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Free Speech Vs. Free Press: Analyzing the Impact of Nelson v. McClatchy Newspapers, Inc. on the Rights of Broadcast Journalists

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FREE SPEECH VS. FREE PRESS: ANALYZING THE IMPACT OF *NELSON V. McCLATCHY NEWSPAPERS, INC.* ON THE RIGHTS OF BROADCAST JOURNALISTS

I. INTRODUCTION

Freedom of individual political expression is among the most personal of individual liberties for Americans. Yet many individuals have jobs or careers consuming so much of their lives that they do not have time to exercise this liberty. These individuals voluntarily choose their careers over political involvement, even though they have the option to engage in both simultaneously if they desire. Journalists in America do not have this luxury. They are politically neutralized by corporate policies and journalism codes of ethics from the time they decide to pursue journalism as a career.[1] For the most part, this type of political abstinence is enforced only upon print journalists and not broadcast journalists.[2] The current trend, however, is to extend policies constraining political activity to cover broadcast journalists as well.[3]

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1. *See* Karen Schneider & Marc Gunther, *Those Newsroom Ethics Codes*, COLUM. JOURNALISM REV., July-Aug. 1985, at 55, 55.

2. Other careers also exist which limit individuals in their outside political activities. Government employees are restricted by the Hatch Act from "tak[ing] an active part in political management or political campaigns." 5 U.S.C. § 7323(b) (1988). Yet restrictions on journalists often sweep far more widely than provisions of the Hatch Act because the Hatch Act at least preserves the right of a government employee to "express his opinion on political subjects and candidates." *Id.* § 7323(c). The Hatch Act also does not reach many types of outside activity that journalists are restricted from engaging in, such as demonstrations and community involvement. *See id.* § 7323.

3. *See, e.g.*, *Talk of the Nation: Journalism and Ethics and Television* (National Public Radio News, June 9, 1997) [hereinafter *Talk Nation*] (quoting Barbara Cochran stating that CBS News has conflict rules that govern its employees and prohibit them from "tak[ing] part in any kind of political or partisan activity."); Verne Gay, *Crossing the Line*, NEWSDAY, July 1, 1997, at B4

It is unthinkable that the Framers of the United States Constitution ever would have condoned abridging the most intimate of rights they sought to preserve, the freedom of political expression, in exchange for a free press. Indeed, the United States Supreme Court places freedom of political expression at the top of the list of constitutionally protected rights.[4] According to the United States Supreme Court, the most protected form of speech is political speech, because without free political speech one cannot have a true democracy.[5] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[6] Yet, despite the protection given to the freedom of political expression, courts have recently begun to abridge this right when balancing it against the freedom of the press.[7] Media corporations have successfully asserted the free press provisions of the United States Constitution as a defense to state laws prohibiting discrimination against employees based on outside political activities.[8]

Journalists are often among the most politically inclined individuals. Arguably, they are also among the individuals most fit to make political decisions because they have investigated both sides of the story and are therefore more able to make a balanced and informed decision. In spite of journalists' unique characteristics, many courts have upheld actions taken by corporate media entities

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(discussing ABC News's policy prohibiting employees from "'active support of electoral politics'"); Kelley Griffin, *Journalism Serves Civic Role*, DENV. POST, Aug. 7, 1997, at B11 (discussing a reporter's reassignment by Colorado Public Radio because of the conflict of interest created by her husband's run for governor).

4. *See* WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT CASES AND MATERIALS 21 (2d ed. 1991).

5. *See* Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

6. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

7. *See, e.g.*, Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123 (Wash.), *cert. denied*, 118 S. Ct. 175 (1997) (holding that the First Amendment's free speech clauses permit a newspaper to restrict the political activities of its journalists).

8. *See infra* Part III.

resulting in the political silencing of journalists.[9] Thus, the courts' recent trend indirectly encourages journalists to have greater loyalty to media corporations and their agendas, rather than to their cities, states, country, or individual beliefs.

This Note discusses how broadcast journalists will be impacted by a recent case validating the corporate policy of a newspaper that abridged the political rights of one of its journalists. Part II of this Note will discuss the treatment of such corporate policies by the courts historically, and the similar policies that a news station might promulgate to prohibit the outside activities of broadcast journalists. The focus of this Note will be on the recent Washington Supreme Court case, *Nelson v. McClatchy Newspapers, Inc.*,[10] discussed in detail in Part III. Part IV explains why this recent decision is unsound. Part V discusses the ramifications *Nelson* will have on the rights of broadcast journalists by opening the door to the political gerrymandering of journalists by news stations. Finally, Part VI discusses ways in which news stations can achieve their corporate goals without infringing on the political freedoms of their journalists.

II. BACKGROUND[11]

Restrictions on journalists' outside political activities are a recent trend founded on the concept of objectivity in news gathering.[12] Current restrictions were prompted by a change in the nature of news gathering caused mainly by new incentives for profit making.[13]

Political objectives and money were the driving forces behind early American newspapers.[14] As a result, the press contained very little objectivity.[15] For example, the standard form of newspaper writing in the eighteenth and nineteenth centuries consisted of what

9. *See infra* Part III.

10. 936 P.2d 1123 (Wash.), *cert. denied*, 118 S. Ct. 175 (1997).

11. For an extensive look at the historical development of American journalism, especially print journalism, see Jason P. Israelowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221 (1992).

12. *See* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 129-30 (3d ed. 1990).

13. *See id.*

14. *See* HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 30-32 (1989).

15. *See id.*

are today referred to as "editorials."[16] As a matter of fact, partisanship in newspapers did not begin to wane until the middle of the nineteenth century when the cost of manufacturing newspapers dropped, and objectivity became a useful marketing strategy for many newspapers in obtaining advertisers.[17] The commercial imperative of attracting advertisers and increasing revenue ushered in the era of objectivity in the press.[18] Thus, the driving force behind objectivity was not the constitutional right to a free press,[19] but rather profitability. These commercial objectives explain why the press promulgated restrictions on political activity to promote the appearance of objectivity.

The early cases in which journalists contested political restrictions stem from the middle of this century, during the Cold War era of anticommunist fervor in America. This period, known as the McCarthy Era, witnessed the indictment of numerous individuals from a cross-section of the American population, including reporters, film directors, and screenwriters.

A number of news organizations fired employees during the McCarthy Era for alleged communist affiliations.[20] Journalists were fired for such things as refusing to testify before the House Un-American Activities Committee.[21] Newspapers sought to justify

16. *See* Gerald J. Baldasty, *The Nineteenth-Century Origins of Modern American Journalism*, *in* THREE HUNDRED YEARS OF THE AMERICAN NEWSPAPER 407, 408-09 (John B. Hench ed., 1991) (stating that "partisanship [in newspaper content] was deemed a badge of honor and integrity").

17. *See* MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 18-19 (1978).

18. *See* BAGDIKIAN, *supra* note 12, at 129, 130. *See also* HERBERT J. GANS, DECIDING WHAT'S NEWS 186 (1979) (stating "the Associated Press is often credited with having invented objectivity in order to sell uniform wire-service news to a politically and otherwise diverse set of local newspapers").

19. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

20. *See* Mark T. Carroll, Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 73 (1981).

