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NOTES

OUTTAKES, HIDDEN CAMERAS, AND THE FIRST AMENDMENT: A REPORTER'S PRIVILEGE

On November 5, 1992, the ABC investigative journalism show *PrimeTime Live* broadcast a segment about Food Lion, then the fastest-growing supermarket chain in the nation.¹ *PrimeTime Live*, relying on undercover film footage, reported that Food Lion employees regularly used unsanitary food handling practices.² Food Lion's stock fell sharply the next day,³ and its net profits dropped from \$178 million in 1992 to \$3.8 million in 1993.⁴

The television segment broadcast approximately five minutes out of fifty-five hours of footage⁵ from a camera smuggled into the store by an ABC producer working undercover as a meat wrapper.⁶ Even before the show aired, Food Lion executives filed suit in federal court in an attempt to block the telecast.⁷ They charged that the ABC producer had obtained her job under false pretenses, and that ABC's First Amendment rights "do not allow it to use illegal means to invade the privacy and property rights of businesses and people."⁸ After the district court judge

1. See Frank Swoboda, *Food Lion Faces Huge U.S. Complaint*, WASH. POST, Nov. 7, 1992, at A1.

2. For instance, the show reported that Food Lion employees "routinely cover[ed] rancid meat with barbecue sauce, repackage[d] it and put it up for sale . . . ; use[d] nail polish remover to change the 'sell by' dates on packaged foods; and even wash[ed] hams that [had] begun to spoil in a weak solution of bleach to clean them up and take away the smell." *Id.*

3. See *Food Lion Stock Falls After Report*, N.Y. TIMES, Nov. 7, 1992, at 37.

4. See Marc Gunther, *Food Lion, ABC in Tape Tug of War: Grocer Claims Footage Was Shot Illegally*, WASH. POST, Aug. 30, 1995, at D1.

5. See *id.*

6. See Swoboda, *supra* note 1, at A1.

7. See *id.*

8. *Id.*

denied the initial request to block the broadcast,⁹ Food Lion sued again, this time alleging common law fraud, trespass, and civil conspiracy, and seeking \$30 million in damages.¹⁰

On June 30, 1995, ABC filed a motion asking for a protective order to prevent Food Lion from using the fifty-five hours of videotape footage outside of the case.¹¹ The magistrate judge refused to grant the network's protective order, stating that ABC had not made "a clear showing of confidentiality, privilege, or copyright infringement."¹²

Finally, in August 1995, Food Lion attorneys screened the outtakes¹³ for the first time, after which Food Lion claimed that the footage did not support the broadcast segment.¹⁴ ABC's lawyers insisted that the program was fair.¹⁵ Furthermore, they argued that ABC News should be able to keep the footage confidential because it was similar to notes taken by print reporters, and therefore protected by the First Amendment.¹⁶ Nevertheless, the jurors were allowed to view some of the outtakes.¹⁷

9. *See id.*

10. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 812 (M.D.N.C. 1995); *Food Lion Sues ABC for Tapes, \$100 Million*, NEWS & OBSERVER (Raleigh, N.C.), July 14, 1995, available in 1995 WL 2678169.

11. *See Food Lion Seeks Right to ABC Tapes*, PR NEWSWIRE, July 13, 1995, available in LEXIS, News Library, US File. Food Lion wanted the footage for use in related lawsuits and to defend its reputation. *See Gunther, supra* note 4, at D1.

12. *Food Lion Seeks Right to ABC Tapes, supra* note 11. Food Lion also filed another suit, seeking \$100 million in damages, alleging copyright infringement after learning that in 1993 ABC had filed to copyright the videotapes. *See Food Lion Sues, Seeks Undercover TV Tapes*, ATL. J. & CONST., July 14, 1995, at H3, available in 1995 WL 6535927.

13. Outtakes are unbroadcast videotaped material.

14. *See Gunther, supra* note 4, at D1.

15. *See id.*

16. "These videotapes are copyrighted, protected by the reporter's privilege and treated as confidential by ABC." *Id.*

17. *See Dorothy Rabinowitz, ABC's Food Lion Mission*, WALL ST. J., Feb. 11, 1997, at A20. Because Food Lion never sued for libel or legally contested the accuracy of the broadcast, the jury did not have to determine if the broadcast itself or the outtakes were truthful. *See Howard Kurtz & Sue Anne Pressley, Jury Finds Against ABC for \$5.5 Million*, WASH. POST, Jan. 23, 1997, at A1. In fact, the judge told the jury to assume that the broadcast was true. *See David E. Rovella, After \$ 5.5 Million Fraud Victory, Supermarket Chain Faces Shareholder Lawsuit*, NAT'L L.J. Feb. 10, 1997, at A7. The jury's final verdict of fraud and trespass was based on the fact that the two ABC producers had lied to get jobs at Food Lion, and had used hidden cameras. *See Kurtz & Pressley, supra*, at A1.

This Note focuses on investigative journalism and hidden cameras and examines the implications of constitutional protection for reporter work product in the forms of both standard and hidden camera outtakes. This Note posits that the courts are biased against television reporter work product, and that this bias arises from a general prejudice against television as a medium. Arguing that such bias is inappropriate, this Note concludes that interference with the editorial process is a less appropriate control on media than other currently available controls.

THE REPORTER'S PRIVILEGE: A CONSTITUTIONAL PERSPECTIVE

Underlying Rationales

Although the Constitution does not provide explicitly for a reporter's privilege, the media have argued successfully that the First Amendment mandates a privilege protecting confidential news sources.¹⁸ At least two strands of reasoning have developed in support of such a privilege grounded in the First Amendment.¹⁹ The first falls under the rubric of the "public's right to know,"²⁰ an argument invoked by Justice Brennan in *Herbert v. Lando*.²¹ A second grounding of the privilege, the "structuralist"

The parties differed as to the role that they thought the outtakes played in the verdict. ABC spokeswoman Eileen Murphy stated that the verdict was unrelated to the extra footage, but Food Lion attorney Richard Wyatt, Jr. said that the outtakes were "very influential" in the jury's decision. See Howard Kurtz, *Jury Finds ABC Committed Fraud in Food Lion Investigative Story*, WASH. POST, Dec. 21, 1996, at A7 (quoting Wyatt). Of course, if the verdict truly rested only upon the fraudulent job applications and the hidden cameras, then the content of the outtakes need never have been revealed.

18. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1602 (1985) [hereinafter *Developments*].

19. See James J. Mangan, Note, *Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation*, 83 GEO. L.J. 129, 147-48 (1994).

20. *Id.* at 148.

21. 441 U.S. 153 (1979). Justice Brennan stated that:

In recognition of the social values served by the First Amendment, our decisions have referred to "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," and to "the circulation of information to which the public is entitled in virtue of the constitutional guaranties."

Id. at 188 (Brennan, J., dissenting) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)); See *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

view, was most notably advanced by Justice Stewart in a speech given at Yale Law School.²² Justice Stewart's structuralist view of the privilege has, perhaps, a firmer constitutional foundation, while Justice Brennan's argument for the public's right to know relies more on overarching public policy rationales. Although both arguments appear in the case law discussing the reporter's privilege, Justice Brennan's view has greater appeal, and often has been invoked in subsequent First Amendment decisions.²³

Branzburg v. Hayes—*The Seminal Case*

*Branzburg v. Hayes*²⁴ involved four consolidated cases in which reporters claimed a First Amendment privilege to withhold testimony before a grand jury.²⁵ Noting that "news gathering is not without its First Amendment protections,"²⁶ the ma-

22. Justice Stewart argued that:

[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

. . . .

It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.

Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 633 (1975).

23. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (noting that "[i]n a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas'" (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (noting that "compelled production of a reporter's resource materials . . . may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege").

24. 408 U.S. 665 (1972).

25. See *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom. Branzburg*, 408 U.S. 665; *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom. Branzburg*, 408 U.S. 665; *In re Pappas*, 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom. Branzburg*, 408 U.S. 665. The respondent in the primary case, the Honorable John P. Hayes, was the successor of Judge Pound. See *Branzburg*, 408 U.S. at 668 n.3.

26. *Branzburg*, 408 U.S. at 707.

jority nevertheless refused to recognize a "constitutional newsman's privilege"²⁷ and held that "requiring newsmen to appear and testify before state or federal grand juries [does not] abridge[] the freedom of speech and press."²⁸ In hindsight, the majority opinion has not directed definitively the future of the reporter's privilege; rather, Justice Powell's concurrence²⁹ and Justice Stewart's dissent³⁰ have proven more influential.

In his brief concurrence, Justice Powell emphasized that the Court's holding addressed a narrow question³¹ and suggested that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."³²

In his dissent, Justice Stewart proposed that the government should be required to fulfill a three-part test in order to overcome a reporter's privilege.³³ The test would require the government to:

- (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.³⁴

Justice Stewart further noted that Justice Powell's "enigmatic concurring opinion gives some hope of a more flexible view in the future."³⁵

27. *Id.* at 703-04.

