as the "real Parmigiano" compared to the "dried cream cheese" competitor. These statements did not convey any objectively verifiable facts and were therefore nonactionable.

A West Virginia trial court dismissed a judge's libel complaint against a local television station for broadcasting a political advertisement that sharply criticized the judge's decision in a criminal appeal and called the judge a "radical." *McGraw v. Blankenship*, No. 04-C-317 (Cir. Ct. W. Va. July 25, 2005). This is non-actionable opinion, because the term is not a factual assertion, but a description of "political behavior and thought" that is "relative to each person."

A New York appellate court reinstated a libel claim by former New York Stock Exchange Chairman Richard Grasso against the Exchange and its current Chairman, John S. Reed, finding that statements made to the press and public were not protected opinion since they implied undisclosed facts. *Grasso v. The New York Stock Exchange, Inc., et al.*, No. 401620/04 (NY App. Div. Sept. 29, 2005). Among other things, Reed was quoted in the press stating that a person "trained in the law ... would say that there is information in [an audit] report that would support a potential legal action." Although this expressed the opinion of the NYSE on its potential claims against Grasso, a reasonable reader could understand the statements to imply undisclosed defamatory facts.

In contrast, the statement in a letter to the editor that a company's patent was "essentially worthless" was non-actionable opinion where the letter itself disclosed the factual basis for the writer's comment – that the patent was sold for only $1. *Solaia Tech., LLC v. Specialty Publishing Co.*, 826 N.E.2d 1208, 1212 (Ill. App. Ct. 2005).

3. Truth/Falsity

Burden of Proof

In a non-media case, the Second Circuit Court of Appeals held that under New York law a public figure libel plaintiff must prove falsity by clear and convincing evidence, providing guidance in an area of law that New York State's highest court has yet to address. *DiBella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005). In concluding that New York's highest court would adopt this standard, the Second Circuit noted that the state's intermediate appellate courts had adopted this standard, as have the majority of other state and federal courts that have considered the issue. *See, e.g., Deutcsh v. Birmingham Post Co.*, 603 So.2d 910, 912 (Ala.1992) (public figure plaintiff must prove falsity by clear and convincing evidence); *Barnett v. Denver Publ'g Co., Inc.*, 36 P.3d 145, 147 (Colo. App.2001) (same); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 905-06 (Iowa 1996) (plaintiff must prove falsity and malice by clear and convincing evidence); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626, 629 (1993) (public figures must prove falsity by clear and convincing evidence); *Newman v. Delahunty*, 681 A.2d 671, 674 (1994) (same); *Pritt v. Republican Nat'l Comm.*, 210 W.Va. 446, 557 S.E.2d 853, 862 (2001) (same); *Batson v. Shiflett*, 602 A.2d 1191, 1210 (1992).

Substantial Truth

The Second Circuit reinstated libel claims against a local newspaper and broadcaster over their reports about the opaque findings of an audit report on cost overruns in the renovation of a golf course. *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 33 Media L. Rep. 2281 (2d Cir. 2005). The district court had granted defendants' motion to dismiss, finding the reports were true and/or fair reports of the audit. Reversing, the Second Circuit concluded that the news reports went beyond the auditor's findings and could be read to accuse plaintiff of misappropriating public funds.

The Eighth Circuit affirmed summary judgment in favor of an aircraft safety ratings company which gave plaintiff a poor safety rating and commented on that rating in a newspaper interview. *Aviation Charter,*

Inc. v. Aviation Research Group, Civ. No. 04-3040, 2005 WL 1691643 (8th Cir. 2005). Among other things, defendant stated that the owner of the plane that crashed and killed U.S. Senator Paul Wellstone of Minnesota in 2002, had "a history of safety problems." Taking a literal approach, the court held the statement was true where plaintiff had more than one past safety problem. The court also applied an incremental harm analysis (though it didn't use the term) to dismiss claims over certain technical errors in describing FAA actions against plaintiff. "Any potential harm caused by the improper characterization [of FAA violations] was overshadowed by at least three other eye-catching observations" in the newspaper article.

Several cases considered substantial truth with respect to describing judicial proceedings and related legal nomenclature.

A newspaper report that plaintiff was being prosecuted by the SEC for "securities fraud" was substantially true where plaintiff was facing a civil fraud trial. *Associated Press v. Boyd*, No. 05-04-01172-CV, 2005 WL 1140369 (Tex.App.-Dallas May 16, 2005). Plaintiff alleged that the article falsely implied he was being criminally prosecuted. The court reasoned that it was undisputed that plaintiff was accused of unlawful conduct and whether he was prosecuted in criminal or civil court did not materially affect the sting caused by the accurately reporting allegations of his participation in a fraudulent scheme.

Statements in the movie *Bowling for Columbine* that James Nichols, the brother of convicted Oklahoma City bomber Terry Nichols, was "arrested in connection with the Oklahoma City bombing" was substantially true where he was held as a material witness. *Nichols v. Moore,* 2005 WL 1678670 (E.D. Mich. July 13, 2005) (a "journalist need not describe legal proceedings in technically precise language").

A magazine article "sidebar" stating that plaintiffs were serving "9 years each for luring a 14-year-old girl from Cameroon with promises of schooling, then isolating her in their Maryland home, raping her, and forcing her to work as their servant for three years," was substantially true where plaintiffs were convicted of human trafficking. *Nanji v. National Geographic Society*, No. AW-04-2635, 2005 WL 3293132, 33 Media L. Rep. 2074 (D. Md. June 28, 2005).

A libel complaint by a judge against a local television station for broadcasting a political advertisement that sharply criticized the judge's decision in a criminal appeal was dismissed, in part, on grounds of truth. *McGraw v. Blankenship*, No. 04-C-317 (Cir. Ct. W. Va. July 25, 2005). The statement that plaintiff "voted to release child rapist Tony Arbaugh from prison" was true where Arbaugh was convicted of "sexual assault" for having intercourse with a minor under 12 years old. "In common terms such a victim is classified as a child." *But see Roe v. Heap*, 2004 WL 1109849 (Ohio App. May 11, 2004) (statement that a minor was "a convicted sexual offender" was not substantially true where a magistrate judge had "recommended" the minor be adjudicated "a delinquent" for sexual misconduct).

A newspaper report that plaintiff, a former district attorney and judge, "altered a client's will" was substantially true where plaintiff acknowledged he "modified" the will. The court noted that "nowhere in the article did defendants state that plaintiff did anything illegal, felonious or criminal." *Proskin v. Hearst Corp.*, No. 96303, 2004 WL 3053218 (NY App. Jan. 6, 2005).

The Michigan Court of Appeals unanimously affirmed a directed verdict in favor of the *Lansing State Journal*, and a columnist on a libel claim over columns about a plumber's bill to an elderly widow. *Armour v. Federated Publications, Inc.*, No. 245361, 2004 WL 2754682 (Dec. 2, 2004) (unpublished). The sting or gist of the articles – that plaintiff's company would charge $329 to replace a few parts in a toilet tank – was substantially true.

4. Fault

Public Figure Status

Among the interesting decisions on plaintiffs' status, a Minnesota appeals court held that a former prosecutor who launched an Internet chat group to debunk conspiracy theories regarding the death of Minnesota Senator Paul Wellstone made himself a public figure – a status that doomed his defamation suit when the target of his criticism called him an incompetent lawyer who had been accused of sexual

harassment and had been deprived of the right to practice law. *Thomas J. Bieter v. James H. Feltzer, et al.*, No. A04-1034, 2005 WL 89484 (Minn. App. Jan. 18, 2004). Plaintiff argued that defendant's attacks were personal and outside the scope of the controversy. The appeals court disagreed, holding that by "repeatedly presented himself as a 'former criminal prosecutor' and as someone who has specialized talents in evaluating evidence, plaintiff placed his credibility at issue in the controversy."

Similarly, a plaintiff's numerous blog and Internet postings about a guardianship dispute helped render her a public figure in her lawsuit against a Florida broadcaster that reported on the controversy. *Thomas v. Patton, et al.*, Case no. 16-2005-CA-003777, 2005 WL 3048033 (Fla. 4th Cir. Ct. Oct. 21, 2005).

The Georgia Court of Appeals reinstated a university professor's libel action against two local newspapers that published allegations that the professor made anti-American statements in his classroom and refused to allow a student to express a contrary view. *Sewell v. Trib Publications, Inc., et al.*, No. A05A2077, 2005 WL 2901674 (Ga. App. Nov. 4, 2005) (reversing summary judgment on libel claims and affirming dismissal of invasion of privacy and emotional distress claims). The professor's claims against the media defendants (the newspapers and individual journalists) had been dismissed on summary judgment for lack of evidence of actual malice. The appellate court ruled that it was error to deem plaintiff a public figure. It held that while there is certainly a public controversy about America's military activities in Iraq, the professor's classroom statements about it "in no way thrust him to the forefront of the controversy in any public forum."

The Utah Supreme Court held that a television reporter was a private figure for purposes of her employment-related libel claim against her former station/employer. *Wayment v. Clear Channel Broadcasting, Inc.*, 116 P.3d 271 (Utah 2005). Notwithstanding plaintiff's on-air position, she was a private figure in her suit over statements about her termination which was not a matter of public controversy – at least prior to bringing suit.

Similarly, a lawyer named in a domestic abuse petition was a private figure for purposes over her libel suit against a local newspaper for allegedly implying she was the "defendant" in the petition. *Weber v.*

Lancaster Newspapers, Inc., No. 898 MDA 2004, 2005 WL 1217365 (Pa. Super. May 24, 2005). Plaintiff had no control over the fact that she was mentioned in the petition or that it generated significant media concern. "If anything the newspaper defendants turned Weber into a public figure by their newspaper reports."

Two of Russia's richest businessmen, and banks under their control, were deemed to be public figures in a libel suit over a watchdog organization's report on corruption. *OAO Alfa Bank v. Center for Public Integrity*, 387 F.Supp.2d 20, 33 Media L. Rep. 2410 (D.D.C. 2005). The plaintiffs were all figures in a public controversy over the rise of "Russian oligarchs" and the decline of the Russian economy into a "criminal-syndicalist state."

A corporation suing a former employee for libel for various postings on a Yahoo! investors' bulletin board was deemed a public figure. *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863 (Cal. App. 2005). Looking at the number of postings about the company, the fact that it was publicly traded, and the corporation's press releases about business operations, a public controversy existed about the management and operations of the corporation.

Application of Actual Malice Rule

Appeals of Verdicts

In *West v. Media General Operations, Inc.*, 120 Fed.Appx. 601, 33 Media L. Rep. 1321 (6th Cir. 2005) (unpublished), the Sixth Circuit reversed a $310,000 jury verdict over a series of investigative news reports about a private counseling service for probationers. Among other things, the reports discussed plaintiff's "cozy" relationship with several local judges and stated that plaintiff was being investigated by the FBI. Over defendants objections, the jury was not instructed or given a list of the alleged defamatory statements in the broadcasts, instead they received a general verdict form. The Sixth Circuit held this was error because "the general verdict gives us no guidance as to whether the jury found for the plaintiff on a constitutional or an unconstitutional claim of defamation." The court advised:

> Though special verdicts or special interrogatories are not necessary in all defamation cases, in a case such as the one before us involving a television broadcast capable of making many separate statements through the use of the same audio and video clips, we believe a special verdict or special interrogatories provide a useful check not only against misconstruction of the actual malice standard, but also against a misunderstanding of Plaintiffs' allegations themselves.

The Tenth Circuit affirmed a damage award for libel and related claims against a martial arts trade magazine. *Century Martial Art Supply, Inc. v. National Association of Professional Martial Artists*, 129 Fed. Appx. 421 (10th Cir. 2005). The jury found that defendant made deliberately false statements about the quality of plaintiffs products. On appeal the Tenth Circuit affirmed without reviewing the finding on actual malice. Instead, it found that defendant's vague objections to the verdict were not properly preserved for appeal. "Incanting a generic argument that there was insufficient evidence to support any of [plaintiff's] claims ... failed to provide guidance to the district court or the opposing counsel regarding how Century's evidence fell short as a matter of law."

A divided Kentucky Supreme Court reinstated a $2.97 million defamation verdict over a series of television broadcasts concerning an accident at plaintiff's amusement park. *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.,* 2005 WL 2043633, 33 Media L. Rep. 2350 (Ky. Aug. 25, 2005). In a 4-3 decision, the court found the trial record "full of evidence" of actual malice to sustain the judgment. This included evidence the station had "specific knowledge" that its statement that the ride was "too dangerous" was false. The statement that the ride "malfunctioned" was made even though the station's own records reflected that state inspectors had not made the statement, and after the station had acknowledged to plaintiff that the statement was incorrect and would be corrected. And the majority concluded that the station had "a continuing commitment to running and rerunning the same story line; that there was a significant failure to investigate or verify credibility; and the general makeup and presentation of the story exhibited hostility." The court also ruled that it was proper to allow a journalism expert to testify for plaintiff on the issue of actual malice. The expert criticized the station's journalist standards and ethics. Acknowledging that such testimony cannot by itself support actual malice, it was admissible to assist the jury "in understanding the

circumstantial evidence of actual malice." One of the dissenting judges pointedly referred to the majority decision as a "real tragedy" for the "breathing space" that is "imperative for a vigorous and competent press."

The South Carolina Supreme Court held that a directed verdict in favor of a newspaper was error because the plaintiff had presented sufficient evidence of actual malice at trial for the case to have gone to the jury. *Anderson v. The Augusta Chronicle, Morris Communications*, No.26031, 2004 WL 3486868 (S.C. Aug 22, 2005). At issue was a newspaper editorial entitled "Let the Liar Run" that accused plaintiff, a local political candidate, of falsely claiming he had recently been called into service by the National Guard for post-hurricane relief efforts. Plaintiff had actually served as a hurricane insurance adjuster in the "National Flood Insurance Program." The newspaper had "obvious reason to doubt" the accuracy of its editorial where prior to publication plaintiff disputed the allegation, supplied the newspaper with documentary evidence about his service and other newspapers correctly identified plaintiff's service. Moreover, it "was highly questionable" on its face that plaintiff, who was already over 60, would have been recalled into the National Guard.

The Virginia Supreme Court reversed a jury damage award to a public official over campaign advertisements criticizing him for approving the construction of low income housing. *Jordan v. Kollman*, No. 041885, 041861, 2005 WL 925692 (Va. April 22, 2005). Plaintiff argued the ads were false because he opposed the project. The Court found that there was no evidence of actual malice where the defendant relied on a newspaper report to form his criticism. Indeed, the Court found that the reliance on the newspaper report showed defendant had a "good faith" belief in his charges. Defendant's reliance on the newspaper article showed he had an objective basis to charge that plaintiff supported the project – and there was no actual malice "merely because he failed to comprehend the intricacies of City Council voting procedure."

The Utah Supreme Court reversed the punitive damage award on a libel / false light claim for lack of evidence of actual malice. *Jensen v. Sawyers,* 2005 WL 3043691 (Utah Nov. 15, 2005). At issue was a news report on "questionable doctors," based in part on hidden camera filming in a doctor's office. The

broadcast stated that plaintiff, a diet doctor, "promised" to prescribe illegal drugs to a reporter who pretended to be seeking treatment as a patient. Plaintiff actually said he'd "work with her" in prescribing the drugs. While the station's characterization of plaintiff's words made him seem more willing to "flout the law governing prescription medicine" the distinction between "promise" and "work with" was insufficient to establish actual malice.

Summary Judgment

The Texas Supreme Court granted summary judgment to a newspaper in a libel suit brought by a public official over coverage of his statements at a candidates debate. *Freedom Newspapers of Texas v. Cantu*, No. 04-0115, 2005 WL 1489924 (Tex. June 24, 2005), *reversing*, 126 S.W.3d 185, 32 Media L. Rep. 1555 (Tex. App. 2003). The article began: "No Anglo could ever be sheriff of Cameron County, Conrado Cantu said Wednesday during a debate with his opponent ...." Plaintiff did not use that phrase but stated "you have to have the right character to be a sheriff .... You have to be bi-cultural to understand what is going on in our neighborhoods ...." In a unanimous decision, the court concluded that discrepancies between the news reports and what plaintiff actually said at the debate were insufficient evidence of actual malice to withstand a motion for summary judgment. No reasonable reader would interpret the paraphrase as a direct quote, and that the characterization was a reasonable interpretation of an ambiguous statement.

