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### We're Mad as Hell and We Aren't Going to Take it Anymore: The Press Responds to Meritless Libel Suits

Jana Miller Brewer

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# **“WE’RE MAD AS HELL AND WE AREN’T GOING TO TAKE IT ANYMORE”:<sup>1</sup> THE PRESS RESPONDS TO MERITLESS LIBEL SUITS**

*While recognizing the power of the media to destroy a reputation in an instant of television coverage or with a banner headline, we must also recognize the power of libel actions, even their mere threat or pendency, to destroy the press itself and with it the very foundation of our democracy.<sup>2</sup>*

## **I. INTRODUCTION**

There is a growing problem enveloping libel litigation—one which threatens the constitutional protections secured for the press<sup>3</sup> by *New York Times Co. v. Sullivan*<sup>4</sup> and its progeny. This problem manifests itself in the form of lawsuits designed to stifle press defendants’ publications by coercion or to punish them for stories previously published. Such lawsuits cause the press great expense,<sup>5</sup> jeopardize its libel defense insurance coverage<sup>6</sup> and force it to spend countless hours in court.<sup>7</sup>

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1. Although this phrase has enjoyed popular usage for some time, it is probably most closely associated with the motion picture *Network* (Metro-Goldwyn-Mayer 1976).

2. *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 686 (D.N.J. 1985).

3. The term “press” will be used throughout this Comment to refer to members of the journalism profession, regardless of the medium through which they practice their craft.

4. 376 U.S. 254 (1964). See *infra* notes 23-30 and accompanying text.

5. Libel defense costs are generally paid by insurance carriers. Rapidly increasing insurance costs, however, are changing the nature of this once-satisfactory arrangement. Baer, *Insurers to Libel Defense Counsel: “The Party’s Over,”* AM. LAW., Nov. 1985, at 69.

According to James Goodale of Debevoise & Plimpton, New York, a typical libel case cost approximately \$20,000 to defend in the 1970’s. At a libel insurance conference in June 1985, Goodale reported that, as of that date, bills for \$200,000 to \$300,000 were not uncommon. Congressman Charles Shumer of New York placed the amount at closer to \$150,000. *Id.* at 69-70.

CNA Insurance Companies, a major libel insurance carrier, paid a portion of the bills for the *Sharon* (*Sharon v. Time, Inc.*, No. 85-7029 (2d Cir. Jan. 15, 1985) (LEXIS, Genfed library, Courts file)) and *Westmoreland* (*Westmoreland v. Columbia Broadcasting Sys., Inc.*, No. 82 Civ. 7913 (S.D.N.Y. filed Nov. 30, 1982) (dismissed at plaintiff’s request)) cases before deciding not to write any new libel policies after December 31, 1985. Those partial bills reportedly totaled \$15 million. Insurers have recently implemented cost cutting measures; in the last six months of 1985, many policy premiums and deductibles doubled. *Id.* at 69.

6. Although some believe that media lawyers are responsible for existing first amendment law, insurance companies presented with the bills incurred in establishing that law may soon decline to participate. Media/Professional Insurance, Inc., the largest libel claims management company in the country, has decided not to cover all or even part of the defense costs for the largest media organizations, particularly television networks. Media/Professional’s assis-

While no one disputes a public figure's right to defend his or her reputation,<sup>8</sup> meritless libel suits<sup>9</sup> have so ignited the press as to give rise to a new phenomenon: the press defendant's countersuit.<sup>10</sup> This Comment

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tant general counsel, Chad Milton, predicts that high-risk companies will become self-insuring due to an inability to find satisfactory coverage. Jeffrey Vosburgh, Assistant Vice-President of Safeco—Media/Professional's principal carrier—agrees. *Id.* at 70.

Bermuda Mutual Insurance Company, Ltd. holds its insured companies responsible for 20% of the legal fees that exceed their deductibles. Lloyds of London has ceased writing new libel defense policies and provides only limited coverage for its current clients. Media/Professional's president and general counsel, Lawrence Worrall, notes: "Small publishers who are doing investigative reporting, who don't have the assets to pay large premiums and sustain large deductibles, are having difficulty finding a carrier." *Id.*

All of this suggests that self-insurance may be the only option for some press organizations. But even more alarming is the possibility that self-insurance may result in self-censorship. Former *New York Times* counsel James Goodale foresees pressure from press ownership to curtail aggressive reporting in order to avoid expensive litigation. Floyd Abrams, current counsel for the *New York Times* and NBC, among others, also predicts that risky, investigative journalism will fall prey to economic demands. *Id.* at 72. This effect is doubly distressing since it is precisely this sort of journalism upon which democracy depends. See *infra* text accompanying notes 15 & 20.

CBS, due to an unusually large deductible, is nearly self-insured since an average year will not require expenditures which substantially exceed its deductible. Baer, *supra* note 5, at 70. According to CBS general counsel George Vradenburg III, the insurance situation has not affected editorial policy. Still, he notes that costs to the press itself may result in "concern" over stories broadcast. *Id.* at 69, 72. Floyd Abrams best summarized the potential chill: "The ultimate way to avoid the risk is not to write the story." *Id.* at 72.

7. For example, Anthony Herbert filed suit against Barry Lando, Mike Wallace and *Atlantic Monthly* on January 25, 1974. The action was finally dismissed on Lando's motion for summary judgment on January 15, 1986. *Herbert v. Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 106 S. Ct. 2916 (1986). Although this case was unusual in that the discovery process was the subject of extended litigation and thus the case was delayed, it suggests that even summary judgment is not always a satisfactory alternative for a press defendant anxious to get out of the courtroom and back to the newsroom.

For a more complete discussion of the Supreme Court's ruling concerning discovery in *Herbert v. Lando*, 441 U.S. 153 (1979), see *infra* notes 44-46 and accompanying text. For a discussion of summary judgment, see *infra* note 60.

8. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 262-63 (1974) (White, J., concurring). Justice White, critical of the expansion of the public figure doctrine and its effect on the "average citizen's" ability to meet the burden of proof in a libel action, noted the Court's traditional respect for an individual's reputation interest. *Id.* See also *infra* note 19.

9. The meritless libel suit is not an everyday occurrence. Genovese, *Unmerited Libel Cases Trigger Countersuits*, PRESSTIME, May 1985, at 6. Two commentators suggest that such cases are those in which the plaintiff has exhibited bad faith, by suing either to stifle future publication or to punish the press for previous stories. Cutting & Levine, *Fighting Back—Media Lawyers are Developing New Tactics to Discourage Libel Suits*, COMM. LAW., Fall 1985, at 16. Gary B. Pruitt, counsel for McClatchy Newspapers, cautions that "filing a counterclaim should not become a knee-jerk reaction to every libel suit." Genovese, *supra*, at 7. Pruitt suggests that publishers carefully examine the circumstances of a libel suit before taking action. *Id.* See also *infra* text accompanying note 48.

10. "Countersuit" is actually somewhat of a misnomer, since there are at least three procedural approaches available depending on the cause of action. Actions for infringement of first

will discuss the feasibility of such an action and various theories by which it can be supported: first amendment infringement,<sup>11</sup> abuse of process,<sup>12</sup> malicious prosecution<sup>13</sup> and actions for attorney's fees.<sup>14</sup>

## II. HISTORICAL BACKGROUND

"[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>15</sup>

With those words, the United States Supreme Court rendered its decision in *New York Times Co. v. Sullivan*,<sup>16</sup> thus changing the face of both libel and constitutional law. This is not to suggest, however, that either discipline had remained stagnant prior to the Court's decision. Libel law has been fraught with tension since the invention of the printing press, and has continued to evolve ever since.<sup>17</sup> English common law only examined whether a statement was defamatory; American common law sought to improve upon this formula by injecting into the controversy the question of the statement's truth or falsity.<sup>18</sup>

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amendment rights or abuse of process can be filed either as counterclaims within the libel action (see, e.g., *Laxalt v. McClatchy*, 622 F. Supp. 737 (D. Nev. 1985), discussed *infra* at notes 92-156 & 280-85) or as countersuits concurrent with the libel action (see, e.g., *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984), discussed *infra* at notes 196-221 & 258-63).

A more traditional approach requires waiting until the libel action is resolved. If the press defendant prevails, he may initiate actions for malicious prosecution or attorney's fees. Countersuits have been advocated not only by the press but by its insurers. Chad Milton, assistant general counsel for Media/Professional Insurance, Inc., advocates the use of countersuits, particularly when a libel plaintiff has sued for publicity purposes as much as for redress of a grievance. Milton suggests that countersuits will effectively discourage frivolous suits, encourage plaintiff's attorneys to think carefully before initiating a libel suit and help the press—and presumably, its insurers—recover defense costs. Baer, *supra* note 5, at 71.

11. See *infra* text accompanying notes 72-224.

12. See *infra* text accompanying notes 225-85.

13. See *infra* text accompanying notes 286-314.

14. See *infra* text accompanying notes 315-403.

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

16. 376 U.S. 254 (1964).

17. Kaufman, *Press Privacy and Malice: Reflections on New York Times Co. v. Sullivan*, 5 CARDOZO L. REV. 867, 869 (1984).

18. *Id.* A defamatory statement is one which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). In general, liability for defamation requires the following elements: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespec-

Despite the American alteration, a dilemma persisted. That dilemma resulted from a desire to reconcile two competing values: the rights to free speech and a free press and the right to reputation.<sup>19</sup> Democracy depends on informed voters making informed choices; informed choices can only result from the dissemination of news unfettered by government or majority control.<sup>20</sup> Yet, simultaneously there was concern that the press should not excessively intrude upon the privacy of others.<sup>21</sup> Two nineteenth century commentators observed:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . [C]olumn upon

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tive of special harm or the existence of special harm caused by the publication." *Id.* at § 558 (1977).

19. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 262-63 (1974) (White, J., concurring); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 (1979) and cases cited therein.

20. See *supra* text accompanying note 15. In a letter to Colonel Edward Carrington, Thomas Jefferson wrote: "[T]he basis of our government being the opinion of the people, the very first object should be to keep that right . . ." J. BARTLETT, *FAMILIAR QUOTATIONS* 388 (15th ed. 1980). Two centuries later, Judge Learned Hand observed that the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). See also *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (The first "[a]mendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society.").

21. Samuel D. Warren and Louis D. Brandeis published an article reviewing various cases which, although not expressly recognizing a right of privacy, protected that right in some form. The authors concluded that privacy was entitled to recognition as a separate right. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The right of privacy, defined in the comment to Restatement (Second) of Torts § 652A as "the right to be let alone," was recognized early in this century in *Pavesich v. New England Life Ins.*, 122 Ga. 190, 50 S.E. 68 (1905). The court held that the publication of a person's picture, without his consent, to advertise the publisher's business violated that person's privacy for which he could recover damages. *Id.* at 216, 50 S.E. at 79.

Four forms of invasion are cited by the Restatement: "[U]nreasonable intrusion upon the seclusion of another, . . . appropriation of another's name or likeness, . . . unreasonable publicity given to the other's private life, . . . [or] publicity that unreasonably places the other in a false light before the public . . ." RESTATEMENT (SECOND) OF TORTS § 652A.

The Supreme Court has held that a person's constitutional right to privacy entitles him to freedom from "unbridled discretion of law enforcement officials." *Delaware v. Prouse*, 440 U.S. 648, 661 (1979). However, the Court has also held that the right of privacy does not prevent the publication of information already in the public record. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975).

column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.<sup>22</sup>

Thus, while legal minds studied the questions of falsity, common law malice and defendants' good faith, the controversy over free press versus reputation persisted. The United States Supreme Court examined these very issues in *Sullivan*. The case arose as the result of an advertisement which appeared in the *New York Times* and was signed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."<sup>23</sup> The advertisement included statements concerning police action directed against students participating in a civil rights demonstration on the steps of the state capitol building in Montgomery, Alabama.<sup>24</sup> The plaintiff, Sullivan, was the Commissioner of Public Affairs whose duties included supervision of the Montgomery police department.<sup>25</sup> Sullivan claimed that the advertisement's implied criticism of the police department would be imputed to him and that he had therefore been libeled.<sup>26</sup> The trial court held for the plaintiff and the Alabama Supreme Court affirmed.<sup>27</sup>

The United States Supreme Court, however, reversed the state court's decision<sup>28</sup> and, in so doing, set new boundaries for discussion of public issues. The Court established a standard which must be met before a public official can recover damages for a defamatory falsehood—that of "actual malice."<sup>29</sup> Actual malice "prohibits a public official from

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22. Warren & Brandeis, *supra* note 21, at 196. Although this criticism was published nearly one hundred years ago, it is no doubt a complaint embraced by many contemporary critics of the press. Kaufman, *supra* note 17, at 868.

It is no secret that the press has recently engendered stringent reprobation. Viewed by some as aloof and arrogant, concerned only with sales or ratings, its members are continually condemned. Unquestionably, when viewers are repeatedly subjected to footage of an astronaut's parents watching the exploding space shuttle which carried their daughter, the press' reputation for insensitivity is buttressed. "The people's right to know is not a synonym for the media's right to bully." Rosenberg, *The Best and Worst of Shuttle Coverage*, L.A. Times, Feb. 3, 1986, pt. VI, at 7, col. 2. Similarly, the press' truthfulness is subject to careful scrutiny when major newspapers admit that an award winning article was purely fiction. Kaufman, *supra* note 17, at 868.

Still, the press serves a crucial function. See *supra* note 20. During the space shuttle tragedy, the television press in particular provided the catharsis necessary to assuage a grieving nation. Rosenberg, *supra* at 1, col. 6. As for truthfulness, Justice Powell explained: "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

23. *Sullivan*, 376 U.S. at 256-57.

24. *Id.* at 257.

25. *Id.* at 256.

26. *Id.*

27. *Id.* at 262-63.

28. *Id.* at 292.

29. *Id.* at 279-80. Judge Kaufman theorized that the Court's decision to use the term

recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with . . . knowledge that it was false or with reckless disregard of whether it was false or not."<sup>30</sup>

*Sullivan* set the wheels of change in motion. In *Curtis Publishing Co. v. Butts*<sup>31</sup> and its companion case, *Associated Press v. Walker*,<sup>32</sup> the Supreme Court held that a "public figure," having attained that status by position alone or by having thrust himself into the "vortex" of a public controversy, was entitled to less protection than that provided under an ordinary negligence standard, but more than that provided by the actual malice standard.<sup>33</sup> The Court explained this new standard, stating that a public figure may recover damages if the defamatory falsehood would result in substantial damage to reputation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."<sup>34</sup>

Chief Justice Warren, concurring in the result, noted that the proposed standard was of an "unusual and uncertain formulation"<sup>35</sup> and would be useless to "guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment."<sup>36</sup> The Chief Justice instead proposed that the actual malice standard of *Sullivan* be extended to all public figures.<sup>37</sup>

In 1974, the Supreme Court again spoke on the issue of libel and public figures. In *Gertz v. Robert Welch, Inc.*,<sup>38</sup> the Court held that the

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"actual malice" was an attempt to remain faithful to our common law heritage. Yet, he noted, "[b]y choosing a term that was intended to signify something *other* than its common sense and common law definition, the Supreme Court inadvertently created semantic chaos." Kaufman, *supra* note 17, at 873 (emphasis added). Judge Kaufman further posited that the confusion over actual malice and common law or "ill-will" malice subsequently resulted in the Court's decision to allow discovery into the press defendant's state of mind during preparation of the statements at issue. *Id.* See *Herbert v. Lando*, 441 U.S. 153 (1979). See *infra* text accompanying notes 44-46.

30. *Sullivan*, 376 U.S. at 279-80.

31. 388 U.S. 130 (1967).

32. *Id.*

33. *Id.* at 155.

34. *Id.*

35. *Id.* at 163 (Warren, C.J., concurring).

36. *Id.* (Warren, C.J., concurring).

37. *Id.* at 164 (Warren, C.J., concurring).

38. 418 U.S. 323 (1974). A Chicago policeman shot and killed a youth whose family later hired attorney Elmer Gertz to represent them in civil litigation against the officer. *Id.* at 325. Robert Welch, Inc., published a magazine espousing the views of the John Birch Society. The magazine printed an article suggesting that the testimony against the officer at his criminal trial was false and that the trial was part of a nation-wide Communist campaign to discredit

actual malice standard does not protect publishers of defamatory statements concerning a person who is neither a public figure nor a public official.<sup>39</sup> The Court reasoned that private figures have little or no opportunity to gain access to public forums and have not voluntarily exposed themselves to the risk of press scrutiny as have public figures. Therefore, the state interest in protecting the private figure's right to reputation takes precedence over a publisher's right to disseminate information.<sup>40</sup> The Court left to the states the task of defining the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual.<sup>41</sup> In defining a public figure, the *Gertz* Court stated:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.<sup>42</sup>

In summation, the Court stated that when there is no clear evidence of general fame or notoriety within the community, or of pervasive involvement in the affairs of society, a person is not a public figure "for all aspects of his life."<sup>43</sup>

In *Herbert v. Lando*,<sup>44</sup> the Supreme Court held that there was no

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local law enforcement agencies. *Id.* at 325-26. The article indicated that Gertz was responsible for the plot against the officer, and stated that Gertz had been an official of the Marxist League for Industrial Democracy. It also reported that Gertz had been an officer in the National Lawyers Guild, to which the article assigned responsibility for "the Communist attack on the Chicago police during the 1968 Democratic Convention." *Id.* at 326. The article also labeled Gertz a "Leninist," *id.*, a "Communist-fronter," *id.*, and indicated that Gertz possessed a criminal record. A photo accompanied the article and was captioned, "Elmer Gertz of Red Guild harasses Nuccio [the officer]." *Id.* at 327.

