

1-1-2005

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Clay Calvert

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## Recommended Citation

Clay Calvert, *All the News That's Fit to Steal: The First Amendment, a Free Press &(and) a Lagging Legislative Response*, 25 Loy. L.A. Ent. L. Rev. 117 (2005).

Available at: <http://digitalcommons.lmu.edu/elr/vol25/iss1/6>

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# ALL THE NEWS THAT'S FIT TO STEAL: THE FIRST AMENDMENT, A "FREE" PRESS & A LAGGING LEGISLATIVE RESPONSE

*Clay Calvert\**

## I. INTRODUCTION

This is a story amazingly rich with irony, but, unfortunately, remarkably poor with appreciation of the First Amendment's protection of freedom of the press,<sup>1</sup> and sadly indicative of a growing trend today. On November 4, 2002—one day prior to local elections in Berkeley, California—mayoral candidate Tom Bates stole approximately 1000 copies of the *Daily Californian* “from their kiosk on Sproul Plaza, birthplace of the Free Speech Movement.”<sup>2</sup> The student newspaper, which is distributed free-of-charge, endorsed incumbent Shirley Dean in the mayoral race rather than Bates, “a Democrat who was one of the most liberal members of the [California] State Assembly for two decades.”<sup>3</sup> Although Bates would win the election by slightly more than 5000 votes, he was roundly criticized and chastised by other local press outlets for the paper pilfering incident. As the neighboring *Oakland Tribune* opined, “[t]hat the mayor of a city proud to call itself the home of the free-speech movement would trample on those First Amendment rights is not only ironic but also embarrassing.”<sup>4</sup> *San*

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\* Clay Calvert earned his J.D., Order of the Coif, from McGeorge School of Law in 1991 and his Ph.D. in Communications from Stanford University in 1996. He is currently Associate Dean of Schreyer Honors College at Pennsylvania State University.

1. U.S. CONST. amend. I (providing in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press”). See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating free speech and free press clauses through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials).

2. Charles Burress, *Berkeley Mayor Will Plead Guilty*, S.F. CHRON., Dec. 12, 2002, at A25.

3. *Berkeley Mayor Admits to Role in Throwing Out Newspapers*, N.Y. TIMES, Dec. 7, 2002, at A17. See, e.g., *U-Md. Paper Disappears Off Racks*, WASH. POST, Apr. 19, 2002, at B3 (noting that nearly 4000 copies of an edition of the student newspaper at the College Park campus of the University of Maryland, which contained editorial endorsements of candidates in the student government races, vanished from campus news racks).

4. *Mayor Tom Bates Owes More Than Apology*, OAKLAND TRIB., Dec. 12, 2002, at Local 10.

*Francisco Chronicle* columnist Chip Johnson observed, “it’s pretty hard for Bates to be a champion of the proletariat when he’s ripping off their kids’ student newspaper.”<sup>5</sup>

However, the problem for local law enforcement officials was that California did not have a state statute addressing “the theft of free newspapers, making it difficult for prosecutors to charge those who steal papers such as the Daily Cal.”<sup>6</sup> As John Adams, an assistant district attorney in Alameda County where Berkeley is located, commented, “[t]here is an issue whether free newspapers can be the subject of a theft.”<sup>7</sup> Due to the absence of both state and local legislation targeting the theft of free newspapers, Bates ultimately was charged only “with an infraction, and he was fined \$100.”<sup>8</sup> It was a very small price to pay for stealing speech.

And therein lies the problem of, quite literally, stealing free speech: how can one steal something if it is free? In August 2003, a man and woman who did not like a story printed about them allegedly pilfered 8000 copies of three free newspapers in and around Aspen, Colorado. In response, Colorado police officers claimed “there was nothing they could do—it’s no crime to steal free newspapers.”<sup>9</sup>

As this article later explains in Part II, the theft of newspapers—particularly free newspapers at colleges and universities—has grown rapidly since the early 1990s. In the first five months of 2004 alone, there were at least half-a-dozen separate incidents of newspaper theft reported across the country.<sup>10</sup> Yet at the same time, legislative bodies have been excruciatingly slow to react to these blatant acts of censorship by failing to criminalize the theft of free newspapers. In fact, in 2004, Colorado became only the second state to adopt a statute making the theft of free newspapers a crime.<sup>11</sup> The only other state to have a newspaper theft statute is Maryland.<sup>12</sup> Thus, the publishers of free newspapers in the other forty-eight states have limited legal remedies when their publications are pilfered in massive quantities by individuals seeking to stifle disagreeable

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5. Chip Johnson, *Bates Needs to Restore Good Name*, S.F. CHRON., Dec. 16, 2002, at A19.

6. Kathy Lee, *Theft of Free Newspapers to be a Crime in Berkeley*, DAILY CALIFORNIAN ONLINE (Berkeley, Cal.), Oct. 14, 2003, at <http://www.dailycal.org/article.php?id=13113>.

7. *Berkeley Mayor Admits to Role in Throwing Out Newspapers*, N.Y. TIMES, Dec. 7, 2002, at A17.

8. Charles Burress, *Berkeley to Ban Free-Paper Theft*, S.F. CHRON., Oct. 16, 2003, at A24.

9. John J. Sanko & Peggy Lowe, *Just a Bill? They're Burying Capitol Hill*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 8, 2004, at 20A.

10. See *infra* Part II (describing specific examples of recent newspaper theft incidents).

11. COLO. REV. STAT. § 18-4-419 (2004) (effective July 1, 2004).

12. MD. CODE ANN., CRIM. LAW § 7-106 (2003).

expression.

