
Roger J. Traynor
The National News Council, Inc.

James J. Brosnahan

Robert Russell

Roscoe L. Barrow

David O. Kehe

See next page for additional authors

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Authors
Roger J. Traynor, James J. Brosnahan, Robert Russell, Roscoe L. Barrow, David O. Kehe, and Thomas F. Schroeter

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James J. Brosnahan--Sullivan and Its Progeny (proposed title)

As promised, I will set out for you an outline of my proposed article on Sullivan and its progeny. Recent developments, including the United States Supreme Court's decision in the Gertz case concerning constitutionally protected publica­tions and the companion case of Tornillo involving the Florida statute providing for equal space in a newspaper for a person attacked by that newspaper, provide added current interest in the subject. My outline is as follows:

I. Times v. Sullivan and Its Progeny: The First Ten Years

A. The Common Law and other antecedents.
   --Prosser, Law of Torts (historical discussion);

   --Black's view of the First Amendment; Meiklejohn's view of the First Amend­ment; Emerson's view of the First Amend­ment; absolute protection of speech versus the balancing approach.


   a) persons covered under "public officials" [cases];
      public figures [cases]; matters of public interest [cases];
   b) standard of malice--unreasonable conduct--knowledge of falsity--clear and convincing evidence--mere negligence is not enough;
   c) reliance on sources;
   d) case law concerning summary judgment;
   e) appellate review.

E. The Burger court speaks--the Gertz case, its holding and its implications for the future.

F. Some pending studies of alternatives to money damages.
   --the proceedings of the American Law Institute, May, 1974, approving tentative draft No. 20 of the Restatement of the
Law, Second, Torts, including declaratory relief, retraction, injunctive relief, right of reply, self-help, and reform of the damage remedy.

David O. Kehe--Do We Really Need First Amendment Antitrust Protection for the Media (proposed title)

The Supreme Court made it clear in Associated Press v. United States (1945) 326 U.S. 1, that the First Amendment did not provide antitrust protection for the media. In fact, the Court argued that the first Amendment requires encouraging rather than stifling competition in the media. The first half of my article will trace the application of this doctrine demonstrating that the philosophy of A.P. (supra) is today hornbook law, and that media exemption from antitrust enforcement requires legislative action. The remainder of my article will explore a portion of our experience with media exemption through legislation.

One legislative action was the creation of the FCC. Although the Commission does not have primary jurisdiction of antitrust issues (U.S. v. RCA, 358 U.S. 334 (1959)), it appears to have been granted "de facto" pre-emption for broadcast media regulation by the Antitrust Division. Because of the broad language of the Commission's authority, lack of binding precedent, and the Commission's political nature, meaningful analysis of its enforcement of the antitrust laws is virtually impossible; and evaluating whether or not FCC regulation has benefited the media is beyond the analytical capacity of this writer. I will do no more than state the issue, and allow others to analyze the FCC.

However, the Supreme Court's decision in Citizen's Publishing v. United States, 394 U.S. 131 (1969), resulted in another type of legislative action - the Newspaper Preservation Act of 1900. The Act was designed to preserve multiple editorial voices in daily newspapers by allowing joint operating agreements which otherwise violated the antitrust laws. In theory the Act was an attempt to insure freedom of the press by preserving competition. The Act requires that the Attorney General determine one of the operating partners a "failing" newspaper pursuant to a standard less stringent than traditional case law, allowing the partners to pool their production and distribution facilities. The second half of my article will document and analyze the success of the Act in preserving multiple editorial voices.

C. Delos Putz, Jr.--(no proposed title as yet)

The article will deal with the application of the Fairness Doctrine to news programs and documentaries, with particular emphasis on the issues raised by the current litigation over the NBC documentary dealing with private pension programs.

This article will urge removal of all restrictions on the presence of television equipment in courtrooms for live or delayed broadcast of their proceedings. Conditions and exceptions are inevitable and probably essential. Experience will help shape the conditions and exceptions and a cautious approach in the beginning would be wise. Dissomination of matter prejudicial to a fair trial must be prohibited. Current notions of what is prejudicial are likely to be unnecessarily overbroad. Disruption and distraction must be minimized. A specific objection by a witness or party should be given great weight to be measured on the possibility of interference with a fair trial.

Television will improve justice. It will educate the public as to what is good and bad justice; it will expose the callous indifference to the humanity of defendants which is an every-day occurrence in the lower criminal courts; it will expose the social and economic biases of the court system; it will allow greater public commentary on the conduct of judges, prosecutors and attorneys and will improve their demeanor and preparation. It will not interfere with the basic right to a fair trial.

The present Rule 980 of the Calif. Rules of Court is anachronistic and protective of the failures of the judicial system. What a marvelous educational and social experience the American people would have had if the Angela Davis trial could have been televised! Cf. television of Waltergate and impeachment.
Robert E. Bergen, Jr.
Associate Research Editor
The Hastings Law Journal
198 McAllister Street
San Francisco, California 94102

Dear Mr. Bergen:

As promised, I will set out for you an outline of my proposed article on Sullivan and its progeny. Recent developments, including the United States Supreme Court's decision in the Gertz case concerning constitutionally protected publications and the companion case of Tornillo involving the Florida statute providing for equal space in a newspaper for a person attacked by that newspaper, provide added current interest in the subject. My outline is as follows:

I. Times v. Sullivan and Its Progeny: The First Ten Years

A. The Common Law and other antecedents.
   -- Prosser, Law of Torts (historical discussion); Levy, Freedom of the Press: From Zenger to Jefferson; other references.

