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Case Comments

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CONSTITUTIONAL LAW—*IN RE GRAND JURY MATTER, GRONOWICZ*: QUALIFIED NEWSPERSON'S PRIVILEGE DOES NOT EXTEND TO AUTHORS

In *In re Grand Jury Matter, Gronowicz*,[1] the United States Court of Appeals for the Third Circuit held that a grand jury could subpoena an author's personal notes and records while investigating him for mail and wire fraud. The court reasoned that because the investigation was proper and the material sought was relevant to the investigation, the grand jury could issue the subpoena consistent with the first amendment. The court did not consider a qualified privilege to balance the author's first amendment rights with society's interest in prosecuting crime. Other courts, however, have applied such a privilege in different contexts. Ignoring this privilege could arguably chill the free flow of information from writers.

This comment discusses the *Gronowicz* court's analysis of the grand jury's power to subpoena an author's personal notes and records. Part I sets forth the facts and holding of *Gronowicz*. Part II then examines the qualified journalist's privilege and argues that this privilege should apply to grand jury proceedings. Next, Part III analyzes the first amendment implications of *Gronowicz*. Finally, Part IV concludes that the court's failure to recognize a qualified privilege may have an adverse effect on future publications.

I. *In re Grand Jury Matter, Gronowicz*

In his book, *God's Broker*, author Antoni Gronowicz intended to portray "[t]he life of Pope John Paul II as told in his own words and in the reminiscences of cardinals, bishops, and friends."[2] Gronowicz informed his publishers and a film producer that he based the text on personal interviews with the Pope and other Vatican officials.[3] After obtaining information which suggested that Gronowicz had never interviewed the Pope, the publisher and movie producer concluded that the book was a fraud insofar as it purported to recount interviews which never took place.[4]

The government initiated an investigation to determine whether Gronowicz had defrauded the publisher and producer in

1 764 F.2d 983 (3d Cir. 1985).
2 *Id.* at 985.
3 *Id.*
4 *Id.*

violation of the federal mail and wire fraud statutes.[5] In the proceeding, the grand jury issued a subpoena duces tecum[6] requiring Gronowicz to produce all notes and records compiled in preparation of *God's Broker*. Gronowicz moved to quash the subpoena, claiming that the documents were sought for an improper purpose because the investigation itself was outside the authority of the grand jury.[7] Gronowicz alleged that the first amendment prohibited the investigation because it inquired into the truth of assertions made by him in his book. Gronowicz also maintained that, as an author, he was protected by a federal common law privilege from producing materials related to the writing of his book.[8] The United States District Court for the Eastern District of Pennsylvania denied Gronowicz's motion to quash. The court held that the grand jury properly issued the subpoena because it sought information relevant to the investigation.[9] Gronowicz appealed from the order of the district court.

The United States Court of Appeals for the Third Circuit affirmed, rejecting Gronowicz's argument that the investigation was outside the authority of the grand jury.[10] Addressing the federal common law privilege, the court stated that no case has recognized a press privilege to be "absolutely free from inquiry into the legality of the reporter's own activities, even those reflected in a publication."[11] The court noted that the press privilege is only a qualified one; it is ordinarily invoked by reporters called to testify in proceedings directed against third parties.[12]

Once the court determined that the investigation was not barred by the federal common law privilege, it considered the pro-

5 The relevant statutes are 18 U.S.C. §§ 1341, 1343 (1982).

6 A subpoena duces tecum is a process by which the court, at the instance of a party, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of a pending controversy, to produce it at trial. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979). *See* FED. R. CIV. P. 45 and FED. R. CRIM. P. 17.

7 Gronowicz also objected (1) because the subpoena sought information that was within the protection of the Pennsylvania Shield Law, 42 PA. CONS. STAT. ANN. § 942 (Purdon 1982) (affords privilege to journalists not to disclose information obtained during course of their newsgathering); (2) because it was burdensome, oppressive, and unreasonable; and (3) because Gronowicz's health precluded his personal appearance. *Gronowicz*, 764 F.2d at 984-85. These objections were not considered on appeal.

8 *Id.* at 985-86.

9 The order was modified and defendant Gronowicz still refused to comply. The court directed Gronowicz to show cause why he should not be held in civil contempt. He unsuccessfully asserted the same objections, *see* note 7 *supra*, and the court ordered him to pay $500 a day until he complied. *Id.* at 984.

10 *Id.* at 986.

11 *Id.* The court recognized that an author may be held accountable for culpable falsehoods, both criminally and civilly. *See* Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

12 764 F.2d at 986.

priety of the subpoena duces tecum. The court stated that a valid grand jury subpoena must fulfill the following requirements: (1) the subpoenaed items must be relevant to the investigation; (2) the items must be properly within the grand jury's jurisdiction; and (3) they must not be sought primarily for another purpose.[13] The court reasoned that if the first amendment allowed the grand jury to proceed with the investigation, then these three requirements would be satisfied.[14]

In analyzing the first amendment question, the court analogized mail and wire fraud with libel.[15] In libel cases, courts rely on scienter requirements to protect first amendment interests.[16] The *Gronowicz* court stated that the scienter requirement for fraud "is at least as strict as that held to be the constitutional minimum for libel."[17] The court concluded that because no significant differences exist between libel and fraud, the scienter requirement for fraud would adequately protect the first amendment rights of authors.[18] Because the grand jury investigation was proper, and because no constitutional problem existed, the majority opinion ruled that the grand jury properly issued the subpoena duces tecum.[19]

In his dissenting opinion, Judge Higginbotham similarly recognized the propriety of the grand jury's investigation into Gro-

13 *Id.* at 986 (citing *In re* Grand Jury Proceedings, Schofield, 507 F.2d 963, 966 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975)). In *Schofield*, the court reviewed these requirements in a case where the defendant was held in civil contempt for refusing to comply with a grand jury subpoena directing her to submit to fingerprints, photographs, and handwriting exemplars. The court held that although the district court could have required a further showing on the government's part, the three-part test requirements were satisfied. 507 F.2d at 966-68.

14 764 F.2d at 986.

15 *Id.* at 988.

16 Courts balance the first amendment with societal interests in protecting others from the harm of defamation by demanding a specific scienter requirement. The scienter requirements vary depending upon whether the plaintiff is a public or private figure. When the plaintiff is a public figure, the scienter requirement is knowledge of falsity or reckless disregard of the truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976).

17 764 F.2d at 988.

18 *Id.*

19 Two judges submitted concurring opinions. Each discussed the possible fifth amendment privilege against self-incrimination. They concluded that Gronowicz possessed a personal fifth amendment privilege to refuse compliance with the subpoena. *Id.* at 989-91.

In the principal case, Gronowicz did not assert the fifth amendment privilege. *Id.* at 985. In failing to do so, he did not waive his right to assert it once the grand jury proceedings recommence. While it is not in issue here, it appears likely that Gronowicz would succeed if he asserted a fifth amendment privilege. According to United States v. Doe, 465 U.S. 605 (1984), compelling production of an individual's books and papers for use against him in legal proceedings violates the fifth amendment. The act of producing subpoenaed documents cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002-6003 (1982).

nowicz's alleged violation of the mail and wire fraud statutes.[20] The dissent, however, differed on the question of *how* the grand jury could proceed. Judge Higginbotham stated that a grand jury ought to recognize a qualified privilege when it directs a subpoena at "the author of a book who is the target of a grand jury investigation into the truthfulness of his assertions of fact."[21] This qualified privilege would permit access to unpublished information held by writers where the movant shows that: (1) he or she has made an effort to obtain the information from other sources; (2) that the only access to the information is through the writer and his or her sources; and (3) the information must be crucial to the claim.[22]

Judge Higginbotham found that the government had not made a showing of need that could overcome Gronowicz's right to resist disclosure of documents compiled in preparation of *God's Broker*.[23] According to Judge Higginbotham, the "sweeping" subpoena resembled a "fishing expedition" more than a search for "crucial"

20 764 F.2d at 994. Two other judges also dissented. Judge Hunter conceded that while the three-part test utilized by the majority normally suffices, it was not adequate here because the focus was on the truth of the book itself, not on the misrepresentations. *Id.* at 992.

Judge Hunter also asserted that the majority improperly relied on private suits to circumvent the first amendment concerns. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979) (holding that no first amendment privilege exists barring a defendant from inquiring into the editorial process where the inquiry will produce evidence relevant to proving a critical element of the plaintiff's cause of action). Judge Hunter stated that "the First Amendment primarily protects citizens from *government* intrusion into their freedom of expression, and not against private efforts to gain vindication by civil actions." 764 F.2d at 994 (emphasis in original).

Judge Sloviter's dissenting opinion went a step further. She criticized the majority opinion for freely analogizing criminal fraud with civil libel, asserting that the analogy overlooked the role played by the government and its ability to control, and even manipulate, the grand jury in a fraud action. *Id.* at 1001. She suggested that a balancing test was not enough to temper this problem. *Id.* at 1002.

According to Judge Sloviter, the absence of any precedent in this precise situation indicates that the criminal process has never previously been used to investigate the truthfulness of a book or writing dealing with an important public issue. *Id.* The court's decision, Judge Sloviter stated, is incompatible with the first amendment. *Id.* Ultimately, she suggested that it would be best "to relegate one potentially fraudulent book to the remedy provided by the civil law in order to insure that there is no inhibition in the future on speech concerning public affairs." *Id.* Judge Sloviter expressed concern over potential abuse of the *Gronowicz* decision by a prosecutor "who is imbued with a sense of zealous righteousness." *Id.* at 1000.

21 *Id.* at 999.

22 *Id.* Judge Higginbotham cited United States v. Criden, 633 F.2d 346, 358-59 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), which held that a journalist could not refuse to affirm or deny that she had conversed with a particular individual concerning matters arguably relevant to the judicial inquiry when the individual had already testified.

While this privilege admittedly had never been applied in a situation precisely like Gronowicz's, Judge Higginbotham argued that it should not matter that "appellant's medium was a book, rather than a newspaper article," or that the person claiming it was the target of the investigation. 764 F.2d at 999.

23 *Id.* at 1000.

information.[24] It would require production of papers having only attenuated relevance to any mail fraud. Moreover, the government had not shown that it could not obtain the information it sought from other sources. Judge Higginbotham therefore concluded that the grand jury improperly issued the subpoena.[25]

II. The Qualified Journalist's Privilege

Although the rights guaranteed by the first amendment are highly respected by the courts, these rights are not absolute. First amendment rights may be subordinated when they clash with other important interests, such as society's interest in prosecuting crime or a civil plantiff's need for information. To protect first amendment rights in light of these conflicting interests, many courts have recognized a qualified privilege for writers to protect their sources. While few courts have applied the privilege in grand jury investigations, recognition of the privilege first arose in the grand jury context.

A. *Creating a Balancing Test*

In *Branzburg v. Hayes*,[26] the United States Supreme Court considered three cases in which a reporter claimed a privilege not to reveal his sources before a grand jury. In each case, the reporter based the privilege on the first amendment.[27] The reporters ar-

24 *Id.* at 999-1000.

25 *Id.*

26 408 U.S. 665 (1972).

27 *Id.* at 679-80. In the first of these cases, reporter Paul Branzburg observed production of hashish in Jefferson County, Kentucky, and published his observations in the Louisville Courier-Journal. The Jefferson County grand jury subpoenaed Branzburg, but he refused to identify the subjects of his article. Branzburg alternatively claimed a reporter's privilege under Kentucky law, the first amendment of the United States Constitution, or the Kentucky Constitution. All claims of privilege were rejected by the trial court and the Kentucky court of appeals.

In the second case, *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), television newsman-photographer Paul Pappas was allowed into Black Panther headquarters during a civil disturbance on condition that he not disclose anything he heard or saw except for an anticipated police raid. The police raid never materialized and two months later, Pappas refused to reveal his observations to a grand jury, asserting a first amendment privilege to protect his confidences. Both the trial court and the Supreme Judicial Court of Massachusetts denied Pappas' motion to quash the grand jury subpoena.

The final case, United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970), concerned a reporter, Earl Caldwell, who was assigned to cover the Black Panthers for the New York Times. A federal grand jury subpoenaed Caldwell to testify before it. The subpoena did not specify the extent of Caldwell's testimony. Caldwell moved to quash the subpoena, arguing that a grand jury appearance would destroy his working relationship with the Panthers. The district court issued a protective order to allow Caldwell to withhold the identity of his sources, but Caldwell nonetheless refused to appear. He was ordered jailed for contempt, but the Ninth Circuit reversed the order. The Ninth Circuit recognized a qualified reporter's privilege based on the first amendment. The court reasoned that re-

gued that forcing a reporter to reveal his sources to the grand jury would deter individuals from providing information to reporters in the future and consequently, chill the free flow of information.[28]

The Court rejected this argument, and denied the first amendment privilege in grand jury proceedings.[29] Justice White, writing for a 5-4 majority, noted courts' almost uniform rejection of the first amendment argument in a grand jury context.[30] Justice White attributed this position to the historical role of the grand jury and the necessary breadth of its investigatory powers.[31] He concluded that the governmental interest in law enforcement exceeded the "consequential, but uncertain, burden on news gathering" resulting from requiring reporters to testify.[32] Thus, the Court held that all three reporters must testify before the grand jury.[33]

Despite the holding of the majority opinion, *Branzburg* in fact opened the door to a qualified reporter's privilege.[34] In his concurrence, Justice Powell suggested that newspersons possess a qualified privilege in the grand jury context. Justice Powell stated that:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. . . . In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.[35]

Justice Stewart's dissent provided the strongest argument in favor of recognizing the privilege.[36] Justice Stewart, concerned about the potential "chill" on the flow of information caused by requiring testimony from newsmen, posited that the grand jury's power is not absolute. He reasoned that the first amendment

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quiring a reporter to reveal his sources may deter his informants and cause the reporter to censor his work. 434 F.2d at 1087-90.