28. *Id.* at 667. Justice White, joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist, wrote the opinion of the Court. *See id.* at 665.

29. *See id.* at 709 (Powell, J., concurring).

30. *See id.* at 725 (Stewart, J., dissenting).

31. *See id.* at 709 (Powell, J., concurring).

32. *Id.* at 710 (Powell, J., concurring). Justice Powell further noted that "the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case." *Id.* at 710 n.* (Powell, J., concurring).

33. *See id.* at 743 (Stewart, J., dissenting) (footnote omitted).

34. *Id.* (Stewart, J., dissenting) (footnote omitted).

35. *Id.* at 725 (Stewart, J., dissenting).

Commentators disagree over which opinion has most influenced the reporter's privilege.³⁶ Both Justice Powell's and Justice Stewart's arguments are persuasive, and the United States Courts of Appeals have varied in which argument they have chosen to follow.³⁷

Taking Branzburg to the Limit

After the Supreme Court established the framework, the lower courts began tinkering with the concept of a reporter's privilege, taking it far beyond the majority's holding in *Branzburg*.³⁸ Combining a rationale culled from Federal Rule of Evidence 501 with the language of *Branzburg*, courts expanded the protection available to journalists.³⁹ Two cases, one from the Second Cir-

36. See Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 838 (1984) ("The now widely accepted view of *Branzburg*, therefore, is that it was limited by the specific facts . . . and that the case-by-case [balancing] analysis must be used While this view is not universally held, it is certainly the clear majority position, especially in federal courts.") (footnotes omitted); see also *Developments*, *supra* note 18, at 1603-04 ("The equivocal nature of the *Branzburg* decision has enabled lower federal courts to create a media source privilege based on the [F]irst [A]mendment. . . . The result has been the adoption of Justice Powell's approach") (footnotes omitted). But see Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1 (1986). Monk noted that:

a majority, consisting of the four dissenters and Powell, explicitly recognized a constitutional right to protect sources. The post-*Branzburg* history of reporter's privilege in the courts demonstrates that, in states without a shield statute, a qualified privilege much like that suggested in Justice Stewart's dissent has become the prevailing doctrine in both the lower federal and the state courts.

Id. at 24-25 (footnotes omitted).

37. See, e.g., *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983) (applying a three-pronged test requiring that the information sought be "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources"); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980) (balancing potential harm to the free flow of information against the asserted need for the requested information).

38. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 929 (1992) ("Extrapolating from the majority's language in *Branzburg* that 'news gathering is not without its First Amendment protections,' as well as from Justice Powell's pivotal concurring opinion, many lower courts have recognized a qualified privilege that protects against the disclosure of confidential sources, confidential information, and unpublished materials.") (footnotes omitted).

39. See generally FED. R. EVID. 501 (stating that privilege shall be governed by

and the other from the Third Circuit, evinced strong support for a privilege and employed representative reasoning.⁴⁰ The Third Circuit emphasized balancing the relevant interests,⁴¹ while the

common law except where state law applies). One commentator argued:

Soon after *Branzburg*, great attention was given to Rule 501 of the Federal Rules of Evidence The language of the Rule is intentionally vague. The key phrase is that judges in determining privilege should look to the "light of reason and experience." In spite of the apparently contrary view of Justice White and three other Justices, many federal judges seized upon this language to declare that, in the media representative context, "the courts should continue to develop the federal common law of privilege on a case-by-case basis."

Marcus, *supra* note 36, at 840 (footnotes omitted) (quoting *Lewis v. United States*, 517 F.2d 236, 238 n.4 (9th Cir. 1975)).

40. See *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

41. See *Cuthbertson*, 630 F.2d at 148. *Cuthbertson*, decided one year after *Herbert v. Lando*, 441 U.S. 153 (1979), involved the federal prosecution of the principals of a restaurant chain on charges of conspiracy and fraud. See *Cuthbertson*, 630 F.2d at 142. Nine months prior to the grand jury indictment, the chain had been the subject of a segment broadcast on *60 Minutes*. See *id.* One month before trial, the defendants served CBS with a subpoena duces tecum asking for the notes, outtakes, and any other videotapes or documents used in preparation for the program. See *id.* CBS moved to quash the subpoena, asserting a qualified First Amendment privilege. See *id.* CBS also raised an objection under Federal Rule of Criminal Procedure 17(c). See *id.* at 144. For a discussion of the *Cuthbertson* test see *infra* notes 76-77 and accompanying text.

In *Cuthbertson*, the Third Circuit cited its earlier holding that journalists have a federal common law qualified privilege under Federal Rule of Evidence 501 to refuse to divulge confidential sources in civil cases. See *id.* at 146 (citing *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979)). The court noted that "CBS's interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal." *Id.* at 147.

Recognizing the "strong public policy supporting the unfettered communication to the public of information and opinion," *id.* at 146, and finding support in *Branzburg*, the court extended its earlier holding, giving journalists a qualified privilege not to disclose unpublished information in their possession in criminal cases. See *id.* at 146-47. The court then echoed the language of Justice Powell in *Branzburg*, stating that the court must "balance the . . . need for the material against the interests underlying the privilege." *Id.* at 148.

The Third Circuit has since adopted a three-pronged test. See, e.g., *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 150, 151 (E.D. Pa. 1994) ("First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the court that the information sought is crucial to the claim.").

Second Circuit employed a more explicit three-pronged test.⁴²

The lower courts have taken advantage of possible avenues that the Supreme Court has prescribed (or, at any rate, not proscribed), for formulating some sort of reporter's privilege. Nine circuit courts have recognized a qualified privilege expressly,⁴³ two have not addressed the issue,⁴⁴ and only one has decided that no such privilege exists.⁴⁵

THE PRIVILEGE APPLIED: HOW DO OUTTAKES FARE?

Standard of Review

Branzburg was the Supreme Court's last ruling on the reporter's privilege,⁴⁶ and the lower courts have cobbled together their own body of privilege law.⁴⁷ The tests, however, are fairly similar from circuit to circuit. Generally speaking, reporter's work product issues undergo a two-tiered review.

42. In *Burke*, the defendants' convictions arose in connection with the Boston College "point-shaving scandal" that occurred during the 1978-1979 basketball season. See *Burke*, 700 F.2d at 73. Prior to the appeal, *Sports Illustrated* published an article purporting to be a firsthand account of the point-shaving scheme, see *id.* at 73 n.1, by a witness who testified in the trial under a grant of immunity. See *id.* at 83. The defendants served a subpoena seeking production of all the documents and tapes relating to the *Sports Illustrated* article. See *id.* at 76.

The court recognized the need to balance First Amendment interests against evidentiary needs, but in its analysis relied primarily on a three-pronged test drawn directly from Justice Stewart's proposal in *Branzburg*. See *id.* at 77-78 (citing *Cuthbertson*, 630 F.2d at 139 and *Branzburg v. Hayes*, 408 U.S. 665 (1972)); see also *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting) (applying the three-pronged test). The court held that "disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Burke*, 700 F.2d at 76-77 (citations omitted).

43. See, e.g., *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995); *LaRouche v. National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Burke*, 700 F.2d at 77; *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *Cuthbertson*, 630 F.2d at 147; *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972).

44. The Seventh and Eleventh Circuits.

45. See *In re Grand Jury Proceedings*, 810 F.2d 580, 584-85 (6th Cir. 1987).

46. See MARC A. FRANKLIN & DAVID A. ANDERSON, *CASES AND MATERIALS ON MASS MEDIA LAW* 523 (5th ed. 1995).

47. See *supra* notes 39-46 and accompanying text.

The first step usually involves a threshold determination of whether work product should receive *in camera* review.⁴⁸ This evidentiary determination follows the procedure outlined in *United States v. Nixon*.⁴⁹ If the reporter's materials at issue fulfill these first-tier threshold guidelines, then the court may move to the second tier of constitutional review, employing either the three-pronged test or applying balancing analysis used by the specific circuit court in order to determine whether the privilege exists.⁵⁰

The Standard Applied

As stated by one noted media scholar, "[t]he law governing reporters' work product is 'not very developed'."⁵¹ Very few decisions deal with outtakes specifically, and the existing recent decisions are scattered throughout the federal courts.⁵² Taken as

48. Courts are not required by the Federal Rules of Evidence to conduct an *in camera* review. Many judges, however, appear to feel that an *in camera* review is the best way to balance the values of the First Amendment against the need for discovery. See, e.g., *Burke*, 700 F.2d at 78 n.9 (noting that courts are encouraged to inspect sensitive documents, including media work product, to determine if they contain probative evidence); *United States v. Gambino*, 741 F. Supp. 412, 414 (S.D.N.Y. 1990) (noting that "*in camera* inspections provide a useful intermediate step between full disclosure and total nondisclosure").