   -- Black's view of the First Amendment; Meiklejohn's view of the First Amendment; Emerson's view of the First Amendment; absolute protection of speech versus the balancing approach.


a) persons covered under "public officials" [cases]; public figures [cases]; matters of public interest [cases];

b) standard of malice -- unreasonable conduct -- knowledge of falsity -- clear and convincing evidence -- mere negligence is not enough;

c) reliance on sources;

d) case law concerning summary judgment;

e) appellate review;

E. The Burger court speaks -- the Gertz case, its holding and its implications for the future.

F. Some pending studies of alternatives to money damages:

-- the proceedings of the American Law Institute, May, 1974, approving tentative draft No. 20 of the Restatement of the Law, Second, Torts, including declaratory relief, retraction, injunctive relief, right of reply, self-help, and reform of the damage remedy.

I look forward to submitting my manuscript to you. If you could give me a current deadline, I would appreciate it.

Very truly yours,

JAMES J. BROSNAHAN

[DICTATED BUT NOT READ BY MR. BROSNAHAN]
To:

Prof. Traynor

From:

Bob Russell, Articles Editor, Vol. 26

FOR ACTION AS INDICATED

☐ REPLY—MY SIGNATURE  ☐ SIGNATURE  ☐ NOTE AND FORWARD

☐ REPLY—COPY TO ME  ☐ APPROVAL  ☐ NOTE AND FILE

☐ PLEASE SUMMARIZE  ☐ ACTION  ☐ NOTE AND RETURN

☐ PLEASE INVESTIGATE  ☐ COMMENTS  ☐ PLEASE PHONE ME

☐ FORWARDED PER REQUEST  ☐ INFORMATION  ☐ PLEASE SEE ME

Remarks:
Dear Mr. Russell:

My apologies for being so long in replying to your letter of May 7. I have been travelling. In fact, I saw Judge Traynor briefly in Washington, D.C. a few weeks ago.

The only summary of the proposed article that I would want to undertake at this time would be the following:

The article will deal with the application of the Fairness Doctrine to news programs and documentaries, with particular emphasis on the issues raised by the current litigation over the NBC documentary dealing with private pension programs.

I don't expect to get seriously into the article until early July.

Sincerely yours,

C. Delos Putz, Jr.
Dean

CDP:sem
THE MORE PUBLIC TRIAL: JUSTICE NEEDS TELEVISION

This article will urge removal of all restrictions on the presence of television equipment in courtrooms for live or delayed broadcast of their proceedings. Conditions and exceptions are inevitable and probably essential. Experience will help shape the conditions and exceptions and a cautious approach in the beginning would be wise. Dissemination of matter prejudicial to a fair trial must be prohibited. Current notions of what is prejudicial are likely to be unnecessarily overbroad. Disruption and distraction must be minimized. A specific objection by a witness or party should be given great weight to be measured on the possibility of interference with a fair trial.

Television will improve justice. It will educate the public as to what is good and bad justice; it will expose the callous indifference to the humanity of defendants which is an every-day occurrence in the lower criminal courts; it will expose the social and economic biases of the court system; it will allow greater public commentary on the conduct of judges, prosecutors and attorneys and will improve their demeanor and preparation. It will not interfere with the basic right to a fair trial.

The present Rule 980 of the Calif Rules of Court is anachronistic and protective of the failures of the judicial system. What a marvelous educational and social experience the American people would have had if the Angela Davis trial could have been televised! Cf. television of Watergate and impeachment.
June 5, 1974

Dear Judge Traynor:

Mr. Robert J. Russell, Articles Editor of the Hastings Law Journal, has requested that I send you a brief summary of the article which I am to write for the symposium on the First Amendment and the News Media symposium.

My article will concern the right of the people to know in the context of the Fairness Doctrine. It will update the evaluation of the importance of the Fairness Doctrine in broadcasting, and consider the extent to which the Doctrine should be extended to Cable Television and the Print Media.

As I am still grading papers, I have not prepared a concrete outline, and I have not reached definite conclusions beyond the fact that the Fairness Doctrine should be retained in broadcasting. It is likely that I will find in the Cable Television context analogous merits for applying the Fairness Doctrine. In the political campaign: personal attack context, such as gave us Miami Herald v. Tornillo, my inclination is to the view that the importance of an informed electorate justifies the Fairness Doctrine even in the print media.

My approach to the problem of the right of the people to know is to assess the societal values in access of the people to specific types of information, such as information regarding candidates, information relating to issues which the people vote upon in an election, information regarding controversial issues of public importance, and the like. There is, I think, a scale of societal values involved in different types of information. As to some, the right of the people to know should apply. As to others, the balance of capacity of the media to serve and other factors may suggest that, while the need for information may be established, it does not merit being made a right.