28 408 U.S. at 679-80.

29 *Id.* at 690.

30 *Id.* at 685-86.

31 *Id.* at 686-88.

32 *Id.* at 690-91.

33 *Id.* at 708-09.

34 The weight of academic commentary agrees with this interpretation of *Branzburg*. *See, e.g.*, Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Murasky, *The Journalist's Privilege:* Branzburg *and its Aftermath*, 52 TEX. L. REV. 829 (1974); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 137-48 (1972); Comment, *The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application*, 75 J. CRIM. L. & CRIMINOLOGY 413 (1984). *But see* Yarbrough, *Press Privilege Claims and Balancing Doctrine*, 31 ALA. L. REV. 523 (1980) (reading *Branzburg* to reject any reporter's privilege based on the first amendment).

35 408 U.S. 665, 710 (1972) (Powell, J., concurring).

36 *Id.* at 725 (Stewart, J., dissenting). Justices Brennan and Marshall joined in Justice Stewart's opinion. Justice Douglas filed a separate opinion, calling for an absolute privilege to reporters protecting their sources. *Id.* at 711 (Douglas, J., dissenting).

should weigh as heavily as the fourth and fifth amendment privileges already recognized in grand jury proceedings.[37] To protect these important first amendment rights, Justice Stewart proposed a balancing test. The test provides that to obtain confidential information from a reporter during a grand jury proceeding, the government must show that: (1) it has probable cause to believe that the newsman has information clearly relevant to a specific probable violation of the law; (2) the government cannot obtain the information through alternative means less destructive of first amendment rights; and (3) the government possesses a compelling and overriding interest in the information.[38]

Lower courts have used Justice Stewart's test to fashion qualified reporter's privileges for their jurisdictions.[39] Interestingly, the privilege has been extrapolated to various civil and criminal proceedings, but rarely recognized in grand jury investigations.[40]

B. *Subsequent Application of the Balancing Test*

Most federal and state courts have recognized a qualified reporter's privilege in civil cases and in criminal proceedings other than grand jury investigations.[41] Usually a reporter or journalist

37 *Id.* at 737 (Stewart, J., dissenting).

38 *Id.* at 743.

39 *See* notes 41-57 *infra* and accompanying text.

40 *See* note 66 *infra* and accompanying text.

41 The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits have recognized the journalist's qualified privilege. The Sixth and Seventh Circuits have recognized the privilege at the district court level. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (Privacy Act suit); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (criminal proceeding), *cert. denied*, 449 U.S. 1126 (1981); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) (libel action), *cert. denied*, 450 U.S. 1041 (1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (libel action); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (civil rights action); United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976) (civil contempt action), *aff'd en banc*, 561 F.2d 539 (1977); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y.) (criminal proceeding), *aff'd mem.*, 559 F.2d 1206 (2d Cir. 1976), *cert. denied*, 434 U.S. 997 (1977); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (criminal proceeding), *cert. denied*, 427 U.S. 912 (1976); Carey v. Hume, 492 F.2d 631 (D.C. Cir.) (libel action), *cert. dismissed*, 417 U.S. 938 (1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972) (libel action), *cert. denied*, 409 U.S. 1125 (1973); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972) (civil rights action), *cert. denied*, 411 U.S. 966 (1973).

State courts have also recognized the privilege. *See, e.g.*, State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) (criminal proceeding); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (criminal case), *cert. denied*, 419 U.S. 966 (1974).

Courts have based the privilege on the first amendment. The privilege promotes the free flow of information, freedom of ideas, and unfettered discussion of controversial topics. *See* United States v. Burke, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); United States v. Criden, 633 F.2d 346, 355 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Bursey v. United States, 466 F.2d 1059, 1084 (9th Cir. 1972). Forcing journalists and reporters to reveal sources and disclose information will "chill" the flow of information. *See* notes 72-79 *infra* and accompanying text.

who has authored a publication pertinent to an ongoing civil or criminal proceeding asserts the privilege.[42] In a typical criminal case, the defendant seeks the journalist's information to exculpate himself.[43] In civil cases, the plaintiff ordinarily wants the information to prove part of his case or to lead to probative information.[44]

Although the person asserting the privilege is usually a journalist, newspaper companies,[45] television networks,[46] and authors like Gronowicz[47] have all asserted the privilege. The privilege has also been invoked to protect sources,[48] documents,[49] work notes,[50]

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42 *See, e.g.*, United States v. Burke, 700 F.2d 70 (2d Cir.) (journalist), *cert. denied*, 464 U.S. 816 (1983); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (journalist); United States v. Criden, 633 F.2d 346 (3d Cir. 1980) (journalist), *cert. denied*, 449 U.S. 1113 (1981); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) (journalist), *cert. denied*, 450 U.S. 1041 (1981); United States v. Steelhammer, 539 F.2d 433 (4th Cir. 1976) (reporters), *aff'd en banc*, 561 F.2d 539 (1977); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y.) (newsman), *aff'd mem.*, 559 F.2d 1206 (2d Cir. 1976), *cert. denied*, 434 U.S. 997 (1977); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (reporter), *cert. denied*, 427 U.S. 912 (1976); Carey v. Hume, 492 F.2d 631 (D.C. Cir.) (column writer), *cert. dismissed*, 417 U.S. 938 (1974); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972) (journalist), *cert. denied*, 411 U.S. 966 (1973); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972) (reporter), *cert. denied*, 409 U.S. 1125 (1973); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (journalists).

43 *See, e.g.*, United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y.), *aff'd mem.*, 539 F.2d 1206 (2d Cir. 1976), *cert. denied*, 434 U.S. 997 (1977); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979).

44 Most often, courts uphold the journalist's privilege to refuse to testify or deliver documents or other information in civil cases. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (Privacy Act suit against the federal government); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (civil rights action against corporation involved in death of Karen Silkwood); United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976) (civil contempt trial involving a wildcat strike), *aff'd en banc*, 561 F.2d 539 (1977); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972) (civil rights action), *cert. denied*, 411 U.S. 966 (1973).

A journalist often invokes the journalist's privilege in libel cases where the plaintiff seeks the journalist's information to show that the published material was false, or to show the requisite state of mind in publishing the information. *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

45 *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (newspaper company).

46 *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (television network), *cert. denied*, 449 U.S. 1126 (1981).

47 *See, e.g.*, United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979) (the fact that reporter was subpoenaed regarding a book he was writing for his own personal gain is irrelevant because the reporter's privilege must encompass all newsgathering efforts).

The person asserting the privilege need not be a full-time professional in the news industry. *See* Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (reporter working on a documentary film who was not a regular salaried newspaper reporter could invoke the privilege).

48 *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Miller v. Transamerican

and other confidential information involved in assembling the published piece.[51] This diverse application of the privilege coincides with the underlying theory of the privilege; that is, the policy of free flow of information supports the protection of any confidential information associated with speech.[52]

The privilege is qualified, however, and the moving party's interest in the information may be so strong as to overcome it. Courts have used a variety of tests to balance the competing interests of the journalist and the party seeking the information. The tests have generally been patterned after Justice Stewart's test in *Branzburg*. Courts most often uphold the privilege in civil cases,[53] even when the publisher is the defendant in a libel case.[54] In a libel case, courts balance the journalist's first amendment privilege against the plaintiff's need for the information.

More difficult, however, are criminal proceedings where the defendant seeks exculpating information.[55] Unlike the civil situation, courts must balance the first amendment right of the journalist against the sixth amendment right of the defendant to confront witnesses against him.[56] If the defendant shows that the information is highly relevant to the trial, that he cannot obtain the information from other sources, and that his interest in the information is compelling, courts usually will find that his interest outweighs the

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Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

49 *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

50 *See, e.g.*, United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979).

51 United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976), *aff'd en banc*, 561 F.2d 539 (1977); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977). *See also* United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). In *Cuthbertson*, the court reasoned that the journalist's privilege is not limited to protection of confidential sources. *Id.* at 147. The court observed that compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes, substantially undercutting the public policy favoring the free flow of information. *Id.*

52 *See* note 41 *supra*.

53 *See* note 44 *supra*.

54 *Id.*

55 *See* note 43 *supra*.

56 U.S. CONST. amend. VI. The sixth amendment in part provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."

privilege.[57]

C. *The Privilege and Grand Jury Proceedings*

In *Bursey v. United States*,[58] the Ninth Circuit recognized the journalist's privilege in the context of a grand jury investigation. *The Black Panther* newspaper had published a speech by the Black Panther's Chief of Staff in which he stated "we will kill Richard Nixon."[59] Two journalists from the newspaper refused to answer questions put to them by a federal grand jury investigating a plot to kill the President.[60] The court upheld the journalists' right to refuse to answer the questions.[61] The court reasoned that speech, press, and associational relationships are presumptively covered by the first amendment even in a grand jury proceeding. Moreover, the court stated that the burden rests on the government to establish that the first amendment does not apply to the particular instance.[62] To overcome the privilege, the court ruled that the government must show: (1) that the government's interest in the subject matter is immediate, substantial, and subordinating; (2) that a substantial connection exists between the information sought and the overriding governmental interest; and (3) that the means of obtaining the information is no more drastic than necessary.[63] The court found that the government failed to meet this burden.[64] Although the government asked for a rehearing based on the *Branzburg* decision, the court refused.[65]

Since *Bursey*, no court has upheld the privilege in a grand jury proceeding.[66] Some courts, however, have indicated in dicta that

57 *See, e.g.*, United States v. Criden, 633 F.2d 346, 358-59 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979).

58 466 F.2d 1059 (9th Cir. 1972).

59 *Id.* at 1065-66.

60 *Id.*

61 *Id.* at 1081-88.

62 *Id.* at 1082. The court stated that:

> No governmental door can be closed against the [First] Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance.

Id.

63 *Id.* at 1083.

64 *Id.*

65 *Id.* at 1090-91.

66 Courts have relied on *Branzburg's* majority opinion in denying the privilege in grand jury proceedings. *See, e.g.*, Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) (radio station manager did not have first amendment privilege to refuse to comply with federal grand jury subpoena for a communique received from group claiming responsibility for a bombing because manager did not show that the investigation was conducted in bad faith); Tofani v. State, 229 Md. 165, 465 A.2d 413 (1983) (newspaper reporter does not have first amendment privilege to refuse to testify before grand jury where reporter had already pub-

the privilege should apply in grand jury investigations.[67] Although a grand jury proceeding is private, the journalist must still provide the confidential information he seeks to protect to the government. Therefore, the potential chilling effect on the flow of information, the concern which supports the privilege in other types of proceedings, equally applies.

Other constitutional rights restrict grand jury investigations. A grand jury may not violate a defendant's fifth amendment right against self-incrimination or his fourth amendment right against unreasonable searches and seizures.[68] Among constitutional rights, the rights of freedom of speech and freedom of the press are paramount.[69] Although criminals should not be permitted to "hide" behind the first amendment, a qualified privilege would balance the journalist's interest in keeping his information confidential against the government's interest in investigating crime. In *Branzburg*, the Court noted that the government's interest in prosecuting crime is substantial;[70] yet, so is our national policy of unrestricted flow of ideas. Courts consider the journalist's first amendment rights even when the opposing interest rests on constitutional grounds, as when a criminal defendant needs exculpating information.[71] It seems anomalous to refuse to provide a similar protective procedure in grand jury proceedings.

III. Impact of *Gronowicz*

Gronowicz presents the first case in which a grand jury has compelled an author, as the subject of an investigation, to submit his personal notes and records used in preparing a publication. Because *Gronowicz* initially appears to limit the qualified reporter's privilege and to expand the grand jury's investigative powers only

licly revealed names of her sources); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (N.Y. Sup. Ct. 1977) (a journalist has no first amendment privilege to refuse to testify before a grand jury unless he can show the investigation is not in good faith or that the subpoena constituted harassment).