49. 418 U.S. 683 (1974). In *Nixon*, the President's counsel moved to quash the Special Prosecutor's subpoena for the Watergate tapes on two grounds: first, that the subpoena failed to meet the requirements of Rule 17(c) of the Rules of Criminal Procedure; and second, that the tapes were subject to executive privilege. See *id.* at 686. The Court applied a four-pronged test based on Rule 17(c), see *id.* at 699-700, considered the weight of the privilege, and determined that the tapes should be produced. See *id.* at 713-14.

The Rule 17(c) test requires that the moving party show:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699-700.

50. See *supra* notes 41-42.

51. Gunther, *supra* note 4, at D1 (quoting Professor Rodney Smolla, College of William & Mary School of Law).

52. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (recognizing a qualified reporter's privilege for outtakes); *Doe v. Kohn Nast & Graf, P.C.*,

whole, however, the cases suggest that outtakes are more likely to be discoverable than other forms of journalistic work product for two reasons: the inherent nature of the medium, and a subtle judicial bias that favors "traditional" written work product.⁵³

*Doe v. Kohn, Nast & Graf, P.C.*⁵⁴ provides a lens through which to examine these arguments. In *Kohn*, the plaintiff brought action under the Americans with Disabilities Act against the law firm of Kohn, Nast & Graf.⁵⁵ Doe had worked at the firm as an associate, and alleged that the partners had fired him when they discovered that he was HIV-positive.⁵⁶ After the plaintiff filed the lawsuit, ABC, CBS, and NBC each interviewed him.⁵⁷ Both ABC and NBC broadcast a portion of the interviews.⁵⁸

The portions of the interviews that were actually broadcast were produced in discovery.⁵⁹ The defendants, however, also subpoenaed the networks for the unbroadcast outtakes.⁶⁰ ABC, CBS, and NBC objected to production, asserting a reporter's privilege arising under "federal common law and the First Amendment to the Constitution."⁶¹ In analyzing the networks' assertion, the district court performed a two-tiered review.⁶²

In camera Review

The district court first noted that an *in camera* review of the tapes "would be helpful, if not essential, to its analysis,"⁶³ and

853 F. Supp. 147 (E.D. Pa. 1994) (*Kohn I*); *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 150 (E.D. Pa. 1994) (*Kohn II*); *United States v. Bingham*, 765 F. Supp. 954 (N.D. Ill. 1991) (compelling a television station to deliver video outtakes to defense counsel); *infra* note 92.

53. See *infra* notes 104-30 and accompanying text.

54. *Kohn I*, 853 F. Supp. 147; *Kohn II*, 853 F. Supp. 150.

55. See *Kohn I*, 853 F. Supp. at 147.

56. See *id.*

57. See *id.* at 148.

58. See *id.*

59. See *id.*

60. See *id.*

61. *Id.*

62. See *supra* notes 48-50 and accompanying text.

63. *Kohn I*, 843 F. Supp. at 149. Courts invoke *in camera* review as a layer of protection for the media. See, e.g., *United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 (1st Cir. 1988) (noting that "to minimize intrusion, [the court] required

used *United States v. Cuthbertson*⁶⁴ as its template.⁶⁵ In *Cuthbertson*, CBS argued that "even *in camera* review inhibits the journalist's exercise of rights protected by the first amendment."⁶⁶ In analyzing CBS's argument, the Third Circuit gave a mixed message as to how effectively the media can protect itself against *in camera* review in cases involving outtakes. The court concluded that *in camera* review is justified if the defendant satisfies the *Nixon* test⁶⁷ and also establishes "that the information sought is not available from another source."⁶⁸ In its analysis, the court noted that the second and third elements of the *Nixon* test did not apply to cases in which the information was produced only to the court.⁶⁹ The resulting analysis therefore consisted of three prongs: good faith (an element of the *Nixon* test), unavailability, and relevancy (also a *Nixon* test element).⁷⁰

The troubling aspect of this framework is the way in which the court characterized the materials at issue—verbatim statements of witnesses taken by CBS: "[b]y their very nature, these statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time."⁷¹ The verbatim statements at issue included outtakes of interviews as well as written transcripts.⁷² Under the court's rationale, outtakes are always "not obtainable from any other source."⁷³ Video "freezes" testimony, more so than any other medium.

Carried to its logical conclusion, the Third Circuit's analysis in *Cuthbertson* suggests that outtakes almost always will be admissible for *in camera* review. If outtakes by definition are "not

that the materials be submitted under seal subject to *in camera* review and possible release to defendants later on").

64. 630 F.2d 139 (3d Cir. 1980).

65. See *Kohn I*, 683 F. Supp. at 149.

66. *Cuthbertson*, 630 F.2d at 148 (emphasis added).

67. See *supra* note 49.

68. *Cuthbertson*, 630 F.2d at 148.

69. See *id.* at 145; *supra* note 49.

70. See *Cuthbertson*, 630 F.2d at 145.

71. *Id.* at 148.

72. See *id.* at 142.

73. *Id.* at 148.

sible for *in camera* review. If outtakes by definition are "not obtainable," then the party seeking them need only show evidentiary relevance and good faith.⁷⁴ This standard is significantly less stringent than that required for production to parties, which requires that the evidence be *highly* relevant and critical to the claim.⁷⁵

The result in *Kohn I* illustrates this conclusion. In that case, the court asked whether the outtakes sought consisted of relevant evidentiary matter and whether they were available elsewhere.⁷⁶ The court easily found evidentiary relevance in the tapes because John Doe's "credibility [would] play an important role at trial."⁷⁷

In addressing whether the videotapes were unavailable elsewhere, the court followed exactly the thread of reasoning in *Cuthbertson*: "In short, verbatim statements are unique. The only source of this information is from the videotapes themselves. Plaintiff cannot possibly be expected to remember or recite, at a later time, exactly what he said in prolonged interviews such as those involved here."⁷⁸ Not surprisingly, the court ordered production of the outtakes for *in camera* review.⁷⁹

Production to the Parties

In *Kohn II*⁸⁰ the district court, in deciding whether to compel production to the parties, employed a three-pronged standard.⁸¹

74. The court did *not* decide whether defendants needed to make any additional showing to compel production of the statements at trial. *See id.* at 149.

75. *See supra* note 42.

76. *See Kohn I*, 853 F. Supp. at 149. In applying the *Cuthbertson* test, the district court noted that "[a]lthough this is not a criminal case, given the nature of the qualified privilege, we see no reason to apply a different standard in a civil action." *Id.* at 149 n.6. Facially, the court's statement shows attentiveness to First Amendment concerns. Given the ease with which the *in camera* review standard is met, the attentiveness is not substantive.

77. *Id.* at 150. The court found that the videotapes "could be used for impeachment purposes and would be admissible as admissions." *Id.*

78. *Id.*

79. *See id.*

80. *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 150 (E.D. Pa. 1994) (*Kohn II*).

81. *See id.* at 151. The court stated:

First, the movant must demonstrate that he has made an effort to obtain the information from other sources. *Second*, he must demonstrate that

The court previously found that the second prong, unavailability, already had been met when it made its *in camera* determination.⁸² The unavailability requirement swallowed the first prong—a good faith effort to find the information elsewhere. The court therefore needed only to inquire whether the information sought was crucial to the claim.⁸³ The court determined that the outtakes, in fact, were not crucial, finding that no material discrepancies existed between the interview statements and the deposition testimony.⁸⁴

Where the Law Leaves Us

Thus, at least in the Eastern District of Pennsylvania, the tests governing outtake production to judges and parties experienced considerable pruning.⁸⁵ For production *in camera*, a party

the only access to the information sought is through the journalist and her sources. *Finally*, the movant must persuade the court that the information sought is crucial to the claim.

Id. (quoting *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980)).

82. *See id.*

83. *See id.* at 152. Arguably, situations *could* exist in which the information would be available from other sources. For instance, a private (nonmedia) individual could film a public event. In *Russo v. Geagan*, 35 Fed. R. Serv. 2d 1403 (D. Mass. 1983), the plaintiffs alleged that while attending a KKK rally unidentified police officers assaulted them without justification. *See id.* at 1404. The rally was filmed by the news media and the court ordered production of the outtakes. *See id.* at 1407. The First Circuit uses a strict balancing analysis, *see id.* at 1406, so the Massachusetts court did not have to discuss explicitly whether the information was available elsewhere. Absent concrete evidence to the contrary, even under the three-pronged test, it seems highly unlikely that any court would require the seeking party to speak with every individual who *might* have filmed a public event.

84. *See Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 150, 152 (E.D. Pa. 1994) (*Kohn II*) ("In order to make this determination, we have read the pleadings and over 1,600 pages of plaintiff's deposition, reviewed numerous deposition exhibits, and watched the unabridged ABC, CBS, and NBC interviews.")

