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VANITY AND VEXATION: SHIFTING THE FOCUS TO MEDIA CONDUCT

Jane E. Kirtley*

Lawsuits brought by corporations against news organizations during the last few years demonstrate that it is no longer sufficient for the press to get its facts straight. With some industries literally fighting for their lives, a new legal climate has encourage litigation that deflects bad publicity by shifting the focus away from the traditional issue of accuracy to a critical examination of the news media's newsgathering techniques. Concerns about the reaction of courts to unorthodox reporting methods may prompt news organizations to censor themselves, but the author argues that facing the threat of mega-verdicts or contempt citations should be regarded as simply a cost of doing business.

* * *

"Yet vanity inclines us to find faults anywhere rather than in ourselves."

Samuel Johnson, *The Idler* No. 70

INTRODUCTION

In early November 1995, CBS Inc. decided not to air a *60 Minutes* story that would have featured an interview with a tobacco executive who criticized the actions of his former employer, the Brown & Williamson Tobacco Corporation.¹ According to Don Hewitt, Executive Producer of *60 Minutes*, CBS lawyers were worried that the network would be sued for "something called tortious interference."²

The problem with the interview, according to the lawyers, was not its content, but the fact that the source had signed a confidentiality agreement with his former employer, and nevertheless had agreed to talk about the company with *60 Minutes* reporters.³ CBS lawyers' lack of confidence in

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¹ Howard Kurtz, "60 Minutes" Kills Piece on Tobacco Industry, WASH. POST, Nov. 10, 1995, at A3.

² Wade Lambert & Elizabeth Jensen, *Companies Turn to Novel Tactics to Thwart Negative News Stories*, WALL ST. J., Nov. 10, 1995, at B8.

³ Kurtz, *supra* note 1, at A3.

their ability to defend against a lawsuit based on a theory of tortious interference with contract shocked journalists both inside and outside the network.⁴ The decision to spike the story, apparently in the absence of a direct threat by the tobacco company, reflects a changing legal climate in which news organizations must spar with large corporations that try to prevent or deflect bad publicity by shifting the focus from their own conduct to the media's newsgathering practices.

In some cases, companies may seek restraining orders to prevent the dissemination of unflattering or embarrassing information. For the most part, such efforts have been unsuccessful. For example, in *Federal Beef Processors, Inc. v. CBS Inc.*,⁵ a meat-packing company persuaded a South Dakota state judge to order CBS not to broadcast on *48 Hours* a videotape shot inside its plant, alleging that the tape, depicting unsafe food handling practices, was obtained through deception and misdeeds. The order was overturned by Circuit Justice Harry A. Blackmun in time for the program to air as originally scheduled. Justice Blackmun observed that "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context."⁶

Nevertheless, just a few weeks before CBS dropped its tobacco story, a judge in *Procter & Gamble Co. v. Bankers Trust Co.*⁷ ordered *Business Week*, hours before it was going to press, not to publish information in the magazine's possession that was subject to a stipulated confidentiality order sealing pre-trial discovery documents in a civil case. *Business Week* failed to persuade an appeals court panel, or Circuit Justice John Paul Stevens,⁸ to overturn the restraining order in time for it to publish its story on schedule. Justice Stevens's refusal was prompted, at least in part, by a concern that "the manner in which petitioner came into possession of the information it seeks to publish may have a bearing on its right to do so."⁹

Despite the Sixth Circuit's subsequent repudiation of the *Business Week* restraining orders,¹⁰ it is impossible to appraise the *60 Minutes* incident without considering Justice Stevens's ominous observation that the right to

⁴ See, e.g., James C. Goodale, "60 Minutes" v. CBS and Vice Versa, N.Y. L.J., Dec. 1, 1995, at 3.

⁵ Civ. No. 94-590 (S.D. Cir. Ct. Feb. 7, 1994) (order granting temporary injunction), *motion for stay denied sub nom.* CBS Inc. v. Davis, No. 18637 (S.D. Feb. 8, 1994), *stay granted*, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994); see also *Federal Beef Processors, Inc. v. CBS Inc.*, 851 F. Supp. 1430, 1432 (S.D. 1994).

⁶ CBS Inc. v. Davis, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994).

⁷ 900 F. Supp. 186 (S.D. Ohio 1995), *vacated*, 78 F.3d 219 (6th Cir. 1996).

⁸ McGraw-Hill Cos. v. Procter & Gamble Co., 116 S. Ct. 6 (Stevens, Circuit Justice 1995).

⁹ *Id.* at 7.

¹⁰ Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996).

publish can be affected by the methods used to gather the news. In an era in which more and more news operations have turned to practices considered by some to be unethical or even illegal, CBS's decision suggested that even the most well-heeled media organizations are susceptible to a potent legal threat: the increasingly successful tactic by plaintiffs of scrutinizing the newsgathering techniques employed by the press. The assault on such media practices challenges important First Amendment principles, including the once nearly insurmountable presumption that prior restraints are unconstitutional,¹¹ in ways that were seemingly inconceivable just a few years ago. Given the current legal climate, it is no longer sufficient for reporters to concern themselves with simply getting the facts straight. They must also consider how judges and juries will evaluate their methods of gathering news.

This Article examines recent cases in which the traditional issues of accuracy and truth were eclipsed by attacks on the newsgathering techniques that produced indispensable information for each story. It suggests that the precursors for this state of affairs lies in the seminal defamation case of *New York Times Co. v. Sullivan*,¹² long regarded as the vehicle that revolutionized investigative reporting and commentary in the United States.

In addition, this Article will consider the broader implications of the *60 Minutes* incident, where CBS resorted to self-censorship of a truthful story rather than risk having to defend itself against a potential claim of interference with business relations based on how the story was obtained. In light of the responses to these and other threats, it is worth asking whether a media outlet today would risk contempt or other sanctions by publishing the contemporary equivalent of the purloined *Pentagon Papers*.

I. BACKGROUND

A. *The Pentagon Papers Case*

In *New York Times Co. v. United States*,¹³ better known as the *Pentagon Papers* case, six Supreme Court Justices reaffirmed the heavy presumption against prior restraints in a terse per curiam opinion issued just fifteen days after a federal judge in Manhattan imposed a temporary restraining order on publication of certain government documents by the *New York Times*.¹⁴ The Court overruled the Second Circuit's order prohibiting the

¹¹ See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

¹² 376 U.S. 254 (1964).

¹³ 403 U.S. 713 (1971).

¹⁴ *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y.), *remanded*,

New York Times from publishing classified documents leaked to it by Daniel Ellsberg, a former Pentagon official.¹⁵ In six concurring opinions, the Justices considered what circumstances, if any, would justify a prior restraint on the press.

First Amendment absolutists Justices Hugo L. Black and William O. Douglas clung to their position that the government could never enjoin publication by the press.¹⁶ Justice Black commended the *Times* for publishing documents "revealing the workings of government that led to the Vietnam War."¹⁷

Justice William J. Brennan, Jr., hearkening back to dicta in the Supreme Court's ruling in *Near v. Minnesota*,¹⁸ argued that a prior restraint could be upheld only if the government could prove that publication would "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."¹⁹ Justice Potter Stewart similarly contended that a prior restraint must be justified by a showing of "direct, immediate, and irreparable damage to our Nation or its people."²⁰

Justice Byron R. White opined that although publication of the *Pentagon Papers* would "work serious damage to the country," the government could not ban its publication, at least not in the absence of legislation by Congress.²¹ The better course, Justice White wrote, would be to pursue a conviction in subsequent criminal proceedings: "That the Government mistakenly chose to proceed by injunction does not mean that it could not proceed in another way."²² Justice Thurgood Marshall's concurring opinion observed that although it may be more convenient for the government to persuade a judge to prohibit publication, "convenience . . . do[es] not justify a basic departure from the principles of our system of government" in the absence of Congressional action.²³

In dissent, Chief Justice Warren Burger and Justices John Marshall Harlan and Harry A. Blackmun decried the quick pace of the litigation.

444 F.2d 544 (2d Cir.) (en banc), *rev'd*, 403 U.S. 713 (1971).

¹⁵ The documents were a classified, 47-volume Pentagon study entitled *History of U.S. Decision-Making Process on Viet Nam Policy*. See generally RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.03(2) (1994); John C. Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341 (1993).

¹⁶ *New York Times Co.*, 403 U.S. at 714-24 (Black, J., concurring).

¹⁷ *Id.* at 717 (Black, J., concurring).

¹⁸ 283 U.S. 697 (1931).

¹⁹ *New York Times Co.*, 403 U.S. at 726-27 (Brennan, J., concurring) (quoting *Near v. Minnesota*, 283 U.S. 697 (1931)).

²⁰ *Id.* at 730 (Stewart, J., concurring).

²¹ *Id.* at 732-33 (White, J., concurring).

²² *Id.* at 733 (White, J., concurring).

²³ *Id.* at 742-43 (Marshall, J., concurring).

Justice Harlan listed seven difficult issues that required more time to resolve,²⁴ including whether the newspaper was entitled to retain documents it knew to be stolen.²⁵

Chief Justice Burger emphasized this issue in his separate dissenting opinion, focusing on the manner in which the *Times* had obtained and handled the "purloined documents."²⁶ The Chief Justice expressed astonishment that the *Times* had not simply returned the documents to the government, stating:

To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times.²⁷

B. *Side Effects of New York Times Co. v. Sullivan*

Before the Court's landmark decision in *New York Times Co. v. Sullivan* a plaintiff could establish a *prima facie* case of defamation in most states simply by proving that a false publication had harmed her reputation.²⁸ *Sullivan* and its progeny recognized that the First Amendment required a departure from this sort of strict liability standard to discourage self-censorship by the press.²⁹ *Sullivan* forced public officials to prove that the publisher of libelous statements relating to official conduct acted with "actual malice"—knowledge of falsity or with reckless disregard of whether a statement was false.³⁰ Three years later, the Supreme Court extended *Sullivan's* "actual malice" standard to public figures.³¹

²⁴ *Id.* at 754-55 (Harlan, J., dissenting).

²⁵ *Id.* at 754 (Harlan, J., dissenting).

²⁶ *Id.* at 748-52 (Burger, C.J., dissenting).

²⁷ *Id.* at 751 (Burger, C.J., dissenting).

²⁸ SMOLLA, *supra* note 15, § 11.01(1)(a) n.2.

²⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

³⁰ *Id.* at 279-80.

³¹ See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967).

1. Herbert v. Lando

In *Herbert v. Lando*,³² the Supreme Court ruled that because public figures or officials must prove actual malice in order to prevail, they are entitled to inquire into the newsgathering and editorial processes involved in the stories at issue.³³ This is not only time-consuming and expensive for both sides,³⁴ but invites significant prying into activities that otherwise would be protected from outside scrutiny.³⁵

The Court of Appeals for the Second Circuit had found that a journalist's privilege was a logical safeguard necessary to ensure the right to disseminate information. The panel opinion stated:

The acquisition of newsworthy material stands at the other pole of the press's function. Freedom to cull information is logically antecedent and necessary to any effective exercise of the right to distribute news. Indeed, the latter prerogative cannot be given full meaning unless the former right is recognized.³⁶

In rejecting that privilege, the Supreme Court noted that the libel plaintiff needed to "focus on the conduct and state of mind of the defendant" in order to establish liability.³⁷ The Court stated that a long, intrusive, and

³² 441 U.S. 153 (1979).

³³ *Id.* at 175.

³⁴ As author Anthony Lewis recounts, the *Herbert* case went on for 12 years before being dismissed. During that time, CBS producer and defendant Barry Lando was deposed 28 times and had to turn over all his files and videotapes of all interviews conducted for the program. Plaintiff Anthony Herbert was compelled to turn over 12,000 pages of documents to CBS. The network spent in excess of \$4 million in attorneys' fees. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 202 (1991).

³⁵ As Randall Bezanson, law professor and proponent of a variety of libel "reform" measures, has suggested,

Because of *Sullivan*, libel suits involve intrusions into the editorial process that would be unthinkable in any other setting. Lawyers will be able to disgorge your life history, present it to the world in its blemished grandeur, search your notes, probe your mind, recreate your every judgment and doubt, and second-guess your every action. They will be able to divert your attention, occupy countless hours of your time, and threaten you with great personal and professional risk.

