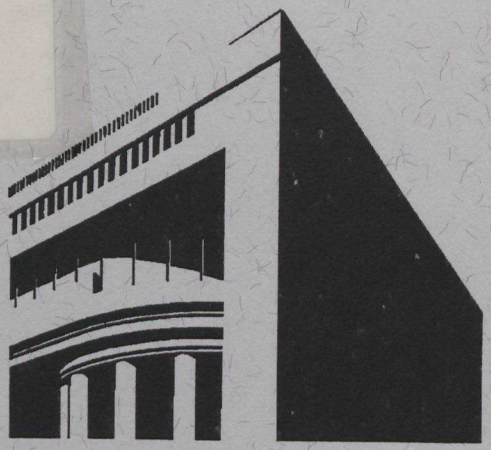

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Themes Promoting Community and Individualism in U.S. and Canadian Media Law and Journalistic Practice

Vernon Keel
Wichita State University, KS

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A paper presented at the First Biennial ACSUS in Canada Colloquium
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This paper provides an interim report on a project designed to explore themes promoting community or individualism in U.S. and Canadian media law and through journalistic practice. In particular, its focus is on the ways and the extent to which the law, the courts and the media in each country tend toward perspectives that favor the rights of individual journalists and media operations or that emphasize the values of community and the place of the media within the broader context of communities.

The first part of this paper examines the way courts in Canada and the United States have interpreted their respective constitutional provisions for freedom of expression by looking at themes in those judgments that appear to promote individualism or, more specifically, individual rights of the mass media on one hand, and community or societal interests on the other. These are not either-or distinctions, certainly, and as Greenawalt explains, the ways in which courts and legislatures approach these issues are influenced by legal traditions and broader cultural considerations as well as the practicing philosophy of the country, which can be highly individualistic or that can tend to emphasize the place of persons within communities.[1] While his analysis looks at free speech issues like flag burning, hate speech and campus speech codes, the focus of this project is on developments in the law that are more directly related to the operations of the mass media.

The second part of the paper begins to examine the influence of English and French traditions on journalism and journalistic practice in Canada in ways that are similar to or different from those in the United States, particularly with respect to how these approaches encourage community or individualism. This part grows out of some earlier work done by the author on English, French and American influences on professional values of journalists in the United States and Canada.[2]

Differences in the Canadian and American Experiences

Concerns about community, community-building and nation-building have been part of the Canadian experience from the beginning. Realities of history and geography have caused Canadians to be concerned about issues related to national unity, cultural identity, and foreign, mostly American, cultural influence through the media of mass communication. These concerns have resulted in various national communication policies, regulations, and controls which, in turn,

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[1] Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech.* (Princeton, N.J." Princeton University Press, 1995) at 7.

[2] Vernon A. Keel and Viateur Larouche, "Journalists in the United States, English Canada and Quebec: Beginning a Comparative Analysis." Paper presented at the Midwest Association for Canadian Studies, Northwestern University, September 1985.

have influenced the structure and performance of the Canadian media, resulting in a media system that is, while similar in many ways, unique and different from the one south of the border.[3]

Nation-building in the United States, on the other hand, has been a process based more on the values of independence and rugged individualism. The American media system developed on its own without government support or intervention and in response to changing social and economic situations, with little concern about forces or developments beyond national borders. It has not been until recently that scholars, community leaders and policy planners have begun to express concern about the breakdown in community and to search for solutions to problems of establishing and maintaining community as a means of dealing with problems of urban society. Established authors such as Arthur M. Schlesinger, Jr., for example, have called attention to these problems in the context of multiculturalism.[4] And in media circles, a recent call for a revision in journalistic practice to promote community through civic or public journalism has challenged the way responsible media report on and relate to the communities they serve.[5]

The Framework for Considering Differences

The framework for looking at differences in media law and journalistic practice in Canada and the United considers the manner and extent to which these forces of law and practice tend to promote individualism or, more specifically, individual rights of the mass media on one hand, and community or societal interests on the other. This is similar to the approach used by Greenawalt in his comparative legal analysis of free speech in the United States and Canada.[6] In particular, he looked at how the courts in the two countries dealt with controversial speech issues like flag burning, hate speech, campus speech codes, workplace harassment, and obscenity. While these were his main issues, he also considered court decisions related to campaign financing and medical advice about abortions to determine the extent to which legislatures and courts should focus on justice toward individuals or toward the health of communities.[7] In his chapter on individuals and communities, where he sorts through the differences between libertarian and communitarian political philosophies, he points out the complexity of what might appear to be a rather straightforward dichotomy between individuals and communities. His conclusion is that "Understanding the values of communities does not warrant disregard of individualist perspectives; rather communal and individualist perspectives should temper each other in sensitive constitutional

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[3] Many good works exist to describe and explain the development and structure of the Canadian media. See, for example: Helen Holmes and David Taras, *Seeing Ourselves: Media Power and Policy in Canada* (Toronto: Harcourt Brace Jovanovich, Canada, 1992); W. H. Kesterton, *A History of Journalism in Canada.* (Toronto: McClelland and Stewart, 1967); Marc Raboy, *Les Médias Québecois: Presse, radio, télévision, câblodistribution* (Boucherville, Québec: Gaëtan morin éditeur, 1992); Benjamin D. Singer, *Communications in Canadian Society* (Scarborough, Ontario: Nelson Canada, 1991); Herbert Strentz and Vernon Keel, "North America." The chapter on U.S. and Canadian Media in John C. Merrill, ed.,*Global Journalism: Survey of International Communication.* Third Edition (White Plains, N.Y.: Longman, 1995) at 355-394; and David Taras, *The Newsmakers: The Media's Influence on Canadian Politics* (Scarborough, Ontario: Nelson Canada, 1990).

[4] Arthur M. Schlesinger, Jr., *The Disuniting of America: Reflections on a Multicultural Society* (New York: W.W. Norton Company, 1992).

[5] See especially: Davis Merritt, *Public Journalism and Public Life: Why Telling the News Is Not Enough.* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1995); Jay Rosen, *Getting the Connections Right: Public Journalism and the Troubles in the Press* (New York: Twentieth Century Fund, 1995); Jay Rosen and Davis Merritt, Jr., *Public Journalism: Theory and Practice* (Dayton, OH: Kettering Foundation, 1994); and James Fallows, *Breaking the News: How the Media Undermine American Democracy* (New York: Pantheon Books, 1996).

[6] Greenawalt, *supra* note 1. See also Kent Greenawalt, "Free Speech in the United States and Canada," *Law and Contemporary Problems* 55, no. 1 (1992) at 5-33.

[7] Greenawalt, *supra* note 1, at 4.

adjudication.[8] More specifically, in cautioning against too firm a distinction between "individualism" and "community" in comparative legal analysis, he writes:

> "Liberal theory is rich enough to recognize the centrality of communities for human life; thus, genuine disagreements between thoughtful liberals and communitarians are much more subtle than any simple-minded account would propose. When thoughtful versions of competing points of view are applied to constitutional issues, differences are less stark than some rigid division of communitarian and individualist theories might suggest."[9]

With this in mind, our use of these concepts in attempting to compare developments in media law and standards of journalistic practice in Canada and the United States will be relative in terms of the extent to which variations in the law and the media in each country tend toward favoring the rights of the press and individual journalists or toward serving community or broader societal interests. While Greenawalt looked at developments in the law related to issues of free speech, our analysis compares developments in press law in the two countries and looks, as well, at how journalistic practices both reflect and affect broader social values and traditions.

Community and Individualism in the Law

While the legal systems in Canada and the United States share a similar tradition in English Common Law, their judicial and political traditions are different in important ways. For example, while their founding documents have some similarities, they reflect important differences in values and priorities. The American Declaration of Independence and its commitment to "Life, Liberty and the pursuit of Happiness" is contrasted to the British North America Act with its emphasis on the "Peace, Order and Good Government" of Canada. The former reflects an individualistic, anti-government theme while the latter reflects a trust in government and ambivalence toward personal freedom.[10] Lipset and Pool explain that while both nations seek to protect the rights of the individual while promoting and protecting the general welfare of the community, they "strike different balances, with Canada tipping toward the interests of the community, and the United States toward the individual."[11]

Also, the constitutional statements guaranteeing individual rights and freedoms are similar in many ways, but different in others. In particular, the American Bill of Rights provides no role for government in limiting basic freedoms while the Canadian Charter, particularly through Sections 1 and 33(1), reflects a tradition of parliamentary supremacy by specifying how federal and provincial parliaments can limit basic rights specified elsewhere in the document. And while the enumeration of rights and freedoms, including press freedom, are similar in the two documents, the firm American proscription against government from interfering with the rights to free speech by the press and public is quite different from the more positive provision in the Canadian Charter of Rights and Freedoms which, in Section 2(b), provides that everyone "has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication."

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[8] Id. at 149.

[9] Id. at 9.

[10] David Pritchard, "The Political Culture of Facts: Limits on Truthtelling in Canada and the United States," in Florian Sauvageau, ed., *Liberté de la presse et vie privée: Regards de l'étranger/Freedom of the Press versus Privacy: Views from Abroad* (Québec: Institut québecois de recherche sur la culture, 1996) at 11.

[11] Seymour Martin Lipset and Amy Bunger Pool., "Balancing the Individual and the Community: Canada versus the United States," *The Responsive Community*, Summer 1996, Vol. 6, Issue 3, at 37.