67 *See* United States v. Burke, 700 F.2d 70, 77 (2d Cir.) (court indicated that reporters have a qualified first amendment privilege even in grand jury proceedings), *cert. denied*, 464 U.S. 816 (1983); Zerilli v. Smith, 656 F.2d 705, 711 & n.41 (D.C. Cir. 1981) (qualified first amendment privilege would be available in some instances in grand jury proceedings); Baker v. F & F Inv., 470 F.2d 778, 784-85 (2d Cir. 1972) (court interpreted *Branzburg* as recognizing the need to balance first amendment values even where a reporter is asked to testify before a grand jury), *cert. denied*, 411 U.S. 966 (1973).

68 *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (4th amend.); United States v. Washington, 431 U.S. 181 (1977) (5th amend.); Counselman v. Hitchcock, 42 U.S. 547 (1892) (5th amend.). *See also* cases cited in *Branzburg*, 408 U.S. at 737, nn. 21-22 (Stewart, J., dissenting). *See generally* 38 AM JUR 2d *Grand Juries* §§ 8, 38 (1968).

69 *Branzburg*, 408 U.S. at 734 (Stewart, J., dissenting).

70 *See* note 32 *supra* and accompanying text.

71 *See* notes 55-57 *supra* and accompanying text.

marginally, other courts are likely to follow the majority's reasoning. The decision, however, overlooks the possibility that authors, faced with the grand jury's power to obtain their personal notes and records, may be reluctant to write, thus restricting the free flow of ideas and information.

The first amendment concern created by the *Gronowicz* court stems from the chilling effect this decision might have on future publications. As the Supreme Court stated in *Time, Inc. v. Hill*,[72] the guarantees of the first amendment "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assumes the maintenance of our political system and an open society."[73] Restrictions on authors of non-fiction works of public interest damage the public as much as restrictions on the press.[74]

The majority opinion in *Gronowicz* relied upon the scienter requirement[75] of the mail and wire fraud statutes[76] to negate this chilling effect.[77] The scienter requirement, however, is part of the government's case at trial and provides little procedural protection to the target of a grand jury investigation. The three-part test[78] articulated by the majority opinion merely requires the government to show the relevance of the sought-after documents to the investigation.[79] In effect, the majority opinion failed to adequately consider Gronowicz's actual first amendment concern — the chilling effect to authors when a grand jury may lawfully subpoena the author's personal notes and records when he or she is the subject of an investigation.

On the other hand, the government maintains a strong interest in law enforcement. Writers should not be given a license to commit crimes by "hiding" behind the first amendment. To ensure a proper balance between competing interests in cases involving first amendment rights in the grand jury context, courts should uni-

72 385 U.S. 374, 389 (1967).

73 *Id.* at 389.

74 *See generally* Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970) (noting that the adverse impact of the subpoena threat has been primarily in "poisoning the atmosphere," making insightful, interpretive reporting more difficult).

75 *See* note 16 *supra*.

76 18 U.S.C. §§ 1341, 1343 (1982).

77 This chilling effect could potentially have far-reaching ramifications. Knowing that he could be compelled to produce, through a subpoena duces tecum, notes and papers relevant to the writing of his book, an author may not even consider transmitting his thoughts into print.

78 *See* note 13 *supra* and accompanying text.

79 764 F.2d at 986.

formly apply the qualified privilege as stated by Justice Stewart in *Branzburg*.

IV. Conclusion

Courts have applied a qualified privilege in various criminal and civil proceedings to protect the first amendment interests of a writer. Few courts have recognized this privilege in grand jury investigations. Nevertheless, the threat of a grand jury investigation as well as the threat of a civil or criminal trial can adversly affect free speech. Therefore, the privilege should apply to grand jury investigations.

The *Gronowicz* court sets a dangerous precedent by not recognizing the qualified privilege. If subsequent courts follow suit, authors may be reluctant to write, thus chilling the free flow of information.

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CRIMINAL LAW—*UNITED STATES V. BELL*: REJECTING GUILT BY ASSOCIATION IN SEARCH AND SEIZURE CASES

Guilt by association is an unreasonable basis for an intrusive personal search. Yet, on this basis, several United States Courts of Appeals have established an "automatic companion" rule.[1] Essentially, this rule enables a law enforcement officer, pursuant to the arrest of one individual, to conduct a pat-down search of an arrestee's companions to ensure that they are unarmed.[2] The automatic companion rule derives from the principle that an officer may stop and frisk an individual when he can point to specific attributable facts which justify that intrusion.[3] This rule penalizes an individual for being with the wrong person at the wrong time. In a recent Sixth Circuit case, *United States v. Bell*,[4] the court refused to adopt the automatic companion rule. In *Bell*, the court held that the defendant, as the companion of an arrested felon, was not automatically subject to a pat-down search. The court held, however, that based on traditional fourth amendment analysis, the search was reasonable.[5]

This comment analyzes the holding and reasoning of *United States v. Bell* and discusses the validity of the automatic companion rule as set forth by the Fourth, Seventh, and Ninth Circuits.[6] Part I examines the development of the rule. Part II states the facts of *Bell* and analyzes the court's justifications for rejecting the automatic companion rule. Part III concludes that the automatic companion rule would erode the individualized protections afforded by the fourth amendment.

I. Development of the Automatic Companion Rule

The fourth amendment of the United States Constitution prohibits unreasonable searches and seizures of individuals.[7] Accord-

1 *See* notes 18-32, 36-38 *infra* and accompanying text.

2 United States v. Bell, 762 F.2d 495, 498 (6th Cir.), *cert. denied*, 106 S. Ct. 155 (1985) (citing United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971)).

3 Terry v. Ohio, 392 U.S. 1 (1968). *See* notes 15-17 *infra* and accompanying text.

4 762 F.2d 495 (6th Cir.), *cert denied*, 106 S. Ct. 155 (1985). *See* notes 39-42 *infra* and accompanying text.

5 *Id.* at 502.

6 *See* notes 18-32, 36-38 *infra* and accompanying text.

7 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. *See* Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)

ingly, the United States Supreme Court has developed the exclusionary rule,[8] which suppresses evidence seized in violation of the reasonableness requirement of the fourth amendment. The Supreme Court in *United States v. Di Re*,[9] a 1948 case, determined that the automatic search of a person found in a car with validly arrested suspects is unreasonable under the fourth amendment. In *Di Re*, police searched defendant Michael Di Re, who was a passenger in a car with a government informant and a man suspected of selling counterfeit gasoline ration coupons. Police discovered such coupons on Di Re. At trial, Di Re was convicted of knowingly possessing counterfeit gasoline ration coupons. The appellate court reversed the conviction, holding that the evidence was the fruit of an illegal search and therefore was not admissible. The Supreme Court affirmed the reversal.[10]

The Supreme Court rejected the Government's argument that the search of Di Re was justified as incident to a legal search of the car in which Di Re was a passenger. Because the Court found that the police did not search the automobile, the search of Di Re could not be incident to it.[11] Moreover, even if the police legitimately searched the car, it would not necessarily have conferred an incidental right on the officers to search Di Re: "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."[12]

The Court also rejected the Government's alternative argument that the police searched Di Re incident to his lawful arrest.

("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

8 The exclusionary rule was first applied to federal criminal trials in Weeks v. United States, 232 U.S. 383 (1914). The United States Supreme Court extended the rule to state criminal proceedings in Mapp v. Ohio, 367 U.S. 643 (1961).

9 332 U.S. 581 (1948). In *Di Re*, an informant, Reed, had told the officer that he was to purchase counterfeit ration coupons from an individual named Buttita. Acting on this information, the investigator and a police detective trailed Buttita's car. Once Buttita parked the car, the officer approached the car and found Buttita in the driver's seat, the informant Reed as the only passenger in the back seat, and Michael Di Re, an unidentified passenger, in the front seat. Reed identified Buttita as the only man who had given him the counterfeit coupons which Reed held. The officer nevertheless frisked all three men, and took them to the police station. When Di Re emptied his pockets as instructed, he produced several counterfeit ration coupons. After booking and a thorough search, the police discovered one hundred counterfeit coupons on Di Re. The coupons were introduced as evidence over the defendant's objection, and the district court convicted Di Re. *Id.* at 583.

10 *Id.*

11 *Id.* at 586.

12 *Id.* at 587. The Court in *Di Re* held that an individual in an automobile could not be subject to a search without a warrant based on the automobile exception because an individual has his own expectations of privacy. *Id.* at 587. *See also* Carroll v. United States, 267 U.S. 132 (1925) (automobile exception).

The Court found that Di Re's presence in the automobile not only failed to create an inference of participation in the transaction between the other two occupants of the car, but also failed "to support the inference of any felony at all."[13] Di Re's presence in the car did not, by itself, support an inference of criminal behavior. The Court held that the search of Di Re and seizure of the coupons found in the search were illegal because they were based solely on Di Re's presence in the car with a man suspected of selling counterfeit coupons.[14] Thus, the Supreme Court rejected the arguments that searches of automobile companions are valid based on either the automobile exception or the search incident to arrest exception to the warrant requirement.

Some courts construed the Supreme Court's decision in *Terry v. Ohio*[15] as supporting an automatic companion rule. The *Terry* exception to the warrant requirement allows the officer to conduct a warrantless search for weapons in the course of an investigation of suspicious or criminal behavior.[16] The Court justified such a limited pat-down search by weighing the public interest in law enforce-

13 332 U.S. at 593. The Court continued by stating that:

> The argument that one who "accompanies a criminal to a crime rendezvous" cannot be assumed to be a bystander . . . is far-fetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city . . . . Presumptions of guilt are not lightly to be indulged from mere meetings.

Id.

14 *Id.* at 587, 593.

15 392 U.S. 1 (1968). Officer McFadden, patrolling an area in downtown Cleveland, observed Terry and a companion loitering on the street, seemingly "casing" a store. The two men joined a third man with whom they had conferred earlier. The officer believed that perhaps the men were planning to rob the store, so he approached them and asked for identification. When the men only mumbled a response, the officer frisked petitioner Terry and felt a pistol in the pocket of his overcoat. He removed the overcoat completely and confiscated a .38-caliber revolver. At trial Terry was convicted of carrying a concealed weapon. The Supreme Court held that the officer did not act unreasonably in conducting a limited pat-down search for weapons. *Id.* at 5-7, 30-31. *See* note 49 *infra* and accompanying text.

16 The Court stated that:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

392 U.S. at 24. In Sibron v. New York, 392 U.S. 40 (1968), a companion case to *Terry*, the Court elaborated on this rule:

> Before [a police officer] places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.

Id. at 64.

ment against the intrusion into the privacy interests of the individual.[17]

Despite the Supreme Court's straightforward rejection of automatic searches of an arrestee's companion in *Di Re*, the United States Court of Appeals for the Ninth Circuit seized upon language carefully chosen from *Terry v. Ohio* to justify the police search of a companion. In *United States v. Berryhill*,[18] postal inspectors had obtained a warrant for the arrest of defendant Raymond J. Berryhill because he allegedly stole checks. Police officers, aware of this warrant, and aware that the defendant usually carried a weapon, located the defendant and his wife in an automobile. The officers stopped the car and arrested the defendant at gunpoint.

One officer noticed several envelopes in a paper bag at the top of Mrs. Berryhill's purse. Although the officer did not have a warrant for Mrs. Berryhill, the officer searched the handbag and discovered the evidence used to indict the defendant. The officer grew suspicious and searched Mrs. Berryhill's purse *after* he saw the envelopes at the top of the bag. The court, however, avoided the argument that the envelopes led the officer to search the bag by referring to the handbag as a reasonable depository for the weapon Mr. Berryhill may have had in his possession.[19] Defendant Berryhill unsuccessfully objected to the search of his wife's purse. The court held that the search met the *Terry* standards which justify a frisk[20] because it was a limited search of an occupant of the arrestee's vehicle for weapons.[21]

The Ninth Circuit in *Berryhill* rightly noted *Di Re*'s relevance: "[T]he lawful arrest of Berryhill cannot legalize a personal search of a companion for evidence against her simply because she was there."[22] The court, however, also cited *Terry v. Ohio*: "We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest."[23] The *Berryhill* court extended *Terry* beyond its narrow confines: "All companions of the arrestee within the immediate vicinity, capable of accomplishing a

17 *Terry*, 392 U.S. at 21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)). In *Terry*, the Court described this public interest as the government interest in "effective crime prevention and detection." 392 U.S. at 22. In *Bell*, the court stated that the "reasonableness of a given search or seizure depends upon 'a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " 762 F.2d at 499 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

18 445 F.2d 1189 (9th Cir. 1971).

19 *Id.* at 1193.

20 *Id.* *See* note 16 *supra* and accompanying text.

21 445 F.2d at 1192.

22 *Id.* at 1193 (citing *Di Re*, 332 U.S. 581 (1948)).

23 445 F.2d at 1193.

harmful assault on the officer, are constitutionally subject to the cursory 'pat-down' reasonably necessary to give the assurance that they are unarmed."[24] Thus, the Ninth Circuit's extension of *Terry* ignored the principle set forth by the Supreme Court in *Di Re* that the automatic search of a companion in a car is unlawful.[25]

Other United States Courts of Appeals have adopted the *Berryhill* court's extension of *Terry* to justify companion searches. The Fourth Circuit, in *United States v. Poms*,[26] referred to both *Terry* and *Berryhill* in upholding the search of Alan Poms' shoulder bag. Poms was a companion of Gabriel Brobow, for whose apartment the police had obtained a search warrant.

