

PRESS COUNCILS: THE ANSWER TO OUR FIRST AMENDMENT DILEMMA†

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The first amendment guarantees a free press but not a fair press. The Supreme Court's most recent decisions on two first amendment issues, access to the press and libel, underscore the inability of legal institutions to resolve this dilemma. In *Miami Herald Publishing Co. v. Tornillo*¹ and *Gertz v. Robert Welch, Inc.*,² members of the Court suggested a press council, an independent arbitration board, as a means of resolving free press-fair press conflicts. Two major press councils are now functioning in the United States, the Minnesota Press Council and the National News Council. An examination of their procedures and decisions demonstrates that the press council mechanism can foster a fair and responsible press while upholding the first amendment's guarantee of a free press.

THE NEED FOR PRESS COUNCILS

Advocates of a free press traditionally point to the first amendment ideal of an unrestricted marketplace of ideas where the open dis-

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1. 94 S. Ct. 2831, 2838 n.19 (1974).

HEREAFTER THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

H.P. LEVY, *THE PRESS COUNCIL* (1967) [hereinafter cited as LEVY];

THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, *CODE OF ETHICS* (1973) [hereinafter cited as JOURNALISTS CODE OF ETHICS];

Balk, *Background Paper*, in THE TWENTIETH CENTURY FUND, *A FREE AND RESPONSIBLE PRESS* (1973) [hereinafter cited as Balk].

2. 94 S. Ct. 2997, 3019 n.2 (1974) (Brennan, J., dissenting).

discussion of public affairs can take place; they demand a hands-off approach.³ Finding this traditional approach inadequate to meet the realities of modern mass media, fair press forces have advocated a legal right of access to the news media.⁴ Advocates of enforced access argue that the first amendment is primarily meant to provide for full debate on issues of public import so that the citizenry can make informed decisions.⁵ Since public affairs are no longer debated on soap boxes or in political pamphlets but in a limited number of newspapers and broadcasting stations, the ownership of which is concentrated in increasingly fewer hands,⁶ enforced access for persons opposed to the views taken by the mass media is seen as harmonious with, if not mandated by, the first amendment.⁷ Senator Sam Ervin, Chairman of the

3. This view was developed by Mr. Justice Holmes in his free speech decisions and is known as the theory of "the marketplace of ideas."

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get accepted in the competition of the market *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Therefore, it is argued that when ideas compete in the marketplace for acceptance, without any government control, the truth will emerge as the victor. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring); *Dennis v. United States*, 341 U.S. 494, 584-85 (1951) (Douglas, J., dissenting); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis & Holmes, JJ., concurring).

4. The leading work which advocates this right is Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). There have been a multitude of law review articles written on the subject of access to both the print and broadcast media, with a majority favoring a right of access to both. A complete list appears in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1, 2 n.5 (1973).

5. See, e.g., Barron, *supra* note 4 *passim*; Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); Comment, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120 (1971).

6. See generally Johnson & Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971). For statistics on the concentration of ownership see Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 NW. U.L. REV. 159, 181-86 (1971); Flynn, *Anti-trust and the Newspaper: A Comment on S. 1312*, 22 VAND. L. REV. 103, 120 (1968); Johnson & Hoak, *Media Concentration: Some Observations on the United States Experience*, 56 IOWA L. REV. 267, 269-70 (1971).

7. Professor Barron has proposed two mechanisms through which a right of access would be initiated. The first involves creating a new judicial remedy.

One alternative is a judicial remedy affording individuals and groups desiring to voice views on public issues a right of nondiscriminatory access to the community newspaper. This right could be rooted most naturally in the letter-to-the-editor column and the advertising section. Barron, *supra* note 4, at 1667.

The second mechanism consists of access through statutes.

Another, and perhaps more appropriate, approach would be to secure the right of access by legislation. A statute might impose the modest requirement, for example, that denial of access not be arbitrary but rather be based on rational grounds. *Id.* at 1670.

United States Senate Committee on Constitutional Rights, has reasoned that the first amendment's purpose of stimulating public discussion imposes on publishers and broadcasters a duty to disseminate such information as will enable readers, viewers, and listeners to arrive at the truth and to make well-informed decisions on issues of public concern.⁸ This reasoning suggests that enforced access statutes⁹ have a constitutional imprimatur.

The arguments in favor of enforced access to the media were presented to the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*.¹⁰ The issue in *Tornillo* was the constitutionality of a Florida statute¹¹ which provided for a right of reply for political candidates assailed by newspapers. The Court recognized that strong arguments can be made in favor of enforced access¹² but held that, regardless of the validity of those arguments, upholding the statute would strain the meaning and history of the first amendment's prohibition against governmental regulation of the press.¹³ The *Tornillo* decision is clearly consonant with the express language of the first amendment,¹⁴ with

8. *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 872 (1972) (Introduction by Senator Ervin).

9. See, e.g., FLA. STAT. ANN. § 104.38 (1973) (held unconstitutional in *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974)). The proposed Massachusetts enforced access statute was also construed as unconstitutional in *Opinion of the Justices*, 298 N.E.2d 829 (Mass. 1973). Statutes which allow a defendant in a defamation suit to limit the amount of damages recoverable against him by publishing a conspicuous and timely retraction (the so-called London Libel Law) can also be considered as a form of enforced access. Twenty-five states have such statutes. E.g., CAL. CIVIL CODE § 48(a) (West 1954); FLA. STAT. ANN. §§ 770.01-02 (1973); N.C. GEN. STAT. §§ 99-1 to -2 (1972). An excellent discussion of the right of retraction appears in Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

10. 94 S. Ct. 2831 (1974).

11. FLA. STAT. ANN. § 104.38 (1973).

12. The enforced access proponents first made the point that control of the news media is being concentrated in fewer and fewer hands. 94 S. Ct. at 2835-36. It was then argued that "the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation." *Id.* at 2836.

13. See *id.* at 2838-40. Even in the broadcasting industry in which the first amendment's blanket protection has been modified by the FCC's fairness doctrine, see *Red Liou Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), proponents of enforced access have suffered setbacks. For example, in *National Broadcasting Co. v. FCC*, 43 U.S.L.W. 2133 (D.C. Cir. Sept. 27, 1974), the Court of Appeals for the District of Columbia Circuit held that a television program which was critical of pension plans did not violate the fairness doctrine. The court indicated that the primary discretion as to whether the fairness doctrine required a balanced program was not vested in the government agency but in the licensee.

14. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I (emphasis added).

the judicial gloss on that language,¹⁵ and probably with the intent of the founding fathers.¹⁶

In the *Tornillo* opinion, Chief Justice Burger noted that "the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual."¹⁷ Although legislative and judicial mechanisms were effectively foreclosed by *Tornillo*, consensual means of implementing such access were not. As an example of such a consensual mechanism concerned with press fairness, the Chief Justice pointed to the National News Council.¹⁸ The National News Council is a press council—an independent board of journalists and laymen which undertakes a neutral examination of claims of press inaccuracy and unfairness.