The statements were substantially incorrect. While Gertz had belonged to the National Lawyers Guild 15 years earlier, there was no indication that he or the Guild had participated in the 1968 Chicago demonstrations. *Id.* at 326. Moreover, Gertz had never been a member of the Marxist League for Industrial Democracy and there was no evidence that he was a "Leninist" or a "Communist-fronter." *Id.*

39. *Id.* at 343.

40. *Id.* at 343-48.

41. *Id.* at 347.

42. *Id.* at 345.

43. *Id.* at 352.

44. 441 U.S. 153 (1979). Anthony Herbert is a retired Army officer who served in Viet Nam. In 1969-70, he received considerable attention from the press after accusing his superior officers of covering up reports of war crimes. On February 4, 1973, Columbia Broadcasting System (CBS) broadcast a program about Herbert and his accusations. The program was



first amendment privilege barring a plaintiff from conducting discovery as to the press defendant's state of mind within the editorial process.<sup>45</sup> The Court reasoned that this inquiry, although intrusive, was necessary to determine whether the defendant knew of possible falsity or acted with reckless disregard for the truth or falsity of the matter reported.<sup>46</sup>

Thus, the law concerning libel of public figures and first amendment protections of the press has undergone a spectacular metamorphosis since 1964 and remains unsettled still. It is against this backdrop that the options available to a press inundated by libel suits are examined.

### III. THE PROBLEM

Meritless libel suits, though not unheard of, are still comparatively rare.<sup>47</sup> Consequently, it may be difficult to know when such a suit has been filed. Attorney Robert D. Sack suggests that the following situations might provide grounds for a countersuit or subsequent action by a press defendant:

1. Proof that suit was brought for reasons of harassment, particularly if the plaintiff has been involved in a pattern of similar litigation.
2. A case that seems frivolous on its face, where what was published is obviously and clearly true or privileged . . . .
3. A situation where the case is not about the particular plaintiff. For example, a journalist suing for libel on the basis of the statement, "all journalists take bribes."
4. Something that is plainly a statement of opinion . . . .
5. A statement that is clearly not defamatory.
6. A plaintiff who refuses to discontinue the suit even when, during the course of litigation, it becomes certain there is not sufficient fault on which a verdict can rest.<sup>48</sup>

Lurking beneath the expense and time consumption inherent in defending meritless libel suits is a more costly and insidious threat: self-censorship. With the increasing costs of libel litigation<sup>49</sup> and the willing-

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produced by Barry Lando and narrated by Mike Wallace. Lando subsequently published an article about Herbert in *Atlantic Monthly*. Herbert then sued Lando, Wallace, CBS and *Atlantic Monthly* for libel. *Id.* at 155-56.

45. *Id.* at 175.

46. *Id.* at 170-71.

47. *See supra* note 9.

48. Weber, *Countersuing*, *ASNE BULL.*, Sept. 1985, at 16.

49. *See supra* note 5.

ness of wealthy or corporate-subsidized plaintiffs<sup>50</sup> to engage in lengthy and expensive proceedings,<sup>51</sup> the self-censorship warned of in *New York Times Co. v. Sullivan*<sup>52</sup> may have already begun. For example, McClatchy Newspapers<sup>53</sup> recently published a story linking Senator Paul Laxalt<sup>54</sup> to organized crime and discussing skimming activities which allegedly took place in a Nevada casino while the casino was partially owned by Laxalt.<sup>55</sup> After Senator Laxalt sued McClatchy for libel,

50. Floyd Abrams cited "[t]he participation by large corporations, on behalf of their executives" as a threat to the press' "ability . . . to write vigorously about the very people who should be scrutinized most carefully: those in power." Abrams, *It's a landmark to freedom of expression*, A.B.A. J., July 1985, at 38, 40-41. Abrams noted that Mobil Oil directly paid the costs of its president's suit against the *Washington Post* (Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir.), vacated in part, reh'g granted (en banc), 763 F.2d 1472 (D.C. Cir. 1985)). *Id.* Martin Garbus noted that Mobil subsequently began carrying insurance providing funds for executives who decide to sue for defamation. Garbus, *New Challenge To Press Freedom*, N.Y. Times, Jan. 29, 1984, § 6 (Magazine), at 33, 49.

In addition, groups such as the Capitol Legal Foundation, which participated in *Westmoreland v. CBS, Inc.*, No. 82 Civ. 7913 (S.D.N.Y. filed Nov. 30, 1982) (dismissed at plaintiff's request), have recently emerged to support or actually prosecute libel claims. Organized fundraising has aided the prosecution of other cases such as *Sharon v. Time, Inc.*, No. 85-7029 (2d Cir. Jan. 15, 1985) (LEXIS, Genfed library, Courts file) and *Laxalt v. McClatchy*, No. CV-R-84-407-ECR (D. Nev. filed Sept. 21, 1984). Kaufman, *Libel 1980-85: Promises and Realities*, COMM. LAW., Fall 1985, at 1, 20.

51. Why are people willing to engage in lengthy and expensive libel actions? Surveying approximately 800 libel cases, the Iowa Libel Research Project found that "most libel plaintiffs do not sue to win, but feel they win by suing." Randolph, *The Latest Brand of Libel Suit is Won or Lost on the Courthouse Steps*, COMM. LAW., Fall 1985, at 7, 8. The study further indicated that although plaintiffs' attorneys often request large damage awards, most plaintiffs are primarily interested in "correct[ing] the record and . . . get[ting] even." Griffith, *Getting Even Without Winning*, TIME, Aug. 19, 1985, at 55.

Attorney Gerry Spence, who successfully represented the former Miss Wyoming in a libel suit against Penthouse, stated that the public "'fear[s] the power of the press.'" Randolph, *supra*, at 9. Spence queried: "'What do we do with things we are afraid of? What do you do with a snake? You step on its head.'" *Id.*

52. 376 U.S. 254 (1964). In its discussion of truth as an absolute defense to a claim of libel, the Sullivan Court stated:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

*Id.* at 279 (citations omitted).

53. McClatchy Newspapers owns *The Sacramento Bee*, *The Fresno Bee* and *The Modesto Bee* as well as other media entities. *Laxalt v. McClatchy*, 622 F. Supp. 737, 739 (D. Nev. 1985).

54. Paul Laxalt is a United States Senator from Nevada. *Id.* at 737.

55. *Id.* at 739. The articles at issue included a series entitled "Agents Say Casino

McClatchy counterclaimed for infringement of first amendment rights and abuse of process.<sup>56</sup> Discussing the effect of Senator Laxalt's lawsuit and his actions prior to filing,<sup>57</sup> McClatchy Newspapers alleged that the Columbia Broadcasting System (CBS) and the American Broadcasting Company (ABC) were influenced to discontinue work on their stories concerning Senator Laxalt's casino activities.<sup>58</sup>

The problem, then, is this: while the actual malice standard is arguably sufficient to protect the press when there is a genuine question as to the libelous nature of specific statements, the process of litigation must be completed before a result can be determined. When the libel plaintiff does not have a valid claim, litigation must still be completed, forcing the press defendant to expend time and money and endure an extremely intrusive discovery process.<sup>59</sup> Thus, as the case law currently stands, press defendants have little protection against the meritless libel suit.<sup>60</sup>

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'Skimmed' During Senator Laxalt's Ownership," written by staff reporter Denny Walsh and published in all three newspapers on November 1, 1983. Art Nauman, ombudsman of *The Sacramento Bee*, wrote an article published on the same day in all three papers entitled "Laxalt Donors Included Gaming Figures With Mob Ties." Nauman also wrote an additional article entitled "Laxalt Buried" which appeared only in *The Sacramento Bee* on November 6, 1983. *Id.*

56. *Id.*

57. Senator Laxalt made written and personal demands for a retraction and disclosure of confidential sources. In addition, he instigated a state investigation into the statements contained in the article, urging state officials to compel disclosure of the documentation and sources supporting those statements. Memorandum in Opposition to Senator Laxalt's Motion to Dismiss Counterclaims at 2-5, *Laxalt v. McClatchy*, 622 F. Supp. 737 (D. Nev. 1985) [hereinafter *McClatchy Memorandum*].

The district court discounted the chilling effect of Laxalt's actions, noting that Nevada law requires the libel plaintiff to first write a letter demanding retraction before filing suit. *Laxalt*, 622 F. Supp. at 747. The court further stated that "[a]ny individual can demand that information in the possession of a newspaper be turned over to the police for further investigation," similarly discounting the effect of Senator Laxalt's status as a United States Senator. *Id.* at 748.

58. *McClatchy Memorandum*, *supra* note 57, at 4-5. This allegation was not addressed by the court. For a more complete discussion of *Laxalt*, see *infra* text accompanying notes 92-156 & 279-84.

59. The United States Supreme Court has held that when a journalist is sued for libel, there is no first amendment privilege barring the plaintiff from conducting discovery delving into the editorial process and the state of mind of those responsible for publishing the allegedly defamatory statement. Such discovery, however, must produce evidence necessary to prove a critical element of the plaintiff's cause of action. *Herbert v. Lando*, 441 U.S. 153, 170-75 (1979). This ruling approved previously forbidden intrusion into the editorial process. Assuming that such intrusion is necessary to determine whether actual malice exists—the crucial part of the plaintiff's case—it is clearly unwarranted when the plaintiff's claims are without merit.

60. What little protection does exist takes the form of a motion for summary judgment, which has been labeled "the focal point of most libel litigation." Kovner, *Motion for Summary Judgment*, PRACTISING LAW INSTITUTE, *NEW YORK TIMES v. SULLIVAN—THE NEXT TWENTY YEARS* 303, 305 (1984). Federal Rule of Civil Procedure 56(b) provides as follows:

## IV. THE SOLUTION

The press defendant faced with a meritless libel suit has several

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"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." FED. R. CIV. P. 56(b).

Subsection (c) provides that a favorable judgment shall be rendered if there is no genuine issue as to any material fact and "the moving party is entitled to judgment as a matter of law." *Id.* However, the court is bound to examine the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," *id.*, to determine its verdict. This suggests that a substantial portion of discovery must be completed in order to support a motion for summary judgment. The Libel Defense Resource Center (LDRC) recently published a report in which it discussed motions for summary judgment in the fifty states. *High Success Rate Shown on Summary Judgment Motions*, 11 Media L. Rep. (BNA) Feb. 19, 1985 [hereinafter *High Success Rate*]. LDRC warned that more discovery is currently being required since the Supreme Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (*see infra* this note), thus resulting in greater expenditure of time and money before courts will consider summary judgment motions. *High Success Rate, supra*.

Most state provisions for summary judgment are remarkably similar and therefore present similar problems. Kovner, *supra*, at 308. Kovner suggested New York's rule as a representative example: "The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." N.Y. CIV. PRAC. L. & R. 3212(b) (McKinney Supp. 1986).

In another report prepared for the Practising Law Institute, Floyd Abrams discussed the application of summary judgment in libel actions. Abrams, *Summary Judgment in Libel Actions*, PRACTISING LAW INSTITUTE, NEW YORK TIMES v. SULLIVAN: THE NEXT TWENTY YEARS 373 (1984). Abrams noted that summary judgment was frequently granted in libel cases, especially those involving public figure plaintiffs, citing *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 486 U.S. 1011 (1967), as a typical example of such cases. In *Keogh*, the court noted the possibility that a plaintiff might be motivated by a desire to harass the press, and that one purpose behind the standard imposed in *New York Times Co. v. Sullivan* was

to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.

*Id.* at 968.

The Supreme Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), however, cast a shadow on the appropriateness of summary judgment motions. In *Hutchinson*, Senator William Proxmire awarded his "Golden Fleece of the Month Award" to Ronald Hutchinson, a behavioral scientist studying methods of measuring aggression. *Id.* at 114-15. Senator Proxmire's awards were given out to publicize what the Senator felt were "the most egregious examples of wasteful governmental spending." *Id.* at 114.

Hutchinson sued Senator Proxmire for libel, alleging that the award and the surrounding publicity had damaged his professional and academic reputation. *Id.* The district court granted summary judgment for Senator Proxmire and the court of appeals affirmed. *Id.* at 118, 120-21. Reversing the lower courts' decisions, the Supreme Court held that Hutchinson was not a public figure. More importantly for this discussion, however, the Court discussed the district court's statement that "in determining whether a plaintiff had made an adequate showing of 'actual malice,' summary judgment might well be the rule." *Id.* at 120. In the now famous footnote 9, the Court stated: "[We] are constrained to express some doubt about the

available alternatives. One solution is to file an action for infringement of

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so-called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition." *Id.* at 120 n.9 (citations omitted). The court declined to deal further with the propriety of utilizing summary judgment when complex issues such as actual malice are involved, reasoning that the question was not before the Court. *Id.*

Abrams is quick to point out that the issue was left open "for future resolution." Abrams, *supra* at 375. In addition, Abrams noted that the Court was entirely silent about the appropriateness of summary judgment when another element of libel (e.g., the existence of a false and defamatory statement) is at issue. *Id.* at 375-76.

The United States Supreme Court recently spoke again on the issue of summary judgment in *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986), holding that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 2514. Thus, in a libel action in which the clear and convincing evidentiary standard applies, that same standard must be met to defeat a motion for summary judgment. *Id.* In a footnote, the Court somewhat clarified the *Hutchinson* footnote, stating that it "was simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the protections embodied in the substantive laws.'" *Id.* at 2514 n.7 (quoting *Calder v. Jones*, 465 U.S. 783, 790-91 (1984)). While this statement appears encouraging at first blush, whether summary judgment is appropriate in libel actions remains an unanswered question.

LDRC reported that 75% of libel defendants were successful on summary judgment motions in 1980-82, the period immediately following the *Hutchinson* decision. *High Success Rate*, *supra*. During the four years prior to *Hutchinson*, libel defendants had prevailed on 78-80% of summary judgment motions. *Id.* Thus, as Abrams pointed out, the expected fall-out from the *Hutchinson* decision was less severe than anticipated, although the most recent LDRC study concluded that summary judgment motions during 1982-84 were successful 74% of the time. *Id.*

LDRC warned, however, that "in far too many cases summary judgment is still not granted." *Id.* Further, LDRC noted the possibility that such motions are being attempted less frequently, resulting in an increased number of libel trials. *Id.*

Abrams cited two approaches to summary judgment motions since the *Hutchinson* decision. In *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980), cited by Abrams as the "most influential post-*Hutchinson* case," Abrams, *supra*, at 377, the court specified the neutral approach to summary judgment motions. The court interpreted footnote 9 as requiring that "neither grant nor denial of a motion for summary judgment is to be preferred," *Yiamouyiannis*, 619 F.2d at 940, stating that any chilling effect resulting from the lawsuit was to have no bearing on the court's decision. For cases adhering to the neutral approach, *see, e.g.*, *Clark v. American Broadcasting Cos.*, 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *Schultz v. Newsweek*, 668 F.2d 911 (6th Cir. 1982); *Guccione v. Flynt*, 618 F. Supp. 164 (S.D.N.Y. 1985); *Bryant v. Associated Press*, 595 F. Supp. 814 (D.V.I. 1984); *Foodscience Corp. v. McGraw-Hill, Inc.*, 592 F. Supp. 362 (D. Vt. 1984); *Pep v. Newsweek*, 553 F. Supp. 1000 (S.D.N.Y. 1983); *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383 (S.D.N.Y. 1981).

The second approach is one preferring summary judgment. Cases following this approach indicate that concern over the chilling effect on the press of defending lawsuits is paramount. *See, e.g.*, *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, *cert. denied*, 459 U.S. 907 (1982); *Kotlinkoff v. The Community News*, 89 N.J. 62, 444 A.2d 1086 (1982); *see also Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684 (D.N.J. 1985). Although the *Schiavone* court denied the defendant's motion for summary judgment, it expressed concern over the effect of ongoing litigation, stating:

its first amendment rights.<sup>61</sup> Although such an action has survived a motion to dismiss in a California state court,<sup>62</sup> similar claims were dismissed in three federal court actions.<sup>63</sup> A second solution is an action for abuse of process,<sup>64</sup> filed either as a counterclaim or a countersuit. Abuse of process actions have survived motions to dismiss in two federal jurisdictions<sup>65</sup> and in a California state court;<sup>66</sup> a fourth action<sup>67</sup> was recently dismissed in federal court. A third alternative is an action for malicious prosecution.<sup>68</sup> Although employed sparingly, a malicious prosecution action proved a successful alternative for a Kentucky newspaper.<sup>69</sup> Perhaps the most traditional and successful solution has been an action for attorney's fees,<sup>70</sup> filed either against the libel plaintiff, his attorney, or both. Fees have been awarded to press defendants in at least three such cases.<sup>71</sup>

### A. *Infringement of First Amendment Rights*

A claim based on the first amendment is perhaps the most specula-

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[T]he mere pendency and continuation of such actions must of necessity have a chilling effect upon the freedom of the press. If the threat of a libel action is causing any segment of the media to hesitate to publish knowingly false or misleading information about persons or companies, then it is serving a worthwhile function. But if it is causing hesitation by the media in those borderline situations in which the public has a right to know, then one of our most important liberties is in peril. . . .