85. The Third Circuit's decisions model most of the pro-protection options available. As one commentator has noted, the "reporter's privilege has been most fully developed in the Third Circuit [which has also given] a strong reading of the Pennsylvania shield law." James C. Goodale et al., *Reporter's Privilege Cases*, in 2 COMMUNICATIONS LAW 1993 at 787 (Practicing Law Inst. ed., 1993). The Second Circuit "has provided substantial protection for reporters' First Amendment interests" as well. *Id.* at 782.

Although by no means conclusive, one comparison suggests that the Third Circuit at least sometimes can be more sympathetic to media concerns. In *Cuthbertson*, the district court found CBS in civil contempt and fined them one dollar per day.

simply must show that the outtakes are part of any relevant evidentiary matter.⁸⁶ The use of outtakes for impeachment purposes fulfills this standard,⁸⁷ therefore any videotape of any witness making a statement almost automatically will be available for *in camera* review, regardless of whether the footage would be admissible on the merits.⁸⁸ The Supreme Court is not likely to find an absolute privilege for any reporter work product, Justice Douglas's impassioned dissent in *Branzburg* notwithstanding.⁸⁹ However much one feels that judicial review of a reporter's work product intrudes into the editorial process, it is here to stay.

The test for production to parties consists of a single prong—whether the outtakes are crucial to the claim.⁹⁰ Because this question involves more substantive concerns, courts issue orders for production to parties less often than in the *in camera* review context.⁹¹ In some instances courts stretch to find innovative solutions in order to avoid requiring production.⁹² Even

See *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980). In contrast, in *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988), the district court found NBC in civil contempt for refusing to submit its outtakes and ordered them to pay a fine of \$500 per day. See *id.* at 1177.

86. The court in *Kohn I* dispensed with the "good faith" portion of the Rule 17(c) analysis. See *Doe v. Kohn, Nast & Graf, P.C.*, 853 F. Supp. 147, 149 n.6 (E.D. Pa. 1994) (*Kohn I*) (describing the court's interpretation of Rule 17(c)).

87. See *Cuthbertson*, 630 F.2d at 144. The footage at issue in *Cuthbertson* was admitted only for impeachment purposes. See *id.* at 148.

88. For example, in *LaRouche*, the court affirmed an order for *in camera* inspection of interview outtakes with a prospective key witness. See *LaRouche*, 841 F.2d at 1183; see also *United States v. Cutler*, 6 F.3d 67, 70 (2d Cir. 1993) (ordering *in camera* review); *United States v. Sanusi*, 813 F. Supp. 149, 151 (E.D.N.Y. 1992) (ordering *in camera* review); *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991) (ordering *in camera* review).

89. "My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment [presented by the three-pronged test]." *Branzburg v. Hayes*, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).

90. See *supra* notes 83-84 and accompanying text.

91. See, e.g., *United States v. Burke*, 700 F.2d 70, 78 & n.9 (2d Cir. 1983) (ordering discovery of outtakes for *in camera* inspection, but then finding the evidence to be cumulative and refusing production to the parties).

92. For instance, in *Bingham*, outtakes of an NBC interview with a key government witness were requested. See *Bingham*, 765 F. Supp. at 956. The court conducted an *in camera* review and found that inconsistent statements existed. See *id.* at

so, outtakes often are found to be relevant, crucial, and producible, perhaps to a greater extent than are other forms of work product. Two rationales supporting this argument are discernible throughout the cases.

"Unique bits of evidence"

First, the language in *Cuthbertson* and *Kohn* describing the intrinsic nature of the medium⁹³ does not stand alone—most of the cases dealing with outtakes include numerous such statements. For instance, in *LaRouche* the court ordered *in camera* production of almost two hours of interview outtakes involving a key government witness.⁹⁴ The court referred to the statements in *Cuthbertson*, noting that "[n]o other source (by definition) [was] available."⁹⁵ Additionally, the court found that the witness's "facial expressions might well be directly relevant to showing animus against defendants."⁹⁶ Video footage is the only medium about which this could ever be said, and the fact that the court took note of it is telling.⁹⁷ The same undercurrent animated *United States v. Sanusi*,⁹⁸ a case involving a Secret Service search of a defendant's home.⁹⁹ A CBS camera crew accompanied the agents at the search, filming the entire proce-

view and turned the entire manuscript over to the defendant. *See id.* at 959. The court then noted that if the witness were to make a statement at trial inconsistent with the transcript, it would allow the videotaped portion to be introduced. *See id.* "The court believes this procedure minimizes to the extent possible the intrusion on NBC's newsgathering privilege and acknowledges NBC's proprietary rights in the [outtakes] while according defense counsel the information they currently need to cross-examine Harris." *Id.* at 960.

93. *See supra* text accompanying notes 73 & 78.

94. *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1183 (1st Cir. 1988).

95. *Id.* at 1180.

96. *Id.*

97. The court in *Bingham* relied on the statements made in *Cuthbertson* and *LaRouche* in deciding that the interview outtakes at issue were relevant and crucial. *See Bingham*, 765 F. Supp. 958-59. The court made a transcript of the tapes rather than ordering that the actual tapes be produced, *see id.* at 959—an odd solution for evidence that "by [its] very nature . . . [is] unique." *Id.* at 959 (quoting *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980)). The court, however, also provided that actual footage could be used at trial after the witness testified, if it were deemed highly relevant. *See id.* at 959-60.

98. 813 F. Supp. 149 (E.D.N.Y. 1992).

99. *See id.* at 151.

panied the agents at the search, filming the entire procedure.¹⁰⁰ In issuing the discovery order, the court reasoned that the outtakes "would provide defendant a window through which he could demonstrate to the jury *with extraordinary clarity* the government's zeal to arrest him."¹⁰¹ This language is a more subtle variation on the ideas formulated in *Cuthbertson* and developed in *LaRouche*.¹⁰² State courts, as well, have used similar language when addressing discovery of outtakes under their constitutions or shield statutes.¹⁰³

The fact that some judges may consider outtakes to be a unique form of evidence is not *the* decisive factor in any decision to order production. The language of *Cuthbertson* and *LaRouche*, and the cases that rely upon them on this point, is not conclusive. It does demonstrate, however, that judges implicitly consider video evidence to be in a category all its own, a view that makes it more likely that outtakes will receive different treatment.¹⁰⁴

100. *See id.*

101. *Id.* at 159-60 (emphasis added). Another federal court, addressing this issue under state law, questioned whether "an 'ear-witness' account of [plaintiffs'] statements would, in any event, properly serve in the stead of a word-for-word sound recording." *Don King Prods., Inc. v. Douglas*, 131 F.R.D. 421, 426 (1990) (citing *Cuthbertson*, 630 F.2d at 148). *But see United States v. Lopez*, 14 Media. L. Rep. (BNA) 2203, 2205 (N.D. Ill. 1987) (finding that the presence of the party seeking production and her counsel at the interview adequately replaced outtakes of the interview).

102. *See supra* notes 64-79 and accompanying text.

103. For example, see *CBS, Inc. v. Jackson*, 578 So. 2d 698 (Fla. 1991) in which the court noted:

In the case under review, the sought-after discovery is the untelevised CBS videotapes of [defendant's] arrest. From a [F]irst [A]mendment privilege standpoint, we can perceive no significant difference in the examination of an electronic recording of an event and verbal testimony about the event. . . . We see no realistic threat of restraint or impingement on the news-gathering process . . . [even though] the media may be somewhat inconvenienced.

Id. at 700; *see also* *WBAL-TV Div., The Hearst Corp. v. Maryland*, 477 A.2d 776, 782 (Md. Ct. App. 1984) (finding production of the outtakes to be necessary because neither "the reporter [nor] her cameraman . . . is likely to remember the statements word for word").

104. For instance, in a related area, attorney work product cannot be discovered by the opposing party unless that party shows the inability "without undue hardship to obtain the substantial equivalent of the materials by other means." *FED. R. CIV. P.* 26(b)(3). One court has noted that because "tapes generally capture historical occur-

Of course, differing treatment based on the intrinsic nature of the medium is not necessarily offensive. The idea that outtakes are "unique bits of evidence"¹⁰⁵ is credible: video often is more inescapably realistic than print, and perhaps more vivid as well.¹⁰⁶ Moreover, video (and audio) recording is more technically accurate than written notes. Consequently, the courts' reliance on statements such as those in *Cuthbertson*¹⁰⁷ is only a first (and perhaps reasonable) step toward overt differentiation between broadcast and print work product.

An Underlying Judicial Bias?