The possibility of using press councils has been suggested in another area of first amendment law which has caused the Court great difficulty, the law of libel. When a member of the news media is sued for defamation, the Court has yet to formulate a clear legal solution to the free press-fair press conflict. In *New York Times Co. v. Sullivan*,¹⁹ the Supreme Court reasoned that the first amendment requires a press uninhibited by the threat of huge judgments in libel cases.²⁰ Thus, the Court held that a public official must prove either knowing falsity or reckless disregard for the truth in order to recover from a newspaper in a libel suit.²¹ The scope of the *New York Times* privilege

15. See, e.g., *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 381-82 (1973); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-77 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

16. Thomas Jefferson once wrote in a letter to a friend, "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them." Letter from Thomas Jefferson to Dr. Walter Jones, Jan. 2, 1814, reprinted in 14 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 47 (A. Bergh ed. 1907). Yet Jefferson, who himself was much criticized by the press, contended that the situation presented "an evil for which there is no remedy . . . [since] liberty depends on the freedom of the press . . ." Letter from Thomas Jefferson to Dr. James Currie, Jan. 28, 1786, reprinted in 9 T. JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 238 (J. Boyd ed. 1954).

17. 94 S. Ct. at 2838.

18. *Id.* at 2838 n.19.

19. 376 U.S. 254 (1964).

20. *Id.* at 277-78. The possibility that the press could be inhibited by large libel judgments was quite real. For example, a \$500,000 jury verdict was returned against the *New York Times* in a leading case, *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964); likewise, in another notable libel action, a jury verdict of \$800,000 (reduced to \$500,000 by the trial judge) was returned against the Associated Press, *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965), *rev'd sub nom. Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

21. 376 U.S. at 279-80.

was steadily expanded,²² culminating with the opinion joined in by three members of the five-man majority of the Supreme Court in *Rosenbloom v. Metromedia, Inc.*,²³ which extended that privilege to news media defamation of private persons involved in matters of general interest.²⁴ Although it was generally concluded after *Rosenbloom* that the news media, as a matter of constitutional right, were practically immune from libel and slander suits,²⁵ the five separate opinions in that case evidenced the great difficulty that the Justices were having in resolving the conflicting rights. Thus, it was not too surprising that *Rosenbloom* was redefined by *Gertz v. Robert Welch, Inc.*,²⁶ in which the Court held that a private person can recover actual damages in a defamation action against the news media without meeting the *New York Times* standard of knowing or reckless falsity.²⁷ Yet even in *Gertz*, six separate opinions were written, and Justice Blackmun joined the five-man majority only to eliminate "the unsureness engendered by *Rosenbloom's* diversity."²⁸

The diversity of *Rosenbloom* and *Gertz* demonstrates the Supreme Court's inability to use existing legal mechanisms to define clearly and satisfactorily the boundary between defamation and the first amendment. Even after the "Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press,"²⁹ the accommodation reached in *Gertz* was able to draw the wholehearted support of only four Justices. Justice Brennan intimated in his dissent in *Gertz* that a nonlegal mechanism may be necessary to deal with charges of

22. See *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Greenbelt Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Garrison v. Louisiana*, 379 U.S. 64 (1964). For a detailed discussion of the progeny of *New York Times*, see Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972).

23. 403 U.S. 29 (1971). The judgment of the Court was announced in an opinion written by Justice Brennan, in which Chief Justice Burger and Justice Blackmun joined. *Id.* at 30. The other members of the plurality were Justices Black and White. Justice Black restated his view of absolute immunity for the press, *id.* at 57, while Justice White concurred on the narrower ground that the press had immunity in the case because the event reported involved action of governmental officials, *id.* at 62.

24. *Id.* at 43-44.

25. See Levine, *Times to Rosenbloom: A Press Free From Libel—The Editors' Peak*, 27 U. MIAMI L. REV. 109 (1972); cf. Comment, *supra* note 22, at 1568.

26. 94 S. Ct. 2997 (1974).

27. *Id.* at 3010.

28. *Id.* at 3014.

29. *Id.* at 3000.

defamation by the news media; the example he noted was the National News Council.³⁰

The establishment of a nonlegal mechanism is a possible solution to the dilemma raised by the failure of existing legal mechanisms to resolve press access and defamation disputes. In both the *Tornillo* and the *Gertz* decisions a press council was suggested as a possible non-governmental means of accommodating the conflicting interests.³¹ A press council is an independent board of journalists and laymen which acts as a nonbinding arbitration board. Consideration of a problem is initiated by the filing of a complaint against a member of the news media. The council will not hear a dispute until the parties have met to attempt reconciliation.³² If a settlement cannot be reached, a hearing is called. All parties are given adequate notice and a full opportunity to present relevant evidence, to cross-examine witnesses, and to be represented by counsel.³³ However, formal rules of procedure and evidence are not strictly followed.³⁴ The press council renders a decision by a written opinion which includes a statement of the facts, a ruling for one of the parties, and a discussion of the considerations on which the ruling is based. All members of the news media within the council's geographical area are notified of the decision and are requested to publicize it.

The power to publicize its decisions is the only sanction of a press council. Thus, it has been said that a press council is like a toothless watchdog—it lacks bite, but has a loud bark.³⁵ It is from this "loud bark" of publicity that the press council derives its real power, that of

30. *Id.* at 3019 n.2.

31. See notes 18 & 30 *supra* and accompanying text.

32. *E.g.*, Minnesota Press Council, Grievance Comm. Procedural Rule I.A.: "No grievance should be processed unless the matter has first been presented to the newspaper by the complainant"; National News Council, Grievance Comm. Rules of Procedure Relating to Public Complaints, Rule 9: "The Grievance Committee will not hear a complaint unless the complainant has first sent written notification of the complaint to the news organization complained against and has received either an inadequate response or no response . . ."

33. *E.g.*, Minnesota Press Council, Grievance Comm. Procedural Rule II.F.: "All parties will have the opportunity to appear in person and give oral testimony. . . . A right to cross examination and a right to counsel are available for both parties." National News Council, Grievance Comm. Rules of Procedure Relating to Public Complaints, Rule 20: "Each party shall have the right to engage counsel, to call and examine witnesses, and to cross-examine witnesses called by other parties or the Committee."

34. "At all times the desirability of informality and flexibility of the proceedings must be recognized." Minnesota Press Council, Grievance Comm. Procedure Rule II.F. For example, the Minnesota Press Council has refused to let technical mootness of the instant case prevent it from deciding an important question. *Rachner v. Union Advocate*, Minnesota Press Council Decision No. 3, at 4-5 (1973).

35. *Balk* 29.

developing public awareness of problems in the free press-fair press area.³⁶ A press council provides the means of simultaneously attaining the following four community benefits: (1) freeing of the news media from restraints imposed by the threat of economic or criminal sanctions, (2) determination of press disputes by both laymen and journalists, (3) correction of inaccurate or unfair reporting, and (4) growth of a set of journalistic standards for the news media.³⁷

THE HISTORY OF PRESS COUNCILS

The concept of a press council is not new. It began in 1916 when the Swedish government formed the Press Fair Practices Commission to serve as an intermediary between the press and the public. Since then fifteen other European nations have established press councils, the twenty-year old British Press Council standing out as the most successful.³⁸

The British Press Council was formed in 1953, but its origin lies in the recommendations of a Royal Commission established by the British Parliament after World War II as a result of public concern over newspaper mergers, closings, and charges of biased news reporting.³⁹ The major objectives of the Council are to preserve freedom of the press, to maintain high professional standards of journalism, to deal with complaints about conduct of the press, and to review developments which might tend to restrict the supply of information.⁴⁰ The Council itself feels that its most useful function has been that of maintaining professional standards of journalism.⁴¹ The Council has jurisdiction over only the print media, although some feel that a similar body should exist for the broadcast media.⁴²

The British Press Council is composed of twenty-five members, twenty of whom are publishers and working journalists, the other five of whom are lay members selected from the public by the professional

36. See LEVY 465-66. The power of publicity obviates the need for sanctions:

The answer, therefore, to the question whether sanctions are necessary, is that they are not and the [British] Press Council has proved it. . . .