The guarantees for freedom of expression in the United States are found in the speech-press clause of the First Amendment. The language is quite specific in stating that "Congress shall make no law . . . abridging freedom of speech, or of the press." In 1925, the Supreme Court interpreted this provision to apply to the states through the "due process" clause of the Fourteenth Amendment.[12]

U.S. court interpretations have largely held in favor of promoting individual rights, both of citizens and of the press, against directly promoting interests of community or the broader societal good. At one extreme, the argument is made that the First Amendment was intended as a proscription against government in matters of free expression, including freedom of the press, and nowhere does it say the press must be responsible. Others argue that the broader societal interests are advanced by protecting these rights essential to the workings of a free democratic society. At the other extreme are those who argue that the speech-press clause requires an *ad hod balancing of interests*. Supreme Court Justice Brennan proposed a "two-tiered" approach to the First Amendment allowing for the application of a more absolutist "speech model" in some instances and a "structural model" in others when a balance of freedoms is more appropriate.[13]

In Canada, on the other hand, provisions of the more positive affirmation in Section 2(b) of the Charter of Rights and Freedoms are qualified in a manner that supports the broader community or societal interests through Section 1, which guarantees these freedoms but "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." According to Martin and Adam in their *Sourcebook of Canadian Median Law*, this substantially expanded the scope of judicial review in Canada by conferring on the courts "the additional and extraordinary power to examine whether contested legislation conforms to the values and declarations in the Charter."[14] Before that, the courts dealt mainly with questions of jurisdiction between the provinces and the federal government. Community interests in Canada are further accommodated in Section 33(1) of the Charter by allowing Federal Parliament or provincial legislatures to pass laws in compliance with Section 1 *notwithstanding* the protections of Section 2(b).

Despite these fundamental differences in the form and approach to press freedom and other basic rights in the two countries, an important emerging similarity is the expanding role the courts must play in defining and applying these protections. While this has long been the case in the United States, it is increasingly the case in Canada since enactment of the new Constitution in 1982 with its entrenched Charter of Rights and Freedoms. As Martin and Adam explain:

> "Canada's Constitution acquired some of the characteristics of the U.S. Constitution when the scope of judicial review was expanded so drastically. The Supreme Court of Canada began to exercise powers long held by the Supreme Court of the United States, this despite the fact that Canada purports to be a parliamentary democracy rather than a republic. Parliamentary democracies are marked by an acceptance of a basic constitutional rule that Parliament is supreme. The Canadian version of the principle, until 1982, was that Parliament was supreme in its domain and the provincial legislatures were supreme in theirs. From another

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[12] *Gitlow v. New York*, 268 U.S. 652 (1925).

[13] William J. Brennan, Jr., "The Symbiosis Between the Press and the Court," *The National Law Journal*, 2, no. 2, (October 29, 1979).

[14] Robert Martin and G. Stuart Adam, *A Sourcebook of Canadian Media Law. Second Edition* (Ottawa: Carleton University Press, 1994) at 71.

perspective, then, the Charter represents another step in the Americanization of our institutions."[15]

Even in light of Charter provisions for parliamentary or legislative exceptions to these guarantees, it is ultimately left to the courts to determine what are "reasonable limits prescribed law" that "can be justified in a free and democratic society," as required by Section 1. Just as the Supreme Court in the United States long ago established that the determination of what constitutes appropriate government limitations on freedoms "is clearly a judicial responsibility, not a legislative one,"[16] the new Charter has given to judges, and ultimately the Supreme Court of Canada, "the responsibility for weighing the merits of the conduct of elected bodies and governmental officials, both legislative and administrative, against the constitutionally protected elements of liberty."[17]

Balancing the Interests of Government and the Media

Several important provisions in the Canadian Charter of Rights and Freedoms give legislative bodies, both federal and provincial, authority to define the scope of these and other fundamental rights and freedoms specified in Sections 2-15. The first is the "application provision" in Section 32, which applies the Charter to the Parliament and government of Canada in respect to all mattes within Parliament's authority and to provincial legislatures and governments in respect to all matters within the legislative authority of each province. This legislative authority is limited in Section 24(1) by the right to apply to a court for an appropriate remedy by anyone whose rights or freedoms have been infringed or denied. More specifically, Sections 1 and 33(1) define the role of federal and provincial governments in balancing these fundamental rights against the broader needs and interests of society. Section 1 guarantees the rights and freedoms set out in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 33(1) allows Federal Parliament and provincial legislatures to pass laws that "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the Charter.

The language of Section 1 requires that any legislative action limiting the basic rights and freedoms guaranteed in the Charter must satisfy three general requirements. First, it must be a reasonable limit on the right or freedom being affected. Second, it must be demonstrably justifiable. And third, it must reflect the values of a free and democratic society.[18] Lepofsky lists four questions a court must ask when considering if an infringement on free expression is justified under Section 1: 1) Is the action of such pressing and substantial importance as to justify restricting free speech? 2) Does it achieve or promote its purpose? 3) Is this the option for achieving its

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[15] Robert Martin and G. Stuart Adam, *A Sourcebook of Canadian Media Law. Second Edition* (Ottawa: Carleton University Press, 1994) at 72.

[16] *Schenck v. U.S.*, 249 U.S. 47, at 52 (1919). "When a nation is at war many things that might be said in a time of peace are such a hindrance to its effort . . . that *no Court could regard them as protected by any constitutional right.*" [emphasis added]. For a more complete discussion of Justice Holmes' views on this point, see: "Holmes and the Judicial Role," Chapter 6 in Jeremy Cohen, *Congress Shall Make No Law: Oliver Wendell Holmes, the First Amendment, and Judicial Decision Making* (Ames: Iowa State University Press, 1989).

[17] Philip Anisman, "Application of the Charter: A Structural Approach," in Philip Anisman and Allen M. Linden, eds., *The Media, The Courts and The Charter* (Toronto: Carswell, 1986) at 21. See also David M. Lepofsky, "Open Justice 1990: The Constitutional Right to Attend and Report on Court Proceedings in Canada," in David Schneiderman, ed., *Freedom of Expression and The Charter* (Scarborough, Ont.: Thomson Professional Publishing Canada, 1991) at 184.

[18] Id. at 21.

objectives that impairs free speech as little as reasonably possible? and 4) Are the objectives proportional to their effects?[19]

In 1986 the Supreme Court of Canada identified two central criteria that must be satisfied in order to establish that a limit is allowable under Section 1. First, the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." Second, once such an objective is recognized, "the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified."[20] The Court elaborated on this second criterion in *R. v. Whyte* by explaining that a "proportionality test" must be met to show that the measures are reasonable and demonstrably justified.[21] The three parts of this test are:

1) The measures must be carefully designed to achieve the objective of the legislation, with a rational connection to the objective;
2) The measure should impair the right or freedom as little as possible; and
3) There must be proportionality between the effects of the impugned measures on the protected right and the attainment of the objective.[22]

The Court applied these rules to two cases directly involving freedom of expression under Section 2(b) of the Charter and ruled in one that an Alberta law prohibiting publication of certain materials from court proceedings was not justifiable under Section 1.[23] In the other, the Court ruled that an injunction restraining picketing and other activities calculated to interfere with the operations the court was justified by Section 1 of the Charter.[24] This decision caused one analyst to conclude that the court, in this decision, displaced and relegated the *Charter's* guarantee of freedom of expression to a constitutionally inferior position *vis-à-vis* other constitutional rights.[25] In the *Dolphin Delivery* case two years earlier, the Supreme Court recognized picketing as a constitutionally protected form of expression.[26]

Section 33, which allows the federal and provincial governments to pass laws that "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the Charter, offers a balance between judicial and legislative supremacy under the Charter.[27] Given the history of parliamentary supremacy in Canada, the language of this section seems to leave the last word to the legislatures while not indicating whether legislative action under this section is beyond judicial review. The major case testing the strength of this provision dealt with an act by the parliament of Quebec declaring that the rights and freedoms of the Charter do not apply to any legislation in Quebec.[28] Here, Superior Court Judge Deschênes identified four conditions of form imposed by Section 33 of the Charter: a) an express declaration; b) concerning an Act therein described; c) with

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[19] M. David Lepofsky, "Toward a Purposive Approach to Freedom of Expression and Its Limitations," in Frank E. McArdle, ed., *The Cambridge Lectures 1989* (Montreal: Les Editions Yvon Blais, 1990) at 5-6.

[20] *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138-139, referring to *R. v. Big M Drug Mart Ltd.* In separate cases, the Supreme Court twice ruled that certain provisions of Quebec's Bill 101, *The Charter of the French Language*, exceeded the limits of and were not justified under Section 1. See *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 and *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.

[21] [1988] 2 S.C.R. 3, at 20.

[22] Ibid.

[23] *Edmonton Journal v. Alta (A.G.)*, [1989] 2 S.C.R. 1326.

[24] *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214. The Court reached this conclusion even though the lower court record included an affidavit from a member of the Law Society of British Columbia explaining that the "picket line was orderly and peaceful" and that "Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers." At 221.

[25] D. Schneiderman. *supra* note 17, at xxiv.

[26] *R.W.D.S.U., Loc. 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [B.C.].

[27] Anisman, *supra* note 17, at 5.

[28] *Alliance des Professeurs de Montréal v. A.-G. Que.*, 5 D.L.R. (4th) 157 [1984].

respect to a given provision of ss. 2 or 7 to 15 of the Charter; and d) for a specified period.[29] Applying these conditions, he ruled that the Quebec legislature acted within the provisions of Section 33.