Randall Bezanson, *Case Study: Sullivan Opened the Door to Troublesome Meddling into How Journalists Do Their Jobs*, *NEWSINC.*, Apr. 1992, at 30.

³⁶ *Herbert v. Lando*, 568 F.2d 974, 977 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

³⁷ *Herbert*, 441 U.S. at 160.

expensive discovery period was the price the media had to pay in exchange for a higher burden of proof for libel plaintiffs.³⁸ The opinion by Justice Byron White observed: "If plaintiffs in consequence now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants."³⁹

2. *Discovering Sources After Sullivan*: Philip Morris Co. v. ABC/Capital Cities, Inc.

In any libel suit against the media, the most disturbing area for pretrial discovery involves plaintiffs' attempts to uncover the identity of reporters' confidential sources. *Herbert* did not directly address whether confidential sources would be subject to pretrial discovery. The Court's seminal decision on the reporter's privilege, *Branzburg v. Hayes*,⁴⁰ addressed compelled disclosure to a grand jury of confidential information pertaining to criminal activity, but it did not discuss disclosure in the libel context. Accordingly, journalists were forced to look to lower federal and state courts to determine what, if any, protection they would have in libel cases. Twenty-nine states and the District of Columbia have "shield" laws providing varying degrees of protection from forced disclosure of sources.⁴¹ Most states also provide some degree of privilege based on constitutional or common law.⁴²

³⁸ *Id.* at 176.

³⁹ *Id.*

⁴⁰ 408 U.S. 665 (1972).

⁴¹ See ALA. CODE § 12-21-142 (1995); ALASKA STAT. §§ 09.25.220-.360 (1994); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (1994); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1995); COLO. REV. STAT. §§ 13-90-119, 24-72.5-101 to .5-106 (1995); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1995); D.C. CODE ANN. §§ 16-4701 to -4704 (1995); GA. CODE ANN. § 24-9-30 (1995); ILL. ANN. STAT. ch. 735, paras. 5/8-901 to -903 (Smith-Hurd 1995); IND. CODE § 35-3-5-1 (Burns 1986 & Supp. 1995); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. §§ 45:1451-1459 (West 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1995); MICH. COMP. LAWS § 767.5a (1994); MINN. STAT. ANN. §§ 595.021-.025 (West 1995); MONT. CODE ANN. §§ 26-1-902 to -903 (1994); NEB. REV. STAT. §§ 20-144 to -147 (1991); NEV. REV. STAT. § 49.275 (1995); N.J. STAT. ANN. §§ 2A:84A-21 to -21.9, -29 (West 1994); N.M. Sup. Ct. R. 11-514 (1994); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992); N.D. CENT. CODE § 31-01-06.2 (1995); OHIO REV. CODE ANN. §§ 2739.04-.12 (Anderson 1995); OKLA. STAT. ANN. tit. 12, § 2506 (West 1995); OR. REV. STAT. §§ 44.510-.540 (1994); 42 PA. CONS. STAT. ANN. § 5942 (1995); R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (1994); S.C. CODE ANN. § 19-11-100 (Law. Co-op. 1993); TENN. CODE ANN. § 24-1-208 (1995).

⁴² See, e.g., *Norandal U.S.A. Inc. v. Local Union No. 7468*, 13 Media L. Rep. (BNA) 2167, 2168 (Ala. Cir. Ct. Sept. 11, 1986); *Coney v. Graham*, 699 P.2d 899, 902 (Alaska 1985); *Matra v. Superior Court*, 825 P.2d 971, 973-74 (Ariz. 1992); *Saxton v.*

The privilege, however, is often modified or held inapplicable in libel cases. Some statutes explicitly exclude defamation cases.⁴³ Even if the statute itself is silent, court decisions may limit its applicability. In construing its state shield law in 1990, for example, the Rhode Island Supreme Court ruled that when a libel plaintiff is required to show actual malice to prevail, a media defendant may not invoke the shield law to prevent that plaintiff from inquiring about confidential sources on whom the defendant relied.⁴⁴

Similarly, the United States Court of Appeals for the Ninth Circuit ruled that under California law, when a public figure sues a media defendant for

Arkansas Gazette Co., 569 S.W.2d 115, 116 (Ark. 1978); *New York Times Co. v. Superior Court*, 796 P.2d 811, 815 n.8 (Cal. 1990); *Henderson v. People*, 879 P.2d 383, 392-94 (Colo. 1994); *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005, 1007 n.4 (Conn. 1984); *Delaware v. Hall*, 16 Media L. Rep. (BNA) 1414, 1414-15 (Del. Mun. Ct. Mar. 8, 1989); *Tribune Co. v. Huffstetler*, 489 So. 2d 722, 723 (Fla. 1986); *Nobles v. State*, 411 S.E.2d 294, 293-99 (Ga. Ct. App. 1991); *In re Contempt of Wright*, 700 P.2d 40, 43-45 (Idaho 1985); *People v. Palacio*, 607 N.E.2d 1375 (Ill. Ct. App. 1993); *In re Stearns*, 12 Media L. Rep. (BNA) 1837, 1839-41 (Ind. Ct. App. Feb. 26, 1986); *Bell v. City of Des Moines*, 412 N.W.2d 585, 587-88 (Iowa 1987); *State v. Sandstrom*, 581 P.2d 812, 814-15 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *Chesapeake Publishing Corp. v. Williams*, 661 A.2d 1169 (Md. 1995); *Sinnott v. Boston Retirement Bd.*, 524 N.E.2d 100, 104 (Mass.), *cert. denied*, 488 U.S. 980 (1988); *Koniak v. Heritage Newspapers, Inc.* 476 N.W.2d 447, 449-50 (Mich. Ct. App. 1991); *CBS Inc. v. Campbell*, 645 S.W.2d 30, 31-33 (Mo. Ct. App. 1982); *Sible v. Lee Enters., Inc.*, 729 P.2d 1271, 1274 (Mont. 1986); *Las Vegas Sun, Inc. v. District Court*, 761 P.2d 849, 853-54 (Nev. 1988); *State v. Siel*, 444 A.2d 499, 502-03 (N.H. 1982); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220 (N.J. 1986); *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 277-81 (N.Y. 1988); *Clark v. Brown*, 393 S.E.2d 134 (N.C. Ct. App. 1990); *Taylor v. Miskovsky*, 640 P.2d 959, 961-62 (Okla. 1981); *Hass v. Port of Portland*, 829 P.2d 1008, 1011-12 (Or. Ct. App. 1992); *McMenamin v. Tartaglione*, 590 A.2d 802, 811 (Pa. Commw. Ct. 1991); *Hopewell v. Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254, 255-56 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va.), *cert. denied*, 419 U.S. 966 (1974); *Snedigar v. Hoddersen*, 786 P.2d 781, 783-84 (Wash. 1990); *State v. Henry*, 389 S.E.2d 188, 193-94 (W.Va. 1989); *Zelenka v. State*, 266 N.W.2d 279, 286-87 (Wis. 1978). *But see* *NBC v. Lake City Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990). For a fuller discussion of court-recognized testimonial privileges, see THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, CONFIDENTIAL SOURCES & INFORMATION: A PRACTICAL GUIDE FOR REPORTERS IN THE 50 STATES AND D.C. (1993).

⁴³ See, e.g., ILL. ANN. STAT. ch. 735 paras. 5/8-901 to -903 (Smith-Hurd 1995); LA. REV. STAT. ANN. §§ 45:1451-1459 (West 1992); MINN. STAT. ANN. §§ 595.021-.025 (West 1995).

⁴⁴ *Capuano v. Outlet Co.*, 579 A.2d 469, 476-77 (R.I. 1990). *But see* *Sprague v. Walter*, 543 A.2d 1078, 1083 (Pa. 1988) (ruling that a trial court may not draw an adverse inference from a media defendant's invocation of the shield law). In *Sprague*, however, Pennsylvania's supreme court further directed the trial judge to instruct the jury that citing the reporter's privilege does not establish the reliability of the source, nor the accuracy of the information received. *Id.* at 1086.

libel, the balance of interests weighs in favor of disclosure of confidential sources.⁴⁵ “[P]roving actual malice may be difficult without knowing the identity of the informant. Proof of malice may be supported by establishing that the informant is unreliable, or that no informant even exists. Without knowing the identity of the informant, such proof is difficult to establish.”⁴⁶

The practical effect of such rulings can be devastating. If a journalist refuses to reveal a confidential source, the court may hold her in contempt and order her to jail, although this sanction is seldom invoked by the courts in libel cases because it is perceived to be ineffective in compelling disclosure.⁴⁷ Another harsh alternative is the threat of entry of a default judgment against the news organization, but this option has been criticized on due process grounds.⁴⁸

A court may also adopt a presumption that there was no source for the information.⁴⁹ The most frequently chosen sanction by far, however, is the exclusion of evidence concerning the source or information provided by the source. Although this sanction generally limits the reporter’s testimony to a simple statement that information was gathered from a confidential source, the jury may still evaluate for itself the veracity of that testimony, and conclude either that a confidential source existed, or that there was no such source.⁵⁰

A classic example of the long, intrusive, and costly discovery process in libel suits against the media occurred during the course of Philip Morris’s \$10 billion libel suit against ABC for the network’s *Day One* broadcasts accusing the tobacco industry of “spiking” cigarettes with extraneous nicotine.⁵¹ ABC relied on a number of confidential sources to provide informa-

⁴⁵ *Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856 (9th Cir. 1993).

⁴⁶ *Id.* at 861.

⁴⁷ *See Downing v. Monitor Publishing Co.*, 415 A.2d 683 (N.H. 1980). The court said that sending a journalist to jail would not help the plaintiff prove his case. “Although we do not say that the contempt power should not be exercised, we do say that something more is required to protect the rights of a libel plaintiff.” *Id.* at 686.

⁴⁸ *See Georgia Communications Co. v. Horne*, 294 S.E.2d 725, 726 (Ga. Ct. App. 1982); *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 623 P.2d 103, 107-08 (Idaho 1980).

⁴⁹ *See DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981); *Downing*, 415 A.2d at 685.

⁵⁰ Among the many cases utilizing this option are *Desai v. Hersh*, 954 F.2d 1408 (7th Cir. 1992); *Laxalt v. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987); *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19 (D.D.C. 1986); *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983); *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. App. 1984); *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Court*, 761 P.2d 849 (Nev. 1988); *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 464 N.E.2d 967 (N.Y. 1984); *Sands v. News Am. Publishing Inc.*, 560 N.Y.S.2d 416 (App. Div. 1990); *Greenberg v. CBS, Inc.*, 419 N.Y.S.2d 988 (App. Div. 1979).

⁵¹ All of the opinions in *Philip Morris Co. v. ABC/Capital Cities, Inc.* are consoli-

tion during its investigation: a former R.J. Reynolds executive dubbed "Deep Cough," a former Philip Morris employee, and an undisclosed number of federal government employees.⁵² Invoking the reporter's privilege against disclosure of confidential sources, ABC refused to identify these sources or to supply any information that might reveal their identities.⁵³

Philip Morris filed a motion to compel disclosure of the confidential sources, arguing that the reporter's privilege did not apply in public figure defamation actions where the reporter is a party.⁵⁴ In the alternative, Philip Morris argued that any privilege that existed was qualified and must yield when balanced against a public figure plaintiff's burden of proving "actual malice."⁵⁵

At the same time, Philip Morris issued subpoenas duces tecum to American Express, Citibank, Sprint, Bell Atlantic, Cellular One, MCI, NYNEX, Hertz Corporation, AT&T, U.S. Air, United Airlines, Continental Airlines, and Adam's Mark Hotels, seeking the travel, credit and telephone records of ABC News employees.⁵⁶ In support of its motion to quash the subpoenas duces tecum, ABC argued that such discovery from disinterested non-parties is tantamount to asking the reporter directly because reporters must travel and use the telephone in order to gather news and foster the free flow of information.⁵⁷ Philip Morris replied that the privilege does not protect parties to a confidential relationship from compromise by a neutral third party with whom they knowingly shared information.⁵⁸ Philip Morris also maintained that the privilege is personal to the reporter and does not apply in third party situations.⁵⁹

In January 1995, the trial court ruled that a qualified reporter's privilege applied to these third party records, observing that "this type of discovery will deter sources from divulging information and deter reporters from gathering and publishing information."⁶⁰ Nevertheless, the court held that the

dated at 36 Va. Cir. 1 (Cir. Ct. 1994). See also Steve Weinberg, *Hardball Discovery*, A.B.A. J., Nov. 1995, at 66.