Therefore, probably more than any other type of case, summary judgments in libel actions should be readily available and granted where appropriate.

*Id.* at 686.

Thus, while statistics indicate that motions for summary judgment are still predominantly successful, the potential chilling effect of a pending lawsuit remains—particularly in light of a post-*Hutchinson* trend, bolstered by *Anderson*, toward neutral application of summary judgment. In addition, the potential for harassment remains, especially in cases in which summary judgment is precluded due to the existence of a material question of fact.

61. See *infra* notes 72-224 and accompanying text.

62. *E.W. Scripps Co. v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984).

63. *Feder v. Woodward*, 12 Media L. Rep. (BNA) 1071 (C.D. Cal. 1985); *Rewald v. Western Sun*, 11 Media L. Rep. (BNA) 2494 (D. Haw. 1985); *Laxalt v. McClatchy*, 622 F. Supp. 737 (D. Nev. 1985).

64. See *infra* notes 224-85 and accompanying text.

65. *Feder v. Woodward*, 12 Media L. Rep. (BNA) 1071 (C.D. Cal. 1985); *Rewald v. Western Sun*, 11 Media L. Rep. (BNA) 2494 (D. Haw. 1985).

66. *E.W. Scripps Co. v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984).

67. *Laxalt v. McClatchy*, 622 F. Supp. 737 (D. Nev. 1985).

68. See *infra* notes 286-314 and accompanying text.

69. *Marcum v. Kirk*, No. 82-CI-951 (Ky. Cir. Ct. Feb. 1, 1985) *aff'd*, *Kirk v. Marcum*, Nos. 85-CA-798-MR, 85-CA-951-MR (Ky. Ct. App. June 13, 1986).

70. See *infra* notes 315-404 and accompanying text.

71. *Porter v. Qualls*, No. 20935 (Ariz. Super. Ct. Dec. 24, 1984); *Carr v. Times-Picayune Publishing*, 619 F. Supp. 94 (E.D. La. 1985); *Daily Gazette v. Canady*, 332 S.E.2d 262 (W. Va. 1985).

tive and yet the most philosophically satisfying of all the proposed solutions.<sup>72</sup> The first amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press."<sup>73</sup> This directive from the Founding Fathers has been applied to the states via the fourteenth amendment, thus prohibiting federal or state action abridging freedom of the press.<sup>74</sup>

There are two sets of circumstances in which a defendant's first amendment argument might apply. The first involves a lawsuit initiated by a federal or state official which is designed to violate or effectively results in a violation of the press defendant's responsibility and constitutional right to disseminate newsworthy information. The second involves a private individual's request for the court—an arm of the state—to engage in a similar violation.

### 1. Infringement by a government official

It is well settled that a federal official may not infringe the constitutional rights of an individual. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>75</sup> federal agents first manacled the plaintiff in his apartment in front of his wife and children before arresting him for alleged narcotics violations.<sup>76</sup> The Supreme Court held that the fourth amendment guarantees of freedom from unreasonable searches and seizures had been denied the plaintiff by federal agents acting under color of their authority. This denial gave rise to a cause of action for damages.<sup>77</sup>

Justice Brennan, comparing the difference between actions of private and government infringers, wrote: "[A]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority

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72. First amendment law has been described by at least one author as "God's work." Baer, *supra* note 5, at 69. Perhaps because it is based on the document fundamental to our system of government—indeed, to our way of life—a first amendment argument is the most philosophically satisfying of the solutions presented.

73. U.S. CONST. amend. I.

74. The Supreme Court first recognized the incorporation of the first amendment in *Gitlow v. New York*, 268 U.S. 652 (1925):

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

*Id.* at 666.

75. 403 U.S. 388 (1971).

76. *Id.* at 389.

77. *Id.*

other than his own.”<sup>78</sup> The Court noted that merely invoking federal power is normally sufficient to weaken a citizen’s resistance to an unlawful entry or arrest.<sup>79</sup>

In *Davis v. Passman*,<sup>80</sup> the Court extended its holding in *Bivens* to include causes of action arising under the due process clause of the fifth amendment.<sup>81</sup> Plaintiff Shirley Davis had been hired by Congressman Otto Passman as a deputy administrative assistant on February 1, 1974.<sup>82</sup> Five months later, Passman terminated Davis’ employment, stating that although Davis was an able and energetic worker, it was essential that the position be held by a man.<sup>83</sup> Davis filed suit, alleging that Passman’s conduct discriminated against her on the basis of sex, thus violating her fifth amendment right to due process.<sup>84</sup> The Supreme Court, following its reasoning in *Bivens*, held that a private cause of action does arise from a violation of fifth amendment rights.<sup>85</sup>

In 1976, a first amendment action joined the line of cases upholding a cause of action for violation of constitutionally guaranteed rights. In *Elrod v. Burns*,<sup>86</sup> the plaintiffs were non-civil service employees of the Cook County, Illinois Sheriff’s Office.<sup>87</sup> They alleged that they were threatened with loss of employment, or in some instances actually discharged, for failing to join the Democratic party. The dismissals were allegedly ordered by the Sheriff.<sup>88</sup> The plaintiffs contended that this activity violated their first amendment freedoms of association and belief.<sup>89</sup> The Supreme Court, observing that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,”<sup>90</sup> affirmed the appellate court decision granting injunctive relief.<sup>91</sup>

Clearly, in light of these cases, a viable cause of action exists for violation of first amendment rights by a government official. However, in each of the above cases, the government official acted in an official capac-

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78. *Id.* at 392.

79. *Id.* at 394.

80. 442 U.S. 228 (1979).

81. *Id.* at 234.

82. *Id.* at 230.

83. *Id.*

84. *Id.* at 231.

85. *Id.* at 234.

86. 427 U.S. 347 (1976).

87. *Id.* at 350.

88. *Id.* at 351.

89. *Id.* at 350.

90. *Id.* at 373.

91. *Id.*



ity—either as a federal narcotics agent making an arrest, a congressman choosing his official staff or a sheriff making a similar selection. This factor is of vital importance to such causes of action. In fact, as illustrated in *Laxalt v. McClatchy*,<sup>92</sup> it is critical to the survival of such a claim.

*Laxalt* resulted from a series of articles published in *The Sacramento Bee*, *The Fresno Bee* and *The Modesto Bee* on November 1 and 6, 1983. The articles linked Senator Paul Laxalt with organized crime. Laxalt sued McClatchy Newspapers, owner of the three newspapers, for libel and defamation.<sup>93</sup>

McClatchy filed a counterclaim for violation of its first amendment rights, alleging that Laxalt had “used his power and influence as an United States Senator to punish [McClatchy] and to burden and chill the exercise of [its] first amendment rights.”<sup>94</sup> The district court granted Laxalt’s motion to dismiss the first amendment counterclaim, holding that Laxalt did not act “under color of federal law.”<sup>95</sup> The court further held that McClatchy was not deprived of a federal right.<sup>96</sup>

McClatchy argued that Laxalt acted under color of federal law when he wrote a letter on Senate stationery demanding both a retraction and the release to law enforcement officials of McClatchy’s sources and information.<sup>97</sup> McClatchy alleged that the use of official stationery and Laxalt’s signature over the caption “ ‘U.S. Senate’ ”<sup>98</sup> implied that Laxalt would use the power of his office to force compliance via retaliation.<sup>99</sup>

Relying on *Bivens*, the court determined that Laxalt did not act under “the cloak of the government’s legitimacy”<sup>100</sup> by writing a letter demanding a retraction, noting that such a request is required by Nevada law before a libel suit may be instituted.<sup>101</sup> The court further noted that

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92. 622 F. Supp. 737 (D. Nev. 1985).

93. *Id.* at 739. See *supra* notes 53-55. Laxalt also included claims for conspiracy among the defendants to commit the libel and for intentional infliction of emotional distress. *Laxalt*, 622 F. Supp. at 739.

94. *Id.* at 746. See *infra* notes 279-84 and accompanying text for a discussion of the abuse of process counterclaim also filed by McClatchy.

95. *Laxalt*, 622 F. Supp. at 747.

96. *Id.* at 747-48.

97. *Id.* at 747.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The court stated that Laxalt “acted as would have any private citizen considering the possibility of filing suit for libel. The fact that Laxalt is a United States Senator does not automatically convert this action as occurring under color of federal law.” *Id.*

The court was also concerned that finding Laxalt’s letter to be an act made under color of federal law would create a dangerous precedent, dissuading other officials from taking action

the Supreme Court has recognized a public official's increased opportunity for clearing his or her name "through the media"<sup>102</sup>—an opportunity less readily available to private persons.<sup>103</sup>

Citing *Gertz v. Robert Welch, Inc.*,<sup>104</sup> the *Laxalt* court noted the Supreme Court's instruction to public figures to seek "'self-help'"<sup>105</sup> and use "'available opportunities'"<sup>106</sup> to correct errors.<sup>107</sup> Thus, the court concluded, *Laxalt* had only acted as required both by Nevada law and Supreme Court directive, and neither the emphatic nature of the request nor the stationery upon which it was made was of significance.<sup>108</sup> Moreover, the court noted that any person may request that information retained by a newspaper be released to the police; therefore, this action was not under color of federal law.<sup>109</sup>

McClatchy also claimed that by demanding the release of confidential information and sources, *Laxalt* intended to expose those involved to physical harm and to inhibit the newspaper's first amendment rights by preventing access to those sources.<sup>110</sup> Relying primarily on *Miller v. Transamerican Press, Inc.*,<sup>111</sup> the court stated that there was no constitutional right protecting those sources, and thus the publisher's claim stood unsupported.<sup>112</sup>

In *Miller*, the Fifth Circuit ruled that a first amendment privilege protected the identity of a confidential source, but stated that in a libel case "the privilege must yield."<sup>113</sup> The *Miller* court proposed a three-part test to determine when protection for sources is unavailable: (1) the information must be relevant to the case; (2) the information must be otherwise unavailable; and (3) there must be a compelling interest in disclosure of the information.<sup>114</sup>

Applying the *Miller* test, the *Laxalt* court found that the "number and credibility"<sup>115</sup> of McClatchy's sources was relevant, since that infor-

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necessary to clear their names while in office and inhibiting wronged parties from seeking legal redress for their grievances. *Id.*

102. *Id.*

103. *Id.* at 747-48.

104. 418 U.S. 323 (1974).

105. *Laxalt*, 622 F. Supp. at 748.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

112. *Laxalt*, 622 F. Supp. at 749.

113. *Miller*, 621 F.2d at 725.

114. *Id.*

115. *Laxalt*, 622 F. Supp. at 749.

mation would influence the jury's ability to determine whether actual malice existed when the libel suit reached trial.<sup>116</sup> The court also determined that McClatchy was the only source of the informants' identities.<sup>117</sup> Finally, the court found that such evidence might be the only evidence which would show malice, thus satisfying the compelling interest requirement.<sup>118</sup>

In addition, the court rejected McClatchy's argument that Laxalt's suit was filed "merely as a harassment device"<sup>119</sup> designed to deprive McClatchy of its constitutional rights.<sup>120</sup> In support of its claim, McClatchy cited *Cate v. Oldham*,<sup>121</sup> in which an attorney brought a wrongful death claim against the State of Florida and certain officials, alleging that they had negligently failed to effectively prosecute a husband for battery and that their failure resulted in the death of the wife.<sup>122</sup> The Florida state court granted summary judgment and attorney's fees to the state; the fees were reversed when the appellate court found that the wrongful death suit was not frivolous.<sup>123</sup> The State of Florida subsequently filed suit against the attorney for malicious prosecution.<sup>124</sup> The attorney responded with a section 1983<sup>125</sup> civil rights action, claiming that the state's malicious prosecution action infringed the attorney's first amendment right to petition the government.<sup>126</sup> The court stayed the malicious prosecution action, noting that protection of the attorney's first amendment rights outweighed any damage to state officials resulting from the delay in the malicious prosecution case.<sup>127</sup>

The *Laxalt* court distinguished *Cate* on several points.<sup>128</sup> The first amendment right involved in *Cate* was the right to petition the government; in *Laxalt* it was the right to a free press.<sup>129</sup> In addition, the court noted that the facts of *Cate* clearly indicated an attempt by state officials

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 749-50.

121. 707 F.2d 1176 (11th Cir. 1983).

122. *Id.* at 1180.

123. *Id.*

124. *Id.*

125. 42 U.S.C. § 1983 (1981). Section 1983 provides for a private right of action against any person who, under color of state law, deprives a citizen of "any rights, privileges, or immunities secured by the Constitution and laws . . . ." *Id.*

126. *Cate*, 707 F.2d at 1180.

127. *Id.*

128. *Laxalt*, 622 F. Supp. at 750.

129. *Id.*

to "penalize and deter the filing of suits against the government."<sup>130</sup> The court reiterated its conclusion that Laxalt's actions were undertaken as a private citizen rather than as a government official and that his pending libel suit enjoyed no government support.<sup>131</sup>

The *Laxalt* court concluded its dismantling of McClatchy's first amendment claim by noting that even when the press' rights are chilled by a libel suit, that chill is the price exacted for the "generous standards"<sup>132</sup> of *Sullivan*. Citing *Calder v. Jones*,<sup>133</sup> the court stated: "[N]o other procedural protections are necessary to protect libel defendants . . . because the *New York Times* standards already constitute significant protection, and further safeguards would amount to 'double counting.'" <sup>134</sup> The court concluded that McClatchy's protection from first amendment infringement lies in the actual malice standard, not in a *Bivens* type action.<sup>135</sup> Moreover, the court held that allowing such a claim would subject a public official to first amendment counterclaims when attempting to recover damages, thus jeopardizing his or her ability to bring a libel action.<sup>136</sup>

Arguably, the court acted too hastily in rationalizing Laxalt's retraction demands via *Gertz*. The *Gertz* language relied upon was that referring to the first remedy of an alleged libel victim—self-help.<sup>137</sup> The Supreme Court indicated that an alleged victim should use "available opportunities to contradict the lie or correct the error"<sup>138</sup> reasoning that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."<sup>139</sup>

The *Gertz* Court clearly indicated that it was the public figure's increased access to the communications media which justified assigning a greater burden of proof to such plaintiffs. The *Gertz* decision echoed reasoning alluded to by Justice Harlan in *Curtis Publishing Co. v. Butts*.<sup>140</sup> Justice Harlan referred to the fact that both plaintiffs, football coach Butts and politically prominent Walker, "commanded sufficient continu-

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130. *Id.*

131. *Id.*

132. *Id.*

133. 465 U.S. 783 (1984).

134. *Laxalt*, 622 F. Supp. at 750.

135. *Id.* at 751.

136. *Id.*

137. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

138. *Id.*

139. *Id.*

140. 388 U.S. 130, 155 (1967).

ing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."<sup>141</sup> In his concurrence, Chief Justice Warren noted: "[S]urely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication."<sup>142</sup>

Thus, the Supreme Court assumed that public figures would have the opportunity to correct any misinformation via channels of communication unavailable to members of the general public. Yet, the *Laxalt* court cited the *Gertz* language to support its conclusion that Laxalt's status as a public figure mandated his request for a retraction.<sup>143</sup> Additionally, the court labeled Laxalt's actions as those of "any private citizen considering the possibility of filing suit for libel."<sup>144</sup> While this may be accurate, it demands a tortured interpretation of the *Gertz* language to support the *Laxalt* court's reasoning that a public official must request a retraction. As Justice Harlan indicated in *Butts*, the public figure's access to channels of communication affords him the opportunity "to expose through discussion" <sup>145</sup> any falsehoods published about him. The goal is the dissemination of information via "uninhibited, robust and wide-open" debate<sup>146</sup> rather than to squelch information via retraction. Arguably, had Laxalt issued a press release or held a press conference responding to *The Bees'* stories, McClatchy would have had no complaint and the Supreme Court's directive would have been clearly satisfied.

The *Laxalt* court's treatment of the confidential source issue was equally puzzling. The court cited *Branzburg v. Hayes*<sup>147</sup> for the proposition that a reporter's confidential sources are not protected by any constitutionally secured right.<sup>148</sup> Yet, the issue in *Branzburg* was whether freedom of speech and of the press was abridged by a requirement that a journalist appear and testify before state or federal grand juries.<sup>149</sup> In *Laxalt*, the request for the names of confidential sources came from Laxalt himself, not from the court. *Branzburg* would only be applicable had

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141. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

142. *Id.* at 164 (Warren, C.J., concurring).

143. *Laxalt*, 622 F. Supp. at 748.

144. *Id.* at 747.

145. *Butts*, 388 U.S. at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

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

147. 408 U.S. 665 (1972).

148. *Laxalt*, 622 F. Supp. at 748.

149. *Branzburg*, 408 U.S. at 667.

*The Bee* reporters been summoned to testify in the underlying libel action.

