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SYMPOSIUM

UNDERCOVER NEWSGATHERING TECHNIQUES: ISSUES AND CONCERNS*

TAINTED SOURCES: FIRST AMENDMENT RIGHTS AND JOURNALISTIC WRONGS

Robert M. O'Neil**

The issue of news organizations' potential liability for their newsgathering practices has garnered significant attention in several recent cases. Robert M. O'Neil discusses several such cases which have focused on the balance between the First Amendment interests at stake and the improper or possibly illegal manner in which the media obtained its information. The author concludes by suggesting principles to guide in balancing these interests.

* * *

INTRODUCTION

Just after CBS withdrew a scheduled *60 Minutes* segment about tobacco industry practices because the network feared legal liability, two pre-eminent First Amendment litigators offered diametrically opposed views on the withdrawal. The issue was whether the network could have been held civilly

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liable for inducing a tobacco executive to breach a contract with his former employer not to disclose confidential information about the cigarette making process. For P. Cameron DeVore, the network's outside counsel on such matters, CBS's action was sound; Supreme Court decisions offered little promise that "a tort . . . [would be] trumped by the First Amendment."¹ But for James C. Goodale, who had counseled the *New York Times* through the *Pentagon Papers* crisis,² "that explanation doesn't wash."³ As he read the case, "no news organization has ever been sued for what it published solely on a claim of inducing breach of contract . . . [because] the First Amendment prevents it."⁴

With all deference, neither view fully reflects the complexity of the issue or the uncertainty of the precedents. Indeed, it might not be unfair to suggest that one of the experts is right for the wrong reasons, while the other may be wrong for the right reasons. Before examining the cases on which both DeVore and Goodale relied, the *60 Minutes* matter should be placed in a larger context. To some degree, such variant views reflect a different focus: optimists tend to find comfort in the strong First Amendment protection that courts have conferred upon *publication*, while pessimists are discouraged by the absence of comparable protection for *newsgathering*. The problem is that the most difficult cases currently involve *both* gathering and disseminating news, a duality that blurs the application of the clear principles that surround each activity. The truth, therefore, may lie somewhere between the two extremes.

Another factor helps to reconcile divergent views about the appropriate level of constitutional protection. In a half-dozen recent instances, the status of highly visible media stories has been affected by the legality or propriety of conduct involved in obtaining the key information. At the heart of the dispute between Messrs. DeVore and Goodale, among others, is an issue that needs much more attention than it has received: How far does newsgathering conduct shape the dimensions of First Amendment protection for media use of that information? It may be helpful to review current events before revisiting the legal context.

Almost forgotten among recent cases was the final chapter in the five-year battle between Panamanian General Manuel Noriega and CNN.⁵ In December 1994, CNN apologized profusely—as a federal district judge demanded—for having aired portions of an interview between Noriega and his lawyer.⁶ Although the primary basis for the sanction was the breach of a

¹ P. Cameron DeVore, *Letter to the Editor*, N.Y. TIMES, Nov. 17, 1995, at A30.

² See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

³ James C. Goodale, "*60 Minutes*" v. *CBS and Vice Versa*, N.Y. L.J., Dec. 1, 1995, at 3.

⁴ *Id.*

⁵ *CNN v. Noriega*, 917 F.2d 1543 (11th Cir.), *cert. denied*, 498 U.S. 976 (1990).

⁶ *CNN Is Sentenced for Tapes and Makes Public Apology*, N.Y. TIMES, Dec. 20,

judge's order, the means by which the interview had been obtained, as well as the potential effect of its airing on Noriega's right to a fair trial, entered the equation.⁷ In fact, the Noriega case represents a clear break with a line of cases that refused to uphold gags on pre-trial publication of potentially harmful material.⁸

Later that same year came ABC's curious apology to Philip Morris for statements the network had broadcast during a *Day One* exposé of the cigarette manufacturing process.⁹ Although ABC lawyers concluded that the accusation of "spiking" cigarettes with nicotine for addictive purposes was fully defensible, other forces took over and led to the much-criticized apology.¹⁰

The Philip Morris settlement did not end all such problems for ABC. Very much alive, though dormant, is a running dispute with Food Lion over news gathering methods.¹¹ In 1992, the network broadcast a *Prime Time Live* segment about Food Lion's marketing practices.¹² The most damaging material came from footage shot in a Food Lion store by an ABC staff member who used an assumed name to obtain employment.¹³ Although it never sought to enjoin the broadcast, Food Lion has sued for damages on several grounds.¹⁴

Later, there was the effort to prevent *Business Week* from publishing material potentially damaging to the parties in a suit over financial losses from use of derivatives. Procter and Gamble had sued Bankers Trust for various alleged breaches. Through a friend (who was a member of the bank's New York law firm), a *Business Week* reporter obtained materials about the case that had been obtained originally through pre-trial discovery.¹⁵ Although the lawyer did not realize it at the time, some of those ma-

1994, at B7.

⁷ *Noriega*, 917 F.2d at 1549-50.

⁸ See *Press Enter. Co. v. Superior Court*, 478 U.S. 1 (1986); *United States v. Columbia Broadcasting Sys., Inc.*, 497 F.2d 102, 104 (5th Cir. 1974).

⁹ See *ABC and Tobacco: The Anatomy of a Network News Mistake*, WASH. POST, Jan. 7, 1996, at A1.

¹⁰ *Id.*

¹¹ *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (M.D.N.C. 1995); see also Elizabeth Jensen, *ABC Fights Lawsuit by Food Lion Involving Newsgathering Methods*, WALL ST. J., Aug. 29, 1995, at B6.

¹² *Food Lion*, 887 F. Supp. at 816.

¹³ *Id.* at 814-16.

¹⁴ *Id.* at 812 (alleging state tort violations of, inter alia, intentional misrepresentation, deceit, fraud, negligent supervision, trespass, and breach of fiduciary duty stemming from ABC's undercover investigation).