⁵² *Philip Morris*, 36 Va. Cir. at 12 (Jan. 26, 1995 opinion and order compelling disclosure of defendants' confidential sources), *vacated*, 36 Va. Cir. at 26 (July 11, 1995).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 4-5 (citing *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030 (D.C. Cir. 1978)).

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 7.

qualified privilege was outweighed by Philip Morris's need to discover evidence that might prove actual malice.⁶¹

After further briefing and arguments, the court vacated that order in July 1995. The court found that Philip Morris might be able to rely on other information to meet its burden of proof.⁶² For its part, ABC had demanded production of thousands of pages of documents that it believed necessary to prove the accuracy of the *Day One* broadcast.⁶³

In August 1995, ABC settled the libel lawsuits brought by Philip Morris and R.J. Reynolds by issuing a public apology for airing the spiking allegation.⁶⁴ The apology stated in part: "That was a mistake that was not deliberate on the part of ABC, but for which we accept responsibility and which requires correction."⁶⁵ At the same time, ABC noted that the parties continued to disagree about the focus of the *Day One* reports.⁶⁶ ABC also paid the tobacco companies' reportedly substantial attorneys' fees and legal costs.⁶⁷ Had the case gone to trial, Philip Morris undoubtedly would have attempted to maintain its focus on ABC's newsgathering practices. One of the last orders issued in the case would have permitted Philip Morris to present an expert witness on "journalistic standards."⁶⁸

⁶¹ *Id.*

⁶² *Id.* at 28 (July 11, 1995 order observing that "prudence suggests that Philip Morris go further to convince the court that its need for discovery of confidential sources is compelling").

⁶³ After three court orders, Philip Morris produced the documents on dark red paper in order to prevent photocopying. Judge Theodore J. Markow denied ABC's motion for sanctions against Philip Morris for producing documents that were difficult to read and that emitted a nauseating, chemical-like odor. *Id.* at 24-25 (May 5, 1995 order denying motion for sanctions).

⁶⁴ See John Schwartz, *ABC Issues Apology for Tobacco Report*, WASH. POST, Aug. 22, 1995, at A1, A5.

⁶⁵ *Id.*

⁶⁶ The apology stated:

ABC and Philip Morris continue to disagree about whether the principal focus of the reports was on the use of nicotine from outside sources. Philip Morris believes that this was the main thrust of the program. ABC believes that the principal focus of the report was whether cigarette companies use the reconstituted tobacco process to control the levels of nicotine in cigarettes in order to keep people smoking. Philip Morris categorically denies that it does so. ABC thinks the reports speak for themselves on this issue and is prepared to have the issue resolved elsewhere.

ABC, Philip Morris Settle 'Spiking' Case, NEWS MEDIA & THE LAW, Fall 1995, at 30.

⁶⁷ See Schwartz, *supra* note 64, at A1.

⁶⁸ See Weinberg, *supra* note 51, at 66.

3. *Creative Claims and Legal Theories*

Because corporations usually are found to be public figures, corporate plaintiffs carry a heavy burden of proof when suing the press for defamation.⁶⁹ As a result, corporate plaintiffs must become more creative in their legal strategies to deflect unfavorable press coverage. Instead of basing their complaints solely on defamation, they have added counts claiming invasion of privacy, trespass, and intentional infliction of emotional distress.⁷⁰ Corporate plaintiffs also have sued news organizations for tortious interference with business relations⁷¹ and unlawful disclosure of trade secrets.⁷² These latter claims traditionally appear in the context of unfair commercial competition, but increasingly they have become a means for corporate plaintiffs to attack and discourage unfavorable news reporting.

In 1979, the National Conference of Commissioners on Uniform State Laws approved the Uniform Trade Secrets Act, which has since been adopted by more than forty states and the District of Columbia.⁷³ The uniform act broadly defines "trade secrets" to include information that

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁷⁴

Trade secret laws developed from efforts by courts to establish rules for fair competition among businesses.⁷⁵ In 1974, the Supreme Court, in an opinion by Chief Justice Burger, identified three policy considerations underlying trade secrets law.⁷⁶ One purpose of trade secrets law is to maintain

⁶⁹ Even when not found to be a public figure, a plaintiff must demonstrate some fault on the defendant's part. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁷⁰ See, e.g., *Desnick v. ABC, Inc.*, 44 F.3d 1345 (7th Cir. 1995); *Food Lion, Inc. v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D.N.C. 1995).

⁷¹ See *infra* part III for discussion of tortious interference with business relations and the *60 Minutes* incident.

⁷² See *infra* part II.A for a discussion of *Federal Beef Processors, Inc. v. CBS Inc.*

⁷³ For citations to the state versions, see UNIF. TRADE SECRETS ACT, 14 U.L.A. 440 (1990 & Supp. 1995).

⁷⁴ *Id.* § 1(4).

⁷⁵ See generally JAMES H. POOLEY, *TRADE SECRETS: A GUIDE TO PROTECTING PROPRIETARY BUSINESS INFORMATION* (1989).

⁷⁶ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478-79 (1974) (holding that federal patent law does not preempt state laws protecting trade secrets).

standards of commercial ethics.⁷⁷ Trade secrets law, like patent law, is also intended to encourage invention.⁷⁸ Moreover, it discourages breaches of confidentiality, such as between employer and employee, licensor and licensee, as well as "other forms of industrial espionage."⁷⁹

Some corporations have attempted to stretch trade secrets law beyond these fundamental purposes to attack routine news reporting. For example, in July 1991, Procter & Gamble persuaded Cincinnati law enforcement officials to investigate the source of a news leak to the *Wall Street Journal*.⁸⁰ A month earlier, the *Journal* had reported that a Procter & Gamble official had resigned under pressure and that part of the company's food and beverage division might be sold.⁸¹ The article attributed the information to "current and former P&G officials."⁸²

Procter & Gamble alleged that the newspaper's sources had acted in violation of Ohio's trade secrets law.⁸³ At the request of the Hamilton County prosecutor's office, a grand jury issued four separate subpoenas requiring Cincinnati Bell to identify all the phone numbers in the Cincinnati and eastern Kentucky areas that had dialed the reporter's office, fax, or home telephone numbers in Pittsburgh between early March and mid-June.⁸⁴ In the end, the phone company obtained records of more than 800,000 phone lines and forty million long-distance calls.⁸⁵

The *Wall Street Journal* did not learn of the phone searches until early August, when a former Procter & Gamble manager called the newspaper and said he had been questioned by Cincinnati police, who told him they had records of his calls to the newspaper.⁸⁶ Dow Jones & Company, publisher of the *Journal*, immediately demanded that Cincinnati Bell refrain

⁷⁷ *Id.* at 481-82.

⁷⁸ *Id.*; see also *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 266 (1979) (noting that trade secrets law assures that the public is not deprived of the use of valuable, if not quite patentable inventions).

⁷⁹ *Kewanee Oil Co.*, 416 U.S. at 484; see also *Bonito Boats, Inc., v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Peabody v. City of Norfolk*, 98 Mass. 452 (1868); *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 120-21 (Ohio 1991) (upholding an order that enjoined an attorney from revealing confidential information concerning a previous employer).

⁸⁰ See, e.g., James S. Hirsch, *No Charges Are Expected in P&G Affair*, WALL ST. J., Aug. 14, 1991, at A3; James S. Hirsch, *Procter & Gamble Calls in the Law to Track News Leak*, WALL ST. J., Aug. 12, 1991, at A1, A4; *P&G Calls in the Law to Trace Leaks*, NEWS MEDIA & THE LAW, Fall 1991, at 2.

⁸¹ *P&G Calls in the Law to Trace Leaks*, *supra* note 80, at 2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

from providing any more records. Bell lawyers responded that all subpoenaed records already had been turned over to police.⁸⁷

By claiming violation of trade secrets law, Procter & Gamble had executed a successful end-run around the Pennsylvania⁸⁸ and Ohio⁸⁹ shield laws, which give reporters an absolute privilege against forced disclosure of confidential sources, without having to file a lawsuit directly against the *Wall Street Journal*.

C. Courts as Ethics Police: Masson and Cohen

Because *Herbert v. Lando* recognized that the "conduct and state of mind" of the press are relevant in libel cases,⁹⁰ the emphasis on proving fault inevitably led to consideration of whether a news organization's conduct in preparing and disseminating the story was reasonable or reckless. Such examination unfortunately provides judges and juries with the opportunity to sit as de facto ethics tribunals, deciding whether a journalist acted in a "professional" manner. Although Justice Stevens's majority opinion in *Harte-Hanks Communications, Inc. v. Connaughton*⁹¹ reiterated the Court's position that *Sullivan* requires a public figure plaintiff to prove more than simply an extreme departure from professional standards to demonstrate actual malice, convincing the jury that such deviations occurred and amounted to reckless disregard for the truth has become an increasingly important component of a plaintiff's case.

Connaughton itself provides a detailed blueprint for subjecting the newsgathering process to analysis, first by a jury, then by an appellate court engaged in the independent review required by *Bose Corp. v. Consumers Union of United States, Inc.*⁹² The *Connaughton* opinion painstakingly explores editorial decisions such as witnesses contacted, individuals not interviewed, tape recordings deliberately not listened to, competitive considerations that may have motivated a decision to publish with undue haste, as well as the credibility of newspaper employees' statements about their subjective belief in the truth of what was published. Ultimately, the Court ruled that the *Connaughton* jury reasonably could have concluded that the evidence demonstrated not only an extreme departure from professional standards, but the purposeful avoidance of the truth, or actual malice.⁹³

⁸⁷ *Id.*

⁸⁸ 42 PA. CONS. STAT. ANN. § 5942 (1995).

⁸⁹ OHIO REV. CODE ANN. §§ 2739.04-.12 (Anderson 1995).

⁹⁰ *Herbert v. Lando*, 441 U.S. 153, 160 (1979).

⁹¹ 491 U.S. 657 (1989).

⁹² 466 U.S. 485 (1984).

⁹³ *Connaughton*, 491 U.S. at 692-93.

Many different types of journalistic conduct could be scrutinized under the rubric of "actual malice." As a result, media defense lawyers now find themselves defending not only against inquiries about reliance on dubious sources, lack of corroboration for potentially defamatory information, or failure to review readily available documentation. They also must be prepared to justify the timing of a story that coincides with a ratings "sweeps" period, the use of colorful or sensational headlines or teasers, selective retention of notes and drafts, or questionable newsgathering techniques, such as the use of hidden microphones or cameras. None of these practices, taken alone, would constitute actual malice as a matter of law. Nevertheless, in the hands of competent plaintiff's counsel, a pointed recital of many routine newsroom practices can sufficiently inflame a jury or judge to support a hefty damages award or even a prior restraint.

Determining what constitutes accepted "professional standards" for journalists is problematic, to say the least. Reporters in the United States are not licensed, and do not subscribe to a universal code of ethics or professional conduct.⁹⁴ Codes of ethics that do exist, such as those promulgated by the Society of Professional Journalists, American Society of Newspaper Editors, or Radio-Television News Directors Association, are aspirational rather than mandatory in nature. Consequently, a cottage industry of self-described journalism "experts," many of whom are retired editors or senior academicians, fills the gap between these non-binding codes and the necessity for articulating precisely what "professional standards" may be.