The role of the Press Council is that of educator, not inquisitor; its method is persuasion not force; its weapon is publicity not punishment; its appeal is to conscience and fair play. In a free press sanctions would be an incongruity. *Id.* at 466.

37. See text accompanying notes 104-11 *infra*.

38. T. PETERSON, J. JENSEN & W. RIVERS, *THE MASS MEDIA AND MODERN SOCIETY* 98-99 (1971).

39. LEVY 3-10.

40. [BRITISH] PRESS COUNCIL: ARTICLES OF CONSTITUTION art. 2, *reprinted in* LEVY app. I, at 473-74; *see* LEVY 19-22.

41. LEVY 21.

42. Balk 30.

members.⁴³ The Council receives over 400 complaints per year concerning the contents of newspapers and the behavior of journalists,⁴⁴ and it renders approximately 300 decisions per year⁴⁵ dealing with all facets of newspaper performance, including reporting of confidential documents,⁴⁶ false and biased reporting,⁴⁷ and the right of privacy.⁴⁸ In the first fourteen years of the Council's existence, only five newspapers refused to print a decision.⁴⁹ The British Press Council has not solved all of the problems that face the press; however, it has reportedly been successful in establishing a body of professional journalistic standards for newspapers. One legal commentator has referred to these standards as a "common law" of journalism.⁵⁰

Numerous groups have proposed press councils in the United States. The first formal recommendation came in 1947 from the Commission on Freedom of the Press, chaired by Robert Hutchins, chancellor of the University of Chicago and former dean of Yale Law School. Stressing that the only way for the press to remain free was to be responsible, the Commission called for creation of an independent agency to appraise and report annually on press performance.⁵¹ In 1951, Senator William Benton of Connecticut proposed that a similar body for the electronic media be established by Congress with its members appointed by the President.⁵² John Lofton of Stanford's Institute for Communication Research in 1961 called for the development of a body "to monitor and report on press performance."⁵³ In 1963, University of Minnesota Journalism Professor J. Edward Gerald asked that a national press council be formed and supported by the established professional and educational associations.⁵⁴ In 1967, it was suggested by journalist and media critic Ben H. Bagdikian that universities serve as centers in creating press councils for their respective

43. [BRITISH] PRESS COUNCIL: ARTICLES OF CONSTITUTION art. 3-4, reprinted in LEVY app. I, at 474.

As originally established in 1953 the British Press Council was composed entirely of representatives of the press. LEVY 19. The present composition is the result of a reorganization of the Council in 1963. *Id.* The addition of lay members increased the public's confidence in the Council without hindering its operation. *See id.* at 462-64.

44. LEVY 26.

45. *Id.*

46. *See id.* at 39-51.

47. *See id.* at 83-144.

48. *See id.* at 240-69.

49. BALK 28.

50. Lord Devlin, *Preface to LEVY*.

51. BALK 31.

52. *Id.*

53. *Id.*

54. *Id.* at 32.

areas.⁵⁵ The National Institute of Public Affairs in Washington in its 1968 meeting outlined a proposal for a national press council made up of distinguished laymen.⁵⁶ In 1970, a Task Force of the National Commission on the Causes and Prevention of Violence called for a "national media study center with . . . , 'clearly delineated powers of monitorship, evaluation, and publication, but without sanction.'"⁵⁷

The first American councils were not what would be considered press councils today. They were citizen participation groups intended to bring newspapers closer to the people, and they served a need recently referred to by the Supreme Court: "[T]he public has lost any ability to respond or contribute in a meaningful way to the debate on issues."⁵⁸ The first prototype of this kind of council was established in 1950 by William Townes, a publisher of the *Santa Rosa Press Democrat*, and was called a "Citizens' Advisory Council."⁵⁹ Although Townes continued to determine the newspaper's policies alone, he welcomed criticisms and suggestions from the Council. Townes felt that the Council helped improve his paper and continued the Council until he left.⁶⁰ In reviewing this project, a respected journalism publication stated:

This is an experiment in getting closer to the community which strikes us as valuable. The good points outweigh the bad and if conducted properly and regularly can only result to the benefit of the newspaper.⁶¹

There have been several other citizen advisory councils, many of which were financed by the Mellet Foundation.⁶² Like the Santa Rosa experiment, these councils dealt only with one newspaper each and did not render any formal decisions. Acting as a link between newspapers and the public, they served as forums for citizens to discuss community problems. Although these councils served a useful function, they were not designed as a mechanism for achieving press fairness.

MODERN AMERICAN PRESS COUNCILS

The Minnesota Press Council

The first major American experiment with a British-type press council, *i.e.*, one concerned with press fairness, is the Minnesota Press

55. *Id.*

56. *Id.*

57. *Id.*

58. *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831, 2836 (1974).

59. *Balk* 32.

60. B. BLANKENBURG & W. RIVERS, *BACKTALK: PRESS COUNCILS IN AMERICA* 13 (1972).

61. *EDITOR AND PUBLISHER*, July 28, 1951, at 36, *cited in* *Balk* 32-33.

62. *See* B. BLANKENBURG & W. RIVERS, *supra* note 60.

Council.⁶³ That Council was established in 1971 by the Minnesota Newspaper Association, the membership of which is composed of the daily and weekly newspapers in the state. The chairman of the Council is a Minnesota Supreme Court Justice, the Honorable C. Donald Peterson, whose selection was influenced by the British Press Council's practice of selecting its chairman from the judiciary. The Council has eighteen members, half laymen and half journalists. The lay members were selected with the view of including representatives of influential subgroups such as women in public affairs, leaders of educational institutions, government leaders, and persons from minority groups. The journalist members must include at least two individuals who are not related to either ownership or management. To avoid any appearance of collusion with the press, the Council's first act was to declare itself independent from the Minnesota Newspaper Association. At an early stage of development it was decided not to include the electronic media, but this decision is now being reconsidered. Not all newspapers actively support the Press Council. However, one major Minnesota newspaper which does not support it, the St. Paul *Dispatch-Pioneer Press*, does cooperate by appearing at Council proceedings and by referring individuals with complaints to the Council.⁶⁴

In its three year existence, only eleven cases have been fully adjudicated. Many other complaints have been dismissed as being insignificant, such as a newspaper's food column including recipes which require alcoholic ingredients or charges that a newspaper is "too liberal." Several complaints have also been withdrawn as a result of reconciliation between the parties themselves; such a meeting is a condition precedent to Press Council consideration of a complaint.⁶⁵ Through its decided cases, the Minnesota Press Council has begun to establish a body of standards for responsible press performance on issues of national importance to the news media and the public: libel, access to the press, newsman's privilege not to disclose sources, and biased news reporting. An examination of the cases decided by the Minnesota Press Council will demonstrate that the Council is providing a viable means of resolving free press-fair press conflicts.