The court in *Cantu* also considered the value of expert testimony in evaluating actual malice. The intermediate appeals court cited as significant the testimony of an "expert journalist" who claimed the newspaper defendant "showed a consistent pattern of biased reporting, editing, and publishing regarding [plaintiff], and that the appellants showed a reckless disregard for the truth." *See* 126 S.W.3d 185, 194, 32 Med. L. Rep. 1555 (Tex. App. 2003). Reversing, the Texas Supreme Court noted that actual malice involves an inquiry into the mental state of defendant, and the expert could not show that the newspaper "knew its articles were not a rational interpretation of Cantu's remarks." *Compare Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, supra, (finding expert's testimony probative on issue of actual malice).

The Texas Supreme Court also granted summary judgment on appeal to a newspaper that was sued by three prosecutors over an article which discussed allegations of serious misconduct in the local prosecutors office. *Hearst Corp. v. Skeen*, 159 S.W.3d 633 (Tex. 2005). The intermediate court of appeals had essentially held that the newspaper had to prove the truth of charges by critics that the prosecutor had a "win at all costs" mentality. The Texas Supreme Court reversed, addressing only actual malice, and finding that comprehensive investigation and reliance on solid sources negated actual malice.

A libel suit over a report about an altercation between plaintiff (a judge) and an airport baggage screener during which plaintiff allegedly used a racial epithet was dismissed on summary judgment for lack of evidence of actual malice. *Manning v. WPXI, Inc.*, 2005 PA Super. 343, 2005 WL 2496501 (Oct. 11, 2005). The majority found no evidence of actual malice where the report repeatedly stated that plaintiff denied the allegations and included the fact that a police report did not state that plaintiff used a racial epithet. In an interesting point, plaintiff's lawyer testified that in speaking to the station prior to publication the producer of the piece stated "I don't care what the truth is. I'm running the story my way." Assuming this to be true, the court noted it would not "trump the actual content of the published broadcast" which contained both the allegations and plaintiff's denials.

A policeman's libel suit over a letter to the editor accusing him of rape was not published with actual malice where the charge had previously been made in a criminal proceeding. *Weaver v. Lancaster Newspapers, Inc.*, 875 A.2d 1093 (Pa. Super. 2005).

A policeman's libel suit over news articles discussing complaints of aggressive enforcement tactics was dismissed for lack of actual malice. *Bartlett v. Bradford Publishing*, No. 794 WDA 2004, 2005 WL 2622739 (Pa. App. Oct. 17, 2005) (no duty to investigate statements made by sources from the local community). *See also Atlanta Humane Soc'y v. Mills,* 2005 Ga. App. LEXIS 558 (2005) (failure to investigate the truth of claims aired by a television station prior to commenting on those programs does not amount to actual malice).

A watchdog group's report on corruption in Russia was not inherently improbable so as to raise an issue of actual malice. *OAO Alfa Bank v. Center for Public Integrity*, 387 F.Supp.2d 20, 33 Media L. Rep. 2410 (D.D.C. 2005).

Public Concern

In *Ramsey v. Fox News Network*, 351 F. Supp. 2d 1145 (D. Colo. 2005), the court reaffirmed that under Colorado law a private figure plaintiff is required to prove actual malice when suing over statements involving a matter of public concern. And it found that a news report over the murder of JonBenet Ramsey undoubtedly involved a matter of public concern. *See also Johnson v. KTBS, Inc.*, 889 So. 2d 329 (La. App. 2d Cir. 2004) (private figure case involving issues of public concern requires a showing of actual malice under Louisiana law).

Negligence Standard

A divided Ohio appeals court, reinstated a school lunchroom monitor's libel claim against a television station and reporter who investigated and reported on allegations that plaintiff had "threatened and become physical with students." *Young v. Russ*, No. 2003 L 206, 2005 WL 1538103 (Ohio App. June 30, 2005). The court found that while there was no evidence that the reporter knew that the allegations were false or exaggerated, a jury could find the report negligent where a school official testified that prior to broadcast she informed the reporter that one child recanted his allegations. The school official also stated in her deposition that the reporter "wanted to believe the children" and "was not looking for the truth." This created an issue of negligence "best suited for a jury's determination." The court affirmed summary judgment for the anchor who introduced the story, but otherwise had no hand in the story; and for the corporate parent.

5. Liability for Republication

Respondeat Superior

The South Carolina appeals court reversed a directed verdict that had been entered in favor of a broadcaster in a defamation case over off-air statements made by a station news director. *Murphy v.*

Jefferson Pilot Comm., No. 3988, 2005 WL 1115211 (S.C. App. May 2, 2005). The appeals court held that the jury, which rendered a $9 million damage judgment against the (indigent) former news director, should have been allowed to decide whether the broadcaster was vicariously liable for the statements – which involved a series of strange fabrications about plaintiff, a South Carolina lawyer. The trial court described the facts as "bizarre" and "unique" and noted that "to extend vicarious liability to the facts of this case would be beyond reason." The Court of Appeals agreed that the case was bizarre, but found conflicting evidence whether the news director was acting withing the scope of his employment or simply pursing a personal matter. Since this involved issues of credibility regarding the director, other station employees and witness, the court concluded these issues should have been decided by the jury.

A university was not liable for alleged defamatory statements published in a student-run newspaper where university policy prohibited the school from exercising any control over the content of the newspaper. *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472-73, 33 Media L. Rep. 1660 (Minn. Ct. App. 2005).

Communications Decency Act § 230

A $3.7 million jury award for libel and false light against a newspaper and television station was reversed on appeal under § 230 of the Communications Decency Act. *Stewart v. Oklahoma Pub. Co.*, No. 100,099 (Okla. Ct. Civ. App. 2005) (unpublished). The media defendants jointly operated a news website which republished in its entirety Oklahoma's sex offender registry. The registry contained outdated information and plaintiff's address was listed as the residence of a convicted sex offender. The appeals court held that the website was an "interactive computer service" within the meaning § 230 and was therefore defendants were immune from liability for republishing the state registry.

In the first New Jersey case interpreting § 230, an appellate court held that the operator of an electronic community bulletin board who was actively involved in writing and editing on the board was immune from defamation and related claims. *Donato v. Moldow*, 865 A.2d 711 (App. Div. 2005) (affirming dismissal of defamation, harassment and emotional distress claims brought by elected officials). The court

made clear that "interactive computer service," for purposes of § 230 protection, includes small website operators. And the court further decided that the defendant's decisions to edit, delete, or retain third party messages did not alter the immunity provided under the Act. *See also Whitney Info. Network, Inc. v. XCentric Ventures, LLC*, 2005 WL 1677256, *3 (M.D.Fla. July 14, 2005) (defendant immune from suit for republishing information provided by consumers).

6. Privileges

Fair Report

An Illinois appeals court reinstated a libel claim against the publisher of a business magazine over an article headlined "Conspiracy of a Shakedown" that discussed an antitrust complaint brought by plaintiff, holding that an allegation of actual malice is sufficient to defeat the fair report privilege at the motion to dismiss stage. *Solaia Tech., LLC v. Specialty Publishing Co.*, 826 N.E.2d. 1208, 1219 (Ill. App. 2005). Although the article was a fair and accurate summary of a public proceeding, the court held that plaintiff's conclusory allegations of actual malice were enough to overcome the privilege on a motion to dismiss. The ruling conflicts with Illinois case law that the privilege is absolute, so long as the material is a fair and accurate summary. *See, e.g., Schwager v. Ricchio, et al.*, No. 05 L 4815 (Ill. Cir. Sept. 7, 2005) (allegation of malice does not defeat privilege, privilege is essentially absolute once it is established that the news story fairly summarized an official or otherwise privileged source). The Illinois Supreme Court has granted an appeal in *Solaia.*

The D.C. federal district court declined to apply the fair report privilege to an accurate summary of an official report by the Russian government, holding that the privilege "does not extend to the official reports of the actions of a foreign government." *OAO Alfa Bank v. Center for Public Integrity*, 387 F.Supp.2d 20, 33 Media L. Rep. 2410 (D.D.C. 2005). Extending the privilege to foreign government reports would place the court "in the untenable position of attempting to determine whether a foreign state exhibits the 'openness and reliability that warrant an extension of the privilege'" – a particularly apt concern with Russia.

A Pennsylvania appellate court reinstated a lawyer's libel case against three newspapers for their reports about a statement in a domestic abuse petition. *Weber v. Lancaster Newspapers, Inc.*, No. 898 MDA 2004, 2005 WL 1217365 (Pa. Super. May 24, 2005). The court found that while the reports about the statement were literally true they could create the defamatory implication that plaintiff was the defendant in the petition and, therefore, the reports were not protected by the fair report privilege. The court explained that "one way a newspaper may abuse the privilege is by placing a misleading and sensationalized 'spin' on a relatively insignificant aspect of the public document."

Last year in *Hatfill v. New York Times Co.*, the district court found that a series of op-ed columns were protected as accurate reports of ongoing investigations, stating "The principle that an accurate report of ongoing investigation or an allegation of wrongdoing does not carry the implication of guilt has long been recognized at the common law, and is mandated by the First Amendment. Indeed, for this reason, courts routinely dismiss libel claims against defendants who accurately report on investigations or charges made by others." *See* 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D. Va. November 24, 2004). This year the Fourth Circuit reinstated the claims, finding there was insufficient evidence at this stage of the case to show whether the columns were accurate reports of an ongoing investigation. *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. July 28, 2005).

The Maryland federal court dismissed a libel suit brought against *National Geographic* by a man convicted for human trafficking, finding the magazine's report was protected by the fair report privilege because it accurately summarized a Department of Justice report and press release. *Nanji v. National Geographic Society*, No. AW-04-2635, 2005 WL 3293132, 33 Media L. Rep. 2074 (D. Md. June 28, 2005). *See also Thomas v. Patton, et al.*, Case no. 16-2005-CA-003777, 2005 WL 3048033 (Fla. 4th Cir. Ct. Oct. 21, 2005) (privilege applied to accurate reports of guardianship proceedings).

The Connecticut appellate court affirmed dismissal of libel and related claims against a local newspaper and individual reporters and editors, holding that articles about plaintiff's criminal trial were

protected by the fair report privilege. *Fuller v. Day Publishing Co.*, No. 25228, 2005 WL 1175310 (Conn. App. May 24, 2005). This is the second Connecticut Appellate Court decision to expressly apply the fair report privilege. As reported last year, the court addressed the privilege for the first time in *Burton v. American Lawyer Media, Inc.*, 887 A.2d 1115, 32 Media L. Rep. 1893 (Conn. App. 2004).

In contrast, in *Wiest v. E-Fense, Inc.*, 356 F.Supp.2d 604 (E.D. Va. 2005), the court held that a summary of a court martial proceeding, was not "fair and accurate" for purposes of the privilege because it failed to include the subsequent history – that plaintiff's conviction was reversed.

The Second Circuit Court of Appeals summarily affirmed summary judgment in favor of a local newspaper that reported on town proceedings involving plaintiff's payment of car taxes. *Seymour v. Lakeville Journal Co. LLC*, 2005 WL 2573985 (2d Cir. Oct 13, 2005). The newspaper reports were immune from suit under New York's statutory fair report privilege as accurate reports of official proceedings.

Interestingly, Louisiana courts have effectively applied the fair report privilege under the rubric of "truth." In *Thompson v. Emmis Television Broad.*, 894 So. 2d 480 (La. App. 2005), a news story reported that church congregants had accused the plaintiff reverend of embezzling church money. Without discussing the fair report privilege, the court dismissed the litigation because "the fact that these allegations were made was true."

Neutral Reportage

Showing that good facts can make good law, the Utah Court of Appeals adopted the neutral report privilege in affirming dismissal of a pro se plaintiff's libel and false light claims against a Utah newspaper and individual reporters and editors. *Schwarz v. Salt Lake City Tribune,* 2005 WL 1037843, 2005 UT App 206 (May 5, 2005). The complained of article discussed plaintiff's history of filing dozens of frivolous request and lawsuits seeking information about "her Utah hometown" (which, in fact, doesn't exist); her allegations of wide-ranging government conspiracies and her own self-published tale claiming kinship to L.

Ron Hubbard, founder of the Church of Scientology, and descriptions of being "kidnaping by Nazis, mind control, conspiracy, hidden fortunes ... and micro chips implanted in unsuspecting peoples' heads." The court found the article "covered by the neutral reportage privilege because it contains 'accurate and disinterested reporting' of the information contained in the record." Quoting from *Edwards v. National Audubon Soc'y,* 556 F.2d 113, 120 (2d Cir.1977) the court further stated the "the public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." *See also Thomas v. Patton, et al.*, Case no. 16-2005-CA-003777, 2005 WL 3048033 (Fla. 4th Cir. Ct. Oct. 21, 2005) (holding news reports protected by the neutral reporting privilege, "because the reports are disinterested accounts of news worthy information about matters of public concern.").

Judicial Proceedings Privilege

In an opinion by Supreme Court nominee Samuel Alito, the Third Circuit held that a private university's grievance proceedings are not "quasi-judicial" and are therefore not entitled to an absolute privilege in a defamation action. *Overall v. Univ. of Pennsylvania,* 412 F.3d 492 (3d Cir. 2005) ("under Pennsylvania law government involvement is also a necessary condition for according quasi-judicial status to grievance procedures).

In what it called a "close question," a New Jersey appeals court reinstated a reporter's defamation lawsuit against an attorney and her client over a letter to plaintiff's editors that, among other things, accused plaintiff of being biased in her coverage the client's case. *Williams v. Kenney*, A4855-03, 2005 WL 1588253 (N.J. App. July 8, 2005). The letter also accused plaintiff of having an affair with the source, and the court found the letter was more akin to a public relations campaign than correspondence related to the ongoing lawsuit. The "rather salacious gossip not really germane to the pending litigation."

Other Privilege Decisions

In an interesting decision in a libel action by a judge against a local newspaper, an Illinois appellate court recognized an absolute judicial deliberations privilege that shielded non-party judges and clerks from having to disclose confidential communications "made in the course of the performance of their judicial duties and relating to official court business." *Thomas v. Page, et. al.*, No. 2-05-0348, 2005 WL 2746327 (Ill. App. Oct. 20, 2005). At issue were columns criticizing Illinois Supreme Court Justice Ronald Thomas' motives in meting out a suspension to an attorney. The columns stated while other Justices on the court favored the lesser punishment of censure, Thomas held out for stiffer punishment to extract political endorsements from the attorney's supporters. The media defendants sought discovery from plaintiff's colleagues on the bench, arguing that no privilege should apply when a sitting judge files a libel complaint that puts court communications at issue.

The Ninth Circuit held that the publisher of the magazine *Coin World* had a qualified privilege to alert its subscribers to a "scam" subscription service. *I.C. Marketing Inc. v. Amos Press, Inc.*, No. 03-36044, 2005 WL 2174640 (9th Cir. Sept. 9, 2005). Even if some of the statements in the subscriber alert were false and defamatory, the joint interests of the publisher and its subscribers made th alert privileged.

Sources' statements to the press were considered in two interesting cases. A federal court in Maine held that a university dean's statements to the press about a student disciplinary proceeding were conditionally privileged. *Gomes v. University of Maine Syst.*, 365 F. Supp. 2d 6, 44, 45 (D. Me. 2005) (recognizing conditional privilege "where society has an interest in promoting free, but not absolutely unfettered, speech).

And a federal court in New York held that police statements to the press accusing plaintiff of trying to poison her husband were conditionally privileged. *Kramer v. City of New York*, 2004 WL 2429811 (S.D.N.Y. Nov. 1, 2004). The privilege could be defeated by proof of actual malice – or "spite or ill will," but only if it is the one and only cause for the publication."

A "common interest" privilege applied to statements by a newspaper editor that a journalist "fabricated the premise of one of his columns" where the statement was made to people with an interest in the journalist's "job performance at the paper." *Zion v. NYP Holdings*, 18 A.D.3d 238 (1st Dep't 2005).

