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I am deeply honored to have been asked to be this year's Telford Lecturer.[1] The series bears a most distinguished name. While I regret not having met Mr. Telford, I appreciate how well his generosity has brought a number of eminent visitors to Washington and Lee. I am delighted to join so distinguished a roster.

Let me begin with a simple question. In the interests of free expression and anonymity, I shall not ask for a show of hands. But I hope you will give careful thought to this query: "Does the first amendment fully protect the right to speak and publish the truth?" You may well be tempted to answer in the affirmative—recalling, for example, that truth is an almost universal defense to libel claims and charges of perjury. Yet if you answered "no," or "not always," you were correct—probably to an even greater degree than you might have supposed. In fact, speaking or writing the truth may clash with governmental or private protection of at least four separate interests of which I shall speak this evening—intellectual and literary property; privacy and publicity; judicial administration; and national security.

I. INTELLECTUAL AND LITERARY PROPERTY

Questions concerning the scope of first amendment protection of speech have been much in the news of late. A recent and much noted case offers a logical staring point. About a month ago the United States Supreme

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1. The Robert Lee Telford Lecture Series was established at Washington and Lee in 1986. In connection with the series, accomplished and nationally recognized scholars from around the country are invited to visit the Washington and Lee campus. Visiting professors spend several days on campus and lecture on topics of broad interest to the student and faculty community. The *Law Review* is pleased to have the opportunity to publish Professor O'Neil's Telford Series Address.

Court refused to review a copyright decision which writers and publishers fear has profound first amendment implications.[2] The dispute revolves about a recently published, rather critical biography of Church of Scientology founder L. Ron Hubbard. The book includes quotations from unpublished diaries, letters and other documents—among them a letter to the FBI in which Hubbard denounces his wife as a spy, a proposal to convert Scientology into a religion to gain tax benefits, and a letter to his daughter in which Hubbard falsely denies being her father.

The lower federal courts ruled that such unpublished materials may not, under the copyright laws, be used without permission.[3] While copyright laws permit what is called "fair use"—brief quotations from published works in reviews, for example—that privilege does not extend to unpublished material. The effect of such a restrictive judgment may reach well beyond the literary world; the *Washington Post* observed editorially the next day, "the Hubbard biography primarily involves questions of facts, many of which can be best settled by quotation from Mr. Hubbard's own writings. Here a broad application of copyright protection trespasses on the public's right to know."[4]

The issue is clearly not one of first impression. Five years ago the Supreme Court held that *The Nation* could not use purloined excerpts from former President Gerald Ford's memoirs, about to be published in book form.[5] Two years later a federal judge required the publisher of a biography of J. D. Salinger to delete unauthorized portions of the novelist's letters.[6] Both courts recognized the degree to which a copyright claim may inhibit or constrain the right to print or to speak the truth.

Paradoxical though it seems, this may be just what the framers of the Constitution intended. The clause which protects intellectual property does, after all, appear in the text of the Constitution, while protection for free expression appears only in the amendments. There is no evidence that the framers meant to nullify the new copyright clause by adopting a Bill of Rights. Legal protection for the writings of an author—whether published or not—gains meaning and effect only through occasional restraint upon another's free use of those writings. Yet, as Professor Melville Nimmer (expert on both subjects) once remarked, the constitutional tension between protection and publication creates "a largely ignored paradox."[7]

The paradox has brought an uneasy truce, as the recent cases reveal—especially when they involve highly visible persons like Ford, Hubbard and Salinger. The competing interests are of a very high order. The ability to recount freely the life of a celebrity seems the essence of a free press. If

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2. 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

3. New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493 (1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989).

4. Wash. Post, Feb. 22, 1990, at A22, col. 1.

5. 471 U.S. 539 (1985).

6. 811 F.2d 90 (2d. Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).

7. M. NIMMER, NIMMER ON FREEDOM OF SPEECH 2-56 (1984).

the account is completely truthful, the interest gains an even higher stature. Yet the national interest in promoting and rewarding creativity reserves to the creator the control of unpublished material. Preservation of privacy for the creator reinforces that interest. Thus any attempt to balance or accommodate in this area must start by recognizing the exceptionally high stakes on both sides.

While one might question the force of the media claim in the case of a former president or a religious leader, such doubts cannot cloud the case of a genuine author like Salinger. There is no indication that the framers meant to limit copyright protection to works of great literary merit. Indeed, even material so offensive that it can be banned as obscene is typically entitled to copyright—illustrating graphically the contrast both in purpose and in scope between the two constitutional clauses we seek to balance.