In the United States, balancing the protections of press freedom against the needs of government and society are played out differently because of different constitutional language and traditions. Despite the absolutist language of the First Amendment ("Congress shall make no law..."), few justices or legal scholars have taken a firm absolutist position in defining the limits of protected speech.[30] Justice Holmes, in fashioning his "clear and present danger" doctrine and arguing for the fullest possible protection for free expression, explained however that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[31] He further argued that determining whether an act constitutes a "clear and present danger" is clearly a judicial responsibility, not a legislative one.[32]

In attempting to clarify the poles of the debate between those arguing that First Amendment rights are absolute and those advocating a balancing of competing interests, Laurence Tribe provided useful context by offering a two-track approach for understanding the constitutional issues involved. In track one, "the absolutists essentially prevail" while in track two "the balancers are by and large victorious."[33]

Justice Brennan adapted this approach to media issues and the free press clause of the First Amendment in a 1979 speech at Rutgers University.[34] His two "tiers" or "tracks" take the form of "two distinct models of the role of the press in our society that claim the protection of the First Amendment."[35] The first, the "speech" model, protects the acts of speaking, publishing or broadcasting and "readily lends itself to the heady rhetoric of absolutism." This model fosters the values of democratic self-government.[36] The second model, the "structural" model, protects the press "when it performs all the myriad tasks necessary for it to gather and disseminate the news. Under this model, Brennan explained, "the court must weigh the effects of the imposition inhibiting press access against the social interests served by the imposition."[37] Justice Brennan felt compelled to offer this clarification in response to considerable press criticism over several recent Supreme Court decisions. In particular, he focused on recent Court decisions that failed to provide

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[29] Id. at 164. Concerning the fourth condition, s. 33(3) provides that "A declaration made under subsection (1) shall cease to have effect vie years after it comes into force or on such earlier date as may be specified in the declaration."

[30] One notable exception would be Justice Hugo Black. In a public interview with Professor Edmond Cahn, he explained: "I believe when our Founding Fathers, with their wisdom and patriotism, wrote this Amendment, they knew what they were talking about. They knew what history was behind them and they wanted to ordain in this country that Congress, elected by the people, should not tell the people what religion they should have or what they should believe or say or publish, and that is about it. It says 'no law,' and that is what I believe it means." In Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview,* 37 N.Y.U.L. Rev. 549 at 554 (1962). Cited in Everett E. Dennis, Donald M. Gillmor and David L. Grey, *Justice Black and the First Amendment: "'no law' means no law"* (Ames: Iowa State University Press, 1978). See also Harry Kalven, Jr., "Upon Rereading Mr. Justice Black on the First Amendment," 14 U.C.L.A. Law Review 428 (1967).

[31] *Schenck v. U.S.*, 249 U.S. 47, at 52 (1919).

[32] Ibid.

[33] Laurence H. Tribe, *American Constitutional Law,* Second Edition, (Mineola, NY: The Foundation Press, Inc., 1988) at 792.

[34] W. J. Brennan, Jr., *supra* note 13.

[35] Ibid.

[36] Ibid. At this point in his speech, Justice Brennan quotes Professor Zechariah Chafee: "[t]he First Amendment protects . . . a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way." Free Speech in the United States 33 (1946)."

[37] Ibid.

reporters with a constitutional privilege from having to testify,[38] that upheld a third-party search of a campus newspaper's newsroom,[39] and that required a media libel defendant to answer questions about his state of mind during the editorial process.[40] These activities, Justice Brennan explained, are among "the myriad tasks necessary for [the press] to gather and disseminate the news."[41] They come under the "structural" model and are deserving of qualified protection when balanced against other rights and needs. They must be distinguished from the more specific acts of publishing, included under the "speech" model, which are deserving of more absolute protection under the First Amendment.

The following section provides a summary of supreme court judgments in both countries dealing with the right to publish, which comes under what Justice Brennan would consider the more absolutist "speech" model. It is followed by a section that reviews several important areas of media law (public libel, false light privacy, journalist's privilege, media and the courts, and access to information), which come under Justice Brennan's "structural" model. The purpose is to determine how the courts in the United States and Canada have balanced individual constitutional protections for the media in these areas against broader interests of government, the courts and society.

The Basic Right to Publish

Both Canada and the United States have landmark decisions issued earlier in this century expressing a strong commitment to the principle of a free press, even though "freedom of the press" was not formally part of any constitutional document in Canada prior to the *Charter of Rights and Freedoms* in 1982.

In the United States, the Supreme Court's 1931 decision in *Near v. Minnesota*[42] still serves as guiding precedent in cases involving prior restraint by government.[43] Other decisions, like the one in the famous *Pentagon Papers* case,[44] reaffirmed the principles of *Near* and explained that the government "carries a heavy burden of showing justification" for the enforcement of any restraints on the press.[45] Later, in a case involving an unconstitutional judicial prior restraint, the Court explained that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[46]

In Canada, the landmark pre-Charter decision concerning freedom of the press is the *Alberta Press* case[47] decided in 1938, well in advance of even the original Canadian Bill of Rights

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[38] *Branzburg v. Hayes*, 408 U.S. 665 (1972).
[39] *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).
[40] *Herbert v. Lando*, 441 U.S. 153 (1979).
[41] Brennan, *supra* note 13.
[42] 283 U.S. 697 (1931).
[43] *Near* reaffirmed an important constitutional principle from a case six years earlier when the Supreme Court applied the First Amendment to the states through the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652.
[44] *New York Times v. United States*, 403 U.S. 713 (1971). See also *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), decided six weeks before *Pentagon Papers* where the Supreme Court reaffirmed that "Any prior restraint on expression comes to this Court with a 'heavy presumption against its constitutional validity." At 419.
[45] Ibid.
[46] *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 at 559. This was "the thread running through all these cases," referring to *Near v. Minnesota, Bantam Books, Inc. v. Sullivan, Organization for a Better Austin v. Keefe* and *New York Times v. U.S.*
[47] *Reference re Alberta Statutes*, [1938] S.C.R. 100 (S.C.C.).

in 1961. The case involved a bill introduced in the Alberta legislature requiring newspapers to disclose their sources of information and to print government statements to correct previous articles. Since, at that time, there was no constitutional guarantee of freedom of the press, the Court ruled not on the constitutionality of the so-called "Press Bill" but that the Alberta parliament did not have legislative jurisdiction.[48] More important, the Court issued a strong statement in support of free press guarantees: "Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the Government concerning matters of public interest. There must an untrammeled publication of the news and political opinions of the political parties contending for ascendancy."[49] Other pre-Charter decisions involving freedom of expression did not deal directly with the press but served to reaffirm the Court's view about the fundamental importance of informed public discussion free from interference by government.[50]

There is one important area of prior restraint law, however, where the supreme courts in the two countries have taken different positions. It has to do with the permissible reach of government in banning publication of truthful information, lawfully obtained. In the United States, the Supreme Court has ruled in several cases that rules or laws prohibiting the press from publishing such information are unconstitutional while rules against the release of such information are not.[51] In Canada, however, the Supreme Court took a different position in *Canadian Newspapers Co. v. Canada (A. G.).*[52] The case dealt with Section 442(3) of the *Criminal Code*, which permits the presiding judge in a sexual offense case to issue an order prohibiting the publication or broadcast of any information that could disclose the identity of the complainant. The Court ruled that such an order, limited to instances where the complainant or prosecutor requests it or the court considers it necessary, is justifiable under Section 1 of the *Charter* since the legislative objective of protecting the identity of the victim in such cases outweighs the media's rights under s. 2(b) of the *Charter.*[53]

More recently, an amendment in the *Canada Elections Act* of 1993 bans the publication of public opinion polls within the last 72 hours of a campaign.[54] The current legislation also makes it an offense for the media to report how the parties stand in opinion polls in the last three days of the campaign. While the Supreme Court has not been asked to rule on the constitutionality of such a ban, a bill in 1983 "of similar approach and identical purpose" was ruled unconstitutional by the Alberta Court of Queen's Bench.[55]

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[48] Clare Becton, "Freedom of the Press in Canada: Prior Restraints," in P. Anisman and A. M. Linden, eds., *supra* note 17, at 119.

[49] Alberta Press Case, *supra* note 47.

[50] See *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 (S.C.C.), a Jehovah's Witness case similar to the 1938 case of *Lovell v. Griffin* in the United States (303 U.S. 444); *Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.), "the Quebec padlock case"; and *Boucher v. The King*, [1951] S.C.R. 265 (S.C.C.).

[51] See *Cox Broadcasting Corp. v Cohn*, 420 U.S. 469 (1975), the state cannot punish the media for disseminating the name of a rape victim acquired from a document introduced during trial; *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the press cannot be stopped from publishing information when reporters are allowed to attend a juvenile court proceeding; *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the state cannot punish the press for publishing the name of a juvenile offender acquired from police sources; and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a newspaper cannot be punished for publishing the name of a rape victim released y the sheriff's department.

[52] [1988) 2 S.C.R. 122.

[53] Id. at 124.

[54] See J. Andrew Fraser, "The Blackout of Opinion Polls: An Assault on Popular Sovereignty," 4 *Media and Communications Law Review* (1993-95), at 365-403, citing R.S.C. 1985, c E-2 and explaining at 365 that "The amendments came via Bill C-114, *An Act to Amend the Canada Elections Act*, 3d Sess., 34th Parl., 1993 (S.C. 1993, c. 19)."