This suggestion is supported by *Miller v. Transamerican Press, Inc.*,<sup>150</sup> in which the Fifth Circuit Court of Appeals held that a reporter must reveal his confidential sources, when relevant, to a plaintiff whom he has allegedly libeled when the plaintiff has requested those sources in connection with the libel action. The *Laxalt* court found the *Miller* court's reasoning persuasive; arguably, however, the *Laxalt* court "jumped the gun." Had *The Bee* reporters refused to disclose their sources in connection with a judicial proceeding, *Miller* would compel such disclosure. Yet, *Laxalt*'s demand for disclosure was not connected with a judicial proceeding. Such demands—at least at the pre-litigation stage—should have been afforded more careful scrutiny.

The court concluded its discussion of first amendment infringement by stating that press defendants must bear the chill which might result from the institution of a libel suit "in light of the generous standards of *New York Times v. Sullivan*."<sup>151</sup> The court cited *Calder v. Jones*<sup>152</sup> in support of its conclusion, yet failed to discuss the substantial factual differences between *Calder* and *Laxalt*. In *Calder*, the press defendants were attempting to avoid the assertion of personal jurisdiction by a California court pursuant to a libel action.<sup>153</sup> The United States Supreme Court held that jurisdiction was properly imposed, reasoning that the press defendants would receive sufficient protection by virtue of the actual malice standard to avoid any chilling effect resulting from the pending lawsuit.<sup>154</sup>

In *Calder*, the press defendant made no allegation that the libel suit was instituted for any purpose other than the redress of grievances. In *Laxalt*, however, McClatchy claimed that *Laxalt* was using the libel suit to harass McClatchy and chill its first amendment rights.<sup>155</sup> The court completely ignored the harassment claim with respect to McClatchy's first amendment rights, addressing only the possible chill imposed on the press by lawsuits in general.<sup>156</sup>

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150. 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). See *supra* text accompanying notes 111-18 for a discussion of *Miller*.

151. *Laxalt*, 622 F. Supp. at 750.

152. 465 U.S. 783 (1984).

153. *Id.* at 784-85.

154. *Id.* at 790-91.

155. *Laxalt*, 622 F. Supp. at 748-49.

156. *Id.* at 750-51. Such a concern has not gone unnoticed by other courts, however, even where the claim was not explicitly advanced. See, e.g., *Nemeroff v. Abelson*, 469 F. Supp. 630, 633 (S.D.N.Y. 1979), discussed *infra* at text accompanying notes 380-402. In *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684 (D.N.J. 1985), the court waxed eloquent over the

In sum, the *Laxalt* court failed to consider the implications of Laxalt's extra-judicial activities, choosing instead to apply holdings from cases in which an alleged libel was at issue. In so doing, the court ignored the possibility that attempted infringement had occurred, forcing McClatchy to endure the effects of infringement while defending itself in the underlying libel action. In light of this result, it is clear that a press defendant will need to allege and prove facts stronger than those asserted by McClatchy in order to prevail in a *Bivens*-type action. Proof that the libel plaintiff brought the suit to harass the press defendant and infringe its first amendment rights is essential, but without proof that the libel plaintiff was acting in an official capacity, an action for infringement of first amendment rights cannot survive. As demonstrated in *Laxalt*, retraction demands written on official stationery are insufficient to constitute official action. Perhaps if such demands were accompanied by other activity such as government-endorsed interference with the press defendant's sources of information, the quantum of official activity would be sufficient to support a *Bivens*-type action for infringement of first amendment rights.

## 2. Infringement by a private party

While there is sufficient case law supporting an action against a government official for constitutional infringement,<sup>157</sup> there is considerably less authority in support of a similar action against a private party.<sup>158</sup> Such actions present a problem because, in order to claim an infringement of constitutional rights, there must have been some form of "state action." "State action" is action by "any level of government, from local to national,"<sup>159</sup> which intrudes upon the protection of individual rights guaranteed by the Constitution.<sup>160</sup> The Supreme Court has defined this term as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state

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chilling possibilities of pending libel suits—particularly one focusing on "the deletion of *one* sentence from *one* memorandum in *one* article in *one* magazine." *Id.* at 709 (emphasis in original). The court noted that the suit may "result in a timorous and tentative press content to report on births, weddings, deaths and craft fairs. . . . [T]he court wonders whether the cost of the litigants in this suit, the ultimate cost to the media from all such suits, and the final cost to the first amendment may be too expensive a price to pay." *Id.* at 710.

157. *Davis v. Passman*, 442 U.S. 228 (1979); *Elrod v. Burns*, 427 U.S. 347 (1976); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

158. One commentator has gone so far as to term such a claim "exotic." Cutting & Levine, *supra* note 9, at 16.

159. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147 n.2 (1978).

160. *Id.* at 1147. State action existed in *Davis*, *Elrod* and *Bivens* because, in each case, the defendant acted in his capacity as a government official.

law.”<sup>161</sup> Justice Brennan, writing for the majority in *Sullivan*, answered the Alabama Supreme Court’s assertion that there had been no state action in Sullivan’s claim against the *New York Times*, stating: “The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”<sup>162</sup> Thus, Justice Brennan reasoned, the fact that a court had applied a state law which the *Times* claimed restricted its constitutional freedoms was sufficient to properly bring the issue before the Court.<sup>163</sup>

The Court relied upon similar logic some years earlier in *Shelley v. Kraemer*.<sup>164</sup> The Court held that a private agreement to exclude persons of certain racial backgrounds from residing in specific neighborhoods did not violate the equal protection clause of the fourteenth amendment, but that enforcement of such an agreement by a state court did constitute a violation.<sup>165</sup> The Court specifically held that actions of state courts and judicial officers were “state action” for purposes of the fourteenth amendment. Thus, such actions by courts or judicial officers which violated constitutional rights were subject to judicial scrutiny.<sup>166</sup>

Although these decisions appear to support the theory that using a lawsuit to infringe first amendment rights constitutes state action, at least one court has distinguished *Shelley* and *Sullivan* from a situation in which the infringing judicial or state action is merely requested by a private individual. In *Henry v. First National Bank of Clarksdale*,<sup>167</sup> a group of merchants sued the National Association for the Advancement of Colored People (NAACP), the Mississippi Action for Progress, Inc. (MAP), individuals working with these groups and banks in which these organizations had deposited funds. The suit alleged conspiracy in restraint of trade, unlawful secondary boycotts and business interference stemming from demonstrations and boycotts against the plaintiffs.<sup>168</sup> Without notice or hearing, writs of attachment were issued against NAACP funds held in the defendant banks.<sup>169</sup> However, the banks mistakenly attached funds of the Mississippi NAACP rather than the national entity named in the suit.<sup>170</sup>

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161. *United States v. Classic*, 313 U.S. 299, 326 (1941).

162. *Sullivan*, 376 U.S. at 265.

163. *Id.*

164. 334 U.S. 1 (1948).

165. *Id.* at 20.

166. *Id.* at 18.

167. 444 F.2d 1300 (5th Cir. 1971).

168. *Id.* at 1302-03.

169. *Id.* at 1303-04.

170. *Id.* at 1304.



The Mississippi NAACP filed a civil rights action against the banks, alleging that the attachment of funds made it impossible for the organization to carry out its constitutionally protected activities.<sup>171</sup> The merchants amended their complaint to include the Mississippi NAACP; the Mississippi NAACP then moved to enjoin the merchants from prosecuting their claim.<sup>172</sup> The injunction was granted and the merchants appealed, claiming that there was no state action involved.<sup>173</sup>

The Fifth Circuit Court of Appeals agreed.<sup>174</sup> The court noted that the common element in both *Sullivan* and *Shelley* was that a final judgment or dispositive order had been made, thus constituting the state action.<sup>175</sup> Judge Thornberry eloquently reasoned that the "court is an open forum before which each party is to have a full and fair opportunity to make his case."<sup>176</sup> He concluded by stating that only after a court has rendered a decision is the state's power exercised in enforcing it.<sup>177</sup>

Under Judge Thornberry's reasoning, a party may never make an argument for constitutional infringement at the trial level. Instead, the party must wait for the infringing activity to be ratified by the trial court and then assert infringement of constitutional rights in an appeal. This argument appears to be economically unsound—both for the parties and the courts. Not only will the parties be compelled to spend countless hours and dollars in litigation, but the court's resources will be needlessly wasted.<sup>178</sup> If a plaintiff makes a claim which, if enforced, will infringe the defendant's constitutional rights, is it not more logical and efficient to allow the defendant to argue that a judgment in the plaintiff's favor will result in infringement rather than to force the defendant to endure the

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171. *Id.*

172. *Id.* at 1307.

173. *Id.*

174. *Id.*

175. *Id.* at 1309.

176. *Id.* at 1310. The right "to petition the Government for a redress of grievances" is constitutionally guaranteed. U.S. CONST. amend. I.

177. *Henry*, 444 F.2d at 1310.

178. Although Judge Thornberry's concern about access to the courts is valid, *see supra* note 176 and accompanying text, there is an equally valid concern among the judiciary about the burden of needless or frivolous litigation. *See, e.g., Brown v. Gibson*, 571 F. Supp. 1075 (W.D. Mo. 1983): "Plaintiff's right of access to the court is not absolute or unconditional. . . . This is particularly true where plaintiff has demonstrated a propensity for filing numerous meritless and vexatious lawsuits which clutter the docket of this court and put defendants to the time and expense of answering frivolous . . . allegations." *Id.* at 1076-77 (citations omitted). *See also Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 164 (N.D. Ga. 1982) ("[A]ttorneys have an affirmative obligation not to clog the courts with frivolous lawsuits.").

expense and inconvenience of a second action?<sup>179</sup>

In addition, if the plaintiff's claim is meritless, the defendant will win the lawsuit, but the defendant's rights will have been infringed and the litigation expenses will have been incurred. Subsequent actions for malicious prosecution or attorney's fees will add additional expense and may or may not be successful—leaving the press defendant with a somewhat empty victory. Worse still, the self-censorship which could easily occur as a result of the infringement is irreparable.<sup>180</sup>

The United States District Court recognized this logic in *Galella v. Onassis*.<sup>181</sup> Galella, a photographer, sued Jacqueline Onassis and three secret service agents, alleging false arrest, malicious prosecution and business interference in connection with his attempts to photograph her.<sup>182</sup> Onassis filed a counterclaim seeking damages for, among other things, violation of her constitutional right of privacy.<sup>183</sup> In addressing Galella's contention that constitutional rights of privacy can only be infringed by state action, the court acknowledged that any act of a court, "even the entry of a judgment denying relief,"<sup>184</sup> constituted state action.<sup>185</sup> On this basis, the court reasoned that "the denial of relief in this

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179. The key concept is that the libel suit must be meritless. See *supra* note 9.

180. Chief Justice Warren realized the irreversible effect of self-censorship in *Times Film Corp. v. Chicago*, 365 U.S. 43, 66 n.6 (1961) (Warren, C.J., dissenting):

Tolstoy once wrote: "You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me! I wanted to write what I felt; but all the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I abandoned, and went on abandoning, and meanwhile the years passed away."

*Id.*

181. 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd in part, rev'd in part on other grounds*, 487 F.2d 986 (2d Cir. 1973).

182. *Id.* at 199.

183. *Id.* Galella's attempts to photograph Onassis and her children, Caroline and John, were varied and often obnoxious. He interrupted a private dinner party held at a restaurant, initially taking photos while hidden behind a coat rack. The party ended abruptly when Galella emerged, darting around the table to take photos of Onassis and the other guests. *Id.* at 207.

While John and his mother were riding their bicycles in Central Park, Galella jumped onto the bike path approximately 10 feet in front of John, forcing him to swerve quickly and nearly causing him to fall. *Id.* On another occasion Galella appeared while Caroline was playing tennis in Central Park. Galella followed Onassis and her daughter into the tennis house, knocking Caroline into a wall. After Caroline went onto the court, Galella ran around outside the fenced court, photographing her and her mother. *Id.* at 209. He eventually ran onto the court, jumping around Caroline as he took pictures. She soon left the court, went into the tennis house, and then began to walk home. Galella was within three feet of her at all times, taking pictures and ignoring instructions from a secret service agent to leave Caroline alone. *Id.* at 210.

184. *Id.* at 232.

185. *Id.*

case—relief essential to vindicate a basic human and constitutional right—would itself violate the Constitution.”<sup>186</sup> Clearly, the court had concluded that Galella’s conduct violated Onassis’ right of privacy. Galella’s lawsuit, in effect, requested judicial approval of his intrusive practices. Thus, the court determined that to deny, at the trial court level, the relief Onassis requested would violate her constitutional right of privacy.

This argument is further supported by *Edwards v. Habib*,<sup>187</sup> in which a tenant was evicted after exercising her first amendment rights.<sup>188</sup> The District of Columbia Circuit Court of Appeals stated that “[a] state court judgment, . . . even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech.”<sup>189</sup> The court relied on *Sullivan*<sup>190</sup> and *Marsh v. Alabama*.<sup>191</sup>

In *Marsh*, a Jehovah’s Witness faced criminal punishment for attempting to distribute religious literature in a company-owned town.<sup>192</sup> Employing a balancing test, the Court held that the state had improperly favored the rights of the property owner over the rights of the defendant to distribute, and the town’s inhabitants to receive, the literature. The Court concluded that the defendant’s conviction could not stand.<sup>193</sup>

The *Edwards* court noted that both *Sullivan* and *Marsh* involved privately initiated judicial activity and that “the state simply provided courts and laws to settle essentially private disputes.”<sup>194</sup> Yet, when settlement affected first amendment freedoms, the reviewing court employed a balancing test to determine whether the result was unconstitutional—suggesting that the lower court’s approval of the settlement sufficiently constituted state action.<sup>195</sup>

The *Galella* and *Edwards* decisions suggest that the *Henry* court’s

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186. *Id.*

187. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

188. *Id.* at 688-89. The tenant notified the Department of Licenses and Inspections of sanitary code violations in her apartment. Upon inspection, over 40 violations were discovered which the landlord was ordered to rectify. The landlord then issued the tenant a 30-day notice to vacate the premises. *Id.*

189. *Id.* at 694.

190. The *Edwards* court noted that *Sullivan* was technically reviewed under the fourteenth amendment due process clause as opposed to the first amendment. However, because the first amendment has been applied to the states via fourteenth amendment incorporation, “there is no reason to think that review under the First Amendment is more limited.” *Id.* at 694 (footnote omitted).

191. 326 U.S. 501 (1946).

192. *Id.* at 503-04.

193. *Id.* at 509.

194. *Edwards*, 397 F.2d at 696 (footnote omitted).

195. *Id.*

reasoning is flawed. According to the *Gallela* and *Edwards* courts, state action occurs when a court renders a decision. Therefore, when a party asks the court to approve action which violates another's constitutional rights, the court should decline to do so.

One case involving a press defendant followed such a course. In *E.W. Scripps Co. v. Ninio*,<sup>196</sup> a Los Angeles Superior Court judge allowed a claim for violation of first amendment rights to stand. That case resulted from a libel suit filed by Victor Ninio against *The Cincinnati Post*. During a December 3, 1979 rock concert at Riverfront Coliseum in Cincinnati, Ohio, a "human stampede" for preferred seating resulted in eleven deaths. Ninio, a local ambulance service operator, provided services at that event.<sup>197</sup> *The Post* published two articles on April 3, 1980, reporting that Ninio had been convicted of traffic violations prior to the concert, that Ninio had smoked marijuana prior to the concert, that Ninio's driver's license had been suspended at the time of the concert, that one of Ninio's ambulances was not equipped to provide oxygen to an injured person, that the keys were not in one of Ninio's ambulances which blocked the path of another ambulance and that Ninio possessed a Cincinnati Fire Department resuscitator more than two weeks after the concert.<sup>198</sup>

Ninio filed a libel suit against *The Post* in Ohio.<sup>199</sup> Although he alleged that *The Post's* articles were false and defamatory,<sup>200</sup> Ninio later admitted, during his deposition testimony, that the facts reported by *The Post* were true.<sup>201</sup> E.W. Scripps Co., publisher of *The Cincinnati Post*, and the other libel defendants filed a countersuit alleging that Ninio intentionally infringed Scripps' federal and state constitutional rights by suing for the purpose of "silencing" Scripps and punishing them for their accurate reporting.<sup>202</sup>

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196. No. C 500 144 (Cal. Super. Ct. filed May 31, 1984).

197. Plaintiff's Memorandum of Points and Authorities in Opposition to Demurrer at 2, *E.W. Scripps Co. v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984) [hereinafter Second Memorandum].

198. *Id.* at 3.

199. *Id.* Also named in the suit were William Burleigh, Vice President and General Editorial Manager of E.W. Scripps Co., Paul F. Knue, Editor of *The Cincinnati Post*, James Chute, former reporter for *The Cincinnati Post* and Paul Harasim, reporter for *The Cincinnati Post*. First Amended Complaint For Abuse Of Process And Intentional Infringement Of The Exercise Of Federal And State Constitutional Rights at 2 & 4, *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984) [hereinafter First Amended Complaint].

200. Second Memorandum, *supra* note 197, at 3.

201. First Amended Complaint, *supra* note 199, at 4.

202. *Id.* at 8-9. Ninio moved from Ohio to California after March 1980; consequently, Scripps filed its countersuit in California state court. *Id.* at 2.