¹⁵ *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 190 (S.D. Ohio 1995), *vacated*, 78 F.3d 219 (6th Cir. 1996); see also Milo Geyelin, *Leaky Credibility: Big Law Firm's Gaffe over Sealed Records Raises Troubling Issues*, WALL ST. J., Oct. 4, 1995, at A1; Linda Himelstein, *The Story Behind the Bankers Trust Story*, BUS. WK.,

terials had been sealed, and thus should not have been divulged without court permission.¹⁶ The trial judge initially enjoined *Business Week* from publication,¹⁷ but, after *Business Week*'s unsuccessful pleas to the Sixth Circuit and the Supreme Court,¹⁸ eventually lifted the order.¹⁹ *Business Week* was thus free to, and did, make extensive use of the materials, but only after the judge had chided its editors for what he deemed the "unlawful" nature of its newsgathering.²⁰ The Sixth Circuit, some months after the curb had been lifted, held the district court's ban on publication to be a prior restraint in clear violation of the First Amendment because it "prevent[ed] a news organization from publishing information in its possession on a matter of public concern."²¹

The trial judge was not alone in faulting *Business Week*'s conduct. Justice Stevens, who as a Circuit Justice had refused to stay the restraint, added that, in his view, "the manner in which [*Business Week*] came into possession of the information it seeks to publish may have a bearing on its right to do so."²² This dictum was relatively unimportant to the immediate dispute. It is, however, highly significant to the larger issue that is our focus. Here we have a conscientious interpreter of the First Amendment expressing his view that the nature of newsgathering conduct may affect courts' power to restrain publication of material that is truthful and is of obvious public interest and concern.

I. DOES NEWSGATHERING CONDUCT REALLY MATTER?

Justice Stevens's comment brings us to the heart of a critical First Amendment issue. It is an issue on which the courts have, in fact, given considerable guidance, though much of it by inference and indirection. We might divide the cases into three groups—those where First Amendment protection is so clear that conduct apparently does not matter;²³ those at the other extreme where First Amendment interests are insufficient, regardless

Oct. 2, 1995, at 58.

¹⁶ *Procter & Gamble*, 900 F. Supp. at 190-91.

¹⁷ *Id.* at 188.

¹⁸ *McGraw-Hill Cos. v. Procter & Gamble Co.*, 116 S. Ct. 6 (Stevens, Circuit Justice 1995).

¹⁹ *Procter & Gamble*, 900 F. Supp. at 193.

²⁰ *Id.*

²¹ *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996).

²² *McGraw-Hill*, 116 S. Ct. at 7.

²³ See generally *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

of conduct;²⁴ and a third, potentially most helpful, group of cases where conduct seems critical to the scope of First Amendment rights.²⁵

First, the classic example of a “conduct doesn’t matter” case is that of *New York Times Co. v. United States*,²⁶ commonly known as the *Pentagon Papers* case. In *Pentagon Papers*, the United States government sought to enjoin publication of stolen government documents that explored the United States’s involvement in Vietnam.²⁷ The fact that the critical documents were stolen did not matter at all to the Supreme Court’s majority, so clear was the First Amendment’s abhorrence of prior restraint.²⁸ Even the dissenters made little of the means by which Daniel Ellsberg had obtained the papers: Chief Justice Burger spoke at one point of the *New York Times*’s “unauthorized possession,”²⁹ but rested his dissent much more on what he saw as the unseemly haste on the Court’s part in deciding the case rather than unseemly behavior by the newspaper.³⁰

Another example of “conduct doesn’t matter” comes from related quarters. *Landmark Communications, Inc. v. Virginia*³¹ involved the publication of “confidential” information about an inquiry into judicial misconduct. By definition, the media were not supposed to have so sensitive a report. Yet, once the media had obtained the report, even Chief Justice Burger was clear that no restraint was appropriate because “the publication Virginia seeks to punish . . . lies near the core of the First Amendment, and the Commonwealth’s interests . . . are insufficient to justify the actual and potential encroachments on freedom of speech and of the press”³² Although neither side made much of the way in which the report had been obtained, the opinion strongly implied that however egregious the media conduct might have been, direct sanctions or tighter security offered the only constitutionally acceptable means of control.³³

A third kind of case that fits the “conduct doesn’t matter” rubric are those dealing with pre-trial publicity—at least until *CNN v. Noriega*.³⁴ *Ne-*

²⁴ See generally *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Snepp v. United States*, 444 U.S. 507 (1980); *Zacchini v. Scripps-Howard Publishing Co.*, 433 U.S. 562 (1977).

²⁵ See generally *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

²⁶ 403 U.S. 713 (1971).

²⁷ For a more detailed discussion of the case, see John C. Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341 (1993).

²⁸ See *New York Times*, 403 U.S. at 714-15.

²⁹ *Id.* at 750 (Burger, C.J., dissenting).

³⁰ *Id.* at 751-52 (Burger, C.J., dissenting).

³¹ 435 U.S. 829 (1978).

³² *Id.* at 838.

³³ *Id.* at 841.

³⁴ 917 F.2d 1543 (11th Cir.), *cert. denied*, 498 U.S. 976 (1990).

*braska Press Association v. Stewart*³⁵ remains the classic case. In striking down the gag order that Nebraska courts had imposed to protect the fairness of a highly visible trial, many factors entered the equation. The key to invalidating such a decree was the trial judge's failure to assess the efficacy of various alternatives, such as change of venue, sequestration, rigorous *voir dire*, and detailed instructions, all of which might have tempered the risk of publicity without gagging the media.³⁶ The case did not address the propriety of the media's conduct; apparently the reporters were entitled to be present when the potentially damaging evidence came out.