21. *See* Hearst Publ'g Co., 30 Lab. Arb. Rep. (BNA) 642 (1958) (Schedler, Arb.); *see also* New York Times Co., 26 Lab. Arb. Rep. (BNA) 609, 611 (1956) (Corsi, Arb.) (holding that *The Times* had good cause for dismissing a foreign desk copyreader who acknowledged past membership in the communist party); United Press Ass'n, 22 Lab. Arb. Rep. (BNA) 679, 683 (1954) (Spiegelberg, Arb.) (stating that *United Press* would have been justified for

these firings with claims of the appearance of a lack of objectivity and credibility in the eyes of newspaper readers.[22] Arbitrators upheld these discharges on "[t]he theory . . . that newspapers, which have a great responsibility to the public to present objective news, untainted by Communist propaganda, are justified in requiring absolute certainty in their employees' willingness to present unslanted news."[23]

Several cases also exist that address the rights of employees in other areas of media, including television and film. Until recently, employment contracts frequently contained provisions requiring employees to avoid conduct that is prejudicial to the employer's interests.[24] These were called morals clauses. Morals clauses played a prominent role in a line of cases affecting directors and screenwriters during the McCarthy Era. Courts ruled that these individuals were properly discharged for violating morals clause provisions by engaging in political activity that was, or appeared to be, communist.[25] For example, in one case a screenwriter was suspended for refusing to testify before a Congressional committee about whether he was a member of the Communist Party.[26] The court upheld the employer's action based on the employment contract.[27] The screenwriter had contractually agreed "to conduct himself with due regard to public conventions and morals" by avoiding activity tending to degrade him or "bring him into public hatred, contempt, scorn, or ridicule."[28] The contract also stated that he would do nothing that would "tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or

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discharging a reporter who refused to testify before Un-American Activities Committee had it specified that its concern was that readers would infer bias); Los Angeles Daily News, 19 Lab. Arb. Rep. (BNA) 39, 40 (1952) (Dodd, Arb.) (upholding the firing of two editorial writers who refused to deny communist affiliation charges).

22. *See* Carroll, *supra* note 20, at 73-74 & n.195.

23. *Id.* at 73 n.195 (citations omitted).

24. *See* Jay M. Zitter, Annotation, *Liability for Discharge of Employee from Private Employment on Ground of Political Views or Conduct*, 38 A.L.R. 5th 39, 52-54 (1996).

25. *See id.*

26. *See* Loew's, Inc. v. Cole, 185 F.2d 641, 645 (9th Cir. 1950).

27. *See id.* at 661-62.

28. *Id.* at 645.

radio industry in general."[29] The *Loew's, Inc. v. Cole* court found that the screenwriter had breached the contractual provision by refusing to testify.[30] The court concluded that a jury could reasonably find that the screenwriter's refusal to testify as to his communist involvement gave the Congressional committee and the public the impression that he was a communist.[31]

Similarly, the court in *Scott v. RKO Radio Pictures*[32] held that a director breached his employment contract by refusing to testify before the Congressional committee regarding his communist involvement.[33] The court reasoned that the conduct of the director tended to offend the community and caused the public to believe the movie industry was shielding communists.[34]

Many collective bargaining agreements that are in place today for various media unions—such as the American Federation of Television and Radio Artists, the Screen Actors Guild, the Writers Guild of America, and the Directors Guild of America—prohibit morals clauses such as those found in McCarthy Era employment contracts.[35] Provisions prohibiting morals clauses are especially important because many of the news reporters, writers, and directors working at news stations are union members. Thus, the provisions of union collective bargaining agreements can work to the advantage of broadcast journalists when they file grievances for interference with their outside political activities.[36]

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29. *Id.* at 649 n.6.

30. *See id.* at 658.

31. *See id.* at 649. *See also* Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954) (upholding an employer's discharge of a screenwriter for violating a contract clause by refusing to testify before a congressional committee).

32. 240 F.2d 87 (9th Cir. 1957).

33. *See id.* at 90-91.

34. *See id.*

35. For example, see DIRECTORS GUILD OF AMERICA, INC., 1993 BASIC AGREEMENT § 17-123 (1993).

36. *See, e.g.*, Knoxville Newspaper Guild, Local 376 v. The Knoxville News-Sentinel Co., A.A.A. No. 30 30 0069 83, 20 (June 10, 1983) (Duff, Arb.) (stating that "[t]he expression of political beliefs by activities, such as running for office of School Board Director, involves a person's civil rights and cannot be restricted by an Employer except for some proven compelling reason").

After the period of the McCarthy Era cases, the Vietnam War "sparked a rebirth of political activism among journalists."[37] Some individual reporters participated openly in political demonstrations and expressed their personal opinions publicly.[38] Journalists also played a role in exposing the Watergate scandal.[39] At this point, journalism industry leaders expressed discomfort with the idea of politically influential reporting.[40] As a result, newspaper publishers began adopting conflict of interest restrictions and promulgating codes of ethics designed to allay concerns about the involvement of journalists in politics.[41] In the 1980s the number of newspapers with nonparticipation guidelines dramatically increased.[42]

Today, while many newspapers maintain codes of ethics, television news broadcasters are also beginning to adopt their own sets of codes.[43] The trend is toward more restrictions on journalists' activities. Furthermore, courts have generally upheld these restrictions. Only a small number of cases have spawned victories for journalists, most of which were settled out of court.[44]

A news station is likely to promulgate policies that prohibit journalists from running for political office, becoming involved in political or social causes, making campaign contributions, and taking sides on political or social issues.[45] In theory, these provisions could possibly influence journalists' voting rights or decisions.[46] Also, the network's policies may not require a showing that the prohibited

37. Isralowitz, *supra* note 11, at 228.

38. *See id.*

39. *See* MICHAEL SCHUDSON, WATERGATE IN AMERICAN MEMORY 105 (1992).

40. *See id.* at 114.

41. *See* Isralowitz, *supra* note 11, at 229.

42. *See* Schneider & Gunther, *supra* note 1, at 55.

43. *See supra* note 3; *see also* Schneider & Gunther, *supra* note 1, at 55 (discussing codes of ethics promulgated by newspapers and broadcasters).

44. *See Abortion Foe Wins Action Against Paper*, CHI. TRIB., Dec. 6, 1989, at 14 (discussing an out-of-court settlement won by a reporter against *The Milwaukee Journal*); *Iowa: Des Moines*, USA TODAY, Apr. 21, 1992, at 6A (discussing how two ex-editors won an out-of-court settlement against *The Fairfield Ledger*).

45. *See, e.g.*, *supra* note 3.

46. *See* Isralowitz, *supra* note 11, at 237-40.

activity actually interfered with the objectivity of the reporter.[47] The mere appearance of a conflict of interest or an interference with objectivity might be sufficient to qualify an activity as prohibited.[48] The argument against these ambiguous policies is that they open the door for corporate manipulation of the political process. In other words, they can be used to further a political agenda while appearing to encourage journalistic objectivity.

III. NELSON V. MCCLATCHY NEWSPAPERS, INC.[49]

Thus far, no case has dealt directly with the rights of broadcast journalists to engage in political activities outside of working hours, though many believe that the same issues and arguments that apply to print journalists also apply to broadcast journalists.[50] The *Nelson* case is a recent state court decision that impacts the political rights of print journalists. Broadcast journalists, however, are also affected by the *Nelson* decision because of the broad language of the court's opinion.

A. Facts

Sandra Nelson began working as a reporter for The News Tribune, (TNT), in Tacoma, Washington in 1983.[51] In 1986 McClatchy Newspapers acquired TNT and decided to keep Nelson as a reporter, assigning her to cover the education beat.[52] Nelson's job focused on "Tacoma schools as well as regional and state educational issues."[53] Nelson was an accomplished reporter who had won awards for her work,[54] but she engaged in activities outside her job with which TNT did not agree.[55] Nelson, a "self-professed" lesbian, spent much of

47. *See id.* at 247.