Scripps argued that Ninio used the judicial processes of Ohio to impair Scripps' constitutional rights, and that because Ninio's conduct was "under the color and authority of Ohio state law,"<sup>203</sup> the state action requirement was satisfied.<sup>204</sup>

Demurring to Scripps' complaint, Ninio contended that his actions had not met the state action requirements of *Lugar v. Edmondson Oil Co.*<sup>205</sup> The *Lugar* Court held that conduct alleged to have caused the deprivation of rights must "be fairly attributable to the State."<sup>206</sup> To determine fair attribution, the Court stated that the deprivation must result from the exercise of a state-created right, privilege or rule of conduct or be caused "by a person for whom the State is responsible."<sup>207</sup> Additionally, the person allegedly causing the deprivation must be a "state actor,"<sup>208</sup> either because he is a state official or has received assistance from an official, "or because his conduct is otherwise chargeable to the State."<sup>209</sup>

Scripps contended that because libel suits have the "potential to inhibit the free flow of ideas and information upon which self-governing democracy depends"<sup>210</sup> libel plaintiffs must adhere to the restrictions of the first and fourteenth amendments.<sup>211</sup> In support, Scripps cited *New York Times Co. v. Sullivan*<sup>212</sup> and *Edwards v. Habib*.<sup>213</sup>

Scripps also alleged violation of its state constitutional rights to free speech and press under both the California and Ohio Constitutions.<sup>214</sup> Scripps cited *Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills*<sup>215</sup> and *Robins v. Pruneyard Shopping Center*<sup>216</sup> in support

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203. Second Memorandum, *supra* note 197, at 14 (emphasis in original).

204. *Id.*

205. 457 U.S. 922 (1982).

206. *Id.* at 937.

207. *Id.*

208. *Id.*

209. *Id.*

210. Points And Authorities In Opposition To Defendant's Demurrer at 17, *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984) [hereinafter First Memorandum].

211. *Id.* at 18.

212. 376 U.S. 254, 265 (1964). See *supra* text accompanying notes 162-63.

213. 397 F.2d 687, 691 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). See *supra* text accompanying notes 187-95.

214. First Amended Complaint, *supra* note 199, at 8-9 (citing CAL. CONST. art. I, § 2 and OHIO CONST. art. I, § 11). Although Ohio's Constitution limits its guarantee of free speech and press rights to citizens while California's includes all persons, Scripps alleged that it enjoyed protection under either standard. First Memorandum, *supra* note 210, at 12-13.

215. 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), *appeal dismissed*, 459 U.S. 1192 (1983).

216. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980)

of its proposition.<sup>217</sup> In *Pruneyard*, the California Supreme Court noted that the protection afforded the rights to freedom of speech and of the press by the California Constitution is "more definitive and inclusive than the First Amendment."<sup>218</sup>

In *Laguna Publishing*, a private, residential, walled community refused a newspaper distributor permission to distribute his newspaper within its gates. The court of appeals held that the distributor's rights under article I, section 2 of the California Constitution had been violated and that the distributor was entitled to damages. The court held that under California law, the state action necessary to activate constitutional restraint "is something less than that degree of conduct sufficient to entitle one to a right of action for damages"<sup>219</sup> under federal law. The court further stated that the *Pruneyard* decision suggested that "a private individual can be held to have violated the state constitutional rights of another, at least the latter's free speech rights."<sup>220</sup>

Scripps argued that these cases bestowed upon it a private right of action against Ninio for violation of its state and federal guarantees of free speech and press. The California Superior Court of Los Angeles County agreed, overruling Ninio's demurrer for "reasons stated in [Scripps'] responding papers."<sup>221</sup>

Although the court did not speculate as to the motivation for Ninio's libel suit, Ninio's admission that the contested statements were true suggests that he *was* only interested in punishing the newspaper and chilling the exercise of its first amendment rights. Following the *Gallela* court's reasoning, the trial court would have violated *The Post's* first amendment rights had it dismissed the countersuit, since dismissal would have effectively amounted to approval of Ninio's actions.

However, since the court did not articulate its reasoning beyond the reference to Scripps' memoranda, one can only speculate as to which fact or legal theory was the deciding factor. Perhaps then, such an "exotic" claim should be reserved for those fact situations which are so obviously and unreasonably violative of constitutional rights—such as a libel suit concerning a truthful story—that a more time consuming and costly

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(holding that the California Constitution protects the reasonable exercise of free speech and petition rights in privately-owned shopping center).

217. First Memorandum, *supra* note 210, at 13.

218. 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859 (quoting *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975)).

219. *Laguna Publishing*, 131 Cal. App. 3d at 849, 182 Cal. Rptr. at 832.

220. *Id.* at 838, 182 Cal. Rptr. at 825-26 (emphasis in original).

221. *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. Dec. 12, 1984) (order overruling defendant's demurrer).

remedy, such as a subsequent action for malicious prosecution or attorney fees, is unsatisfactory.<sup>222</sup>

Further comparison between *Laxalt* and *Scripps* prompts another possibility: due to the more inclusive first amendment protection of the California Constitution<sup>223</sup> and the lesser degree of state action necessary to activate that protection,<sup>224</sup> an action for infringement of the rights of free speech and press under the appropriate state constitution may afford a more satisfying result.

### B. Abuse of Process

Abuse of process is a tort action which involves use of the judicial process for ends other than the redress of grievances—for example, to compel a settlement or coerce the defendant into refraining from engaging in unwanted but otherwise permissible activity.<sup>225</sup>

While at first blush abuse of process appears similar to the tort of malicious prosecution, further analysis reveals a number of differences. Most relevant for this discussion, abuse of process can be asserted in a counterclaim before the initial action has been completed.<sup>226</sup> Because the purpose for which process is used is all that is important, a plaintiff in an abuse of process action need not prove that the original action terminated in his favor, an element which is required in a malicious prosecution action.<sup>227</sup> However, the same set of facts can give rise to both actions, often causing confusion between them.<sup>228</sup>

222. In two other cases, *Feder v. Woodward*, 12 Media L. Rep. (BNA) 1071 (C.D. Cal. 1985) and *Rewald v. Western Sun*, 11 Media L. Rep. (BNA) 2494 (D. Haw. 1985), counterclaims for violation of first amendment rights were dismissed virtually without comment.

In *Rewald*, the court stated that neither party had cited any authority for the counterclaim and that the court was aware of none. The court acknowledged that attempted infringement of *Western Sun's* first amendment rights could constitute the "collateral purpose" requirement of *Western Sun's* abuse of process claim. See *infra* text accompanying notes 264-73. The court held, however, that such attempted infringement did not stand as a separate cause of action since the Constitution protects the press only from government, not private, action. *Rewald*, 11 Media L. Rep. (BNA) at 2495.

The *Feder* court was even more brief, stating simply: "The Counterclaim has not and cannot allege the requisite element of state action." *Feder*, 12 Media L. Rep. (BNA) at 1072.

223. See *supra* text accompanying note 218. Presumably, other state constitutions include free speech and press provisions that have been similarly interpreted. Such a discussion is beyond the scope of this article, however.

224. See *supra* text accompanying notes 219-20.

225. PROSSER AND KEETON ON THE LAW OF TORTS, § 121 (W. Keeton 5th ed. 1984) [hereinafter PROSSER AND KEETON]. See generally Davis, *Torts—Abuse of Process Defined*, 28 ARK. L. REV. 388 (1974).

226. PROSSER AND KEETON, *supra* note 225, § 121.

227. *Id.*

228. Davis, *supra* note 225, at 394-95. For example: *A* sues *B*. *B* counterclaims against *A*

Abuse of process and malicious prosecution can be distinguished by examining the point at which each tort is established. Abuse of process involves misuse of process *after* it is initiated; malicious prosecution involves "wrongful initiation" of process.<sup>229</sup>

Section 682 of the Restatement (Second) of Torts provides that "[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."<sup>230</sup> Thus, the essential elements of abuse of process consist of: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.<sup>231</sup> The ulterior purpose often results in an act of coercion to obtain a benefit or advantage not normally associated with the proceeding,<sup>232</sup> thus fulfilling the second requirement. Dean Prosser referred to the use of an improper purpose as "a form of extortion," stating that the tort results from "what is done in the course of negotiation, rather than the issuance or any formal use of the process itself."<sup>233</sup> For example, a libel suit filed in order to coerce a settlement when the plaintiff has admitted that the published information was true states a cause of action for abuse of process.<sup>234</sup> Even a demand occurring before initiation of a lawsuit may be within the realm of abuse of process as long as the party making the demand eventually files suit.<sup>235</sup>

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for abuse of process. *B* loses on his counterclaim, but successfully defends against *A*'s suit. *B* may now sue *A* for malicious prosecution.

229. *Id.*; see also PROSSER AND KEETON, *supra* note 225, § 119.

230. RESTATEMENT (SECOND) OF TORTS § 682 (1977).

231. *Huggins v. Winn-Dixie Greenville, Inc.*, 49 S.C. 206, 153 S.E.2d 693 (1967) (*see infra* note 235); *Three Lakes Ass'n v. Whiting*, 75 Mich. App. 564, 255 N.W.2d 686 (1977) (allegations that defendants: (1) intended to use lawsuit to coerce plaintiff to abandon opposition to condominium project; (2) abused discovery process by requesting discovery while delaying response to plaintiff's discovery requests; and (3) agreed to settle case and then refused to comply were sufficient to state a cause of action for abuse of process); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980) (*see infra* text accompanying notes 236-43); see also PROSSER AND KEETON, *supra* note 225, § 121, at 898.

232. PROSSER AND KEETON, *supra* note 225, § 121, at 898.

233. *Id.*

234. See *infra* text accompanying notes 258-63 for a discussion of *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984).

235. PROSSER AND KEETON, *supra* note 225; *Huggins v. Winn-Dixie Greenville, Inc.*, 49 S.C. 206, 153 S.E.2d 693 (1967). In *Huggins*, the plaintiff was detained at a grocery store for allegedly shoplifting two packages of sliced ham. *Id.* at 210, 153 S.E.2d at 695. The manager asked the plaintiff to pay \$10 for merchandise that he felt the plaintiff had taken in the past, and testified that if the plaintiff had paid the \$10, he would not have called the police. The court held that the defendant grocery store "cannot divorce itself from responsibility for the proceedings that resulted from the store manager's actions; . . . the testimony [and subsequent proceedings] were tainted throughout with the ulterior and improper purpose of coercing the



In *Bull v. McCuskey*,<sup>236</sup> the Nevada Supreme Court affirmed a decision favoring a physician who contended that the defendant attorney initiated and pursued a medical malpractice suit against him for the ulterior purpose of coercing a nuisance settlement. The plaintiff, Dr. Charles McCuskey, had treated an elderly patient's orthopedic ailments resulting from an automobile accident. The patient's nephew, displeased with Dr. McCuskey's performance, replaced him with another doctor. Although the patient's condition was not traceable to the doctor's conduct, a malpractice action was filed.<sup>237</sup>

The jury rendered a verdict for the doctor, who then initiated an action against the patient's attorney.<sup>238</sup> The court found that the attorney had not reviewed or even obtained the patient's medical records. He had not taken the deposition of the plaintiff doctor, nor had he attempted to retain an expert witness for trial.<sup>239</sup> Additionally, the attorney's remarks concerning the plaintiff during the malpractice trial were extremely derogatory.<sup>240</sup>

In his suit for abuse of process, the plaintiff contended that the defendant attorney had used the malpractice action to coerce a nuisance settlement. The jury agreed, awarding the plaintiff \$35,000 in compensatory damages and \$50,000 in punitive damages.<sup>241</sup> On appeal, the Nevada Supreme Court upheld the jury verdict, stating that "it was permissible for the jury to conclude that attorney Bull had utilized an alleged claim of malpractice for the ulterior purpose of coercing a nuisance settlement."<sup>242</sup> The court reasoned that the defendant's offer to settle for a minimum of \$750, when he had failed to adequately research the facts or provide essential expert testimony, supported the jury's conclusion that the requisite elements of abuse of process had been met.<sup>243</sup>

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respondant to pay for merchandise that the store manager 'felt' or suspected he had previously taken." *Id.* at 212, 153 S.E.2d at 696.

236. 96 Nev. 706, 615 P.2d 957 (1980).

237. *Id.* at 708, 615 P.2d at 959.

238. *Id.* at 709, 615 P.2d at 959.

239. *Id.* at 708, 615 P.2d at 959.

240. Delineating the extent of attorney Bull's transgressions, the court noted:

During trial, attorney Bull called Dr. McCuskey incompetent, a fumble-fingered fellow, a liar, a scoundrel, a damned idiot. He also said, "[i]t will be a cold day in hell when I let that dum-dum take care of my mother." Of the doctor he also stated, "[h]e will lie under oath, steel [sic] an elderly woman's redress, cheat if he can get away with it, and all that is left for him is to make a pact with the devil and murder those who would oppose him."

*Id.* at 708-09, 615 P.2d at 959.

241. *Id.* at 707, 615 P.2d at 959.

242. *Id.* at 709, 615 P.2d at 960.

243. *Id.*

In *Neumann v. Vidal*,<sup>244</sup> the plaintiff, Neumann, sued a competing developer for abuse of process.<sup>245</sup> Neumann claimed that the defendant, RECO, had abused the procedures<sup>246</sup> of the Maryland judicial system as well as the United States Patent and Trademark Office in order to block Neumann's company from competition.<sup>247</sup> Relying on principles of res judicata and collateral estoppel, the trial court dismissed Neumann's action, because RECO had previously obtained an injunction preventing Neumann from using or disclosing RECO's trade secrets.<sup>248</sup> The District of Columbia Court of Appeal, noting that "an abuse of process action can be maintained even where the earlier suit was ostensibly legitimate, so long as the reasons for the suit are found illegitimate,"<sup>249</sup> held that Neumann was not barred from raising an abuse of process claim simply because RECO had obtained an injunction. The court noted that the question still remained whether the original suit had been "designed 'to accomplish some end which the process was not intended by law to accomplish'—such as frightening off [plaintiff's] investors or delaying . . . getting [his project] underway."<sup>250</sup>

Similar issues were raised in *Alexander v. Unification Church of*

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244. 710 F.2d 856 (D.C. Cir. 1983).

245. Plaintiff Neumann was an engineer and draftsman. One of his customers, Reinforced Earth Company (RECO), had been established by the defendant, Vidal. Vidal had developed a retaining wall system in the early 1960's; RECO was the United States licensee of the system. *Id.* at 857.

Neumann decided that he could design a better system. In April 1976, he told RECO he would no longer design and draft for them; in May, he hired a patent attorney who filed a patent application for Neumann's system. *Id.* at 858.

246. Neumann encountered difficulty financing his project. In addition, RECO sued Neumann, alleging misappropriation of trade secrets, trademark infringement, unfair competition and breach of fiduciary duty. Although Neumann was not found to have used or disclosed trade secrets, the court issued an injunction forbidding him from doing so.

As a result of the litigation, interested investors withdrew. Further protest by RECO delayed issuance of the patent until July 1982. *Id.* at 858.

247. *Id.*

248. *Id.* One factor upon which the trial court relied in dismissing the abuse of process claim was the Maryland court injunction. However, the court of appeals noted that the applicable question was not whether an injunction had been issued, but rather whether the initial suit and the patent office protests were initiated for some improper purpose, such as frightening off Neumann's investors. *Id.* at 860.

The court of appeals also rejected the district court's reasoning that the Maryland court had already considered Neumann's abuse of process claim since there was no evidence supporting this conclusion. *Id.* Further, the court of appeals disagreed with the district court's rejection of Neumann's claim based on equitable estoppel. The district court found that Neumann was chiefly responsible for RECO's action protesting the patent application. The court of appeals noted that this conclusion was reached after resolving issues of fact which should have precluded the summary judgment rendered by the lower court. *Id.* at 860-61.

249. *Id.* at 860.

250. *Id.*

*America*.<sup>251</sup> There, the plaintiffs—"deprogrammers"<sup>252</sup>—brought suit against the Unification Church, its president, Neil Salonen and its leader, Sun Myung Moon, alleging violations of the deprogrammers' civil rights.<sup>253</sup> The action was in response to a suit filed in the name of a young adult member of the Church whose parents wished to have her deprogrammed.<sup>254</sup> One count of the Alexander's complaint asserted a claim for abuse of process. The court construed this count to allege that the purpose of the lawsuits brought by the Church was not to obtain damages for the Church members, but rather "to compel [the deprogrammers] to cease their deprogramming activities by putting them to the trouble and expense of litigation."<sup>255</sup> The court held that a claim for abuse of process had been sufficiently stated and that the lower court's dismissal of that count was improper.<sup>256</sup>

Each of the preceding cases suggests that when the facts indicate that a lawsuit has been instituted for improper purposes—*e.g.*, coercion or punishment, and an act in furtherance of that purpose has occurred—*e.g.*, minimal settlement offers—abuse of process exists. However, no specific test emerges from the cases. Thus, it is apparently left to the factfinder's discretion to determine when that improperly motivated activity has taken place.

Actions for abuse of process have survived motions to dismiss in at least three libel cases.<sup>257</sup> In *E.W. Scripps Co. v. Ninio*,<sup>258</sup> Scripps' countersuit included a claim for abuse of process. Scripps alleged that Ninio

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251. 634 F.2d 673 (2d Cir. 1980).