Indeed, *Nebraska Press* and other pre-trial publicity cases strongly suggest that if improper newsgathering methods were the sole basis for seeking a restraint, the constitutionally preferable remedy would be direct sanctions against the offenders rather than denial of the tainted information to the public.³⁷ On that theory, even *Noriega* may be consistent; although clearly there was some concern about the network's newsgathering methods, the trial judge's paramount concern was possible harm to the fairness of the trial—and to the sanctity of the lawyer-client relationship—from the broadcasting of conversations between a defendant and his attorney.³⁸

From cases that seem clearly on the protective side, we turn to a different group of cases in which conduct may be equally irrelevant, though for the opposite reason—cases where even blameless behavior would not absolve the media. Those who claim that the truth should always justify publishing material of public interest must contend with several troublesome precedents.

First, there is the intriguing case of Hugo Zacchini, the human cannonball who recovered damages from a television station that broadcast without permission his entire fifteen-second act that it had filmed at an Ohio county fair.³⁹ The Court held that the station had misappropriated Zacchini's valuable property.⁴⁰ Although the camera crew's entry to the site was not authorized by the performer, there was no suggestion of trespass; the fair's management apparently had acquiesced.⁴¹ This judgment, therefore, stands alone in its curious resolution of a dispute between the right to publish truthful information of public interest on the one hand, and a claim of legal protection for intangible interests that are not covered by copyright, trademark, or unfair competition, on the other.⁴² Given the consistent reluctance of courts to impose liability for truthful publications that invade privacy,⁴³

³⁵ 427 U.S. 539 (1976).

³⁶ *Id.* at 562-69.

³⁷ *See id.* at 568-70.

³⁸ *See id.* at 568-69.

³⁹ *Zacchini v. Scripps-Howard Publishing Co.*, 433 U.S. 562 (1977).

⁴⁰ *Id.* at 575-78.

⁴¹ *Id.* at 563-64.

⁴² *Id.* at 573.

⁴³ *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S.

even if resulting in grave harm, *Zacchini* seems something of an aberration. Nevertheless, it is alive and well as a precedent,⁴⁴ and one that surely qualifies the media's right to disseminate the truth.

One other type of case that seems to fit this rubric involves the tension between the right to publish and breach of contract. In *Snepp v. United States*,⁴⁵ a case that time largely has overlooked, a former CIA employee was unanimously held to be bound by his pre-employment agreement not to publish anything about certain facets of his job, and to publish nothing without agency clearance.⁴⁶ The Supreme Court, in a per curiam opinion, sustained the agency's position, largely on national security grounds, but without applying anything close to a clear and present danger standard.⁴⁷ Justices Stevens, Marshall, and Brennan agreed that *Snepp* had "breached his duty" and thus was culpable.⁴⁸ They demurred only on the issue of remedies, arguing that imposing a constructive trust was too drastic a remedy.⁴⁹ Such issues as the accuracy of the material *Snepp* proposed to include in his book, or whether any rules had been broken in the process of obtaining it, were simply not considered legally significant.

Snepp should have better prepared court commentators for the Supreme Court's 1991 ruling in *Cohen v. Cowles Media Co.*⁵⁰ In *Cohen*, a media source, who had been promised confidentiality in return for a politically explosive interview, sought and recovered substantial damages for breach of contract when his name appeared on the front pages of the *St. Paul Pioneer Press Dispatch* and the *Minneapolis Star and Tribune*.⁵¹ Because the state contract principle of promissory estoppel was one of "general applicability," its application to the media abridged no First Amendment interests—even though, when the dust settled, a newspaper had to pay large damages for publishing a truthful statement of obvious public interest that it had obtained by seemingly lawful means.⁵² Four dissenters argued that a defense of truth, reinforced by public interest, ought to avail in such a situation.⁵³ The

374 (1966).

⁴⁴ See, e.g., *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 789 F.2d 1319, 1321 (9th Cir. 1986) (holding that property rights can be protected without violating the First Amendment), *aff'd*, 483 U.S. 522 (1987); *Tacyne v. City of Phila.*, 687 F.2d 793, 796 (3d Cir. 1982) (finding entertainment as a form of protected speech), *cert. denied*, 459 U.S. 1172 (1983).

⁴⁵ 444 U.S. 507 (1980) (per curiam).

⁴⁶ *Id.* at 514-16.

⁴⁷ *Id.*

⁴⁸ *Id.* at 516 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

⁴⁹ *Id.* at 516-18 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

⁵⁰ 501 U.S. 663 (1991).

⁵¹ *Id.* at 666.

⁵² *Id.* at 669-72.

⁵³ See *id.* at 676 (Souter, J., dissenting, joined by Marshall, Blackmun & O'Connor,

majority rejoined that "[t]he First Amendment does not grant the press such limitless protection."⁵⁴

Although this factor apparently did not shape the outcome, *Cohen* returns to the issue of conduct. Although there was certainly nothing unlawful about the newsgathering activity at issue—no theft, torture, bribery, or coercion—the majority was not ready to give its imprimatur to the newspaper's conduct. Because the newspaper "obtained Cohen's name only by making a promise that they did not honor," there was some doubt whether the media conduct deserved the accolade "lawful."⁵⁵ So brief a reference offers at most a hint that the *Cohen* majority saw the matter of newsgathering conduct as potentially relevant to resolving a close case, even where that conduct could surely not be called "unlawful" in any conventional sense.

We come now to a third group of cases, where media conduct is not only relevant to First Amendment protection, but may be dispositive. Four times, the Supreme Court has addressed the tension between publishing truthful information and such state-protected interests as the anonymity of sexual assault victims.⁵⁶ Each time the First Amendment claim has prevailed.⁵⁷ In such cases, however, the Court has firmly resisted invitations to recognize an absolute defense of truth.⁵⁸ Instead, the Court has found three essential conditions to have been satisfied in each case: that the information was accurate; that it had public interest; and that it had been lawfully obtained.⁵⁹ What happens if the media defendant fails to meet these conditions remains unclear. The Court's cautious, case-by-case approach certainly implies that failure to satisfy any of these desiderata would alter the balance, and quite possibly the outcome.