48. *See id. See generally* Schneider & Gunther, *supra* note 1, at 55 (discussing conflict of interest restrictions affecting journalists that cover various activities).

49. 936 P.2d 1123 (Wash.), *cert. denied*, 118 S. Ct. 175 (1997).

50. *See* Isralowitz, *supra* note 11, at 221 & n.3.

51. *See Nelson*, 936 P.2d at 1124.

52. *See id.*

53. *Id.*

54. *See Media Can Ban Reporter Activism*, 5 MEDIA & LAW 4, Feb. 28, 1997.

55. *See Nelson*, 936 P.2d at 1125.

her off-duty time participating in political activities.[56] Nelson's political activism included attending "political fora, demonstrations, and classes for political causes including highly visible support for gay and lesbian rights, feminist issues, and abortion rights."[57] Tacoma Radical Women, a feminist socialist organization of which Nelson was a member and an organizer, provided support for much of Nelson's political activism.[58] Nelson was also a member of the Freedom Socialist Party.[59] Nevertheless, McClatchy was aware of Nelson's political activism when it chose to retain her as a reporter.[60]

In 1987, a TNT reporter and photographer saw Nelson picketing for abortion rights outside a local hospital.[61] TNT management subsequently told Nelson that such activity compromised the newspaper's appearance of objectivity.[62] Nelson, in response, stated that "she would continue her public political activity . . ." and in 1989, she "helped launch a ballot initiative to have an antidiscrimination ordinance reinstated following its repeal."[63] Nelson openly promoted the initiative throughout 1990 by organizing volunteers, soliciting support, arranging for speakers, organizing rallies, and collecting signatures for the initiative.[64] Throughout the year, the initiative battle was a major political story, and its notoriety increased as the fall election approached.[65] TNT's editors informed Nelson on August 15, 1990, that they would transfer her from her position as education reporter to swing shift copy editor until the November elections were over.[66]

As swing shift copy editor, Nelson maintained her salary, benefits, and seniority.[67] The new nonmanagerial position required the same general qualifications as a reporter and involved editing a wide

56. *See id.*
57. *Id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.*
63. *Id.*
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*

variety of local and national news accounts, but Nelson no longer worked as a beat reporter investigating and writing stories.[68] In October 1993, Nelson wrote to her TNT supervisor requesting that the paper reinstate her as a reporter.[69] She later applied for such a position.[70] Nelson's transfer to the new position became permanent, however, when she refused to end her political activism.[71]

Nelson's political activity continued into 1994, when she actively opposed a ballot initiative preventing municipalities from extending civil rights to gays and lesbians.[72] During that year she also testified on behalf of the "Stonewall Committee" before the Washington State Legislature in support of a gay and lesbian civil rights bill.[73] Nelson's testimony before the state legislature received front page coverage in TNT and many other state newspapers.[74] A state legislator, who knew Nelson was a TNT employee, inquired with TNT as to whether Nelson was lobbying the legislature on behalf of TNT.[75]

TNT's editors responded by writing to Nelson, stating "[w]e are dismayed and concerned that you have taken your political activism to a new and larger arena."[76] The editors also wrote that Nelson's activities "jeopardized the credibility of TNT in the eyes of its readers and the Legislature alike."[77] They further expressed that their discomfort with Nelson's activities was not because of the subject matter, since TNT editorials had adopted pro-gay positions on several occasions.[78] TNT concluded by informing Nelson that if her political activism continued to compromise TNT's credibility, "it would be forced to 'further isolate' [Nelson] and to take 'appropriate disciplinary action.'"[79]

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68. *See id.*
69. *See id.* at 1126.
70. *See id.*
71. *See id.* at 1125.
72. *See id.*
73. *See id.*
74. *See id.* at 1125-26.
75. *See id.* at 1126.
76. *Id.*
77. *Id.*
78. *See id.*
79. *Id.*

Nelson asked TNT in January of 1995 to consider her for an unannounced education reporter position.[80] TNT had hired nine other reporters since Nelson's transfer to swing shift copy editor, and Nelson alleged that TNT made it clear that positions would remain closed to her so long as she was involved in high profile political activism.[81]

Nelson filed suit in Pierce County Superior Court alleging that her transfer out of the reporter position was an improper action by TNT.[82] Nelson claimed that TNT did the following: (1) violated Washington Revised Code section 42.17.680(2) of the Fair Campaign Practices Act which prohibits discrimination by employers against employees who support initiatives, political parties, or political committees;[83] (2) violated article I, sections 4,[84] 5,[85] 19,[86] and article II, section 1[87] of the Washington Constitution; (3) breached her employment contract by transferring her without good cause; and (4) wrongfully transferred her because TNT's restrictions on her off-duty political activities violated public policy.[88]

Pierce County Superior Court granted TNT's summary judgment motion on Nelson's claim under RCW 42.17.680 and on all of Nelson's constitutional claims.[89] Nelson's breach of employment and wrongful transfer claims survived, however, and went to trial on remand.[90] Thus, the issue on appeal before the Washington Supreme

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80. *See id.*
81. *See id.*
82. *See id.*
83. *See* WASH. REV. CODE § 42.17.680(2) (West 1992). This section states:

> No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.

Id.
84. *See* WASH. CONST. art. I, § 4 (freedom to assemble and petition government).
85. *See id* § 5 (right to free speech).
86. *See id.* § 19 (guarantee of free elections).
87. *See id.* art. II, § 1 (popular right to initiative).
88. *See Nelson*, 936 P.2d at 1126.
89. *See id.*
90. *See id.*

Court was whether the trial court's dismissal of Nelson's statutory and constitutional claims was proper.[91]

B. The Court's Reasoning

The Washington Supreme Court initially recognized that one of TNT's fundamental goals as a news publication was the appearance of objectivity in the eyes of its readers.[92] TNT's 1987 ethics code regulated activity deemed to present apparent or actual conflicts of interest.[93] Conflicts of interest, as defined by the ethics code, "include[d] all situations in which readers might be led to believe that the news reporting [was] biased, including situations in which reporters participate[d] in high profile political activity."[94] The court stated that TNT had transferred Nelson because she had violated TNT's ethics code.[95]

After describing TNT's ethics code, the court reviewed the commonality of journalistic codes of ethics and conduct that minimized conflicts of interest.[96] The court cited a 1983 Ohio University study indicating that seventy-five percent of news organizations have similar codes in place.[97] The court quoted from a code of ethics maintained by *The Washington Post* for its newsroom employees that was identical to TNT's.[98] The code cautioned employees to "avoid active involvement in any partisan causes—politics, community affairs, social action, demonstrations—that could compromise or seem to compromise our ability to report and edit fairly."[99] The court,

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91. *See id.*
92. *See id.* at 1124-25.
93. *See id.* at 1125.
94. *Id.*
95. *See id.*
96. *See id.*
97. *See id.* (citing Isralowitz, *supra* note 11, at 229). By contrast, more than 20 years prior to the *Nelson* case, a 1974 Associated Press Managing Editors survey found that less than 10% of newspapers had such guidelines. *See* Schneider & Gunther, *supra* note 1, at 55. Whereas in September 1992, even the traditionally liberal MTV directed its employees covering the presidential campaign to refrain from making significant contributions to candidates. *See* Judith Miller, *But Can You Dance to It?: MTV Turns to News*, N.Y. TIMES MAGAZINE, Oct. 11, 1992, at 30.
98. *See Nelson*, 936 P.2d at 1125.
99. Benjamin C. Bradlee, *Standards and Ethics*, *in* THE WASHINGTON POST

however, did not address the history of ethics codes restraining political activity in the press, or the lack thereof, but rather only discussed the recent trend in the promulgation of these codes.