Probably my article will have been written by mid-July. I could give you a more concrete description later if this would serve a purpose.

Best personal regard,

Honorable Roger J. Traynor
Hastings College of the Law
To:

Prof. Traynor

From:

Bob Russell, Articles Editor
Law Journal

FOR ACTION AS INDICATED

☐ REPLY—MY SIGNATURE  ☐ SIGNATURE  ☐ NOTE AND FORWARD
☐ REPLY—COPY TO ME  ☐ APPROVAL  ☐ NOTE AND FILE
☐ PLEASE SUMMARIZE  ☐ ACTION  ☐ NOTE AND RETURN
☐ PLEASE INVESTIGATE  ☐ COMMENTS  ☐ PLEASE PHONE ME
☐ FORWARDED PER REQUEST  ☑ INFORMATION  ☐ PLEASE SEE ME

REMARKS:

Attached is a summary of David Kehe's article.
Dear Mr. Russell:

In response to your request for a summary of my upcoming article, I submit the following:

Expected Title -- Do We Really Need First Amendment Antitrust Protection for the Media.

The Supreme Court made it clear in Associated Press v. United States (1945) 326 U.S. 1, that the First Amendment did not provide antitrust protection for the media. In fact, the Court argued that the First Amendment requires encouraging rather than stifling competition in the media. The first half of my article will trace the application of this doctrine demonstrating that the philosophy of A.P. (supra) is today hornbook law, and that media exemption from antitrust enforcement requires legislative action. The remainder of my article will explore a portion of our experience with media exemption through legislation.

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I hope this brief summary is satisfactory for Justice Traynor's purposes. If not, please contact me.

Sincerely yours,

David O. Kehe

Mr. Robert J. Russell
Articles Editor
The Hastings Law Journal
198 McAllister Street
San Francisco, California 94102

AIR MAIL
May 28, 1974

James J. Brosnahan, Esq.
Cooper, White & Cooper
44 Montgomery Street
San Francisco, California 94104

Dear Jim:

I deeply appreciate your thoughtfulness in sending on with your letter of 16 May the petition and resulting stay order in the "Zebra" case, People v. Green et al.

The National News Council was meeting in New York the day after Judge Agnes O'Brien Smith's order and was contemplating taking a strong position against the order insofar as it related to the news media. The stay you so effectively and promptly obtained removed the urgency for Council action. May I congratulate you for this important victory for First-Amendment freedom.

In the light of the Pentagon papers case, I have doubts about the proviso in the Court of Appeals stay order and will watch developments in that respect with great interest.

With all good wishes,

Sincerely,

Roger J. Traynor
May 16, 1974

The Hon. Roger J. Traynor
2643 Piedmont Avenue
Berkeley, California 94704

Dear Judge Traynor:

I thought you might be interested in the enclosed petition and resulting stay order which has the effect of allowing the press to publish any information that it receives from persons who are not themselves prohibited from making statements on the subject of the so-called "Zebra" killings investigation and murder prosecutions.

The documents in our brief were dictated, typed and presented in a period of about five hours, so that I apologize in advance for any typographical errors.

Best regards,

JAMES J. BROSNAHAN

JJB:dj
Enclosures (2)
MEMORANDUM

TO: Professor Roger J. Traynor

FROM: Thomas F. Schroeter, Articles Editor, Law Journal

DATE: April 29, 1974

Enclosed is a copy of a letter I recently received from Professor Freund. He added a personal note of "best regards" to you and Professor Niles. Because this is final exam time, I was afraid I would be unable to deliver this message personally--so I have enclosed it herein.

I have been in correspondence with Professor Freund in regards to an article he is publishing in our May, 1974 issue (to be distributed in June, 1974). The article concerns the proposed National Court of Appeals.

I did mention to Professor Freund that his name was being used "in vain" on national television. In a recent panel discussion moderated by Mr. William F. Buckley, a law professor from Georgetown said Professor Freund supported the Equal Rights Amendment while Mr. Buckley said he didn't. It appears from this letter that Professor Freund does not support it. Sometime in May, our new research staff will officially solicit Professor Freund to write on this topic.

Like you and Professor Niles, Professor Freund is a very amiable and considerate man. If you do correspond with him in the future, please note to him the Journal's appreciation for his article and its very warm feelings toward him.

Very respectfully yours,

Thomas F. Schroeter
Articles Editor, Volume 25
April 25, 1974

Mr. Thomas F. Schroeter
Hastings Law Journal
198 McAllister Street
San Francisco, California 94102

Dear Mr. Schroeter:

I appreciate your very kind letter of April 19. I will look forward to receiving proof of the article and I do not anticipate any material changes, aside perhaps from restoring a comma or two.

I had not been aware of the Buckley program, and I find it amusing that anyone should speculate on a change in my opposition to the ERA as a consequence of the Rodriguez decision. I am impenitent even after yesterday's decision on the property tax allowance given to widows and not widowers.

I did want to inquire whether reprints will be obtainable.

With all good wishes,

Sincerely,

[Signature]

Paul A. Freund

PS: If you have an opportunity, please give my best regards to Justice Truyman and Professor Niles.