The Minnesota Press Council's first case, *Lindstrom v. Union Advocate*,⁶⁶ illustrates how a press council can function as both an al-

63. On a smaller scale, a city-wide Community-Media Council has been established in Honolulu. See Balk 46-55.

64. Interview with John Finnegan, Editor of the St. Paul *Dispatch-Pioneer Press*, in St. Paul, Minnesota, Jan. 11, 1974.

65. See Minnesota Press Council, Grievance Comm. Procedural Rule I.A.

66. Minnesota Press Council Decision No. 1 (1972).

ternative to a court libel action and an effective means of access to the press. Mr. Lindstrom, a state legislator, alleged the inaccuracy of two news stories in which it was reported that he had voted for a liquor tax increase after being entertained by lobbyists in a restaurant. He agreed to drop his libel suit prior to filing a Press Council complaint in order to comply with the Council's requirement that a complainant waive his right to sue prior to submitting to a Press Council determination.⁶⁷ The evidence presented by the complainant established that the reported restaurant meeting between the lobbyists and the legislator did not take place. No evidence was produced by the newspaper to controvert the complainant's evidence, nor would the paper disclose the name of its confidential source.

The Council ruled that the news articles were inaccurate and that the newspaper had violated its journalistic obligation to check its information with the principals and others known to be present.⁶⁸ In an effort to uphold a newsman's right to withhold the names of his sources, the Council refused to request the disclosure of the story's source and asserted that the policy of not demanding disclosure would continue in the future.⁶⁹

The result was that the defamed complainant received his desired vindication without the expense of a trial. The publicizing of the decision in every newspaper in the state, including the one which printed the inaccurate stories, gave the complainant a better right of access than any right of reply statute would allow, since such statutes only

67. See Minnesota Press Council, Grievance Comm. Procedural Rule I.C.:

No grievance will be considered if legal action based on the same subject matter is pending against the newspaper or an individual journalist. A grievance will not be processed until the complainant waives any possible future civil action that he may have arising out of the grievance for matters occurring prior to the filing of the grievance.

See text accompanying notes 150-53 *infra* for a discussion of the validity of such a waiver.

68. *Accord*, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, CODE OF ETHICS: CANON IV, ¶ 1 ("By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities."); JOURNALISTS CODE OF ETHICS: ACCURACY AND OBJECTIVITY ¶ 3 ("There is no excuse for inaccuracies or lack of thoroughness.").

69. Confidentiality of sources is not guaranteed in the Minnesota Press Council's Constitution or Grievance Committee Rules; however, it is specifically provided for by the National News Council's Rule 11 of the Grievance Committee Rules of Procedure Relating to Public Complaints. See NATIONAL NEWS COUNCIL, BY-LAWS AND RULES OF PROCEDURE 16 (1973); *accord*, JOURNALISTS CODE OF ETHICS: ETHICS ¶ 5 ("Journalists acknowledge the newsman's ethic of protecting confidential sources of information."). No parallel provision exists in the Code of Ethics of the American Society of Newspaper Editors.

apply to the newspaper carrying the story.⁷⁰ It should be noted that the decision is consonant with the *Gertz* decision, in which the Court stated that the "first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error"⁷¹ The *Gertz* Court went on to say it was easier for a public official or public figure to accomplish this remedy than the private individual, since the public official and public figure "enjoy significantly greater access to the channels of effective communications."⁷² However, through the use of a press council, even the private individual can enjoy significant access to the "channels of communication" by the publication of the press council's decisions. In addition, a press council decision is likely to be accorded greater weight than a self-serving reply.

The issue of inaccurate and biased reporting was again before the Council in *Long & Erickson v. Worthington Daily Globe*.⁷³ In that case, two legislators filed a complaint alleging that a newspaper headline and a related editorial were inaccurate and unfair. The headline read: "Rep. Erickson, Rep. Long Vote Continued Support for War." The story which accompanied the headline was an Associated Press release about their votes against a resolution in the state legislature to urge Congress to halt war appropriations. After hearing all the evidence produced by the parties, the Council concluded that the headline was in fact inaccurate and unfair. The decision went on to lay down the general guideline that "[n]ews headlines should be allowed a reasonable latitude," however, they should be "generally correct, objective, non-misleading and non-opinionated . . . [and] supported by facts within the news story."⁷⁴

In regard to the related editorial, the Council held that it would not be stepping beyond its proper reach to discuss *factual* inaccuracies and misstatements, but that it must confine its consideration to only factual questions so as "not to trespass upon or discourage the maximum freedom for newspapers to express opinions in editorial columns."⁷⁵ As a result of this policy, the Council did not pass upon the

70. See statutes cited in note 9 *supra*.

71. 94 S. Ct. at 3009.

72. *Id.*

73. Minnesota Press Council Decision No. 5 (1973).

74. *Id.* at 3-4; *accord*, AMERICAN SOCIETY OF NEWSPAPER EDITORS CODE OF ETHICS: CANON IV, ¶ 2 ("Headlines should be fully warranted by the contents of the article which they surmount."); JOURNALISTS CODE OF ETHICS: ACCURACY AND OBJECTIVITY ¶ 4 ("Newspaper headlines should be fully warranted by the contents of the article they accompany.").

75. Minnesota Press Council Decision No. 5, at 8 (1973).

validity of the editorial's opinion, but it did suggest that specific factual errors in the editorial constituted a breach of professional responsibility.⁷⁶ The decision was careful to emphasize that the Council encourages newspapers to express their opinions in editorials and to welcome letters in reply as the newspaper in the instant case had done.

Another aspect of the *Long-Erickson* case involved the right-of-reply issue. Part of the procedure of the Minnesota Press Council is a requirement of a face-to-face discussion between the parties before a hearing is held.⁷⁷ In the meeting in this case the newspaper involved offered the complainants space to reply at length. The legislators refused the offer, demanding a retraction with the same front page publicity as the headline and refusing to be put in the position of appearing to feel compelled to justify their position. The Council's decision supported the complainants: "We find it the newspaper's responsibility to correct its own headline error. The offended citizen should not have to bear the burden of writing the correction"⁷⁸

In two cases, *Rachner v. Union Advocate*⁷⁹ and *Blahauvietz v. Pipestone County Star*,⁸⁰ the Council considered the issue of access to a newspaper through paid advertisements. In *Rachner*, a school board candidate complained that her paid political advertisement had been refused by the newspaper because she was not endorsed by labor. The *Union Advocate*, the paper involved, is the official AFL-CIO newspaper in St. Paul and is mailed to union members as an incident of membership. The Press Council recognized that newspapers should have considerable latitude in establishing policies governing the acceptance of advertising and that there is no legal duty to accept all advertising offered to them.⁸¹ The right of the *Union Advocate* to re-

76. *Id.* at 8-9; *accord*, AMERICAN SOCIETY OF NEWSPAPER EDITORS: CANON III, ¶ 2 ("Partisanship, in editorial comment, which knowingly departs from the truth does violence to the best spirit of American journalism"); JOURNALISTS CODE OF ETHICS: ACCURACY AND OBJECTIVITY ¶ 6 ("Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.").

77. *See* Minnesota Press Council, Grievance Comm. Procedural Rule I.A.