1. The Washington Fair Campaign Practices Act

The Washington Supreme Court first addressed whether section 42.17.680(2) of the Fair Campaign Practices Act applied to an "employee who is discriminated against for refusing to abstain from political involvement."[100] The court resolved this issue by first determining whether such employer actions fell within the scope of the statutory prohibition against removing an employee for "'supporting or opposing' a ballot initiative, political party or committee."[101] Due to the scarcity of legislative history interpreting the statute, together with the absence of case law, the court had to use its own discretion in assessing the two options the parties advocated for interpreting the statute.[102]

Nelson argued the court should look at the plain language of the statute.[103] Using this approach, the court reasoned that subsections (2)(b) and (2)(c) afforded protection to employees in two different scenarios.[104] The court first determined that subsection (2)(b), which states that "no employer may discriminate against an employee for the 'failure in any way to support or oppose' a candidate, ballot

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DESKBOOK ON STYLE 1, 3 (Thomas W. Lippman ed., 2d ed. 1989). The court also noted the Society of Professional Journalist's 1973 Code of Ethics which reads:

> Secondary employment, political involvement, holding public office, and service in community organizations should be avoided if it compromises the integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner which protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount. That is the nature of their profession.

See Nelson, 936 P.2d. at 1125 (citing SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI CODE OF ETHICS (1973), *reprinted in* Lynn W. Hartman, Comment, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637 app. C at 697 (1986)).

100. *Nelson*, 936 P.2d at 1126.
101. *Id.*
102. *See id.* at 1126-27.
103. *See id.* at 1127.
104. *See id.*

proposition, political party, or political committee[,]"[105] logically applies when an "employee fails to adopt and support the employer's political position."[106] The court then determined that subsection (2)(c), which states that "no employer may discriminate against an employee for 'in any way supporting or opposing a candidate, ballot proposition, political party, or political committee' . . . appl[ies] when the employee refuses to abstain from political activity."[107] The court felt that there was no other rational meaning for subsection (2)(c).[108]

TNT argued that the court should read the section's language in context with the entire statute and to construe it in a manner consistent with the statute's general purpose.[109] TNT asserted that subsection (2)(c) read in context, has a narrower meaning and would apply only in situations where "an employer attempts to strong-arm an employee into adopting its political position."[110] TNT also argued that Washington's labor law already forbade "discrimination against an employee on the basis of age, sex, marital status, race, creed, color, national origin, or physical handicap."[111] TNT argued that Nelson's reading created a protected political activist category, but located it in the campaign finance reform law rather than in the labor or civil rights laws.[112] TNT questioned this placement of the provision.[113]

While the trial court agreed with TNT's interpretation of the statute, the Washington Supreme Court did not.[114] The supreme court relied on the history and the purpose of the statute—which was known as Initiative 134 before it was passed by a popular vote in 1992 with a seventy-two percent margin—to conclude that Nelson's interpretation was correct.[115] The court acknowledged that "[o]ne of

105. *Id.* (citing WASH. REV. CODE § 42.17.680(2)(b) (1992)).
106. *Id.*
107. *Id.* (citing WASH. REV. CODE § 42.17.680(2)(c) (1992)).
108. *See id.*
109. *See id.* (citing Nationwide Papers, Inc. v. Northwest Egg Sales, Inc., 416 P.2d 687, 689 (Wash. 1966)).
110. *Id.*
111. *Id.* at 1128 (citing WASH. REV. CODE § 49.60.180 (1990)).
112. *See id.*
113. *See id.*
114. *See id.* at 1126-28.
115. *See id.* at 1127-28.

the stated purposes of [Initiative 134] was to prevent financially strong organizations from exercising a disproportionate or controlling influence [over] elections."[116] The court added that TNT's interpretation did not track the text of the act and that:

> When read in context [RCW 42.17.680] has a clear relation to the rest of the campaign finance reform act; it is meant to prevent employers from wielding their might to influence politics and elections. The law is part of campaign finance, not civil rights or labor law. Taken as a whole, the provision in question means that employers may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees. The law is designed to restrict organizations from wielding political influence by manipulating the political influence of their employees through employment decisions.[117]

The court found that section 42.17.680(2) applied to Nelson's case and turned to a discussion of the statute's constitutionality.[118]

2. Constitutionality of the Washington Fair Campaign Practices Act

In spite of the court's finding that section 42.17.680(2) applied to Nelson, the court found the statute unconstitutional under both the United States and Washington Constitutions.[119] TNT argued that section 42.17.680(2) violated the First Amendment[120] to the United States Constitution and article I, section 5[121] of the Washington Constitution.[122] Specifically, TNT asserted that the free press clause of the two constitutions guaranteed it "editorial discretion to control the content of its publication."[123] TNT argued, further, that an integral component of editorial discretion involves controlling the

116. *Id.* at 1128 (citing WASH. REV. CODE § 42.17.610(1) (1993)).
117. *Id.*
118. *See id.*
119. *See id.* at 1128-29.
120. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.
121. WASH. CONST. art. I, § 5 states, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."
122. *See Nelson*, 936 P.2d at 1128-29.
123. *Id.* at 1129.

newspaper's credibility.[124] In essence, TNT asserted that a constitutionally protected characteristic of the press was editorial integrity.[125] In response, Nelson argued that TNT reporters' conduct outside of work was unrelated to the content and credibility of TNT or the free press clauses of the respective constitutions.[126]

The court found that the First Amendment and the Washington Constitution protected TNT's editorial discretion by giving them the "'right to protect the newspaper's unbiased content, both [through] its facts and as perceived by its readers, its sources, and its advertisers.'"[127] The court agreed with the trial court's reasoning that in order for TNT to protect its credibility, it could force its employees to be politically neutral.[128] The court based its conclusions on several different factors.

First, the court reiterated the importance of free speech in our society.[129] The court also recognized the historical importance of free press and the vehement protection that written press received over other types of media.[130] Next, the court referred to the trend of affording greater First Amendment protection that the United States Supreme Court and some state courts have recently espoused.[131] Among the cases the court cited were *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[132] and *R.A.V. v. City of St. Paul.*[133]

In addressing whether governmental regulation affecting the press violated TNT's constitutional free press protection, the court recognized two polar governing principles and attempted to consider where the action complained of fell in this case.[134] The first

124. *See id.*
125. *See id.*
126. *See id.*
127. *Id.* (quoting trial court opinion).
128. *See id.* (citing trial court opinion).
129. *See id.*
130. *See id.* at 1129-30.
131. *See id.* at 1130.
132. 515 U.S. 557, 578-81 (1995) (stating that a state law requiring parade organizers to allow a gay group to march unconstitutionally infringes on the organizers' free speech).
133. 505 U.S. 377, 396 (1992) (invalidating St. Paul's hate speech "Bias-Motivated Crime Ordinance" because it violated free speech).
134. *See Nelson*, 936 P.2d at 1130-31.

principle the court discussed was that a newspaper "has 'no special immunity from the application of general laws' simply because it is the press."[135] The second principle, the extreme opposite of the first, prohibits the government from regulating the content of a newspaper.[136] The court adopted the second principle.[137]