[55] "The gag slips quietly into place," *The Globe and Mail*, May 18, 1993, A22.

Qualifying Media Rights

Public Libel and False Light Privacy

The Supreme Court of the United States has constitutionalized a major part of defamation law and extended this approach to a branch of privacy law known as false light privacy.[56] Before 1964 and the Court's decision in *New York Times v. Sullivan,*[57] the Supreme Court had considered defamatory publication to be outside protection of the First Amendment.[58] With that decision, however, the Court ruled that the principle of "strict liability" would not apply to elected public officials seeking to recover damages for libel. Instead, they would have to meet a new national, uniform standard of fault by having to prove "actual malice", which Justice Brennan defined as publication "with knowledge that it was false or with reckless disregard of whether it was false or not."[59] He went on to explain:

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[60]

The Supreme Court extended these principles to false light privacy by requiring that plaintiffs presented in a false manner by the media must meet the actual malice fault standard to collect damages under privacy law.[61] In *Time Inc. v. Hill,*[62] Justice Brennan extended the *New York Times v. Sullivan* rule to require the victim of a hostage-taking to show that his portrayal in a false manner by the media defendant was done deliberately or with reckless falsity. In another key

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[56] Putting the Plaintiff in a False Light: One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matte and the false light in which the other would be placed." See Stuart M. Speiser, Charles F. Krause and Alfred W. Gans, *The American Law of Torts,* Volume 8. (New York: Clark, Boardman, Callaghan, 1991).

[57] 376 U.S. 254 (1964).

[58] See *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942) and *Beauharnais v. Illinois,* 343 U.S. 250, 266 (1952). Before *New York Times v. Sullivan,* the Court specifically ruled in *Roth v. United States* (354 U.S. 476, 1957), that some expression, including obscenity, was unprotected. This gave new significance to the concept of a two-tiered theory of the First Amendment (Jerome A. Barron and C. Thomas Dienes, *Handbook of Free Speech and Free Press.* Boston: Little Brown and Company, 1979, at 222.)

[59] Id. at 280.

[60] Id. at 270. The Court later applied this rule to appointed public officials (*Rosenblatt v. Baer,* 383 U.S. 75, 1966) and to public figures. (*Curtis Publishing Co. v Butts* and *Associated Press v. Walker,* 388 U.S. 130, 1967). In 1971 it abandoned the distinction between public and private persons and extended this requirement to all libel plaintiffs if the issue they were involved in was a public issue or involved matters of public interest (*Rosenbloom v. Metromedia,* 403 U.S. 29, 1971). Three years later, however, it returned to the distinction between private and public person plaintiffs in libel action but required that private persons meet a lesser standard of negligence unless they wished to collect punitive damages, which would require proving actual malice (*Gertz v. Robert Welch,* 418 U.S. 323, 1974).

[61] This branch of the tort of privacy is, as one writer put it, a combination of weak defamation and weak privacy. While the plaintiff is presented in a false manner, it is not serious enough to cause damage to reputation and be actionable under libel law. And if the presentation is true, it is not sufficient to cause injury under the embarrassing private facts branch of privacy law. Marc Franklin, "An Introduction to American Press Law" in P. Anisman and A. M. Linden, eds., *supra* note 17, at 87.

[62] 385 U.S. 374 (1967).

case, *Cantrell v. Forest City Publishing Co.*,[63] the court extended the same requirement to the private person survivor of an accident victim. The extent to which these developments parallel those in the public law of libel is not clear,[64] mainly on the question of whether private-person plaintiffs in a false light privacy suit can meet a lesser fault standard of negligence, for example, or whether they must establish that their portrayal in a false light was done with knowledge or reckless disregard (the *Sullivan* rule).

Canadian courts have not adopted the American approach to the "public law of libel."[65] In a recent case, *Hill v. Church of Scientology*,[66] the Supreme Court of Canada was asked in arguments by the appellants to adopt the actual malice rule from the United States, but the Court declined. Justice Cory, writing for the majority, reviewed the development of this standard in the United States, including critiques of the actual malice rule, and explained how the courts in England and Australia had refused to adopt it.[67] He concluded that "None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar.[68] His conclusion was that "the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it."[69] Earlier in his opinion, he refused to separate an individual's public and private rights to recover damage to reputation.

> The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. To accept the appellants' position would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society. Government employment cannot be a basis for such a distinction. Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment.[70]

In the end, by continuing intact the English common law tradition in civil libel, the Canadian Supreme Court keeps Canada more in line with other Western democracies, which set themselves apart from the American tradition that grants considerable protection to the news media to comment on government and criticize public officials and public figures with less fear of being successfully challenged under libel law.

Similarly, the Canadian Supreme Court has never acknowledged false light privacy, which is a uniquely American judicial development. Nothing quite like it exists in Canadian law. Section 181 of the Criminal Code makes it an offense to knowingly publish false news which causes or is likely to cause injury or mischief to a public interest.[71] Several of the provinces have some form of

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[63] 419 U.S. 245 (1974).

[64] See J. A. Barron and C. T. Dienes, *supra* note 58, at 380-384.

[65] See Thomas A., Hughes, "The Actual Malice Rule: Why Canada Rejected the American Approach to Libel." Paper presented at the annual convention of the Association for Education in Journalism and Mass Communication, Anaheim, California, August 1996.

[66] [1995] 2 S.C.R. 1130.

[67] Id., at 1180 to 1187.

[68] Id., at 1188. He went on to explain that this case does not involve the media or political commentary about government policies, that a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations, and that in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

[69] Ibid.

[70] Id. at 1161.

[71] M. G. Crawford, *The Journalist's Legal Guide*, Second Edition (Toronto: Carswell, 1990) at 275. Crawford also notes that the Broadcasting Act makes it an offense to spread false or misleading news, citing *Radio Regulations, 1986*, SOR/86-982, s. 5(1) and *Television Broadcasting Regulations*, SOR/87-49, s. 5(1).

statutory protection for invasion of privacy.[72] British Columbia, Manitoba and Saskatchewan, for example, have similar laws making it a tort, actionable without having to prove damage, to invade another person's privacy willfully and without claim of right. In Quebec, the plaintiff must prove fault, damage, and a causal link between the fault of the defendant and the damage suffered. These laws, however, deal mainly with the more traditional areas of privacy, including intrusion and trespass. Any action for damages resulting from a false light portrayal would have to be sought under defamation law with the requirement of proof of damage to reputation.

Journalist's Privilege

Neither Canadian nor American courts have been willing to grant journalists the same common law privilege from having to testify as is provided for doctor-patient, lawyer-client and priest-penitent communications. In both countries, the general rule is that journalists will not be offered absolute protection from having to disclose the identity of a source or confidential information if it is considered relevant and necessary. There are differences, however, in the constitutional and statutory considerations between the two legal systems.[73]

In the U.S. Supreme Court's 1972 decision in *Branzburg v. Hayes*[74] dealt specifically with the application of a First Amendment privilege for journalists from having to testify when confidential sources or information is involved. While the Court failed in this case to extend such constitutional protections, the split vote (4-1-4) and the lengthy majority opinion by Justice White left open the door for state and federal courts to find some degree of privilege under the First Amendment. The swing vote and short opinion by Justice Powell, who agreed with much of what was included in the opinions on both side, agreed that there were times when such a constitutional shield would be allowed if a legitimate First Amendment interest was involved. Most significant was the dissenting opinion by Justice Stewart who offered a three-part test that is used in state and federal courts in applying federal or state common law protection or statutory protection under a state "shield" law. The test requires:

1) Probable cause to believe the journalist has relevant information;
2) The information sought cannot be obtained in another way less injurious of the First Amendment; and
3) There is a compelling and overriding interest in the information.[75]

The issue of journalist's privilege had not been dealt with by the Supreme Court of Canada until 1989, when it decided a case similar in many ways to *Branzburg v. Hayes*. In *Moysa v. Alberta (Labour Relations Board)*[76] a reporter for the *Edmonton Journal* refused to identify her sources of information, claiming confidential privilege protection under common law and the Canadian Charter. The Court affirmed the decision of the two lower courts that the reporter in this case had no special privilege to refuse to testify before the labour board. While the Court did not

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[72] Id., at 94-106.

[73] In the United States, a constitutional or federal common law privilege for journalists from having to reveal confidential sources or materials has been recognized by all but one of the federal courts of appeal, and similar protections have been established under either state constitutional or statutory law in all but six states. Donald M. Gillmor, Jerome A. Barron, Todd F. Simon and Herbert A. Terry, *Fundamentals of Mass Communication Law* (Minneapolis/St. Paul, Mn.: West Publishing Co., 1996) at 125 and 131-132.

[74] 408 U.S. 665 (1972).

[75] Id at 743. The only other Supreme Court decision directly involving journalist's privilege since *Branzburg v. Hayes* is *Cohen v. Cowles Media Co.* (501 U.S. 663, 1992), but this case was about the legal consequences of the news media breaking a promise of confidentiality, not the protection of source identities Gillmor, et. al., *supra* note 73, at 130.

