TESTING THE LIMITS:

WHEN AGGRESSIVE NEWSGATHERING BECOMES ILLEGAL CONDUCT

First Amendment jurisprudence ensures broad protections in speech, but provides fewer guidelines on gathering the news. One instance involving trespass may be a poor test case to push the envelope of the law regarding newsgathering.

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On April 27, 2000, KMSP-TV reporter Tom Lyden pursued the story of a professional boxer accused of staging illegal dog fights. When that story eventually aired, little did Lyden realize that the story would be easily upstaged by the manner in which he pursued it. As part of his investigation of the story, Lyden took a videotape depicting dogfights from a car parked on private property where 13 pit bulls had been seized. After making a copy of the tape, Lyden turned over the original copy to Sherburne County authorities on May 2, and KMSP-TV aired the dogfighting tape the next day.

After accusations first flew that he committed crimes while gathering information for that story, Lyden simply defended his actions as "aggressive reporting." Days later, criticisms from his professional colleagues surfaced. Eventually, Sherburne County prosecutors formally charged him with three misdemeanor counts — theft, temporary theft, and motor-vehicle tampering. Lyden responded by publicly apologizing on the air: "Caught in the rush of the story, I went too far. . . . Once I viewed the tape, and saw more than two hours of dog-fighting footage, I felt I had two obligations. First, turn the tape over to the police because it showed a crime. Second, inform the public about a viciously inhumane sport."[1]

Lucy Dalglish, executive director of the Reporter's Committee for Freedom of the Press in Arlington, Va., said that reporters being charged in this country is rare.[2] While it is not unusual for reporters to be arrested, Dalglish, a former media law attorney with Dorsey & Whitney and a former *Pioneer Press* reporter, said those cases often involve trespassing at crime scenes by reporters crossing police lines.[3]

Despite the warnings of First Amendment advocates to reserve judgment on Lyden's conduct until the criminal charges against him have been resolved, many of Lyden's colleagues dismissed his "aggressive reporting" excuse and denounced his conduct as unethical.[4] In fact, the Minnesota Chapter of the Society of Professional Journalists issued a harsh

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statement shortly after the allegations against Lyden surfaced, stating that not only did Lyden act unethically when he took the videotape, but he acted in a fashion not condoned by professional journalists in pursuit of a story.[5] In the meantime, KMSP-TV has stated that it was conducting an internal investigation and reserved the right to take disciplinary action against Lyden once legal issues were resolved.

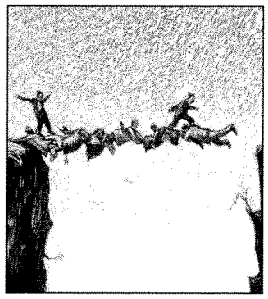
Journalism ethics aside, the pressing issue now is whether Lyden's prosecution will be determined in light of First Amendment interests. Moreover, if indeed the Sherburne County court finds that Lyden engaged in illegal newsgathering practice, will that decision have a "chilling effect" on the entire media industry and prevent important information from being uncovered? An analysis of the relevant law and Lyden's own admission of his wrongful acts indicate that this case will likely have no effect on First Amendment protections. However, assuming the case is not resolved by plea bargain and it goes up the appellate ladder — an unlikely scenario indeed — Lyden's prosecution may serve to clarify the law regarding newsgathering torts and crimes, something recent cases have not been able to do.

One of the reasons why the law has been slow in clearly defining what are permissible newsgathering practices stems from *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), wherein the U.S. Supreme Court based its decision on a misstatement of the law. Unfortunately, the *Cohen* decision and state and federal courts' reliance on the language in *Cohen* have evolved legal doctrines to the point where they are not only legally unsupportable but also deny journalists the First Amendment protections they should deserve under the U.S. Constitution. Lyden's allegedly illegal newsgathering acts serve as a convenient vehicle to take a close look at the *Cohen* case and its impact on subsequent newsgathering cases.

First Amendment Protection for Newsgathering

"Newsgathering" is a term used to describe the broad range of activities journalists undertake to collect the information they intend to publish or broadcast. Without First Amendment protections, journalists would not be able to perform what some observers call their "watchdog" duties.[6] It was, after all, the protections of the First Amendment that permitted Bob Woodward and Carl Bernstein of *The Washington Post* to pursue leads that eventually fueled President Nixon's decision to leave the White House.