The second thread running through the cases is more subtle. When the court in *Kohn I* ordered production of outtakes for *in camera* review, it noted that "[w]e do not believe that [review of outtakes] will inhibit the work of a free press, particularly because neither a confidential source *nor a reporter's notes or recollections are involved*."¹⁰⁸ The court granted outtakes second-class status and explicitly expressed a judicial bias favoring "traditional" written work product.¹⁰⁹ The court in *Kohn I* cited no authority for this statement, nor did it supply its own rationale. A close examination of other work product decisions, and other areas of media law, however, suggests that an inherent bias exists against nonprint media work product, and the nonprint media.

rences . . . and because the tapes are only available from the party who took them, most courts have held that this prong of Rule 26(b)(3) is automatically satisfied when a party seeks discovery of surveillance tapes." *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 151 n.9 (S.D. Ind. 1993). Of course, the party still must meet the "substantial need" prong of the Rule. *See id.* at 151.

105. *Cuthbertson*, 630 F.2d at 148.

106. For a discussion of biases against broadcast and the popularity of television, see *infra* notes 199-204 and accompanying text.

107. *See Cuthbertson*, 630 F.2d at 148; *supra* notes 66-73 and accompanying text.

108. *Doe v. Kohn Nast & Graf, P.C.*, 853 F. Supp. 147, 150 (E.D. Pa. 1994) (*Kohn I*) (emphasis added).

109. *See id.*

*What Bias, and Why?**Media Work Product Cases Beyond Kohn*

In *United States v. Sanusi*,¹¹⁰ the court considered quashing a subpoena duces tecum against CBS News.¹¹¹ The court analyzed the First Amendment newsgathering privilege and noted that "[t]here is no reason why rules for print reporters should not apply to other media."¹¹² The court, however, then completed the sentence, noting that such rules ought to be similarly applicable "particularly since television techniques allow the identities of informants to be blocked out electronically."¹¹³ This statement is puzzling. The court recognized that the privilege applies to both confidential sources and nonconfidential materials,¹¹⁴ but then turned the rationale on its head. The entire statement is not internally consistent unless the court meant that television footage should be more easily discoverable because of the technological protections of confidentiality that it provides. Ignoring the fact that nonconfidential materials also deserve protection, the court argues that television's technology undermines the policy rationales for protecting it like print work product.¹¹⁵

Krause v. Graco Children Products, Inc. provides another example of subtle bias.¹¹⁶ In *Krause*, the defendant subpoenaed NBC News for notes and outtakes relating to an interview conducted with plaintiffs and their attorneys on NBC's newsmagazine show *Dateline*.¹¹⁷ During oral argument, the defendant agreed to limit the scope of the subpoena to include only the

110. 813 F. Supp. 149 (E.D.N.Y. 1992).

111. See *id.* at 151. A crew from CBS, including a camera operator and a sound technician, had accompanied the Secret Service as they executed a search warrant. See *id.* CBS filmed for approximately 20 minutes. See *id.*

112. *Id.* at 153.

113. *Id.*

114. See *id.*

115. The Ninth Circuit has argued under a different aegis that work product gathered by new technology might deserve less protection, noting that "[w]e strongly disagree . . . that the hidden mechanical contrivances are 'indispensable tools' of newsgathering." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

116. 24 Media L. Rep. (BNA) 1028 (S.D.N.Y. 1995).

117. See *id.* at 1029.

outtakes.¹¹⁸ In refusing to quash the subpoena, the judge noted that he was "somewhat amazed to find that this matter was litigated as far as it has been. NBC has no interest in the outtakes and any statements contained therein were never considered confidential by those being interviewed. . . . This type of useless proceeding merely clogs the dockets of our courts."¹¹⁹ Granted, the court could have had the same attitude toward the written notes had they been at issue; the fact that the notes were omitted from consideration,¹²⁰ however, along with the court's cavalier treatment of NBC's First Amendment interests,¹²¹ suggests that the type of work product at stake colored the court's attitude.

In *United States v. Cutler*,¹²² several print reporters received subpoenas for their notes as well as for outtakes from CBS and Fox television.¹²³ In the course of pretrial hearings, the television stations advised the court that they would not disclose the outtakes to the parties, but would allow the judge to conduct an *in camera* review.¹²⁴ The print reporters made no such offer and stated that they would not produce anything unless ordered to do so by the Second Circuit Court of Appeals.¹²⁵ What is interesting is not the final outcome of the motion to quash,¹²⁶ but the fact that the print reporters did not consider *in camera* re-

118. See *id.* Unfortunately, the court did not explain why the defendant agreed to do so. Perhaps he felt his chances of obtaining the notes were slim, or perhaps they were not needed for trial. As too much information is generally better than not enough, the first choice is a logical guess.

119. *Id.* at 1030.

120. See *id.* at 1029.

121. See *id.* at 1030. This disregard for First Amendment interests is striking, considering the "general rule that the greatest protection is afforded the journalist's privilege when the press is subpoenaed in a civil litigation to which it is not a party." *Bradosky v. Volkswagen of Am., Inc.*, No. M8-85 (SWK), 1988 U.S. Dist. LEXIS 571 (S.D.N.Y. Jan. 12, 1988). See also *Baker v. F & F Inv.*, 470 F.2d 778, 785 (2d Cir. 1972) (holding that nondisclosure of the identity of a journalistic source is permissible); *United States ex rel Vuitton et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 670 (S.D.N.Y. 1985) (discussing a reporter's right not to disclose sources).

122. 6 F.3d 67 (2d Cir. 1993).

123. See *id.* at 68.

124. See *id.* at 70.

125. See *id.*

126. The judge ordered production of portions of the print and video work product material. See *id.* at 75.

view to be an option. *In camera* review often is touted as an ideal compromise in cases dealing with outtakes,¹²⁷ but it is not used to the same extent in cases involving print work product.¹²⁸ Of course, the distinctions drawn between the two media are not dispositive. They do suggest, however, that although print work product is a heavyweight—treated with an “all or none” attitude—video work product holds a middleweight status in at least one concrete area.

Superficially, according outtakes less respect has some intuitive appeal. A reporter's notes involve his trained eye and professional instincts, not indiscriminately registered information. Notes are a conduit into a reporter's thoughts and views. Outtakes, however, are recorded mechanically. They are not personal; they do not involve independent thought.

Why should this distinction matter? Editorial processes are editorial processes. As one journalist has noted, “[i]t's not a quantum leap from scribbling on a matchbook or writing in a notebook to the use of a tape recorder. It's all just notes, a collections of words or bleeps or electronic impulses that a reporter uses to do the job.”¹²⁹ Presumably, the same argument could be made for video, and in fact, video has more of the quality of written notes than does tape recording, which truly records indiscriminately. The cameraman exercises individual judgment regarding what to record. He frames his shots; he chooses the angles and the direction from which to show subjects; and he controls the lighting.¹³⁰ Perhaps judges fail to realize these subtleties and the bias is only against what they perceive the

127. See *supra* notes 48 & 63 and accompanying text.

128. See e.g., *United States v. King*, 911 F. Supp. 113, 114 n.1 (S.D.N.Y. 1995) (allowing a newspaper reporter whose notes had been subpoenaed to “read those notes to the Court, in order to aid the Court in its in camera review”); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 133 F.R.D. 531, 541-42 n.20 (S.D. Ind. 1990) (noting that although the court “would be empowered to conduct an in camera examination of the [documents at issue], such an examination is not required here”).

129. Jonathan Friendly, *Ethics of Taping: Debate over the Ground Rules*, N.Y. TIMES, June 25, 1983, at 48 (quoting Jan Mittelstadt, editor, *The People's Press*).

130. For instance, a cameraman for *NBC Nightly News* testified in a deposition for a defamation case that he considered himself an artist and carefully picked and chose his shots for maximum effect. (Tom Spahn, attorney with McGuire, Woods, Battle & Boothe, Lecture at the College of William and Mary (Feb. 15, 1996) (discussing defamation suits he has tried against the media)).

nature of the work product to be—i.e., a mechanical recording. In contrast, judges might be perfectly aware of the artistry involved in video recording¹³¹ and the bias could indicate negative perceptions held against the medium as a whole.

Broadcasting as a Medium

Criticism of television is common. One book on the subject has noted that “television news coverage of major issues tends to be fragmented and devoid of much thematic or substantive content”¹³² and that “networks no longer exempt the news divisions from ‘bottom-line’ considerations.”¹³³ Correspondent Bill Moyers described the economic constraints placed on news divisions, noting that “the center of gravity shifted from the standards and practices of the news business to show business” and that “[i]n meeting after meeting, ‘Entertainment Tonight’ was touted as the model—breezy, entertaining and undemanding.”¹³⁴ Hints of an “intellectual elite” prejudice against television exist, as does the perception that regular viewers of television are less discriminating or educated.¹³⁵ Possibly, the courts evince a similar skepticism toward the value of television in their treatment of the medium. Analogies to other areas of media law support this argument.