The crucial issue is, of course, conduct. In the most recent of these cases, *Florida Star v. B.J.F.*,⁶⁰ the Court absolved a newspaper of civil liability for publishing the name of a sexual assault victim in violation of Florida law. The source of the information was less pure than in the earlier cases because it came from a police report prepared before a suspect had been identified, rather than from open court records.⁶¹ That difference, however, did not fail the "lawfully obtained" test. The Court went to some

JJ.).

⁵⁴ *Id.* at 671.

⁵⁵ *Id.*

⁵⁶ See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

⁵⁷ See, e.g., *Florida Star*, 491 U.S. at 526; *Cox Broadcasting Co.*, 420 U.S. at 485-87.

⁵⁸ See, e.g., *Cohen*, 501 U.S. at 671-72.

⁵⁹ See, e.g., *Florida Star*, 491 U.S. at 532-37.

⁶⁰ 491 U.S. 524 (1989).

⁶¹ *Id.* at 527.

length to describe the rationale for requiring that the material, even if truthful and of public interest, be lawfully obtained:

To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the [earlier cases'] principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate injury caused by its release. The government may classify certain information Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.⁶²

This passage suggests that although government may not punish or even enjoin publication of truthful information that has been lawfully obtained, the trade-off is that government retains substantial latitude in defining what constitutes "unlawful" for these purposes. This leaves open the question of what kinds of state law violations might warrant imposing liability for media transgressions committed in pursuit of truthful material. In fact, the majority also left open the very policy issue that underlay this case—whether states can grant redress to rape victims through confidentiality laws more precise than the Florida statute.⁶³ Thus, the concluding caution in *Florida Star*—"our holding today is limited"⁶⁴—was no mere rhetorical twist. Any doubt about whether media conduct matters in this context should now be put to rest.

In fact, it was already clear that newsgathering did not absolve journalists from direct liability for damages caused by aggressive pursuit of information. If a reporter tramples a flower bed, breaks a window, or assaults a person in pursuit of a story, no court in the country would entertain a First Amendment defense to a suit for direct damages. The journalistic goal would, in fact, be irrelevant to most such claims. That much was clear before the recent round of more complex First Amendment litigation.

Another Supreme Court case may belong in this category, although "conduct" does not quite capture the Court's rationale for limiting the right to publish the truth in that instance. In *Seattle Times Co. v. Rhinehart*,⁶⁵ the Court sustained a ban on publication of sensitive information that the media defendant had obtained from the plaintiff through pre-trial discovery. The

⁶² *Id.* at 534.

⁶³ *Id.* at 540.

⁶⁴ *Id.*

⁶⁵ 467 U.S. 20 (1984).

trial court's discovery decree was accompanied by a protective order barring out-of-court use of the resulting material.⁶⁶ The newspaper challenged the protective order, asserting a First Amendment right to print truthful information of clear public interest.⁶⁷ In rejecting that claim, the Court insisted that this was not a "classic prior restraint," but simply a condition needed to ensure the smooth and fair functioning of the discovery process.⁶⁸ The order applied only to information that the media/party had obtained through discovery; it did not bar use of that same information if it were obtained by means other than discovery.⁶⁹ Yet the media anxiety that greeted *Seattle Times* was clearly warranted, for it added another situation in which truth no longer afforded a media defense.

Ostensibly, *Seattle Times* had nothing to do with "media conduct."⁷⁰ Because the case was heard before there was even a threat to publish, much less actual publication, the Court had no occasion to assess the editors' behavior.⁷¹ Yet the judgment may have content implications: Like the newspaper in *Cohen*, the *Seattle Times* obtained sensitive information by means that would be deemed "lawful" only if it continued to respect the constraints accompanying the initial access to the information.⁷² When the *Minneapolis Star* breached its pledge by blowing Cohen's cover, a process that had been undeniably lawful up to that point was somehow made "unlawful." The conduct would have remained lawful if the source had never been named. Similarly, the *Seattle Times* would, by publishing, have transformed from lawful to unlawful the process by which it obtained its information about its adversary, the information which was presumably accessible only through court-compelled discovery.

One more recent case supports our analysis of "conduct," although it involves a non-media defendant. It is one of remarkably few invasion-of-privacy cases to impose liability for a completely truthful disclosure. In *Doe v. City of New York*,⁷³ an HIV-positive airline employee in New York was fired and sought the help of the city's Human Rights Commission.⁷⁴ The agency worked out a settlement with the airline that secured reinstatement and back pay.⁷⁵ The Commission then proclaimed its success by issuing a press release.⁷⁶ Although the release did not identify the agency's client by

⁶⁶ *Id.* at 25.

⁶⁷ *Id.* at 30-31.

⁶⁸ *Id.* at 33.

⁶⁹ *Id.* at 34.

⁷⁰ *Id.*

⁷¹ *Id.* at 25.

⁷² *See id.* at 34.

⁷³ 15 F.3d 264 (2d Cir. 1994).

⁷⁴ *Id.* at 269.

⁷⁵ *Id.* at 265.

⁷⁶ *Id.*

name, the client argued in a federal privacy suit that co-workers recognized him at once, and that he was ostracized as a direct result of the publicity.⁷⁷ Recognizing a special right of privacy with regard to HIV status, the Second Circuit reversed the district court's dismissal of the suit.⁷⁸ The court also ruled that the employee had not waived his right to confidential treatment by seeking the Commission's help—his disclosures were limited to steps the agency had to take on his behalf, and the agency's use of the information did not properly extend to public revelations about so sensitive a matter.⁷⁹

Once again the issue of conduct seems germane. Although the court did not suggest that the Commission had acted unlawfully, it gave legal significance to the agency's having exceeded the implied consent with which the complainant had revealed his status in order to initiate the redemptive process. Normally a truthful disclosure of this sort, even under New York's unusually broad privacy laws,⁸⁰ would not occasion liability. Yet *Doe* is an unusually compelling case for several reasons. The subject—HIV status—is uniquely sensitive, the revelation of which is potentially devastating. Moreover, the public use of the information departs substantially both from the complainant's expectations and the agency's needs; indeed, the only apparent reason for issuing a release was to win favor and support from the city's gay community. Thus the court's conclusion that liability might be found approaches the outer edge of the privacy interest.