78. Minnesota Press Council Decision No. 5, at 5 (1973); *accord*, AMERICAN SOCIETY OF NEWSPAPER EDITORS CODE OF ETHICS: CANON VI, ¶ 2 ("It is the privilege, as it is the duty, of a newspaper to make prompt and complete correction of its own serious mistakes of fact or opinion, whatever their origin."); JOURNALISTS CODE OF ETHICS: FAIR PLAY ¶ 4 ("It is the duty of news media to make prompt and complete correction of their errors.").

79. Minnesota Press Council Decision No. 3 (1973).

80. Minnesota Press Council Decision No. 6 (1973).

81. Minnesota Press Council Decision No. 3, at 5-6 (1973); *see* Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Opinion of the Justices, 298 N.E.2d 829, 835 (Mass. 1973); *cf.* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 130-31 (1973).

fuse paid political advertisements was upheld on the ground that it is a part of the "special interest" press and, therefore, does not accept "the obligation to function as a general newspaper or to be bound by the convention usually associated with general publications."⁸² However, the Council went on to urge that non-"special interest" newspapers clarify and publish their advertising acceptance policies and stated that "[a] standard under which only the advertising of political candidates approved by the publisher is accepted would be patently offensive to fundamental principles of fairness and responsibility."⁸³

The *Blahauvietz* case concerned access through political advertising on election day. The newspaper involved refused to run Mr. Blahauvietz's election day advertisement because of a Minnesota statute which had been interpreted to bar any political advertising on election day. The case was complicated by the fact that the same newspaper inadvertently ran the advertisement of Mr. Blahauvietz's opponent on election day. Since the discrimination was unintentional, the Council simply ordered the newspaper to make an apology. Although the decision appears to be a Pyrrhic victory for Mr. Blahauvietz, it is significant for establishing guidelines "governing the publication of political advertising to assure fair and equal treatment of all candidates."⁸⁴ In addition, the opinion suggested that the state statute forbidding political advertisements on election day might be unconstitutional and that it might be appropriate to set up a test case.⁸⁵ A dissenting member condemned the majority for recommending a system which he felt encouraged private blackouts of political advertisements.⁸⁶

The issue of access to the media through letters to the editor was raised in *Shearin v. Rochester Post-Bulletin*.⁸⁷ That case dealt with a newspaper's rejection of a second letter after publication of a previous letter by the same author on the same subject. The Council held for the newspaper, recognizing that newspapers must deal with limitations of space and form. The editor was held entitled to establish rea-

82. Minnesota Press Council Decision No. 3, at 7 (1973).

83. *Id.* at 6.

84. Minnesota Press Council Decision No. 6, at 10-11 (1973).

85. *Id.* at 8-11. The Council felt that the case of *Mills v. Alabama*, 384 U.S. 216 (1966) (holding that editorials on election day cannot be constitutionally prohibited), was determinative of the issue of constitutionality.

86. Minnesota Press Council Decision No. 6, at D6-D11 (1973) (Gerald, dissenting). Mr. Gerald argued that the majority's statement that newspapers should "set forth the condition and final publication dates for [political] advertising," *id.* at 11, would encourage newspapers to impose political advertising blackouts on election days. *Id.* at D10.

87. Minnesota Press Council Decision No. 4 (1973).

sonable controls, such as the format of the letters (here the letter included footnotes and a bibliography), the frequency with which certain subjects are treated, and when to terminate publishing letters on a particular topic.⁸⁸ The Council pointed out that all of these controls should be based on the considerations of fairness and reasonable presentation of conflicting views.

In *Samuelson v. Thief River Falls Times*,⁸⁹ a second case concerned with letters to the editor, a newspaper had previously stated that all letters to the editor must be signed, but that names would be withheld upon request. Mr. Samuelson wrote a letter critical of the city council and requested that his name be withheld. Without notifying Mr. Samuelson, the newspaper released his name at the request of the chairman of the city council. In response to the complaint, the newspaper urged that it was following its usual practice of withholding names upon request, but releasing the name of the author to anyone who, in the newspaper's opinion, had a legitimate interest in finding out who the author was. The Council found for the complainant and called upon the newspaper to apologize to Mr. Samuelson and to publish all the conditions which attach to the withholding of the names of letter writers.⁹⁰

The case of *Minnesota Education Association v. 32 Minnesota Newspapers*⁹¹ gave the Council the opportunity to address the issue of attribution and identification of sources of news releases. The case arose out of a press release which was distributed to all Minnesota newspapers by the Minnesota School Board Association (MSBA). The Minnesota Education Association, which opposed the views expressed by the MSBA in its news release, charged that thirty-five newspapers had published the release either as an editorial or as a news story without naming the MSBA as the source of the story. The Council took note of the facts that the MSBA was a lobbying and pressure group and that the news release expressed the view of the MSBA on a controversial issue. The Council then decided that the publication of the news release as an editorial without attribution was a "breach of faith with the readers";⁹² the use of the release as a news story without attribution was labeled a violation of a "long acknowledged and established principle of responsible journalism."⁹³ Setting out a general policy to-

88. *Id.* at 6.

89. Minnesota Press Council Decision No. 2 (1972).

90. *Id.* at 5.

91. Minnesota Press Council Decision No. 7 (1973).

92. *Id.* at 14.

93. *Id.*

ward attribution of sources, the Council stated:

As a general guideline . . . the Minnesota Press Council urges that newspapers adopt a consistent policy that published editorials from outside sources, or written by persons other than newspaper staff members, should carry attribution as to their source or author. Such attribution may appear in the text of the editorial, or if verbatim publication is made, attribution may be in the form of a credit line at the beginning or the conclusion of the copy.

. . . .

With respect to news stories, attribution or identification of source is a vital facet of responsible reporting—a yardstick by which readers can better measure the veracity and reliability of the viewpoints expressed. Such attribution is particularly crucial to readers in evaluating stands taken in regard to political issues or pending legislation. News stories should be attributed to sources.⁹⁴

It should be noted that the Council was addressing the issue of attribution of sources of an article written in the form of a news release and not the issue of undisclosed sources of information used in an article.⁹⁵

In *Guthrie v. Minneapolis Tribune*,⁹⁶ the Council considered the conduct of investigative reporters in a criminal case. The case arose out of a kidnapping case in which newspaper reporters, by monitoring a police radio, were able physically to follow an FBI agent making the ransom drop. As a result of the presence of the news media members at the drop site, the FBI was unable to make the drop. Finding that “[a]ny experienced reporter or editor must know that the ransom drop involves a time of substantial tension and concern in a kidnapping case,”⁹⁷ the Council held that the newspapers involved had acted irresponsibly and urged that the press exercise “restraint in matters involving the personal safety of individuals.”⁹⁸ In response to the defense that other media members were engaged in the same activity, the Council ruled that the fact that competitors fail to exercise restraint constitutes no excuse.⁹⁹ The Council went on to observe that

the media would have been substantially assisted in evaluating its responsibilities in cases such as this if the police would inform the media of its concerns regarding the present reporting or non-reporting of specific events¹⁰⁰

94. *Id.* at 13-14, 16.

95. See text accompanying notes 68-69 *supra*.

96. Minnesota Press Council Decision No. 11 (1974).

97. *Id.* at 4.

98. *Id.* at 6.

99. *Id.* at 4.

100. *Id.* at 5.