As former FCC Chairman Charles Ferris has noted, “limitations on broadcast content that would be unconstitutional if applied to the print press have been routinely upheld when applied to broadcasting.”¹³⁶ A variety of rationales explain the more rigorous regulation of television, including the scarcity of avail-

131. See *supra* note 130. The judge in that case would have been aware of the deposition testimony.

132. STEPHEN ANSOLABEHERE ET AL., *THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE* 4 (1993).

133. *Id.* at 214.

134. Jeffrey B. Abramson, *Four Criticisms of Press Ethics*, in *DEMOCRACY AND THE MASS MEDIA* 229, 260 (Judith Lichtenberg ed., 1990).

135. See ANSOLABEHERE, *supra* note 132, at 140-41. The perception is based in reality, as regular newspaper readers tend to be more educated than regular television viewers. See *id.* at 141.

136. Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 309 (1989).

able frequencies and the impact on children.¹³⁷ These rationales have been criticized by commentators and courts.¹³⁸ Scarcity is not a tenable argument in the area of cable television,¹³⁹ but content regulation in broadcasting continues¹⁴⁰ and bias against broadcast media appears in other areas.

A powerful example of judicial prejudice against the broadcast medium exists in the federal court system's overt hostility regarding television cameras in the courtroom. In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court guaranteed the right of the public and the press to attend criminal trials.¹⁴¹ The Court based its conclusion both on the long "history of . . . trials being presumptively open"¹⁴² and the "First Amendment right to 'receive information and ideas.'"¹⁴³ However, "[w]hen the press seeks to photograph or broadcast courtroom proceedings, the access question is treated quite differently."¹⁴⁴ In fact, the Supreme Court has "refused to interpret the First Amendment as providing a constitutional guarantee to televise courtroom proceedings."¹⁴⁵

In 1990, the United States Judicial Conference approved a pilot program authorizing two federal courts of appeals and six federal district courts to allow television coverage of trials.¹⁴⁶

137. See FRANKLIN & ANDERSON, *supra* note 46, at 661-64. Other asserted differences between print and broadcast media on which regulations are based are public ownership, intrusiveness, pervasiveness, inability to control access, power, vividness, emulation of violence, illusion of reality, involuntary appearances, and speed of reporting. See *id.*

138. See *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (rejecting the "power" justification); T.M. Scanlon, Jr., *Content Regulation Reconsidered*, in DEMOCRACY AND THE MASS MEDIA, *supra* note 134, at 331, 331-53 (arguing that restriction of broadcast expression on the basis of content is unacceptable).

139. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994).

140. See *FCC v. Pacifica Found.*, 438 U.S. 726, 735-38 (1978).

141. 448 U.S. 555 (1980).

142. *Id.* at 575.

143. *Id.* at 576 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

144. FRANKLIN & ANDERSON, *supra* note 46, at 612.

145. Kathleen M. Krygier, *The Thirteenth Juror: Electronic Media's Struggle To Enter State and Federal Courtrooms*, 3 COMM'LAW CONSPECTUS 71, 78 (1995).

146. See Linda Greenhouse, *U.S. Judges Vote Down TV in Courts*, N.Y. TIMES, Sept. 21, 1994, at A18. Chief Justice Rehnquist heads the Judicial Conference, which is composed of the chief judges of each circuit court of appeals and select judges

The Federal Judicial Center monitored the experiment and issued a generally favorable report on the project's first two years.¹⁴⁷ At the end of the three-year program, however, the Judicial Conference voted by a two-to-one margin against making the pilot project permanent.¹⁴⁸ The underlying rationale given for the decision was the "potentially negative effects upon jurors and witnesses."¹⁴⁹ In March 1996, the Judicial Conference reversed itself, announcing that each circuit could make its own determination as to whether to allow cameras at the appellate level.¹⁵⁰ At this time, two circuit courts of appeal permit television coverage and five circuit courts of appeal continue to ban cameras.¹⁵¹ The Judicial Conference also urged that cameras be banned from the federal district courts.¹⁵²

Decisions to ban television from the courtroom do not depend on situational realities. The judges who had participated in the Judicial Conference's experiment had discerned "few if any problems and had generally been pleasantly surprised by the experience."¹⁵³ Moreover, the federal courts had before them the example of the forty-seven states that now allow cameras in the courtroom, where the experience on the whole has been favorable.¹⁵⁴

A rational basis for a ban continues to elude commentators. One argument posits that ignoring the favorable results from the state courts "subtly suggests that there is a greater significance to the federal court system which warrants the mandatory

from district courts in each circuit. *See id.*

147. *See id.*

148. *See id.*

149. Krygier, *supra* note 144, at 81.

150. *See* James C. Goodale, *Cameras, the Courts and the Missing 'Simpson' Backlash*, N.Y.L.J., Aug. 2, 1996, at 3.

151. *See id.* The Second and Ninth Circuits approved television coverage. *See U.S. Appeals Court Set To Ban TV Cameras*, DALLAS MORNING NEWS, July 15, 1996, at A18, available in 1996 WL 10964988. The First, Fifth, Seventh, Tenth, and Eleventh Circuits have banned television coverage. *See id.*

152. *See* John Flynn Rooney, *U.S. Judges Here Vote To Codify Ban on Televising Trials*, CHI. DAILY L. BULL., June 18, 1996, at 1, available in LEXIS, News Library, Curnws File.

153. Greenhouse, *supra* note 146, at A18.

154. *See* Krygier, *supra* note 144, at 76.

closure."¹⁵⁵ In the same vein, another contention is that "reluctance to admit cameras stems also from [a] reluctance to change tradition."¹⁵⁶ These arguments must be persuasive to the courts continuing the ban, for "[w]ith the miniaturization of the broadcasting equipment and reasonable rules to preserve courtroom decorum, no valid reason exists for not allowing the television camera to substitute for the citizen in attendance during a trial."¹⁵⁷ On the other hand, a number of federal judges have expressed concerns regarding the "potential 'circus atmosphere' invited by electronic media access."¹⁵⁸

The courts proclaim their concern for the judicial process, but they protest too much. Arguments pointing to self-importance¹⁵⁹ and blind adherence to tradition strike a more resonant chord. The implication is that the medium of television is not proper for the sanctity of the federal courts, perhaps because it lacks seriousness or importance. Even the judges' arguments, seemingly a nod to the power of the medium, carry negative connotations—television is somehow not quite respectable enough, and at the very minimum promotes disrespect for the judicial process.¹⁶⁰ An anti-television bias, and arguably an unreasonable one, is evident.

Of course, the effect of the O.J. Simpson trial on this debate cannot be ignored, and it most likely confirmed many courts'

155. *Id.* at 82.

156. M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1487 n.111 (1989). Katsh commented further that this rationale is "very difficult to sustain in an electronic communications environment." *Id.*

157. David E. Kendall, Book Review, 37 VAND. L. REV. 647, 659 (1984) (reviewing J. EDWARD GERALD, *NEWS OF CRIME: COURTS AND PRESS IN CONFLICT* (1983)).

158. Laralyn M. Sasaki, Note, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. MICH. J.L. REFORM 769, 791 (1990). The author conducted a survey of the 738 sitting district court judges, and received 249 responses. *See id.* at 770 n.5. She noted that "many judges expressed this general concern." *Id.* at 791 n.99. The judges used such terms as "showboating," "hams," and "play-acting." *Id.* at 792.

159. *See supra* note 155 and accompanying text.

160. The states are not immune to such arguments. For instance, some politicians have reasoned that cameras in the courtroom would "transform trial lawyers into 'more Virginia hams than we've got in Smithfield.'" Mary Battiatia, *Virginia Senate Defeats Bill To Allow Some Courtroom TV Cameras*, WASH. POST, Mar. 2, 1984, at B1 (quoting an unidentified Virginia state senator during debate).

worst fears. The judge in the Susan Smith trial, for example, refused to allow cameras in his courtroom in part because of the negative perceptions that followed the Simpson trial.¹⁶¹ Commentators have noted, however, that Judge Lance Ito can specifically bear the blame for the excesses.¹⁶² One can also fault the networks' battle for ratings, a factor unique to that "celebrity" trial.¹⁶³ In any event, judicial prejudice against cameras in the courtroom existed long before the O.J. saga, even in the face of evidence that cameras in the courtroom have been a positive experience overall.

The same bias appears in cases dealing with the press's right of access to public institutions. In *Houchins v. KQED, Inc.*,¹⁶⁴ a California county jail instituted the policy of allowing press access only through regularly scheduled, limited public tours.¹⁶⁵ Reporters could take notes, but no one could bring cameras or tape recorders on the tours.¹⁶⁶ The Supreme Court upheld the regulation, finding that the press is not entitled to special access beyond that granted to the general public.¹⁶⁷ The majority in *Houchins* emphasized that it was concerned with the "freedom of the media to *communicate* information once it is obtained,"¹⁶⁸ not with the media's ability to "access [information] on demand."¹⁶⁹

The Court's holding completely disregarded its "support" for the communication of information.¹⁷⁰ Televising prison conditions has little to do with access; the journalists would not have seen more of the jail merely because they had held cameras. Indeed, televising prison conditions has everything to do with

161. See Michelle Millhollon, *Blind Justice? Media Coverage of Courtroom Trials*, QUILL, Oct. 1995, at 28, available in LEXIS, News Library, Curnews File.