To put media interests into the picture, suppose that a New York City daily had used the press release, correctly identified the employee in its story, and was then sued for invasion of privacy. The conventional answer would be that truth affords a complete defense, even in New York. It is not beyond contemplation, however, that a sympathetic court might legally attribute the Commission's transgression to the newspaper. If, for example, the reporter knew, or should have known, that such a release was unconventional as well as potentially devastating, a basis for liability might be found. Surely *Doe* suggests that the disclosure of a non-public person's AIDS/HIV status presents a uniquely compelling situation.

II. CONDUCT PRINCIPLES APPLIED

This analysis of precedent provides a context for the current debate over the scope of First Amendment rights to disseminate truthful but possibly tainted information. Closer examination of several current *causes célèbres* should be helpful. In each instance, assume the worst about the newsgather-

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 268-69.

⁸⁰ See, e.g., N.Y. CONST. art. 1 § 8 (protecting freedom of speech and press); N.Y. CIV. RIGHTS § 50 (Consol. 1982 & Supp. 1994) (ensuring privacy protection).

ing conduct, and the best about the accuracy and value of the information. This approach highlights the tension between the clarity of the right to publish, on the one hand, and the lack of certainty about less than impeccable newsgathering methods, on the other.

A. 60 Minutes *Revisited*

For example, consider the CBS *60 Minutes* case. As noted, the experts are split as to whether airing the interview would have been appropriate.⁸¹ Some seasoned litigators insist that the explosive interview with the tobacco executive could and should have been aired with impunity.⁸² Others argue with equal conviction that such a step by the network would have been foolhardy because a suit for inducing a breach of contract certainly would have been filed, and very likely have been successful.⁸³

We now have identified plausible support for both views. On the one hand, there seems never to have been a litigated claim of inducing breach of contract against a media defendant, much less an actual damage award upheld by a higher court. On the other hand, it is far less clear after cases like *Cohen* that such a suit would have been futile had the CBS broadcast occurred. Such a suit would have had to establish such elements as the existence of the executive's agreement, the network's knowledge of that agreement, and its design to induce a breach on the executive/source's part. Evidence already published about the case suggests that these requirements easily could have been met. Indeed, the fact that the network paid the executive a substantial fee and then promised to indemnify him from possible liability goes far to satisfy the factual elements of the case.

What, then, of the constitutional dimensions? Had the concern been one of pre-broadcast restraint, a First Amendment defense almost certainly would have prevailed; even the ominous *Noriega* precedent would not come close to justifying an injunction here to protect purely private economic interests. Any court would note that such interests properly look to subsequent civil suits rather than to injunctive relief.

It is the prospect of those civil suits that poses the dilemma. *60 Minutes* is not exactly like *Cohen*'s promissory estoppel claim. Not all states recognize a tort claim for inducing a breach of contract.⁸⁴ Those that do so typically require proof that a defendant "intentionally and improperly" inter-

⁸¹ See *supra* notes 1-4 and accompanying text. The Wigand interview was later aired, and on March 24, 1996, *60 Minutes* aired a similar interview with a senior Philip Morris executive.

⁸² See, e.g., Goodale, *supra* note 3, at 3.

⁸³ See, e.g., DeVore, *supra* note 1, at A30.

⁸⁴ See RESTATEMENT (SECOND) OF TORTS § 766(b) (1977).

ferred with a contractual commitment.⁸⁵ Yet it is not implausible that courts in such a state might find an actionable inducement in the *60 Minutes* saga. If they did so, the question would then be whether such a basis for liability would be constitutionally different from the promissory estoppel claim that the Court allowed in *Cohen*, despite the obvious effect there is on publishing truthful information of clear public interest. If the issue is only whether, under *Cohen*, the legal standard on which liability turns is one of "general application," then little more need be said. For that reason, pessimists—or realists—like Cameron DeVore argue that CBS had no choice but to withdraw from the field because it was virtually certain to lose the battle.

If, however, a more extensive analysis of media conduct is appropriate, then the outcome might be different. On this basis, optimists like James Goodale fault CBS for having given up before a fight. In his view, it would have been "very hard for CBS to lose"; the outcome would likely have been "a slam dunk win for '60 Minutes.'"⁸⁶ The dramatic difference between these two views has nothing to do with the network's and its reporters' actions, nor with the agreement between the tobacco company and its errant executive. The basis of difference is not even whether media conduct in newsgathering affects the right to publish the information so obtained; both sides agree that it often does.

Rather, the issue is how far First Amendment analysis includes dimensions of the tort claim on which the suit was based—in this instance, inducing a breach of contract. If, as DeVore has argued, the only issue is whether the network could be found in a state court to have committed a tort by getting the tobacco executive to talk in breach of his confidentiality pledge, then the case is over; it makes little difference whether the inducer is a broadcaster or a bookie. That is clearly the pessimistic end of the scale.

If, on the other hand, a media defendant sued for tort damages may develop its position on such questions as motive, employer interests, media and public interests, social interests, proximity, and relations between the parties (whether or not competitors, for example), then the chance of avoiding civil liability is greatly enhanced.⁸⁷ If a defendant like CBS could proclaim itself, and its source, as whistleblowers serving the vital public purpose of exposing corporate malfeasance, then their chances before the courts improve dramatically. Even proof that a confidentiality agreement existed between employer and source, and that CBS meant to and did induce the employee to violate that agreement, would not assure media liability.