The lack of consensus on professional standards disquiets many journalists, who are appalled by what they see as lack of any meaningful remedy for media "excesses."⁹⁵ One anomalous result was that many in the news media actually welcomed the Supreme Court's decision to review two ethics cases in its 1990 term: *Masson v. New Yorker Magazine*⁹⁶ and *Cohen v. Cowles Media Co.*⁹⁷

In *Masson*, author Janet Malcolm was accused of having fabricated quotations that she attributed to psychoanalyst Jeffrey Masson in a series of

⁹⁴ As the West Virginia Supreme Court observed:

[T]here is no objective, reasonable person standard that holds everyone alike to a uniform level of due diligence of reasonable care Unlike the media, the courts have strict and enforceable canons of ethics, and a litigant aggrieved by the abusive conduct of a judge is provided a forum where serious sanctions may be imposed upon the judge. This system may not be perfect, but it is better than anything the media have.

Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 573 (W.Va. 1992).

⁹⁵ See, e.g., *Clark Mollenhoff, 25 Years of Times v. Sullivan*, *QUILL*, Mar. 1989, at 27-31.

⁹⁶ 501 U.S. 496 (1991).

⁹⁷ 501 U.S. 663 (1991).

articles that appeared in the *New Yorker*.⁹⁸ Masson claimed that the unflattering comments defamed him.⁹⁹ Malcolm had kept audiotapes of only some of their conversations, and Masson disputed the accuracy of her transcribed notes of the interviews.¹⁰⁰ Accordingly, the Supreme Court was asked to decide whether tinkering with quotations, if proven, could constitute actual malice.¹⁰¹

The Court's decision in favor of Masson stopped short of imposing a requirement of verbatim accuracy on journalists. In an opinion by Justice Anthony M. Kennedy, the Court expressly held that even a deliberate alteration of words will not constitute actual malice as long as the meaning of the statement is not materially changed.¹⁰² Nevertheless, the ruling signaled a willingness on the part of the Court to dictate, however benignly, acceptable journalistic standards.¹⁰³

Similarly, in *Cohen*, the Court chose to review the propriety of a news organization publishing the name of a source in violation of an express promise given by its reporter to keep the informant's identity confidential.¹⁰⁴ In deciding that a source whose identity is revealed without permission is not precluded by the First Amendment from filing suit,¹⁰⁵ the Court transformed what previously had been regarded as a purely ethical and practical obligation into a legally enforceable one. Although *Cohen* was not a libel case, it clearly has implications beyond its facts. The ruling relied on the premise that news organizations enjoy no special immunity from laws of general applicability, including the laws of contract and of promissory estoppel.¹⁰⁶ Such reasoning could place reporters in the untenable position of being compelled to reveal a source during the course of a lawsuit, and then to be sued for breach of contract by the disgruntled source.

⁹⁸ *Masson*, 501 U.S. at 501.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 501-02.

¹⁰¹ Although Malcolm has never conceded inventing the quotations, many journalists immediately denounced her alleged conduct as unethical and promptly distanced themselves from her case. One ad hoc group calling itself "Journalists and Academics Concerned About Media Integrity" even filed an amicus curiae brief with the Supreme Court in favor of Jeffrey Masson. For a fuller discussion of the conflict in the industry over *Masson*, see Mike Hoyt, *Malcolm, Masson, and You*, COLUM. JOURNALISM REV., Mar./Apr. 1991, at 38-44.

¹⁰² *Id.*

¹⁰³ See, e.g., Debra Gersh, *Quote Alterations and Libel*, EDITOR & PUBLISHER, June 29, 1991, at 9 (quoting media attorney Bruce Sanford as stating that "[The decision] shows a great sensitivity to the daily newsroom problems of any journalist" . . . [Kennedy] shows a 'depth of knowledge and appreciation for [the] journalists' profession.'").

¹⁰⁴ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991).

¹⁰⁵ *Id.* at 670-72.

¹⁰⁶ *Id.*

Accordingly, by the 1988-90 terms, the Supreme Court had formally begun to do what the author of *Sullivan* had never contemplated: granting libel plaintiffs' lawyers virtually unlimited license to probe for evidence of actual malice. This would, in turn, allow judges to determine as a matter of law what proper journalistic conduct should be. What began as an attempt to give news organizations breathing space to support the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open,"¹⁰⁷ had turned into a license for the government to scrutinize and to regulate newsroom practices.

II. RECENT CASES

Plaintiffs and some courts have moved a giant step beyond *Herbert v. Lando* by attempting to make newsgathering practices the *primary* issue in litigation against media defendants. In recent cases such as *Federal Beef Processors, Inc. v. CBS Inc.* and *McGraw-Hill Cos. v. Procter & Gamble Co.*,¹⁰⁸ the issue of truth was secondary, or not even contested by the plaintiffs. Yet the corporate plaintiffs justified the issuance of restraining orders as punishment for "improper" newsgathering practices, a remedy that would have been unobtainable as part of a conventional libel suit.

A. *Calculated Misdeeds*: Federal Beef Processors, Inc. v. CBS Inc.

1. *Facts*

In December 1993, a Federal Beef Processors employee¹⁰⁹ wore a hidden camera during his shift at the company's slaughter and distribution facility in Rapid City, South Dakota.¹¹⁰ The employee filmed between five and six hours of processing operations in the boning room, where the carcasses of cattle are divided into various cuts and portions.¹¹¹ He provided the film free of charge to a reporter for the CBS News program 48

¹⁰⁷ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁰⁸ 116 S. Ct. 6 (Stevens, Circuit Justice 1995).

¹⁰⁹ Federal Beef claimed that the employee was Leendelle McClean and named him as a co-defendant with CBS. A federal district court later would hold that McClean, a South Dakota resident, was fraudulently joined to the action in an attempt to prevent CBS from removing the case from state court under diversity jurisdiction. See *Federal Beef Processors, Inc. v. CBS Inc.*, 851 F. Supp. 1430 (D.S.D. 1994). Another employee, Ray Lum, was found to have been the one that wore the hidden camera. *Id.* at 1435.

¹¹⁰ *CBS Inc. v. Davis*, 114 S. Ct. 912, 913 (Blackmun, Circuit Justice 1994).

¹¹¹ *Id.*

Hours.¹¹² The reporter subsequently contacted officials at Federal Beef and confronted them with the videotape.¹¹³

Federal Beef responded by filing suit against CBS and Leendelle McClean, the suspected employee,¹¹⁴ in Pennington County Circuit Court in Rapid City.¹¹⁵ Federal Beef's complaint listed, *inter alia*, claims of trespass, invasion of privacy, breach of duty of loyalty, and violation of the Uniform Trade Secrets Act.¹¹⁶ It also asked for an injunction to stop CBS from broadcasting the videotape.¹¹⁷

Even in cases where there are no First Amendment interests at stake, a court generally will not issue a preliminary injunction unless the petitioner has shown that it has no adequate remedy at law and will be irreparably injured if an injunction is denied; the threatened injury is immediate, certain, and substantial; the petitioner is likely to prevail on the merits; and the injunction will not have an injurious effect on the general public.¹¹⁸ After this showing has been made, the decision whether to grant a preliminary injunction "is within the sound discretion of the trial court."¹¹⁹ When a preliminary injunction takes the form of a prior restraint upon the press, however, the Supreme Court has held that the petitioner also must overcome a heavy presumption against such injunctions.¹²⁰

2. Trial Court's Findings and Order

In *Federal Beef Processors*, however, Pennington County, South Dakota Judge Jeff W. Davis ruled that the heavy presumption against prior restraints did not apply. Judge Davis granted a temporary injunction against CBS preventing the network from disseminating, disclosing, broadcasting, or otherwise revealing the videotapes.¹²¹ The accuracy of the news report that *48 Hours* had planned to air was never an issue in *Federal Beef Processors*. Instead, Judge Davis first focused on the negative economic effects that bad

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *supra* note 109.

¹¹⁵ The case was subsequently removed to federal court. See *Federal Beef Processors, Inc. v. CBS Inc.*, 858 F. Supp. 125 (D.S.D. 1994).

¹¹⁶ *Davis*, 114 S. Ct. at 913.

¹¹⁷ *Id.*

¹¹⁸ *Syntex Ophthalmics, Inc., v. Tsuetaki*, 701 F.2d 677, 681 (7th Cir. 1983).

¹¹⁹ *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940).

¹²⁰ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (discussed *supra* part I.A).

¹²¹ *Federal Beef Processors, Inc. v. CBS Inc.*, Civ. No. 94-590, slip op. at 8 (S.D. Cir. Ct. Feb. 7, 1994) (order granting temporary injunction), *motion for stay denied sub nom. CBS Inc. v. Davis*, No. 18637 (S.D. Feb. 8, 1994), *stay granted*, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994).

publicity would have on his home state: "public dissemination of information suggesting unsanitary practices or conditions at Federal could result in a significant portion of the national chains refusing to purchase beef processed at Federal and thereafter in the Federal plant's closure, for which there is no adequate remedy at law."¹²² The court, however, made no findings or conclusions as to whether unsanitary practices or conditions actually existed at the Federal Beef plant. CBS later submitted evidence that Federal Beef had received 600 U.S.D.A. citations in 1993 alone.¹²³

The court found that CBS had employed unethical newsgathering techniques that, if not illegal, were "at the very least . . . calculated misdeeds."¹²⁴ These "misdeeds" occurred when CBS "successfully induced" a Federal Beef employee to wear a hidden camera and recording devices to work.¹²⁵ The misdeeds were "calculated" because CBS "knew that wearing recording devices within Federal's plant was forbidden and, accordingly, McClean and CBS implemented measures to ensure that the recording devices were concealed."¹²⁶ These findings led Judge Davis to formulate the following rationale to support issuing an injunction:

The appropriate focal point of the present dispute is the manner by which the videotape was secured by CBS. The Court concludes that but for the calculated misdeeds of CBS, CBS would not be in possession of the videotape which is the subject of this action and as a result, conventional prior restraint analysis is inapposite.¹²⁷

Implicit in the court's conclusion is the premise that news organizations which engage in newsgathering practices deemed to be unethical are not entitled to First Amendment protection.¹²⁸ In fact, the court observed that "there exists significant legal authority which holds that there is no First Amendment interest protecting the news media from calculated misdeeds."¹²⁹ The court, however, did not cite any legal authority for that proposition.

¹²² *Id.* at 3. The opinion also noted that the Federal Beef plant in question employed 320 people, 120 independent truckers, and supported many local ranchers. *Id.* at 2.

¹²³ Brief for Petitioner at 22, *CBS Inc. v. Davis*, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994) (No. A-669); see also Eric Torbenson & Dan Daly, *USDA Filed 603 Reports on Federal Beef in '93*, RAPID CITY J., Feb. 10, 1994, at 1.

¹²⁴ *Federal Beef Processors*, Civ. No. 94-590, slip op. at 4.

¹²⁵ *Id.* at 3-4.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 7.

¹²⁸ See discussion of *Masson v. New Yorker Magazine* and *Cohen v. Cowles Media Co.*, *supra* part I.C.

¹²⁹ *Federal Beef Processors*, Civ. No. 94-590, slip op. at 7.

3. Justice Blackmun's Opinion

On February 8, 1994, the South Dakota Supreme Court denied CBS's application for a stay, instead setting a hearing date in late March, well after the scheduled broadcast date for that segment of *48 Hours*.¹³⁰ Following the South Dakota Supreme Court's action, CBS immediately appealed to Justice Blackmun in his capacity as Circuit Justice for the Eighth Circuit. Justice Blackmun issued an emergency stay within twenty-four hours.¹³¹

In its brief, Federal Beef argued that CBS's newsgathering techniques constituted not merely "calculated misdeeds," but criminal activity.¹³² Federal Beef contented that when CBS "induced" a Federal Beef employee to wear a hidden camera, it violated a host of laws.¹³³

Under South Dakota law it was clear that such activity violated statutes and case law proscribing invasion of privacy, protection of trade secrets, inducing the disloyalty and breach of trust of an employee, and in fact probably amounted to burglary in that it is the intentional entry into the premises for an illegal purpose.¹³⁴

Federal Beef framed the issue of the case as "whether the news media may utilize a tape obtained by unlawful means and thereafter claim a prior restraint to enjoy the fruits of its illegality."¹³⁵ Justice Blackmun, however, viewed the issue as whether extraordinary circumstances existed to justify the "most extraordinary remedy" of a prior restraint.¹³⁶ It was not enough that Federal Beef might suffer economic harm from bad publicity.¹³⁷ Justice Blackmun noted that "[e]ven if economic harm were sufficient in itself to justify a prior restraint . . . [the Court] previously ha[s] refused to rely on such speculative predictions as based on 'factors unknown and unknowable.'"¹³⁸

¹³⁰ CBS Inc. v. Davis, No. 18637 (S.D. Feb. 8, 1994) (order denying motion for stay), *stay granted*, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994).