Intellectual property and free expression can be accommodated in other ways. Copyright law does not protect ideas, but rather the particular expression of ideas. Compilations of facts, for example, attain copyright with great difficulty and only with the addition of some original creative component. Thus critics of the recent Hubbard decision are not quite fair in claiming that courts have cut off access to the facts. Equally important, writings that have passed into the public domain may never reclaim protection—even if public distribution happens inadvertently, as it did several years ago with a collection of Martin Luther King speeches carelessly distributed without the required copyright notice.

Moreover, the duration of copyright for published works is limited by statute—though unpublished materials are protected through 2002 under federal law.[8] Finally, a defense of "fair use" will defeat certain claims when information of great public interest is in issue. In what may be the most celebrated such case, a federal judge allowed unauthorized copying and use of the famous home movie which turned out to contain the only view of President John Kennedy being shot during the fateful Dallas motorcade.[9] The judgment relied in part on the statutory defense of fair use, but cited strong first amendment overtones. It should now be apparent that the qualification of copyright is substantial when the opposing interest is that of newsworthiness.[10]

Yet the tension remains. Literary or intellectual property marks a major exception to the assertion that one may freely speak or print the truth. While the Hubbard decision technically governs but one federal circuit, publishers and authors elsewhere have already altered their permission practices—producing what first amendment

8. 17 U.S.C. § 303 (1977).

9. 293 F. Supp. 130 (S.D.N.Y. 1968).

10. For additional reading on the doctrine of fair use, see generally W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985); Leval, *Commentary: Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990); Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137 (1990).

lawyer Floyd Abrams calls "the most extreme form of self-censorship."[11] Taylor Branch, last year's Pulitzer Prize historian, fears that such a ruling "would be a severe blow to history."[12]

One might expect Congress to come to the aid of the literary and information community—for example, by broadening the scope of fair use, or otherwise marking a clearer path of access to such information. Such a step could reconcile the contending forces in a way that seems more congenial to first amendment freedoms, and would at least approach full protection for publishing the truth. Yet I think it unlikely that either Congress or the Supreme Court will intercede to give much solace to writers, scholars or publishers. The current (albeit uncomfortable) balance has evolved over decades, and could not easily be disturbed. Thus the paradox remains—and perhaps it is exactly what Mr. Jefferson and his fellow framers meant us to endure.

II. Privacy and Publicity

Copyright is not the only source of confusion in our quest for the truth about truth. Let us move from the New York publishing world to a county fair in Northeast Ohio. The star of the midway is one Hugo Zacchini, who performs several times each day as "the Human Cannonball." His claim of notoriety—and his sole livelihood—is a fifteen-second routine in which he is literally ejected from a cannon. Large signs warn that photographing or filming the routine is forbidden. One afternoon, however, a camera crew from a Cleveland television station defies the ban. Zacchini's act is featured that evening on the 6:00 news across northeast Ohio. He promptly sues the station for an unlawful appropriation of his professional property.

The Ohio courts recognized that such a claim might exist, but ruled that broadcasters enjoyed a constitutional privilege to report accurately on matters of public interest.[13] A sharply divided United States Supreme Court reversed, and found in Zacchini's favor.[14] The Justices began by reaffirming the right of the media to report matters of public interest, even when their accounts might invade personal privacy or place the subject in a false light.[15] The case of the Cleveland television station might have seemed an unusually strong one; there was no hint of disparagement, and the filmed routine had occurred before thousands of spectators rather than in the privacy of the home.

Common law had, however, long recognized a limited "right of publicity" which protected the commercial value of performances by entertainers and athletes. Such protection might occasionally limit access of the media,

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11. Wash. Post, Feb. 21, 1990, at A1, col. 1 (final ed.).
12. *Id.*
13. 47 Ohio St.2d 224, 351 N.E.2d 454 (1976), *rev'd*, 433 U.S. 562 (1977).
14. 433 U.S. 562 (1977).
15. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 573.

though the high Court had never before addressed the latent conflict of values.

For a bare majority of the Justices, Zacchini's interest in protecting the value of his performance outweighed the claim of the media to film and broadcast it.[16] Entertainment might, of course, constitute news, but a performer's interest in protecting the value of his performance also deserved a measure of protection which could at times conflict with the first amendment. But to film and broadcast a performer's entire act without his permission was another matter; it seemed to the majority so clear a threat to his livelihood that damages might be given without abridging the rights of the media.