In *Miami Herald Publishing Co. v. Tornillo*,[138] the United States Supreme Court struck down a Florida "right-of-access" statute that forced a newspaper to publish responses of politicians it had previously criticized.[139] The main principle established in *Tornillo* was that editors of a newspaper must be free to exercise editorial control and discretion.[140] The Court in *Tornillo* also stated that newspapers are "more than . . . passive receptacle[s] or conduit[s] for news, comment, and advertising."[141] Instead, decisions about the material contained in a newspaper, limitations on the size and content of the newspaper, "and [the] treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment."[142] The Court concluded that because the Florida statute deprived the newspaper of its editorial discretion, it was necessarily unconstitutional as applied to the newspaper.[143] Similarly, the *Nelson* court established that editorial control is a necessary component of the free press, and a state law infringing upon that control is unconstitutionally applied.[144]

The court also briefly discussed several other related cases. In *Passaic Daily News v. NLRB*,[145] the United States Court of Appeals, District of Columbia Circuit, held that it was unconstitutional to require a newspaper to publish a reporter's column as a remedy for unlawful termination because doing so would interfere with the

135. *Id.* (quoting Associated Press v. NLRB, 301 U.S. 103, 132 (1937)).
136. *See id.* at 1131 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).
137. *See id.* at 1131.
138. 418 U.S. 241 (1974).
139. *See id.* at 258.
140. *See id.*
141. *Id.*
142. *Id.*
143. *See id.*
144. *See Nelson*, 936 P.2d at 1131, 1133.
145. 736 F.2d 1543 (D.C. Cir. 1984).

paper's editorial function.[146] The same court, in *Newspaper Guild of Greater Philadelphia v. NLRB*,[147] stated that editorial integrity is to a newspaper what machinery is to a manufacturer, and that "credibility is central to [the] ultimate product [of most news publications] and to the conduct of the enterprise."[148] The court noted that control of credibility falls within the sphere of First Amendment protection and, therefore, laws infringing on this control must be scrutinized.[149] The *Newspaper Guild* court further announced the principle that:

> In order to preserve [integrity and credibility], a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity.[150]

For example, requiring a reporter to choose between writing for a nationally syndicated column and participating "in a national political campaign as a prominent party official" does not violate this principle.[151] The court did state, however, that the degree of control "is not open-ended, but must be narrowly tailored to the protection of the core purposes of the enterprise."[152]

The *Nelson* court found that the *Newspaper Guild* case was "directly on point."[153] It found that TNT designed its no-conflict-of-interest policy to uphold its credibility, and thus the policy merited protection under the state and federal constitutions.[154]

The court rejected Nelson's claim that *Associated Press v. NLRB*[155] supported her position.[156] In *Associated Press*, the newspaper fired one of its editors for attempting to unionize the work

146. *See id.* at 1558-59.
147. 636 F.2d 550 (D.C. Cir. 1980).
148. *Id.* at 560.
149. *See id.*
150. *Id.* at 561 (footnotes omitted).
151. *Id.* at 563 n.50.
152. *Id.* at 561 n.36.
153. *Nelson*, 936 P.2d at 1132.
154. *See id.*
155. 301 U.S. 103 (1937).
156. *See Nelson*, 936 P.2d at 1132.

force.[157] The NLRB argued that the firing violated the National Labor Relations Act, (NLRA), which specifically grants workers the right to form, join, and participate in labor unions.[158] The Court, by a five to four vote, found that the NLRA was constitutional and that firing the editor violated the NLRA.[159] The court held that unionization had "no relation whatever" to the newspaper's free press rights.[160] It concluded that union membership, and not editorial prerogative, truly motivated the firing.[161]

Nelson argued that TNT's code of ethics regulating high profile employee activity did not affect the newspaper's core function, and that her transfer, like the discharge in *Associated Press*, was not protected by the free press clauses.[162] The court in *Nelson*, however, distinguished *Associated Press* by limiting its holding to the NLRA and union activity, and further negated the weight of its authority by relegating it to the historical context of the New Deal Era.[163] It is important to keep in mind, however, that *Associated Press* was good law when the court decided *Nelson*.

On October 6, 1997, the United States Supreme Court denied Nelson's petition for writ of certiorari.[164] Nelson continues to work at TNT as a swing shift copy editor. Even though she still has the same benefits as a beat reporter, she is not permitted to perform her original job duties. Sandra Nelson cannot freely exercise her passion for beat reporting, merely because she openly advocates political views different from those of her employer.

IV. ANALYZING WHY THE *NELSON* COURT WAS WRONG

The majority opinion in *Nelson* balanced the individual First Amendment right of free speech against the corporate First Amendment right of free press. The majority carved out a special exception for TNT in the *Nelson* case, however, because it is a newspaper, even

157. *See Associated Press*, 301 U.S. at 125.
158. *See id.* at 123. The National Labor Relations Act's grant of this right appears in 29 U.S.C. § 157 (1994).
159. *See Associated Press*, 301 U.S. at 125-30.
160. *Id.* at 133.
161. *See id.* at 132.
162. *See Nelson*, 936 P.2d at 1132.
163. *See id.*
164. *See* Nelson v. McClatchy Newspapers, Inc., 118 S. Ct. 175 (1997).

though it is a commercial entity.[165] The majority treated individual political expression as less valuable than corporate free press. Such a hierarchical analysis was improper because the majority failed to recognize the United States Supreme Court's informal order of protected First Amendment rights, which places individual political speech at the top of the list of protected rights.[166]

The majority also disregarded the numerous cases in which the Supreme Court held that the First Amendment's freedom of press right does not necessarily insulate the press from enforcement of statutes of general applicability.[167] This principle grew out of the holding in the *Associated Press*[168] case cited by the majority opinion.[169] In *Associated Press*, the Supreme Court stated that "[t]he publisher of a newspaper has no special immunity from the application of general laws."[170] Applying this rationale, both TNT's assertion and the *Nelson* majority's finding that the right to a free press insulates it from Washington law was erroneous. The majority should have prohibited TNT from discriminating against Nelson for

165. Individual political speech is at the core of protected First Amendment speech. *See* VAN ALSTYNE, *supra* note 4, at 32. Commercial speech, although protected by the United States Supreme Court, is not protected nearly as much as individual political speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

166. *See* VAN ALSTYNE, *supra* note 4, at 32. The Supreme Court has not formally stated an order of protected rights, but in its opinions the Court has made clear that core political speech is the most protected type of speech. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974); Mills v. Alabama, 384 U.S. 214, 218 (1966).

167. *See* Associated Press v. NLRB, 301 U.S. 103, 130-33 (1937) (holding that the discharge of an employee was prohibited under the NLRA and that such a prohibition was not an unconstitutional abridgment of freedom of the press); Associated Press v. United States, 326 U.S. 1, 7 (1945) (holding that publishers are equally subject to antitrust laws); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 192-93 (1946) (holding that applying the Fair Labor Standards Act in publishing contexts does not violate the First Amendment); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (holding that an ordinance prohibiting sex-designated advertising for non-exempt job opportunities did not violate a newspaper's First Amendment rights).

168. 301 U.S. 103 (1937).

169. *See* Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1132 (Wash. 1997).

170. *Associated Press*, 301 U.S. at 132.

her political activities, just as the majority would have done if TNT were not a newspaper.

The majority in *Nelson* also implies that applying the Washington Fair Campaign Practices Act to the press would amount to government control of its content.[171] In this regard, the majority's reasoning is suspect because the Act does not direct the press to make certain contextual decisions, but rather directs the employment decisions of companies like TNT.[172] Unlike *Tornillo*,[173] the Act in *Nelson* did not require TNT to publish or print anything, but merely required that it not discriminate against its employees based on political activity or inactivity.[174] Thus, the *Nelson* court improperly extended the *Tornillo* case to prohibit government regulation of the press's employment practices.