¹³¹ CBS Inc. v. Davis, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994) (order granting motion for stay).

¹³² Brief for Respondent at 1-2, CBS Inc. v. Davis, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994) (No. A-669).

¹³³ *Id.* at 2.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ CBS Inc. v. Davis, 114 S. Ct. 912, 914-15 (Blackmun, Circuit Justice 1994).

¹³⁷ *Id.* at 915.

¹³⁸ *Id.* (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (Blackmun, Cir-

Justice Blackmun also rejected the trial court's conclusion that conventional First Amendment prior restraint doctrine was inapplicable because of CBS's "calculated misdeeds" in obtaining the videotape.¹³⁹ The remedy for such misdeeds could be had in subsequent civil or criminal proceedings, Justice Blackmun noted.¹⁴⁰ In response to Federal Beef's assertions that CBS's newsgathering techniques were not just misdeeds, but illegal, Justice Blackmun observed that there was no clear evidence of criminal activity by CBS.¹⁴¹ He added: "If CBS has breached its state law obligations, the First Amendment requires that Federal remedy its harms through a damages proceeding rather than through suppression of protected speech."¹⁴²

The same day that Justice Blackmun issued his emergency stay, *48 Hours* broadcast the footage taken inside the Federal Beef plant.¹⁴³ Judge Davis's preliminary injunction was vacated by a federal district court on May 3, 1994.¹⁴⁴

B. "Protecting Vanity" Through Prior Restraints: McGraw-Hill Cos. v. Procter & Gamble Co.

1. Facts

In early September 1995, a reporter at *Business Week*, the nation's largest circulation business magazine, obtained documents that had been sealed under a protective order in litigation between Procter & Gamble Company and Bankers Trust Company.¹⁴⁵ The sealed documents had been submitted in support of a motion by Procter & Gamble to amend its complaint against Bankers Trust by adding a RICO claim.

A *Business Week* reporter called a partner at the firm representing Bankers Trust and asked for a copy of the documents.¹⁴⁶ The magazine claimed that the reporter did not know the court had issued a protective order allowing the litigants to seal discovery documents that would reveal "trade secrets

cuit Justice 1975)).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 915-16.

¹⁴¹ *Id.* at 916.

¹⁴² *Id.*

¹⁴³ Dan Daly, "48 Hours" *Airs Federal Tape*, RAPID CITY J., Feb. 10, 1994, at 1.

¹⁴⁴ Federal Beef Processors, Inc. v. CBS Inc., 858 F. Supp. 125 (D.S.D. 1994), *vacating* Civ. No. 94-590 (S.D. Cir. Ct. Feb. 7, 1994).

¹⁴⁵ Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 186-88 (S.D. Ohio 1995), *vacated*, 78 F.3d 219 (6th Cir. 1996). The order was entered by the late U.S. District Judge Carl B. Rubin, who was then presiding over the case. Following the death of Judge Rubin, Judge John Feikens was designated to hear the case. *Id.*

¹⁴⁶ Keith H. Hammonds, *Business Week vs. The Judge*, BUS. WK., Oct. 16, 1995, at 114.

or other confidential research, development or commercial information," or information otherwise entitled to protection under Fed. R. Civ. P. 26.¹⁴⁷ Even though McGraw-Hill, the publisher of *Business Week*, was not a party to the stipulated protective order, Judge John Feikens would later find that the reporter's request for the documents was "unlawful."¹⁴⁸

After the reporter obtained the documents, she called representatives from both parties to question them about the potential addition of a RICO claim against Bankers Trust and the information in the supporting documents.¹⁴⁹ Upon learning that *Business Week* was about to publish an article on the litigation, the parties notified Judge Feikens that sealed documents had been leaked to the press and requested a restraining order.¹⁵⁰ Without first contacting *Business Week* or lawyers for its publisher, McGraw-Hill, Judge Feikens issued a restraining order prohibiting *Business Week* from "any disclosure of documents filed under seal."¹⁵¹ Lawyers for the parties faxed a copy of the order to counsel for McGraw-Hill that evening.¹⁵² After attempting to reach Judge Feikens and being rebuffed by a judge for the Sixth Circuit, *Business Week* decided to pull the story to avoid being held in contempt of court.¹⁵³

The next day McGraw-Hill sought expedited review from the U.S. Court of Appeals for the Sixth Circuit, maintaining constant contact with the clerk's office.¹⁵⁴ On September 19, a panel of the Sixth Circuit issued a two-page opinion declining to review the order, characterizing it as a temporary restraining order over which it had no jurisdiction.¹⁵⁵ The same day,

¹⁴⁷ *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 222 (6th Cir. 1996). The order allowed the litigants to designate discovery material as "confidential" without further order of the court, unless there was a dispute as to whether it fell within the order. *Id.* In that event, the material would be sealed until the court had the opportunity to resolve the dispute. *Id.* The order also provided that the parties could modify the terms of the protective order, upon mutual consent, without prior approval from the court. *Id.*

¹⁴⁸ *Procter & Gamble*, 900 F. Supp. at 193.

¹⁴⁹ *Id.* at 189.

¹⁵⁰ Hammonds, *supra* note 146, at 118.

¹⁵¹ *Procter & Gamble Co. v. Bankers Trust Co.*, No. C-1-94-735 (S.D. Ohio Sept. 13, 1995) (order prohibiting disclosure of documents under seal).

¹⁵² Hammonds, *supra* note 146, at 118.

¹⁵³ Counsel for McGraw-Hill called Judge Danny J. Boggs of the Sixth Circuit at home at 9 p.m. seeking emergency action. Judge Boggs declined to act, suggesting that more conventional procedural methods would be appropriate. Brief of Petitioners at 1-2, *McGraw-Hill Cos. v. Bankers Trust Co.*, 116 S. Ct. 6 (Stevens, Circuit Justice 1995) (No. A-276).

¹⁵⁴ See Letter from Richard M. Goehler, Counsel for the McGraw-Hill Cos. to the United States Court of Appeals for the Sixth Circuit (Sept. 15, 1995) (on file with author).

¹⁵⁵ *Procter & Gamble Co. v. Bankers Trust Co.*, No. 95-3996, slip op. at 2 (6th Cir.

McGraw-Hill sought a stay from Justice John Paul Stevens in his capacity as Circuit Justice for the Sixth Circuit.

2. Justice Stevens's Opinion

In an opinion issued on September 21, 1995, Justice Stevens acknowledged that the district court's order was entered without notice to McGraw-Hill and was not supported by the findings of fact required under Rule 65(b) of the Federal Rules of Civil Procedure.¹⁵⁶ Nevertheless, he denied the application for a stay, finding that McGraw-Hill should have filed a motion for a hearing with the district court instead of applying to the Sixth Circuit.¹⁵⁷ If McGraw-Hill had done so, the prior restraint would have been lifted by the district court, or, if not, would have become a final order that would have been directly appealable to the Sixth Circuit, which could overturn it.¹⁵⁸

Justice Stevens noted that there were unresolved issues of fact, such as the manner in which *Business Week* obtained the documents.¹⁵⁹ Significantly, Justice Stevens remarked that the newsgathering techniques employed by *Business Week* were an issue of fact that could affect the decision of the district court, stating 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."¹⁶⁰

This remark appears to be directly at odds with *CBS Inc. v. Davis*,¹⁶¹ where Justice Blackmun observed that "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context."¹⁶² Justice Stevens, however, did not attempt to distinguish it from Justice Blackmun's dictum, nor to support it by citation to other case law. In fact, Justice Stevens's opinion contained no citations to authority whatsoever. The obvious animus in Justice Stevens's opinion seems to spring from his displeasure with the procedural tactics adopted by McGraw-Hill's lawyers. Justice Stevens even took space in his two-page opinion to point out that the caption of McGraw-Hill's "hastily prepared document" mistakenly

Sept. 19, 1995).

¹⁵⁶ McGraw-Hill Cos., Inc. v. Procter & Gamble Co., 116 S. Ct. 6, 7 (Stevens, Circuit Justice 1995).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *CBS Inc. v. Davis*, 114 S. Ct. 912 (Blackmun, Circuit Justice 1994).

¹⁶² *Id.* at 914.

read: "On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit."¹⁶³

3. Judge Feikens's Opinions

Justice Stevens remanded the case to the district court.¹⁶⁴ Judge Feikens apparently viewed Justice Stevens's statement 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"¹⁶⁵ as a mandate to focus principally on *Business Week*'s reporting techniques. Two days of evidentiary hearings probed *Business Week*'s newsgathering process and the identity of its confidential sources. The judge permitted lawyers for Procter & Gamble and Bankers Trust to repeatedly press *Business Week* reporter Linda Himmelstein about the identity of her confidential source.¹⁶⁶ Ms. Himmelstein refused to answer, invoking the reporter's privilege under the Ohio Shield Law¹⁶⁷ and the First Amendment.¹⁶⁸ As the judge explained, "[t]he purpose of the[] hearings was to determine whether the protected, confidential information obtained by *Business Week* was acquired lawfully and independently of the discovery process."¹⁶⁹

On October 3, 1995, Judge Feikens issued two opinions, one finding that *Business Week* had unlawfully obtained the sealed documents and making permanent his restraining order prohibiting the magazine from publishing those copies of them,¹⁷⁰ and the other granting Procter & Gamble's motion to amend its complaint and releasing the documents into the public record for the first time.¹⁷¹ The anomalous result of Judge Feikens's two orders

¹⁶³ *McGraw-Hill*, 116 S. Ct. at 6.

¹⁶⁴ *Id.* at 7.

¹⁶⁵ *Id.*

¹⁶⁶ *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 189-90 (S.D. Ohio 1995).

¹⁶⁷ OHIO REV. CODE ANN. §§ 2739.04-.12 (Anderson 1995).

¹⁶⁸ U.S. CONST. amend. I. Ironically, the source Himmelstein was trying to protect was a partner at the firm representing Bankers Trust, the very party requesting that she reveal her source and asking the court to hold her in contempt. During the second day of the hearing, the source, Steven Holley, a partner at Sullivan & Cromwell, admitted under examination that he had breached the protective order but denied knowing before Sept. 21 that the papers had been sealed. *See Procter & Gamble*, 900 F. Supp. at 190-91.

¹⁶⁹ *Procter & Gamble*, 900 F. Supp. at 188 (order and opinion permanently denying McGraw-Hill the right to publish illegally obtained material covered by protective order).

¹⁷⁰ *Id.*

¹⁷¹ *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 193 (S.D. Ohio 1995) (order and opinion granting plaintiff's motion for leave to amend its complaint).

was that *Business Week* could publish its story with materials obtained from the now-public record, but technically remained barred from using the contaminated copies it had "unlawfully" received from its source.¹⁷²

Tracking the language used by Justice Stevens, Judge Feikens stated that "the manner in which *Business Week* came into possession of the protected discovery information has an important bearing on its right to publish it."¹⁷³ Justice Stevens, however, had focused on the parties' disagreement over the facts, and on his unwillingness to make a ruling without a hearing. It was in that context that Justice Stevens observed that the parties seem "to acknowledge 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."¹⁷⁴

Judge Feikens concluded that *Business Week* had, indeed, obtained the documents unlawfully, noting:

I cannot permit *Business Week* to snub its nose at court orders. *Business Week* was aware of the protective order in this case but nevertheless continued to pursue the sealed information. The integrity of a court and the entire judicial system requires that its orders be acknowledged and obeyed. . . . Thus, I conclude that *Business Week* may not use the confidential materials that it obtained unlawfully.¹⁷⁵

Judge Feikens's reliance on the Supreme Court's 1984 ruling in *Seattle Times Co. v. Rhinehart*¹⁷⁶ to justify his finding that *Business Week* was bound by a stipulated confidentiality order to which it was not a party was clearly misplaced because *Seattle Times* involved a restraint on a media party to a libel suit. His ruling, however, assumed that *Business Week* had acted unlawfully, and ignored Justice Blackmun's admonition in *Davis* that

¹⁷² *Business Week* finally was able to publish its full story on the Procter & Gamble/Bankers Trust litigation in mid-October. See Kelley Holland & Linda Himmelstein, *The Bankers Trust Tapes*, BUS. WK., Oct. 16, 1995, at 106.