The four dissenters were deeply troubled by the implication that a "station's ordinary news report may give rise to substantial liability."[17] Using the footage for competing or commercial reasons would be one thing, but using it simply as news was quite another—especially when the subject himself eagerly sought publicity in one form but then tried to control or prevent it in other forms.[18] As the depth of division within the Court suggests, Zacchini was a case not only unique but exceedingly difficult because of the inescapable tension between free expression and personal rights.

Let me posit several variations on Zacchini, a case I have long delighted in teaching. Suppose the day of the filming is damp, and the gunpowder fails to ignite. What is filmed—and broadcast that evening as though it were vintage Zacchini—shows a limp figure drooping from the mouth of the canon rather than a human trajectory being hurled the normal distance from the shooting site. While the film would indeed be an accurate record of what occurred on the midway that afternoon, I suspect most courts would find its broadcast actionable disparagement if it implied this was a normal Zacchini performance. Truthful it might be in recording a single event—but truthful it would not be in its larger implication about the performer's talent and skill.

Let me offer an even more difficult variation. A slow motion camera reveals that much of the impact of the performance on the live audience at the fair is an illusion. When viewed at slow speed, the ejection from the canon is far less dazzling—and also less dangerous—than it appears without benefit of such a camera. To play the tape in slow motion on the evening news would be truthful in one sense—but potentially actionable, I believe, because of the way in which technology undermines the value of a routine which dazzles the naked eye. This variation is admittedly more difficult than the first, but is comparable to the degree it places the performer in a false light.

My next variation is a bit different: The manager of the county fair sees commercial potential in the Zacchini routine, and uses excerpts (without

16. *Zacchini* at 578.
17. *Id.* at 580.
18. *Id.* at 581.

the performer's permission) for promotional purposes. When Zacchini seeks damages, most courts would view this as a case of misappropriation or invasion of another's right of publicity. In a commercial context—whether or not between competitors—such an unauthorized use of a performance would almost universally yield redress, and without abridging freedoms of expression.

The last variation is the most intriguing. An industrious camera crew discovers that a Cleveland banker, having seen Zacchini's act, has been secretly practicing human cannonballing on weekends in his own backyard. Even his Lakewood neighbors are unaware of the source of occasional muffled booms that echo about the block. With a ladder and a long lens, the television crew records from the adjacent sidewalk several minutes of practice cannon ejections by the banker. He is mortified when the tape is played, without his knowledge or permission, on the evening news. Here again we have a case of truth—an accurate account of an event of potential interest to viewers—though not involving a celebrity, and certainly not a professional performer who, like Zacchini himself, could be said to have sought publicity on his own terms.

This third variation involves the issue of what I would call pure privacy. There are a number of such cases, though most involve some claim either of disparagement or of misappropriation. Relatively rare is the case in which a person like our Cleveland banker simply wishes to conceal a truthful facet of his or her private life from public exposure. A few courts have allowed recovery for unconscionable invasions of an "inner core of intimacy"—as in the successful suit of a California woman who took an assault complaint to a police station, where officers insisted she undress, photographed her naked and circulated the resulting photos.[19] The woman's federal civil rights act claim prevailed as a most unusual recognition of a privacy interest of high order, set against a minimal public interest in dissemination.

The classic case of the person wishing to be left alone is that of a recluse who struggled to escape his early life as a putative genius, and had for years managed to do so. Then came a New Yorker profile, which resurrected the total (in many ways tragic) life story. The report was apparently in all respects brutally accurate; indeed, its painful impact on the unwilling subject was heightened by its very veracity. He brought suit against the magazine, citing a New York law which protects privacy more broadly than do those of most other states.[20]

The federal appellate court ultimately denied relief, ostensibly applying the terms of the statute, but fully aware of latent first amendment concerns.[21] Courts later struggled with a similar issue in the case involving a Vietnam veteran who won fame and honor for protecting President Ford from an

19. York v. Story, 324 F.2d 450 (1963), *cert. denied*, 376 U.S. 939 (1964).

20. 113 F.2d 806 (2d Cir. 1940).

21. Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940).

assailant's bullet, but to whose great embarrassment was later reported to be homosexual.[22]

In the later cases, recovery has so consistently been denied—on statutory much more than constitutional grounds—that (as Professor Dorsey Ellis remarked several years ago) the "very existence [of the cause of action] is in doubt, at least outside the law reviews."[23] Yet there have been a very few exceptions, and the need for guidelines remains. Where the subject is or has been a public figure—as is arguably the case with both the reclusive genius and the brave but gay veteran—the media interest in probing a private life is surely greater than in the case of a complete unknown.

Indeed, even where such disclosures are false, the constitutional privilege of fair comment compels a plaintiff to show either actual malice or reckless disregard of the truth before damages can be awarded. Where there is no claim of falsehood or distortion, but simply intrusion, the immunity of meddlesome media should be even clearer.