In *Poms*, both Brobow and defendant Poms were suspected of narcotics trafficking. According to an informant, Poms lived in Brobow's apartment. This same informant indicated that Poms usually carried a brown leather bag which always contained an automatic handgun. Poms stepped off the elevator in the apartment building to find that federal agents had arrested Brobow. One agent saw Poms as the elevator door opened, saw the brown leather bag, identified Poms, and seized the bag. Upon discovering cocaine and an automatic pistol in the bag, the officer arrested Poms.

The court held that the search of Poms' bag was a justifiable *Terry* procedure and insisted that *Terry* supported this automatic search. This 1973 holding by the Fourth Circuit furthered the automatic companion rule, especially by citing *Berryhill* with approval.[27]

It has been argued that *United States v. Simmons*[28] supports the automatic companion rule.[29] However, because the court in *Simmons* declined to follow the rule set down in *Berryhill*, the case does not support an automatic companion rule.[30] In *Simmons*, police officers traced the defendant, suspected of armed robbery, to a hotel. They arrested him in his room, then searched the bed and the purse of the woman who was in the room with the defendant. The court limited its holding to these specific facts: "[A] search of items within the area of immediate control of a person who is present during a custodial arrest for a recent crime in which guns were used is reasonable when an objective probability of danger to law enforcement exists under the circumstances."[31] Because of the

24 *Id.*

25 *See* notes 9-14 *supra* and accompanying text.

26 484 F.2d 919 (4th Cir. 1973).

27 *Id.* at 922.

28 567 F.2d 314 (7th Cir. 1977).

29 *See Bell*, 762 F.2d at 498 (discussing the Government's argument that *Simmons* supports the automatic companion rule).

30 567 F.2d at 318-19. *See* notes 65-68 *infra* and accompanying text.

31 567 F.2d at 320.

court's narrow holding and its refusal to apply the *Berryhill* extension of *Terry*,[32] the *Simmons* holding does not support the automatic companion rule.

The United States Supreme Court's 1979 decision in *Ybarra v. Illinois*[33] arguably invalidated an automatic companion rule. In *Ybarra*, police officers obtained a search warrant for a tavern and its bartender, who was suspected of dealing in narcotics. While executing the warrant, police detained the bar patrons. Upon searching defendant Ybarra, one of the patrons, the police discovered six packets of heroin. The police arrested Ybarra and he was subsequently convicted of unlawful possession of a controlled substance.

The Supreme Court reversed Ybarra's conviction. The Court held that the search of Ybarra and the seizure of the heroin were unconstitutional because the police had no reasonable belief that Ybarra was armed or involved in criminal activity. The Court stated that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."[34]

While the reasoning of *Ybarra* argues against applying an automatic companion rule, the holding actually referred to quite different circumstances than existed in *Berryhill*, *Poms*, *Simmons*, and *Bell*. The Court in *Ybarra* determined whether law enforcement officials have the right to search an individual solely because the individual is on the premises for which the police have a valid search warrant.[35] Whereas, in *Berryhill*, *Poms*, *Simmons*, and *Bell*, the person searched was associated with the person arrested rather than simply being incidentally on the premises. Thus, *Ybarra's* impact on the automatic companion rule is minimal.

United States v. Vaughan,[36] decided in 1983, may represent the Ninth Circuit's attempt to resuscitate the automatic companion rule after *Ybarra*. In *Vaughan*, the court held that police officers, having obtained valid arrest warrants for the driver and one passenger of an automobile, had the right to detain the second passenger, defendant Vaughan. While the police detained Vaughan, they searched his briefcase where they found incriminating evidence. The *Vaughan* court ultimately rejected the Government's "frisk of companions" argument, not because the initial detention and frisk

32 *Id.* *See* notes 18-25 *supra* and accompanying text.

33 444 U.S. 85 (1979).

34 *Id.* at 91.

35 The Illinois statute which authorized the search was declared unconstitutional as applied in Ybarra v. Illinois, 444 U.S. at 97 n.11. *See generally* Note, *Fourth Amendment Rights of Persons Present When a Search Warrant is Executed:* Ybarra v. Illinois, 66 IOWA L. REV. 453, 455 n.22 (1981) (listing other states with statutes similar to Illinois').

36 718 F.2d 332 (9th Cir. 1983).

of Vaughan's briefcase were unjustified under the automatic companion rule, but because the officer carried the search too far when he opened the briefcase.[37] The court held that the officers had the right to "briefly detain" Vaughan in order to conduct a *Terry* stop and frisk to determine that he had no weapons. The court allowed this even though the officers were ignorant of Vaughan's identity, had no warrant for his arrest, and were unaware of any involvement by Vaughan in the drug-smuggling conspiracy for which his companions were arrested.[38]

The *Vaughan* case, decided before *Bell*, appears to support an automatic companion rule in the Ninth Circuit. The 1985 decision by the Sixth Circuit in *Bell* thus established a split among the Circuits. *Bell* rejected the automatic companion rule set forth by the Fourth, Seventh, and Ninth Circuits in *Poms*, *Simmons*, *Berryhill*, and *Vaughan* by holding that the companion of an arrested felon is not automatically subject to a pat-down search.

II. Analysis of *Bell* and the Validity of an Automatic Companion Rule

In *Bell*, the Federal Bureau of Investigation (FBI) assigned Agent Snyder to aid in the execution of arrest and search warrants for Earl Cherry and his van. Cherry was suspected of food stamp, narcotics, and weapons violations. An unidentified accomplice accompanied Cherry while he allegedly committed some of these offenses. The agent believed Cherry was "armed and dangerous."[39]

Snyder and three other FBI agents located Cherry in the driver's seat of a Cadillac parked in front of a food stamp distribution center. Defendant-appellant Wayne Bell, who was not known by the officers, sat in the passenger seat next to Cherry. A number of people milled about the car. After a brief surveillance, two agents moved toward the driver's side of the car and arrested Cherry. Snyder, backed by another agent, moved to the passenger's side. Agent Snyder ordered Bell to place his hands on the dashboard. Bell did not respond to this or to a subsequent identical command. Snyder then ordered Bell to get out of the car; Bell unlocked the door, but did not open it, staring "defiantly" at the agent.[40] Snyder then opened the car door and removed Bell. When Bell did not respond to a command to place his hands on the roof of the car, Snyder turned him around and put his hands on the

37 *Id.* at 333.

38 *Id.* at 334.

39 The agents wore protective vests throughout their search for Cherry. 762 F.2d at 496.

40 *Id.* at 497.

car. Snyder then frisked Bell.[41] The agent found a small automatic handgun in Bell's jacket pocket. He arrested Bell for allegedly violating an ordinance prohibiting the carrying of concealed weapons. Because of a prior felony conviction, Bell was indicted as a convicted felon carrying a firearm.[42]

At the hearing on the admissibility of the firearm, the magistrate recommended that the gun be inadmissible as evidence.[43] The United States District Court for the Northern District of Ohio affirmed, with modifications, the magistrate's decision.[44]

The United States Court of Appeals for the Sixth Circuit refused to accept the Government's assertion that the search which revealed the handgun was proper based solely upon Bell's presence in the automobile when the police arrested Cherry.[45] The court found the search reasonable, however, based upon traditional fourth amendment analysis. Given the totality of the circumstances, the court found that Snyder reasonably perceived that Bell may have posed a risk of danger to the agents and others present at the scene.[46]

The Sixth Circuit, in reaching its decision, stated that *Terry v. Ohio* did not support an automatic companion rule:

> As to the propriety of the "automatic companion" rule, we do not believe that the *Terry* requirement of reasonable suspicion under the circumstances . . . has been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates.[47]

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41 *Id.*

42 *Id.* Bell was convicted under 18 U.S.C. app. § 1202(a) (1976).

43 Agent Snyder agreed that nothing indicated that Bell had a weapon until Snyder felt it during the frisk. The only basis for the frisk was that Bell was in the company of a suspect considered armed and dangerous and Bell's failure to respond to Snyder's commands to put his hands on the dashboard. The magistrate, relying heavily on *Ybarra* (*see* text accompanying notes 33-35 *supra*) concluded that the Government had not met its burden of showing that the frisk was reasonable. 762 F.2d at 497-98.

44 The district court felt that the Government's case was weaker than the magistrate suggested. The record did not support the fact that Agent Snyder admitted that he did not recognize Bell as the unidentified male accomplice and Bell did eventually unlock the car door. *Id.* at 498.

45 *Id.* at 499.

46 The *Bell* court cited five factors which it held satisfied the *Terry* requirement that Bell posed a physical threat to Agent Snyder and others in the vicinity of the car:

> (1) Cherry was known to be potentially armed and dangerous; (2) Bell was in the Cadillac with Cherry; (3) Bell could not be ruled out as Cherry's accomplice of the week before; (4) the car was parked in a relatively crowded place, with people milling around it; and (5) Bell refused to comply with the agent's commands while staring at him "defiantly."

Id. at 502.

47 *Id.* at 499 (citation omitted). The *Bell* court concluded that companionship can be a factor in determining the legitimacy of a frisk, but companionship cannot be the sole legitimizing factor. *Id.* at 499 n.4. The *Bell* court recognized that a patron in a bar, as in *Ybarra*, has no necessary connection with the bartender under suspicion. On the other hand, "one

The police officer in *Terry* observed the suspicious activities of three men. The men were clearly together, and acted in such a manner as to reasonably raise a suspicion in the mind of an experienced officer that a potential for criminal activity existed. In beginning a cursory investigation of the situation, the officer's suspicions were furthered, thus justifying a self-protective frisk for weapons.[48]

The Sixth Circuit in *Bell* noted that an automatic companion rule "is inconsistent with the Supreme Court's observation that it 'has been careful to maintain [the] narrow scope' of *Terry*'s exception to the warrant requirement."[49] In *Dunaway v. New York*,[50] the Supreme Court again emphasized the narrowness of the *Terry* exception. Without a warrant, police officers took defendant Dunaway, a homicide suspect, to the station for questioning. The State argued that it had made a *Terry* detention rather than an arrest. The *Dunaway* Court said *Terry* departed from traditional fourth amendment analysis. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope."[51]

In a more recent case, *Michigan v. Long*,[52] the Supreme Court

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would expect that persons in a . . . car are there by invitation or consent." *Id.* (quoting *Vaughan*, 718 F.2d at 335 n.6). Thus, *Bell* could be used to argue that proximity can be given more weight in circumstances where the people are clearly together in a demonstrable relationship.

48 392 U.S. at 7. The suspects had been loitering within the same vicinity for an extended period of time. When the officer approached the suspects and requested identification, the men "mumbled something" and failed to comply with his request. These circumstances further aroused the officer's suspicions that the two men were "casing a job, a stick-up" and that they might be armed. *Id.* at 6-7. The Supreme Court in Sibron v. New York, 392 U.S. 40 (1968), a companion case to *Terry*, clarified the issue of companionship in *Terry*. The Court stated that merely being in the company of known narcotics addicts did not give rise to reasonable fear to justify a *Terry* search: "The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to a reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime." *Id.* at 64. *See* note 16 *supra*. *See also* United States v. Clay, 640 F.2d 147 (8th Cir. 1981). In *Clay*, the United States Court of Appeals for the Eighth Circuit held unreasonable the search of a man approaching a house on the basis that: (1) he might be a companion of the owner; (2) the officer had an opportunity for inquiry as the defendant approached; and (3) inquiry should have been made before frisking. The court held that "[a]n officer is not warranted in relying upon circumstances deemed by him suspicious, when the means are at hand to either verify or dissipate those suspicions without risk." *Id.* at 161.

49 762 F.2d at 499 (citing Dunaway v. New York, 442 U.S. 200 (1979)).

50 442 U.S. 200 (1979). A Rochester, New York police detective had received information that Dunaway was a possible suspect in a homicide, but learned nothing that supplied "enough information to get a warrant" for Dunaway's arrest. *Id.* at 203. Nevertheless, the detective ordered others to "pick up" Dunaway and "bring him in." The Court ruled that a subsequent confession was invalid, because the detention constituted an illegal seizure. *Id.* at 219.

51 *Id.* at 210.

52 463 U.S. 1032 (1983). After seeing respondent Long's vehicle driving erratically and then swerve off the road, police officers stopped to investigate. Long appeared to be

reiterated that *Terry* searches are limited in scope. The Court held that an area search for weapons based upon articulable suspicion did not exceed this narrow scope. The Court emphasized that police may not conduct *Terry* searches without articulable suspicion that the intrusion is justified, and that *Terry* searches must remain limited protective weapons searches.[53]

The *Bell* court stated that in addition to exceeding the narrow scope of the *Terry* exception, an automatic companion rule may not be constitutional in light of existing precedent.[54] Specifically, the *Bell* court looked at the *Di Re* and *Ybarra* decisions of the Supreme Court.