252. The court defined "deprogrammers" as persons "who work on behalf of parents in what they characterize as an effort to restore new converts of unorthodox religious groups to society by dissuading them from their new-found beliefs." *Id.* at 675. See generally Note, *Deprogramming Religious Cultists*, 11 LOY. L.A.L. REV. 807 (1978).

253. *Alexander*, 634 F.2d. at 675. The Alexanders moved to consolidate their suit with one brought by Theodore Patrick, Jr., another deprogrammer. The district court did not rule on the motion to consolidate, but simply dismissed the Alexanders' suit for failure to state a ground upon which relief could be granted. Patrick's suit was dismissed for failure to state a claim and lack of subject matter jurisdiction. Only the Alexanders appealed. *Id.*

254. Wendy Helander, a Unification Church member, brought suit against Patrick seeking substantial damages and injunctive relief under New York and federal civil rights law. The Alexanders' complaint alleged, however, that Helander had only lent her name to the suit, that she was without funds to bring the suit, that all expenses were being paid by the Church and that any judgment Helander received would be turned over to the Church. *Id.* at 676-77.

255. *Id.* at 678.

256. *Id.*

257. *E.W. Scripps Co. v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984); *Feder v. Woodward*, 12 Media L. Rep. (BNA) 1071 (C.D. Cal. 1985); *Rewald v. Western Sun*, 11 Media L. Rep. (BNA) 2494 (D. Haw. 1985).

258. *E.W. Scripps Co. v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984). For a discussion of the facts surrounding this case, see text accompanying notes 196-200.

continued to utilize judicial procedures, such as requesting depositions, after admitting the truth of the matters at issue in the libel action. Scripps further alleged that Ninio's collateral purpose in requiring the plaintiffs to attend depositions was to prevent them and other members of the press from publishing any further accounts of the rock concert tragedy and Ninio's involvement in it,<sup>259</sup> regardless of the fact that the event was "the focus of legitimate public interest."<sup>260</sup> Scripps also alleged that Ninio's ulterior purpose in maintaining the libel suit was to force the plaintiffs to incur litigation costs "as a punishment for their truthful reporting."<sup>261</sup>

Ninio demurred to Scripps' complaint.<sup>262</sup> However, the court overruled the demurrer, "for reasons stated in [Scripps'] responding papers."<sup>263</sup>

The court's ruling suggests that an allegation of misuse of process subsequent to the filing of a complaint is sufficient to maintain a cause of action for abuse of process. Further, the ruling suggests that it is sufficient to allege that a libel plaintiff's collateral purpose is improper when he attempts to silence the press and punish it for truthful or non-reckless reporting by forcing it to incur legal expenses in its defense.

In *Rewald v. Western Sun*,<sup>264</sup> a United States District Court denied Ronald Rewald's motion to dismiss an abuse of process counterclaim filed in response to his libel action against Western Sun, an Iowa corporation which owns KHON television.<sup>265</sup> Rewald sued the station and three of its reporters for broadcasting allegedly defamatory reports about his investment firm.<sup>266</sup> The reports charged Rewald with "running an investment scam"<sup>267</sup> and misrepresenting certain characteristics of his

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259. Second Memorandum, *supra* note 197, at 7. Scripps alleged that Ninio had required two employees of Scripps to appear and give depositions in April 1984. First Amended Complaint, *supra* note 199, at 5. Thus, Scripps alleviated the court's concern that Ninio had done no more than file a libel complaint. *Id.* at 7-8.

260. First Amended Complaint, *supra* note 199, at 6.

261. *Id.* at 7. Ninio also refused the plaintiffs' request, made after Ninio's admissions, that he drop the suit. Instead, Ninio demanded that the plaintiffs pay him \$75,000 before he would dismiss the libel action. *Id.* at 5. Ninio's actions were reminiscent of the extortion analogy made by Dean Prosser. See *supra* text accompanying notes 233-34.

262. Demurrer, *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. filed May 31, 1984).

263. *E.W. Scripps v. Ninio*, No. C 500 144 (Cal. Super. Ct. Dec. 12, 1984) (order overruling defendant's demurrer).

264. 11 Media L. Rep. (BNA) 2494 (D. Haw. 1985).

265. *Id.* at 2495.

266. The first newscast prompted the investment firm's collapse and Rewald's attempted suicide and subsequent arrest. *Id.* at 2494.

267. *Id.*

past.<sup>268</sup>

Western Sun filed a counterclaim alleging abuse of process, arguing that Rewald had brought the defamation action not to recover damages for the alleged defamation, but to intimidate the television station and its reporters in order to keep them from reporting news about him.<sup>269</sup> The court, citing Dean Prosser, stated that abuse of process "normally consists of misuse of a writ . . . for a collateral purpose."<sup>270</sup> The court reasoned, however, that "the process misused may be the summons served at the beginning of any suit."<sup>271</sup>

Finding that there were no facts in the record indicating Rewald's purpose in instituting the defamation action, the court denied the motion to dismiss the abuse of process claim.<sup>272</sup> The court relied on procedural grounds, reasoning that an action should not be dismissed for failure to state a claim unless there is no conceivable set of facts upon which the plaintiff might prevail.<sup>273</sup>

The United States District Court for the Central District of California recently refused to dismiss a counterclaim for abuse of process filed by Simon & Schuster and author Bob Woodward against Dr. Robert J. Feder.<sup>274</sup> Feder sued Woodward for libel based on statements in Woodward's book, *Wired: The Short Life and Fast Times of John Belushi*.<sup>275</sup> The statements in question concern treatment for drug abuse and prescriptions of drugs.<sup>276</sup> Woodward contended that Feder knew that the statements were true, and that Feder's true motives in maintaining the libel suit were to obtain false publicity, silence inquiry into the Los Angeles drug culture, burden plaintiffs with the expense and inconvenience of

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268. *Id.*

269. *Id.* at 2495.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Rewald*, 11 Media L. Rep. (BNA) at 2495 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

274. *Feder v. Woodward*, 12 Media L. Rep. (BNA) 1071 (C.D. Cal. 1985).

275. B. WOODWARD, *WIRED: THE SHORT LIFE AND FAST TIMES OF JOHN BELUSHI* (1984).

276. Feder claimed he was

defamed by statements reporting that he had treated Belushi for "overuse of drugs, especially cocaine," that he "gave amphetamines, or uppers, to some of his patients if they needed to be on for a particular performance or day" and for statements asserting that Feder had used the name of Belushi's manager on prescriptions for amphetamines intended for Belushi's use.

*Libel Plaintiff Charged in Abuse of Process Lawsuit*, 11 Media L. Rep. (BNA) Mar. 19, 1985. In response to a letter from Feder's attorney, Woodward offered to make available his source materials for the book. Although Feder and Woodward entered into a written agreement providing for Feder's review of the materials, Feder filed the libel suit. *Id.*

litigation and silence criticism of himself and his medical practices.<sup>277</sup> The court declined to discuss the issue, however, denying Feder's motion to dismiss the counterclaim in one sentence.<sup>278</sup>

Without the benefit of the court's elaboration on its decision, it is difficult to know why it found the abuse of process claim sufficient to withstand Feder's motion to dismiss. However, assuming Woodward could prove his allegations—particularly that Feder knew the statements were true when he instituted the suit—Feder's action could not have been motivated by the need to redress a grievance and thus, on its face, was abusive.

Yet, in *Laxalt v. McClatchy*,<sup>279</sup> the Nevada District Court required more than allegations of baseless litigation. McClatchy Newspapers filed an abuse of process counterclaim against Senator Paul Laxalt of Nevada.<sup>280</sup> McClatchy contended that Laxalt's purpose in filing a libel suit against it was not to recover damages for the alleged libel, but "to punish [McClatchy] for exercising [its] First Amendment rights, to coerce the disclosure of confidential sources, and to deter third parties, including ABC and CBS, from publishing information about the Senator."<sup>281</sup>

The court dismissed the claim, stating that while McClatchy had alleged an improper purpose, it had failed to allege abusive tactics such as "minimal settlement offers or huge batteries of motions filed solely for the purpose of coercing a settlement."<sup>282</sup> The court rejected McClatchy's interpretation of *Bull v. McCuskey*, which suggested that improper motive alone is sufficient to support a claim for abuse of process.<sup>283</sup> Instead, the *Laxalt* court concluded that the abuse in *Bull* resulted from the attorney's minimal settlement offer of \$750 on a medical malpractice action, and that no similar abuse existed here.<sup>284</sup>

Under the court's reading of *Bull*, it is clear that McClatchy did not sufficiently allege abuse of process in its counterclaim. All of the Senator's activities<sup>285</sup> appear to have occurred before Laxalt filed suit; had McClatchy alleged similar activity occurring after Laxalt filed suit, the result might well have been different. Yet this reasoning contradicts the

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277. *Id.*

278. *Feder v. Woodward*, 12 Media L. Rep. (BNA) 1071, 1072 (C.D. Cal. 1985).

279. *Laxalt v. McClatchy*, 622 F. Supp. 737 (D. Nev. 1985).

280. *Id.* See *supra* notes 53-58 and 92-93 and accompanying text for a description of the facts surrounding this case.

281. McClatchy Memorandum, *supra* note 56, at 4-5.

282. *Laxalt*, 622 F. Supp. at 752.

283. *Id.*

284. *Id.*

285. See *supra* text accompanying note 281.

holdings in *Scripps*, *Feder* and *Rewald*, which only required that a collateral and improper purpose for the litigation be alleged. These contradictory decisions appear to be irreconcilable, and perhaps can only be explained by differences in state common law. Because the *Feder* and *Rewald* courts avoided detailed analysis of the issue, however, any conclusion is, at best, speculation.

Yet, in light of these very recent and still pending cases, it remains possible that abuse of process is a viable means of holding libel plaintiffs accountable for the legal actions they initiate. However, as the *Laxalt* case demonstrates, the crucial elements, an ulterior purpose and an improper act in furtherance of that purpose, must be apparent to the court and must extend beyond the usual request for damages or redress of a grievance which is at the foundation of most lawsuits. Where the lawsuit is pursued merely to harass or discourage the press defendant, an improper purpose should be found. Moreover, according to *Laxalt* and *Scripps*, a ridiculously low settlement offer or refusal to dismiss a suit that is admittedly baseless will satisfy the requisite "act in furtherance." Thus, careful attention to these requirements should result in success for the press defendant.

### C. *Malicious Prosecution*

Malicious prosecution is a tort action aimed at curbing suits brought without probable cause. The term "malicious prosecution"<sup>286</sup> technically refers to criminal actions. However, it has long been recognized as applying to civil actions as well—sometimes referred to as "wrongful civil proceedings."<sup>287</sup> Malicious prosecution is distinguishable from abuse of process in that the former refers to wrongful initiation of a lawsuit—one that the plaintiff knows or should know is meritless.<sup>288</sup>

Unlike abuse of process actions, which can be brought before the initial litigation is completed—thus making counterclaims and countersuits possible<sup>289</sup>—malicious prosecution requires that the previous action be terminated in the malicious prosecution plaintiff's favor.<sup>290</sup> A majority of jurisdictions require the following four elements: (1) an initial action initiated against an individual; (2) terminated in that individual's

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286. PROSSER AND KEETON, *supra* note 225, § 119.

287. *Id.* at § 120.

288. See *Hughes v. Swinehart*, 376 F. Supp. 650, 653 (E.D. Pa. 1974); PROSSER AND KEETON, *supra* note 225, §§ 119-120. Abuse of process refers to use of the judicial process for ends other than the redress of grievances—i.e., to compel a settlement or coerce the defendant into refraining from engaging in unwanted but otherwise permissible activity. *Id.* § 121.

289. See *supra* notes 225-85 and accompanying text.

290. PROSSER AND KEETON, *supra* note 225, § 120, at 892.

favor; (3) brought without probable cause and (4) brought with malice.<sup>291</sup> Minority jurisdictions require that special damages or grievances exist, such as interference with person or property.<sup>292</sup>

An action for malicious prosecution has been successful in at least one case concerning a press defendant. *Marcum v. Kirk*<sup>293</sup> involved Homer Marcum, publisher of *The Martin Countian*, a small weekly newspaper in Inez, Kentucky, and Willie Kirk, a former judge-executive for Martin County.<sup>294</sup> The newspaper had published numerous articles critical of Willie Kirk during his administration.<sup>295</sup> Willie Kirk had been convicted on charges of extorting flood relief money, but had been later pardoned and reelected as judge-executive.<sup>296</sup> He sued the paper for libel

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291. *Id.*; Dobbs, *Belief and Doubt in Malicious Prosecution and Libel*, 21 ARIZ. L. REV. 607 (1979); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1219 (1979) (hereinafter *Groundless Litigation*). See, e.g., *Peerson v. Ashcraft Cotton Mills*, 201 Ala. 348, 78 So. 204 (1917) (successful defendant has an action for malicious prosecution against a plaintiff who proceeded against him to his damage, maliciously and without probable cause); *Shaeffer v. O.K. Tool Co.*, 110 Conn. 528, 148 A. 330 (1930) (plaintiff in malicious prosecution action must allege and prove original action was instituted without probable cause, with malice, and that it terminated in his favor); *Rosenblum v. Ginis*, 297 Mass. 493, 9 N.E.2d 525 (1937) (plaintiff in malicious prosecution action has burden of proving that the original action was brought maliciously, without probable cause and was terminated in plaintiff's favor).

292. PROSSER AND KEETON, *supra* note 225, § 120; *Groundless Litigation*, *supra* note 291, at 1219. Dean Prosser notes that jurisdictions rejecting special injury insist that the plaintiff's heavy burden of proof protects the honest litigant. Jurisdictions requiring special injury are concerned more with the possibility that honest litigants will fear retribution and thus avoid legitimate litigation. PROSSER AND KEETON, *supra* note 225, § 120, at 890. In either case, the dual threats of first amendment infringement and self-censorship should satisfy the special injury requirement.

293. No. 82-C1-951 (Ky. Cir. Ct. Feb. 1, 1985), *aff'd*, *Kirk v. Marcum*, Nos. 85-CA-798-MR, 85-CA-951-MR (Ky. Ct. App. June 13, 1986).

294. Brief for Appellee and Cross Appellant at 1, *Kirk v. Marcum*, Nos. 85-CA-798-MR, 85-CA-951-MR (Ky. Ct. App. June 13, 1986) [hereinafter Brief for Appellee].

Marcum founded the newspaper in 1975. He received numerous journalism awards, particularly for stories concerning corruption in Willie Kirk's administration. *Id.* Prior to Marcum's establishing *The Martin Countian*, he taught high school journalism and was a reporter for *The Martin County Mercury*, owned by John Kirk, Willie Kirk's cousin and political ally. *Id.* at 2. Although there was some dispute as to whether Marcum quit or was fired by John Kirk, Marcum subsequently began publishing *The Martin Countian*. John Kirk's *Mercury* went out of business as did another Kirk newspaper, *The Martin County Times*. *Id.*

295. *Id.* at 3-4. The articles published included one questioning the legality of Willie Kirk's purchase of land at a tax sale when existing receipts indicated that taxes had been paid. An editorial following Kirk's election in November 1977 queried whether the election had been "purchased" since an unusually high percentage (15%) of voters required "voter assistance" in the voting booth. Marcum also reported that various members of Willie Kirk's family would be on the county payroll at a combined salary of \$60,000. A subsequent article reported that Kirk was building private fox hunting roads with county funds. *Id.* at 3-4.

296. *Publisher Wins Damages for Malicious Prosecution*, 11 Media L. Rep. (BNA) Feb. 26, 1985.



as a result of an article which stated that he had been involved in an altercation with public officials in the Martin County Courthouse.<sup>297</sup> The article included an accusation by the county jail matron that Judge Kirk had hit her in the chest and had run from the courthouse.<sup>298</sup>

Willie Kirk was represented by his cousin, John Kirk, who had unsuccessfully prosecuted Marcum on charges concerning newspaper sales.<sup>299</sup> John Kirk had also filed three separate libel actions against Marcum in the first four years that *The Martin Countian* was published; all were resolved in Marcum's favor.<sup>300</sup>

In the Willie Kirk libel action, the jury deliberated less than twenty minutes following a four day trial before reaching its conclusion that *The Martin Countian* article containing the jail matron's allegations was truthful.<sup>301</sup> In Marcum's subsequent malicious prosecution suit, he alleged that Kirk's action was brought without probable cause and with malice.<sup>302</sup> The jury agreed, awarding Marcum \$21,000 including legal

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297. Brief for Appellee, *supra* note 293, at 5.

298. *Id.* at 4-5. There was some dispute as to the argument's origins. The matron contended that it centered on whether Willie Kirk and his political allies could dismiss the jailer—the matron's husband—from his post. Kirk, however, contended that the argument centered on whether jail employees' time sheets were accurate. The matron accused Judge Kirk of hitting her after she told him " 'Mr. Kirk, I hope . . . you go back to the pen so I can yell suey at you. I'll waive [sic] at the train that takes you away.' " *Id.* at 5.

Willie Kirk denied having hit the matron and requested that the newspaper issue a retraction. Marcum agreed to print Kirk's version of the events in a separate story which appeared two issues after the initial article's appearance and which enjoyed similarly prominent placement on the front page. *Id.* at 7. Several months after the second article appeared, Kirk filed the libel suit against Marcum. *Id.* at 8.