7. Discovery of Sources in Libel and Related Cases

The issue of reporters privilege continued to loom large over the past year. The D.C. Circuit affirmed findings of contempt against reporters Judith Miller and Matthew Cooper for refusing to disclose the identities of confidential sources to the Grand Jury investigating whether any government official(s) violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame. *In re Grand Jury Subpoena*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S.Ct. 2977. *See also Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (affirming contempt against reporters in the context of civil discovery). Miller ultimately served 85 days in jail, Vice President Cheney's chief of staff was indicted for perjury and obstruction of justice and additional reporters have been called before the grand jury.

These issues are examined more thoroughly in Part II of this year-end Bulletin. But the issue of reporters privilege was also an active one in the context of libel actions.

In the libel case by former Alabama University football coach Mike Price against *Sports Illustrated*, the Eleventh Circuit affirmed that Alabama's shield law does not extend to magazine reporters. *Price v. Time*, No. 04-13027, 2005 WL 1653730 (11th Cir. July 15, 2005). The court undertook an exhaustive examination of dictionaries, thesaurus citations and industry standards to hold that the Alabama shield statute applies only to newspapers, radio broadcasting stations and television stations – and not to magazines. The court went on, though, to recognize that a qualified First Amendment privilege applied, requiring plaintiff to use "reasonable efforts to discover the information from alternative sources." Because plaintiff had not deposed four women, one of whom was likely the source, his motion to compel was quashed. But in the most troubling portion of the ruling, the court suggested that the publisher's lawyers would have an ethical duty to advise the trial court if the confidential source testified falsely during the required depositions.

In a closely watched case, the Massachusetts Supreme Judicial Court upheld a default judgment against the *Boston Globe* for its refusal reveal the identity of confidential sources for a series of stories about fatal medical overdose at a Boston hospital. *Ayash v. Dana Farber Cancer Institute*, 822 N.E. 2d 667 (Mass. 2005), *cert. denied,* 126 S.Ct. 397 (U.S.). The result was a $2.1 million jury award for defamation and other claims against the Globe and its reporter, awarded to a doctor who claimed that she had been scapegoated by the hospital. The trial court had entered the default judgment on the plaintiff's libel claims against the Globe as a sanction for the Globe's failure to reveal its confidential sources in discovery. The court concluded that the trial judge had performed the required balancing test carefully, and had properly concluded that "the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press."

In a decision apparently inspired by the Miller Cooper litigations, a Pennsylvania trial court ordered a reporter to disclose her confidential source for an allegedly libelous report about two local politicians because the confidential source provided information about plaintiffs' testimony to a grand jury. *Castellani v. Scranton Times*, No. 05 CIV 69 (Pa. Ct. C.P., Lackawanna County June 3, 2005). The Pennsylvania shield law creates an absolute privilege protecting the identity of confidential sources even in libel cases against the press. But the trial court concluded that grand jury secrecy rules are of such paramount importance they outweigh any competing First Amendment or statutory rights.

A Mississippi trial court ordered a non-party reporter to reveal to libel plaintiffs her source for a confidential drug enforcement agency memo. *Pierce v. Melton*, No. 03-CV-071 (June 8, 2005). While the reporter enjoyed a qualified privilege to protect the identity of her source, plaintiffs, a current and a retired narcotics agent, had exhausted all reasonable means to discover who leaked an allegedly defamatory memo.

Discovery of Anonymous Internet Posters

In a decision involving speech on the Internet, but applying to traditional publications as well, the Delaware Supreme Court held that a public figure libel plaintiff must satisfy a summary judgment standard

before obtaining the identity of an anonymous defendant. *Cahill v. Does*, No. 266, 2005 WL 2455266 (Del. Oct. 5, 2005). This is the first decision on the issue at the state supreme court level – and the unanimous court acknowledged both the historical protection for anonymous political speech and the Internet's role as "a unique democratizing medium." The standard will be very useful in weeding out what the court called "silly" and "trivia" defamation suits over statements of opinion and hyperbole. Indeed, the court suggested that anonymous or pseudonymous statements on Internet blogs, forums and message boards, are in context generally "either subjective speculation or merely rhetorical hyperbole."

The Maine Supreme Court was asked to adopt similar protections for anonymous speech on the Internet but declined to do so on the ground that the issue had not been preserved on appeal. *Fitch v. Doe*, 869 A.2d 722 (Me. 2005).

In *Alvis Coatings, Inc. v. John Does One Through Ten*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), the court recognized that anonymous speech is protected by the First Amendment, but ruled that in the context of commercial speech on the Internet a plaintiff need only make out a prima facie showing that the speaker's statements are false and damaging to compel the production of the speaker's identity.

8. Remedies

Post-trial Injunctions

The Supreme Court issued a narrow decision in a non-media case that raised the issue of post-trial injunctions in libel cases. *Tory v. Cochran*, 125 S.Ct. 2108, 33 Media L. Rep. 1737 (U.S. 2005), *vacating*, No. B159437, 2003 WL 22451378 (Cal. Ct. App. Oct. 29, 2003) (unpublished). The California appellate court affirmed a broad post-trial injunction that barred the defendants, a disgruntled client and his wife, from making virtually any statements about lawyer Johnnie Cochran. The case was complicated by the death of the plaintiff just after argument to the Supreme Court. The defendants had argued that the First Amendment forbids the issuance of a permanent injunction in a defamation case, at least when the plaintiff is a public figure. The

Supreme Court ruled that under the circumstances the injunction was overly broad and unconstitutional, but concluded that Cochran's death made it unnecessary to address the broader First Amendment claims.

Pretrial Injunctions

After plaintiff's store was the subject of a "Shame on You" local television news broadcast, the store owner sued for libel and sought a preliminary injunction to prevent the station from making any defamatory statements about the store or reentering it. *Foley v. CBS Broadcasting, Inc.*, No. 108403/05 (Sup. Ct. N.Y. Co. 2005).[1] The court denied the request, noting that "absent extraordinary circumstances, injunctive relief should not be issued in defamation cases."

Pretrial Attachment

In an unusual pretrial ruling in a libel case, a Connecticut trial court granted a plaintiff's motion for a prejudgment attachment order freezing $150,000 of the defendant's assets pending resolution of the libel case. *Burgess v. Marino*, No. AAN-CV-04-4001823-S, 2005 WL 895868 (Conn. Super. Ct. Ansonia/Millford; ruling March 14, 2005). The defendant's self-published newsletter called the plaintiff a "lying, oversexed, non-thinking pervert" and accused him of having an affair with a 17-year-old female firefighter. Connecticut provides for prejudgment remedies in actions in law and equity where there is "probable cause that a judgment in the amount of the prejudgment remedy sought ... will be rendered in the matter in favor of the plaintiff." C.G.S. Sec. 52-278. After an evidentiary hearing, the trial court found "not even a scintilla of evidence ... that would suggest the defendant conducted even the most cursory of investigations to confirm the veracity of the allegations he made against Ronald Burgess."

Presumed Damages

In *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 33 Media L. Rep. 2254 (3d Cir. 2005), the Third Circuit affirmed a jury verdict in favor of the *Times* in a defamation action over the use of

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[1] Available at http://decisions.courts.state.ny.us/fcas/fcas_docs/2005sep/30010840320051sciv.pdf

a picture of plaintiff's website in an article on online drug purchasing. The newspaper article, entitled, "Web Bazaar Turns into a Pharmaceutical Free For All," addressed the risks of purchasing fertility drugs on the internet, describing certain online sellers as "unscrupulous" and "cloak and dagger." The jury found that the article falsely implied plaintiff engaged in such practices and was published negligently. But the jury found that the publication caused no actual harm to the plaintiff, so that the *Times* was entitled to judgment. On appeal, the plaintiff argued that the trial court erred in failing to charge the jury that damages could be presumed because the article was defamatory *per se*, but the Court of Appeals held that the plaintiff had waived that issue by not objecting to the jury charge. The Court also held that failure to charge on the issue was not "plain error" because Pennsylvania law is unclear on whether damages are presumed if the defamation is *per se* and any such presumption would apply only upon proof of actual malice, which had not been found by the jury. The Court also held that it was not error to fail to charge that proof of pecuniary injury is unnecessary in a case of defamation *per se* because the substance of the court's charge fully apprised the jury of the proper elements of recoverable damages.

Punitive Damages

According to the 2005-2006 MEDIA LIBEL SURVEY, eight jurisdictions do not permit punitive damages in defamation cases.[2] Eleven states impose statutory limitations on punitive damage awards[3] and 21 states limit punitive damages through retraction laws.[4]

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[2] Louisiana, Michigan, Nebraska, Puerto Rico and Washington do not allow punitive damages; Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; and New Hampshire, although prohibiting punitive damages, permits plaintiffs an "enhanced recovery" in tort cases where defendant acted with malice or wanton disregard of plaintif's rights.

[3] Colorado, Georgia, Kansas, Missouri, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Texas and Virginia.

[4] Alabama, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma (rarely invoked), South Dakota, Tennessee, Utah and Wisconsin.

Punitive damages in defamation cases are determined by state law, with only rough guidance from the Supreme Court on the constitutionality of such awards in the First Amendment context.[5] Several recent U.S. Supreme Court cases, though, have reviewed the constitutionality of punitive damages on due process grounds,[6] requiring de novo review of awards and cautioning that disproportionate awards will constitute a deprivation of property – standards now being applied in the defamation context.

Missouri this year enacted a law capping punitive damages. Mo.Rev.Stat. §510.265 *et seq.* Under the statute, punitive damages may not exceed $500,000 or "five times the net amount of any judgment awarded to the plaintiff against the defendant." Mo.Rev.Stat. §510.265.1. (These limitations do not apply where the defendant has pled guilty or has been convicted of a felony arising out of the acts or omissions forming the basis of the plaintiff's claim.) The statute also limits discovery of a defendant's assets in connection with a punitive damages, allowing such discovery "only after a finding by the trial court that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages."

A new tort reform law in Ohio limits the recovery of punitive damages based on the size of the defendant, allows a party to request a separate trial on the issue of punitive damages, and prohibits pre-judgment interest on punitive damages awards. O.R.C. § 2315.21. The effect of these provisions on media cases is unclear as the punitive damages limitations specifically do not apply when the defendant has acted "purposefully" or "knowingly." Non-economic damages are also limited, as is the type of evidence that can be considered in determining the amount of non-economic damages. Specifically, the trier of fact may not consider evidence of the defendant's wealth or financial resources in determining the amount of non-

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[5] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring actual malice to recover punitive damages, at least when matters of public concern are at issue).

[6] *See BMW v. Gore*, 517 U.S. 559 (1996) (due process clause prohibits "grossly excessive" punitive damages in civil suits); *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (due process requires *de novo* review of punitive damage awards); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (punitive 6 damage awards that are not proportional to the harm committed constitute an arbitrary deprivation of property).

economic damages (O.R.C. §2315.18). General verdicts must now be accompanied by jury interrogatories specifying how much is being awarded for economic loss and how much for non-economic loss and a *de novo* appellate standard has been adopted to review excessive awards of non-economic loss. (O.R.C. §2315.19).

Several non-media libel decision examined the constitutional limits on punitive damages. In *Lowe Excavating Co. v. Int'l Union of Operating Engineers*, 832 N.E.2d 495, 505-506 (2005), the Illinois appellate court conducting a de novo review, reduced as unconstitutionally excessive a $525,000 punitive damage award. The 115 to 1 ratio to compensatory damages was "exceedingly disproportionate" and the court reduced it to a "constitutionally acceptable ratio of approximately 75 to 1" under the facts of the case.

In *Superior Federal Bank v. Jones & Mackey Construction*, 2005 WL 3307074 (Ark App. Dec. 7, 2005), the court held that a $175,00 defamation award and a $210,000 promissory estoppel award could be combined as the "denominator" for purposes of a $3.08 million dollar punitive damage award on the defamation claim. This created an 8 to 1 ratio of compensatory damages to punitives, in line with the Supreme Court's guidelines in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). Ratios above double digits, the Arkansas court noted, are more constitutionally suspect, but "there is no bright line on the matter" and suggested it would have upheld the punitive award based solely on the defamation award (a 17 to 1 ratio).

9. Criminal Libel

The Kansas criminal libel statute again withstood a constitutional challenge. In *How v. City of Baxter Springs, Kansas*, 369 F. Supp. 2d 1300 (D. Kan. 2005), and *Thomas v. Baxter Springs*, 329 F. Supp. 2d 1281 (D. Kan. 2005), the Kansas federal district court dismissed constitutional challenges filed by the publisher of a local newspaper and an advertiser who had both been charged with criminal libel for publishing an ad criticizing the local town clerk. The charges were dropped. The publisher and advertiser then brought a §1983 action seeking a declaration of unconstitutionality and damages. The district court held that the local criminal libel ordinance – identical to the Kansas state statute – was not vague or over-broad

under the First Amendment because it applied only to false statements made with actual malice. The same court later dismissed plaintiff's remaining § 1983 claims for damages, holding that the town clerk did not act "under color of law" when she filed criminal libel charges and that plaintiffs suffered no deprivation of constitutional rights. *See* 2005 WL 3447702 (D.Kan. Dec. 15, 2005)

Recent developments in criminal libel are discussed in more detail in Part III of this Bulletin beginning at page 51.

10. Statute of Limitations / Single Publication Rule

New Jersey joined the growing list of states to hold that the single publication rule applies to publications on the Internet. *Churchill v. State of New Jersey*, 876 A.2d 311 (NJ App. 2005). Plaintiffs alleged that material on a state website accused them of dishonesty, secrecy and fiscal irresponsibility. Affirming dismissal on statute of limitations grounds, the appeals court relied primarily on the New York Court of Appeals decision in *Firth v. State*, 775 N.E.2d 463 (N.Y. 2002), but also noted that courts in Mississippi, Kentucky, Arizona, California, Georgia, Massachusetts and Oregon have all reached the same conclusion within the past two years. Indeed the court concluded that the "Internet appears to be particularly suited to the application of the single publication rule because it is rapidly becoming (if it has not yet already become) the current standard for the mass production, distribution, and archival storage of print data and other forms of media."

11. Procedural Matters

Jurisdiction

In *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005), the Fifth Circuit affirmed that the publishers of German magazines were not subject to personal jurisdiction in Texas even though one of the plaintiffs is a Texas citizen and one or more Texans were sources for the articles. The Texas plaintiff actually lived in Germany, where the "brunt" of the alleged harm was felt. The magazines were in the German language and circulated very few copies within Texas.

California courts had no jurisdiction over a Finnish magazine that allegedly published a defamatory story about plaintiff's role in a California lawsuit. *Nygard v. Oy*, No. B168313, 2005 WL 375517 (Cal. Ct. App. Feb. 17, 2005). "The fact that AJO published a magazine in Finland, which magazine conceivably could be read in California, or the fact that AJO operated a website, which website could conceivably could be viewed in California, does not amount to conduct expressly aimed at, or targeting, California."

Similarly, a federal court in Houston granted a North Carolina newspaper's motion to dismiss a libel complaint brought by a Texas resident. *Anwar Ouazzani-Chahdi v. Greensboro News & Record, Inc.*, No. H-05-1898, 2005 WL 2372178 (S.D. Tex. Sept. 27, 2005). At issue was an article entitled "Fake-Marriage Schemes Commonplace," that was also available on the newspaper's website. The mere posting of a news article on a passive website, together with the presence of three mail subscriptions in Texas, is insufficient to confer personal jurisdiction. *See also Jackson v. The California Newspapers Partnership, et. al.*, No. 05 C 3459, 2005 WL 2850116 (N.D. Ill. Oct. 27, 2005) (no jurisdiction over California newspaper based soley on Internet publication).

A New York federal court dismissed libel and related claims against a California defendant over online bulletin board and website postings, for lack of personal jurisdiction. *McConnell v. Cummins*, No. 03 Civ. 5035, 2005 WL 1398590 (S.D.N.Y. June 13, 2005). The court noted that "[w]hen a case only involves online postings of information, rather than commercial transactions, it is unlikely that jurisdiction will be appropriate" unless the postings are specifically targeted to the state. The case involved "a bitter online feud" between plaintiff, a New York publisher of an online newsletter on small cap stocks, and defendant, a California critic. In online investor bulletin boards, such as RagingBull.com and on her own website, defendant accused plaintiff of taking money from companies to tout their stocks and called her a "fraudster," "hypster unextraordinaire," "paid stock promoter," "insane," and a "criminal."