Three recent decisions are important because they show that the public is looking to the Council for correction of unfair or inaccurate reporting. In *Connors v. St. Paul Pioneer Press*,¹⁰¹ the complainant alleged that he had been misquoted by a newspaper. The complaint was dismissed on the basis that the story which appeared in print was a fair interpretation of the complainant's remarks. In *Robb v. The Minneapolis Star*,¹⁰² the complainant alleged that a newspaper editorial misinterpreted certain of his statements which appeared in a county board resolution. In rejecting the complaint, the Council reaffirmed the policy stated in the *Long-Erickson* case of not attempting to exercise any control over opinions which appear in editorials. A charge of inaccurate reporting was the basis of the complaint in *Fugina & Johnson v. Duluth News Tribune*.¹⁰³ The case was resolved prior to the Council hearing when the newspaper agreed to publish a clarifying article acceptable to both parties.

After three years of decision-making, it is safe to conclude that the Minnesota Press Council has gained acceptance on the part of both the press and the public. Newspapers which did not actively cooperate with the Council at its inception now find it a useful institution to which they can refer their complaints. Thus, it seems clear that press councils can achieve at least the first two of the four ends¹⁰⁴ for which they are established: (1) freeing the news media from restraints imposed by the threat of economic or criminal sanctions, and (2) determination of press disputes by a mixture of ordinary citizens and persons with experience and expertise in journalism. The Minnesota Press Council's decisions also show that press councils can fulfill the third role which they are expected to play, that of providing a forum for correction of inaccurate or unfair reporting. The *Lindstrom* and *Long-Erickson* decisions demonstrate that press councils can effectively serve such a corrective function, even in cases in which it is very doubtful that the complainant could secure relief from a court of law.¹⁰⁵ Most importantly, the Minnesota decisions establish that a press council can use its decisional process to promulgate a set of journalistic standards. For example, the *Lindstrom* decision made it clear that newspapers are expected to verify their stories whenever possible,¹⁰⁶ and the *Long-Erickson* decision set out the Council's guidelines for fair and accurate

101. Minnesota Press Council Decision No. 9 (1974).

102. Minnesota Press Council Decision No. 10 (1974).

103. Minnesota Press Council Decision No. 8 (1973).

104. See text accompanying note 37 *supra*.

105. See notes 65-78 *supra* and accompanying text.

106. See note 68 *supra* and accompanying text.

headlines and editorials.¹⁰⁷ The *Rachner* and *Blahavietz* decisions suggested standards for the acceptance of political advertisements by both general and "special interest" newspapers.¹⁰⁸ Certain aspects of the Council's view regarding the proper handling of letters to the editor were described in the *Shearin* and *Samuelson* decisions.¹⁰⁹ The *Minnesota Education Association* decision promulgated the general policy toward attribution of news releases.¹¹⁰ Finally, the *Guthrie* decision called for media restraint when covering news stories in which interference by the media could cause personal injury.¹¹¹ In sum, the short experience of the Minnesota Press Council bodes well for the use of press councils as a means of resolving free press-fair press conflicts.

The National News Council

The British Press Council and the Minnesota Press Council have been used as models for the first nationwide press council, the National News Council. Unlike the Minnesota Council, which was initiated by the press, the National Council was initiated by private foundations. In 1972, the Twentieth Century Fund released a report of a task force made up of nine journalists and five public members, calling for the establishment of a national press council which would entertain any complaints involving the principal national suppliers of news: nationwide wire services, supplemental wire services, national weekly news magazines, national newspaper syndicates, national daily newspapers, and nationwide commercial and noncommercial broadcast networks.¹¹² With an announced goal of preserving freedom of communication and advancing accurate and fair news reporting, the National News Council was formally established in August 1973.¹¹³ It was funded by several national foundations, and former California Supreme Court Chief Justice Roger Traynor was named as the first chairman.¹¹⁴

In its first nine months the Council received 160 complaints.¹¹⁵ Of these, 132 were disposed of by the staff without proceeding to the

107. See notes 73-76 *supra* and accompanying text.

108. See notes 79-86 *supra* and accompanying text.

109. See notes 87-90 *supra* and accompanying text.

110. See notes 91-95 *supra* and accompanying text.

111. See notes 96-100 *supra* and accompanying text.

112. The Twentieth Century Fund Task Force, *Report of the Task Force*, in THE TWENTIETH CENTURY FUND, A FREE AND RESPONSIVE PRESS 3-4 (1973).

113. "Monitoring" *National News Suppliers—A Unique Proposal*, COLUM. JOURNALISM REV. Mar.-Apr., 1973, at 43.

114. Stanley Fuld, former Chief Judge of the New York Court of Appeals, has recently succeeded Justice Traynor.

115. REPORT BY THE NATIONAL NEWS COUNCIL 3 (1974).

first stage of formal Council action, consideration by the Grievance Committee.¹¹⁶ Many were settled when the staff referred the initial complaint to the media member complained against. For instance, the American Medical Association charge that an NBC documentary had made derogatory comments about the medical profession was resolved without further action when NBC agreed to the appearance of an AMA spokesman on its "Today" show to rebut the comments.¹¹⁷

The twenty-eight complaints considered by the Council's Grievance Committee have all involved charges of biased or inaccurate reporting. Since many have concerned naive and trivial matters,¹¹⁸ the Council has been cautious in pronouncing judgment. However, it has defined some standards and announced two significant news media transgressions.

The most significant case thus far is the complaint of Mobil Oil Corporation against ABC-TV for inaccurate and biased reporting in a documentary on the oil crisis. In its introduction, the program was described as "a primer on oil and oil policy . . . designed to help understand the current crisis."¹¹⁹ The Council's investigation resulted in a finding that ABC had selected facts that pointed in one direction and omitted others that pointed elsewhere: "[The] organization of the facts presented . . . created one specific editorial impression: namely that government policy on oil has been manipulated over the years by the oil industry"¹²⁰ Nonetheless, the Council found the program to be within the bounds of robust opinion journalism:

ABC was not under any obligation to give a scrupulously balanced presentation.

. . . .

. . . [S]hort of outright factual misstatements, the interests of free expression are best served by allowing full scope to a variety of views, very definitely including those that are one-sided.¹²¹

However, the Council did hold that ABC had violated acceptable journalistic standards by giving the impression that a documentary on a controversial subject was striving for balance and fairness when in fact it was not.¹²²

116. *Id.*

117. *Id.* at 10.

118. For example, a charge that a news report was inaccurate in reporting that a man died from drinking too much carrot juice, *id.* at 8, and a charge that pro-abortion forces were given larger coverage than anti-abortion groups, *id.* at 6, did not require action by the Council.

119. National News Council Decision in *Mobil Oil Corp. v. ABC News 1* (1974).

120. *Id.* at 2.

121. *Id.* at 3.

122. *Id.* at 2.

It could be contended that this Solomon-like attempt to give something to both sides satisfied neither. The winner, however, was the journalistic community, because a standard of unbiased reporting has been set for the broadcast media: Thou shalt not label editorials as news reports. The Council could have relied upon the Code of Ethics of the Society of Professional Journalists, Sigma Delta Chi, which states that "[s]ound practice makes clear distinction between news reports and expressions of opinion."¹²³ Yet neither the National Council nor the Minnesota Council have referred to the Sigma Delta Chi or American Society of Newspaper Editors Codes of Ethics. This practice is probably an imitation of the British Press Council which has voted not to draft a code for the press.¹²⁴ The practice of an unwritten constitution, however, seems in keeping with British, but not American, custom.