[76] [1989] 1 S.C.R. 1572.

feel compelled by the facts of the case to address the "broad and important constitutional questions" before it, Justice Sopinka in his opinion for the majority did refer to an earlier pre-Charter decision[77] when the Court acknowledged the four criteria cited by Wigmore for when a privilege for confidential privilege should be granted.[78] It is likely that the Wigmore test will play an important role when and if the Court is presented with the right case requiring a consideration of the constitutional questions not addressed in *Moysa*. However, from Justice Sopinka's opinion, news media appellants can expect to have to establish with evidence that a direct link exists "between testimonial compulsion and a 'drying-up' of news sources."[79]

The Issue of Newsroom Searches. Journalists in both Canada and the United States have had to deal with unfavorable high court decisions upholding the constitutionality of third-party newsroom searches. In the United States, the Supreme Court ruled that a warrant authorizing the search of a newspaper's newsroom (a third-party or innocent-party search) to find evidence to help authorities identify individuals being sought for unlawful activity was not an unconstitutional violation of the newspaper's First Amendment rights.[80] The result was passage several years later of the Federal Newsroom Search Bill that prohibited such searches except in the most extreme circumstances.[81]

A year before the *Stanford Daily* decision, a British Columbia court quashed a search warrant authorizing federal officials to search the offices of a newspaper for information about individuals whose picketing activities had interfered with and inquiry.[82] The Court's ruling in this pre-Charter decision was based on "freedom of the press" rights included in the Canadian Bill of Rights that was enacted by Parliament in 1961. However, the Supreme Court of Canada took a different view in two post-Charter decisions when it ruled in 1991 that separate warrants to search CBC newsrooms did not violate the media's rights under s. 2(b) of the Charter of Rights and Freedoms.[83] Justice Cory, in his majority opinion in *New Brunswick* explained that the justice of the peace, in issuing such an order, should "ensure that a balance is struck between the competing interests of the state . . . and the right of the media in the course of their news gathering and news dissemination."[84] However, since the Court upheld both search warrants, observers have concluded that the media in Canada have little more protection from third party search warrants than do individual citizens.[85]

Media and the Courts

No area of media law has attracted more attention by the courts in both countries than the one involving the relationship between the media and the courts. This area directly involves the conflict of constitutional guarantees: freedom of the press and its companion need to gather

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[77] *Slavutych v. Baker*, (1975), 55 D.L.R. (3d) 224 (S.C.C.)

[78] Wigmore's four criteria are: 1) The communications must originate in a confidence that they will not be disclosed; 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; 3) The relations must be one which in the opinion of the community ought to be sedulously fostered; and 4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. From Crawford, *supra* note 71, at 68-69, citing *Wigmore On Evidence*, 3rd ed., (McNaughton Revision, (1961), para. 2285.

[79] *Moysa, supra* note 76, at 1581.

[80] *Zurcher v. The Stanford Daily* , 436 U.S. 547 (1978).

[81] Privacy Protection Act (18 U.S.C.A. § 793 ff).

[82] *Pacific Press Ltd. v. R.*, [1977] 5 W.W.R. 507 (B.C.S.C.).

[83] *CBC v. Lessard*, [1991] 3 S.C.R. 421 and *CBC v. New Brunswick (A.G.)*, [1991] 3 S.C.R. 459. Both judgments were released together on November 14, 1991.

[84] *New Brunswick*, Id., at 481.

[85] See Paul B. Schabas, "Search Warrants of Media Organizations: Chilling Effects or Good Citizenship?" 3 *Media and Communications Law Review* (1992-93), at 253-264.

information and cover government, including the courts, and the defendant's constitutional right to a fair trial. In the United States, the conflict is between the First and Sixth Amendments. In Canada, it is the conflict between freedom of the press and other media of communication in Section 2(b) and the right to a fair and public hearing in Section 11(d) of the Charter of Rights and Freedoms.

The first time the U.S. Supreme Court overturned a criminal conviction because of prejudicial pre-trial publicity was in its 1961 decision in *Irvin v. Dowd.*[86] Five years later, in *Sheppard v. Maxwell,*[87] the Court overturned another conviction and was critical of the state trial judge for not having been a better master of his own courtroom. This was instruction and a warning to all trial judges to better use all the instruments at their disposal to assure the defendant's constitutional right to a fair trial. Ten years later, in *Nebraska Press Association v. Stuart,*[88] the Court ruled that a trial judge had gone too far in issuing a restraining order against the news media (a "gag" order) to prevent coverage of a murder trial and that he had thus violated the constitutional rights of the press. If the news media could not be restrained from covering court proceedings, the next solution judges tried to assure the defendant's right to a fair trial was to close the trial to the press and the public. In 1979 and 1980, the Supreme Court issued two decisions ruling that pre-trial proceedings could be closed to protect the Sixth Amendment rights of the defendant,[89] but that criminal trials could not be closed because to do so would violate the First Amendment rights of the press and the public.[90]

In Canada, prior to the enactment of the Charter of Rights in 1982, the rights of individuals and the media to attend and report on court proceedings were much more limited than was the case south of the border.[91] Since then, however, the courts in Canada have issued important decisions that have expanded these rights considerably, but still not to the extent that the courts have in the United States. For example, trial court judges in Canada still have considerable authority to restrain the publication of certain information arising from hearings (publication of evidence tendered in a preliminary hearing is usually banned until after a full trial can be held before an unbiased jury),[92] and journalists have no general right of access to court documents unless specifically provided by statute or court rule.[93]

During the first year of the new Charter, the Ontario Court of Appeal, in a decision that is similar in some ways to *Richmond Newspapers v. Virginia,* ruled that an absolute ban on the press and public from attending court proceedings was a violation of Section 2(b). While recognizing that the guarantee of freedom of the press is not absolute, the Court acknowledged that "There can be no doubt that the openness of the courts to the public is one of the hallmarks of a democratic society. Public accessibility to the courts was and is a felt necessity; it is a restraint on arbitrary action by those who govern and by the powerful."[94] It concluded, however, that while

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[86] 366 U.S. 717 (1961).

[87] 384 U.S. 333 (1966).

[88] 427 U.S. 539 (1976).

[89] *Gannett v. DePasquale,* 443 U.S. 368 (1979).

[90] *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980). Two later Supreme Court decisions firmly established the constitutional right of the news media to attend and report on proceedings of almost all types. In *Globe Newspaper Co. v. Superior Court* (457 U.S. 596, 1982), the Court struck down a Massachusetts law requiring closure during testimony of a rape victim under 18 years of age, ruling that automatic closure of proceedings is unconstitutional. Justice Brennan, for the majority, adopted a compelling interest test requiring that closure must be considered on a case-by-case basis on its own merits. In *Press-Enterprise v. Riverside County Superior Court* (478 U.S. 1, 1986). the Court expanded the right of access to pre-trial proceedings.

[91] Lepofsky, *supra* note 17, at 75.

[92] M. Crawford, *supra* note 71, at 133.

[93] Id., at 169.

[94] *Re Southam Inc. and the Queen (No. 1),* 3 C.C.C. (3d) 515 at 521.

absolute bans excluding the press and public from court proceedings did not constitute a reasonable limit while closures requiring judicial discretion would be allowed under Section 1 of the Charter. The Supreme Court of Canada offered further instruction in the application of Section 1 in matters relating to the courts in one ruling that struck down an Alberta law prohibiting publication of materials from court proceedings, ruling that such limits were not justified under Section 1.[95] In another decision, the Supreme Court ruled that an injunction restraining picketing and other activities calculated to interfere with the operations of the court was justified under Section 1, even though the lower court record included an affidavit from a member of the Law Society of British Columbia explaining that the "picket line was orderly and peaceful" and that "Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers."[96] Further, in *Canadian Newspapers Co. v. Canada (A.G.),*[97] the Supreme Court held that a mandatory ban on publishing the identity of a sexual assault victim was allowed under Section 1 since it was required to achieve Parliament's objective of facilitating complaints by victims of sexual assaults.[98]

In a recent decision, the Canadian Supreme Court set aside a ban on CBC from broadcasting a fictional account of sexual and physical abuse of children during a trial in Ontario with similar facts and circumstances.[99] While ruling that such a ban did not meet the "reasonable limits" test of s. 1, the majority justices offered an interesting observation about differences between the Canadian and American constitutional approaches to issues like this: "Publication bans, however, should not always be seen as a clash between freedom of expression for the media and the right to a fair trial for the accused. The clash model is more suited to the American constitutional context and should be rejected in Canada."[100]

Access to Information

In both Canada and the United States, the issue of access to government information, to government proceedings, and to government institutions has been played out mainly in the legislative arena. The exception, of course, is the matter of access to judicial proceedings and court documents, discussed in a previous section.

In the United States, rights of access to federal government are provided by the Federal Public Records Law (Freedom of Information Act), which came into effect in 1967, and the Federal Open Meetings Law (Government-in-Sunshine Act) passed by Congress ten years later. The 1974 Federal Privacy Act protects the privacy of government data on individuals and provides individuals a right of access to information about them created and stored by federal agencies.[101] All states have open records laws, and every state has some form of statutory or constitutional right of access to public meetings.

The Supreme Court has issued several important decisions over the years that address the issue of a constitutional access to government and government information through the First Amendment. In *Branzburg v. Hayes,* for example, the Court explained that "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access

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[95] *Edmonton Journal v. Alta. (A.G.),* [1989] 2 S.C.R. 1326. Earlier, the Ontario Supreme Court ruled that Section 2(b) of the Charter does not confer on the media any general constitutional right to compel access to Court documents which they deem newsworthy. *R. v. Thomson Newspapers,* (1984) 4 C.R.D. 525.40-01 (S.C.O.)