299. *Id.* at 3. In addition to his position as publisher of a rival newspaper, John Kirk served as county attorney from 1975-79. During that tenure, he prosecuted Marcum for " 'unlawful transactions with a minor,' " *id.*, based on charges that Marcum employed children to sell newspapers during school hours. Marcum was acquitted. *Id.*

300. *Id.* at 2-3. One of Kirk's libel actions, in which he served as both plaintiff and plaintiff's attorney, was brought only one month after *The Martin Countian* began publication. The complaint was amended three separate times asserting four individual claims of libel. John Kirk's "full scale assault through the legal system," *id.* at 2, was buttressed by a fourth libel suit against Marcum brought by the purchaser of Kirk's *Mercury*. *Id.* at 2-3.

301. *Id.* at 13; Proceedings of Trial and Judgment, Kirk v. Marcum, No. 80-CI-473 (Ky. Cir. Ct. Apr. 30, 1981) (original libel action).

302. Complaint at 3-4, Marcum v. Kirk, No. 81-CI-240 (Ky. Cir. Ct. Feb. 1, 1985). Marcum alleged that Willie Kirk knew that he had been involved in a fistfight with the jail matron, that the resulting article was true and that therefore, Willie Kirk had no probable cause to believe that his claims of libel could be factually supported. *Id.* at 3.

Marcum included John Kirk as a defendant, alleging that as an attorney and former publisher, John Kirk knew or should have known that there were no facts supporting Willie Kirk's libel claim since Marcum had made every effort to obtain all available information and had reason to believe that the story was true. *Id.* See *infra* text accompanying note 312.

Marcum also alleged that Willie Kirk was motivated by malice in bringing the libel suit, since he was displeased with *The Martin Countian* articles critical of his administration and

expenses, actual damages for lost time and wages and punitive damages.<sup>303</sup>

On appeal, Willie Kirk contended that he reasonably relied upon his counsel's advice and therefore, probable cause for instituting the libel lawsuit was conclusively established.<sup>304</sup> Yet, as the attorneys for Homer Marcum so eloquently stated, "[t]urning to John Kirk for advice on whether to file suit against Homer Marcum for libel [was] like asking a Hatfield if he has good grounds to shoot a McCoy."<sup>305</sup> Clearly, John Kirk maintained a bias against Marcum, as evidenced by his repeated and unsuccessful litigation against Marcum. Moreover, John Kirk was a rival publisher, competing in a small geographic area for a limited number of readers. It was certainly in John Kirk's best interests to distract and deter Marcum by forcing him to expend considerable time and money defending lawsuits rather than publishing a newspaper.<sup>306</sup> Additionally, Marcum's printing company was included as a defendant in each suit filed by attorney Kirk. Although the printers were dismissed in each suit, Marcum encountered difficulty finding a printer willing to print his newspaper without Marcum's promise of indemnity against costs of litigation.<sup>307</sup> The Kentucky Court of Appeals held that the issue of probable cause was properly submitted to the jury.<sup>308</sup>

It was unclear whether Willie Kirk supplied his attorney with all of the facts necessary to formulate advice upon which Willie Kirk could reasonably rely. Indeed, Kirk told his attorney that he did not hit the jail matron and therefore Marcum's article was untrue.<sup>309</sup> Yet, the juries in both the libel suit and the malicious prosecution suit found that the article was true.<sup>310</sup> Accordingly, it is unlikely that Willie Kirk provided his attorney with all of the pertinent information upon which to base his

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was embarrassed at having the fistfight publicized. *Id.* Marcum alleged that John Kirk's malice stemmed from the lack of success his newspapers had suffered in competition with Marcum's. *Id.* at 4. John Kirk was dismissed as a defendant. Brief for Appellant at 2, *Kirk v. Marcum*, Nos. 85-CA-798-MR, 85-CA-951-MR (Ky. Ct. App. June 13, 1986) (hereinafter Brief for Appellant).

303. Brief for Appellant, *supra* note 302, at 3.

304. *Id.* at 3.

305. Brief for Appellee, *supra* note 293, at 22.

306. *Id.* at 23. Marcum cited *Kroger Grocery & Baking Co. v. Hamlin*, 193 Ky. 116, 235 S.W. 4 (1921) to support his contention that an attorney must be disinterested before a client can cite reliance upon that attorney's advice as a defense to a malicious prosecution action. *Id.* at 24.

307. Brief for Appellee, *supra* note 293, at 23.

308. *Kirk v. Marcum*, Nos. 85-CA-798-MR, 85-CA-951-MR, slip op. at 3 (Ky. Ct. App. June 13, 1986).

309. *Id.* at 9.

310. Proceedings of Trial and Judgment, *Kirk v. Marcum*, No. 80-CI-473 (Ky. Cir. Ct.

advice. The court of appeals rejected this argument, however, stating that because the facts were in dispute, the lower court properly permitted Willie Kirk to relate his version to the jury. The court further noted, however, that both the libel suit jury and the malicious prosecution suit jury reached the same conclusion as to Willie Kirk's veracity.<sup>311</sup>

As an attorney, John Kirk should have known that Willie Kirk would have to prove not only falsity, but actual malice. Yet it is unlikely that Willie Kirk would have been able to prove that Marcum knew the story was false or did not care whether it was true or false. Marcum testified that he attempted to contact each witness to the alleged event, although Willie Kirk was unavailable.<sup>312</sup> Even more persuasive was Marcum's attempt to present all sides of the story by subsequently printing Judge Kirk's version of the incident. Clearly, Marcum's action indicated a willingness to seek and print the truth. The court of appeals ignored this aspect of John Kirk's participation. However, the court did reverse the trial court's denial of emotional distress damages and remanded the case for a new trial on that issue.<sup>313</sup>

The *Marcum* facts suggest a situation in which the libel plaintiff and his attorney attempted to litigate a publisher out of business. Under such circumstances, where probable cause for the libel suit is non-existent and malice is apparent, an action for malicious prosecution is merited. Without such recourse, a publisher's "first amendment rights will amount to little more than the right to go broke defending meritless libel suits"<sup>314</sup> brought by disgruntled subjects of public interest.

#### D. Attorney's Fees and Sanctions

An action for attorney's fees and/or sanctions is another possible solution to meritless libel suits.<sup>315</sup> Some press attorneys believe that this

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April 30, 1981) (original libel action); Trial Order and Judgment, *Marcum v. Kirk*, No. 82-CI-951 (Ky. Cir. Ct. Feb. 1, 1985) (malicious prosecution action).

311. *Kirk v. Marcum*, No. 85-CA-798-MR, 85-CA-951-MR, slip op. at 4.

312. Brief for Appellee, *supra* note 293, at 6. One witness testified that she refused to talk to Marcum about the incident because she was concerned about losing her job—a fate controlled by Willie Kirk. Marcum testified that the witness' concern about being fired indicated that he was "on the right track." *Id.*

313. *Kirk v. Marcum*, Nos. 85-CA-798-MR, 85-CA-951-MR, slip op. at 8-9.

314. Brief for Appellee, *supra* note 293, at 29.

315. One scholar has called attention to our "increasingly litigious society" as a potential threat to the judicial system's effectiveness. Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 615 (1983). Professor Mallor noted that the judicial system and those it serves suffer when the court is "forced to waste its limited resources on proceedings that should not have been brought." *Id.* Mallor cited assessment of attorney's fees as a method of discouraging such waste. *Id.*

kind of action strikes directly at the heart of the problem, since attorneys ultimately provide the counsel which results in the initiation of a lawsuit.<sup>316</sup>

### 1. The "bad faith" exception

In England, the losing party pays the winner's legal fees and litigation costs.<sup>317</sup> Conversely, the American rule provides that each party pay its own legal fees absent statute or enforceable contract.<sup>318</sup> Yet, a court may assess fees "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>319</sup>

The "bad faith" exception to the American rule is the most versatile and perhaps the most effective at deterring judicial system abuse.<sup>320</sup> One scholar separates the bad faith exception into four categories: (1) prelitigation misconduct; (2) substantive bad faith—the assertion of frivolous claims, counterclaims and defenses; (3) procedural bad faith; and (4) attorney's bad faith.<sup>321</sup>

Bad faith which takes the form of prelitigation misconduct is subject to an objective standard: was the plaintiff's claim "well-established in law so as to render the defendant's opposition specious"?<sup>322</sup> However, a stricter standard is applied when substantive bad faith is at issue.<sup>323</sup> Unfortunately, case law defining substantive bad faith is sparse.<sup>324</sup>

In *Browning Debenture Holders' Committee v. DASA Corp.*,<sup>325</sup> an often cited case, the court stated that a claim must be clearly without color and made for harassment or similarly improper purposes to meet

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316. W. E. Chilton III, publisher of the *Charleston Gazette* in West Virginia, has included attorneys as defendants in actions for fees and countersuits, noting that plaintiffs do not know the law and rely on their attorneys' advice. Genovese, *supra* note 9, at 6.

317. Mallor, *supra* note 315, at 615.

318. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 126 (1974); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). For a discussion of the American rule, see Mallor, *supra* note 315, at 615-19.

319. *Alyeska Pipeline*, 421 U.S. at 258-59.

320. Mallor, *supra* note 315, at 630, 652.

321. *Id.* at 632, 638, 644, 646.

322. Mallor, *supra* note 315, at 638 n.170.

323. Mallor, *supra* note 315, at 639.

324. See, e.g., *Ellington v. Burlington N., Inc.*, 653 F.2d 1327, 1331-32 (9th Cir. 1981) (bad faith existed where plaintiff filed sham pleadings containing false allegations twenty years after gravamen of complaint was resolved). Yet, in *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980), the court stated that a meritless claim does not necessarily suggest bad faith. *Id.* at 21.

325. 560 F.2d 1078 (2d Cir. 1977).

the standard for substantive bad faith.<sup>326</sup> This two step analysis has come to be the accepted test for substantive bad faith.<sup>327</sup> Procedural bad faith is governed by the rules applied to substantive bad faith, although courts appear more willing to rely on an objective standard.<sup>328</sup>

Actions for attorney's fees appear to have been the most successful response to meritless libel suits thus far. In *Beary v. West Publishing Co.*,<sup>329</sup> the plaintiff sued West for libel after it published a court opinion rendered in a suit in which Beary was the defendant.<sup>330</sup> Beary contended that the opinion portrayed him in an unfavorable light.<sup>331</sup> Prior to the libel suit, Beary had filed a motion to vacate the opinion; in response, the judge requested that the state reporter substitute the word "homeowner" wherever Beary's name appeared.<sup>332</sup> Although the substitution was made, Beary filed the libel action, claiming that the version appearing in the advance sheet "falsely and maliciously represented him, a lawyer, as 'conniving, contemptible . . . and a person to be avoided, shunned and distrusted.'" <sup>333</sup> West's motion for summary judgment was granted and Beary appealed.<sup>334</sup> The Court of Appeals for the Second Circuit affirmed, holding that reports of judicial proceedings are privileged.<sup>335</sup> The court then awarded West double costs and \$1,000 damages "[i]n view of the complete frivolousness of . . . [the] appeal."<sup>336</sup>

Although the court declined to elaborate on its reasoning, this situation clearly suggests bad faith on Beary's part. Since the publisher had made the requested correction, Beary's subsequent contention that he had been libeled was untenable. Even more persuasive, however, is the fact that Beary, an attorney, should have known that reports of judicial proceedings are privileged and do not subject the publisher to liability for libel. This factor clearly indicates the bad faith and vexatious nature of Beary's action, thus warranting the award of fees and costs.

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326. *Id.* at 1088.

327. Mallor, *supra* note 315, at 641-42. However, Professor Mallor has suggested a modification of the second step. If a claim lacked reasonable merit, that finding would give rise to a rebuttable presumption of bad faith on the part of the party asserting the claim. If that party could show and support a good faith belief in the merits of his claim, no attorney's fees should be assessed against him. If the party could not demonstrate a basis for believing his claim to be meritorious, bad faith would be found and fees assessed. *Id.* at 643-44.

328. *Id.* at 645. See generally Mallor, *supra* note 315, at 630-52.

329. 763 F.2d 66 (2d Cir. 1985).

330. *Id.* at 67.

331. *Id.*

332. *Id.*

333. *Id.* at 68.

334. *Id.*

335. *Id.* at 69.

336. *Id.*

In *Daily Gazette Co. v. Canady*,<sup>337</sup> the *Daily Gazette* sought a writ of mandamus compelling reconsideration of its motion for attorney fees after dismissal of a defamation action filed by an attorney.<sup>338</sup> The West Virginia Supreme Court of Appeals discussed the case law providing for an assessment of fees when bad faith or oppression motivates the losing party.<sup>339</sup> The court also acknowledged the competing goals of unrestricted access to the judicial system and the "unconscionable burden"<sup>340</sup> that vexatious or wanton claims place upon "precious judicial resources already stretched to their limits in an increasingly litigious society."<sup>341</sup> The court further posited that while some claim that the right to judicial access prevents sanctions against those bringing vexatious claims, such vexatious claims inhibit the judicial access that supporters claim prevents their sanction.<sup>342</sup>

The court rejected the *Gazette's* assertion that frivolity alone was sufficient justification for a finding of bad faith, noting that "[i]n some cases . . . frivolity may be less a function of improper motive than of sheer incompetence."<sup>343</sup> However, the court held that an attorney may be assessed fees and costs resulting from his or her vexatious, wanton, or oppressive assertion of a claim unsupportable "by a good faith argument for the application, extension, modification or reversal of existing law."<sup>344</sup> The court granted the *Gazette* a writ of mandamus, compelling the lower court judge to conduct a hearing as to the appropriateness of an award of attorney's fees to the *Gazette*.<sup>345</sup>

As in *Beary*, the court's reliance on the "bad faith" rule was appropriate. However, because the court declined to set out the facts surrounding the litigation, it is difficult to ascertain whether the *Gazette* will prevail in its request for attorney's fees. Nevertheless, the court's opinion

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337. 332 S.E.2d 262 (W. Va. 1985).

338. *Id.* at 263.

339. *Id.* at 264.

340. *Id.* at 265 (emphasis omitted).

341. *Id.*

342. The court acknowledged the lawyer's ethical responsibility to zealously represent his or her client "within the bounds of the law." *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1979)). However, it also noted the lawyer's duty to refrain from asserting a frivolous claim and stated that conduct is acceptable which asserts a position supported by law or by a "good faith argument for the extension, modification, or reversal of the law." *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1979)).

343. *Id.* at 266.

344. *Id.* at 265. The court's language directly tracked that of MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1979) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1), (2) (1979). See *supra* note 342.

345. *Id.* at 266.

provides additional authority for the assessment of fees when the appropriate fact situation arises.

## 2. State statutory provisions

In *Porter v. Qualls*,<sup>346</sup> a total of \$7500 in attorney's fees was awarded to a radio station and the mayor of a small Arizona town, pursuant to an Arizona statute, after the Arizona Superior Court of Navajo County found that the libel action " 'was harassment, groundless, and lack[ed] good faith.' " <sup>347</sup> The suit stemmed from a debate among Show Low, Arizona citizens and city officials over the location of a new city hall complex.<sup>348</sup> In early 1983 a building purchase was proposed which Mayor Ellis Qualls favored.<sup>349</sup> David Porter, a former councilman and mayor, emerged as an opponent to the proposal.<sup>350</sup> Porter claimed that a new building could be constructed at a cost lower than the purchase of the proposed existing building. A meeting was arranged between Mayor Qualls, Porter and a local builder after Mayor Qualls challenged Porter to substantiate his figures.<sup>351</sup> However, Mayor Qualls was called to an emergency before the meeting commenced, and the builder left for another appointment before the Mayor's return.<sup>352</sup>

Radio station KVSL's president and station manager interviewed Porter. The resulting report indicated that Porter had waited thirty-five minutes for the Mayor to return and that Porter felt he had met the Mayor's challenge.<sup>353</sup> Mayor Qualls prepared a statement to be broadcast which disputed Porter's assertion that Mayor Qualls had irresponsibly ignored an appointment and that Porter had proven his building cost quotations.<sup>354</sup>

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346. No. 20935 (Ariz. Super. Ct. Dec. 24, 1984).

347. Amended Judgment at 1, *Porter v. Qualls*, No. 20935 (Ariz. Super. Ct. Dec. 24, 1984).

348. Defendant KBW Associates' Motion for Summary Judgment and Memorandum in Support of Motion at 3, *Porter v. Qualls*, No. 20935 (Ariz. Super. Ct. Dec. 24, 1984) [hereinafter KVSL Memorandum]. Defendant KVSL's motion for partial summary judgment requesting dismissal of all claims for punitive damages was granted based on Arizona law prohibiting punitive damages against broadcasters. Motion for Costs and Attorney's Fees at 2, *Porter v. Qualls*, No. 20935 (Ariz. Super. Ct. Dec. 24, 1984).

349. KVSL Memorandum, *supra* note 348, at 3.

350. *Id.* Porter also served as city park commissioner from 1980 to 1982. The park was named after him upon his retirement from city council in 1980, but the voters subsequently elected to reinstate the park's former name, Show Low City Park, in 1983. Porter was active in community affairs and admitted to being active in public debate. Still, he claimed not to be well known in Show Low. KVSL Memorandum, *supra* note 348, at 3-4.

351. *Id.* at 4.

352. *Id.* at 5.

353. *Id.* at 5-6.