Thus, Professor Thomas I. Emerson in his classic first amendment treatise concedes an "inner core of intimacy"—unconsented photos of a woman in childbirth, for example, but then argues: "Beyond this point . . . disclosure of embarrassing facts or fictionalization would not be embraced by the legal system of privacy."[24] Few cases seem at variance with that judgment. The time may well have come for unqualified judicial recognition of a constitutional defense of truth, whatever statutes may purport to say to the contrary.

III. Administration of Justice

Privacy interests may receive protection in a quite different setting. Many states forbid publication of such sensitive information as the identity of a rape victim or a juvenile offender—not only to shield the individual, but also to enhance the administration of justice. Where those two interests converge, the inherent tension with free expression is even greater.

The courts have had several recent occasions to address that tension. The United States Supreme Court has considered the issue four times in the past decade and a half.[25] The three earlier cases—two dealing with juvenile offenders and one with a rape victim—so consistently exonerated the media that last year an accused newspaper could argue the Court had

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22. Sipple v. Chronical Publishing Co., 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984).

23. .Ellis, *Damages and the Privacy Tort: Sketching a "Legal Profile"*, 64 Iowa L. Rev. 1111, 1133 (1979).

24. Emerson, The System of Freedom of Expression 557 (1970).

25. *See* The Florida Star v. B.J.F., 109 S. Ct. 2603 (1989) (upholding right of newspaper to publish name of rape victim); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (protecting right of newspaper to publish identity of youth charged as juvenile offender); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (upholding right of media to publish name and photograph of youth involved in a juvenile proceeding). Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (protecting right of newspaper to publish identity of rape victim).

created "a broader first amendment principle that the press may never be punished, civilly or criminally, for publishing the truth."[26]

In deciding this latest case in the newspaper's favor last summer, the Justices stopped just short of declaring so sweeping a precept. The competing forces, they explained, must be weighed in each case. Where the media had lawfully obtained truthful information of manifest public interest, only a governmental interest of the highest order would justify penalties or damages for publishing that information.[27] No such interest existed here, despite the strong goals of shielding the hapless victim and furthering the interests of justice through confidentiality.[28]

The limits of the current standard remain unclear, despite the volume of litigation. While the Court has not upheld sanctions even in the most appealing of circumstances, neither have the Justices been willing to adopt a *per se* standard protecting publication of truth under any and all conditions. It is no longer easy to conjure the case that will create the exception, at least so long as the information in question is accurate, has not been illegally obtained, and has public interest. Absent any of those ingredients, the outcome might well be different—but that possibility does not tell us much of what we need to know. We must continue to wonder why the Court stops just short of a broader and more satisfying principle.

IV. National Security

The most difficult context of all for truth is understandably that of national security. Let me illustrate with a statute that is in fact premised on the notion that certain truths can be extremely dangerous. In 1982 Congress made it a federal crime to reveal the identity or location of United States undercover agents in foreign lands.[29] Such information may have not only prurient appeal, but also may reflect substantial and legitimate public interest—to determine how many such agents the United States has in any given foreign capital, or what kinds of people we deploy there. Yet even most first amendment absolutists would accept the need to deter disclosures that would immediately imperil the lives of our agents abroad. They would also recognize the narrow focus of such a law, and the slight risk of confusion or uncertainty to a conscientious editor or publisher.

This statute is not alone among federal prohibitions on publishing truth that could harm national security. There are laws that proscribe publishing certain photographs of drawings of military installations. Other statutes forbid knowing and wilful publication of classified information concerning cryptographic systems or data obtained from intelligence activities. While such laws have seldom been tested, and never directly before the Supreme Court, the case for their validity is quite different from the case that could

26. The Florida Star v. B.J.F., 109 S. Ct. 2603, 2608 (1989).
27. *Id.* at 2611.
28. *Id.*
29. 50 U.S.C. § 421 (Supp. 1990).

be made for suppressing truth in other settings. The issue that remains for us is the basis of that difference, and its constitutional status. It is just that question with which I propose to conclude these comments.

From its earliest tests, free expression has been qualified by a finding of "clear and present danger." While the focus has always been upon the degree of harm that may be posed to the national security—or some other cognizable interest such as public order—truth has played at least some role in the equation from the start. We often forget that when Justice Holmes offered his maxim about shouting in a crowded theater, his malefactor was one who falsely cried fire and thereby created a panic. Truth offered for him an absolute defense, at least in this setting. If the place really is on fire, the one who warns others is hero rather than villain, panic or not.