162. See *Larry King Live* (CNN television broadcast, July 21, 1995), available in LEXIS News Library, Script File (questioning of Judge Ito's performance by numerous commentators).

163. See *Reliable Sources: The Media and the O.J. Simpson Trial* (CNN television broadcast, Oct. 1, 1995), available in LEXIS, News Library, Script File.

164. 438 U.S. 1 (1978).

165. See *id.* at 4.

166. See *id.* at 5.

167. See *id.* at 11-12.

168. *Id.* at 9.

169. *Id.*

170. See *supra* note 23.

communication, the very issue over which the Court supposedly expressed such concern.¹⁷¹ The Court based its rationale on principles applicable to journalists in general, but the practical result of its holding barred the broadcast media from prisons.¹⁷²

Ottakes are considered somehow less important or less respectable than are "real" notes.¹⁷³ Cases involving content regulation, as well as courtroom and prison access issues, attack the issue from the opposite direction, and appear to rely on a derogatory perception of the medium—that it is somehow less important, or less respectable, than "real" print journalism. Perhaps the broad aversion to the medium displays itself in the courts' treatment of work product. If so, this bias is misplaced on both levels.

HIDDEN CAMERAS—A WHOLE NEW VIEW?

In recent years, investigative journalism shows have overrun the television screen, leading one commentator to term them the "hottest trend in journalism."¹⁷⁴ *60 Minutes*, the first of the television newsmagazines, began airing in 1969.¹⁷⁵ Twenty years later, *20/20* and *48 Hours* had joined the fray, and by 1989 a total of seven investigative shows were storming the networks, with more on the way.¹⁷⁶ With the growth in the

171. Justice Stewart recognized this in his concurring opinion, stating that "if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment." *Houchins*, 438 U.S. at 17 (Stewart, J., concurring).

172. The Court agreed that the press acts as the "eyes and ears" of the public, *id.* at 8, but noted that the "public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions with camera equipment, and take moving and still pictures of inmates for broadcast purposes." *Id.* at 9.

173. See *supra* notes 108-129 and accompanying text.

174. Howard Kurtz, *Hidden Network Cameras: A Troubling Trend? Critics Complain of Deception as Dramatic Footage Yields High Ratings*, WASH. POST, Nov. 30, 1992, at A1.

175. See Russ W. Baker, *Truth, Lies, and Videotape: PrimeTime Live and the Hidden Camera*, COLUM. JOURNALISM REV., July-Aug. 1993, at 25.

176. See *id.* The shows are very popular. During the 1995-1996 television season, *60 Minutes* was ranked ninth in the Nielsen household rankings, *20/20* was ranked

ber of these shows has come a corresponding growth in the use of the hidden camera in investigative reporting. Although the shows do not use hidden cameras for every segment that they produce, producers do have an "insatiable hunger for the kind of documentation that looks good on screen. . . . Secretly recorded video, where the viewers see the action with their own eyes, may be the tastiest delicacy of all."¹⁷⁷ The use of hidden cameras for investigative reporting brings a different spin to the analysis of legal attitudes toward television. This section examines why the television editorial process, even where it involves hidden camera footage, should be protected in the same way as the print editorial process.

Why Protect the Editorial Process?

One of the cornerstones of press freedom is its ability to choose what to publish, and as the Court has noted, "[f]or better or worse, editing is what editors are for; . . . [t]hat editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion."¹⁷⁸ The Court acknowledged a (very) qualified reporter's privilege for the editorial process in *Herbert v. Lando*,¹⁷⁹ and the lower courts have expanded on the notion.¹⁸⁰

eleventh, *PrimeTime Live* was ranked eighteenth, and *Dateline* was ranked twenty-ninth. See Diane Werts, *Glued to the Tube, Making Sense of Ratings, Networks, Nielsens and the Nonsense That Kills Certain Shows: Final Rankings for 1995-96 TV Shows*, *NEWSDAY*, June 4, 1996, at B49.

177. Baker, *supra* note 175, at 26. One of the reasons that reporters do not always use hidden cameras may be cost. Because of the extra labor and research involved in undercover investigations, *PrimeTime Live* often spends twice as much on stories obtained as a result of hidden camera reporting as compared to regular pieces. See *id.*

178. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) (disagreeing with the court of appeals's finding that the speaker is the "best judge" of what the listening public ought to hear, and noting that "[a]ll journalistic tradition and experience is to the contrary").

179. 441 U.S. 153, 174 (1979) ("There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny.").

180. See, e.g., *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1306 (8th Cir. 1986) (recognizing that "[a]ccounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors"); *United States v. Marcos*, 17 Media L. Rep. (BNA) 2005, 2007 (S.D.N.Y.

Why is it so important to protect the editorial process? One of the more frequently invoked arguments is that compelling a reporter to produce his resource material will have a "chilling effect" on the dissemination of the news.¹⁸¹ As Justice Brennan argued in *Gertz v. Welch*,¹⁸² "[d]emocracy requires an informed and accurate press, and predecisional editorial communication[] contribute[s] to informed and accurate editorial judgments."¹⁸³

Other, more practical, rationales also exist. One court has recognized the possibility that disclosure of notes or outtakes could "prompt reporters or editors to purge from publication any information they fear would excite the interest of current or prospective litigants."¹⁸⁴ Another court has noted that requiring media organizations to respond to subpoenas would interfere with the productivity of journalists and other employees, as well as increasing expenditures for legal fees.¹⁸⁵ In litigation involving issues such as unfair competition or commercial libel, the media could be drawn into public disputes between commercial parties because they expressed an opinion favorable to one side.¹⁸⁶ The media could become a discovery tool—either as an arm of the government, or for private parties—and litigants could begin their discovery by subpoenaing and deposing report-

1990) (noting "the press[s] independence in its 'selection and choice of material for publication'" (citations omitted)).

181. See *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975) (agreeing that "requiring [a reporter to reveal his sources] necessarily has a 'chilling effect' upon his functioning as a reporter and upon the flow of information to the general public"); see also *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981) (noting that "[t]he right of a newspaper to determine for itself what it is to publish and how it is to fulfill its mandate of dissemination must be given great respect if an unfettered press is to exist and information is to flow unhindered from it to the public").

182. 418 U.S. 323 (1974).

183. William J. Brennan III, *Brennan on Brennan: The Justice's Views on the Structural Role of the First Amendment*, N.J. LAW., Aug.-Sept. 1994, at 8.

184. *Marcos*, 17 Media L. Rep. (BNA) at 2007.

185. See *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

186. See, e.g., *In re Consumers Union of United States, Inc.*, 495 F. Supp. 582, 586 (S.D.N.Y. 1980) ("[I]f [defendant] is susceptible to being drawn into private disputes between commercial or other institutional entities simply because [defendant] has expressed an opinion favorable to the dispute, in favor of one side or the other, a significant burden will be placed on [defendant's] coverage of provocative issues important to the public.").

ers covering the story.¹⁸⁷

The policies underlying protection of the editorial process are no less valid for broadcasting than for print, and protection plays an equally vital role in both media.¹⁸⁸ A bias against television, whatever its roots, is not a justification for greater interference with something as fundamental as the editorial process. Even something as seemingly innocuous as harsher treatment of work product goes to the heart of the editorial process. Television reporters sometimes do cross ethical and legal lines, but "[c]alculated risks of abuse are taken in order to preserve higher values,"¹⁸⁹ and other avenues exist by which to control media excesses.

Investigative Reporting—Work Product

An outtake is an outtake, it might be argued, but unfortunately for the investigative journalists, this may not be so. Given the judicial biases against even "traditional" video¹⁹⁰—where everyone is aware that he is on film, and the cameraman has actual control over the images—it is feasible that courts would grant hidden camera outtakes third-class status. After all, a court could equate a hidden camera secreted on a journalist or in a room with the cameras in the corner of a convenience store; both simply record what passes in front in them and no more.

Nevertheless, hidden camera outtakes should not be treated any differently than standard outtakes. By whatever means the footage is gathered, the policy driving the privilege—protection of the editorial process—remains unchanged. The test for discoverability should be the same for any type of footage. Judg-

187. See *Miller v. Mecklenburg County*, 602 F. Supp. 675, 679 (W.D.N.C. 1985).

188. Sandra Baron, the executive director of the Libel Defense Resource Center, has suggested that television work product may warrant even more protection than print work product. See Elizabeth Jensen, *ABC Fights Lawsuit by Food Lion Involving Newsgathering Methods*, WALL ST. J., Aug. 29, 1995, at B6. Baron noted that there are more suits based on news-gathering today than ever before, and that "[u]nlike print news organizations which rely on written notes, television organizations may be uniquely vulnerable if they have to turn over unaired videotape that shows 'all the glitches, the human aspects of reporting.'" *Id.* (quoting Sandra Baron).

189. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 125 (1973).

190. See *supra* notes 108-29 and accompanying text.

es should require that *all* outtakes be highly relevant, necessary or critical to the claim, and unobtainable elsewhere.¹⁹¹

Investigative Reporting—The Genre

Investigative reporting plays a fundamental role in the structure of our nation's government, perhaps more so than any other genre of the press. As the "fourth estate,"¹⁹² the press has special status arising from "the broad societal interest in a full and free flow of information to the public,"¹⁹³ and the idea of the press as monitor.¹⁹⁴ The Court long has acknowledged the responsibility of informing the public as one of the core purposes of the Free Press Clause,¹⁹⁵ and in *Estes v. Texas*,¹⁹⁶ it noted that the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among

191. See *supra* note 42. Of course, treating hidden camera outtakes as equal to standard outtakes still affords them less protection than that granted to print work product.

192. "Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact,—very momentous to us in these times." THOMAS CARLYLE, *CARLYLE'S LECTURES ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY* 188 (Archibald MacMechan ed., 1901).

193. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

194. Justice Stewart argued that the primary purpose of the Free Press Clause was "to create a fourth institution outside the Government as an additional check on the three official branches," and noted the opening words of the Massachusetts Free Press Clause, which was drafted by John Adams: "[t]he liberty of the press is essential to the security of the state." Stewart, *supra* note 22, at 634.

195. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (allowing newspaper to print an article because it concerned a "matter of public significance") (citation omitted); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (noting that "the free flow of commercial information [is] indispensable" in enabling the public to be well informed); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (finding that a statement printed in a newspaper was protected by the First Amendment because "[i]t communicated information . . . [concerning] matters of the highest public interest and concern"); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (finding a "paramount public interest in a free flow of information to the people concerning public officials"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse . . . sources is essential to the welfare of the public, that a free press is a condition of a full society.").

196. 381 U.S. 532 (1965).

public officers and employees and generally informing the citizenry of public events and occurrences."¹⁹⁷

Investigative news shows fulfill this role to the utmost. However one may feel about the methods used by such shows as *Hard Copy* and *PrimeTime Live*, it is impossible to ignore the power of the end result. For instance, *PrimeTime Live* has

pointed a hidden camera into the London hotel room of Malawi's president, documenting the shopping binge of the leader of one of the world's poorest countries. It has shown Wichita students selling guns, Peruvians defrauding adoption-minded Americans by selling them unexportable babies, doctors who repeatedly misread mammograms, and a quadriplegic patient crying out amid filthy conditions at a veterans hospital. . . . [and] followed members of Congress to a lobbyist-funded vacation in Florida.¹⁹⁸

Not only are the newsmagazines exposing stories that need to be in the public eye, they are exposing them to record numbers of people. Nearly ninety-nine percent of American households have a television,¹⁹⁹ and nearly eighty percent of the adult population relies solely on television for news information.²⁰⁰ Moreover, many Americans find television to be the most credible source of news, much more so than newspapers, radio, and magazines.²⁰¹ Regardless of commentators' feelings, television plays a vital role in educating a large majority of Americans.

Negative attitudes *do*, however, exist against the "tabloidization" of television news in general,²⁰² and there is a

197. *Id.* at 539.

198. Baker, *supra* note 176, at 26.

199. See ANSOLABEHERE, *supra* note 132, at 12.

200. See *id.* at 43. Only 20% of adults rely solely on print media for their news. See *id.* at 44.

201. See *id.*

202. As one commentator has noted:

Instead of beating their entertainment and propaganda competitors, many journalists are joining them. The increased competition spawned by the new technologies has led some traditional news purveyors to 'go tabloid'—increasing coverage of celebrity gossip, bizarre crime, and sex scandals to try to retain their mass audience. Television news and magazine programs, in particular, have loosened their standards and definitions of what makes news.

backlash against what is seen as a decrease in the quality of the more respected newsmagazines.²⁰³ Perhaps the quality of broadcast news *has* deteriorated, and perhaps "tabloid T.V." is to blame. Nevertheless, television should not be subject to more rigorous controls of its editorial process merely because it is television, or even bad television.

When Jerry Falwell sued *Hustler* magazine because of an offensive ad parody, the Supreme Court emphasized heavily the important role satirical cartoons have played in public and political debate.²⁰⁴ According to the Court, "the caricature of [Falwell] and his mother published in *Hustler* [was] at best a distant cousin of [political cartoons], and a poor relation at that."²⁰⁵ Nevertheless, the Court decided that it would be impossible to impose a "principled standard" that would "separate the one from the other."²⁰⁶

The argument flowing from this is not that the use of hidden cameras, or television cameras in general, should be protected by an absolute First Amendment privilege. The point is that all types of outtakes, as much as written notes, are the raw materials from which journalists work. The fact that the media—print and broadcast—differ is not a principled standard, and the courts should not interfere at greater lengths in television's editorial process because of an unwarranted *or* warranted bias against the medium.

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203. One television critic, commenting on the failing credibility of newsmagazines, noted that:

[T]he networks simply overloaded the airwaves with magazines, in the mistaken belief that the viewer appetite for news—or, more precisely, entertaining nonfiction stories—was bottomless. . . . [T]he competition and ratings pressure drove down the quality of journalism on the magazines. ABC, in particular, has been hit with a flurry of lawsuits, particularly over hidden-camera reporting.

Marc Gunther, *Prime-Time Blues: Magazine Shows Try To Regroup After a Bad Year*, WASH. POST, Sept. 17, 1995, at G7.

204. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988).

205. *Id.* at 55.

206. *Id.*

A FOCUS ON THE SUBSTANCE

The evidentiary tests regarding production of work product do not differ for print and broadcast, and should apply in the same degree to outtakes, including hidden-camera outtakes. Courts have raised concerns about issues particularly applicable to broadcasting, including the degree of intrusiveness, the power, and the reach of the medium.²⁰⁷ These concerns may be valid, especially so in hidden camera use, but de facto differentiation between print and broadcast on the work product level is not the solution.

The answer is to implement more rigorously the substantive checks that do exist. Suits such as the one filed by Food Lion now occur with greater frequency, and Food Lion's success at the trial level will undoubtedly encourage even more.²⁰⁸ Actions for invasion of privacy, trespass, and fraud all effectively address behavior peculiar to television.²⁰⁹ One commentator has even suggested the institution of a tort for intrusion in public places;²¹⁰ libel or infliction of emotional distress are possibilities as well. Rather than whittle away at the First Amendment privilege from the inside, the Court should openly confront egregious instances of media misbehavior.

Ideally, self-policing is the answer. The ethics of professional journalism should address these problems. For instance, a heated debate exists among journalists over the use of hidden cameras. Some professionals feel that, ethically, their use is inappropriate,²¹¹ while others consider hidden cameras to be an in-

207. See *supra* notes 143-48 and accompanying text.

208. See John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996) (describing recent cases concerning the press's exercise of its First Amendment power).

209. See *id.* at 1112.

210. See Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995) (proposing a redefinition of the tort of intrusion to allow recovery for highly offensive instances of public intrusion, including violations of the right of "public privacy").

211. Marvin Kalb, an investigative journalist who is now the director of Harvard University's Center on the Press, Politics, and Public Policy, has argued that "[i]nvestigative journalism doesn't give us the right to become investigative detectives. . . . I don't think we should be in the business of deceiving people." Laurence

valuable tool in exposing crime and wrongdoing.²¹² Out of this debate has developed a set of standards promulgated by the Society of Professional Journalists that supports the use of hidden cameras only when the issue is of profound importance and there are no other alternatives for obtaining the same information.²¹³ Unfortunately, reliance on ethics alone is not enough, as evidenced by ongoing instances of media misbehavior. Nevertheless, unlawful action by the broadcast media should be attacked directly, by the parties involved, rather than through discriminatory judicial interference with the editorial process.

Alison Lynn Tuley

Zuckerman, *Sticky Issues in Gumshoe Journalism: When Is It Right to Use New High-Tech Spying Devices?*, TIME, Aug. 8, 1988, at 72 (quoting Marvin Kalb).

212. Don Hewitt, the executive producer of *60 Minutes* justified the use of deception and hidden cameras, noting "[i]t's the small crime versus the greater good If you catch someone violating 'thou shalt not steal' by your 'thou shalt not lie,' that's a pretty good trade-off." Colman McCarthy, *Getting the Truth Untruthfully*, WASH. POST, Dec. 22, 1992, at D21 (quoting Don Hewitt).

213. See Baker, *supra* note 176, at 28. Further guidelines are given, including that the harm prevented must outweigh the harm caused by the act of deception. *Id.*