[96] *B.C.G.E.U. v. British Columbia (A.G.),* [1988] 2 S.C.R. 214, at 221.

[97] [1988] 2 S.C.R. 122.

[98] M. Crawford, *supra* note 71, at 9.

[99] *Dagnais v. CBC,* [1994] 3 S.C.R. 835.

[100] *Id.* at 839.

[101] Gillmor, et. al., *supra* note 73, at 203.

to information not available to the pubic generally."[102] In *Pell v. Procunier,* involving the question of whether the press has rights of access to prisons exceeding those of ordinary citizens, the Court rejected any "constitutional right of access to prisons or their inmates beyond that afforded the general public,"[103] and reiterated that "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."[104] In *Houchins v. KQED, Inc.,* the Court dealt specifically with the question of whether the First Amendment affords the press or the public any constitutional right of access to government, and Chief Justice Burger, writing for the majority, concluded: "Neither the First Amendment nor Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[105]

With the Access to Information Act[106] in 1983, Canada joined the United States in providing a federal statutory right of access to government information. In addition, Manitoba, New Brunswick, Nova Scotia, Ontario and Quebec provide statutory access to government information in those provinces. All of the provinces but Prince Edward Island recognize a right to attend meetings of government bodies. The general, but unwritten, presumption in law in Canada is that the public should have access to meetings or hearings of official bodies acting on behalf of the public.[107] Except as concerns the right of the public to attend judicial proceedings and have access to court records, discussed in a previous section, the Supreme Court of Canada has, to date, issued no opinions commenting on a constitutional right of access to government by the press and public under Section 2(b) of the Charter of Rights and Freedoms. However, an important principle coming out of those decisions, well developed by the Supreme Court in the United States, is that the news media in Canada do not have any greater privileges than the average citizen, although the courts have recognized that the news media do serve as representatives of the public.[108]

Differences in Journalistic Practice

In order to make some generalized comparisons of journalists and journalistic practice in the United States, English Canada and Quebec, it is necessary to indulge in some oversimplifications about groups which, in themselves, tend to be rather complex and diverse. Lysiane Gagnon, in her discussion of "Journalism and Ideologies in Quebec,"[109] offers a useful starting point by reviewing the classic work by Siebert, Peterson and Schramm on The Four Theories of the Press,[110] which provides a framework for generalizing about differences between these three groups of journalists in North America.

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[102] 408 U.S. 665 (1972), at 684, citing several cases, including *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965) and *New York Times Co. v United States* 403 US. 713, 728-730 (1971).

[103] 417 U.S. 817 (1974), at 834.

[104] Ibid. See, also, *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974), which follows the same reasoning used in *Pell.*

[105] 438 U.S. 1 (1978) at 15. In *Stahl v. Oklahoma,* 665 P.2d 839 (Okla.Cr. 1983), the Supreme Court let stand an Oklahoma Court of Criminal Appeals ruling that there is no First Amendment protection for newsgathering trespassers, and that journalists do not have a constitutional right of special access not available to the public generally. (464 U.S. 1069 (1984)).

[106] Access to Information Act, ch. 11, 1980-1982 Can. Stat. 3321.

[107] Crawford, *supra* note 71, at 153.

[108] Id., at 3.

[109] Lysiane Gagnon, "Journalism and Ideologies in Québec,"*The Journalists*, Volume 2, Royal Commission on Newspapers (Ottawa: Supply and Services, 1981) at 19-39.

[110] Fred S. Siebert, Theodore Peterson, and Wilbur Schramm, *Four Theories of the Press* (Urbana: University of Illinois Press) 1956.

While the so-called "social responsibility" theory of the press grew out of the 1947 report of the Hutchins Commission on Freedom of the Press in the United States,[111] American journalists have tended not to accept its basic premise which calls for government intervention when and if the media fail to act responsibly.[112] For the most part, they continue to subscribe to the more libertarian view and its imperative that the press be free from government control and influence. However, the most recent national survey of journalists in the United States reveals a shift in the perceived functions of journalism favoring some of the original recommendations of the Hutchins Commission. As Weaver and Wilhoit explain, "most journalists in 1992 appeared to have a 'belief system' that reflected the Commission's goal of investigating 'the truth about the fact[s]' and providing 'a context which gives them meaning.'"[113]

Concerning the appropriate role for government, journalists in English Canada, who share British traditions allowing for more government secrecy and control of information and the reporting of information,[114] are more tolerant than their American counterparts of government intervention and control. And by further comparison, journalists on French-language media in Quebec subscribe even more to the tenants of the social responsibility theory and are willing to accept an even greater role for government involvement in media matters to assure the public's right to information.[115]

According to Fulford, English Canadian journalists have inherited most of their techniques from Britain and the United States,[116] except for the extensive foreign correspondence of British journalism and the investigative reporting in the United States.[117] Further, and perhaps more important, is his observation that English Canadian newspapers tend to mix elements of British and American heritage and share the ideal which involves truth, completeness and justice.[118] Explaining that English Canadian journalists seek "to report the truth," Fulford quotes publisher Stuart Keate who wrote that "Any publisher, editor or reporter worth his salt recognized that he has only one basic duty to perform: to dig for the truth; to write it in language people can understand; and to resist all impediments to its publication.[119]

While changes in English Canadian journalism during this century have paralleled similar changes in the United States, journalism in Quebec has been more influenced by French models that include government distribution agencies, newspapers with more readily-identifiable

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[111]Commission on Freedom of the Press, *A Free and Responsible Press* (Chicago: University of Chicago Press, 1947).

[112] Siebert, Peterson, and Schramm, *supra* note 110, at 5. ". . . the power and near monopoly of the media impose on them an obligation to be socially responsible, to see that all sides are fairly presented and that the public has enough information to decide; and if the media do not take on themselves such responsibility, it may be necessary for some other agency of the public to enforce it."

[113] David H. Weaver and G. Cleveland Wilhoit, *The American Journalist in the 1990s: U.S. Newspeople at the End of an Era* (Mahwah, N.J: Lawrence Erlbaum Associates, 1996) at 138.

[114] Wilfred Kesterton, "Government Secrecy," an unpublished paper for students in his communication law classes at Carleton University in Ottawa. See also Wilfred Kesterton, "Secrecy and Openness in Three Canadian Media-Related Situations," a paper presented at the annual convention of the Canadian Commnication Association, Halifax, Nova Scotia, May 1981,

[115] Gagnon, 1981, *supra* note 109, at 32. See also Florian Sauvageau, "Auto-contrôle ou législaation: de Charybde en Scylla?" in Florian Sauvageau, Gilles Lesage et Jean de Bonville, eds., *Les Journalistes: Dans les coulisses de l'information*. (Quebec/Amérique, 1980), at 337.

[116] Robert Fulford, "A sort of reckless courage," in *The Journalists*, Volume 2, Royal Commission on Newspapers (Ottawa: Supply and Services, 1981), at 14.

[117] Id. at 16.

[118] Id. at 17.

[119] Id. at 3.

political leanings, and greater acceptance of government intervention in media affairs.[120] The latter is linked to the basic tenant of the social responsibility theory of the press which, according to Gagnon, has become more accepted by journalists in the province of Quebec than anywhere else in North America. One of the recent presidents of Quebec's federation of professional journalists, supported this observation by writing: "Now that they have acquired the conditions under which they may practice their profession with dignity, never have they (Québec journalists) been so preoccupied by their responsibilities.[121]

Gagnon further explains that the notion of freedom of the press, which was widely accepted by Quebec journalists in the 1940s and 1950s, has given way to a more complex concept of the public's "right to know," and that this has enjoyed considerable success in Quebec, certainly more than it has in English Canada and, with even more reason, the United States.[122] Part of the explanation for this has to do with the French traditions and perspectives which place a greater value on collectivism over individualism. As Siebert, Peterson and Schramm explain in their classic work, the social responsibility theory is "in closer harmony with a collectivist theory of society than with the individualistic theory from which the libertarian system sprang."[123]

Other ways in which the French tradition has contributed to differences between French and English journalism and journalists in Canada include: the emphasis on analysis over simple reporting of facts; the tendency to treat matters conceptually rather than in terms of people and events; the need to rationalize; and a greater personalization of articles and editorials.[124] This is not to say that Quebec journalists are less committed to the facts and to being factual. A recent study by Pritchard and Sauvageau, for example, found that Quebec journalists are more likely than other Canadian journalists to think that it is important to accurately report comments from news sources.[125] Similarly, an earlier study by Langlois and Sauvageau, which also documented this commitment to the facts, found there to be considerable variation among newspaper journalists in Quebec.[126]

Concerning the greater personalization of articles and editorials, mentioned above, Siegel found in his study of the coverage of the FLQ crisis in 1970 that the French-language papers tended to project an image of self-importance in a variety of ways including "frequent reference to media and journalists; personalized coverage which, at times, included the raising of rhetorical questions which they then proceeded to answer; and editorials written in the first person."[127] Another conclusion he reached points to still another important difference between journalism in English and French Canada. Following a comparison of coverage of several major issues or events as well as a comparison of French and English broadcasting, Siegel found a homogeneity of outlook in the French press system.

> "Of particular interest is the leadership role in French-Canadian society in which French-language journalists see themselves. The articulation of a clearly defined

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[120] Gagnon, 1981, *supra* note 109, at 24.

[121] Réal Barnabé, "Journalism in Quebec: Open-Minded and Rigorous," *Canadian Journal of Communication*, 14:2 (1989), at 55.