These issues undoubtedly would be reachable under state law. The *Restatement (Second) of Torts*, in recognizing potential liability for inducing a

⁸⁵ See *id.*

⁸⁶ Goodale, *supra* note 3, at 3.

⁸⁷ See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *RESTATEMENT (SECOND) OF TORTS* §§ 766-767.

breach of contract, identifies these interests as relevant to the determination of whether liability is appropriate. In that sense, the state law issues would be much more complex than the relatively cut-and-dried breach of contract issues in *Cohen*. Yet the *Restatement*, by itself, does not give constitutional stature to such defense-enhancing interests as public interest, proximity, non-competitive relationship, and the like. The challenge is to get those issues into the First Amendment analysis. On that prospect, the cases offer a varied perspective. Cases like *Cohen* and *Zacchini*, on the one hand, are not encouraging, because civil liability seemed to follow without detailed balancing of the contending state interests and their effect upon press freedoms. On the other hand, cases like *Florida Star* offer modest hope; by rejecting liability for publishing lawfully obtained truthful information of public interest, the Court paid considerable attention to the strength of the underlying interests. Indeed, in addressing the issue of media conduct, Justice Marshall specifically assessed the range of options open to a state that wished to shield the identity of a rape victim.⁸⁸ Thus, the more hopeful analogy for CBS and *60 Minutes* would be to the confidentiality cases—where not only the media conduct is relevant to liability, but where the strength of state interests receives close scrutiny.

There is, of course, another dimension. Even if CBS could have been sued for inducing a breach, and might have lost the case, fear of possible liability is not the only issue these cases raise. Jane Kirtley, Executive Director of the Reporters' Committee for Freedom of the Press, laments recent highly publicized instances of media compromise, observing that "[i]t is a sad day for the First Amendment when journalists back off from a truthful story . . . because of fears that they might be sued over the way they got the information."⁸⁹ Obviously, such judgments reflect, in what seems to be growing measure, considerations other than journalistic merit. Such non-legal factors are beyond the scope of this discussion.

B. Business Week: *Non-Party Journalist and Discovery*

A second recent case involved an actual—though brief—restraint against publication of truthful information obtained through unusual, though not unlawful, means. The issue emerged during a civil suit by Procter and Gamble to recover losses that occurred from using derivatives offered by Bankers Trust.⁹⁰ *Business Week* had been covering the story closely.⁹¹ A re-

⁸⁸ *Florida Star*, 491 U.S. at 537-40.

⁸⁹ Jane E. Kirtley, *Media Cave Despite High Court Support*, NAT'L L.J., Dec. 4, 1995, at A19. [Editor's Note: Ms. Kirtley also participated in the February 22, 1996 William & Mary Bill of Rights Journal Symposium. Her related piece may be found at 4 WM. & MARY BILL RTS. J. 1069 (1996)].

⁹⁰ *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186 (S.D. Ohio 1995),

porter for the magazine contacted a friend in the bank's New York law firm, seeking specific information about the case.⁹² The friend obtained the information from a colleague in the firm, but only after he had given the information to the reporter did it emerge that the material had been sealed by a now deceased federal judge who had compelled pre-trial discovery under protective orders.⁹³

When it became clear that *Business Week* intended to publish the information, both parties asked a new trial judge to issue a restraining order to protect the conditions of discovery.⁹⁴ Such an order was entered.⁹⁵ After unsuccessful pleas to the Sixth Circuit and the Supreme Court,⁹⁶ *Business Week* returned to the district court for another hearing.⁹⁷ After that hearing, the judge reaffirmed the initial restraint, but at the same time made the material part of the amended complaint a public record, thus permitting *Business Week*, along with everyone else, to publish.⁹⁸

The rationale for this novel approach bears analysis. What troubled the judge most was *Business Week's* conduct in "continu[ing] to pursue the sealed information" even though the magazine was "aware of the protective order in the case."⁹⁹ Thus, he concluded, "*Business Week* may not use the confidential materials that it obtained unlawfully."¹⁰⁰ After reviewing the basis and nature of the original protective order, the judge added that "the integrity of a court and the entire judicial system requires that its orders be acknowledged and obeyed."¹⁰¹

The authority for the district court's conclusion in *Procter & Gamble* was the Supreme Court's judgment in *Seattle Times*, where the Court upheld a restraining order against a newspaper's use of sealed material that the newspaper had obtained through discovery in a lawsuit to which it was a party.¹⁰² The opinion stressed that the newspaper "gained the information they wish to disseminate only by virtue of the trial court's discovery pro-

vacated, 78 F.3d 219 (6th Cir. 1996).

⁹¹ See, e.g., Paul Dwyer et al., *The Lesson from Barings' Straits*, BUS. WK., Mar. 13, 1995, at 30; Kelley Holland & Michael Schroeder, *A Lingering Black Eye at Bankers Trust*, BUS. WK., Nov. 14, 1992, at 42.

⁹² Geyelin, *supra* note 15, at A1.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 187 (S.D. Ohio 1995), *vacated*, 78 F.3d 219 (6th Cir. 1996).

⁹⁶ *Id.* at 188.

⁹⁷ *McGraw-Hill Co. v. Procter & Gamble Co.*, 116 S. Ct. 6 (1995).