In contrast, in *Abiomed, Inc. v. Turnbull*, 379 F.Supp.2d 90 (D. Mass. 2005), the court ruled it had personal jurisdiction over an Ohio resident who allegedly posted numerous defamatory messages about

plaintiff on an investors bulletin board. The defendant worked for a competing company, and the court concluded that his postings about plaintiff were purposefully directed at Massachusetts and intended to cause injury there.

The Tenth Circuit affirmed that a Utah federal court had no jurisdiction over a Washington, D.C. reporter who conducted research about alleged abuses at plaintiff's schools. *World Wide Association of Specialty Programs and Schools v. Houlahan*, 138 Fed. Appx. 50, 2005 WL 1097321 (10th Cir. May 10, 2005). Plaintiff was an association of specialty schools for troubled teens with its principal place of business in Utah. The defendant, a Washington, D.C. reporter, researched a story for UPI about alleged abuse at association schools located in New York, South Carolina, Jamaica, and Mexico. Plaintiff alleged that in the course of researching the allegations, the reporter made defamatory statements to potential and former students and their parents (all located outside of Utah) as well as a Utah attorney who had filed numerous suits against plaintiff. Affirming dismissal, the Court held that defendant's acts were not targeted at the state of Utah. Moreover, the Court held that denying plaintiff's request to take additional jurisdictional discovery was not an abuse of discretion absent "an explicit, supported motion" for discovery. *See also LaPointe v. Van Note*, 2004 U.S. Dist. Lexis 27691, 33 Media L. Rep. 1497 (D.D.C. Nov. 9, 2004) (no jurisdiction over a libel defendant who had no office or business in the forum).

Choice of Law

After a lawsuit was transferred from Georgia to Colorado on forum non conveniens grounds, the Colorado court looked to Georgia's choice of law rules to see which state's law applied. *Ramsey v. Fox News Network, L.L.C.*, 351 F.Supp.2d 1145, 33 Media L. Rep. 1161 (D. Colo. 2005) (a court sitting in diversity that has a case transferred to it from another district must apply the choice of law rules of the transferor court). Georgia uses the *lex loci deliciti* choice of law doctrine in tort cases, which means it chooses state law based on the place of the wrong. However, in a multi-state defamation case like *Ramsey*, the court found that Georgia would choose the state law that has the "most significant relationship" to the wrong. The court

applied Colorado law because "the broadcast at issue concern[ed] the murder of a child who died in Colorado while plaintiffs lived in Colorado."

A similar question involving choice of law in a multi-state defamation case arose in *Hatfill v. Foster*, 372 F. Supp.2d 725 (S.D.N.Y. 2005), another case brought by Stephen Hatfill over press articles allegedly implying that he is the anthrax murderer. The case was transferred from Virginia to New York. Noting that it must apply the transferror court's choice of law rules, the New York court held that Virginia law applied. It rejected the defendants request to apply New York law as having the "most significant relationship" to the claims because Virginia has rejected that test.

12. International Developments

Canada

In a closely watched case, the Ontario Court of Appeals ruled that Canada does not have jurisdiction over the *Washington Post* in a defamation case over content found on the paper's online archive. *Bangoura v. Washington Post*, [2004] O.J. No. 284 (Ont. Sup. Ct. Jan. 27, 2004). The plaintiff, a former UN official from Africa, moved to Ontario several years after the *Washington Post* published articles about his alleged misconduct in Africa. The trial court held it had jurisdiction over the *Post* on the grounds that 1) the plaintiff should be entitled to recover for damages where he resides; and 2) the *Post* is an internationally known newspaper that should be prepared to defend libel actions anywhere in the world.

On appeal the *Post* argued that plaintiff failed to satisfy the "real and substantial" test to assert jurisdiction. The *Post* was supported by an international media coalition of 51 organizations which suggested several alternative approaches to the issue of jurisdiction over Internet publications, including a "country of origin" approach and a U.S. style "targeting" approach. The court declined to adopt any of them in this case, stating "[i]t may be that in some future case involving Internet Publication, this court will find it useful to consider and apply one or more of the proposed methods." Instead it held that plaintiff failed to establish

that his action had a "real and substantial connection" to Ontario. Among other things, there was no "no connection with Ontario until more than three years after publication," the only known publication in Ontario occurred when plaintiff's lawyers accessed the articles from the archive and there was no evidence that plaintiff suffered significant damages within Ontario. "To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation."

England

The Court of Appeals of England & Wales also offered some hope to online publishers in *Yusuf Jameel v. Dow Jones & Co Inc* [2005] EWCA Civ 75. The court dismissed a libel action against the U.S. edition of the Wall Street Journal where the only publication in England consisted of a handful of downloads, most by plaintiff and his lawyers. Although such downloads technically satisfy the publication requirement of the tort, the court held it would be an "abuse of process" to entertain a claim over such minimal publication. Citing to the European Convention on Human Rights, the Court of Appeals noted:

> Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.

[2005] EWCA Civ 75 at ¶ 55.[7]

[7] Available at http://www.bailii.org/ew/cases/EWCA/Civ/2005/75.html

B. MEDIA PRIVACY AND RELATED LAW

1. False Light

Recognition

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, 34 jurisdictions currently recognize the false light tort.[8] In six of these jurisdictions, however, the tort has not been applied in the media context.[9] Ten other jurisdictions have explicitly rejected the tort.[10]

Significant Media Cases

The Seventh Circuit affirmed dismissal of a false light claim based on the use of plaintiff's photograph in a non-fiction book about organized crime. *Raveling v. HarperCollins Publishers Inc.*, No. 04-2963 (7th Cir. March 4, 2005) (unpublished), *affirming*, No. 03 C 7333, 2004 WL 422538 (N.D. Ill. Feb. 10, 2004). The book, entitled "Double Deal," contained a photograph of plaintiff at a christening ceremony attended by organized crime figures. The court held that plaintiff failed to state a claim where there was nothing inaccurate in the photograph or caption, rejecting her claim that it falsely associated her with organized crime.

A black football player sued the makers of a video game for libel and false light for mistakenly using his picture with the description of a like-named white football player. *Neal v. Electronic Arts, Inc.*, 374 F.Supp.2d 547 (W.D. Mich. 2005). The court ruled that plaintiff's claimed failed as a matter of law. "Plaintiff's argument that the use of his picture in place of a Caucasian player is highly offensive to a reasonable person is simply contrary to the well-established history of the judiciary not to condone theories of recovery which promote racial prejudice or effectuate discriminating conduct."

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[8] Alabama, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire (federal), New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virgin Islands, Virginia, and West Virginia.

[9] Delaware, Indiana, Kansas, Nebraska, Vermont, and Virgin Islands.

[10] Colorado, Massachusetts, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia and Wisconsin.

A Michigan appellate court affirmed summary judgment for rapper Marshall Mathers III, a/k/a "Eminem" in a false light action over the a song and related statements made in *Rolling Stone* magazine. *Bailey v. Mathers*, No. 252123, 2005 WL 857242 (Mich. Ct. App. Apr. 14, 2005) (unpublished). The lyric's characterization of plaintiff as a bully who "*banged my head against the urinal til he broke my nose/ Soaked my clothes in blood, grabbed me and choked my throat*" was substantially true.

The Ninth Circuit affirmed summary judgment dismissing a city commissioner's false light claim over a hidden camera news report about her activities while in Las Vegas to attend a management conference. *Harris v. City of Seattle,* 2005 WL 2417118 (9th Cir. 2005) (unpublished). The broadcast reported that plaintiff attended only 3 ½ hours of seminars and workshops and showed her visiting the casino's slot machines instead. Plaintiff's self-serving denial fell "well short of demonstrating that KING acted with malice" in broadcasting the report. And KING's failure to include plaintiff's attendance at nighttime conference events in its calculation of how much time she spent attending seminars did not support an inference of malice where the conference schedule clearly distinguished between daytime sessions and evening social events.

In an interesting decision involving fictional programming, a California appellate court held that a woman who played a brief role in a comedy sketch program had viable claims of false light and libel – at least to withstand an anti-SLAPP motion to strike – where the obviously fictitious sketch allegedly created the false impression that she was the type of actress "willing to engage in a simulated sex scene." *Burns v. MTV Networks Enterprises, Inc.*, No. BC307620, 2005 WL 775758 (Cal. App. April 7, 2005) (unpublished). Plaintiff and a male actor portrayed a husband and wife in bed about to have sex when they are interrupted by their daughter who bursts into the room. Show host, Snoop Dogg then appeared telling the audience that children are the ultimate form of birth control. Plaintiff alleged that she had expressly refused a director's request that she do the scene lying on top of the male actor or in any other way that would suggest simulated sex or nudity. The appellate court affirmed in part and reversed in part. It ruled that the breach of contract and related fraud claims failed for lack of damages and evidence of intent to harm, and the allegations could not support a claim for severe emotional distress. But the court affirmed that plaintiff had established a probability

of prevailing on her libel and false light claims to withstand the motion to strike. Relying on plaintiff's own declaration describing what she agreed to do in the scene, the court ruled that she established that MTV deliberately placed her in a false light and libeled her by "portraying her as willing to engage in a simulated sex scene .... which is the type of scene that is just not done by certain types of actors and actresses."

The Utah Supreme Court affirmed, in part, a jury damage award for libel and false light against a broadcaster based on hidden camera filming inside a doctor's office. *Jensen v. Sawyers,* 2005 WL 3043691 (Utah Nov. 15, 2005). At issue were three broadcasts that reported on plaintiff's willingness to prescribe illegal diet medication. On appeal, the Utah Supreme Court ruled that claims over the first two broadcasts should have been governed by the one-year libel statute of limitations rather than the four-year "catch-all" provision applied by the trial court to privacy actions. Discussing at length the differences between the torts, the court declined to reject the false light tort entirely, but concluded that the shorter limit applied because the false light claim was identical to the libel claim. But the court went on to affirm a $500,000 compensatory damage award for libel / false light over the third broadcast, holding that the jury's finding of falsity was a finding of fact supported by the evidence.

2. Private Facts

Recognition

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, 43 jurisdictions currently recognize a claim for publication of private facts.[11] The tort has been specifically rejected in four jurisdictions.[12]

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[11] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, Washington, West Virginia, and Wisconsin.

[12] Nebraska, New York, North Carolina, and Virginia.

Significant Media Cases

Illustrating the perils of filming in hospitals, a divided Michigan Court of Appeals reinstated a private facts claim against a broadcaster for videotaping inside a hospital emergency room for a documentary entitled "A Brush With Death, A Night in the E.R." *Stratton v. Krywko, et al.*, 2005 WL 27522 (Mich. App. Jan. 6, 2005). The court affirmed dismissal of a variety of claims, including libel, false light and negligence claims against the broadcaster defendants; and negligence and malpractice claims against hospital defendants. Claims over taping at a roadside accident scene were dismissed because much of the information subsequently disclosed was not private as the scene was "exposed to the public eye." But plaintiff had triable claims for publication of private facts and intrusion. Broadcasting a doctor's statement that plaintiff was "on Prozac" was not newsworthy as a matter of law and therefore could amount to an actionable disclosure of a private fact, notwithstanding that many of plaintiff's friends apparently knew she took the medication. The court also reinstated the intrusion claim, finding that filming plaintiff in an emergency room after she refused to sign a release could be offensive and unreasonable.

In one of the strangest rulings of the year, a Texas federal district court ruled that a private facts claim over a newsworthy publication could survive a motion to dismiss where plaintiff alleged the information came from a sealed court file. *Lowe v. Hearst Communications*, No. SA-05-CA-554-OG, 2005 WL 3348941 (W.D.Tex. Dec. 7, 2005). The court reasoned that under such circumstances the newspaper might have acquired the information illegally and its publication therefore would not receive First Amendment protection.

A California federal district court dismissed a private facts claim brought by four Navy SEALs against the Associated Press for publishing photographs of plaintiffs subduing or detaining Iraqi prisoners. *Four Navy Seals v. Associated Press*, No. 05 CV 0555 (JMA) (S.D. Cal. July 12, 2005). The photos had been uploaded to a website for storage and sharing with family members that was actually searchable on Google and available to the public. An AP reporter found the pictures through a photo sharing website,

brought them to the attention of Navy officials, and then included them in a news report about the Navy's investigation into the matter. Plaintiffs conceded that the publication was newsworthy, but alleged it was outrageous for AP to have revealed their identities. The court held that no private facts had been disclosed, because the SEALs' identities were "in the public domain" once the photos were posted on the internet.

A Florida federal district court dismissed an invasion of privacy complaint over a *Rolling Stone* magazine article recounting a reporter's experiences working undercover in a 2004 Bush campaign office in Orlando. *Mills v. Wenner Media,* 2005 WL 1126662, 33 Media L. Rep. 2022 (M.D. Fla. 2005). Plaintiff, a local sheriff's deputy, had no idea he was speaking with a journalist when he discussed his ideas about having "a clone army" guard the country. ("We'd just have a big breeding farm in Colorado," he said. "Course, it'd be a security problem if they got out, you know, if you had rogue clones running around. You'd have to have a special security force to maintain 'em.") The court held that the facts in the article were not private and addressed issues of public concern.

The Third Circuit affirmed that the First Amendment shielded a newspaper from liability for publishing accurate and lawfully obtained information about a juvenile's arrest for rape. *Bowley v. City of Uniontown Police Dep't,* No. 04-2352 (3d Cir. Apr. 26, 2005). Plaintiff, a minor at the time the suit was filed, claimed that publication was a breach of confidentiality under 42 Pa. Cons. Stat. § 6308, a Pennsylvania law that generally prohibits the disclosure of juvenile law enforcement records, as well as an invasion of his privacy. On appeal, the Third Circuit recognized that although the Supreme Court "has declined to hold that publication of truthful information is *per se* protected by the First Amendment," as a general matter "'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'"

The Eleventh Circuit summarily affirmed dismissal of a private facts claim brought by a convicted drug smuggler against an author and book publisher for allegedly outing him as a cooperating informant for the Drug Enforcement Agency ("DEA"). *Alexander v. HarperCollins Publishers Inc. and Bernard B. Kerik,* No. 04-12801, 2005 WL 1163612 (11th Cir. May 18, 2005). The court approved of the district court's

reasoning that plaintiff's legal and illegal activities were matters of public interest and therefore he had no cause of action for invasion of privacy.

Significant Non-media Cases

The California Supreme Court recently accepted for review an interesting privacy case against university researchers who published articles and made public statements challenging scientific study about recovered memories of abuse. *Taus v. Loftus*, No. A104689, 2005 WL 737747, 33 Media L. Rep. 1545 (Cal. App. 1 Dist. April 1, 2005) (unpublished), *review granted*, (Cal. Jun 22, 2005). Plaintiff was the subject of a published case study relating to recovered memories of child sex abuse. The appellate court held, *inter alia,* that plaintiff made out a prima facie claim for disclosure of private facts based on one defendant's statement at a science conference that hinted at plaintiff's identity – defendant used plaintiff's real initials and said she is now in the Navy. The court reasoned that while the issue of recovered memory was a matter of public interest, there is no public interest in knowing plaintiff's identity which it presumed could be pieced together from the defendant's remarks and the published article.

In addition to the reporters privilege/default issue in *Ayash v. Dana-Farber Cancer Institute*, 822 N.E.2d 667, 683 (Mass. 2005), the court also addressed plaintiff's privacy claim based on disclosure of statutorily protected medical peer review information. The claim failed as a matter of law where the information concerned matters of "intense public interest" and disclosure not of "an exceedingly personal or intimate nature."

In dicta, an Illinois court noted that disclosure of a person's sexual orientation is not a matter of legitimate public concern and disclosure could be highly offensive. *Doe v. Templeton*, 2004 WL 1882436, at *3 (N.D. Ill 2004). However, the court granted defendant's motion for summary judgment because when defendant took plaintiff's photograph and featured it in advertisements containing the statement "I am gay in a happy way not a sexual one," defendant was not aware that plaintiff was gay and, therefore, could not have disclosed the fact.