¹⁷³ *Procter & Gamble*, 900 F. Supp. at 188 (order and opinion permanently denying McGraw-Hill the right to publish illegally obtained material covered by protective order).

¹⁷⁴ *McGraw-Hill Cos. v. Procter & Gamble Co.*, 116 S. Ct. 6, 7 (Stevens, Circuit Justice 1995) (emphasis added).

¹⁷⁵ *Procter & Gamble*, 900 F. Supp. at 193 (order and opinion permanently denying McGraw-Hill the right to publish illegally obtained material covered under protective order).

¹⁷⁶ 467 U.S. 20 (1984).

the First Amendment requires that the remedy for harmful publication be obtained in a subsequent criminal proceeding, rather than through suppression of protected speech.¹⁷⁷

In the separate opinion granting Procter & Gamble's motion to amend its complaint by adding RICO claims, Judge Feikens found that there was no substantial governmental interest in maintaining the seal on the documents.¹⁷⁸ The documents could now be viewed, along with the amended complaint, in the clerk's office. Judge Feikens added, "While the defendants have an interest personal to themselves not to have these materials revealed publicly, I cannot keep them from public view for such reasons."¹⁷⁹ Considering these conclusions, it is ironic, to say the least, that Judge Feikens continued to restrain *Business Week* from publishing its copies of the documents.

McGraw-Hill appealed Judge Feikens's restraining order to the Sixth Circuit. During arguments in December 1995, the panel expressed concern that the appeal might be moot in light of Judge Feikens's second order granting Procter & Gamble's amended complaint and dissolving the protective order on the documents.¹⁸⁰

4. *The Sixth Circuit's Panel Opinion*

On March 5, 1996, nearly three full months after the oral argument, a divided panel of the Sixth Circuit reversed and vacated Judge Feikens's restraining orders.¹⁸¹ The majority opinion, authored by Chief Judge Gilbert Merritt, not only categorically rejected the restraining orders as unconstitutional, but also rebuked the trial judges for entering and upholding the protective order that permitted sealing the documents in the first place.¹⁸²

First addressing the mootness issue, Judge Merritt held that Judge Feikens's order unsealing some of the documents did not render *Business Week's* appeal moot.¹⁸³ He observed that the original protective order still remained in place, and that parties to the underlying suit could be expected to want to keep further details about the case secret.¹⁸⁴ Accordingly, he

¹⁷⁷ See *CBS Inc. v. Davis*, 114 S. Ct. 912, 914 (Blackmun, Circuit Justice 1994).

¹⁷⁸ *Procter & Gamble*, 900 F. Supp. at 196-97.

¹⁷⁹ *Id.*

¹⁸⁰ At oral argument, Judge Boyce Martin Jr. referred to the *60 Minutes* incident, discussed *infra* part III, and quipped, "It seems like a U.S. District Judge has less authority than the tobacco companies' executives." *Judge Says Media Fears Tobacco Execs. More Than Courts*, REUTERS, Dec. 6, 1995, available in LEXIS, News Library, REUNA File.

¹⁸¹ *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

¹⁸² *Id.*

¹⁸³ *Id.* at 224.

¹⁸⁴ *Id.* at 223-24.

wrote, it could be expected that another dispute between McGraw-Hill and the parties could arise.¹⁸⁵

Moreover, Judge Merritt found that the unusual circumstances surrounding the imposition of prior restraints could create a situation in which it would be difficult for a news organization to obtain prompt appellate review.¹⁸⁶ "To say that a prior restraint for three weeks by TRO is moot after dissolution would mean that a district court may create an unreasonable three-week exception to the prior restraint rule."¹⁸⁷

Turning to the permanent injunction, Judge Merritt criticized the "strange combination" of orders that continued to prohibit *Business Week* from publishing its copies of the documents, even though the file was now unsealed.¹⁸⁸ "Such orders serve no purpose other than to make a statement or declaration of wrongdoing while seeking to prevent review under the mootness doctrine. It is a clever stratagem: Now you see it, now you don't."¹⁸⁹

On the merits, the majority opinion characterized the issue as "the classic case of prior restraint."¹⁹⁰ Not only had the court failed to consider First Amendment issues before granting the temporary restraining orders, the hearings it eventually held before issuing the permanent injunction "bore no relation to the right of *Business Week* to disseminate the information in its possession."¹⁹¹ Inquiries into how the magazine obtained the documents and its actual knowledge of the terms of the protective order "might be appropriate . . . for a contempt proceeding or a criminal prosecution,"¹⁹² but could not provide the basis for a prior restraint. Judge Merritt also summarily rejected Judge Feikens's reliance on *Seattle Times* as a justification for gagging *Business Week*, noting that *Seattle Times* addressed restrictions on parties to litigation, not on independent news media.¹⁹³

The Sixth Circuit accordingly reversed the permanent injunction as "patently invalid."¹⁹⁴ Judge Merritt also disposed of the temporary restraining orders, relying on the First Circuit's holding in *In re Providence Journal Co.*¹⁹⁵ Recognizing that the purpose of a TRO is to preserve the status quo, Judge Merritt quoted the First Circuit's observation that as far as free-

¹⁸⁵ *Id.* at 224.

¹⁸⁶ *Id.* at *3.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *4.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 225.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 820 F.2d 1342 (1st Cir.), *modified on reh'g*, 820 F.2d 1354 (1st Cir. 1986), *cert. granted and dismissed on other grounds*, 485 U.S. 693 (1988).

dom of the press is concerned, the status quo is to "publish news promptly that editors decide to publish."¹⁹⁶ For that reason, the granting of *ex parte* TROs is particularly inappropriate in cases involving the news media. Due process, as well as First Amendment considerations, require notice and a hearing to prevent impingement on free press rights.¹⁹⁷

Judge Merritt's harsh and unremitting condemnation of the trial court judge's conduct is softened by only one observation. Harkening back to concerns raised in the dissenting opinions in the *Pentagon Papers* case about the deleterious effects of judges acting with undue haste, Judge Merritt noted that "had the District Court not been rushed to judgment by both parties and had it engaged in the proper constitutional inquiry, the injunction would never have been issued."¹⁹⁸

Seemingly almost gratuitously, Judge Merritt's opinion included lengthy comment on the propriety of the underlying protective order signed by Judge Rubin. It is inappropriate, Judge Merritt wrote, for trial judges to abdicate their responsibilities to oversee discovery and determine which documents should be made public by allowing the parties to "adjudicate their own case based upon their own self-interest."¹⁹⁹ According to Judge Merritt, Judge Rubin's order violated long-established traditions valuing public access to court proceedings, as well Rule 26's requirement that sealing be permitted only when good cause is shown.²⁰⁰ "The increasing, routine use of protective orders in the courts only assures that challenges of this type will continue to occur," Judge Merritt admonished.²⁰¹ "The private litigants' interest in protecting their vanity or their commercial self-interest does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal, as the District Court ultimately and correctly decided."²⁰²

¹⁹⁶ *Procter & Gamble*, 78 F.3d at 226.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 225.

¹⁹⁹ *Id.* at 227.

²⁰⁰ *Id.* at 221.

²⁰¹ *Id.* at 223-24. Judge Merritt's observations are particularly significant in light of the ongoing debate surrounding a proposed amendment to Rule 26(c) to permit protective orders to be issued on stipulation of parties. See, e.g., Arthur Bryant, *A Sneak Attack on Open Justice*, NAT'L L.J., July 10, 1995, at A19; Arthur R. Miller, *Effective Rulemaking Damaged by Politics*, NAT'L L.J., May 1, 1995, at A21. The period for public comment on the proposed amendment closed on March 1, 1996, just four days before Judge Merritt's opinion issued. The Advisory Committee on Civil Rules of the Judicial Conference of the United States was slated to consider the proposed amendment at its spring 1996 meeting. See JUDICIAL CONFERENCE OF THE UNITED STATES, REQUEST FOR COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, CRIMINAL PROCEDURE AND EVIDENCE (1995).

²⁰² *Procter & Gamble*, 78 F.3d at 225.

C. Food Lion, Inc. v. Capital Cities/ABC, Inc.

Even if no preliminary injunction or temporary restraining order is sought, corporate plaintiffs have successfully brought claims that force the press to defend their newsgathering practices, rather than the accuracy of their news stories.²⁰³ In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,²⁰⁴ plaintiff Food Lion did not attempt to prevent ABC from broadcasting a report on allegedly unsanitary conditions at Food Lion grocery stores. Instead, its lawsuit successfully turned the focus of litigation away from the allegations of its own wrongdoing to the purported wrongdoing of ABC.

Food Lion is a multi-national food corporation that in the early 1990s was one of the fastest-growing grocery store chains in the country. In the fall of 1991, employees from Food Lion stores in the southeast United States reported abuses of food safety standards to the Government Accountability Project (GAP), a public interest group in Washington, D.C. that provides assistance to "whistleblowers."²⁰⁵ According to Food Lion, GAP suggested to an ABC News producer in December 1991 that Food Lion would be a good target for investigation.²⁰⁶ The network also received encouragement to pursue the story from the United Food & Commercial Workers International Union, which had been trying unsuccessfully to organize Food Lion employees for more than a decade.²⁰⁷

In 1992, ABC News began an undercover investigation of Food Lion's operational practices. ABC News employees sought employment with Food Lion by using false identities, false employment histories, and false reasons for seeking the jobs.²⁰⁸ According to Food Lion, ABC News utilized the mail and interstate wire facilities to create false identities and backgrounds, complete with supporting documentation.²⁰⁹ Once hired, they wore tiny video cameras and audio equipment to surreptitiously record the actions and statements of other Food Lion employees in areas not open to the pub-

²⁰³ See, e.g., *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402 (Minn. Ct. App. 1995) (reversing a summary judgment dismissal on a trespass claim involving use of a hidden camera to videotape material about the veterinary practice); *Philip Morris Co. v. ABC, Inc.* 36 Va. Cir. 1 (1994) (discussed *supra* part I.B). But see *Desnick v. ABC, Inc.*, 44 F.3d 1345 (7th Cir. 1995) (upholding dismissal of illegal wiretapping and fraud claims).

²⁰⁴ 887 F. Supp. 811 (M.D.N.C. 1995).

²⁰⁵ *GAP vs Goliath*, BRIDGING THE GAP (Gov't Accountability Project, Washington, D.C.), Fall/Winter 1995, at 7.

²⁰⁶ *Id.*

²⁰⁷ *Food Lion*, 887 F. Supp. at 814.

²⁰⁸ *Id.* at 813-16.

²⁰⁹ *Id.* at 817.

lic.²¹⁰ The ABC News employees then quit their jobs at Food Lion under false pretenses.²¹¹

The ABC News program *Prime Time Live* reviewed more than fifty hours of hidden camera footage taken at the Food Lion stores.²¹² In its November 6, 1992 broadcast, *Prime Time Live* aired five to six minutes of the footage.²¹³ The hidden camera videotape was used to support the allegations of unsanitary food practices made by several former Food Lion employees and the accompanying commentary by *Prime Time Live* anchor Diane Sawyer.²¹⁴ According to Food Lion, its grocery stores suffered a decline in retail sales and the value of its publicly traded securities decreased following the broadcast.²¹⁵

In September 1992, Food Lion filed claims against ABC in a federal district court in North Carolina for intentional misrepresentation, deceit, fraud, negligent supervision, trespass, breach of fiduciary duty, respondeat superior, civil conspiracy, violations of federal wiretapping laws, unfair and deceptive trade practices, and RICO violations.²¹⁶ Food Lion's forty-seven-page complaint did not include any claims for defamation. ABC moved to dismiss all of Food Lion's claims for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.²¹⁷ In addition, ABC sought dismissal of the entire complaint on First Amendment grounds.²¹⁸

In March 1995, the district court dismissed Food Lion's RICO and wiretapping claims, finding that ABC had not engaged in a pattern of racketeering activity and that the use of hidden cameras and microphones could not be equated with mail and wire fraud.²¹⁹ The court, however, allowed the company to press ahead with its claims for trespass, fraud, and civil conspiracy.²²⁰

On the trespass claim, the court held that even though the entry was consensual, under North Carolina law consent can be negated by a subse-

²¹⁰ *Id.* at 815-16.