⁹⁸ *Procter & Gamble*, 900 F. Supp. at 193.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

cesses.”¹⁰³ The Court added: “A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.”¹⁰⁴ Justices Brennan and Marshall concurred, recognizing that the other party’s “interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment.”¹⁰⁵

The trial judge in *Procter & Gamble* found *Seattle Times* applicable well beyond the immediate parties, and necessary to protect the integrity of the discovery process.¹⁰⁶ The judge may also have been influenced by the way in which the *Business Week* reporter obtained the sealed material.¹⁰⁷ There was no hint of theft, bribery, coercion, or even misrepresentation—simply a catastrophic mistake on the part of the lawyer who gave the material to the reporter.¹⁰⁸ Yet the procedure was unusual and improper. As the *Wall Street Journal* later reported:

It made no sense. Sealed documents were supposed to be strictly off-limits, under possible penalty of contempt and stiff sanctions. Yet [the reporter] had obtained her copy simply by picking up the phone and calling a friendly source at Bankers Trust’s law firm. . . . Now, she later testified, she called her source and told him, “I have learned this document is sealed.” On the other end of the phone line, she testified, came the reply: “Oh, s ____.”¹⁰⁹

The accommodating lawyer had erroneously assumed that the documents were public. Perhaps the circumstances tell us only that *Business Week* should not have obtained the material in the first place, and that some reprisal surely would follow within the law firm. Nevertheless, clearly no laws were violated, nor would any civil recourse lie against *Business Week* or its reporter. Suppose, however, a far worse situation had occurred, such as the documents being obtained through theft, bribery, or misrepresentation. That issue surely deserves attention. First, *Seattle Times* and the restraining order need to be addressed in more detail.

¹⁰³ *Id.* at 32.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 38 (Brennan, J., concurring, joined by Marshall, J.).

¹⁰⁶ *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 192 (S.D. Ohio 1995), *vacated*, 78 F.3d 219 (6th Cir. 1996).

¹⁰⁷ See *supra* notes 91-93 and accompanying text. The district court judge also cited “dubious” testimony and “disingenuous[.]” actions on the part of *Business Week* employees. *Procter & Gamble*, 900 F. Supp. at 189, 191.

¹⁰⁸ *Procter & Gamble*, 900 F. Supp. at 190-91.

¹⁰⁹ Geyelin, *supra* note 15, at A1.

The application of *Seattle Times* to such a case as this is simply misguided. The order the Supreme Court sustained in *Seattle Times* may have been warranted to limit a party's use of material obtained through discovery solely for purposes of litigation. If such protection could not be assured, within the discovery process, courts would be reluctant to order disclosure of highly sensitive materials and parties would be even more reluctant to divulge those materials if secrecy could not be assured. The *Seattle Times* decision, and even more clearly the Brennan-Marshall concurrence, reflected that precise and limited rationale. Repeatedly the Court stressed the inter-party nature of the restraint.¹¹⁰ To extend the reach of *Seattle Times* beyond the parties to a suit requires a wholly different analysis. There may be extreme situations in which a non-party obtains discovery material so explosive—highly classified government documents, or even trade secrets—that publication could be enjoined, or at least deferred. In that event, the standards applicable to such a non-party case would be those of the *Pentagon Papers* case and not *Seattle Times*. Only if publication would do irreparable harm, equivalent to revealing the itinerary of a troop ship about to sail in time of war, would an injunction be warranted.¹¹¹ The interests that uniquely justify intervention to protect the discovery process between parties simply do not extend to a non-party such as *Business Week* in *Procter & Gamble*.

Suppose, however, that the reporter obtained sealed documents by means that were not only reprehensible, but unlawful as well. The issue of conduct would then become central in a way that it was not in the actual *Business Week* case. Yet, under proper First Amendment standards, bad conduct alone would be insufficient justification for enjoining publication of accurate information that was of strong interest to the public. That principle again seems clear from the *Pentagon Papers* case, where the key documents had been stolen, but where the media conduct seemed immaterial to the issue of prior restraint.¹¹²

That view was recently reaffirmed in *CBS Inc. v. Davis*.¹¹³ In *Davis*, a meat-packer sought to enjoin a network broadcast that portrayed unsanitary conditions in one of its plants.¹¹⁴ The packer claimed that the damaging footage had been obtained by persuading one of its employees to wear a concealed camera.¹¹⁵ Thus, the packer claimed, the network could be charged with trespass, breach of the employee's duty of loyalty, and viola-

¹¹⁰ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33, 35 (1984).

¹¹¹ See *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Brennan, J., concurring).

¹¹² See *id.* at 714.

¹¹³ 114 S. Ct. 912 (Blackmun, Circuit Justice 1994).

¹¹⁴ *Id.* at 913.

¹¹⁵ *Id.*

tion of trade secret laws.¹¹⁶ On that basis, a South Dakota trial court granted an injunction, and the state supreme court affirmed.¹¹⁷ The network sought Supreme Court relief, and on the following day Justice Blackmun dissolved the injunction.¹¹⁸

Although acknowledging what the lower courts had termed as CBS's "calculated misdeeds," Blackmun insisted that "subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction . . . in the First Amendment context."¹¹⁹ Thus, under the *Pentagon Papers* standard, injunctive relief was unwarranted. Moreover, this recent reaffirmation of the rigorous prior restraint doctrine seems to confirm that conduct is not a valid basis for injunctive relief. Justice Blackmun's ruling would thus seem at variance with Justice Stevens's comment in *Procter & Gamble*, where he noted that "the manner in which [*Business Week*] came into possession of the information it seeks to publish may have a bearing on its right to do so."¹²⁰

Suppose the meat-packer had sought damages after the fact, rather than seeking to bar the broadcast. If unlawful newsgathering conduct would not justify a prior restraint, what of subsequent relief? Justice Blackmun's own reference to the availability and appropriateness of post-broadcast remedies¹²¹ suggests at least some situations in which conduct would be actionable despite the importance and the accuracy of the information. That prospect brings us to the third and final case.

C. Food Lion: *Unfriendly Cameras in the Freezer*

The prospect of post-broadcast relief is precisely the issue in the ongoing dispute between ABC and Food Lion.¹²² To obtain footage of suspect packaging and marketing practices at certain Food Lion stores, an ABC employee sought and obtained a job at one of those stores.¹²³ Equipped with a hidden camera, she arranged to work alone late one night, and filmed such activities as repacking and re-dating certain perishables, soaking old fish in a bleach solution, and lathering meat with barbecue sauce to cover evidence of spoilage.¹²⁴ Although Food Lion filed suit against the network before the broadcast,¹²⁵ it did not seek an injunction. A spokesman ex-

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 915.