354. *Id.* at 6. Mayor Qualls stated that he had substituted the city clerk and a councilman

Porter responded to Qualls' statement and then requested that Qualls' statement be retracted.<sup>355</sup> KVSL instead agreed to air another response by Qualls.<sup>356</sup> Porter subsequently filed a libel suit against Qualls, the City of Show Low and KVSL.<sup>357</sup>

Porter's attorney later moved to withdraw from the case.<sup>358</sup> When all defendants moved for summary judgment, Porter's new attorney submitted no opposition, reasoning that the applicable law was "favorable to the Defendants' position."<sup>359</sup> Qualls, the City of Show Low and radio station KVSL were awarded attorney's fees pursuant to an Arizona statute<sup>360</sup> mandating such awards in frivolous actions.<sup>361</sup> Both Porter and his original attorney were held liable for those fees.<sup>362</sup>

In reaching its decision, the court emphasized the failure of Porter's original attorney to examine carefully the significance of Porter's status as a public figure, stating that the attorney's lack of investigation indicated a "'sue first, ask questions later' attitude."<sup>363</sup>

### 3. Federal Rule of Civil Procedure 11

Inclusion of the offending attorney in the court's actions raises another avenue of relief for the press defendant—attorney sanctions. Federal Rule of Civil Procedure 11 requires that all papers of parties represented by counsel be signed by at least one attorney,<sup>364</sup> the rule fur-

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for himself when he discovered that he would be unable to attend the meeting. Qualls concluded his statement with the query: "I wonder why Mr. Porter is telling only half the truth? Could it be that Mr. Porter is trying to embarrass the Mayor? I do forgive you, Mr. Porter, maybe you are doing it only out of habit." *Id.*

355. *Id.* at 7-8. Porter's response began: "'It is not my desire or intention to get down in the gutter with Mayor Qualls.'" *Id.* at 7.

356. *Id.* at 8.

357. *Id.* at 2.

358. Motion for Costs and Attorney's Fees, *supra* note 348, at 2.

359. Plaintiff's Porter [sic] Response Motion For Summary Judgment at 1, Porter v. Qualls, No. 20935 (Ariz. Super. Ct. Dec. 24, 1984).

360. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982). The statute provides in pertinent part: "Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the court may consider such evidence as it deems appropriate . . ." *Id.* See also CAL. CIV. PROC. CODE § 128.5 (West Supp. 1986).

361. Amended Judgment, *supra* note 347, at 3.

362. Porter was ordered to pay the defendants \$5000. Norman Kahn, Porter's original attorney, was ordered to pay \$2500. Porter and Kahn were held jointly and severally liable for costs totalling \$676.78. *Id.*

363. *Id.* at 2. The court also speculated that Porter's true motives in suing Qualls were "to settle some old political scores in addition to seeking redress for defamation." *Id.* The court also found evidence of Porter's "ill will" toward Qualls in Porter's letter dismissing his original attorney "for not being aggressive enough." *Id.* at 3.

364. FED. R. CIV. P. 11.



ther states that the signature indicates that the attorney has read the paper and that it is well grounded in fact and not submitted for improper purposes such as harassment, delay or increasing litigation costs.<sup>365</sup> The rule then provides for the imposition of sanctions against the attorney, the represented party or both.<sup>366</sup> According to the Notes of the Advisory Committee on Rules, Federal Rule of Civil Procedure 11 is an attempt to expand the court's equitable power to award fees and costs to a litigant when his opponent acts in bad faith.<sup>367</sup>

In *Carr v. Times-Picayune Publishing Corp.*,<sup>368</sup> the United States District Court for the Southern District of Louisiana relied on Federal Rule of Civil Procedure 11 in inviting *The Times-Picayune* to file a motion and affidavits setting out attorney's fees and costs incurred.<sup>369</sup> Plaintiff Jacqueline Carr had filed a civil action in November 1983, alleging that certain St. Tammany Parish and Louisiana state public officials had denied her the right to seek public office by changing the St. Tammany Home Rule Charter.<sup>370</sup> In June 1984, Carr was ordered to amend the pleadings; upon her failure to do so, the suit was dismissed.<sup>371</sup>

In October 1984, Carr filed suit against *The Times-Picayune*, alleging defamation and violation of civil rights arising from the same facts in the previous case.<sup>372</sup> The court found that because there was no state action the civil rights claim could not stand.<sup>373</sup> Pursuant to *The Times-*

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365. *Id.* The rule provides in pertinent part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*Id.*

366. *Id.* The rule further provides:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

*Id.*

367. FED. R. CIV. P. 11 advisory committee's note. The committee stated that "[g]reater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." *Id.*

368. 619 F. Supp. 94 (E.D. La. 1985).

369. *Id.* at 98.

370. *Id.* at 95.

371. *Id.*

372. *Id.* at 96.

373. *Id.* at 97.

*Picayune's* motion, the court dismissed the suit for lack of jurisdiction, since no other federal question remained.<sup>374</sup> The defendant also moved for sanctions pursuant to Federal Rule of Civil Procedure 11.<sup>375</sup> The court stated that Carr's allegations "[found] no support in any possible theory of law or any possible interpretation of the facts"<sup>376</sup> and thus the complaint violated Rule 11's requirement that complaints be filed in good faith.<sup>377</sup> The court concluded that Carr filed the complaint merely to harass *The Times-Picayune* and that Carr had "unreasonably increased litigation cost and clogged the judicial system."<sup>378</sup> Thus, sanctions were warranted.<sup>379</sup>

In *Nemeroff v. Abelson*,<sup>380</sup> plaintiff Robert B. Nemeroff alleged a conspiracy to depress stock prices through dissemination of disparaging reports published by *Barron's National Business and Financial Weekly* (*Barron's*), one of the defendants.<sup>381</sup> The only justification for Nemeroff's claims was the existence of an investigation by the New York Stock Exchange (NYSE) and the Securities and Exchange Commission concerning the stock.<sup>382</sup> However, more than one month prior to filing the complaint, the NYSE determined that the charges lacked substance.<sup>383</sup>

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374. *Id.*

375. *Id.* at 98.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* Presumably, in light of the court's implied approval, such fees and costs were awarded upon defendants' motion.

380. 469 F. Supp. 630 (S.D.N.Y. 1979), *aff'd in part, rev'd in part*, 620 F.2d 339 (2d. Cir. 1980), *on remand*, 94 F.R.D. 136 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 652 (2d Cir. 1983). The facts of this case were related with differing degrees of thoroughness in the various opinions cited. Therefore, facts will be cited to the earliest opinion in which they appear.

In its first opinion, the district court established a "threshold" point which preceded its discussion of the case: "[W]hile this is not a First Amendment case, it is not inappropriate for the publishing defendants to argue that the court should not allow a party to misuse judicial processes as a vehicle for restricting the exercise of defendants' First Amendment rights." 469 F. Supp. at 633.

381. *Nemeroff*, 469 F. Supp. at 631-32. Robert Nemeroff was a shareholder of Technicare Corporation. *Id.* The defendants included various investors and three publishers: Alan Abelson, author of *Up & Down Wall Street*, a column appearing in *Barron's National Business & Financial Weekly* [hereinafter *Barron's*]; Robert Bleiberg, editor of *Barron's*; and Dow Jones & Co., Inc., publisher of *Barron's* and the *Wall Street Journal*. *Id.* at 631. Nemeroff alleged that the investors conspired with the publishers to depress the price of Technicare stock. The publishers were alleged to have advised the investors of negative information in upcoming articles in *Barron's*; the investors were then allegedly able to "take a short position on Technicare," covering their purchases at a lower price after the articles were published. *Id.* at 631-32.

382. *Id.* at 635-36.

383. *Id.* at 636. Nemeroff's attorney was advised by a NYSE official on February 8, 1977 that "no manipulation of Technicare [stock] had occurred." *Id.* at 634. The court noted that the attorney did not indicate any further communications with NYSE officials, yet the com-

Subsequent depositions revealed no support for Nemeroff's claims.<sup>384</sup> In addition, the complaint was distributed to a newspaper reporter *before* it was filed.<sup>385</sup> Although Nemeroff's attorney contended that the action was maintained in good faith, the district court stated that such contentions were undermined by "[t]he decisions to file the lawsuit solely on the basis of unsupported gossip and inadmissible hearsay and to supply copies of the pleadings to the press even before the complaint was actually filed . . . ."<sup>386</sup>

The district court also discussed the publishing defendants' unique position, noting that their business depended on their credibility.<sup>387</sup> The court concluded that the action's purpose "appears to have been to injure the publishing defendants."<sup>388</sup>

The court discussed its discretionary power to award fees in instances of plaintiff bad faith, indicating that the supplementary powers invoked by Federal Rule of Civil Procedure 11 applied.<sup>389</sup> The court awarded the publishing defendants \$50,000.<sup>390</sup>

On appeal, however, the second circuit held that Nemeroff's claims were not entirely without merit at filing. Accordingly, there was no bad faith entitling the defendants to attorney's fees.<sup>391</sup> This conclusion was based on a rather short discussion of Rule 11; the court of appeals interpreted it as applying only to instances of bad faith commencement of litigation.<sup>392</sup> The court remanded the action, stating that if the plaintiff's conduct was dilatory subsequent to filing, and if at any time sufficient facts became available to Nemeroff indicating that failure to dismiss amounted to bad faith, reasonable expenses should be assessed pursuant

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plaint was not filed until March 25, 1977. The court found that this factor undermined attorney Walker's assertion of good faith in filing the lawsuit. *Id.* at 636-37.

384. *Nemeroff*, 94 F.R.D. 136, 141 (1982).

385. *Nemeroff*, 469 F. Supp. at 635. Bleiberg, *Barron's* editor, received a call from a newspaper reporter on the day the complaint was filed. When Bleiberg returned the reporter's call, between noon and 2:00 p.m., he was told that the reporter had a copy of the complaint and wanted to discuss it. Bleiberg's assistant made several trips to the courthouse to obtain a copy of the complaint, only to be told that no such complaint had been filed. When finally a copy was available, the clerk's notation indicated that the complaint was filed at 3:38 p.m. *Id.*

386. *Id.* at 636.

387. *Id.* at 637. The court stated that the publishing defendants' "business [could not] survive without a reputation for independence, honesty, integrity, good faith and fair reporting." *Id.* The court further noted that Nemeroff's counsel was aware that the allegations at issue were unsupported and constituted an attack on the publishing defendant's integrity, risking destruction of their professional reputations for objective financial analysis. *Id.*

388. *Id.*

389. *Id.* at 641.

390. *Id.* at 642.

391. *Nemeroff*, 620 F.2d at 350.

392. *Id.*

to 28 United States Code section 1927<sup>393</sup> rather than Rule 11.<sup>394</sup>

On remand, the district court found that Nemeroff's conduct—and particularly that of his counsel—was dilatory and that Nemeroff knew that the action should have been dismissed soon after filing.<sup>395</sup> The award of \$50,000, assessed against both Nemeroff and his counsel, was reinstated.<sup>396</sup> Rather than citing Rule 11, however, the court instead cited established case law for the proposition that a federal court possesses the "power to impose sanctions for bad faith litigation . . . where bad faith is found in the conduct of the litigation."<sup>397</sup> The decision was affirmed on appeal.<sup>398</sup>

The court of appeal emphasized that it based its finding of "bad faith continuation" of the lawsuit on the "particular circumstances" of the lawsuit, stating: "We do not thereby create an easy test for the award of attorney's fees to a successful defendant."<sup>399</sup> The court reassured potential plaintiffs that a "colorable basis for a claim"<sup>400</sup> and good faith action will insulate them from liability for attorney's fees should they suffer defeat on the merits. The court cited Nemeroff's and his attorney's choice to continue litigating "without an adequate factual basis behind the case"<sup>401</sup> as the critical factor in affirming the fee award.<sup>402</sup>

The preceding cases illustrate the availability of attorney's fees for successful defendants in vexatious actions filed for harassment or frivolous purposes, or where there is other evidence of plaintiff's bad faith. Actions for fees can be supported by case law, state statutes and Federal Rule of Civil Procedure 11. Central to all three, however, is the press defendant's assertion of plaintiff's bad faith. While little authority exists

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393. *Id.* at 350-51. 28 U.S.C.A. § 1927 (West Supp. 1985) provides: "Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

394. *Nemeroff*, 620 F.2d at 350-51.

395. *Nemeroff*, 94 F.R.D. at 140.

396. *Id.* at 146.

397. *Id.* at 145.

398. *Nemeroff*, 704 F.2d 652 (2d Cir. 1983).

399. *Id.* at 660. The court noted that Nemeroff's failure to conduct discovery "at full speed" was only one factor in its decision to award the publishing defendants attorney's fees. *Id.* See *supra* text accompanying note 384.

400. *Nemeroff*, 704 F.2d at 660.

401. *Id.*

402. *Id.* *Nemeroff* was decided under an old version of Rule 11 which did not specifically provide for assessment of attorney's fees. Pursuant to a 1983 amendment which took effect after the last court of appeals decision, however, the rule currently refers to assessment of fees against an attorney as an appropriate sanction. See *supra* notes 365-66 for the pertinent portions of Rule 11.

defining bad faith,<sup>403</sup> it is clear from the preceding cases that the plaintiff's claim must be unsupportable and must be made for improper purposes before bad faith will be found. It is encouraging to note, however, the sensitivity of the *Nemeroff* court to the precarious yet fundamentally important position of the press.

## V. CONCLUSION

The circumstances under which the preceding solutions may be utilized are limited indeed. Yet, given an appropriate set of facts, a countersuit may prove a viable option.<sup>404</sup> Although such an action has not yet met with success, a government official who initiates a meritless libel suit in an attempt to suppress publication of articles about him or her should be held liable for infringement of first amendment rights. A private party who attempts to suppress articles about him or her by pursuing a meritless libel suit—in effect requesting the court's aid in infringing the press' first amendment rights—should be similarly liable. While federal constitutional guarantees may prove too inflexible to accommodate this action, the court's order in *E.W. Scripps v. Ninio* suggests that state constitutional guarantees may provide the press with protection from intentional attempts to suppress publication.

A libel plaintiff who wields the lawsuit as a club in order to coerce a settlement or suppress information should be held liable for abuse of process. In addition, once a press defendant has won the underlying libel case, it may file a malicious prosecution action or request that attorney's fees be assessed against the losing party when malice or bad faith can be proven.

Actions for the infringement of first amendment rights, and to a lesser extent, abuse of process, remain speculative in light of recent dismissals. Yet, they are inherently more satisfactory alternatives because they allow the press to respond to a meritless suit before the bulk of the expense is incurred and the hours are spent. In addition, press defendants may decline to consider subsequent actions such as malicious prosecution or requests for attorney's fees because the defendants are not insured for "offensive" actions, they lack sufficient funds to proceed on their own, or they are simply too anxious to put the past behind them and get on with the business of journalism.

Moreover, actions for malicious prosecution and attorney's fees do

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403. See *supra* note 319.

404. Prominent press attorneys Robert D. Sack and Bruce W. Sanford caution, however, that "countersuits will not become the silver bullet that kills meritless libel suits." Weber, *supra* note 48, at 17. See *supra* text accompanying note 48.

not remedy the intrusiveness of the libel discovery process. Neither do they prevent the self-censorship which may occur as the press is confronted with increasingly numerous actions. It is quite likely that a publisher would simply veto a story rather than risk editorial integrity or economic security.

Yet, the real victim in all of this is not the press, but the public. Because the public relies on the press for information vital to the healthy functioning of a democracy, the press' role is not one of mere convenience but of sheer necessity. When the press can no longer survive the results of "uninhibited, robust and wide-open"<sup>405</sup> debate, the public will suffer.<sup>406</sup> Recognizing this danger, the *Schiavone* court stated:

Possibly the giants of the industry have both the finances and the stamina to run the risk in such situations. But the independent will of smaller magazines, newspapers, television and radio stations undoubtedly bends with the spectre of a libel action looming. Even if convinced of the ultimate success on the merits, the costs of vindication may be too great for such media defendants to print or publish that which may entail any risk of a court action. If that is the result, it is a sorry state of affairs for the media, and, more important, for this country.<sup>407</sup>

Indeed not all press organizations are mega-corporations able to pay escalating defense expenses. *The Point Reyes Light*, a California weekly newspaper with a circulation of 3500, won a 1979 Pulitzer Prize for exposing Synanon.<sup>408</sup> The paper has since been sued by Synanon-affiliated attorneys for a total in excess of \$1 billion.<sup>409</sup> *The Point Reyes Light* is representative of the press organizations that could be completely obliterated by meritless lawsuits—leaving their readers with an information

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405. See *supra* note 15 and accompanying text.

406. In a somewhat different but complimentary context, the Supreme Court stated that "[i]t is the right of the viewers and listeners . . . which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 388, 390 (1969) (citations omitted) (upholding the constitutionality of an F.C.C. order requiring broadcaster to provide tape, transcript or summary of broadcast to person attacked in broadcast and allow access to air-time for reply).

407. *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 686 (D.N.J. 1985).

408. Abrams, *supra* note 50, at 41.

409. *Id.* Abrams sets the number of lawsuits at six; Martin Garbus cites four such suits. Garbus, *supra* note 50, at 49.

void. It is this ultimate result which has prompted the solutions posited in this Comment.

*Jana Miller Brewer\**

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