3. Intrusion and Related Causes of Action

Recognition

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, 44 jurisdictions recognize a claim for intrusion.[13] Two jurisdictions have explicitly declined to recognize intrusion;[14] in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort.[15]

Significant Media Cases

The Utah Supreme Court affirmed a $90,000 jury damage award for intrusion based on hidden camera filming inside a doctor's office. *Jensen v. Sawyers,* 2005 WL 3043691 (Utah Nov. 15, 2005). A reporter made an appointment with the plaintiff-doctor, stating she wanted to see him as a weight loss patient. The doctor was then secretly filmed offering to prescribe medication that was not generally authorized for weight loss. Affirming on appeal, the Utah Supreme Court ruled that the jury could have reasonably determined that the "falsely represented presence" of the reporter violated a legitimate expectation of privacy.

The Michigan Court of Appeals held that filming plaintiff inside a hospital emergency room after she explicitly refused to sign a release created a triable claim for intrusion since such conduct could be found to be offensive and unreasonable. *Stratton v. Krywko, et al.*, 2005 WL 27522 (Mich. App. Jan. 6, 2005).

A California federal district court dismissed an intrusion claim based on a reporter downloading allegedly private photographs from a website. *Four Navy Seals v. Associated Press*, No. 05 CV 0555 (JMA) (S.D. Cal. July 12, 2005). The photos showed plaintiffs, four Navy SEALs, subduing or detaining Iraqi

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[13] Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, West Virginia, Washington and Wisconsin.

[14] New York and Virginia.

[15] Eighth Circuit opinion interpreting North Dakota law.

prisoners. The photos were uploaded to website for storage and sharing with family members, but the site could be searched on Google and was accessible to the public. Under these circumstances, "one cannot reasonably expect the internet posting of photos to be private." Moreover, any intrusion "was *de minimis* and thus not highly offensive to a reasonable person," especially in the context of newsgathering.

A magazine photograph of plaintiff at a high school prom was not an intrusion upon seclusion under Massachusetts law because the photograph was taken in a public place. *Stanton v. Metro Corp.*, 357 F. Supp. 2d 369, 384 (D. Mass. 2005). The also noted that plaintiff's claim that the publication falsely implied she was promiscuous was inconsistent with her intrusion claim which concerns the disclosure of true but private information about a person.

Non Media Cases

Interpreting the scope of insurance policy for advertising injury, the Seventh Circuit discussed whether a corporation could bring an invasion of privacy claim under Illinois law for intrusion into seclusion. *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir. 2004). The court concluded that corporations and other business entities lack any privacy interest in seclusion, but acknowledged that their employees have an interest in seclusion.

Wiretapping /Hidden Cameras/Other Forms of Surveillance

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, in addition to the Federal Wiretap Statute, 18 U.S.C. §2510 *et seq.*, 52 jurisdictions have electronic eavesdropping statutes.[16] In 39 of those jurisdictions, however, it is not a violation of the statute, as a general proposition, if one party gives

[16] Only South Carolina and Vermont lack eavesdropping statutes. South Carolina does have a "peeping Tom" statute which prohibits eavesdropping on another's property, but it is unclear if the statute would apply to electronic eavesdropping. Mississippi has a very narrowly drafted eavesdropping statute limited to criminal controlled substances investigations which was set to lapse in July 2004.

consent to the recording.[17] The other 13 jurisdictions require the consent of all parties, at least in delineated circumstances.[18]

Significant Media Cases

The Utah Supreme Court affirmed a $90,000 jury damage award for eavesdropping based on hidden camera filming inside a doctor's office. *Jensen v. Sawyers,* 2005 WL 3043691 (Utah Nov. 15, 2005). Affirming on appeal, the Utah Supreme Court ruled that the jury could have reasonably determined that the "falsely represented presence" of the reporter in the plaintiff's examination room violated a legitimate expectation of privacy, citing with approval *Sanders v. American Broadcasting Co.*, 85 Cal.Rptr.2d 909, 978 P.2d 67, 74 (Cal.1999) ("an employee may, under some circumstances, have a reasonable expectation of visual or aural privacy against electronic intrusion by a stranger, despite the possibility that the conversations and interactions at issue could be witnessed by coworkers or the employer").

A Florida federal district court granted summary judgment to the producers of the news show *Inside Edition* on a wiretap claim over a report that was based in part on hidden camera footage obtained by a producer who worked for nine days as a sales agent at plaintiff's magazine subscription company. *Pitts Sales, Inc. v. King World Productions, Inc., et al.*, No. 04-60664-Civ., 2005 WL 1515316 (S.D. Fla. June 28, 2005). The wiretap claim failed because the producer was "a party to the communications." The court concluded that "a party to the communication," under the federal wiretap statute, 18 U.S.C. § 2511, is a person who is present when the oral communication is uttered and need not directly participate in the conversation.

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[17] Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[18] California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, Puerto Rico, South Dakota, and Washington.

Significant Non-media Cases

In an en banc ruling on rehearing, the First Circuit Court of Appeals held that an employee of an internet service provider (ISP) could be prosecuted under federal wiretap laws for accessing e-mails temporarily stored on the ISP's server. *U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc) (vacating 373 F.3d 197 (1st Cir. June 29, 2004)). The court's original panel ruling last year held that the wiretap laws did not apply to the momentary storage involved in the case. It was based on the statute's language and prior decisions holding that while the wiretap laws applied to e-mail messages "in transit," that is, in the course of movement from one computer to another, they did not apply when the messages were "in storage," i.e., stored electronically in a computer's memory or hard drive, even if the storage was temporary while the message was en route from one computer to another.

Related Claims

Trespass

A Florida federal court ruled that a magazine sales company had a triable claim for trespass (albeit for nominal damages) over an investigative news report on its business practices that was based in part on hidden camera footage obtained by a producer worked for the company for nine days. *Pitts Sales, Inc. v. King World Productions, Inc., et al.*, No. 04-60664-Civ., 2005 WL 1515316 (S.D. Fla. June 28, 2005). The court held that a genuine issue of material fact existed regarding whether the producer exceeded the scope of the consent given him to enter plaintiff's properties. The trespass claim was tried before the judge on the briefs and supplemental materials and he ruled in favor the media defendants. Among other things the judge found that the producer "did not gain access to any special areas of Pitts Sales' business not easily accessible by others."

The Maryland Court of Appeals reinstated claims for trespass and intrusion against *The Baltimore Sun* arising out of an interview with former Congressman Parren Mitchell in his nursing home room. *Mitchell v. The Baltimore Sun Company, et al.*, No. 266, 2005 WL 2385972 (Md. App. Sept. 29, 2005). The

court found that an issue of fact existed as to whether the Congressman voluntarily spoke to reporters based on his allegation that he asked the reporters to leave his room and spoke to them after they refused to do so. For the same reason, the court held that genuine issues of material fact existed concerning whether the reporters' conduct in the nursing home room was highly offensive, precluding summary judgment in defendants' favor on the invasion of privacy claim. The court affirmed summary judgment dismissing the Congressman's claim for intentional infliction of emotional distress, finding that the reporters' conduct, even as alleged by the plaintiff, was not extreme and outrageous as a matter of law, and concluding further that the Congressman had failed to proffer sufficient evidence that he suffered extreme distress as a result of it.

In *State v. Wells*, 2004 WL 1925617 (Ariz. Super. Ct. June 15, 2004), the Arizona Superior Court upheld the criminal trespass conviction of a newspaper reporter who entered a fenced residential yard through a gate bearing a "No Trespassing" sign and knocked on the front door of a police officer who had shot and killed a woman suspected of using a false prescription at a drive-through pharmacy. The court concluded that the defendant "knowingly, voluntarily entered a fenced residential yard knowing that he [was] not licensed, authorized, or otherwise privileged," and that neither the First Amendment nor the free speech and press provision of the Arizona Constitution (Article II, § 6) protected the defendant from prosecution. The court stated that "while this court is sympathetic to Appellant's position that a free press is essential to a free and just society, the First Amendment neither immunizes trespassers nor creates any special exemption for reporters who violate criminal statutes of general applicability to all members of the public."

Fraud / Misrepresentation

A Texas appeals court affirmed summary judgment to the publisher of an investment newsletter on claims of fraud and misrepresentation in *Reynolds v. Murphy,* No. 2-03-294, 2005 WL 1654992 (Tex. App.—Fort Worth, July 14, 2005, no pet. h.). Plaintiff alleged that the publisher's non-disclosure of a prior criminal record and drug use amounted to fraud. The court found that the author's "past indiscretions [were] not material to his current performance as a stock analyst."

A Florida federal court dismissed a fraud claim over an investigative news report based in part on hidden camera footage taken by a producer who obtained a job with plaintiff, a magazine sales subscription company. *Pitts Sales, Inc. v. King World Productions, Inc., et al.*, No. 04-60664-Civ., 2005 WL 1515316 (S.D. Fla. June 28, 2005). Relying on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the court granted summary judgment to the defendants because plaintiff's alleged damages were not proximately caused by its reliance on the alleged misrepresentations the producer made to get hired. The court noted that the producer made no representation about how long he would work and that the company experienced "very high" turnover.

In *Brock v. Viacom*, 2005 WL 3273767, 33 Media L. Rep. 1764 (N.D. Ga. 2005), the court treated claims for fraud as libel claims in disguise. The plaintiffs had appeared on the satiric cable television series "Penn & Teller: Bullshit!" to discuss their support for the theory of creationism. Plaintiffs claimed they only appeared because they were assured the show would be a serious discussion of the issue. Instead their interviews were surrounded by mocking gestures and commentary.

In *Burns v. MTV Networks Enterprises, Inc.*, No. BC307620, 2005 WL 775758 (Cal. App. April 7, 2005) (unpublished), the court dismissed an actress's claims for fraud and breach of contract over her appearance in a comedy sketch that appeared to show her engaged in a simulated sex. Although plaintiff had viable claims for libel and false light, her fraud claims failed for lack of damages and evidence of intent to harm, and the allegations could not support a claim for severe emotional distress.

4. Misappropriation/Right of Publicity

Recognition

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, 46 jurisdictions currently recognize the tort of misappropriation / right of publicity.[19] In eight jurisdictions the courts have not yet had the opportunity to rule on the issue.[20]

Significant Media Decisions

On a certified question, the Florida Supreme Court clarified that the use of a person's name and likeness without consent in a movie or other work sold for profit, is not commercial so long as the use does not directly promote the sale of a product or service. *Tyne v. Time Warner Entertainment Co.*, No. SC03-1251, 2005 WL 914193 (Fla. 2005). The plaintiffs claimed that the use of their names without consent in the movie *The Perfect Storm* violated Florida's misappropriation statute. The Florida Supreme Court held that applying the statute's "commercial purpose" element to a movie or other expressive work "raises a fundamental constitutional concern" because such works are clearly entitled to First Amendment protection under the law.

The Fifth Circuit affirmed dismissal of misappropriation claims brought by members of a jury who were mentioned in a *60 Minutes* segment entitled "Jackpot Justice," which focused on the perceived impropriety of large jury verdicts in Mississippi. *Gales v. CBS Broadcasting, Inc.*, 2005 WL 488764, *1 (5th Cir.).

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[19] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, West Virginia, Washington, and Wisconsin.

[20] Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana, North Dakota (no direct cases but addressed in dicta), Puerto Rico (the federal district court in dicta stated that right of publicity has not been recognized under Puerto Rican law, *Alvarez Guedes v. Marcano-Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001)), South Dakota, and Wyoming.

Significant Non-media Cases

The Seventh Circuit did an about face this year, vacating on rehearing a decision that held that a model's right of publicity claim over the use of her photo in an advertisement was preempted by the Copyright Act. *Toney v. L'Oreal U.S.A. Inc.*, No. 03-2184, 2005 WL 1083775 (7th Cir., May 6, 2005) ("*Toney II*"), *vacating,* 384 F.3d 486 (7th Cir. 2004) ("*Toney I*").

Toney I had potentially far-reaching impact on the right of publicity action because it held there was no meaningful distinction between plaintiff's publicity rights and federal copyright law with respect to the use of her photograph. However, the Court of Appeals acted quickly to grant plaintiff's petition for rehearing, vacating *Toney I.* The court's new opinion squarely holds that the Illinois Right of Publicity Act, is not preempted by the Copyright Act.

In *Minnifield v. Ashcraft,* No. 2030328, 2004 WL 2827940 (Ala. Civ. App. Dec. 10, 2004), the Alabama appeals court reinstated a misappropriation claim against a tattoo artist who submitted photographs of his work (featuring plaintiff) for publication in a national tattoo magazine. The court could infer that defendant "sought a commercial benefit from the photographs being published in the magazine." And notwithstanding the appearance of the photo in a national magazine (albeit for a special interest) the court held that photos "did not pertain to a legitimate newsworthy public interest."

5. Intentional Infliction of Emotional Distress

Recognition

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 40 have case law specifically dealing

with the tort in the media context.[21] In the remaining 14 jurisdictions, the courts have yet to address the application of the tort to the media context.[22]

Significant Media Cases

In *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. July 28, 2005), a divided Fourth Circuit panel reinstated claims for libel and intentional infliction of emotional distress filed by a former bioterrorism expert who alleged that a series of op-ed columns in *The New York Times* implied he was responsible for sending letters laced with anthrax that killed five people in the fall of 2001. The Fourth Circuit held that the columns were capable of defamatory meaning because they did not merely report others' suspicions of Hatfill generated suspicion by asserting facts that implicated him in the anthrax murders. With respect to the emotional distress claim, the panel held that the district court erred in holding that publishing news or commentary on matters of public concern could never be sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. "Given the notoriety of the case, the charge of murder, and the refusal to permit comment by Hatfill's counsel," the panel concluded, "the alleged misconduct is extreme and outrageous under Virginia law." The panel also rejected the argument that Hatfill could not use an emotional distress claim to avoid constitutional limitations on defamation actions. If Hatfill ultimately fails to meet constitutional requirements for recovery on his defamation claims, the panel concluded, then he likely will fail to prove misconduct sufficiently outrageous to warrant recovery for emotional distress.

Relying almost exclusively on this decision, a New York federal hearing a lawsuit by Stephen Hatfill against other media outlets, refused to dismiss his claims for intentional infliction of emotional distress. *Hatfill v. Foster*, No. 04 Civ. 9577, 2005 U.S. Dist. LEXIS 26794, (S.D.N.Y. Nov. 2, 2005) (applying

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[21] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas (federal), Kentucky (intermediate), Louisiana, Maine (federal), Maryland, Massachusetts, Michigan (intermediate), Minnesota, Mississippi (federal), Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma (intermediate), Pennsylvania, Puerto Rico, Rhode Island (federal), South Carolina, Texas, Utah, Virginia, Washington, West Virginia and Wyoming.

[22] Delaware, Guam, Indiana, Iowa, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Tennessee, Vermont, Virgin Islands and Wisconsin.

Virginia law) (articles implying plaintiff was the Anthrax murderer may be considered "extreme and outrageous").

The Arizona Supreme Court dismissed a claim of intentional infliction of emotional against the *The Tucson Citizen* for printing a controversial letter to the editor about the war in Iraq. *Citizen Publ'g Co. v. Miller*, No. CV-04-0280-PR (Ariz. Sup. Ct. July 1, 2005). Among other things, the letter stated that "Whenever there is an assassination or another atrocity [in Iraq] we should proceed to the closest mosque and execute five of the first Muslims we encounter." The trial court denied the newspapers motion to dismiss the claim finding that plaintiff pleaded sufficient facts that publication of the letter rose to the level of extreme and outrageous conduct. Reversing, the state supreme court ruled that the letter did not constitute incitement, "fighting words" or a serious expression of unlawful violence,

The Maryland appeals court affirmed dismissal of an emotional distress claim against a newspaper out of an interview with former Congressman Parren Mitchell in his nursing home room. *Mitchell v. The Baltimore Sun Company, et al.*, No. 266, 2005 WL 2385972 (Md. App. Sept. 29, 2005). Although the court found issues of fact about consent – which were sufficient to support claims for intrusion and trespass – the court affirmed summary judgment dismissing the claim for intentional infliction of emotional distress, finding that the reporters' conduct, even as alleged by the plaintiff, was not extreme and outrageous as a matter of law, and concluding further that the Congressman had failed to proffer sufficient evidence that he suffered extreme distress as a result of it.