[122] Id. at 23.

[123] Siebert, Peterson, Schramm, *supra* note 110, at 82.

[124] Gagnon, *supra* note 109, at 28.

[125] David Pritchard and Florian Sauvageau, "The Journalists and Journalism of Canada," Unpublished paper, 1996, at 21.

[126] Simon Langlois and Florian Sauvageau, "Les journalistes des quotidiens québecois et leur métier," *Politique*, Vol. 1, No. 2, 1982, at 5-39. The authors identified newspaper journalists as being in one of four groups: Reporters, 32 percent; Investiagtors/Analysts, 31 percent; Educators, 21 percent; and Seducers (entertainers), 15 percent.

[127] Arthur Siegel, "The Quebec Media and Canadian Unity," in Caldwell and Waddell, eds., *The English of Québec*. (Québec: L'Institut québecois de recherche sur la culture, 1982), at 333.

> value system is evident in French-language journalism, a practice that goes back a long time.[128]

He found no such uniformity of outlook on the part of the English press which, he termed "fragmented." His conclusion is reinforced by David Thomas, an English-speaking journalist from Quebec: "Unity of thought was, and remains, infinitely more obvious in Quebec's French-language media--a phenomenon implicitly recognized by politicians and journalists who repeatedly point to the harsher treatment accorded the government by the English media."[129]

Dominque Clift, a Montreal author and free-lance journalist who worked for major Canadian newspapers in both French and English Canada, characterized this uniformity of French-language journalists in a different way: the way in which they viewed themselves and their role in Quebec society. In his article, "Solidarity on a Pedestal: French Journalism in Quebec," he charged that "French journalists see for themselves a much more exalted role in society than do their English-speaking counterparts," adding that: "It is in the actual practice of journalism that French and English writers differ in the most pronounced manner. It has to do with the way in which journalists look upon themselves, their profession, their public, as well as on their employers."[130]

But Florian Sauvageau, in his more systematic study of journalists on French-language dailies in Quebec, could find no such homogeneity in Quebec's journalistic circles. Instead, he found changes in Quebec media to parallel those in the modern corporate media of North America. Among those include: the tendency to view newspapers as, first and foremost, businesses and journalists as "news workers"; journalists talking not so much in terms of "news" but of the "product"; and business and marketing functions gradually replacing the news function.[131]

> "Journalists are far from all being those radicals trying to control the news, as depicted a few years ago with some help from the pronouncements of the most militant of them. There are some, of course, who still turn for inspiration to the theses of the news as a driving force, and journalism as a tool for development, seeing themselves as agents of change and keeping up with the rhetoric of the 1960s and 1970s. However, a good number are content simply to report the remarks of the dignitaries they meet, or to get the news out as quickly as possible."[132]

The result, he said, is that the work of journalists is becoming more and more routine and fairly unfulfilling, and that this is partly due to the rigid application of certain clauses in collective agreements between journalists and management.

In summary, this brief review of research and commentary on journalists and journalism in the United States, English Canada and Quebec provides some insight into how the practice of journalism in these different settings has been influenced in a variety of ways by English, French and American traditions. Our concern, however, is in how these different traditions or

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[128] Id. at 341.

[129] David Thomas, "The Anglo Press in the Seventies: Conspiracy or Just Plain Incompetence?" in Caldwell and Waddell, eds., *The English of Quebec* (Québec: L'Institut québecois de recherche sur la culture, 1982) at 351.

[130] Dominique Clift, "Solidarity on a Pedestal: French Journalism in Quebec," in Walter Stewart, ed., *Canadian Newspapers: The Inside Story* (Edmonton: Hurtig Publishers, Ltd., 1980), at 206.

[131] Florian Sauvageau, "French-speaking journalists on journalism" in *The Journalists*, Volume 2, Royal Commission on Newspapers (Ottawa: Supply and Services, 1981), at 44-46.

[132] Id. at 46. Gosselin, as well, concludes that the militant model of the 1970s has given way to a more professional model of collective practices. (André Gosselin, "The Collective Practices of Quebec Journalists," *Canadian Journal of Communication*, 14:2 (1989), at 28-40).

perspectives may have resulted in journalistic practices that vary in their tendencies to promote individualism or to serve the community or broader societal interests.

Some Comparative Examples

Despite the growing body of literature from systematic studies of journalists in Canada and the United States, most of the "evidence" about how journalists and journalistic practices differ between the two countries tends to be anecdotal more than the result of systematic research. There are some exceptions, of course. For example, we already reported how the most recent national survey of journalists in the United States shows a shift toward some of the values articulated by the Hutchins Commission, which advanced the "social responsibility" theory of the press.[133] Also, French-language journalists in Canada tend to be more willing than their English Canadian and especially their American counterparts to perceive the press as a public service that can be regulated by the government. As evidence, Langois and Sauvageau found that nearly two-thirds of the French-speaking journalists in their study agreed that the state should intervene in the field of information.[134] Even before the Kent Commission issued its report and recommendations in 1981, Sauvageau argued that the government might intervene to assure the citizen's right to information, similar to the way it has done in education and health care.[135] Several examples, based not on research, help explain how the traditions and perspectives of journalists in Canada and the United States vary considerably in terms of tolerance for intervention by government and the courts in ways that limit the media and the practice of journalism.

Kent Commission Recommendations. Following the simultaneous sale of newspapers in Winnipeg and Ottawa by two major Canadian newspaper groups, the federal government established the Kent Commission in 1980 and authorized it to study the new newspaper industry and make recommendations to the government. One of the more controversial recommendations called for the establishment of a Press Rights Panel within the Canadian Human Rights Commission. Response came manly from representatives and publishers of newspapers owned by large newspaper groups in Canada. The reaction was tempered and mild compared to what one would expect in the United States if similar recommendations were to come out of a government committee that spent more than $3 million to investigate the daily newspaper industry. Reactions in the United States to any threat of government intervention or control in media affairs tend to be immediate and predictable. Media owners and spokespersons for associations of journalists, particularly in the print media, are quick to call "infringement" and issue charges of improper violations of cherished First Amendment guarantees of freedom of the press.

Media Cooperating With Government. At the same time that *The Washington Post* and *New York Times* were deciding whether to publish the Unibomber's manifesto in the fall of 1995, the Royal Canadian Mounted Police and local authorities were in the midst of a 31-day confrontation with armed Indians at Gustafsen Lake, British Columbia. CBC Radio interrupted its afternoon programming in British Columbia four times on September 13 with a brief message, broadcast in English and in the language of Shuswap Indians. The message was written by RCMP officials, who told CBC that it was what the renegades had demanded to hear. CBC senior management in Toronto endorsed the request by the RCMP to air the message, and defended their decision to accede to such demands "if the public interest is at stake."[136]

CBC's decision to cooperate with the RCMP during this confrontation was generally accepted in Canada as being the responsible thing to do. In fact, following the standoff, political

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[133] Weaver and Wilhoit, *supra* note 113, at 138.

[134] Florian Sauvageau, "Main results of the survey of journalists on Québec-language dailies," Appendix in *The Journalists*, Volume 2, Royal Commission on Newspapers (Ottawa: Supply and Services, 1981), at 197.

[135] Sauvageau, *supra* note 115, at 337.

[136] Ross Howard, "Paper's action has Gustafsen Lake parallel," *The Globe and Mail*, September 20, 1995, A20.

columnist Jeffrey Simpson summarized the episode in a column in *The Globe and Mail* under the headline: "Thanks to RCMP, the Gustafsen Lake standoff ended quietly." The column made no mention of CBC's participation.[137]

Across the border, however, the decision by the *Post* and *Times* to publish the Unibomber's manifesto drew strong criticism from some media professionals as being a serious violation of the canons of American journalism. William Serrin, in a special to *The Post,* complained that the newspapers had violated those canons by giving in to the government and by turning their news columns over to a killer.[138] Others, however, like commentator Daniel Schorr, agreed with the publishers that "This centers on the role of a newspaper as part of a community" and argued that the public increasingly views the press as shielding itself behind the First Amendment to exempt itself from its responsibilities to the broader community.[139]

Covering Court Trials. During the months of exhaustive coverage and commentary related to the O.J. Simpson trial in the United States, a trial court judge in Ontario issued a restraining order on the media in the Paul Bernardo murder trial that included, as well, a ban on publication of most information from his wife's trial several months earlier.[140] Canadian journalists complained but complied with the court order while American journalists in neighboring border cities did not, continuing what one U.S. newspaper editor had earlier referred to as a "border battle with Canadian law."[141]

These examples help illustrate the differences between Canada and the United States in terms of their legal systems, judicial traditions and accepted journalistic practice

Discussion

Important differences in the traditions of law and journalism in the United States and Canada result in different approaches to how the rights of the news media are appropriately balanced against the needs of the community and the broader interests of society.

To begin with, while the two legal systems share a similar tradition in English Common Law, their judicial and political traditions are different in important ways. Even their founding documents reflect important differences in values and priorities. The American Declaration of Independence with its commitment to "Life, Liberty and the pursuit of Happiness" is contrasted to the British North America Act and its emphasis on the "Peace, Order and Good Government" of Canada. The former reflects an individualistic, anti-government theme while the latter expresses a trust in government and ambivalence toward personal freedom.[142] It also reflects an important difference in views of the appropriate role of government in a democratic society. As one writer explains: "in Canada the state has been viewed, by and large, as a beneficent agency, protecting the citizen and promoting the general welfare; in the United States, the state has been regarded with

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[137] Jeffrey Simpson, *The Globe and Mail*, September 20, 1995, A14.