The dissenting opinion in *Nelson* attacked numerous weaknesses in the majority's reasoning. The dissent's main focus was that the First Amendment only protects against "interference with a newspaper's right to determine what to print."[175] It criticized the blanket immunity the majority of the court gave to the press.[176] The dissent also did not recognize *Nelson* as an illustration of the conflict between the two "'polar principles' in First Amendment jurisprudence."[177] Rather, the dissenting justices reasoned that the government would not regulate TNT's content by enforcing the statute.[178] There was no allegation that Nelson's political views influenced her reporting or that the "application of the statute would impinge upon [TNT's] exclusive right to determine [its content]."[179]

The dissenting justices recognized the First Amendment ban on government regulation of newspaper content; however, they were unwilling to extend this ban to prohibit government regulation of a

171. *See Nelson*, 936 P.2d at 1129.
172. *See* WASH. REV. CODE § 42.17.680(2) (1992). California has a code similar to Washington's that prohibits discrimination by employers based on political affiliation. *See* CAL. LAB. CODE § 1101 (West 1989).
173. 418 U.S. 241, 258 (1974).
174. *See* WASH. REV. CODE § 42.17.680(2).
175. *Nelson*, 936 P.2d at 1133 (Dolliver, J., dissenting).
176. *See id.* (Dolliver, J., dissenting).
177. *Id.* (Dolliver, J., dissenting).
178. *See id.* (Dolliver, J., dissenting).
179. *Id.* (Dolliver, J., dissenting).

newspaper's employment decisions.[180] Using the reasoning in *Passaic Daily*, the dissent drew a distinction between the regulation of content and the regulation of employment decisions.[181] In *Passaic Daily*, as earlier discussed, the court of appeals held that demoting a columnist due to his outside labor union activities was improper.[182] The court stated that even though the newspaper could not be forced to print the reporter's weekly editorial column as a remedy for the illegal demotion, the First Amendment did not insulate the newspaper from a federal statute prohibiting employers from discharging employees for labor union activity.[183] Thus, the *Passaic Daily* court announced the distinction under the First Amendment between government regulation of the press's labor practices and government regulation of editorial control.[184] The court stated that the government is permitted to regulate the former without violating the First Amendment, but is prohibited from regulating the latter under the First Amendment.[185]

The dissenting justices in *Nelson* went on to criticize the majority's assertion that "'[i]f a newspaper cannot be required to publish a particular reporter's work, how can it be constitutionally required to employ the individual as a reporter?'"[186] The dissent criticized the majority because this was exactly what happened in *Passaic Daily*, where the court did not require the newspaper to publish the column, but did prohibit the newspaper from demoting the reporter due to his activities.[187] Despite the similar holdings in *Passaic Daily* and *Associated Press*, the *Nelson* majority briefly discussed *Passaic Daily* in its opinion, but did not attempt to dismiss its applicability on the same superfluous grounds as it dismissed *Associated Press*. Perhaps this was due to the persuasiveness of *Passaic Daily* and the majority's inability to rebut its precedential value.

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180. *See id.* at 1134 (Dolliver, J., dissenting).
181. *See id.* (Dolliver, J., dissenting).
182. *See* Passaic Daily News v. NLRB, 736 F.2d 1543, 1555-56 (D.C. Cir. 1984).
183. *See id.* at 1556-58.
184. *See id.*
185. *See id.*
186. *Nelson*, 936 P.2d at 1134 (Dolliver, J., dissenting) (alteration in original) (quoting majority opinion).
187. *See id.* (Dolliver, J., dissenting).

The dissent concluded by stating that "[t]here has been no showing that the newspaper's editorial control would be threatened by [Nelson's] continued employment as a reporter."[188] The dissent analogized the employee in the *Associated Press* case—where the Court said that there had been no allegation that the reporter's work was biased[189]—to Nelson.[190]

As the dissent pointed out, the majority failed to recognize that Nelson's reporting was not influenced by her political views.[191] Nevertheless, the majority based its holding on the rationale that TNT has the right "to protect the newspaper's unbiased content, *both its facts and as perceived by its readers*, its sources and its advertisers."[192] This two prong rationale entails two principal policy justifications for restricting journalists' activities.[193] The first is the imperative of journalistic objectivity, which suggests that abstaining from off-duty activities is necessary to avoid bias in reporting.[194] The second is institutional credibility, which assumes that "the mere appearance of an ethical conflict will be harmful insofar as it may lead readers to believe, even if erroneously, that content has been skewed" or biased.[195]

A. Objectivity

The journalistic objectivity rationale entails some discussion of the merits of objectivity as the defining philosophy of modern

188. *Id.* (Dolliver, J., dissenting).
189. *See* Associated Press v. NLRB, 301 U.S. 103, 131 (1937).
190. *See Nelson*, 936 P.2d at 1134 (Dolliver, J., dissenting). The dissent reasoned much like the arbitrator in *Knoxville Newspaper Guild, Local 376 v. The Knoxville News-Sentinel Co.*, A.A.A. No. 30 30 0069 83, 20 (June 10, 1983) (Duff, Arb.). In *Knoxville Newspaper Guild*, the arbitrator recognized objectivity as a legitimate interest for the newspaper to have, but found inadequate the newspaper's naked assertion that a journalist's election to a local school board position endangered its objectivity. *See id.* at 21. The arbitrator stated that the newspaper did not present any "credible evidence which would support the . . . assertion that Mrs. McClary's election to office would be detrimental to its perceived objectivity." *Id.*
191. *See Nelson*, 936 P.2d at 1133-34 (Dolliver, J., dissenting).
192. *Id.* at 1129 (emphasis added).
193. *See* Isralowitz, *supra* note 11, at 240.
194. *See id.*
195. *Id.*

American journalism. Objectivity may itself be unattainable insofar as it aspires to produce news accounts entirely free from journalists' personal biases.[196] After all, journalism itself is an inherently subjective endeavor.[197] Thus, even works purporting to be free from journalists' biases may subtly embody those biases.[198] Moreover, the concept of objectivity in journalism may undermine itself because it may lead journalists to rely overwhelmingly on official sources and accept information from those sources without serious challenge.[199] This practice would hinder the media's ability to achieve diversity and pluralism in its reports, possibly resulting in undue reliance on official sources of information, to a point at which "the government controls the press."[200] Requiring absolute objectivity assumes that journalists do not have some item or affiliation lurking in their background that could compromise what a newspaper perceives as its independence. Nonetheless, "[j]ournalists are real people who live in families, vote and cheer for the home team."[201]

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196. *See* ROBERT MIRALDI, MUCKRAKING AND OBJECTIVITY: JOURNALISM'S COLLIDING TRADITIONS 6, 15 (1990) (contrasting objective reporting to muckraking).

197. *See* BAGDIKIAN, *supra* note 12, at 179 (stating that "[e]very basic step in the journalistic process involves a value-laden decision").

198. *See* Donald McDonald, *Is Objectivity Possible?*, *in* ETHICS AND THE PRESS 69, 70 (John C. Merrill & Ralph D. Barney eds., 1975).

199. *See* Jane Delano Brown et al., *Invisible Power: Newspaper News Sources and the Limits of Diversity*, 64 JOURNALISM Q. at 45, 53 (1987). According to studies, reporters rely heavily on "government sources who are primarily men in executive positions." *Id.* As one commentator states, "If governmental statements are released or officials offer quotes for public consumption which may be partially accurate or not at all, reporters and editors should not parrot such information without adding a qualifying statement." Charles L. Klotzer, *The Unique Profession of Journalists Places a Special Ethical Burden Upon Them*, ST. LOUIS JOURNALISM REV., June 1, 1997, at 4.

