First Amendment Caste System

CHARLES D. TOBIN

A pop quiz for Forum members:

- Are all of your clients card-carrying members of the press?
- Can they recite the first and second canons of the Society of Professional Journalists Code of Ethics?
- If we read their résumés, will we come across the words *magazine*, *newspaper*, or *TV station*?
- Do they have someone else eyeball their copy before they unleash it on the masses?

Charles D. Tobin

If you can't answer yes to all of these questions, you may want to put away that pocket-sized copy of the U.S. Constitution. The First Amendment may not do your clients one bit of good.

That's because, in decision after recent decision, courts are making a muddle of generations of egalitarian constitutional jurisprudence. Consider that, in the past year or so, an Oregon federal court rejected any application of First Amendment principles in a defamation trial brought by an investment firm against a blogger; the U.S. Court of Appeals for the Second Circuit announced a complicated, multipart test to determine who may benefit under what was previously the simplest court-made shield law in the country; and an Iowa judge decided to send a publishing-on-demand company to trial under a strict liability standard in a defamation lawsuit.

Each of these cases is disturbing because the court refused to balance the individual rights of the communicator against the plaintiff's right to redress. Collectively, they raise anew a basic question we thought the legal system had settled years ago: Does the First Amendment protect some more than others?

The Supreme Court, in a series of decisions over forty years, has flatly told us that the First Amendment provides journalists with no preferred position. In *Branzburg v. Hayes*, a majority of the Court supported the notion that "every man," and that includes every journalist, must testify if a grand jury comes calling. In *Pell v. Procunier* and *Saxbe v. Washington Post*, the justices told us that the press has no special rights to interview prisoners. In *Cohen v. Cowles Media*, the Court let us know that, just like any other party and any other agreement, if journalists violate commitments to sources, the law can punish them. And in *Wilson v. Layne*, a unanimous Court adopted the view that journalists accompanying police in executing warrants are as needless and as invasive as any other civilian.

These decisions teach that the First Amendment shield is no thicker for any of us. Yet, recent decisions have gone further by teaching us that the First Amendment shield is perhaps less resilient for some classes of journalists than for others.

Although a local business reporter would have fared differently, Crystal Cox, a self-described "investigative blogger," learned last November in *Obsidian Finance Group v. Cox*[1] that she had no shield at all against a $2.5 million defamation verdict for her Internet posts about an Oregon bankruptcy proceeding. Cox wrote a series of rants on her website obsidianfinancesucks.com that called the American bankruptcy system corrupt and accused plaintiffs of serious wrongdoing. No one reading her blog would confuse Cox for a *Fortune* or *Forbes* writer. But because she is a one-woman crusader, the federal court barred her from any protections under the state's shield law or retraction statute or under the enhanced standards that usually apply in defamation cases involving "media" defendants.

The court grounded its reasoning in its own criteria for deciding who is, and who is not, a member of the media. The judge found that Cox had failed to demonstrate that she has a journalism education; she was affiliated with a "recognized news entity"; she had followed "journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest"; she kept notes; she and her sources had agreed to confidentiality; her blog was "an independent product rather than" an assembly of others' posts; or she had "contact[ed] 'the other side' to get both sides of the story." Because Cox flunked this litmus test, the judge held that her writings warranted no heightened protection under the Constitution: "Without evidence of this nature, defendant is not 'media.'" For this reason, she went to trial with no protections at all and lost—big time—against wealthy and powerful opponents.

The Oregon federal court is not alone in the recent wave of decisions creating a colossally confusing First Amendment caste system. Famously, last January, the Second Circuit in *Chevron Corp. v. Berlinger*[2] ordered an award-winning filmmaker to turn over outtakes of a documentary to lawyers in Ecuadorian civil and criminal litigation. The filmmaker had been commissioned to create the film by class action plaintiffs in a related civil lawsuit that had accused an oil company of polluting rain forests and rivers.

Since the 1987 decision in *von Bulow v. von Bulow*, Second Circuit privilege

Charles D. Tobin (charles.tobin@hklaw.com), chair of the Forum on Communications Law, is a partner in the Washington, D.C., office of Holland & Knight LLP, where he heads the firm's National Media Practice Team.

Published in *Communications Lawyer,* Volume 28, Number 4, January 2012. © 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

law has long been among the most protective in the federal courts. The standard developed in that ruling, i.e., that "the talisman invoking the journalist's privilege is intent to disseminate to the public at the time the gathering of information commences," had become the preferred model for proponents of new shield laws everywhere.

But in last year's *Berlinger* decision, the Second Circuit distinguished away all prior privilege rulings on grounds that the law protects only "the role of the *independent* press." The shield might have protected the documentary filmmaker in other circumstances, but not here: "Those who gather and publish information because they have been commissioned to publish in order to serve the objectives of others who have a stake in the subject of the reporting are not acting as an independent press." Now, the court suggested, journalists will have the burden to establish the "editorial and financial independence" of their "journalistic process" before they can claim privilege.

The commissioned nature of a publisher's work is also the subject of a controversial defamation case pending decision on interlocutory appeal in the Iowa Supreme Court. In *Bierman v. Weir*,[3] the court will decide whether a publishing-on-demand company hired to print its codefendant's memoirs deserves no First Amendment protections at trial. Because the vanity press "is a business which contracts to publish documents for private authors," the trial court held, it "is not the *New York Times* or any other media entity," and its rights "have nothing to do with the First Amendment." And because plaintiffs claim libel per se, according to the trial judge, "the elements of falsity, malice, and damage can be presumed as to [the publisher] and the only element the Plaintiffs would have to prove is publication."

The retreat back to standards of strict liability for certain castes of litigants is, mercifully, not uniform. Some courts still seem to remember that the First Amendment is meant to protect speech—everyone's speech. Even creepy people's speech.

At the end of last year, a federal judge in Maryland in *United States v. Cassidy* dismissed an indictment brought under a federal antistalking statute that proscribes the use of an interactive computer service to "cause substantial emotional distress" to a victim.[4] Defendant had been charged for anonymously posting on blogs and tweeting disturbing statements about the leader of a religious group. Despite the nasty nature of the expressions, the judge likened them to a bulletin board on the front lawn of a colonist's home and the anonymous authorship of the *Federalist Papers*. Because the posts and tweets were published to a mass audience, the victim could have averted her eyes to the expressions. Further, the court found, the subject matter touched on religion. For these reasons, the speech deserved the full protection of the First Amendment, and the indictment could not stand.

This recent case law not only revives an old question, it raises some disturbing new ones: Under the courts' various litmus tests, do free speakers occupy a lower First Amendment caste if they are more independent than traditional media? And what does all of this mean for changing media models and media company ownership?

Endnotes

1. Order, No. 3:11-CV-00057-HZ (D. Or. Nov. 20, 2011) (supplemental opinion & order).

2. 629 F.3d 297 (2d Cir. 2011).

3. No. 10-1503 (Iowa 2012). Oral argument was held on January 25, 2012. Disclosure: My law firm represents a group of amici curiae supporting reversal of the trial court's decision denying summary judgment to the publisher-on-demand, defendant Author Solutions, Inc.

4. Criminal Case No. RWT 11-091 (D. Md. Dec. 15, 2011) (memorandum opinion). Disclosure: My law firm represented amicus curiae Electronic Frontier Foundation in supporting the dismissal on First Amendment grounds of the indictment against defendant William Lawrence Cassidy.

Published in *Communications Lawyer*, Volume 28, Number 4, January 2012. © 2012 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.