In *Di Re*, the Supreme Court refused to adopt a rule that mere presence in a suspected car stripped a person of fourth amendment protections.[55] In *Ybarra*, the Supreme Court required "a reasonable belief that [the suspect] was armed and presently dangerous" as a prerequisite to a pat-down search for weapons.[56] Because the Government in *Bell* failed to contest the continued validity of *Di Re* and *Ybarra*, the Sixth Circuit found that these Supreme Court cases weakened the Government's argument for an automatic companion rule.[57]

The Sixth Circuit in *Bell* also examined the decisions of the

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"under the influence." *Id.* at 1036. The officers noticed a hunting knife on the floor of the car and thus conducted a *Terry* pat-down. Long carried no weapons, but a *Terry*-type search of the car yielded a pouch of marijuana. Long was convicted of possession of marijuana. The Supreme Court reinstated the conviction (which had been affirmed by the appeals court, then reversed by the Michigan Supreme Court), holding that the officers had the authority to conduct an area search of the passenger compartment to uncover weapons when they reasonably believed that the suspect might be dangerous. *Id.* at 1051.

53 *Id.* at 1052 n.16. Although dissenting in *Long*, Justice Brennan agreed that the Court should read *Terry* narrowly. *Id.* at 1055-56 (Brennan, J., dissenting). *See also* Florida v. Royer, 460 U.S. 491, 509-11 (1983) (Brennan, J., concurring in the result); Kolender v. Lawson, 461 U.S. 352, 364-65 (1983) (Brennan, J., concurring); United States v. Place, 462 U.S. 697 (1983) (Brennan, J., concurring in the result).

54 762 F.2d at 498.

55 332 U.S. at 593. *See* notes 9-14 *supra* and accompanying text.

56 444 U.S. at 92-93. The Court stated that:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91. *See* notes 33-35 *supra* and accompanying text.

57 762 F.2d at 499. The *Bell* court, however, noted that the facts of *Ybarra* differed from its own. *Id.* at 499 n.4. Among the distinguishing factors were: (1) There was no demonstrable relationship between Ybarra and the bartender, *id.*, while there is a presumption of a relationship between people in an automobile, *see Vaughan*, 713 F.2d at 335 n.6; and (2) Ybarra made no gestures indicative of criminal conduct and acted in a non-threatening manner. 762 F.2d at 499 n.4. In contrast, Bell ignored two direct commands, staring "defiantly" at the FBI agent. *Id.* at 497. The court did not point out these additional differences: In *Ybarra*, the frisk occurred subsequent to a search warrant, 444 U.S. at 92, while in *Bell* the frisk came after reasonable suspicion had been raised, 762 F.2d at 502. Further-

Ninth, Fourth, and Seventh Circuits in *Berryhill*, *Poms*, and *Simmons* which all upheld the automatic companion rule. The *Bell* court argued, however, that such "automatic companion" language was "in each case *dictum* unnecessary to the court's holding."[58]

In *Berryhill*, the Ninth Circuit dealt with the admission of evidence seized from an individual not charged with a crime.[59] Mr. Berryhill did not have standing to claim that the police violated his wife's fourth amendment rights because the police searched her purse.[60] The issue in *Berryhill* was therefore not companionship but standing.

In *Poms*, the Fourth Circuit first made a traditional *Terry* analysis of reasonableness under the circumstances. The officers had reliable information that Poms always carried a weapon in a brown shoulder bag. The officer searched the bag after Poms reached into it.[61] The court concluded that "this limited protective search was justified under the circumstances."[62] Only after having conducted a *Terry* analysis did the *Poms* court cite to *Berryhill* and purport to adopt the automatic companion rule. Having satisfied the *Terry* requirements, the court did not need to adopt an automatic companion rule. The officer had identified Poms, knew that he was a suspected criminal associate of Brobow, and reasonably believed that Poms carried a weapon. The court itself reaffirmed that the circumstances justified this search.[63] Because this search was not automatic, the court did not have to apply an automatic companion rule to reach its decision.

In *Simmons*, the Seventh Circuit examined the validity of a protective sweep. The Government urged the adoption of *Berryhill*, ar-

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more, in *Ybarra*, the Illinois statute authorized officers to frisk persons present during the execution of a search warrant. 444 U.S. at 92. No such statute existed in *Bell*.

58 762 F.2d at 498.

59 Mrs. Berryhill was not charged with a crime. The checks seized from her purse were used as evidence against her husband. *See* notes 18-25 *supra* and accompanying text.

60 Even if Mr. Berryhill had a sufficient privacy interest to challenge the search of his wife's purse, this challenge would likely have failed. The court indicated that it would have found the search incident to a lawful arrest. The court seems to argue that the evidence seized could not be used against Mrs. Berryhill because of *Di Re*, but can be used against Mr. Berryhill because of an automatic companion rule. The court itself, however, based its decision on the alternative grounds of either no standing to challenge or a search incident to a lawful arrest. Consequently, the court did not need to reach the issue of an automatic companion rule. The *Berryhill* court purported to distinguish *Di Re* on the grounds that the search of Di Re was "a thorough personal search of a companion of one who was lawfully arrested," while the *Berryhill* search was more like a *Terry* frisk: "a limited search for weapons for the protection of the arresting officer." 445 F.2d at 1193. Contrary to the court's assertion, the police did not search Di Re incident to a lawful arrest because the officers had no probable cause to infer felonious behavior on the part of Di Re. 332 U.S. at 593-95.

61 484 F.2d at 921.

62 *Id.* at 922.

63 *Id.*

guing in part that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory pat-down reasonably necessary to give assurance that they are unarmed."[64] The Seventh Circuit responded to this argument: "Our reluctance to rely on the reasoning urged by the government does not necessarily preclude us from allowing the search in this case."[65] When they arrested Simmons, the officers noticed someone else in the room. It was likely that a gun was in the room because Simmons and his accomplice had brandished weapons during the bank robbery earlier in the afternoon. The officers reasonably believed Simmons' companion might have access to a weapon after seeing a lump in the bed near the companion.[66] Again, because the court found the search reasonable under the circumstances,[67] it did not apply an automatic companion rule, but rather applied the traditional analysis under *Terry*. Thus, the cases relied upon by the Government in *Bell* as supporting an automatic companion rule are not precedent, but merely dictum.[68]

The *Bell* court, although rejecting an automatic companion rule, still recognizes companionship as one factor in the totality of the circumstances which can legitimize a *Terry* stop and frisk.[69] Using this approach, the court concluded that the limited intrusion into Bell's privacy was justified under the circumstances, and thus did not offend the fourth amendment.[70]

III. The Unreasonableness of an Automatic Companion Rule

An automatic companion rule treats companionship as the dispositive factor in determining the legitimacy of a *Terry* search: "[T]he legality of such a limited intrusion into a citizen's personal

64 567 F.2d at 318-19. *See* notes 28-32 *supra* and accompanying text.

65 *Id.* at 319.

66 *Id.* at 319-20. The court stated that "[u]nder these circumstances the officers' fear that a weapon could well be present in the room and that the woman might use it against them was legitimate and well-supported." *Id.* at 320.

67 *Id.* at 319.

68 The Government in *Bell* also relied upon the *Vaughan* case as an automatic companion case. The *Bell* court accepted *Vaughan* as setting forth the automatic companion rule. Like *Terry*, however, *Vaughan* was a narrow decision: "Only the facts surrounding the search and seizure of Vaughan's vinyl briefcase are at issue here." 718 F.2d at 333. The *Vaughan* court held that the agents had a right to detain Vaughan and to frisk him for their own safety but not to search the briefcase. It is unclear from this decision whether the court based its right to detain and frisk Vaughan on *Terry* or whether the intrusion was an automatic right. Resolving this issue is not germane to the outcome of the case. The appeal was expressly limited to review of the constitutionality of the full search of the briefcase. The *Bell* court noted that the evidence was suppressed because the real issue was one of a full search and not a *Terry* frisk. 762 F.2d 498-99 n.3.

69 *See* notes 46-47 *supra*.

70 762 F.2d at 502.

privacy extends to a criminal's companions at the time of arrest."[71] The automatic application of such a rule carries with it several risks. Under this rule, a law enforcement official avoids an analysis of the totality of the circumstances which can lead to unreasonable searches proscribed by the fourth amendment.

Companionship is not limited to fact situations identical to *Bell*. Companions are found and frisked not only in cars, but also in hotel rooms,[72] taverns,[73] and on public streets.[74] Searching companions automatically and in such varied circumstances threatens the individualized protections provided by the fourth amendment. In *Ybarra*, the Supreme Court stated that *each* person is "clothed with constitutional protection against an unreasonable search or an unreasonable seizure." Thus, although the police officers had a warrant for the bartender of the tavern, "it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers."[75]

Because an automatic companion rule would erode such constitutional protections, courts should not widen the narrow *Terry* exception to legitimize the automatic companion rule. Justice Douglas warned of such dangers in his dissent in *Terry*: "There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."[76] Justice Stevens, in his dissent in *Pennsylvania v. Mimms*,[77] recalled Douglas' warning by bitterly attacking the Court's "casual" extension of the narrow *Terry* exception.[78]

The Supreme Court has "consistently refused to sanction" intrusions upon guaranteed rights based upon "nothing more substantial than inarticulable hunches."[79] The conduct of law

71 *Berryhill*, 445 F.2d at 1193.

72 *Simmons*, 567 F.2d 314 (7th Cir. 1977). *See* notes 28-32, 64-68 *supra* and accompanying text.

73 *Ybarra*, 444 U.S. 85 (1979). *See* notes 33-35 *supra* and accompanying text.

74 *Terry*, 392 U.S. 1 (1968). *See* notes 15-17 *supra* and accompanying text.

75 444 U.S. at 92 (emphasis added).

76 392 U.S. at 39 (Douglas, J., dissenting).

77 434 U.S. 106 (1977).

78 Justice Stevens stated that:

> Today, without argument, the Court adopts still another —and even lesser—standard of justification for a major category of police seizures. More importantly, it appears to abandon "the central teaching of this Court's Fourth Amendment jurisprudence" which has ordinarily required individualized inquiry into the particular facts justifying every police intrusion—in favor of a general rule covering countless situations. But what is most disturbing is the fact that this important innovation is announced almost casually, in the course of explaining a summary reversal of a decision the Court should not even bother to review.

Id. at 115-16 (Stevens, J., dissenting) (footnotes omitted).

79 392 U.S. at 22.

enforcement officials must be subjected to the detached scrutiny of a judicial official "who must evaluate the reasonableness of a particular search in *light of the particular circumstances*."[80] This strong language from *Terry* underlines the importance of examining the *totality* of the circumstances in search and seizure cases.

IV. Conclusion

Even in those cases which purport to authorize an automatic companion rule, the courts have still looked to the particular facts which justified the searches.[81] If courts continue to justify searches by looking to the totality of the circumstances, then no need for an automatic companion rule exists. On the other hand, straightforward application of the automatic companion rule, without considering the facts of each case, encourages unreasonable searches which violate the fourth amendment. Thus, courts should continue to examine the reasonableness of warrantless searches and frisks based upon the totality of the circumstances and reject automatic rules which threaten the individual protections afforded by the fourth amendment.

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80 *Id.* at 21 (emphasis added).

81 Although the courts in *Berryhill*, *Poms*, and *Simmons* purport to authorize the automatic companion rule, all three courts looked to specific facts beyond companionship to justify the searches. In *Berryhill*, the purse could reasonably have been a depository for a weapon. In *Poms*, the suspect was known to carry a weapon in his shoulderbag. In *Simmons*, the suspect had allegedly been involved in a violent crime in which weapons had been used. *See* notes 18-32, 59-68 *supra* and accompanying text.

CONSTITUTIONAL LAW—*G. & A. Books, Inc. v. Stern*: RELEVANCE OF IMPROPER MOTIVE TO FIRST AMENDMENT INCIDENTAL INFRINGEMENT CLAIMS

Local governments usually have broad latitude in land use planning. Courts generally defer to local government decisions both in formulating land use goals and in devising means to attain those goals. This deference must give way, however, when land use planning infringes on a constitutionally protected right.

The Court of Appeals for the Second Circuit recently faced this issue in *G. & A. Books, Inc. v. Stern*,[1] when sellers of sexually explicit material sought to enjoin the city from condemning their property to initiate the Times Square Redevelopment Project.[2] The plaintiffs produced evidence that the defendants disliked the materials sold in the plaintiffs' stores. The court, however, refused to consider defendants' motivation for the project, looking only at the effects of the project.

Part I of this comment outlines the facts and holding of *G. & A. Books*. Part II then traces the development and integration of the doctrines of eminent domain and freedom of speech. Finally, Part III concludes that in addressing improper motivation in eminent domain actions which infringe on protected speech, courts should apply the test employed by the United States Supreme Court in *Mt. Healthy School District v. Doyle*.[3] This test best protects first amendment rights.