²¹¹ *Id.* at 816.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 812-13.

²¹⁷ *Id.* at 813.

²¹⁸ *Id.* at 817.

²¹⁹ *Id.* at 817-20.

²²⁰ *Id.* at 820. The court deferred ruling on the motion to dismiss as to claims for negligent supervision, respondeat superior liability, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices. *Id.* at 813.

quent wrongful act in abuse of the authority to enter.²²¹ The court found that Food Lion would be entitled to relief on this claim if it successfully proved that ABC had engaged in wrongful conduct, such as fraud.²²²

In upholding Food Lion's right to pursue the fraud, trespass, and civil conspiracy claims, the court rejected ABC's argument that the claims should be dismissed on First Amendment grounds. Citing the Supreme Court's holding in *Cohen v. Cowles Media Co.*, the court noted that the First Amendment does not protect the press when it violates generally applicable criminal or civil laws while engaging in newsgathering activities.²²³ The court, however, refused to allow Food Lion to seek compensation based on its claims for injury to its reputation, citing the Supreme Court's decision in *Hustler Magazine, Inc. v. Falwell*.²²⁴ The trial judge stated: "Food Lion may not . . . under the guise of some other claim, recover publication damages for injury to its reputation without establishing the defamation requirements of actual malice and falsity."²²⁵

III. THE CHILLING EFFECT OF "TORTIOUS INTERFERENCE" ON THE MEDIA: CBS PULLS 60 MINUTES INTERVIEW

A. Facts

In early November 1995, CBS decided not to broadcast a taped interview between correspondent Mike Wallace and Dr. Jeffrey Wigand, former vice president in charge of research at the Brown & Williamson Tobacco Corporation that was scheduled to air on *60 Minutes*.²²⁶ Wigand, who would have appeared in silhouette to hide his identity, alleged in the interview that Brown & Williamson had thwarted plans to develop safer cigarettes and altered documents to delete references to the project.²²⁷

Network lawyers were concerned that Brown & Williamson would sue CBS, but not for defamation. The perceived legal threat was tortious interference with contractual relations, under which CBS theoretically could be liable for inducing Wigand to violate a 1993 confidentiality agreement be-

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 821-22 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)). *Cohen* is discussed *supra* part I.C.

²²⁴ 485 U.S. 46 (1988).

²²⁵ *Food Lion*, 887 F. Supp. at 824. In July 1995, Food Lion amended its complaint to include claims for copyright infringement. See, e.g., Marc Gunther, *Food Lion, ABC in Tape Tug of War*, WASH. POST, Aug. 30, 1995, at D1; Elizabeth Jensen, *ABC Aggressively Contests Suit Over Newsgathering*, WALL ST. J., Aug. 29, 1995, at B6.

²²⁶ Kurtz, *supra* note 1, at A3.

²²⁷ Suein L. Hwang, *The Executive Who Told Tobacco's Secrets*, WALL ST. J., Nov. 28, 1995, at B1.

tween him and his former employer.²²⁸ Although Brown & Williamson's willingness to sue the news media was well known, it never had prevailed in an action against the press based on such a legal theory.²²⁹

Amid criticism of CBS's decision, new details emerged in an article in the *Wall Street Journal*: CBS had paid the source \$12,000 as a consultant fee for his help on a previous *60 Minutes* story, promised to indemnify him against any libel action resulting from the broadcast of the interview, and promised not to air the interview without his permission, which he never granted.²³⁰ The CBS lawyers believed that these factors would be evidence that CBS had interfered with the confidentiality agreement between Wigand and Brown & Williamson.²³¹

On November 17, part of a transcript of the aborted interview was published in the *New York Daily News*, and Wigand was identified as the *60 Minutes* source.²³² Brown & Williamson sent a letter to CBS warning that it would hold CBS legally responsible for any libel contained in the transcript.²³³ On November 21, Brown & Williamson filed a complaint against Wigand in Jefferson Circuit Court in Louisville, Kentucky.²³⁴ The complaint included claims for, *inter alia*, theft, fraud, and breach of contract. Brown & Williamson persuaded Judge William Knopf²³⁵ to issue a temporary restraining order prohibiting Wigand from further violating his confidentiality agreement with the company.²³⁶

In Mississippi, a chancery court judge²³⁷ rejected Brown & Williamson's motion for a protective order to prohibit Wigand from being deposed in a lawsuit by the State of Mississippi against tobacco companies to recoup health care expenses paid by the state in treating smoking-related illnesses.²³⁸ On November 29, despite the Kentucky order, Wigand appeared at a deposition in that lawsuit and testified before lawyers for the U.S. Justice Department, who were investigating possible antitrust violations

²²⁸ Lambert & Jensen, *supra* note 2, at B8.

²²⁹ *Id.*

²³⁰ Alix M. Freedman et al., *Tort TV: CBS Legal Guarantees to '60 Minutes' Source Muddy Tobacco Story*, WALL ST. J., Nov. 16, 1995, at A1.

²³¹ *Id.*

²³² See, e.g., Bill Carter, *Dispute Erupts at "60 Minutes" over Canceling of Interview*, N.Y. TIMES, Nov. 18, 1995, at A10; Howard Kurtz, *Details of Unaired Tobacco Story Emerge*, WASH. POST, Nov. 18, 1995, at A3.

²³³ See Carter, *supra* note 232; Kurtz, *supra* note 232.

²³⁴ Suein L. Hwang, *Brown & Williamson Sues Ex-Executive over Information Leaks to "60 Minutes"*, WALL ST. J., Nov. 22, 1995, at A3.

²³⁵ Judge Steven Mershon now presides over the case.

²³⁶ Hwang, *supra* note 234, at A3.

²³⁷ Judge William H. Myers of the Jackson County Chancery Court.

²³⁸ Suein L. Hwang, *Legal Pincers Close on Ex-Tobacco Aide*, WALL ST. J., Nov. 29, 1995, at B6.

by tobacco companies.²³⁹ The transcripts from Wigand's Mississippi testimony were sealed by court order.²⁴⁰ In mid-December, Wigand testified in Washington, D.C. and New York City before federal grand juries that were investigating possible criminal violations by tobacco executives.²⁴¹

B. Did 60 Minutes "Tortiously Interfere" with a Valid Contract?

1. Overview of the Tort

Claims for tortious interference with contractual relations usually arise in the context of unfair commercial competition. Tortious interference, as with the law of trade secrets, evolved from court decisions that attempted to maintain standards of commercial ethics. The *Restatement (Second) of Torts* defines the tort as:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.²⁴²

Judge Richard Posner has more succinctly defined the tort as when "one person persuades another to break a contract with a third."²⁴³

2. Applicability of the First Amendment

In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court held that the same First Amendment protections that apply to defamation also apply to claims against the media for intentional infliction of emotional distress.²⁴⁴ Consistent with *Falwell*, courts have held that plaintiffs may not assert

²³⁹ Barnaby J. Feder, *Former Tobacco Official Begins Giving Deposition*, N.Y. TIMES, Nov. 30, 1995, at A20.

²⁴⁰ *Id.*; see also Barnaby J. Feder, *6 News Groups Seek to Lift Seal on Testimony in Tobacco Case*, N.Y. TIMES, Dec. 5, 1995, at A23.

²⁴¹ Barnaby J. Feder, *Former Tobacco Executive to Begin Telling Secrets to Grand Jury*, N.Y. TIMES, Dec. 13, 1995, at A21. Wigand was ordered by Judge Steven Mereshon to meet with Brown & Williamson lawyers in Louisville prior to testifying before the grand juries. *Id.*

²⁴² RESTATEMENT (SECOND) OF TORTS § 766 (1977).

²⁴³ *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983).

²⁴⁴ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

claims for tortious interference in an attempt to make an end-run around constitutional libel law.²⁴⁵

In a case in which Brown & Williamson actually sued CBS for tortious interference, the Court of Appeals for the Seventh Circuit stated:

Any libel of a corporation can be made to resemble in a general way this archetypal wrongful-interference case, for the libel will probably cause some of the corporation's customers to cease doing business with it; and whether this involves an actual breaking of contracts or merely a withdrawal of prospective business would make no difference under the modern law of wrongful interference. But this approach would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations with which the law of defamation—presumably to some purpose—is hedged about.²⁴⁶

The Ninth Circuit reached similar conclusions in *Unelko Corp. v. Rooney*,²⁴⁷ in which Unelko sued Andy Rooney and CBS for defamation, product disparagement, and tortious interference with business relations. The claims were based on Rooney's comments on *60 Minutes* that Unelko's product, Rain-X, "didn't work."²⁴⁸ The Ninth Circuit found that Rooney's comment was an objectively verifiable statement of fact, but dismissed the claim because Unelko had failed to show that the statement was false in substance.²⁴⁹ Because the defamation claim failed, the court held that the claims for product disparagement and tortious interference also necessarily failed. "These claims . . . are subject to the same [F]irst [A]mendment requirements that govern actions for defamation."²⁵⁰

²⁴⁵ See, e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (holding that where plaintiff failed to show falsity, a claim for tortious interference with business relations was properly dismissed along with defamation claim), *cert. denied*, 499 U.S. 961 (1991); *Redco Corp. v. CBS Inc.*, 758 F.2d 970 (3rd Cir. 1985) (finding that a statement of opinion that was not actionable as libel is also improper for interference with contractual relations), *cert. denied*, 474 U.S. 843 (1985); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356 (D. Colo. 1987) (same), *aff'd*, 876 F.2d 108 (10th Cir. 1989); see also *Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330 (Pa. Super. Ct. 1991) (applying statute of limitations for libel to claim for tortious interference with contractual relations).

²⁴⁶ *Brown & Williamson*, 713 F.2d at 273-74.

²⁴⁷ 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

²⁴⁸ *Id.* at 1051.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1058.

Thus, if Brown & Williamson had sued CBS on a claim of tortious interference for the *60 Minutes* interview with Wigand, CBS seemingly could have asserted First Amendment defenses. Perhaps one concern of CBS's lawyers in its Brown & Williamson affair was that a tortious interference claim filed alone—instead of in conjunction with a claim for defamation—would be treated as existing independently, and thus not subject to First Amendment principles.

Newsgathering, however, is an activity protected under the First Amendment.²⁵¹ When a reporter uses routine, or even unorthodox, newsgathering techniques to pursue a story of public interest and concern, those activities are covered by the First Amendment. A court would be likely to find that CBS's First Amendment rights outweigh the alleged harm that their actions produced in inducing Wigand to disclose truthful information relevant to public health and safety.²⁵²

3. *Liability Under the Tort*

Some commentators have argued that CBS could not be liable for tortious interference with Wigand's contract even if the First Amendment were disregarded.²⁵³ During the course of litigation, however, the network would have faced close scrutiny of its newsgathering procedures.

The *Restatement (Second) of Torts* lists seven factors to be considered in determining liability:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other party with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.²⁵⁴

²⁵¹ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

²⁵² In fact, a New York County trial court reached that very conclusion when it dismissed a case in which *The Jane Whitney Show* was sued for tortious interference, but not for defamation, for interviewing the plaintiff's ex-wife in violation of a confidentiality agreement. *Huggins v. Whitney*, 24 Media L. Rptr. (BNA) 1088 (N.Y. Super. Ct. Aug. 28, 1995).

²⁵³ See, e.g. Goodale, *supra* note 4, at 3.

²⁵⁴ RESTATEMENT (SECOND) OF TORTS § 767 (1977). These factors were applied in *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983).