Since the First Amendment applies to both speech and some forms of conduct,[7] there is no reason to think that newsgathering practices should not be afforded any protections. Notwithstanding the constitutional applicability of the First Amendment,



however, the Supreme Court has only occasionally considered newsgathering, and even when the Court has done so, its rules have not always been clear. For instance, the Supreme Court has held that the First Amendment affords some degree of protection for newsgathering,[8] but the scope of that protection is not clearly understood. The Supreme Court has also explained that First Amendment protection extends to "routine newspaper reporting techniques," but what exactly is "routine" is also not clearly understood.[9] Courts have stated that journalists, as compared to the general public, have no superior right of access to people and information; however, some courts have sometimes given preferential treatment to journalists.[10] Finally, the U.S. Supreme Court has repeatedly asserted that the First Amendment does not protect journalists from torts and crimes committed while gathering information; however, other courts have sometimes gone out of their ways to protect them.[11] (In fact, one has to wonder whether the Sherburne County prosecutors are not already affording Lyden some protection by stating that they are not seeking jail time for him should he be convicted of any of the misdemeanors. Each charge carries a maximum fine of $700 and 90 days in jail.)

Because so few cases involve a journalist whose acts are blatantly unlawful (arguably in contrast to Lyden's own admission of wrongdoing), and even fewer of these cases actually go to trial, the question of whether a particular newsgathering activity is accorded First Amendment protection may not be definitively answered soon. This uncertainty in the law is not surprising considering First Amendment jurisprudence has largely evolved as specific issues arise.[12] However, perhaps one of the most detrimental events in this natural evolution of First Amendment jurisprudence is the U.S. Supreme Court's opinion in *Cohen v. Cowles Media Co.*, a case involving the *Pioneer Press* and *Star Tribune* newspapers, which has served as the legal backbone for many newsgathering opinions coming out of state and federal courts today.

Cohen v. Cowles Media Co.

Cohen has hardened into doctrines that preclude First Amendment protection for newsgathering torts and crimes. Once it was all said and done, the Supreme Court, with Justice White writing the five-to-four majority opinion, concluded that the First Amendment offers no protection from the enforcement of "generally applicable laws" against newsgatherers and applies only to "lawfully acquired information." A few years later, the significant legal impact of the *Cohen* case on newsgathering was made apparent when a jury awarded $5.5 million in punitive damages against ABC News in a lawsuit against Food Lion, Inc. While philosophically the verdict

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could have represented a possible "chilling effect" on aggressive reporters who might find it necessary to (or even find it impossible not to) commit torts or crimes while covering important news stories that could not be covered any other way, its practical effect is yet unclear.

A close look at *Cohen* shows just how First Amendment jurisprudence was diverted from its natural evolutionary track. Dan Cohen was a public relations executive who worked for Republican Wheelock Whitney during his 1982 bid for governor. Less than a week before Minnesota's general election, Cohen contacted a number of journalists and offered them information concerning a rival DFL candidate in exchange for a promise of confidentiality. Several reporters, including those working for the *Pioneer Press* and *Star Tribune*, accepted his offer and the condition attached to it. Cohen provided the reporters with public court documents showing that the DFL candidate had previously been arrested for unlawful assembly and petit theft. Both the *Pioneer Press* and *Star Tribune* published the story and, despite their reporters' protests, identified Cohen as the source of the information.

Cohen was subsequently fired from his job. He sued the newspapers' publishers alleging fraudulent misrepresentation and breach of contract. Initially successful at the trial court level, Cohen had his $500,000 punitive damage award overturned by the Minnesota Court of Appeals after the court found that he had failed to establish a fraud claim.[13] The Minnesota Supreme Court also later struck down Cohen's $200,000 compensatory damage award after finding that his contract action would violate the newspapers' First Amendment rights if it were recognized. The U.S. Supreme Court granted certiorari.

Justice White rejected the newspapers' defense that the case was controlled by those cases that held "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[14] Instead, Justice White said that the case was controlled "by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[15] Determining that Minnesota's doctrine of promissory estoppel (the basis upon which Cohen's breach of contract claim was based) was such a law of general applicability, Justice White applied it to the newspapers.[16] Justice White added, too, that a long line of cases has clearly established the fact that the First Amendment extends protection only to information that has been lawfully obtained.[17] Critics of the *Cohen* case argue

that Justice White, in reaching these conclusions about "generally applicable laws" and "unlawfully acquired information," misinterpreted and misstated prior case holdings and included confusing dicta in the majority opinion. State and federal courts have since relied on Justice White's opinion in *Cohen* as the law of the land. As a result, First Amendment defenders say, many post-*Cohen* cases have perpetuated this flawed legal analysis and given legal significance to the dicta contained in *Cohen* in order to punish newsgathering practices.

Generally Applicable Laws

Justice White's doctrine of "generally applicable laws" is a commonsensical interpretation of the law: if a law of general applicability was not designed to infringe on a fundamental right, then any burden that a law might impose on that fundamental right is only incidental and, therefore, of no constitutional significance. Thus, according to Justice White's analysis, if a generally applicable criminal statute and tort law, for example, does not single out journalists for their newsgathering practices, the statute or law does not offend the First Amendment. This simple statement of the law, however, is not so easily applied to newsgathering practices.