I. *G. & A. Books, Inc. v. Stern*

Plaintiffs operated businesses which sold sexually explicit material in the Times Square area of New York City. They sought to

1 770 F.2d 288 (2d Cir. 1985), *aff'g* 604 F. Supp. 898 (S.D.N.Y.).

2 Two other cases arose from this same redevelopment project. In Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp., 605 F. Supp. 612 (S.D.N.Y. 1985), plaintiffs, owners of a structurally sound building, challenged condemnation proceedings under 42 U.S.C. § 1983 (1982). They argued that the taking of their building did not serve a public purpose, and that it was done solely to make money for private developers. Relying on Berman v. Parker, 348 U.S. 26 (1954), and Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984), the court held that the plaintiffs failed to state a claim for relief under 42 U.S.C. § 1983 (1982).

In Forty-Second Street Co. v. Koch, 613 F. Supp. 1416 (S.D.N.Y. 1985), movie operators challenged the redevelopment plan on first amendment and equal protection grounds. Although the city was condemning plaintiffs' businesses, the theater buildings housing those businesses were slated for renovation, not destruction. The court held that the plan was neither racially discriminatory nor unnecessarily suppressive of free speech. The taking was, therefore, constitutional. The court noted that plaintiffs' disputes related mainly to questions of policy which were best settled by the legislature, not the judiciary.

3 429 U.S. 274 (1977). *See* notes 100-12 *infra* and accompanying text.

enjoin condemnation proceedings[4] initiated by the Times Square Redevelopment Corporation (defendant).[5] Plaintiffs alleged that defendants undertook the redevelopment project because they were hostile toward the plaintiffs' materials. Plaintiffs argued that the project was designed to stop the distribution of pornography.

The Times Square Redevelopment Project (Project) encompassed thirteen acres between 40th and 42nd Streets, bounded by Broadway and Eighth Avenue. Approximately 400 businesses[6] have been condemned to make way for a hotel, renovated theaters, four office towers, and a wholesale merchandise mart. Prior to any condemnations, the Final Environmental Impact Statement (FEIS) for the Project illustrated the need for redevelopment. The city had developed only one-third of the area's potential zoning capacity and no new major construction had taken place in fifty years. The redevelopment was expected to create 21,000 jobs in the area, an increase of approximately 17,000. The city also expected to gain an additional $650 million in taxes and payments over twenty years time.[7]

In addition to its statistical data, the FEIS also illustrated the government's hostility toward pornography. The district court found that "there [was] sufficient evidence in public documents concerning the Project to show that the government defendants [had] an official policy of hostility toward adult uses."[8] The court, however, concluded that eradicating pornography was not the Project's primary purpose.[9] The court stated that "[i]t strains credibility to assert that the City and State would undertake such a massive project . . . to rid Times Square of a handful of pornographic book-

4 To obtain a preliminary injunction, plaintiffs had to first demonstrate an irreparable harm, and then "either a likelihood of success on the merits or substantial questions going to the merits and a balance of hardships tilting in their favor." 604 F. Supp. at 907. The district court found that the imminent destruction of the plaintiffs' businesses constituted a sufficient harm. But the court, after examining the merits of plaintiffs' claims, denied their motion for injunctive relief. Finding that no material questions of fact remained, the court treated defendants' motion to dismiss as a motion for summary judgment and granted judgment for defendants as a matter of law. *Id.* at 914.

5 The New York State Urban Development Corporation Act, N.Y. UNCONSOL. LAWS §§ 6251-6285 (McKinney 1979), established the Urban Development Commission to eliminate blight and increase opportunity through cooperation with private enterprise. Defendants in this action were various public officials, public corporations, and private developers involved in the Project.

6 Among those 400 businesses were four adult theaters and fifteen businesses involved in distributing pornography. 770 F.2d at 291.

7 Without the Project, the city could expect no more than $123 million from the Times Square area. The FEIS estimated that the Project would generate over $776 million in revenue. 604 F. Supp. at 903.

8 *Id.* at 905.

9 Plaintiffs alleged that eradicating pornography was a major motivation for the Project, not the primary motivation. The district court did not reach any conclusion on whether hostility toward adult uses was a major motivation for the Project.

stores and a few adult movie theaters."[10] The court also concluded that the condemnation proceedings were not content-based because defendants did not single out plaintiffs' speech for special treatment.[11] The Project, the court reasoned, would displace all types of businesses, and a few of those businesses happened to be adult uses.

Although restriction of pornography was not its primary purpose, the Project did infringe on protected speech.[12] To test the constitutionality of this infringement, the court applied the four-part test set out in *United States v. O'Brien*.[13] Both the district court[14] and the court of appeals[15] used the *O'Brien* test as applied by Justice Powell in his concurring opinion in *Young v. American Mini Theatres, Inc.*[16]

The *O'Brien* test first requires that the condemning party have the constitutional power to take property by eminent domain.[17] In *G. & A. Books*, the plaintiffs did not dispute the Urban Development Commission's power to take their property.[18] Second, the *O'Brien* test requires the government to show a substantial interest in the property.[19] The court found that the state's interest in eliminating physical and social blight satisfied this second element.[20]

Third, the *O'Brien* test requires that the government interest be unrelated to the suppression of free expression.[21] The district court found that the Project goals, "in and of themselves [were] substantial, important, and unrelated to the suppression of free

10 604 F. Supp. at 905.

11 *Id.* at 909.

12 The district court stated that, "[t]here is no doubt that plaintiffs engage in activities protected by the First Amendment. Films . . . all kinds of publications . . . and nude dancing . . . are all protected forms of expression." *Id.* (citations omitted).

13 391 U.S. 367 (1968). The *O'Brien* test has become the standard for determining the constitutionality of government regulations which incidentally infringe on protected speech. *See* notes 62-65 *infra* and accompanying text.

14 604 F. Supp. at 908.

15 770 F.2d at 294.

16 427 U.S. 50, 73 (1976). *See* notes 66-74 *infra* and accompanying text.

17 391 U.S. at 377.

18 770 F.2d at 296. Plaintiffs seldom contest the government's constitutional power. A case like *G. & A. Books*, however, does merit more than a cursory consideration of this element. The political branches have the power to exercise eminent domain. But, arguably, they should not have the authority to do so when the act is motivated by hostility toward protected speech. "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). By using legitimate means (eminent domain) to accomplish an illegitimate end (eradication of pornography), a government actor would move outside the sphere of objects entrusted to the government.

19 391 U.S. at 377-81.

20 770 F.2d at 296.

21 391 U.S. at 377, 381-82.

speech."[22] The court noted that "only the legitimate, non-speech goals of fighting blight and crime will be factored into the balance. . . . [Illegitimate] justifications for the Project must be discounted under the *O'Brien* test."[23] The court of appeals stated that "subjective motivation on the part of some proponents of the Project to suppress sex-related businesses does not render it unconstitutional, provided the Project is justified by substantial government interests independent of such motive."[24]

Finally, the *O'Brien* test requires the government to employ the least restrictive means available to achieve its goal.[25] Because of numerous failed attempts to revitalize Times Square, the court found that the Project employed the least restrictive means available.[26] The court reasoned that a less drastic plan would not achieve the Project's legitimate goals.[27]

Finding all four prongs of the *O'Brien* test satisfied, the district court held that the condemnation of the plaintiffs' buildings was constitutional.[28] The Court of Appeals for the Second Circuit, applying a similar analysis, affirmed.[29]

II. Development and Integration of Land Use and First Amendment Law

A. *Land Use Planning*

As the district court noted, *G. & A. Books* involved two strains of constitutional law—judicial deference on land use issues and first amendment rights.[30] The first strain, judicial deference on land use issues, derives from the state's police power: its interest in promoting the health, safety, morals, or general welfare of the community.[31] *Euclid v. Amber Realty Co.*[32] upheld a local zoning ordinance as a legitimate exercise of the police power because the public interest in separating industrial from residential uses outweighed the reduction in property value imposed on the plaintiff.[33] Municipalities ob-

22 604 F. Supp. at 910.
23 *Id.* at 910-11.
24 770 F.2d at 297.
25 391 U.S. at 381.
26 604 F. Supp. at 911.
27 *Id.*
28 *Id.*
29 770 F.2d at 298.
30 604 F. Supp. at 901.
31 Zahn v. Board of Public Works, 274 U.S. 325 (1927).
32 272 U.S. 365 (1926). The owner of an unimproved lot unsuccessfully challenged a zoning ordinance on the grounds that it deprived him of liberty and property without due process of law. The Court held that a land use regulation violates the due process clause if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.
33 *Id.* at 389-90.

tain their power to zone through state enabling acts.[34] Consistent with the decision in *Euclid*, courts generally defer to municipalities on zoning decisions.[35]

In *Berman v. Parker*,[36] the United States Supreme Court extended the judicial deference accorded to zoning decisions to eminent domain proceedings. The plaintiffs in *Berman* argued that condemnation proceedings were not undertaken for a public use, thus violating the fifth amendment.[37] The Court, in upholding the condemnation, stated that:

> [T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.[38]

The Supreme Court reiterated its *Berman* holding in *Hawaii Housing Authority v. Midkiff*.[39] Should the legislature determine that a taking will serve a substantial public purpose, courts must defer to this determination.[40] The Court, in *Midkiff*, held that the rational basis test was the appropriate standard for determining the consti-

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34 *See generally* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 3.09 (1968).

35 Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In *Boraas*, the Court upheld a local zoning ordinance which limited occupancy of single-family dwellings. The Court held that economic and social legislation, including zoning laws, will withstand due process or equal protection attacks if the law is reasonable, not arbitrary, and if the law is rationally related to a permissible state objective. *Id.* at 8.

In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court struck down a local zoning ordinance which, by restricting the definition of "family," prevented a grandmother from having her grandson live with her. Zoning laws must bear a rational relationship to a valid governmental interest and must serve that interest effectively. *Id.* at 499-500.

36 348 U.S. 26 (1954). Appellants owned buildings which were condemned to make way for a redevelopment project having both public and private ownership. They challenged the constitutionality of the District of Columbia Redevelopment Act of 1945, D.C. CODE ANN. §§ 5-701 through 5-719 (1951), as applied to the taking of their property. The Court, in upholding the Act, held that the legislative branch may take into account aesthetic considerations, as well as considerations of health and welfare, when enacting redevelopment legislation.

37 The fifth amendment provides, in pertinent part, that "[n]o person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. In Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 226 (1897), the Court, through the fourteenth amendment, extended the just compensation requirement to the states.

38 348 U.S. at 32.

39 104 S. Ct. 2321 (1984). Hawaii's feudal past had resulted in land ownership being concentrated in a few families. To remedy this situation, the state legislature passed a statute which allowed tenants to seek a state condemnation action against the land they were leasing. The action, if approved by a state board, would eventually result in the tenant taking title in fee simple. Private landowners, the lessors, challenged the constitutionality of that statute.

40 *Id.* at 2331.

tutionality of a taking.[41] *Midkiff* gives the states wide latitude in the exercise of the eminent domain power.

B. *First Amendment*

The second strain of constitutional law which *G. & A. Books* involves derives from the first amendment. In contrast to the state's land use and eminent domain authority, courts are less willing to defer to the legislative branch when government action infringes on the fundamental right of free speech.[42] The first amendment prohibits the government from taking any action which unduly infringes on the free exercise of speech.[43] "But, above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[44]

Infringement on free speech falls into two categories depending on the government purpose which underlies the infringing action. Infringement can be either content-based, singling out speech for special treatment, or incidental, impacting speech inadvertently while attempting to achieve a public purpose. Government action which is content-based bears a heavy presumption of unconstitutionality.[45] In *Near v. Minnesota ex rel. Olson*,[46] the

41 The taking must be "rationally related to a conceivable public purpose." *Id.* at 2329. The Court upheld the statute as a rational approach to correcting a market failure.

42 Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 101 n.30 (1972). The Court affirmed a court of appeals decision invalidating a city ordinance prohibiting all picketing near schools, except peaceful labor picketing. The Court held that the ordinance was an impermissible content-based distinction.

43 "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend I. In Gitlow v. New York, 268 U.S. 652, 666 (1925), the Supreme Court applied the first amendment protection of freedom of expression to the states through the fourteenth amendment.

44 408 U.S. at 95.

45 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Authorized by state statue, the Rhode Island Commission to Encourage Morality in Youth had been blackballing objectionable material and then enforcing their decisions by seeking the cooperation of distributors. The Court held that the chilling effect of such informal censorship was an unconstitutional prior restaint because the Commission's decisions were not subject to judicial review.

The presumption of unconstitutionality exists because of the Supreme Court's preference that truth be proven in the marketplace of ideas. Justice Holmes made the classic statement on the marketplace rationale in his dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919):

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id. at 630 (Holmes, J., dissenting) (*cited with approval in* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)).