In a second case, the Council upheld a conflict of interest complaint against Victor Lasky, a syndicated editorial page columnist who wrote signed political comment appearing in over 100 newspapers. In 1972, while he was writing the column, Mr. Lasky accepted a \$20,000 fee from the Committee for the Re-election of the President to ghost-write speeches. This fact was learned from testimony in the Senate Watergate hearings, and a complaint was filed by the National Conference of Editorial Writers.

The Council stated that "[p]ublic trust in the press is diminished if an editorial page columnist engages in activities which produce a conflict of interest or even the appearance of one."¹²⁵ Thus, the standard was established that a syndicated editorial page columnist is under a responsibility to inform the syndicate for which he writes if he benefits financially from an organization active in an area on which he regularly comments. Secondly, the syndicate was given the responsibility, once it learns of such a relationship, to inform its subscribers.¹²⁶

In two cases major news media members have refused to furnish information or cooperate with the Council. A complaint against the Public Broadcasting Corporation for being one-sided in a "Black Journal" program met with a reply that the Council had no jurisdiction to consider such matters. Even so, the Council proceeded to vindicate

123. JOURNALISTS CODE OF ETHICS: ACCURACY AND OBJECTIVITY ¶ 5.

124. See LEVY 464-65.

125. National News Council Decision in National Conference of Editorial Writers v. Lasky 1 (1974).

126. *Id.* The Council again could have relied on the Code of Ethics of the Society of Professional Journalists, Sigma Delta Chi: "Secondary employment, political involvement, holding public office, and service in community organizations should be avoided if it compromises the integrity of journalists and their employers." JOURNALISTS CODE OF ETHICS: ETHICS ¶ 2.

the Corporation by approving a wide range of editorial judgment by television program producers.¹²⁷

The most adamant objector to the National News Council is the *New York Times*. A complaint against the *Times* was filed concerning a story about a study done by the National Academy of Science on the effect of herbicides in South Vietnam. The *Times* story¹²⁸ was printed before the official release of the Academy's report and was based mainly on the minority dissent from the report. The *Times* refused to respond to the National News Council's requests for information and refused to comment on the Council's decision¹²⁹ that the newspaper should have called to the attention of its readers the information in the full report. Nevertheless, the *Times* did print a report of the decision.¹³⁰

Of the many early objectors to the Council, the *Times* is one of the few still refusing to cooperate. At the Council's commencement, the three major television networks and the *New York Times* announced they would not cooperate, while the *Washington Post* promised cooperation on only a limited basis.¹³¹ After the Council's first year of operation, all three television networks are cooperating by furnishing program transcripts and position statements. The *Post* is also cooperating.

The reason for dwindling opposition is plain from the Council's one year record. It has acted cautiously in criticizing media performance and has approved wide open expression of opinion, so long as opinion is not labeled as fact. The press should find no fault with the Council from its first year's performance; the public should find cause to applaud a mechanism which is finally defining press responsibility in hard specifics rather than easy generalizations.

OBJECTIONS TO PRESS COUNCILS

Lack of support from the journalistic community is the main reason that more experiments with press councils have not been attempted. Many journalists have serious objections to a press council and will not participate in one even on an experimental basis. Some feel that a press council would result in more government control, arguing that "voluntary acceptance of an outside agency to prevent misuse of pub-

127. National News Council Decision in *Rowley v. Corporation for Pub. Broadcasting* (1974).

128. N.Y. Times, Feb. 22, 1974, at 1, col. 6.

129. National News Council Decision in *Accuracy in Media v. New York Times News Serv.* (1974).

130. N.Y. Times, June 26, 1974, at 37, col. 2.

131. TIME, Jan. 29, 1973, at 42.

lic trust" will lead to formal governmental regulations.¹³² It should be noted that the basic purpose of a press council is to provide an independent forum, not connected with government, for debate about media responsibility and performance so that the debate will not take place in government hearing rooms, political campaign, or court rooms.¹³³ The Minnesota Press Council and National News Council have demonstrated that this can be done successfully. Furthermore, it is interesting to observe that English newspaper publishers and editors voiced the same fear over the British Press Council's birth,¹³⁴ but in actual experience no repressive governmental regulation eventuated. In fact, many observers believe that the existence of a press council may neutralize attempts at regulation by the government.

A second contention of many publishers and editors is that press councils are unnecessary since readers are given adequate opportunity to criticize newspaper performance through letter-to-the-editor columns.

We at the *Tribune* consider that we are monitored daily by 170,000 subscribers and on Sundays by 200,000. We cheerfully listen to complaints, correct errors and provide in our Letters columns free space for any reader to criticize our news reporting and editing or challenge our editorial positions. (Last year we published 2,128 letters).¹³⁵

The significance of letters to the editor has been studied elsewhere, and it has been concluded that such mail does not accurately reflect the opinions of the reading public.¹³⁶ This same issue arose in the Bend, Oregon, Press Council, one of the Mellet Foundation experiments, when a public member aptly pointed out that many working class people were intimidated from writing because they feared that the newspaper would publicly scoff at their efforts through a reply.¹³⁷ Hence, for the reader who is in effect isolated from the rest of the community, it would seem that the newspapers are actually further away than a letter to the editor.

Another existing mechanism that journalists point to as an indication of the reader's ability to criticize performance is the newspaper's circulation, for they reason that if a reader is dissatisfied, he does not have to buy the newspaper.¹³⁸ Again, this is not an accurate reflection

132. Letter from James A. Clendinen, Editor of *The Tampa Tribune*, to John A. Ritter, Aug. 24, 1973, on file at the *Duke Law Journal*.

133. Balk 5.

134. LEVY 9.

135. Letter from James A. Clendinen, *supra* note 132.

136. Brown & Levy, *Letter to the Editor*, 1970 *JOURNALISM Q.* 454.

137. T. PETERSON, J. JENSEN & W. RIVERS, *supra* note 38, at 49.

138. Letter from Gloria N. Biggs, Editor and Publisher of the *Melbourne Evening*

of the reality of the situation, especially since there exists a growing concentration of ownership of an ever decreasing number of newspapers.¹³⁹ In most communities a reader does not have a second newspaper to choose, or if there is a second paper, it is often not a meaningful alternative for a dissatisfied reader.

Many journalists feel that a press council would inhibit editors.

The effect of a Press Council would be inhibiting on editors and would open an editorial prerogative to busybodies, no matter how well intentioned. We believe the best judge of our newspaper to be the reading public.¹⁴⁰

However, the absence of sanctions and the decisions to date should lead to the opposite conclusion. The fact that editors need not fear decisions limiting their prerogative is demonstrated by the *Long-Erickson* decision of the Minnesota Press Council. That decision encouraged editors to feel "free to express honest opinion of whatever sort" and stated that "it's for the reading public—not the Press Council—to distinguish between 'good' opinion and 'bad' opinion in newspaper editorials."¹⁴¹

It has also been suggested that press councils serve no purpose since responsible newspapers don't need a press council and irresponsible newspapers will ignore it.¹⁴² The experience of one responsible newspaper in Minnesota which thought it did not need a council is to the contrary. The editor of the *St. Paul Dispatch—Pioneer Press* takes advantage of an existing council by referring to it complaints that the newspaper is unable to resolve.¹⁴³ The former dean of the Columbia School of Journalism, Edward Barrett, also took this position when he stated "these experiments indicate that managements of reasonable character have nothing to fear and definitely something to gain."¹⁴⁴

Arthur Ochs Sulzberger, publisher of the *New York Times*, believes a press council lacks due process in its proceedings. When discussing the National News Council he wrote:

Council hearings would call into question the *Time's* [*sic*] credibility

Times, to John A. Ritter, Aug. 2, 1973, on file at the *Duke Law Journal*.