Although Justice White listed several cases to support his opinion that the doctrine of "generally applicable laws" applies to newsgathering practices, critics of the *Cohen* case argue many of the cases to which he referred involved general economic regulations that have no direct bearing on journalistic activities. Thus, they argue these cases support a far less entrenched doctrine than what post-*Cohen* cases would suggest. The cases involving general economic regulations state only that economic regulations of general applicability may be imposed on businesses engaged in First Amendment activities such as newsgathering. These cases do not address criminal statutes or tort laws that do not constitute economic regulation, but which still may be applied to limit newsgathering practices, such as the three charges that Lyden presently faces — theft, temporary theft, and motor-vehicle tampering.

While Justice White did cite to two newsgathering cases that supported his "generally applicable law" doctrine,[18] critics say these cases do not stand for the proposition that requiring the press to comply with generally applicable laws has no First Amendment significance. Rather, critics have pointed out that Justice White decidedly ignored the fact that these cases really stand for the proposition that the impact of imposing generally applicable laws on the press must be carefully balanced against First Amendment interests before they can be so applied. For instance, in *Branzburg v. Hayes*, Justice White opined that the First Amendment affords journalists

no special privilege of protecting the identity of their sources by refusing to testify before a grand jury. Justice White even reiterated the general applicability doctrine and cited several of the same cases he would later cite in *Cohen* as support. However, critics note that Justice White undermined his own position by admitting that "[n]ewsgathering is not without its First Amendment protections. . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."[19] Thus, critics of the *Cohen* decision argue that *Branzburg*, despite Justice White's construction, should actually stand for the proposition that imposing generally applicable laws on the press must be carefully balanced against First Amendment protections.

A similar examination of the other newsgathering case cited by Justice White, according to these same critics, reveals the same misstatement of the law. In *Zacchini v. Scripps-Howard Broadcasting Co.*, Justice White, writing for the majority, reversed the Ohio Supreme Court's holding that a First Amendment privilege prevented a circus performer from recovering damages from a television station that taped and aired his 15-second "human cannonball" performance in its entirety without his consent. *Zacchini*, as a result of Justice White's opinion, has widely been interpreted to hold that the First Amendment does not require states to provide a "newsworthiness" defense or any other First Amendment balancing requirement. But like Justice White's erroneous interpretations of law in *Branzburg*, critics insist *Zacchini* does not stand for that proposition either. Rather, *Zacchini* simply says only that the First Amendment did not compel Ohio to let the press broadcast the entire performance. However, under the "fair use" doctrine, codified within the Copyright Act of 1976, the press is, in fact, afforded with a First Amendment privilege for taking someone else's performance without consent.

Unlawfully Acquired Information

Another reason Justice White denied some degree of constitutional scrutiny in *Cohen* is the fact that the *Pioneer Press* and *Star Tribune* did not "obtain[] Cohen's name 'lawfully' in this case."[20] However, Cohen's name was not unlawfully obtained: Cohen freely identified himself as the source of information to reporters, and there was no fraud or misrepresentation in its acquisition. As a result, Justice White's analysis of unlawfully acquired information is merely dicta. Yet, state and federal courts in post-*Cohen* decisions have construed, or misconstrued, the doctrine of "unlawfully acquired information" as black-letter law without any skepticism or further discussion or legal analysis.

The Lyden Case and First Amendment Jurisprudence.

So what protections can KMSP-TV reporter Tom Lyden expect? In the grand scheme of things, admittedly not much. While parts of Lyden's acts may arguably lie within the arena of protected newsgathering, significant other elements of the manner in which he obtained the videotape will likely push his conduct outside the protection of traditional First Amendment jurisprudence. However, the more likely scenario is that the Lyden case will reach a plea agreement before First Amendment interests are applied. As a result, the Lyden facts form a poor vehicle to bring about a clearer definition of newsgathering and to ease the restrictive bearing of *Cohen* and its progeny.

Lyden initially characterized his actions as the typical investigation journalists normally engage in and defended it as "aggressive reporting," the goal of which was to procure the evidence necessary to broadcast a fully researched, public-interest story. Lyden's news manager agreed, reasoning that such conduct, while pushing the envelope of acceptability, falls within the realm of protected newsgathering that is in the grey area of legal conduct, much like trespassing onto a crime scene in pursuit of a story. That defense may survive judicial scrutiny if Lyden's conduct were only trespass. However, Lyden is charged with tampering with a private vehicle, theft, and temporary theft.