Supreme Court overturned a state nuisance statute which allowed officials to bring abatement actions against a "malicious, scandalous, and defamatory newspaper, magazine, or other periodical."[47] The Court held that censorship was not the appropriate method to protect citizens from "miscreant purveyors of scandal."[48] Society's interest in an unrestrained press outweighs its concern for shielding individuals from falsehood.[49] Libel actions provide an adequate remedy for injuries caused by publication.[50] Nevertheless, courts generally uphold legislation which restricts expression when the legislature directs the statute toward unprotected speech.[51] The government, however, has the burden of proving that the restraint is justified.[52]

The Supreme Court, however, has allowed reasonable time, place, and manner restrictions on constitutionally protected speech even though the government directed its action at the content of the speech.[53] The state must prove that the restriction furthers a significant government interest,[54] and, generally, the government's justifications are closely scrutinized.[55] In *Erznoznik v. City of Jacksonville*,[56] the Supreme Court invalidated a city ordinance which pro-

46 283 U.S. 697 (1931).

47 *Id.* at 701-02.

48 *Id.* at 720.

49 *Id.*

50 *Id.*

51 The Supreme Court first developed the concept that the Constitution does not protect certain categories of speech in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court upheld a state statute which proscribed the use of "fighting words" in public places, and held that unprotected speech "include[d] the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." *Id.* at 572.

In Roth v. United States, 354 U.S. 476 (1957), the Court specifically placed legally obscene speech in the unprotected category. The *Roth* Court upheld a federal statute which punished the mailing of obscene material. The Court defined legal obscenity in Miller v. California, 413 U.S. 15 (1973). In *Miller*, appellant was convicted of mailing unsolicited, sexually explicit material in violation of a state statute. The Supreme Court vacated the judgment below and remanded for action consistent with the test announced in its opinion. The *Miller* test provides that states may restrict "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 23.

52 New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

53 *Young*, 427 U.S. 50, 63 n.18.

54 *Mosley*, 408 U.S. at 98.

55 The Court recently reiterated this position in Regan v. Taxation With Representation of Washington, 461 U.S. 540, 547 (1983): "Generally, statutory classifications are valid if they bear a rational relationship to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right." A nonprofit organization challenged the Internal Revenue Service's rejection of its application for tax exempt status. The Court, in upholding the rejection, held that granting tax exemptions only to nonprofit organizations which do not engage in significant lobbying activities does not violate the first amendment.

56 422 U.S. 205 (1975).

hibited drive-in movie theaters from exhibiting films containing nudity when the screen was visible from a public street. The Court applied strict scrutiny analysis because the ordinance categorized movies on the basis of content.[57] The Court held that the ordinance was an unreasonable time, place, or manner restriction.[58] The city's primary justification, protecting citizens from unwilling exposure to offensive materials, did not justify the restriction.[59] In effect, the Court found that the least restrictive means to achieve that goal was for offended parties to avert their eyes.[60]

The second and more frequently litigated form of infringement is classified as incidental impact on speech. This incidental impact can occur when the government directs its actions at the noncommunicative elements of a particular activity. The first amendment is violated when the process of achieving these noncommunicative goals has an unduly adverse impact on speech. *United States v. O'Brien*[61] established the test for judging incidental infringement cases.

The *O'Brien* Court held that government action intended to regulate non-speech conduct which results in incidental limitations on first amendment speech must meet four criteria: (1) the government must possess the constitutional power to take the action; (2) the action must further an important or substantial government interest; (3) the government interest must be unrelated to the suppression of free expression; and (4) the incidental restrictions on alleged first amendment freedoms must be no greater than essential to further the government interest.[62] The Court limited[63] the

57 *Id.* at 213. The city did not claim that it was restricting unprotected obscenity.

58 *Id.* at 217-18.

59 *Id.* at 212.

60 *Id.* at 211.

61 391 U.S. 367 (1968). In 1966, petitioner O'Brien burned his draft card on the steps of the South Boston courthouse. He was convicted of knowing destruction of a selective service certificate. He argued that his symbolic conduct was protected by the first amendment. The Court of Appeals for the First Circuit agreed and reduced his conviction to a lesser offense. The Supreme Court vacated the court of appeals decision and reinstated O'Brien's original conviction because the government's interest in assuring the continued availability of selective service certificates justified the incidental infringement on O'Brien's freedom of expression. *See also* note 13 *supra* and accompanying text.

62 391 U.S. at 382.

63 Several authors have questioned the appropriateness of using an *O'Brien* analysis to assess the constitutionality of government action motivated by an intent to regulate protected speech. Professor Tribe argues that the *O'Brien* Court incorrectly labeled the regulation in question as content neutral and erred in applying a less strict test of constitutionality. Professor Tribe asserts that the regulation should have been recognized as a restriction aimed at the expression of certain ideas. Thus, the Court should have tested the regulation under a strict scrutiny analysis. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 597, 685-88 (1978). *See also* Note, *Zoning, Adult Movie Theatres, and the First Amendment: An Approach to* Young v. American Mini Theatres, Inc., 5 HOFSTRA L. REV. 379, 398-400 (1977) (arguing that Justice Powell misapplied *O'Brien*).

O'Brien analysis to government action designed to regulate the non-communicative elements of an activity.[64] In several subsequent cases, the Court has found the *O'Brien* test inappropriate when the government intends to regulate the communicative rather than the non-communicative aspects of the proscribed conduct.[65]

C. *Integration of First Amendment and Land Use Issues*

In *Young v. American Mini Theatres, Inc.*[66] the Court faced a direct confrontation between zoning power and freedom of speech. In holding that a zoning ordinance did not violate the fourteenth amendment's guarantee of equal protection, Justice Stevens, writing for the plurality, stated that sexually explicit speech was not as important as more socially valuable forms of first amendment speech.[67] Sexually explicit speech was thus entitled to less protec-

64 The Court distinguished the facts in *O'Brien* from prior cases and stated that "the case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct itself is thought to be harmful." 391 U.S. at 382. *See also* United States v. Albertini, 105 S. Ct. 2897 (1985) (preventing reentry onto a military base to participate in antinuclear protest after receiving a bar letter from the commanding officer does not violate the first amendment); Wayte v. United States, 105 S. Ct. 1524 (1985) (selective prosecution arising from public declaration of intent not to register for the draft does not violate the first amendment); City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984) (removal of political placards from public property does not violate the first amendment); Spence v. Washington, 418 U.S. 405 (1974) (state regulation punishing desecration of the flag violates the first amendment); Procunier v. Martinez, 416 U.S. 396 (1974) (security related censorship of prisoner mail in federal prisons absent procedural safeguards violates the first amendment).

65 In Buckley v. Valeo, 424 U.S. 1 (1976), the Court invalidated government limits on political contributions and expenditures, holding that such limits violated the first amendment protection of speech. The Court distinguished *O'Brien* by stating that the "governmental interests advanced in support of the Act involve 'suppressing communication.' " *Id.* at 17.

In Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980), Justice Powell declined to apply *O'Brien*. The utility company questioned the constitutionality of a commission regulation that prohibited the utility company from inserting public policy leaflets into their monthly billings. Justice Powell concluded that the intent of the regulation was to protect the customer from hearing the message. Because the regulation was directly related to the suppression of speech, it was outside the *O'Brien* rationale. *Id.* at 542.

66 427 U.S. 50 (1976). The operator of an adult movie theater challenged a Detroit ordinance prohibiting adult businesses from locating within 1000 feet of each other, or within 500 feet of a residential area. The Court upheld the ordinance as a reasonable time, place, or manner restriction because the ordinance furthered a significant government interest—the city's interest in planning and regulating commercial property. *See* Note, *Zoning, Adult Movie Theatres, and the First Amendment*, *supra* note 63; Note, Young v. American Mini Theatres, Inc.: *A Limit on First Amendment Protection*, 12 NEW ENG. L. REV. 391 (1976).

67 Justice Stevens stated that:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that the society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . . Whether political oratory or philosophical discussion moves us to applaud or de-

tion under the fourteenth amendment.[68] Justice Stevens concluded that sexually explicit speech could be subjected to content-based time, place, and manner restrictions[69] as long as the restrictions did not result in a total ban on sexually explicit materials.[70]

Justice Powell concurred in the plurality's result, but not in their argument regarding lesser protection for sexually explicit speech.[71] Instead, Justice Powell combined an *O'Brien* analysis with consideration of the government's motivation[72] and the incidental impact of the regulation[73] before concluding that the ordinance was constitutional.[74]

III. Ramifications of Applying *O'Brien* to Mixed Motive Cases

The court in *G. & A. Books* followed Justice Powell's application in *American Mini Theatres* of the *O'Brien* analysis[75] to land use restrictions impinging on protected speech.[76] The court did not, how-

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spise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

427 U.S. at 70.

Justice Stevens also held that the ordinance was not an attempt to regulate speech expressing a certain point of view. All sexually explicit speech, regardless of personal preference, was equally affected and, therefore, the ordinance was effectively neutral with respect to point of view. *Id.* at 67-68.

68 *Id.* at 70-73.

69 *Id.*

70 The Court confirmed its holding that government action could not result in a total ban on protected speech in Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). The Court declared a town ordinance which totally prohibited live dancing unconstitutional. The Court held that reasonable time, place, and manner restrictions on protected speech are only valid if alternative access to the expression remains available. *Id.* at 75-78.

Most lower courts have interpreted *American Mini Theatres* as prohibiting state action that results in a total ban on protected speech. *See* Alexander v. Minneapolis, 531 F. Supp. 1162 (D. Minn. 1982) (zoning restrictions on closeness of adult uses to specified other uses would have resulted in elimination of 30 of 36 adult uses); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981) (Atlanta zoning restriction on location of adult uses was unconstitutionally vague as it resulted in a two-thirds reduction in number of adult uses).

71 "I do not think we need reach, nor am I inclined to agree with, the holding . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." 427 U.S. at 73 n.1 (Powell, J., concurring).

72 Justice Powell considered the city's motivation for passing the regulation and commented that "Detroit has not embarked on an effort to suppress free expression." *Id.* at 80.

73 Justice Powell described the ordinance as "an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." *Id.* at 73.

74 Justice Powell concluded that "[a]t most the impact of the ordinance on these interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them." *Id.* at 78.

75 *See* notes 71-74 *supra* and accompanying text.

76 The court described Justice Powell's concurring opinion in *American Mini Theatres* as "decisive and influential." 604 F. Supp. at 98. In this way, the court realized the significant precedential value of a lone concurrence in a 4-1-4 decision.

ever, adopt Justice Powell's consideration of the additional factors of improper motivation[77] and the incidental nature of the restriction.[78] Because the court in *G. & A. Books* found that the condemnation of businesses engaged in disseminating protected speech involved a hostile government motive,[79] *G. & A. Books* can be distinguished from Supreme Court cases which have applied *O'Brien*. The majority of cases applied *O'Brien* to situations where the government directed its activity solely at conduct separate from protected speech;[80] in *G. & A. Books*, the government at least partially directed its activity at eliminating protected speech. Given the magnitude of the government interest in the Project, *G. & A. Books* is correctly decided. The court's refusal to address the government's mixed motivation,[81] however, sets precedent which results in inadaquately protecting first amendment rights in future condemnation cases.

G. & A. Books thus illustrates the most frequent criticism of the *O'Brien* test: its blanket refusal to consider legislative or administrative motivation often leads to questionable results.[82] John Hart Ely[83] notes that, although Chief Justice Warren had good reasons in *O'Brien* for refusing to invalidate laws passed because of an illegitimate government motivation,[84] the difficulties present in *O'Brien*

77 *See* notes 8, 23-24, and 72 *supra* and accompanying text.

78 The court discussed the continued availability of similar uses in the Times Square vicinity but did not address the difference in impact of a regulation which restricted location (*American Mini Theatres*) and a permanent condemnation order with no guaranteed right of relocation (*G. & A. Books*).

79 *See* notes 8-10 *supra* and accompanying text.

80 *See* notes 64-65 *supra* and accompanying text.

81 Throughout this comment the authors define mixed motivation as a combination of both constitutionally legitimate and illegitimate purposes.

82 *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative And Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

83 John Hart Ely is the Dean and Richard E. Lang Professor of Law at Stanford University Law School.

84 In *O'Brien*, Chief Justice Warren, writing for the majority, stated that:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void a statute essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

391 U.S. at 383-84. *See* Ely, *supra* note 82, at 1212.

are not necessarily present in every case.[85]

Paul Brest[86] also argues that courts should invalidate illicitly motivated laws.[87] He states that:

> [(1) the government is] prohibited from pursuing certain objectives; [(2) that an] illicit objective may determine the outcome of the decision; [(3) that a person has a] legitimate complaint if [a law] would not have been adopted but for the decisionmaker's consideration of illicit objectives; [and (4) that] the court should presume that [a decisionmaker's] consideration of [an illicit] objective determined the outcome of [his] decision and should invalidate the decision in the absence of clear proof to the contrary.[88]

Courts considering the issue of motivation have articulated similar concerns. Justice White, dissenting in *Palmer v. Thompson*[89] disagreed with the majority's conclusion that a law cannot be invalidated because the legislature passed it pursuant to an illicit motive.[90] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[91] the majority stressed that an illicit legislative

85 Ely, *supra* note 82, at 1278.

86 Paul Brest is the Kenneth & Harle Montgomery Professor of Clinical Legal Education at Stanford University Law School.

87 *See* Brest, *supra* note 82. Brest illustrates his argument for allowing courts to consider whether a law was passed because of an illicit motive with the Supreme Court's decision in Palmer v. Thompson, 403 U.S. 217 (1970). Brest asserts that "[a]lmost everyone in Jackson, Mississippi, knew that the city closed its public swimming pools solely to avoid integration." Brest, *supra* note 82, at 95. The Supreme Court nevertheless refused to declare the law unconstitutional, stating "this Court has [never] held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. at 224. Although *Palmer* is an equal protection case that did not involve a free speech issue, it is relevant here because it demonstrates how a court's refusal to consider motivation can lead to unfair results in any context.