Justice Holmes also wanted us to look at the result; apparently even a false shout of fire that evoked humor rather than panic would not occasion criminal liability. But the crucial question for us is the one on the other side—when, if ever, truthful statements that endanger national security may warrant civil or criminal liability for the speaker or publisher. We do have limited guidance in recent years.

In fact the recent testing ground for national security and truthful speech has not been that of punishment after the fact, but restraint before publication. Such guidance as we have comes mainly from cases involving attempts to enjoin presumably truthful publications. Most helpful is the case of the Pentagon Papers—the government's unsuccessful attempt in 1971 to prevent publication by the *New York Times* of the purloined copy of a detailed and potentially embarrassing analysis of the United States role in Vietnam.[30]

A clear majority of the Justices agreed that the government could not prevent publication of the papers simply because they might embarrass our relations with friendly nations.[31] But they were far from agreement on the scope of such a judgment. Only Justices Black and Douglas took the absolute position that prior restraint was never acceptable.[32] Justice Brennan wanted to leave open the possibility of enjoining publication, *in extremis*, of information such as the itinerary of a "troop ship already at sea" an example the Court had cited many years earlier in another case involving prior restraint.[33] Justice Marshall agreed, in part because he felt there were adequate forms of subsequent punishment to make prior restraint unnecessary.[34] Justices Stewart and White, the other members of the majority, agreed that government must let the material appear and pursue post-publication remedies if the feared consequences did occur.[35]

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30. 403 U.S. 713 (1971).
31. New York Times Co. v. United States, 403 U.S. at 723-24.
32. *Id.* at 714.
33. *Id.* at 724.
34. *Id.* at 740.
35. *Id.* at 730.

Thus the Pentagon Papers yield only two votes against any prior restraint. For the other seven Justices, in varying degree, even truthful statements might be so damaging to national security that even prior restraint, let alone subsequent punishment, might be warranted. Even for so ardent an advocate of free expression as Justice Brennan—whose views I find understandably congenial—the first amendment does not unqualifiedly preclude restraint of the truth, at least under critical wartime conditions.

In fact the relationship between truth and national security is even more complex. If one publishes the wrong address for a United States agent in a foreign capital, or misstates the itinerary of the troop ship at sea, far less damage is done. Such false statements might even aid the national interest—confusing or diverting the enemy, for example. This is not to say that truth is irrelevant here—recall Justice Holmes and the crowded theater again—but only that the needs of national security may more clearly outweigh the interest in free expression when truth is involved. Thus one who would permit prior restraint—and a fortiori punishment after the fact—in such a case is not rejecting the defense of truth but simply balancing contending interests with truth as a major factor on both sides.

If there is a gap in this area, it is the absence of standards by which we can determine when information about an agent's foreign address or the path of a troop ship is so sensitive that it may be proscribed. Perhaps that is simply part of the generality and the perennially disappointing nature of the clear and present danger test—a topic that would carry us well beyond where we should conclude this evening. Suffice it to say that truth is not irrelevant here, but simply that it plays a quite different role from that which we have observed elsewhere—even in areas such as the administration of justice in which the governmental interest is of a very high order.

V. Conclusion

We began with a question I styled as simple—does the First Amendment always protect publication of the truth? We conclude with a less than fully satisfying "that depends." But along the way we have identified a few points of clarity, and a few others in need of clarification.

Let me conclude with several observations:

First, the issue of truth simply is irrelevant to certain kinds of free expression cases—those involving obscenity or child pornography, for example, and quite possibly others as well. Truthfulness would presumably represent no defense, and courts would be unlikely to inquire into the issue of veracity.

Second, there are areas in which truth ought to avail more than apparently is now the case. The Hubbard copyright case suggests the need for a broader definition of fair use or related defense that would better reconcile the interests of creator and general public than some recent cases allow. There must always be a balance, as long as both interests are firmly rooted in the Constitution, and vindication of copyright claims will sometimes inevitably require suppression of truthful material.

Third, publication of truth almost always should prevail against such contending interests as privacy and the administration of justice. The situations in which truth may give rise to liability are so few and so extraordinary that they exist only in hypotheticals—though the case that is supposition today has a way of becoming tomorrow's litigation.

Finally, the balance in the national security area is *sui generis*. Truth is not irrelevant, but the interest in preserving government or public order may enjoy a higher and unique level of deference. Paradoxically, the public interest in restraint may be greater when truth is involved than when the information is false. One can only ask that truth be considered if and when such an issue is raised—so that all may understand the special conditions in which the truth may indeed not set you free.