200. Jeffrey B. Abramson, *Four Criticisms of Press Ethics*, *in* DEMOCRACY AND THE MASS MEDIA 229, 254 (Judith Lichtenberg ed., 1990). Former Vice President and Washington Bureau Chief for CBS News, Barbara Cochran, states that people who come from a political life into journalism have actually enriched the profession. *See Talk Nation*, *supra* note 3. She believes that former politicians are able to ask good questions because they love politics and have had political training, know how politicians think, and can anticipate answers and do a better job of questioning. *See id.*

201. Katherine C. McAdams, *Non-Monetary Conflicts of Interest for Newspaper Journalists*, 63 JOURNALISM Q. 700, 700 (1986).

Restrictions on a journalist's outside activities should reflect that there is not necessarily a correlation between a journalist's private affiliations and activities and the content of the journalist's news copy or report. The editing process at newspapers and in newsrooms also undermines the majority's purported concern about journalists injecting political biases into newspaper content.[202] At least one other person extensively edits a journalist's initial version of stories.[203] Therefore, it is unlikely that personal bias would make it into the final, published account.[204]

B. Appearance of Objectivity

A rationale based on the appearance of objectivity is mainly rooted in the importance of circulation and advertising. The fear is that readers and advertisers may feel alienated as a result of publicity surrounding journalists' private political affiliations.[205] In essence, "anything that appears to be a conflict is treated just as if it were a real conflict."[206] Restrictions on outside activity are used by the press as tools to shape public perception about their image and are usually symbolic in nature.[207] Accordingly, such restrictions are implemented by the press as a public relations tool rather than as a means of influencing journalistic objectivity.[208]

The press's justifications, however, for restrictions based on the appearance of objectivity are deficient. For example, the press may actually impair its credibility by forcing journalists to distance themselves from the local communities they cover. The public may

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202. Barbara Cochran also states that, "[n]o anchor writes all the copy that he reads on an entire broadcast. That would simply be impossible." *See Talk Nation*, *supra* note 3.

203. *See* GANS, *supra* note 18, at 189.

204. *See id.* Further, several television news stations report on the same issue at any given time. *See* David Shaw, *Instant Consensus: How Media Gives Stories Same 'Spin,'* L.A. TIMES, Aug. 25, 1989, at 1. Thus, editors and the public can check their reporters' work against many reliable sources.

205. *See* GANS, *supra* note 18, at 186, 191.

206. H. EUGENE GOODWIN, GROPING FOR ETHICS IN JOURNALISM 298 (1983).

207. *See* David Pritchard & Madelyn Peroni Morgan, *Impact of Ethics Codes on Judgments by Journalists: A Natural Experiment*, 66 JOURNALISM Q. 934, 941 (1989).

208. *See id.*

actually alienate the press if its journalists fail to maintain involvement in the community.[209] If the public alienates the press because of a lack of involvement in the community, then the press's claims that its integrity and public image are threatened by outside activity are undermined by the restrictions it imposes on its journalists. The press might distance itself so much from the public that it will no longer be effective as an outlet for the concerns of the communities it serves.[210]

The *Nelson* majority basically condones the press's concession to its commercial interests and the loss of its independence. It is in essence stating that the newspaper has the power, in the name of preserving its credibility, to transfer Nelson merely because her private or social affiliations are distasteful to the newspaper's advertisers.[211] The irony of this action reveals the inherent flaw in using the appearance of objectivity as a rationale.

Interestingly, publishers and broadcasters who insist that their staff members remain politically abstinent, have themselves been found entangled in various political causes and affiliations.[212] The Gulf War vividly illustrated this form of hypocrisy by publishers and broadcasters.[213] Usually such biases on behalf of corporate owners and management result from governmental[214] and advertiser pressures to engage in favorable coverage of issues.[215] Thus, the outside

209. *See* WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 287-306 (1992). A study has identified lack of involvement as a factor that could contribute to public alienation of the press. *See* Cecilie Gaziano & Kristin McGrath, *Newspaper Credibility and Relationships of Newspaper Journalists to Communities*, 64 JOURNALISM Q. 317, 328 (1987).

210. *See* GREIDER, *supra* note 209, at 287-306.

211. *See* Peerless Publications, Inc. v. Newspaper Guild of Greater Philadelphia, Local 10, 1977-1978 NLRB Dec. (CCH) ¶ 18,465 (Aug. 10, 1977) (Fanning, Arb., dissenting) (stating that newspapers that discipline their employees based on the concerns of their advertisers are "forcing [their] employees to agree with [their] advertisers' ideas").

212. *See* BAGDIKIAN, *supra* note 12, at 3-4, 167.

213. *See, e.g.*, Howard Rosenberg, *TV's Flags and Yellow Ribbons*, L.A. TIMES, Feb. 20, 1991, at A9 (commenting that much of television and news was wrapped up in support for the Gulf War and that there was a lack of anti-war sentiment from these sources).

214. *See id.*

215. *See* BAGDIKIAN, *supra* note 12, at 166-67 (stating that the continuing

activities of the journalists are not what risk the integrity of the press or skew media content, but rather the conflicts of the publishers and the broadcasters. After all, ultimately it is "the media owners and managers who determine which ideas and which version of the facts shall reach the public."[216]

V. THE IMPACT OF *NELSON* ON BROADCAST JOURNALISM: WIDENING THE DOOR FOR POLITICAL GERRYMANDERING BY NEWS CORPORATIONS

Indeed, the implications of *Nelson* are far reaching and affect the political freedoms of broadcast journalists. The decision sets precedent that other courts and arbitrators may rely on when faced with similar issues concerning broadcast journalists. Further, by declining to review the *Nelson* case, the United States Supreme Court leaves the answer to this important issue unanswered. Since many of the same issues that exist in print journalism also exist in broadcast journalism, courts are likely to apply the same legal principles—those similar to the *Nelson* case—to broadcast journalism cases. For example, a broadcast journalist will be barred from marching with the local NAACP chapter outside of working hours in opposition to a law affecting minorities if the news station decides to prohibit the activity. The news station can rely on the *Nelson* case for legal support and will bolster its argument by claiming that because of the nature of their work, the public is more likely to recognize broadcast journalists than print journalists. The news station will argue that a journalist's appearance at the march might send the impression that the news station favors one group over another. Unfortunately, this argument may prevail even though the true reason for the news station's disapproval may be a conflict with its corporate ideals or those of its advertisers.

The decision in *Nelson* has also opened the door for uneven application of restrictions on broadcast journalists. For example, an employer may arbitrarily prohibit some of its journalists from engaging in activities that it disfavors, while allowing other employees

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publisher restraint over certain subject matter stems from the fear of offending advertisers).

216. MARTIN A. LEE & NORMAN SOLOMON, UNRELIABLE SOURCES: A GUIDE TO DETECTING BIAS IN NEWS MEDIA 93 (1990).

to engage in activities that either benefit it, or to which it simply has no objection.[217] These instances are particularly prevalent when the employee is a member of an unpopular group that is subject to widespread prejudice. Accordingly, news stations have recently been criticized for arbitrary application of restrictions on outside activity.[218] For example, news stations seem to have a more permissive set of codes for famous politicians who are hired as news anchors and fluctuate between politics and journalism; other journalists on the staff, however, have to abide by a much stricter set of rules.[219] The former are given leeway to pursue outside activities because they are signed on to gain ratings from viewers and increase advertising, while the latter are restricted from outside activities by ethics codes and are disciplined for involvement in them.[220] These double standards are further perpetuated by the decision in *Nelson*, which allows news stations to terminate or demote broadcast journalists under the cloak of free press rights.