88 Brest, *supra* note 82, at 116-17.

89 403 U.S. 217 (1970).

90 Justice White stated:

> I am quite unpersuaded by the majority's assertion that it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive. Congress has long provided civil and criminal remedies for a variety of official and private misconduct. In various situations these statutes and our interpretation of them provide that such conduct falls within the federal proscription only upon proof of forbidden racial motive or animus.

Id. at 241 (White, J., dissenting). Justice White further noted that:

> The circumstances surrounding this action and the absence of other credible reasons for the closing leave little doubt that shutting down the pools was nothing more or less than a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city.

Id. (White, J., dissenting).

91 429 U.S. 252 (1977). In *Arlington Heights*, developers sued local authorities after the local authorities refused to rezone a tract of land to accommodate multi-family dwellings. The plaintiffs charged that the rezoning denial was racially discriminatory. The district court denied the plaintiffs' demand for injunctive and declaratory relief, holding that the

purpose, even though not the primary motivation behind the law, may still be relevant in determining its constitutionality.[92]

G. & A. Books raises similar concerns. At least some of the city's goals for the Project were illegitimate. The court, however, summarily stated that the defendants had shown that the government interest was not related to the suppression of free speech, the third prong of the *O'Brien* test.[93] *O'Brien*, as applied in this case, did not allow the court to probe into the city's motives. The third prong of the *O'Brien* test is meaningless unless it imposes a duty upon the city to demonstrate not only that it had justifiable reasons for the Project, but that it was not motivated by a desire to suppress free speech.

The United States Court of Appeals for the Ninth Circuit has followed this approach. In *Tovar v. Billmeyer*,[94] the court, applying *O'Brien*, held that an issue of fact existed as to whether or not the city's actions were motivated by the desire to suppress first amendment rights.[95] Moreover, *Playtime Theatres, Inc. v. City of Renton*,[96] held that even though the city's predominate concerns were legiti-

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rezoning denial was motivated by a desire to protect property values, not by the prejudice of local authorities. The court of appeals reversed, finding that the "ultimate effect" of the rezoning was racially discriminatory. The Supreme Court, Justice Powell writing for the majority, reversed and remanded the case. The majority opinion held that the plaintiffs failed to prove that a racially discriminatory intent or purpose was *a motivating factor* in the defendants' decision. Again, this is an equal protection, not a free speech case. *See* note 87 *supra*.

92 429 U.S. at 563-65.

93 The court, in establishing the substantial state interest required by the second prong, listed the Project's goals: eliminating physical and social blight, preserving historic landmarks, bringing new people into the neighborhood, and increasing the area's tax base. The court then stated: "[T]hese goals, in and of themselves, [were] substantial, important, and unrelated to the suppression of free speech, thus satisfying the third strand of the *O'Brien* analysis." 604 F. Supp. at 910. The court essentially merged the second and third prongs of the *O'Brien* test.

94 721 F.2d 1260 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1985). In *Tovar*, the plaintiff brought an action challenging zoning decisions that prevented the operation of an adult bookstore. The district court granted summary judgment in favor of the city, and the plaintiff appealed. The court of appeals reversed, stating:

> The district court must . . . determine at trial whether *a motivating factor* in the zoning decision was to restrict plaintiffs' exercise of first amendment rights. If *a motivating reason* for the Council's actions was to prevent the theater from operating, then the zoning decision would violate the first amendment. Purposeful attempts to suppress protected expression are unconstitutional.

721 F.2d at 1266 (citing Ebel v. City of Corona, 698 F.2d 390, 393 (9th Cir. 1983) (emphasis added)).

95 721 F.2d at 1260.

96 748 F.2d 527 (9th Cir. 1984), *prob. juris. noted*, 105 S. Ct. 2015 (1985). In *Renton*, the purchaser of existing theaters sought a declaration that the city's zoning ordinance which regulated adult movie theatres unconstitutionally infringed on free speech. After a complicated procedural history, the Ninth Circuit held that because the city had failed to prove the zoning laws were unrelated to the suppression of free speech, the *O'Brien* test was not satisfied.

mate, the *O'Brien* test was not satisfied.[97] The court required the city to demonstrate that it was not motivated in any way by a desire to suppress protected speech.[98]

If *G. & A. Books* correctly applied the *O'Brien* test, then the concerns voiced by Ely, Brest, and Justice White are valid.[99] The test announced by the Supreme Court in *Mt. Healthy School District v. Doyle*[100] better protects first amendment interests in the land use context. The *Mt. Healthy* test places the initial burden on the plaintiff to establish that suppression of his constitutionally protected speech was *a motivating factor*[101] in the government's decision to act.

After the plaintiff establishes an impermissible motive, the *Mt. Healthy* doctrine then shifts the burden to the government to prove that it would have reached the same decision absent the illegitimate motive.[102] Thus, *Mt. Healthy* protects first amendment rights better than *O'Brien*. Although both *Mt. Healthy* and *O'Brien* involved the possibility of mixed government motives,[103] only *Mt. Healthy* sought to scrutinize those motives.

Because the government interests were so substantial and the facts so persuasive, had the Second Circuit applied *Mt. Healthy* in *G. & A. Books* the result would likely remain the same. Arguably, *O'Brien*, as applied in this case, allows the government to purposely infringe on a citizen's constitutional rights through condemnation proceedings. By spending exhorbitant amounts of money to expand a project's scope, the government can cover its tracks by showing that the resulting redevelopment project will greatly benefit the public. The government can then argue that regardless of its true motives, compared to the benefits of the project, the infringe-

97 748 F.2d at 538.

98 The Ninth Circuit stated:

> The district court upheld the ordinance on the ground that Renton's predominate concerns were legitimate. But that is not the test in this Circuit. Where mixed motives are apparent, as they are here, *Tovar* requires that the court determine whether a "motivating factor" in the zoning decision was to restrict plaintiffs' exercise of first amendment rights.

Id. at 537 (quoting *Tovar*, 721 F.2d at 1266).

99 *See* notes 82-90 *supra* and accompanying text.

100 429 U.S. 274 (1977). The plaintiff, a school teacher, sued the school board after the board did not renew his teaching contract. The plaintiff alleged that the school board refused to rehire him in retaliation for the exercise of his first amendment rights. Prior to the board's decision the plaintiff, among other things, had a fight with another teacher prompting a teacher walk-out, created a disturbance in the cafeteria over the amount of spaghetti served to him, made obscene gestures to female students, and complained to a local radio station about the school's dress code for teachers.

101 *Id.* at 287 (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 (1977)).

102 429 U.S. at 287.

103 Professor Ely notes that Congress passed the draft card burning law tested in *O'Brien* immediately after the "first publicized draft card burnings." Ely, *supra* note 82, at 1339. He concludes that it is impossible to prove illegitimate purpose with this timing factor. *Id.*

ment on constitutional rights was incidental. The *O'Brien* test therefore creates the possibility of reaching illegitimate ends through legitimate means.[104] When the free speech infringed upon is unpopular, and the government's pretextual benefits from redevelopment are substantial, the government will always win under an *O'Brien* analysis as applied in *G. & A. Books*.

On the other hand, the *Mt. Healthy* test concentrates on what motivated the government to undertake a particular action. This test requires the court, in the case of mixed motives,[105] to determine whether the government's illegitimate motives were so substantial that, in their absence, it would not have chosen to engage in a particular project or enact a particular law.[106] By concentrating on motivation rather than impact, *Mt. Healthy* effectively prohibits the government from using its monetary resources to mask an illegitimate purpose.[107]

Finally, *Mt. Healthy* does not require courts to scrutinize "unascertainable" government motives.[108] Once plaintiffs prove illegitimate motives, as *Mt. Healthy* requires, the government's motives are ascertained. Then, the only remaining issue is the extent of influence that these motives had upon the government. It is not unreasonable to require the government to prove that it would have reached the same decision based on legitimate motives alone after a citizen proves that illegitimate motives were indeed present.

Applying the *Mt. Healthy* test instead of the *O'Brien* test to a situation like *G. & A. Books* would have significant procedural ramifications. After the plaintiff established that impermissible motives were involved in the government's decision, an issue of fact would exist as to whether or not those motives were so substantial that the government would not have reached the same decision in their absence. The existence of this issue of fact would preclude summary judgment.[109] Thus, the *Mt. Healthy* test may encourage plaintiffs to challenge the government's exercise of eminent domain.[110] Because a court is not likely to grant the government summary judg-

104 *See* note 18 *supra*.

105 *See* note 81 *supra*.

106 *See* notes 101-02 *supra* and accompanying text.

107 Even under *Mt. Healthy*, the government could still attempt to use its resources to disguise the amount of influence that illicit motives actually exerted on the decision in question. But public environmental impact statement hearings make this much more difficult. The *Mt. Healthy* test, therefore, still provides greater protection than the *O'Brien* test.

108 This was one of the main reasons why the Supreme Court refused to consider motivation in *O'Brien*. *See* note 84 *supra*.

109 FED. R. CIV. P. 56(c) states that courts should grant summary judgment when no genuine issue of material fact exists and when the moving party is entitled to judgment as a matter of law.

110 *See* note 18 *supra* and accompanying text.

ment,[111] the plaintiffs would almost certainly have the opportunity to litigate the issue. On the other hand, *Mt. Healthy* would not subject defendants to the costs of groundless suits because *Mt. Healthy* requires plaintiffs to raise an issue of illegitimate motivation to get to trial.[112]

IV. Conclusion

The court in *G. & A. Books* noted that the government was hostile towards the plaintiffs' protected speech. Nevertheless, the court applied the *O'Brien* test, summarily dismissing the defendants' desire to silence plaintiffs' protected speech. Courts, however, most often apply the *O'Brien* test when the government seeks to regulate the noncommunicative aspects of a plaintiff's activity and, by doing so, only incidentally affects his protected speech. It is not, then, a proper test for *G. & A. Books* where mixed motives, both legitimate and illegitimate, were involved in the government's decision.

When a plaintiff establishes that mixed motives entered in the government's decision, it is necessary to go beyond *O'Brien*. The *Mt. Healthy* test, which requires the government to prove that it would have reached the same conclusion absent the illicit motives, would provide a more appropriate balance than the *O'Brien* test. It would protect the citizen from deliberate infringement on his protected speech, and it would also protect the government from having to fully litigate groundless claims.

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Addendum

On February 25, 1986, the United States Supreme Court decided City of Renton v. Playtime Theatres, Inc., *106 S. Ct. 925 (1986).* See *notes 96-98* supra *and accompanying text. In* Renton, *the Court upheld the constitutionality of a city ordinance that prohibits adult movie theatres from locating within 1,000 feet of certain property uses. Since the Court found that the ordinance was* predominately *aimed at the secondary effects of adult uses, and not at the content of adult films themselves, the Court (6-1-2) held that the ordinance was designed to serve the substantial government interest in preserving the quality of urban life, while allowing for alternative avenues of communication. Thus, the Court found the ordinance constitutional under the first amendment. Justice Rehnquist, the author of the majority opinion, re-*

111 This would only happen when the plaintiffs failed to make out an issue of illegitimate motivation in their complaint.

112 *See* notes 100-03 *supra* and accompanying text.

jected the Ninth Circuit's view that if a motivating factor *in enacting the ordinance was to restrict the exercise of first amendment rights, the ordinance is invalid, no matter how small a part this motivating factor may have played in the legislative decision to enact the ordinance. The Court, however, did not address the relevance of the* Mt. Healthy *case.*

In dissent, Justice Brennan, who was joined by Justice Marshall, stated that the legislative history strongly suggested that the ordinance was designed to suppress expression, and thus was not content neutral. Since the city did not show that the ordinance was a precisely drawn means of serving a compelling government interest, Justice Brennan argued that the ordinance unconstitutionally infringed upon first amendment rights.

The arguments presented in this case comment for probing into a city's motives, and for applying the Mt. Healthy *analysis to protect first amendment interests in the land use context, apply equally against the Supreme Court's decision in* Renton. *Such arguments should be considered by courts when facing a question similar to that presented in* G. & A. Books.