Still, Lyden may refute these allegations on grounds that these crimes require the element of intent (*e.g.*, taking with intent to keep for himself or deprive the owner of it) — something he lacked — thereby rendering him inculpable. Moreover, Lyden's defense, as many First Amendment advocates would agree, ought to include what his conduct affords the public, the state, and, arguably, the accused. For instance, the tape may be instrumental in the prosecution of the accused; alternatively, it may even serve to aid the accused's defense depending on the full contents of the videotape. The theft of the videotape and its subsequent broadcast informed the public of what Lyden called "a viciously inhumane sport," giving it a first-hand look at an illegal sport taking place in Minnesota. His attorneys should likely argue this public exposure would not have occurred but for Lyden's aggressive reporting. Unfortunately, this defense may be insufficient to diffuse the charges and evidence weighed on Lyden under the scale of criticism from his colleagues who denounced his conduct as outside the scope of routine newsgathering.

Conversely, sufficient facts in Lyden's case tip the scale away from First Amendment protection. The three charges levied against Lyden — theft, temporary theft, and motor-vehicle tampering — are all laws of general applicability. Justice White's analysis in *Cohen*, ironically involving Twin Cities newspapers, will likely be used as the primary legal authority by prosecutors against the Minneapolis television reporter. This analysis will likely make fair use of the surge of criticism against Lyden's conduct from his colleagues. They appear to disagree with his characterization of his newsgathering efforts as "aggressive reporting." In fact, the Minnesota Chapter of the Society of Professional Journalism has described Lyden's conduct as unethical and "quite likely a crime." It is not too removed to believe that a court would consider the views of others in the profession when conducting a First Amendment protection analysis of such behavior. A denouncement from a peer organization could possibly encourage a court to readily adopt Justice White's analysis and conclusion of similar acts as a flagrant violation of laws of general applicability. Accordingly, such a court would not extend First Amendment protection to Lyden's acts.

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CONCLUSION

First Amendment jurisprudence has not evolved significantly to clearly define newsgathering and delineate the types of protections as it has for publication. This evolutionary stump renders the Lyden case a poor vehicle to generate the sort of growth in case law enjoyed by publication. While Lyden's attorneys may seek for him the protections under the First Amendment that are afforded other journalists who venture into the grey arena of protection (*e.g.*, trespass), the facts and circumstances surrounding Lyden's efforts to pursue a story will likely render such efforts futile. Trespassing onto private property, tampering with a parked vehicle thereon, and taking a tape (which he eventually surrendered to local authorities) probably cast Lyden's acts well beyond the protective arms of the First Amendment. Assuming the case does not first result in a plea bargain, the Lyden facts still present a poor test case to push the envelope of the law regarding newsgathering, especially in view of the severe restrictions imposed on First Amendment protections by the *Cohen* court. That case and day are in the distant future. □

NOTES

1 Tom Lyden, "Lyden Apology" (visited May 25, 2000) [http://www.kmsp.com/ news/local/story.asp?content_id=36723].

2 Paul Walsh, "Sherburne County Charges Ch. 9 reporter in Taking of Videotape," Star Tribune *May 17, 2000.*

3 Id.

4 See *Marshall H. Tanick, "Commentary: reporters are too quick to pronounce colleague guilty,"* Star Tribune, *May 26, 2000.*

5 Society of Professional Journalists Board of Directors — Minnesota Pro Chapter, "MN-SPJ Rejects KMSP-TV News Gathering Tactics," June 15, 2000.

6 See *Vincent Blasi, "The Checking Value in First Amendment Theory,"* 1977 Am. B. Found. Res. J. *521. 527.*

7 See, e.g., U.S. v. O'Brien, *391 U.S. 367 (1968).*

8 See Branzburg v. Hayes, *408 U.S. 665 (1972) ("Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.").*

9 Smith v. Daily Mail Publ'g Co., *443 U.S. 97, 104 (1979) ("A free press cannot be made to rely solely upon the sufferance of government to supply it with information.").*

10 Richmond Newspapers, Inc. v. Virginia, *448 U.S. 555, 586 n.2 (1980).*

11 Desnick v. Capital Cities/ABC, Inc., *851 F.3d 1345 (7th Cir. 1995).*

12 See *Tommy Sangchompuphen, "Stripping* United States v. Playboy Entertainment Group *Down to the Bare Essentials: Why Keeping Abreast of First Amendment Issues in Developing Technology Requires Predictability and a Return to Strict Scrutiny,"* Hamline Law Review, *2000.*

13 Cohen v. Cowles Media Co., *445 N.W.2d 248, 260 (Minn. App. 1989).*

14 Cohen, *501 U.S., at 668-69 (quoting* Smith v. Daily Mail Pub'g, *443 U.S., 97, 103 (1979)).*

15 Id. *at 669.*

16 Id.

17 Id. *at 669.*

18 See Branzburg v. Hayes, *408 U.S. 665 (1972);* see also Zacchini v. Scripps-Howard Broadcasting Co., *433 U.S. 562 (1997).*

19 Id. *at 200.*

20 Cohen, *501 U.S. at 671.*

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