Similarly, an Illinois appellate court affirmed dismissal of a criminal defense lawyer's emotional distress claim against the author and publisher of a book about the Mafia. The author's surprise that plaintiff had not been "whacked" was opinion and too vague to satisfy the outrageousness element of the claim. *Tuite v. Corbitt*, 830 N.E.2d 779, 33 Media L. Rep. 1967 (Ill. App. June 7, 2005).

In contrast, an actress's claim that defendants edited a television comedy sketch to make it appear that she was naked and participating in sexual activity could satisfy the outrageousness element of an

emotional distress claim. *Burns v. MTV Networks Enterprises, Inc.*, No. BC307620, 2005 WL 775758 (Cal. App. April 7, 2005) (unpublished). But her allegation that she merely suffered "great emotional distress" was inadequate to satisfy the damages element of the claim which requires "such intense, enduring and nontrivial emotional distress that no reasonable person in a civilized society should be expected to endure it."

Significant Non-Media Cases

The owner of a judo school whose business was mistakenly listed in the Yellow Pages under "Escort Services," failed to state plead a claim for intentional or negligent infliction of emotional distress. *Weil v. Southwestern Bell Yellow Pages, Inc.*, No. CV030830197S, 2004 WL 2669292 (Conn. Super. Oct. 29, 2004). Although the plaintiff alleged the error was "extreme and dangerous," that he was investigated by the police and suffered severe emotional distress, embarrassment, and humiliation he did not allege that the defendant's conduct was "outrageous."

6. Negligent Infliction of Emotional Distress

Recognition

According to the 2005-2006 MEDIA PRIVACY AND RELATED LAW SURVEY, 46 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress.[23] Six jurisdictions have expressly rejected the tort in all cases.[24]

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[23] Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[24] Alabama, Arkansas, Georgia, Kentucky, Maryland, and Texas.

Significant Media Cases

In several media cases courts dismissed emotional distress claims that were simply derivative of failed defamation and related claims. *See, e.g,, Amrak Productions, Inc. v. Morton,* 410 F.3d 69, 33 Media L. Rep. 1891 (1st. Cir. 2005); *Nichols v. Moore,* 2005 WL 1678670 (E.D. Mich. July 13, 2005); *Fuller v. Day Pub. Co.*, 872 A.2d 925 (Conn. App. 2005); *Freedom Newspapers of Texas v. Cantu,* 168 S.W.3d 847 33 Media L. Rep. 1907 (Tex. 2005); *Brock v. Viacom*, 2005 WL 3273767, 33 Media L. Rep. 1764 (N.D. Ga. 2005).

7. Breach of Contract

In *Brock v. Viacom*, 2005 WL 3273767, 33 Media L. Rep. 1764 (N.D. Ga. 2005), the court treated claims for breach of contract as libel claims in disguise. The plaintiffs had appeared on the satiric cable television series "Penn & Teller: Bullshit!" to discuss their support for the theory of creationism. Plaintiffs claimed they only appeared because they were assured the show would be a serious discussion of the issue. Though couched in contract and related terms, the court concluded the gravamen of the action was for defamation – and that failed because defendants' statements were expressions of opinion.

In *Burns v. MTV Networks Enterprises, Inc.*, No. BC307620, 2005 WL 775758 (Cal. App. April 7, 2005) (unpublished), the court dismissed an actress's claim for breach of contract over her appearance in a comedy sketch that was edited to make her appear naked and engaged in simulated sex. Although there was sufficient evidence that defendants breached their agreement with plaintiff by editing the performance, plaintiff failed to show any type of economic loss or prospective economic loss.

8. Interference With Contract/Business Relations

The Ninth Circuit affirmed summary judgment in favor of Amos Press, publisher of *Coin World* magazine, on an interference with business relationships claim over a "subscriber alert" it published about plaintiff's magazine subscription sales practices. *I.C. Marketing Inc. v. Amos Press, Inc.*, No. 03-36044,

2005 WL 2174640 (9th Cir. Sept. 9, 2005). The claim was without merit because the publisher had no duty to allow plaintiff to sell *Coin World* in the face of customer complaints.

An Oregon court dismissed an interference with contract claim brought against a consumer rights radio talk show host. *Gardner v. Martino,* 05-CV-769-HU (D. Or. Dec. 13, 2005 adopting magistrates recommendation 33 Media L. Rep. 2541 Sept. 19, 2005). Among other things, the host stated that plaintiff "sucks" and is was "lying." Dismissing, the court cited with approval case law stating that the constitutional requirements for defamation must equally be met in interference with contract claims, otherwise a plaintiff can avoid the First Amendment merely by the use of creative pleading.

In *Sprewell v. NYP Holdings, Inc.*, No. 12292312002 (N.Y. Sup. Ct. Nov. 5, 2004), the court denied plaintiff's motion to add a claim for intentional interference with contract against a sports reporter who wrote articles allegedly affecting plaintiff's relationship with his team. The court held that there was no intentional or unjustifiable interference because the reporter's conduct was "merely incidental to defendants' exercise of their constitutional right to broadcast newsworthy information about a public figure."

9. Injurious Falsehood/Product Disparagement

The Michigan Court of Appeals reinstated a company's claims for injurious falsehood against a professor who posted an allegedly defamatory paper on web. *Ben-Tech Industrial Automation v. Oakland University*, No. 247471, 2005 WL 50131 (Mich. Ct. App. Jan. 11, 2005). The court found it was error to apply the actual malice standard to the claim, because the company was a private figure plaintiff and only needed to prove gross negligence. The traditional requirement, though, is that actual malice is required in all injurious falsehood cases. *See, e.g, Restatement (Second) of Torts* § 623A (liability requires that the defendant "knows that the statement is false or acts in reckless disregard of its truth or falsity").

10. Unfair Competition Law

Having affirmed dismissal of a libel claim over a miscaptioned photograph, the First Circuit summarily affirmed dismissal of a "derivative" unfair competition claim over the same facts. *Albright v. Morton*, 410 F.3d 69 (1st Cir. 2005).

11. Lanham Act

The Fourth Circuit Court rejected a host of trademark and related claims, ruling in favor of a cybergriper who used the domain name www.fallwell.com to criticize Reverend Jerry Falwell. *Lamparello v. Falwell*, 04-2011, 04-2122, 2005 WL 2030729 (4th Cir. Aug. 24, 2005). Focusing on the likelihood of confusion element, the court noted that the website offers "opposing ideas and commentary" rather than "similar goods and services." Moreover, even if a consumer were misled by the similarities of the domain name and Reverend Falwell's own site, no one would believe that Falwell actually "sponsored a site criticizing himself, his positions, and his interpretations of the Bible."

The Ninth Circuit ruled in favor of a cybergriper who used plaintiff's trademark in the domain name of a website criticizing plaintiff. *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005). The court focused on the noncommercial use of the trademark, reasoning that consumer commentary about the products and services represented by the mark does not constitute infringement under the Lanham Act.

The Eighth Circuit affirmed dismissal of Lanham Act claims brought against a company that gave plaintiff a poor safety rating and commented on that rating in a newspaper interview because defendant's statements were not advertisements and it was not a commercial competitor. *Aviation Charter, Inc. v. Aviation Research Group*, Civ. No. 04-3040, 2005 WL 1691643 (8th Cir. 2005).

12. Other Theories of Media Liability

HIPAA

In an very unusual case, a Kansas trial court judge issued a temporary restraining order barring a television station from reporting on information retrieved from a discarded computer on the ground that HIPAA privacy rights outweigh the station's First Amendment rights. *Monarch v. Meredith Corporation*, (Johnson County District Court, June 27, 2005). The computer, which was thrown out by a plastic surgeon, contained hundreds of patient records, including before and after photographs. The computer was retrieved by a scavenger who contacted and shared the data with a reporter from station KCTV in Kansas. The station ultimately defied the prior restraint and broadcast a report about the doctor's carelessness in discarding the computer. He dropped his claim against the station and the injunction was lifted.

Negligence

A negligence claim against Yahoo! for failure to remove a false online profile was dismissed pursuant to § 230 of the Communications Decency Act. *Barnes v. Yahoo! Inc.*, Civil No. 05-926-AA, 2005 WL 3005602 (D. Or. Nov. 8, 2005). Reaffirming the broad immunity defense for interactive computer service providers, the court dismissed notwithstanding plaintiff's claim that Yahoo! had failed to follow through on a promise to remove the offending third-party content.

A North Carolina appeals court affirmed dismissal of an unusual negligence complaint against a newspaper publisher brought by home owners who were burglarized while on vacation. *Lambeth v. Media General, Inc.*, 605 S.E.2d 165 (2004). Plaintiffs alleged that the publisher failed to treat their "stop delivery" notice in confidence, thereby causing the burglary. The publisher, though, had no legal duty to treat a "stop delivery" notice in confidence and its conduct was not the proximate cause of plaintiffs' injury.

Age Discrimination

A California appellate court affirmed dismissal of a civil rights-based claim against a radio broadcaster and talk show host for allegedly screening out an older caller. *Ingels v. Westwood One Broadcasting Services, Inc.*, 2005 WL 1244794 (Cal.App. 2 Dist.). The court held that California's Unruh Civil Rights Act, Civil Code § 51, which forbids discrimination in business establishments, does not create a cause of action for a caller who was told by a radio show on air that he was too old and outside the program's desired age demographic.

C. STATUTES AND RELATED CASE LAW REPORTED IN THE 2005-2006 SURVEYS

1. Anti-SLAPP Statutes

Twenty-four U.S. jurisdictions now have anti-SLAPP statutes – Arkansas, California, Delaware, Florida, Georgia, Guam, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington.

Anti-SLAPP statutes, designed to combat "strategic lawsuits against public participation,"generally provide for the early dismissal of claims brought against the protected right of petition and/or free speech and may also authorize a stay of discovery and the recovery of legal fees. Application of the statutes to media cases remains very uneven among the states.

California

The California Supreme Court threw out a $775,000 jury verdict against two defendants who continually "flamed" their former employer with Internet postings because the case went to trial before an appeal of an anti-SLAPP ruling was heard. *Varian Medical Systems v. Delfino*, 25 Cal. Rptr. 3d 298 (2005). Resolving a split in the state appeals courts, the Court, without addressing the merits of the underlying claims, held that "an appeal from the denial of a special motion to strike automatically stays all further trial court proceedings on the merits upon the causes of action affected by the motion."

A Yahoo! message board was held to be a "public forum" within the scope of the state anti-SLAPP statute. *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 27 Cal. Rptr. 3d 863 (2005).

A California appellate court held that the infamous *Girls Gone Wild* DVD series does not fall within the protection of the California anti-SLAPP statute. *Padilla v. MRA Holding*, No. B172540, 2004 WL 2988172 (Cal. App. Dec. 28, 2004). The plaintiff was filmed riding topless on a boat in Lake Havasu, California, and the images were used in a DVD and in commercials for the DVD. She brought claims of false light, unfair and fraudulent business practices and deceptive advertising claims. Notwithstanding the substantial sales of the DVD series, the court concluded that women "flashing" does not concern a "public issue."

Along the same lines, another appellate court held that two *National Enquirer* articles that reported on an alleged tryst between actor Ben Affleck and a lap dancer did not concern a "public issue." *Santini v. American Media, Inc. et al.*, No. B174471, 2005 WL 459195 (Cal. Ct. App. Feb. 28, 2005). Apparently conflating its finding that plaintiff was a private figure with its analysis of whether the speech at issue was of public concern, the court noted that not "'all speech about [a] celebrity is necessarily a public issue or an issue of public interest

The Ninth Circuit held that an infringement lawsuit by a trademark owner over the unauthorized use of its mark in a domain name does not necessarily impair free speech rights and therefore the action was outside the scope of the anti-SLAPP statute. *Bosley Medical Institute, Inc. v. Kremer,* 403 F.3d 672 (9th Cir. 2005). Although "a summary judgment motion might have been well-taken, an anti-SLAPP motion to strike was not."

Arkansas

Arkansas's first Anti-SLAPP Statute, the Citizen Participation in Government Act, ARK. CODE ANN. § 16-63-501 through § 16-63-508, was signed into law on April 11, 2005. 2005 Ark. Acts 1843. The statute,

stating that "it is in the public interest to encourage participation by the citizens of the state of Arkansas in matters of public significance," precludes liability for any "privileged communication," defined by the Act as "a communication made in, to, or about an issue of public concern related to any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments . . . by a fair and true report of any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments. . . ." The statute also includes a constitutional limitation that the immunity will not apply to a "statement or report made with knowledge that it was false or with reckless disregard of whether it was false."

Georgia

The Court of Appeals dismissed a libel claim against an on air source who criticized the Atlanta Humane Society and its director. *Harkins v. Atlanta Humane Soc'y. et al.*, No. A03A1422, 2005 WL 1283266 (Ga. App. Jun. 1, 2005). The court held the defendant's statements were privileged under the state anti-SLAPP statute, O.C.G.A. § 51-5-7 and O.C.G.A. § 9-11-11.1 as "statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government [...] in connection with an issue of public interest or concern."

The Court of Appeals reinstated a libel complaint against a woman who complained about the treatment of her mentally retarded son. *Georgia Community Support & Solutions, Inc. v. Berryhill*, No. A05A1121, 2005 WL 1798403 (Ga. App. Aug. 1, 2005). Defendant sent e-mails to about 40 people, including one who worked for the Atlanta Journal-Constitution and one who worked for the Georgia Department of Human Resources, complaining about the care her son received from plaintiff, a non-profit care organization that assists disabled adults. The trial court dismissed under the anti-SLAPP statute, holding that defendant's statements were privileged and that plaintiff had sued to prevent defendant "from bringing the plight of her son ... to the attention of the media, the government and the public at large." Reversing, the appellate court held that while the safety and care of disabled adults is a matter of public concern "the

anti-SLAPP statute does not encompass all statements that touch upon matters of public concern." Rather, the court concluded, "the statute's application is limited to statements made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any ... statement ... made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The court found no evidence that any official proceeding was involved or that defendant sought to specifically initiate an official proceeding by making the statements.

Indiana

A trial court granted a newspaper publisher's motion to strike a libel complaint and award the publisher fees, under the state's anti-SLAPP law, Indiana Code § 34-7-7-1 *et seq.* *Shepard v. Schurz Communications, Inc.* At issue was an article headlined "Monrovia town attorney steamed over letter," which reported on a dispute between the lawyer-plaintiff and the town attorney who were adversaries in a small claims court case. The article quoted the town attorney stating "I guess that's why there's ambulance chasers" (referring to plaintiff) and that plaintiff "is a Liar." The court held that the publisherdemonstrated by a preponderance of the evidence that it published the article in furtherance of its free speech rights on a public issue, and that the article was published in good faith with a reasonable basis in law and fact. The court awarded the publisher $35,595.00 in fees and $1,318.00 in costs.

Louisiana

A Louisiana appellate court affirmed dismissal of a libel claim against a television station under the state's anti-SLAPP statute. *Thompson v. Emmis Television Broadcasting*, 894 So.2d 480 (La. App. 2005). The plaintiffs, a reverend and his wife, sued over investigative news reports on allegations by congregation members against the Reverend. Plaintiffs alleged that the news reports repeated the congregants "false and damaging accusations" that plaintiff had "embezzled church funds and was stealing church money." Affirming dismissal, the court applied "neutral report" analysis (though it never used the term), finding the

broadcast of newsworthy allegations made by third parties against a public figure to be simply not actionable. The court also reversed the trial court's decision not to award the television station its attorneys' fees, finding no mitigating factors to excuse plaintiffs' suit.

The appellate court also ruled that the television station was entitled to recover its legal fees under La. C.C.P. art. 971(B) ("a prevailing defendant on a special motion to strike shall be entitled to recover reasonable attorney's fees and costs"). Although one Louisiana case appeared to hold that an award of fees under the statute is not mandatory (despite the language of the statute), here the court found no mitigating factors to excuse plaintiff from paying defendant's fees.