Any evaluation of CBS's conduct in the context of the tort would certainly include an examination of its newsgathering techniques. According to the *Wall Street Journal*, CBS paid the source \$12,000 as a consultant fee for Wigand's help on a previous *60 Minutes* story, promised to indemnify him against any libel action resulting from the segment, and promised not to air the interview without his permission.²⁵⁵ CBS lawyers reportedly considered these facts to be so unfavorable that they advised spiking the interview with Wigand.²⁵⁶ If this is true, then a major motivation for the lawyers' advice may have been the desire to avoid extensive and intrusive discovery of the program's newsgathering techniques, which would almost certainly have included a demand for disclosure of the identity of Wigand and other *60 Minutes* confidential sources.²⁵⁷

Other *Restatement* factors, however, weigh in favor of CBS. News organizations are unlikely to have the intent or motive necessary to be liable for tortious interference.²⁵⁸ As a news program, *60 Minutes*'s investigations are conducted for the purpose of presenting newsworthy stories of public interest. If Brown & Williamson had sued CBS, a court could have held, as the Massachusetts Supreme Judicial Court did in *Dulgarian v. Stone*²⁵⁹—a case which involved a claim for interference with business relations—that “the plaintiffs could not establish that the defendants’ conduct arose from improper motives or involved improper means.”²⁶⁰

Dulgarian involved a three-part investigative report by WBZ-TV, broadcast in May 1989 entitled “Highway Robbery?”. The report focused on a potential conflict of interest between local automobile repair shops and automobile insurance companies.²⁶¹ One segment showed employees at Richard Dulgarian's body repair shop conducting drive-in appraisal services for the Allstate Insurance Company.²⁶² Dulgarian sued the television station for defamation, interference with business relations, and injurious falsehood.²⁶³ After examining the facts, the court stated:

²⁵⁵ Freedman et al., *supra* note 230, at A1.

²⁵⁶ *Id.*

²⁵⁷ Notably, CBS's decision came on the heels of ABC's announcement of its settlement with Philip Morris, where ABC had been subjected to an exhaustive discovery into its newsgathering techniques, including the identity of its confidential sources. See discussion of *Philip Morris v. ABC/Capital Cities, Inc.*, *supra* part I.B.2.

²⁵⁸ See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983); *Crinkley v. Dow Jones & Co.*, 385 N.E.2d 714 (Ill. App. Ct. 1978); *Dulgarian v. Stone*, 652 N.E.2d 603 (Mass. 1995).

²⁵⁹ 652 N.E.2d 603 (Mass. 1995).

²⁶⁰ *Id.* at 609.

²⁶¹ *Id.* at 605.

²⁶² *Id.*

²⁶³ *Id.*

There is no indication that the report was broadcast for any reason other than the reporting on an issue of public concern. There is no indication that the conversation with Allstate personnel was improper or carried on for any purpose other than journalism.²⁶⁴

Under the *Restatement* analysis, the interests of Brown & Williamson in preventing its former employee from disclosing truthful information and the private interests of CBS would be balanced against societal interests.²⁶⁵ CBS could argue that societal interests favored the broadcast of the Wigand interview because it involved an issue of public concern. As First Amendment attorney James Goodale commented:

Once the court is required to determine whether the publication of the embargoed facts is in the public interest, the case is over. This is as it should be. Employers should not be able to punish the press for publishing the truthful message of a whistleblower.²⁶⁶

Brown & Williamson would also have difficulty proving that *60 Minutes* was the proximate cause of Wigand's breach of the confidentiality agreement. The fee that Wigand had been paid was for consultation work on an earlier project.²⁶⁷ Wigand, who by all accounts had become disillusioned with the tobacco industry, might have breached the confidentiality agreement in any event.

Finally, the *Restatement* requires consideration of "the relations between the parties."²⁶⁸ The tort of tortious interference, as discussed above, evolved in the context of unfair commercial competition. CBS and Brown & Williamson are not competitors in the tobacco industry.²⁶⁹ As Goodale observed, "[c]onsideration of this factor emphasizes the roots of the tort and

²⁶⁴ *Id.* at 609.

²⁶⁵ RESTATEMENT (SECOND) OF TORTS § 767 (c)-(e) (1977).

²⁶⁶ Goodale, *supra* note 4, at 3.

²⁶⁷ Freedman et al., *supra* note 230, at A1.

²⁶⁸ RESTATEMENT (SECOND) OF TORTS § 767 (g) (1977).

²⁶⁹ CBS's then-parent company, Loews Corporation, owned one of Brown & Williamson's competitors, Lorillard, Inc. Lorillard purchased six cigarette brands from Brown & Williamson in November 1995, just as the facts of the *60 Minutes* case came to light. See John Schwartz, *CBS Parent Buys 6 Cigarette Brands*, WASH. POST, Dec. 3, 1995, at A26.

underscores the awkwardness of applying it in the context of news gathering.²⁷⁰

CONCLUSION

Although no one would suggest that otherwise illegal conduct by news organizations is automatically insulated from punishment by simple invocation of the First Amendment, routine newsgathering techniques always have been considered to be protected.²⁷¹ Simply asking a source a question is not criminal conduct,²⁷² the initial opinions in the *Business Week* case notwithstanding.²⁷³ Yet if such routine reporting techniques can justify imposition of a permanent restraining order, what might be the sanction for more unorthodox actions, such as compensating sources, misrepresenting one's identity, or using hidden cameras?

Applying the *Restatement* test, it appears that CBS would have prevailed on the merits in a suit claiming tortious interference with a contract. The claim, however, would have placed the focus of litigation on the newsgathering practices of *60 Minutes*. Even though the accuracy of the report, including Wigand's allegations, probably would not be the central issue, the examination into the "conduct and state of mind" of the journalists involved would be as rigorous as in any libel suit. Apparently CBS was not comfortable with that prospect.

In addition, CBS could have anticipated a hard-fought and drawn-out battle over the identity of its confidential sources. At the time of the decision to spike the interview, Wigand's identity had not been revealed. CBS lawyers may have considered the relentless pressure to compromise confidential sources placed on news organizations, as well as the success of corporate plaintiffs in ferreting the sources out by other means, in making their recommendations to their client.²⁷⁴ The *60 Minutes* incident unfortunately

²⁷⁰ Goodale, *supra* note 4, at 3.

²⁷¹ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (observing that "without some protection for seeking out the news, freedom of the press could be eviscerated").

²⁷² *But see United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), *cert. denied*, 507 U.S. 1003 (1993). In *McAusland*, two marketing executives were convicted of fraud and conversion or unauthorized conveyance of government property when they asked for and obtained information about procurements in contravention of federal acquisition regulations. *Id.*

²⁷³ Judge Merritt's March 5, 1996 opinion for the Sixth Circuit characterized *Business Week's* conduct as "standard journalistic protocol." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224 (6th Cir. 1996).

²⁷⁴ On February 28, 1996, a New York trial court judge refused to force several *60 Minutes* and CBS employees, including Mike Wallace and Morley Safer, to give depositions or to turn over audio and video recordings to Brown & Williamson in connection with the company's suit against Jeffrey Wigand. Judge Robert Lippman stated that he

demonstrates that even financially powerful news organizations can be vulnerable to self-censorship when the way in which a reporter acquired information is called into question.

Only twenty-five years ago, the *New York Times* successfully fought the restraining order that prohibited it from publishing the *Pentagon Papers*. Before the order issued, its longtime law firm, Lord, Day & Lord, had withdrawn from representation when the newspaper vowed to continue publication of leaked classified documents in defiance of a telegram from Attorney General John Mitchell asking the *Times* to desist on grounds of national security. The lawyers believed that the newspaper might face prosecution under federal espionage statutes.²⁷⁵

Risking post-publication sanctions, however, is not the same as defying a court order. Notwithstanding its decision to continue to publish the *Pentagon Papers* after receiving Mitchell's telegram, the *New York Times* obeyed the temporary restraining order issued June 16, 1971 by federal Judge Murray I. Gurfein.²⁷⁶ Nearly a quarter of a century later, when *Business Week* chose to obey the gag order issued by Judge Feikens, editor Stephen Shepard justified his action, distinguishing it from CBS's conduct in the *60 Minutes* case and invoking the *Times*'s legacy:

CBS censored itself, wrongly in my view, by not going ahead with its planned reporting on the tobacco industry. It was not under any court order, lawsuit or even the threat of a lawsuit

The *Business Week* case is totally different. We were ordered by a Federal district judge not to print a story containing information from documents sealed by his court. We obeyed the court order (we are not above the law) and immediately challenged it

Our strategy was the same as followed by . . . The New York Times . . . in 1971.²⁷⁷

wanted to safeguard "a viable free press," and that enforcing such subpoenas against non-party journalists would result in "enormous depletions of time and resources as well as seriously impede their ability to obtain material from confidential sources." *CBS News Wins Judge's Ruling in Tobacco Suit*, WASH. POST, Feb. 29, 1996, at A12 (quoting Judge Robert Lippman). A Brown & Williamson lawyer said the company would appeal. *Id.*

²⁷⁵ See SANFORD UNGAR, *THE PAPERS & THE PAPERS* 121-23 (1989).

²⁷⁶ The *Times*'s source, Daniel Ellsberg, reportedly was enraged that the newspaper refused to defy the gag order, or, at the very least, to publish "white space" where the censored articles would have appeared. *Id.* at 127-28.

²⁷⁷ Stephen Shepard, *Business Week's Case Isn't Like CBS's*, N.Y. TIMES, Nov. 21, 1995, at A20.

As Sheppard's letter demonstrates, despite authority permitting news organizations to violate "transparently invalid" injunctions,²⁷⁸ defying a court order to stop publication seems to some to be the action of an entity that deems itself "above the law." Most news organizations in the same situation would probably grit their teeth and follow *Business Week's* example, confident that a speedy appeal would quickly overturn such a restraining order. Yet, experience shows that this is not always the case. Despite an "expedited" appeals schedule, *Business Week* was still awaiting relief from the Sixth Circuit nearly three months after its initial argument in December 1995, reinforcing Justice Blackmun's 1975 admonition that, "where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate . . . infringement of the First Amendment."²⁷⁹

A lesson of the *Business Week* case may be that sometimes a news organization's duty to its readers or viewers must supplant the "law"—assuming that the law has been applied erroneously by a trial judge.²⁸⁰ In the face of an unconstitutional gag order, a newspaper or broadcast news operation should be prepared to face contempt, or other legal liability, in order to carry out its mission.²⁸¹

Advocating this particular form of civil disobedience is not to suggest that the risks of post-publication sanctions, even if falling short of prosecution under espionage statutes, are insignificant in comparison to contempt. Corporate litigants have shown themselves to be extremely creative in their litigation strategies against those who contemplate publishing information criticizing industry practices. A news organization understandably might contemplate dropping a story if it fears that publication would put a confidential source at risk, expose it to imposition of substantial damages awards, or to years of costly litigation.

Nevertheless, some would argue that the latter risks are, or should be, simply a cost of doing business. As Lawrence K. Grossman, former president of NBC News observed, "[a] decision against CBS for tortious interference with a contract could be substantial, but is hardly likely to bankrupt a company worth \$5.4 billion [O]wning a company with a news division

²⁷⁸ See *In re Providence Journal*, 820 F.2d 1342, 1344 (1st Cir.), *modified on reh'g*, 820 F.2d 1354 (1st Cir. 1986), *cert. granted and dismissed on other grounds*, 485 U.S. 693 (1988). Judge Merritt cited this holding with approval in his opinion for the Sixth Circuit in *Procter & Gamble*. See *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 n.2 (6th Cir. 1996).

²⁷⁹ *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice 1975).

²⁸⁰ See, e.g., *State v. Alston*, 887 P.2d 681 (Kan. 1994).

²⁸¹ See, e.g., *id.* But see *United States v. CNN*, 865 F. Supp. 1549 (S.D. Fla. 1994) (finding that defiance of even unconstitutional court orders by the news media cannot be justified or permitted).

is one of the risks CBS stockholders take.”²⁸² It is a sad day for the First Amendment when journalists back off from a truthful story that the public needs to be told because it fears being sued over the way they got the information.

Under that standard, is it likely the *Pentagon Papers* would be published today?

²⁸² Lawrence K. Grossman, *CBS News, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan./Feb. 1996, at 39, 51.