139. See note 6 *supra*.

140. Letter from Don Shoemaker, Editor of *The Miami Herald*, to John A. Ritter, Aug. 1, 1973, on file at the *Duke Law Journal*.

141. Minnesota Press Council Decision No. 5, at 9 (1973). See notes 73-78 *supra* and accompanying text.

142. Letter from James A. Clendinen, *supra* note 132.

143. Interview with John Finnegan, *supra* note 64.

144. Barrett, Book Review, *COLUM. JOURNALISM REV.*, Mar.-Apr., 1972, at 55.

under a procedure so lacking in due process that one organization would function as investigator, prosecutor and judge rolled into one.¹⁴⁵

However, it is submitted that Mr. Sulzberger is mistaken in his analogy to the elements of a criminal prosecution; a press council proceeding is more closely analogous to a civil or administrative proceeding. There is no prosecutor, only an allegedly injured party seeking redress against another party. The essential requirements for due process in a civil proceeding¹⁴⁶ or an administrative hearing,¹⁴⁷ notice and an opportunity to be heard, are provided. An examination of both the National News Council and the Minnesota Press Council discloses provisions that all parties to a grievance shall have the opportunity to appear in person, to give evidence, and to present testimony.¹⁴⁸ Two further elements of due process are granted by both Councils, the rights to counsel and to cross-examination.¹⁴⁹

One objection voiced by lawyers is the necessity of waiving all right to pending or future civil suits arising out of the subject matter of a press council complaint.¹⁵⁰ The requirement of a waiver of a cause of action is not completely foreign to American jurisprudence,¹⁵¹ but the question exists whether such a waiver is necessary or valid in the press council context. In point of fact, a waiver by the complainant of his right to legal action is vital to the success of a press council. Members of the news media would not cooperate with a council, and would even resist its inquiries, if they were simply participating in pre-trial discovery for future lawsuits.

Generally, waiver of a legal right such as the right to sue is valid if made voluntarily and with full knowledge of the law and facts.¹⁵²

145. *TIME*, *supra* note 131.

146. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

147. *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233 (1944).

148. See note 33 *supra*.

149. See note 33 *supra*.

150. See note 67 *supra*.

151. For example most workmen's compensation statutes require the employee to waive his right to sue except as provided by the statute. See *e.g.*, CAL. LABOR CODE § 3601 (Cumulative Supp., 1974), *amending* CAL. LABOR CODE § 3601 (West 1971); FLA. STAT. ANN. § 440.11(1) (Cumulative Supp., 1974); N.C. GEN. STAT. § 97-10.1 (1972).

152. See *Yates v. American Republics Corp.*, 163 F.2d 178 (10th Cir. 1947):

Waiver is the voluntary relinquishment or surrender of some known right.

Its constituent elements are an existing right; knowledge of such right; and an intention to relinquish or surrender it. *Id.* at 179.

Accord, *Brown v. Cranston*, 214 Cal. App. 2d 660, 668, 29 Cal. Rptr. 725, 729 (Dist. Ct. App. 1963); *Fireman's Fund Ins. Co. v. Vogel*, 195 So. 2d 20, 24 (Fla. Dist. Ct. App. 1967); *Beneficial Fin. Co. v. Norton*, 76 N.J. Super. 577, 581-82, 185 A.2d 218, 220-21 (1962).

Thus, before a press council accepts a party's waiver of his right to sue on the subject matter of his complaint, it should be sure that the party has consulted an attorney and is aware of his legal rights. A further requirement of some courts for a valid waiver is consideration or estoppel.¹⁵³ It is unlikely that consideration would exist in submission of a complaint to a press council unless the potential plaintiff can be said to receive consideration from the press council's examination of his complaint. However, an estoppel would undoubtedly be raised by the production of evidence by a respondent newspaper or broadcaster which has relied on the waiver.

A second objection raised by lawyers to press council procedure is the lack of a right of appeal. An examination of the Minnesota Press Council and the National News Council rules of procedure reveals that this objection has some basis. The Minnesota Press Council allows a party to submit responses to the recommendations of the Grievance Committee before consideration of recommendations by the full Press Council in order to correct errors of fact or law.¹⁵⁴ The rules of the Minnesota Press Council also provide for a discretionary appeal from a final decision in the limited cases of dismissal by the Grievance Committee, or from a report of the Council in a case where the party has not previously appeared before the Council concerning the case in question.¹⁵⁵ The National News Council provides only for a discretionary appeal within fifteen days from a final decision but does not limit this right as does the Minnesota Press Council.¹⁵⁶ In both Councils, a majority vote is necessary for a case to be reconsidered since the appeal is discretionary. Thus, the right-of-appeal objection has some merit since the appeal is limited in scope and must be considered by the same body which heard the case in the first instance.

153. See, e.g., *Chambers & Co. v. Equitable Life Assurance Soc'y of America*, 224 F.2d 338, 345 (5th Cir. 1955); *Peal v. Gulf Red Cedar Co.*, 15 Cal. App. 2d 196, 199, 59 P.2d 183, 184 (Dist. Ct. App. 1936); *Summer v. Fabregas*, 52 N.J. Super. 399, 409, 145 A.2d 659, 665 (1958); *In re Dimon's Estate*, 32 N.Y.S.2d 239, 243 (Sur. Ct. 1941).

154. Minnesota Press Council, Grievance Comm. Procedural Rule III.A.:

Each party will be given a period of ten days to submit responses to the recommendations [of the Grievance Committee] in writing before the consideration of the recommendations by the Press Council.

155. *Id.* Rule IV.A.:

Appeals from a dismissal by the Grievance Committee, or from a report of the Council in grievances where the parties have not previously appeared before the Council, will be permitted only at the discretion of the Press Council.

156. National News Council, Amended Rule 24:

Within fifteen days of the day the Council mails notice of its decision to the parties, a party may ask the Council to reopen the case for further consideration. The Council shall consider the request at its next regular meeting. The request shall be granted if it is favored by a majority of the Council members voting on the question at a meeting at which a quorum is present at the time of the vote.

A review of the journalists' and lawyers' objections to press councils shows them to contain some validity; however, the experience of the Minnesota and National Councils shows that in practice the problems anticipated by these objections have not materialized. The good points of press councils outweigh the bad, suggesting that local, regional, and state councils should be tried, at the very least, on an experimental basis.

CONCLUSION

The law can guarantee a free press, but it is incapable of guaranteeing a fair press. The journalism profession must recognize that while its enterprise is and should remain a private business, free from government regulation, its efforts to define and realize standards of performance are also a community concern. A mechanism is needed through which individuals who understand the complexities of modern journalism and members of the community can meet and discuss press performance and press responsibility. Their discussions should not be restrained by strict interpretations of the first amendment; elementary fairness and high journalistic standards should serve as their guides. A press council satisfies this need.