Massachusetts

In two cases Massachusetts courts examined whether alleged defamatory statements made to the press were entitled to anti-SLAPP protection. A firefighter's widow's statements to a newspaper in which she repeated statements made during a departmental investigation and in which she sought to advance her petition for benefits were protected by the anti-SLAPP statute. *Wynne v. Creigle*, 825 N.E.2d 559 (Mass. App. 2005). Defendant's statements "were essentially mirror images" of statements made at the investigation and were therefore "possessed of the characteristics of petitioning activity."

But a telecom official's statement to a reporter that an arbitration decision "essentially shut down a scam" was not made in connection with any petitioning activity. *Global Naps, Inc. v. Verizon New England, Inc.*, 828 N.E.2d 529 (Mass. App. 2005) ("That a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the character contemplated by the statute."

Minnesota

In a non-media case, the Minnesota Court of Appeals affirmed dismissal of libel and related claims under the Minnesota anti-SLAPP statute in the paradigm SLAPP suit scenario. *Marchant Investment & Management Co. v. St. Anthony West Neighborhood Org., Inc.*, 2005 WL 757612 (Minn. Ct. App. April 5,

2005). The plaintiff real estate developer sued a neighborhood organization over statements in a letter opposing a proposed project. The letter noted "countless" meetings where the developer "refused to listen to our concerns." The court dismissed under the anti-SLAPP statute, finding the complained of statements were matters of opinion. The court also dismissed all non-defamation claims (tortious interference and conspiracy) because they were not viable without a defamation claim.

Oregon

Oregon's federal district court applied the state's anti-SLAPP statute, ORS § 31.150 – 31.155, to dismiss libel and related claims against Tom Martino, the host of a syndicated radio talk show that focuses on resolving consumer complaints, and his distributors, Westwood One and Clear Channel. *Gardner v. Martino,* 05-CV-769-HU (D. Or. Dec. 13, 2005 adopting magistrates recommendation 33 Media L. Rep. 2541 Sept. 19, 2005). In discussing a caller's complaint, Martino stated that plaintiffs, a recreational vehicle dealer and its owners, "went back on their word," were "lying" and "suck." The magistrate judge concluded that in context the statements were non-actionable opinion, noting that "listeners of talk radio may expect a certain amount of ranting and opinionated rhetoric."

Utah

In a non-media case, the Utah Supreme Court held that the state's anti-SLAPP statute Utah Code Ann. § 78-58- 105 does not apply retroactively, but found that the plaintiff might still be subject to the statute under a prospective application because it applies to complaints "commenced or continued without a substantial basis in fact and law." *Anderson Development Co. v. Tobias*, 116 P.3d 323 (Utah 2005). The legislature's explicit use of the phrase "commenced or continued" demonstrates its unmistakable intent to subject a party to liability under the SLAPP Act if that party continues to pursue a proscribed lawsuit after the effective date of the Act.

2. Access

Cameras in the Courtroom

In a unanimous decision, New York's high court rejected an appeal by Court TV challenging the state's statutory ban on cameras in the courtroom, holding that the ban does not violate the federal or New York state constitutions and that permitting cameras in the courtroom is a legislative prerogative. *Courtroom Television Network LLC v. New York*, 2005 WL 1403495 (N.Y.), 2005 N.Y. Slip Op. 05120 (June 16, 2005). In considering the challenge to New York Civil Rights Law § 52, the court first recognized that while the First Amendment grants both the press and public a right of access to trials, the ban on televising courtroom proceedings does not amount to a "restriction on the openness of court proceedings but rather on what means can be used in order to gather news." The court concluded that the decision of whether to permit cameras in the courtrooms is a "legislative prerogative," and that it would not "circumscribe the authority constitutionally delegated to the Legislature to determine whether audio-visual coverage of courtroom proceedings is in the best interest of the citizens of this state." *See also Heckstall v. McGrath*, 790 N.Y.S.2d 566 (3d Dep't 2005) (holding that the trial court exceeded its authority by allowing cameras in the courtroom, in light of statutory ban).

3. "Son of Sam" Laws

A bill to revive California's "Son of Sam" statute was introduced on this year in the California State Assembly and remains pending at press time. In 2002, the state supreme court ruled that Cal. Civil Code § 2225 was unconstitutional, finding it imposed a "presumptively invalid content-based regulation of speech" because "discussions of crime" have never been included among the "classes of speech – obscenity, fighting words, some defamation – [that] may be subject to viewpoint-neutral regulation because of their directly injurious nature." *Keenan v. Superior Court (Sinatra)*, 40 P.3d 718, 117 Cal.Rptr.2d 1, 30 Media L. Rep. 1385 (2002), *cert. denied,* 537 U.S. 818. Assembly Bill No. 878 ostensibly attempts to overcome the constitutional objections by imposing a trust upon "all profits or assets gained by a convicted felon that are a *byproduct* of the felony for which that felon was convicted."

In *Seres v. Lerner*, 102 P.3d 91 (Dec. 2004), the Nevada Supreme Court struck down the state's "Son of Sam" law, NRS 217.007, as unconstitutional. The court held that it was a content-based restriction on speech and was unconstitutionally over-inclusive under the First Amendment. The court found that the state has a compelling interest to compensate crime victims and to prevent felons from directly profiting from their misconduct, but that the state statute was not narrowly tailored enough to meet those interests.

PART III

Criminal Libel Developments

2005 Update

In 2003 MLRC reported that 17 states and two territories had general criminal defamation statutes "on the books – statutes purporting to criminalize statements harmful to reputation. *See* MLRC Bulletin 2003 No. 1, "Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. after Sullivan and Garrison," at 15.

Since that time Puerto Rico repealed its general criminal defamation statute.[1] Thus at the close of 2005 there are still 18 American jurisdictions with such statutes: Colorado, Florida, Idaho, Kansas, Louisiana, Michigan, Minnesota, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Utah, the Virgin Islands, Virginia, Washington, and Wisconsin.

These statutes remain a mix of archaic laws that remain on the books but are unenforced, others that are trotted out, albeit very rarely, by prosecutors, and some that have been more recently revised to require actual malice. Kansas, New Hampshire, North Dakota and Utah (Utah Code § 76-9-404) require actual malice. Statutes in three other states – Florida, Minnesota and Virginia – also require actual malice in the narrower context of criminalizing deliberately false statements *to the press.*

[1] Washington state repealed a separate archaic statute that made it a crime to accuse a female of being "unchaste." But the state's general criminal libel statute remains on the books. Arkansas formally repealed an archaic criminal slander statute that applied to false charges of fornication or adultery and accusations of cowardice for refusing a challenge to a duel. (Arkansas' criminal libel statute was repealed almost 30 years ago.)

Status of General Criminal Defamation Statutes by Jurisdiction:

Colorado

Colorado's criminal libel statute, Colo. Rev. Stat. § 18-13-105, does not require actual malice nor does it recognize truth as an absolute defense, but it was upheld as applied to private libels in *People v. Ryan*, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991), *cert. denied*, 502 U.S. 860 (1991). There is no current bill to repeal the statute.

Last year a civil suit challenging the constitutionality of the statute was dismissed on standing grounds. *Mink v. Salazar,* 344 F.Supp.2d 1231 (D. Colo. 2004). The Colorado federal district court dismissed a civil and declaratory judgment lawsuit brought by a college student who had been threatened with a felony criminal libel prosecution for statements and pictures on his website that ridiculed a college professor. Granting a motion to dismiss, the court held that the student had no standing to sue for damages (or apparently seek a declaratory judgment) because no criminal charges were actually pending and the district attorney stated that no charges would be filed.

Plaintiff appealed and the Tenth Circuit will hear oral argument in the case in January 2006. *Mink v. Dominguez*, No. 04-1496 (10th Cir. appeal filed Nov. 26, 2004). The Associated Press, Bloomberg News, the Colorado Press Association and MLRC filed an amicus brief in the case arguing that plaintiff has standing and that the Tenth Circuit should address the merits of the constitutional challenge.

In another Colorado case, criminal libel charges were brought on March 10, 2004 against David Temple Stephenson for sending disparaging letters on government stationary and creating disparaging web postings about 14 people he had grudges against. Since the charges were filed, Stephenson has been indicted twice on other charges. Stephenson's trial on various charges, including five counts of criminal libel, was scheduled to begin Dec. 21, 2005. *Colorado v. Stephenson*, No. 2004 CR 000095 (Colo. Dist. Ct., La Plata County 2004) (trial scheduled for Dec. 21, 2005).

Florida

Florida's criminal libel statute, Fla. Stat. § 836.01, *et seq.*, contains numerous provisions, one section that prohibits anonymous defamatory publications about individuals or religious groups was declared unconstitutional in *State v. Shank*, 795 So.2d 1067, 29 Media L. Rep. 2532 (Fla. Ct. App., 4th Dist. 2001). There are no current or recent bills to formally repeal this or the other existing sections of the statutes.

Idaho

There are no current or recent bills to repeal the Idaho criminal libel statute. Idaho Code §18-4801, *et. seq.*, presumes common law malice unless the defendant shows "justifiable motive" (§ 18-4804) and limits the defense of truth to publications made with "good motives and for justifiable ends." § 18-4803.

Kansas

The Kansas criminal libel statute again withstood a constitutional challenge. The federal district court in Kansas issued two rulings upholding the constitutionality of a local criminal libel ordinance that is identical to the state criminal libel statute. *How v. Baxter Springs*, 369 F.Supp.2d 1300 (D. Kan. May 10, 2005); *Thomas v. Baxter Springs,* 369 F.Supp.2d 1291 (D. Kan. May 10, 2005). The rulings came in companion civil actions brought by a newspaper columnist and a former city council candidate who had both been threatened with prosecution under the ordinance for criticizing the Baxter Springs City Clerk. The plaintiffs were seeking a declaratory judgment that the ordinance was unconstitutional and damages for deprivation of their civil rights under 42 U.S.C. § 1983. Granting defendants' motion to dismiss, in part, District Court Judge John W. Lungstrum swept aside the constitutional challenge, holding that the actual malice requirement of the law was sufficient to overcome arguments that the statute was vague and overbroad. The court did rule that plaintiffs' claims for abuse of process could proceed, but then granted summary judgment to the defendants dismissing the remaining § 1983 claims for damages on the ground that the town clerk did not act "under color of law" when she filed criminal libel charges against plaintiffs and that they suffered no deprivation of constitutional rights. *See* 2005 WL 3447702 (D.Kan. Dec. 15, 2005)

The state criminal libel statute, Kan. Stat. § 21-4004, was held to be constitutional by the Tenth Circuit in *Phelps v. Hamilton*, 59 F.3d 1058, 23 Media L. Rep. 2121 (10th Cir. 1995). And a state appeals court summarily affirmed the constitutionality of the statute last year in *Kansas v. Carson*, No. 90,690 (Kan. Ct. App. Aug, 20, 2004) (unpublished), *rev. denied*, No. 90,690 (Kan. Dec. 15, 2004).

Efforts to repeal the statute failed in the 2003-04 state legislative session, *see* 2003 Kansas Senate Bill 3, 2003-04 Kansas Legis. (introduced Jan. 1, 2003), and there has been no similar legislation introduced in the 2005-06 session.

Louisiana

In *Garrison v. Louisiana*, 379 US 64 (1964), the U.S. Supreme Court held that the predecessor to La. Rev. Stat.§ 14:47 was unconstitutional because it did not require actual malice in a case involving a public official. Nevertheless, the state supreme court and a Louisiana federal court have subsequently upheld the statute for private libels. *See Synder v. Ware*, 314 F.Supp. 335 (W.D. La.), *aff'd without opinion*, 397 U.S. 589 (1970) (refusing to enjoin prosecution under the statute); and *State v. Defley*, 395 So.2d 759, 761 (La. 1981) (holding statute unconstitutional as applied to public expression about public officials and their job performance, and implying constitutionality of application of private figures). There is no current legislation to repeal the provision.

Michigan

Mich. Comp. Laws § 750.370 makes it a misdemeanor to falsely and maliciously attribute to another the commission of a crime or an infamous or degrading act, or to impute to a female a want of chastity. There is no current legislation to repeal this provision.

Minnesota

Minnesota's criminal defamation statute, Minn. Stat. § 609.765, remains on the books. A 2001 conviction based on complaints about a dentist was vacated on post-trial motion, reportedly on the grounds

that "people must feel free to communicate openly with quasi-judicial entities such as the State Board of Dentistry." There are no current bills to repeal the statute.

Montana

Mont. Stat. 45-8-212 was amended in 1997 to allow truth as an absolute defense, after the state Supreme Court down the statute as facially unconstitutional because it did not expressly so provide. *See State v. Helfrich*, 922 P. 2d 1159, 1162 (Mont. 1996). More recently, the statute was amended in 2003 to cover electronic communication. *See* 2003 Mont. Laws c. 344 (effective Oct. 1, 2003) (*amending* Mont. Stat. 45-8-212). A bill that died in the 2005 session would have imposed lengthier sentences for crimes committed due to bias or discrimination, but exempted criminal defamation. *See* House Bill No 240 (Mont. Leg. 2005).

New Hampshire

N.H. Rev. Stat. § 644:11 was enacted in 1971 when New Hampshire formally repealed all common law crimes. There are no known bills to repeal it.

New Mexico

N. Mex. Stat. 30-11-1, which criminalizes the publication of false and malicious defamatory statements made without good motives and justifiable ends, was held unconstitutional as applied to statements on matters of public concern in *New Mexico v. Powell*, 839 P. 2d 139, 20 Media L. Rep. 1841 (N.M. App. 1992). There is no recent or current legislation to change the statute.

Despite the ruling in Powell, a New Mexico man was convicted of criminal libel after he picketed Farmington, N.M. police headquarters, claiming that he was being harassed by an officer with the department. After a one-day trial in August, the defendant was found guilty of criminal libel, harassment and stalking, all misdemeanors punishable by up to one year imprisonment and/or a fine of up to $1,000. He was given a 360-day suspended sentence and ordered to pay $114 in court costs, perform 50 hours of community service, and attend a life-skills class. *State v. Mata*, No. M-47-MR-200500028 (N.M. Mag. Ct., Farmington

sentencing Oct. 19, 2005). Mata has said that he will appeal. *See MLRC MediaLawLetter* Oct. 2005. In November, he settled a civil suit alleging police brutality against the Farmington police department.

North Carolina

N.C. Gen. Stat. § 14-47, makes communication of a false and libelous statement concerning any person or corporation to a newspaper or periodical for publication, if the information is actually published, a misdemeanor. A separate section, N.C. Gen. Stat. § 15-168., provides that truth is an absolute defense. A 2004 amendment to N.C. Gen. Stat. § 14-47 made the crime a class 2 misdemeanor (punishable by up to 150 days in jail, but with no limits on fines), instead of an unclassified crime punishable by up to 6 months imprisonment or a $500 fine. *See* 2003 N.C. Laws. ch. 529 (eff. Oct. 1, 2004) (note: the original effective date of Jan. 1, 2005 was modified by 1994 1st Exec. Sess. N.C. Laws. ch. 24). There are no other recent bills.

North Dakota

N.D. Cent. Code §12.1-15-01 requires "actual malice or with reckless disregard of the truth." No recent bills to revise this statute.

Oklahoma

Okla. Stat. tit. 21, § 771 applies to "false or malicious" defamatory publications; § 779 criminalizes accusations of female unchastity; and § 781 is a false rumor statute that criminalizes statements that "willfully, knowingly, or maliciously repeat or communicate to any person, or persons, a false rumor or report of a slanderous or harmful nature." § 774 limits the truth defense in all criminal prosecutions or indictments to the "good motives and justifiable ends" qualification, and thus is likely unconstitutional under *Garrison*. Nevertheless, an appellate court upheld the false rumor statute in *Pegg v. State*, 659 P.2d 370 (Okla. Crim. App. 1983).