¹¹⁹ *Id.* at 914.

¹²⁰ *McGraw-Hill Cos. v. Procter & Gamble Co.*, 116 S. Ct. 6, 7 (Stevens, Circuit Justice 1995).

¹²¹ See *supra* note 119 and accompanying text.

¹²² See *Food Lion v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (M.D.N.C. 1995).

¹²³ *Id.* at 814.

¹²⁴ *Id.* at 816.

¹²⁵ *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1992 U.S. Dist.

plained that the company did not want to keep the story off the air; instead, Food Lion sought to demonstrate that "an ABC producer broke the law in order to concoct a story."¹²⁶ Specifically, Food Lion cited several allegedly unlawful elements—that the ABC producer had fraudulently gained employment by using an alias, and that to generate the damaging footage she deliberately manufactured a "mess" so as to film it.¹²⁷ The suit also alleged that the broadcast cast aspersions on what were quite proper practices, such as shipping vacuum-packed meat well within its shelf life.¹²⁸ In separate copyright proceedings, Food Lion asserted its right as the "employer" of the photographer to the unused out-takes of the broadcast—footage which, it insisted would corroborate its charges of distortion.¹²⁹

Food Lion may well yield clearer answers to some core questions about newsgathering conduct. Undeniably, journalists are liable for tangible wrongs they commit in the course of obtaining information.¹³⁰ Thus, if the ABC producer had damaged a freezer during the filming process, no First Amendment defense would have barred Food Lion's suit for the cost of repairs. Had she assaulted another worker to get a better picture, the network would be fully liable for injuries. If a regular Food Lion employee sought libel damages for ABC footage that unfairly implied she had violated company policy or state food packaging laws, the First Amendment would protect the network no more fully than in any other defamation suit by a private plaintiff.¹³¹

These are not, however, the kinds of claims that Food Lion has in mind or that ABC fears. Recovery for such wrongs would be modest and would do nothing to vindicate the plaintiff or deter the defendant. The real issues lie beyond this modest goal, and that are central to Food Lion's suit—whether, if proven, a violation of state employment law on the ABC producer's part, or clear acts of trespass, would give rise to damages.¹³²

The guiding principles should by now be clear. On the one hand, it cannot be said that, in a subsequent civil suit, conduct never matters to the issue of damages; such a view would imply that journalists are above the law, not only with respect to the use of information, but also as to how they

WL 456652, at *1 (M.D.N.C. Sept. 28, 1992).

¹²⁶ *Disinformation Campaign Against Food Lion Must Stop*, PR NEWswire, Nov. 5, 1992, available in LEXIS, World Library, PRNEWS File.

¹²⁷ *Food Lion*, 887 F. Supp. at 815-16.

¹²⁸ *Id.*

¹²⁹ See Jensen, *supra* note 11, at B6.

¹³⁰ See *Food Lion*, 887 F. Supp. at 824. "The laws governing the remaining claims are generally applicable laws which do not target the press. Holding ABC accountable for any damages it allegedly caused Food Lion in violation of those laws would not violate the First Amendment." *Id.*

¹³¹ *Id.*

¹³² *Id.* at 820.

obtain it. To take the clearest case, if a reporter commits robbery or battery to obtain a story, the newspaper or station may be able to use the story, but both the reporter and the employer will be held accountable for the crimes committed. On the other hand, the process of newsgathering is clearly different from activities unrelated to the First Amendment. Thus, the scope of relief in such a case will depend on a careful consideration of various factors. Those factors should help to resolve a variety of difficult cases and issues throughout this complex field. We turn now to a brief consideration of those factors.

III. WHEN DOES CONDUCT MATTER AND HOW MUCH?— PRELIMINARY GUIDING PRINCIPLES

(1) Bad conduct never justifies prior restraint. From the *Pentagon Papers* case through the recent case of the South Dakota meat-packer, the Supreme Court has held consistently to the view that newsgathering conduct by itself never justifies enjoining publication. The very few cases like *Seattle Times*, which do uphold restraints, are not to the contrary, because they do not turn on the conduct of the news organization, but on other dimensions of the source of the information. Thus Justice Stevens incorrectly implied that *Business Week's* newsgathering conduct "may have a bearing on its right [to publish]." ¹³³

(2) The accuracy of the information and the degree of public interest bear significantly, along with conduct, on the issue of post-publication damages and other relief. In cases such as those brought by rape victims and other persons who were promised confidentiality, media freedom from liability depends on the confluence of these three factors.

(3) Not all journalistic misconduct is of equal concern within this equation. Systemic and societal interests bear on the degree to which newsgathering conduct warrants recourse after the fact. Thus, serious criminal law violations would weigh more heavily against a media defendant than simple trespass or misrepresentation, even if such misconduct might support some form of civil redress.

(4) Purely private interests, individual or commercial, should not by themselves be sufficient to support civil redress other than for direct physical injury or damage against unlawful or improper newsgathering; only if there are societal or systemic concerns that transcend individual interests would relief normally be warranted.

(5) The public interest in receiving accurate information about matters of concern should always weigh in the journalist's or media's favor in such

¹³³ See *McGraw-Hill Cos. v. Procter & Gamble Co.*, 116 S. Ct. 6, 7 (Stevens, Circuit Justice 1995).

cases. Thus, the publication of such information, if not technically privileged, creates some latitude in the equation.

(6) The availability and adequacy of alternatives should always weigh in the balance—most clearly in regard to pre-publication restraint, where post-publication options would govern as a matter of law, but also in post-publication proceedings.

(7) The concept of journalistic misconduct should be refined and extended to newsgathering in electronic and digital form. Consideration should now be given to the computer equivalents of physical theft and break-in which represent traditional but increasingly unfamiliar forms of media transgression.