[138] William Serrin, "The Papers Submitted to Blackmail by a Killer," *The Washington Post.* September 24, 1995, C3.

[139] Daniel Schorr, "Printing Was a Tough But Conscionable Choice," *The Washington Post.* September 24, 1995, C3.

[140] For a review of these issues and the original ban in 1993 on publication of information from the trial of Karla Teale, Bernado's former wife, see Tammy Joe Evans, "Fair Trial vs. Free Speech: Canadian Publication Bans Versus the United States Media ," in *Southwestern Journal of Law & Trade in the Americas*, Vol. 2, 1995, at 203-225.

[141] Murray B. Light, "A dispatch from the border battle with Canadian Law," in Backtalk, a column published in *Presstime*, Vol. 16, No. 1, January 1994, at 47. At the time, Light was editor and senior vice president of *The Buffalo* (N.Y.) *News.* The newspaper's coverage of the murder trial conflicted with Canadian law.

[142] Pritchard, *supra* note 10, at 11.

suspicion, as a potential threat to the liberty of the individual."[143] Or as Lipset and Pool explain, while both nations seek to protect the rights of the individual while promoting and protecting the general welfare of the community, they "strike different balances, with Canada tipping toward the interests of the community, and the United States toward the individual."[144]

Similarly, journalists in Canada are more inclined toward a "social responsibility" view of the role of the media in society. While this particular perspective was proposed by the prestigious Hutchins Commission on Freedom of the Press in the United States, American journalists have tended not accept its basic premise, which calls for government intervention when and if the media fail to act responsibly. For the most part, they continue to subscribe to the more libertarian view and its imperative that the media be free from government influence and control. Canadian journalists, however, whether sharing British traditions that allow for more government secrecy and control of information or French traditions that are more accepting of government intervention in media affairs, tend to be more tolerant of government intervention in ways that directly affect the media while serving the broader needs and interests of society.

Our review of the development of media law in the two countries shows that the courts on both sides of the border have expressed a strong commitment to the principle of a free press. In the United States, government restraints on the media are difficult if not impossible, with the Supreme Court ruling that such restraints "are the most serious and the least tolerable infringements on First Amendment rights."[145] The Supreme Court of Canada, while less absolutist in its approach, early on expressed strong support for a free press and "an untrammeled publication of the news and political opinions of political parties contending for ascendancy."[146] Unlike the American Bill of Rights, however, the Canadian Charter of Rights and Freedoms allows for governments to limit basic rights under Section 1, but "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Canadian courts have been less likely than those in the United States to provide strict protections for the media to publish without government restraint or interference. This is most obvious in matters related to coverage of the courts, where judicial restraints are more allowable in Canada. Also, Canadian courts have permitted government bans on the publication of truthful information, lawfully obtained, while American courts have held that such bans constitute and unconstitutional prior restraint. Also, media in the United States are allowed greater latitude to criticize public officials than are media in Canada, where the courts have been reluctant to adopt the American approach to public libel and false light privacy. In other areas, however, involving newsgathering, the duty to testify, and access to information, the courts in both countries have attempted to balance the rights of the news media against the broader interests of society.

Our review of the literature on journalists and journalism in the two countries showed, as well, that Canadian journalists tend to be more tolerant of government intervention and control, even when it affects media activities, and more inclined toward a "social responsibility" view of the role of media in a democratic society. Journalists in the United States, however, still tend to subscribe more to the libertarian view and its imperative that the press be free from government control, although the most recent national survey of American journalists suggests that there may be some shift toward some of the original goals of the Hutchins Commission,[147] which originally proposed the social responsibility model.

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[143] Anthony Westell, "Our Fading Political Culture," in Ronald G. Landes, ed., *Canadian Politics: A Comparative Reader* (Scarborough: Prentice-Hall, 1985), at 246.

[144] Lipset Pool., *supra* note 11, at 37.

[145] *Nebraska Press Assn. v. Stuart, supra* note 46.

[146] *Reference re Alberta Statutes, supra* note 47.

[147] Weaver and Wilhoit, *supra* note 113.

Some Future Considerations

There is considerable discussion about the Constitution in Canada, and has been since it was adopted in 1982. However, little if any of the controversy centers around concerns over government control of the media or court limitations of Charter guarantees of press freedom. This is not to say that journalists and media owners in Canada do not have concerns about these issues or that they would not prefer greater freedom and less government control. It is just that these are not major concerns, at least not compared to the larger constitutional issues being discussed.

This is not the case in the United States where journalists and media owners have long been eager and vocal critics of any attempts by government or the courts to limit press freedoms and violate their First Amendment guarantees. In fact, Justice Brennan's speech in 1979, where he presented his two-model approach to the First Amendment, was largely in response to media criticism of recent court decisions that were unfavorable to media interests.

However, the growing criticism and concerns about court interpretations of the speech-press clause of the First Amendment are coming from non-media sources who are concerned about too much freedom at the expense of other interests, particularly the rights and interests of disadvantaged groups like women and minorities. In particular, concerns being raised by feminists, critical scholars and especially critical legal theorists are that the court's continuing emphasis on protecting press freedoms serves only to advance the status quo and favors the special interests of corporate-owned media conglomerates.[148] These are variations of the same kinds of criticism and concerns expressed by Jerome Barron, who argued nearly 30 years ago that "Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible. But if ever there were a self operating marketplace of ideas, it has long ceased to exist."[149] He went on to argue for a legal right of access to the media to provide citizens with the kind of marketplace originally intended by the Founding Fathers.[150]

More recently, Patrick Garry has proposed a "revised marketplace model" for press freedom in the United States.[151] His approach serves the values of a free press through a two-part approach. The first part protects individual media outlets in their performance of individual media press and speech functions. The second part of the model addresses the structure of the press industry in its commitment to two primary goals: 1) media responsiveness to the community and diversity of expression; and 2) wide public participation in the society-building and self-government process.

Similarly, concerns are being raised in journalistic circles about the status of American journalism, about public criticism of the press and about the appropriate roles *and responsibilities* of the media in a free democratic society. One of the best, recent books on this subject is by Anderson, Dardenne and Killenberg, who argue for a more ecumenical, constructive, participative, and democratically responsive role for journalism's institutional future.[152] Other significant, recent

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[148] See, for example, Mark Tushnet, "A Critical Perspective On the Law of Speech And Communication," *Journal of Communication Inquiry*, 19:2 (Summer 1995), 5-15; Robert Trager and Joseph A. Russomanno, " '. . . The Whole Truth . . .' The First Amendment, Cultural Studies, and Comparative Law," *Journal of Communication Inquiry*, 19:2 (Summer 1995), 16-32; and Matthew D. Bunker, "First Amendment Theory and Conceptions of the Self," 1 *Communication Law and Policy* 241-269 (1996).

[149] Jerome Barron, "Access to the Press--A New First Amendment Right," *Harvard Law Review* 80 (1967) at 1641.

[150] See also Jerome Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Bloomington: Indiana University Press, 1973). He applies these concerns to Canadian issues in: Jerome A. Barron, "Public Access to the Media Under the Charter: An American Appraisal," in Anisman and Linden, eds., *supra* note 17, at 177-202.

[151] Patrick M. Garry, *The American Vision of a Free Press*, (New York: Garland Publishing, Inc., 1990) at 108-116.

[152] Rob Anderson, Robert Dardenne, and George M. Killenberg, *The Conversation of Journalism: Communication, Community, and News* (Westport, Conn.: Praeger Publishers, 1994).

authors like Davis Merrit, Jay Rosen and James Fallows have called for a revision in journalistic practices in order to promote community through civic or public journalism has challenged the way responsible media report on and relate to the communities they serve.[153] As Dennis and Merrill put it, "The new communitarians are waging a rhetorical war against Enlightenment liberalism--against individualism and libertarianism."[154] More specifically, Christians argues that journalists should discard the liberal politics of rights, which "rests on unsupportable foundations," and that such rights should be "given up for a politics of the common good."[155] In response, critics of this approach argue that it "confuses journalism with community organization, a social work concept" and are concerned that if journalists become activists and take positions on community issues, they would lose "any claim to impartiality and would sacrifice credibility."[156]

The purpose in ending this paper with a review of the points of this particular debate is not to suggest that some dramatic changes are about to take place in the practice of journalism in the United States, but rather to call attention to the fact that some basic foundations of law and journalistic practice are being challenged in very significant ways by credible practitioners and scholars. This is all part of the important ongoing discussions on both sides of the border about how to appropriately balance the freedoms of the press and other media of communication against the larger interests of society, and about how to frame the practice of journalism in the best way possible to serve the democratic process. And it is my belief that these discussions can be improved by looking beyond our own borders to see how these issues are being considered against the backdrop of different traditions, practices, values and beliefs.

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[153] See *supra* note 5 for complete citations.

[154] Everett E. Dennis and John C. Merrill, "The New Communitarianism and Public Journalism," in *Media Debates: Issues in Mass Communications*, Second Edition (White Plains, N.Y.: Longman Publishers, 1996), at 156.

[155] Clifford Christians, John Ferre, and P. Mark Fackler, *Good News: Social Ethics and the Press* (New York: Oxford University Press, 1993), at 45.

[156] Dennis and Merrill, *supra* note 154, at 163.