New York Republican Congresswoman Susan Molinari exemplifies the double standards that news stations have regarding conflicts. In 1997 Molinari left her seat in Congress to become an anchor for CBS News.[221] CBS welcomed her with open arms and without any concern for the appearance of bias that her presence may reflect.[222] As Howard Kurtz, reporter for *The Washington Post*, pointed out, "[w]hat they [CBS] care about is a famous face. Susan Molinari is a celebrity, therefore CBS sees this translating into ratings. Therefore, [there was] no hesitation on [CBS's] part to not just blur the line but to obliterate the line between journalism and

217. In *Knoxville Newspaper Guild, Local 376 v. The Knoxville News-Sentinel Co.*, A.A.A. No. 30 30 0069 83, 20 (June 10, 1983) (Duff, Arb.), the newspaper fired a reporter because of her election to a local board of education in a neighboring community. *See* Jonathan Friendly, *Reporter Dismissed After Election to School Board*, N.Y. TIMES, June 15, 1983, at A16. The newspaper, however, had allowed its editor to head a local parking authority, and its conservation reporter to serve on a national park commission. *See* Sandra R. Gregg, *Reporter's Firing Raises Rights Issue*, WASH. POST, June 13, 1983, at A2.

218. *See Talk Nation*, *supra* note 3.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

politics."[223] This distinction makes it clear that, as long as there is financial gain involved, even news stations can find exceptions to their purportedly serious concern about the appearance of objectivity. In fact, news stations are able to preserve their double standards by relying on the *Nelson* decision when broadcast journalists protest such activity.

The *Nelson* case also has strong implications for news station employees other than journalists. For instance, news stations can argue that the news writing and directing staff also play integral roles in the objectivity of the news and thus prohibit them from engaging in outside political activities. *Nelson* has set the groundwork for this type of extension of the First Amendment's free press clause. As a result, *Nelson*'s impact may turn out to be the political silencing of one of the most important segments of our population, broadcast journalists, merely by virtue of the profession they chose.

VI. ALLOWING POLITICAL PROMISCUITY IN BROADCAST JOURNALISM: ALTERNATIVES TO POLITICAL ABSTINENCE

Politically neutralizing broadcast journalists is not only unconstitutional, but is counterproductive to the goals of achieving objectivity in the press. Journalism, however, should not be completely biased either.[224] Indeed, there are some viable alternatives to political abstinence for achieving objectivity in the press.

The first alternative is to lift all restrictions on the outside activities of journalists. Thereafter, journalists would feel more inclined to reveal their relevant biases to their supervisors without fear of a backlash resulting in demotion or termination. This openness will reveal the affiliations, beliefs, and biases of broadcast journalists. Furthermore, news stations concerned with neutrality would be

223. *Id.* Among other "famous faces" that have made it on the network news circuit are former presidential hopeful Pat Buchanan, who is a co-host on CNN's *Crossfire*; former Bill Clinton senior advisor George Stephanopoulos, who is an analyst for ABC's *Good Morning America* and *This Week*; former aide to Democratic Senator Patrick Moynihan, Tim Russert, who hosts NBC's *Meet The Press*; and former Richard Nixon aide Diane Sawyer, who hosts ABC's *20/20*. *See id.*

224. In order to uphold the circulation of ideas, the press must have some objective characteristics. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

alerted to the possibility of meaningful conflicts of interest. After all, an open policy poses a lower risk to objectivity than prohibitive policies, which can lead to the subtle infiltration of bias into news reports. As a result, broadcast journalists may also take the initiative to approach supervisors about certain assignments out of concern that they will not be able to report fairly on a particular topic.[225] This approach is more effective because the news media generally attract people who keep their values separate from their work.[226] Finally, news stations can simply reassign journalists to different stories, instead of demoting or terminating them, when they have strong political or personal feelings.

As a second alternative, employers could support subjective newsgathering and reporting by allowing broadcast journalists to infuse strong personal convictions into stories, buttressed by facts and empirical evidence. This type of reporting reflects the era of muckraking journalism[227] and, like muckraking, can effect important political and social changes.

Regardless of the alternative a news station chooses to adopt, it should abandon the illusory principle of absolute neutrality. The news station should also consider the experiences and affiliations that shape each journalist's reporting style and candidly acknowledge these biases, thereby connecting meaningfully with its audience. Courts should develop a test that balances the journalist's interest in free expression against the protected interest of the news station, thereby intervening to protect the journalist's speech without violating the news station's rights.

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225. *See* David Shaw, *Can Women Reporters Write Objectively on Abortion Issue?*, L.A. TIMES, July 3, 1990, at A23 (reporting the experience of one Los Angeles Times reporter, Patt Morrison, who agreed to receive no assignments related to abortion after she expressed her concerns over her beliefs to her editors).

226. *See* GANS, *supra* note 18, at 184.

227. *See* J. HERBERT ALTSCHULL, FROM MILTON TO MCLUHAN: THE IDEAS BEHIND AMERICAN JOURNALISM 271-76 (1990). "A muckraking work exposes a hidden situation, depicts the situation prescriptively, locates an agent of control, indicates preferred action, incites audience response and maintains authorial autonomy." Harry H. Stein, *American Muckraking of Technology Since 1900*, 67 JOURNALISM Q. 401, 401-02 (1990).

VII. CONCLUSION

Democratic societies demand freedom of expression because it is essential to participation in decision making by all members of society, to individual self-fulfillment, to the advancement of knowledge, to the discovery of truth, and to the maintenance of a proper balance between stability and change.[228] Suppressing individual political freedoms in exchange for a free press is wrong. After all, the press does not become any less "free" if journalists are permitted to express political views in their private lives. Abstaining from outside political activity is not an integral part of producing unbiased news reporting or preventing the appearance of bias. The mere fact that the press prohibits journalists from engaging in outside political activity does not guarantee the objectivity of its news. Rather, it may even work to the news station's disadvantage because such practices will leave journalists with only one avenue of expression: journalism. Accordingly, journalists will have no alternative but to express their political views through their journalistic work. Thus, if the true aim is objectivity, the misconception that journalists can somehow be neutralized through internal policies has a reverse and counterproductive effect.

Concern about employers improperly restricting employee political activity is legitimate, as illustrated by the enactment of statutes like the Washington Fair Campaign Practices and other state laws protecting employees' political activities. Striking down laws that protect journalists on free press grounds does nothing to allay these concerns. Furthermore, granting the press the power to control its credibility by attempting to maintain the objectivity of its journalists makes way for corporate abuse of the First Amendment's free speech provision. The press can use this power to increase profits through the appearance of objectivity and, at the same time, suppress employee political speech that is unfavorable to its corporate ideals. The First Amendment, however, was not drafted to protect the financial interests of the press, but rather to allow unhindered expression.

In conclusion, the Supreme Court should review the issue of whether the appearance of objectivity is a valid corporate objective

228. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1966).

for the press in exercising its First Amendment right to a free press. The Court should also scrutinize the legitimacy of granting a blanket protection under the free press clause. Further, the Court must clarify the ruling in *Tornillo* so that state high courts, like the Washington Supreme Court, will not extend it to prohibit government regulation of the press's employment decisions. No entity, including the press, should have a green light to discriminate against employees based on their intimate right to engage in political expression. "[T]he unlimited freedom to express political views is the very heart of a democratic body, pumping the lifeblood of ideas without which our system could not survive."[229]

*Tom K. Ara**

229. Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 804, 16 Cal. Rptr. 813, 818 (1961).

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