Oklahoma also has a statute, which was recently re-adopted, which defines distribution of advertising that is "untrue, deceptive, or misleading," or any statement that is "false, or maliciously critical of or

derogatory to the financial condition of an insurer and which is calculated to injure any person engaged in the business of insurance," as unfair business practices that are subject to cease and desist orders and civil fines. 36 Ok. Stat. 2001, § 1204 (2) and (3), readopted by 2005 Ok. Laws ch. 129, § 10.[2]

In 2005, an Oklahoma prosecutor declined to file charges based on a former state senator's complaint alleging that a political website was committing criminal libel, according to *The Oklahoman* newspaper. State Senator Gene Stipe alleged that the website, McAlester Watercooler (www.mccooler.net), published defamatory statements against him and his family. After investigating the complaint, McAlester, Ok. police referred the case to Pittsburg County District Attorney Chris Wilson, who declined to pursue the case. *See MLRC MediaLawLetter* Sept. 2005 at 16.

Puerto Rico

Puerto Rico's new penal code, which does not contain any criminal defamation provisions, went into effect on May 1, 2005. Law 149 of June 18, 2004 (repealing P.R. Laws Ann. tit. 33, §§ 4101-4104). The new code repealed the prior criminal defamation provision, which had been declared unconstitutional, at least as applied to public figures, in *Mangual v. Rotger-Sabat*, 317 F. 3d 45 (1st Cir. Jan. 21, 2003); *see also de Jesus-Mangual v. Fuentes Agostini*, Civil No. 99-2049 (D.P.R. declaratory judgment Oct. 29, 2003).

Utah

Utah has two, separate criminal libel provisions.

Utah Code § 76-9-502 is still on the books, despite being struck down as unconstitutional because it failed to incorporate the actual malice standard. *See I.M.L. v. State*, 2002 UT 110, 2002 WL 31528479 (Nov. 15, 2002).

Utah Code § 76-9-404, enacted in 1973 in the same section as the state wiretap law, provides that a "person is guilty of criminal defamation if he knowingly communicates to any person orally or in writing any information which he knows to be false and knows will tend to expose any other living person to public

[2] This statute was not included in previous MLRC examinations of criminal defamation statutes.

hatred, contempt, or ridicule." In the *I.M.L.* case the Utah Supreme Court rejected the state's argument that the definition of defamation from § 76-9-404 should be incorporated into § 76-9-502, which defines "libel" as "a malicious defamation" and provides no separate definition of the term "defamation." The court explicitly did not rule on the constitutionality of § 76-9-404.

A separate section of chapter 76, unconstitutional under the rationale of *I.M.L v. State*, criminalizes willfully "conveying false or libelous material to newspaper or broadcasting stations," to secure publication. Utah Code § 76-9-509. Another section criminalizes oral imputations of unchastity of a woman. Utah Code § 76-9-507.

There have not been any recent bills to repeal or change any of these provisions.

Virgin Islands

14 V.I. Code § 1172 criminalizes the publication of libels, defined in relevant portion as statements that expose "any living person, or the memory of any deceased person to hatred, contempt, ridicule or obloquy." The statute is silent as to fault and requires that true statements be made with justifiable motive, and is likely unconstitutional under *Garrison*.

A separate slander statute criminalizes an oral, public statement which either falsely and maliciously accuses another of a crime, 14 V.I. Code § 1180(a), or a maliciously made "tale[] or report" which "tend[s] to injure the honor, reputation or worthiness" of any person, religious denomination or organization. 14 V.I. Code § 1180(b).

There do not appear to be any bills to repeal or modify these provisions.

Virginia

Va. Code § 18.2-417, which applies to words imputing unchastity of a woman; to insults or words tending to violence or breach of the peace; and to grossly insulting language to a women of good reputation, is presumptively unconstitutional on First Amendment and equal protection grounds.

Va. Code § 18.2-209, entitled "false publications," applies to knowingly false statements made to the press.

There is no legislation to repeal either of these provisions.

A Virginia Circuit Court acquitted a man of criminal libel charges under § 18.2-417 during 2005. Ned Cary, Jr., who had been terminated by Anheuser-Busch in the early 1990s and has a long history of disputes with the company since that time, was arrested on Oct. 19, 2004, as he was parked on the shoulder of U.S. Route 60 near the entrance to the company's Williamsburg, Va. brewery, displaying a sign that read "Shaun Miller of Human Resources is a Negro Nazi." After a discussion with Mr. Cary, James City County police officers confiscated the sign and charged Cary with violating Va. Code § 18.2-417, which makes it a crime to "falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptation are construed as insulting and tend to violence and breach of the peace." Cary was convicted in the General District Court (a court of limited jurisdiction) on Nov. 4, 2004, and appealed to the Circuit Court for the City of Williamsburg and James City County. Under Virginia criminal procedure, the defendant is entitled to trial *de novo* in the Circuit Court, which occurred on March 7, 2005. After the close of the Commonwealth's evidence, defendant moved to strike (Virginia's equivalent of moving for judgment as a matter of law), and the court granted the motion, finding that the Commonwealth's evidence was insufficient to meet the statute's requirement that the words used have a tendency to violence and a breach of the peace. Thus Cary was acquitted. *Commonwealth of Virginia v. Ned Cary, Jr.*, Case No. CR04014275-00 (Va. Cir. Ct., City of Williamsburg and James City County March 7, 2005; *see also MLRC MediaLawLetter* May 2005 at 23..

Washington

Wash. Rev. Code § 9.58.010, the general criminal defamation statute, applies to defamatory "malicious publications." Malice is presumed and truth is subject to the good motives and justifiable ends qualification, § 9.58.020, making the statute presumptively unconstitutional.

Wash. Rev. Code § 9.58.080 makes providing libelous information to newspapers and periodicals a crime.

There is no legislation on these provisions.

A separate statute section criminalizing falsely accusing a female over 12 of being unchaste (§ 9.58.110) was repealed this year. 2005 Wash. Laws ch. 13, § 1 (eff. July 24, 2005).

Wisconsin

Wisconsin's criminal libel statute, Wis. Stat. § 942.01, applies to statements made with the "intent to defame" and truth is subject to the good motives and justifiable ends qualification. This makes it vulnerable to attack under *Garrison*.

There is no legislation on these provisions.

Other Action of Note:

Arkansas: Arkansas repealed its criminal slander statutes, Ark. Code § 5-15-101, et. seq., which criminalized, among other things, false charges of fornication or adultery and accusations of cowardice for refusing a challenge to a duel. These provisions had remained on the books even though Arkansas' criminal libel statute was repealed almost 30 years ago after it was declared unconstitutional in *Weston v. State*, 258 Ark. 707, 528 S.W.2d 412 (Ark. 1975). The criminal slander statute was repealed as part of a 454-page bill to revise the state's criminal code to remove archaic language and provisions. Arkansas Governor Mike Huckabee signed the legislation on April 11, 2005. *See* 2005 Ark. Acts 1994, § 512; *see also MLRC MediaLawLetter* April 2005 at 24.

California: The Ninth Circuit ruled that a California statute that makes it a misdemeanor to knowingly file a false report of misconduct against a peace officer is unconstitutional because it is not viewpoint neutral and "leaves unregulated knowingly false speech supportive of peace officer conduct."

Chaker v. Crogan, No. 03-56885, 2005 WL 2978600 (9th Cir. Nov. 3, 2005) (Cal. Penal Code § 148.6). Last year a California federal district court reached the same conclusion and enjoined enforcement of the statute. *Hamilton v. San Bernadino*, No. CV 00-107-RT, 2004 WL 1551460 (C.D. Cal. July 7, 2004). *See MLRC MediaLawLetter* Aug. 2004 at 24. The federal decisions conflict with a 2002 decision by the California Supreme Court which specifically rejected viewpoint neutrality and related First Amendment arguments against the statute. *See People v. Stanistreet*, 29 Cal.4th 497, 58 P.3d 465, 127 Cal. Rptr.2d 633 (Cal. 2002), *cert. denied*, 538 U.S. 1020 (2003).

Florida: The Eleventh Circuit declared unconstitutional Fla. Stat. § 112.533, which makes it a first degree misdemeanor for anyone involved in a complaint pending against a law officer, including the complainant, to discuss the investigation before it is entered on the public record. *Cooper v. Dillon*, 403 F.3d 1208, 33 Media L. Rep. 1577 (11th Cir. 2005).

The Cooper case involved the editor of the weekly *Key West The Newspaper*, who was arrested for allegedly violating Fla. Stat. § 112.533 by publishing several stories about a complaint that he had about the local police department's handling of an investigation into a 1996 stop of a bicyclist. Prosecutors eventually dropped the charges against Cooper, but he filed a civil case challenging his arrest. After the Eleventh Circuit rejected the district court's finding that the statute was a content-neutral time, place and manner restriction on speech, 403 F.3d 1208, 33 Media L. Rep. 1577, it denied the defendants' motion for rehearing, and the district court scheduled a trial on damages in December. The parties then reached a settlement of $240,000, which was approved by the Key West City Commission on Oct. 18. *See MLRC MediaLawLetter* Oct. 2005.

Illinois: Even though Illinois repealed its criminal defamation provisions in 1986, see 1984 Ill. Laws. ch. 1047, § 1 (repealing 720 Ill. Comp. Stat. 5/27-1 to 5/27-2), a recently-adopted statute provides that a criminal defamation case shall be tried in the county where the defamation is spoken, printed or written, not where it is received or circulated. If the statement is made out of state, it can be tried in any county. 2005 Ill. Pub. Act 94-0051, § 5 and 2005 Ill. Pub. Act 94-0179, § 5 (both creating 720 ILCS 5/1-6, § 1-6(l)).

Iowa: Iowa recently amended Iowa Code § 516E.10 (2) and (4), pre-existing statutes which prohibit car insurers from making false, maliciously critical or derogatory comments about someone's financial condition, to cover all insurers. 2005 Iowa Laws ch. 70.

Montana: A Montana election law allows the state elections commissioner or a county attorney to file a civil action against a person who "misrepresent[s] a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false." Mont. Stat. § 13-37-131. The penalty for this civil offense is a fine up to $1,000. *Id.* A bill to raise the civil fine under the statute from $1,000 to $4,000 passed the state House, but died in the Senate. *See* H.B. 448 (died April 21, 2005).

Nevada: Nevada has repealed Nev. Rev. Stat. § 294A.345, which provided that the state Ethics Commission could levy civil fines of up to $5,000 for the publication of each knowingly false statement about a candidate, effective Oct. 1, 2005. 2005 Nevada Laws ch. 469 (repealing Nev. Rev. Stat. § 294A.345). The repeal came after the statute was declared unconstitutional in *Nevada Press Association v. Nevada Commission on Ethics*, Civil No. 02-1195 (D. Nev. summary judgment granted March 29, 2005). Previously, the federal courts rejected a challenge to the constitutionality of the commission itself and its procedures, saying that the case should have been brought in state court. *Mahan v. Nevada State Comm'n on Ethics*, Civil No. 98-1663 (D. Nev. order of dismissal March 10, 2003), *dismissed sub. nom. Lueck v. Nevada State Comm'n on Ethics*, No 03-15577 (9th Cir. dismissed July 9, 2004).

Nevada also recently repealed Nev. Rev. Stat. § 199.325, which made it a crime to "knowingly file a false or fraudulent written complaint or allegation of misconduct against a peace officer for conduct in the course and scope of his employment." *See* 2005 Nev. Laws ch. 262, § 2. The repeal came after a federal district court held the statute unconstitutional. *See Eakins v. State of Nevada*, 219 F. Supp.2d 1113 (D. Nev. 2002).

North Dakota: The bank libel statute, N.D. Cent. Code § 6-08-15, was amended to cover libel or slander of credit unions. 2005 N.D. Laws. ch. 86, § 13.

Oklahoma: Oklahoma recently re-adopted a statute which defines distribution of advertising that is "untrue, deceptive, or misleading," or any statement that is "false, or maliciously critical of or derogatory to the financial condition of an insurer and which is calculated to injure any person engaged in the business of insurance," as unfair business practices that are subject to cease and desist orders and civil fines. 36 Ok. Stat. 2001, § 1204 (2) and (3), re-adopted by 2005 Ok. Laws ch. 129, § 10.

South Carolina: A bill introduced by State Sen. Dick Elliot would impose a prison sentence of up to five years on anyone who, with actual malice, intentionally defames a political candidate. The bill has not moved beyond its referral to the Judiciary Committee. *See* S. 664 (116th S.C. Gen'l Assem. introduced March 23, 2005).

Washington: An archaic state statute criminalizing falsely charging a female over 12 with unchastity was recently repealed. 2005 Wash. Laws ch. 13, § 1 (repealing Wash. Code § 9.58.110) (eff. July 24, 2005).

A Washington appeals court panel ruled unanimously this month that a state elections law that punishes false statements in campaigns violates the First Amendment. *Rickert v. State, Public Disclosure Com'n,* 119 P.3d 379 (Wash. App. Sept. 7, 2005) (Wash. Rev. Code § 42.17.530). The court reasoned that the statute was subject to strict scrutiny analysis because it punished false – but not necessarily defamatory – political speech. While the goal of the law is to promote integrity and honesty in the elections process, the court ruled that it was not narrowly tailored and was overbroad.

On Sept. 15, 2005, the elections commission voted to appeal the decision to the Washington Supreme Court.

Native American Tribes

Citizen Potawatomi Nation (Oklahoma): *Citizen Potawatomi Nation v. Bruno* (Citizen Potawatomi Nation Tribal Dist. Ct., verdict Aug. 5, 2005): Following a one-day trial, a jury of the Citizen Potawatomi Nation tribal court in Shawnee, Oklahoma found a tribal member not guilty of criminal libel. The defendant

in the case, tribal member Leon Bruno, was charged with making a false complaint to the police about tribal Chairman John Barrett. In December 2004, Bruno wrote a letter to a member of the tribe's business committee inquiring about an article in a business magazine which implied that the committee member was going to assume ownership of the tribe-owned bank. Barrett called Bruno in response to the letter. According to testimony at trial, Barrett told Bruno, "you better tell [your wife] she better be worried about who's going to take care of you if you're gone." Bruno filed a complaint with the tribal police, saying that he took the statement as a death threat. Barrett testified that he only meant that Bruno could be jailed for violating federal banking laws. During trial Barrett testified that Bruno filed the police report to damage his reputation and to affect the election. After 30 minutes of deliberation, the jury found Bruno not guilty. *See MLRC MediaLawLetter* Aug. 2005 at 35.

International

United Nations Human Rights Committee: Ruling in a case from the nation of Serbia and Montenegro, the United Nations Human Rights Committee ruled on November 3, 2005 that the conviction of journalist and magazine editor Zeljko Bodrožic for criminal defamation over statements criticizing factory manager Dmitar Segrt, formerly a prominent member of the Serbian Socialist Party was a violation of Article 19 of the International Covenant on Civil and Political Rights,[3] which provides in part that "everyone has the right to freedom of opinion and expression." The committee ordered Serbia and Montenegro to quash the conviction, repay Bodrožic's fines and court costs, and compensate him for the breach of his rights; the country has 90 days to report back that it has taken these measures. *Bodroži v. Serbia and Montenegro*, Communication No. 1180/2003 (U.N. Comm. on Human Rts., Nov. 3, 2005) (*available at* http://www.yucom.org.yu/EnglishVersion/Attach/UN_Human_Rights_Committee.doc.)

[3] Serbia and Montenegro affirmed its conformance with the Covenant on March 12, 2001, as a successor to the former Yugoslavia, which had signed the Covenant on Aug. 8, 1967 and ratified it on June 2, 1971. The United States ratified the Covenant with reservations in June 1992, and has recognized the competence of the Committee to consider complaints only by one nation against another.

In reaching the ruling the Committee found that Serbia:

> advanced no justification that the prosecution and conviction of the author on charges of criminal insult were necessary for the protection of the rights and reputation of Mr. Segrt. Given the factual elements found by the Court concerning the article on Mr. Segrt, then a prominent public and political figure, it is difficult for the Committee to discern how the expression of opinion by the author, in the manner he did, as to the import of these facts amounted to an unjustified infringement of Mr. Segrt's rights and reputation, much less one calling for the application of criminal sanction.

Moreover:

> The Committee observes, moreover, that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.