In the absence of state legislation, many free newspaper publishers have been forced to resort to self-help tactics to bring their product within the ambit of general theft statutes.<sup>13</sup> For instance, *The Vanguard*, University of South Alabama's student newspaper, states on page two of its editions, "[t]he first copy is free. Additional copies are \$1 each."<sup>14</sup>

At the local level, in October 2003, in reaction to the Bates incident,<sup>15</sup> Berkeley became only the second city in California to adopt a statute against the theft of free newspapers. It passed an ordinance targeting the unauthorized removal of newspapers.<sup>16</sup> The other California city possessing such an ordinance is San Francisco,<sup>17</sup> which adopted its law after it dealt with a high-profile incident of newspaper theft back in 1992. Former Police Chief Richard Hongisto allegedly ordered a couple police officers to remove more than 2000 copies of an issue of the *Bay Times*, a gay-themed newspaper that mocked Hongisto on the cover.<sup>18</sup>

This article examines the escalating phenomenon of newspaper theft, the constitutional questions and concerns it raises, and the far too infrequent legislative and public policy responses to it. In particular, Part II illustrates the problem by providing recent examples involving newspapers that were swiped in bulk by individuals who disagreed with the content therein. Part III demonstrates the harms to both the public and the publishers that occur in such situations in light of well-established theories and doctrines of First Amendment jurisprudence that favor an effective and full-scale legislative response. Next, Part IV analyzes, critiques, and compares the only two examples of statewide legislation making the theft of free newspapers a crime—the new April 2004 Colorado law and Maryland's slightly older measure, adopted in the 1990s. In addition, this part sets forth and contrasts these statewide legislative responses to those of both Berkeley and San Francisco at the local level. Importantly, Part IV

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13. See generally *Ore. University Fines Subject of Political Cartoon \$100 for Newspaper Theft*, STUDENT PRESS LAW CENTER, July 6, 2004, at <http://www.splc.org/newsflash.asp?id=843> (describing how the Western Oregon University includes "a notice in the newspaper that states people are only allowed to take one copy before being charged for another").

14. Sammy Patrick, *3,000 Newspapers Stolen from Campus*, VANGUARD (Mobile, Ala.), Nov. 3, 2003, at [http://www.usavanguard.com/vnews/display.v?TARGET=printable&article\\_id=3fa7e4b758057](http://www.usavanguard.com/vnews/display.v?TARGET=printable&article_id=3fa7e4b758057).

15. See *supra* notes 2–9 and accompanying text (describing the theft of newspapers by Tom Bates).

16. BERKELEY, CAL., MUN. CODE § 13.54.030 (2003).

17. SAN FRANCISCO, CAL., MUN. POLICE CODE § 630 (1999).

18. See Dennis J. Opatrny & George Raine, *Hongisto Guilty of Violating Rights of Paper*, S.F. EXAMINER, Sept. 16, 1994, at A-1.

also examines a May 2004 opinion from a federal district court in *Rossignol v. Voorhaar*<sup>19</sup> involving a related problem. This case asks what happens when individuals (government officials allegedly acting under color of state authority) purchase all copies of an edition of a small-circulation, fee-charging newspaper in order to prevent others from reading it.

Part V then suggests ways that current legislation can be improved and argues that legislators in the other forty-eight states without such anti-theft newspaper statutes must act swiftly to quell the current takings of newspapers and suppression of the First Amendment freedom of the press. Finally, the article concludes by calling on members of the mainstream media, who are typically better financed than many publishers of the often stolen free newspapers, to take affirmative steps in paying for lobbyists and attorneys to draft model legislation for adoption in all states and give better coverage to the problem of newspaper theft. The conclusion contends that the country's large newspapers and newspaper chains<sup>20</sup> carry an ethical obligation to take up the fight on behalf of their counterparts at free newspapers, college newspapers, and alternative weeklies that are less able to carry the financial burdens involved in legislative lobbying.

## II. GIVING NEW MEANING TO "GRABBING THE HEADLINES": THE RISING TIDE OF NEWSPAPER THEFT AND CONFISCATIONS

In a society where fewer and fewer people read print newspapers on a daily basis,<sup>21</sup> it seems that there are some people who would like to see the numbers drop even further. Their guiding maxim appears to boil down to this:

*If you don't like what's in the newspaper, then take as many copies of it as you can so that nobody else can read it.*

Those who subscribe to this philosophy, along with those who apparently believe that the right of free speech gives them the right to squelch the ideas of others whom they think are wrong, are often college students—and sometimes even their administrators—who somehow think nothing of swiping a bundle of the local, free-of-charge campus newspaper.

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19. *Rossignol v. Voorhaar*, 321 F. Supp. 2d 642 (D. Md. 2004).

20. RALPH E. HANSON, MASS COMMUNICATION: LIVING IN A MEDIA WORLD 131 (2005) (defining newspaper chains as "[c]orporations that control a significant number of newspapers and other media outlets").

21. See STANLEY J. BARAN, INTRODUCTION TO MASS COMMUNICATION MEDIA LITERACY AND CULTURE 111 (3d ed. 2004) (writing that, in the United States, newspapers' "overall circulation has remained stagnant despite a growing population. In 1990 there was only 0.7 newspaper subscription per U.S. household compared to 1.12 in 1960").

But they are certainly not the only ones prone to pilfer papers, as illustrated by Tom Bates, described in the introduction.<sup>22</sup> Consider, for instance, the following list of incidents, each of which occurred in just the first five months of 2004:

- In January 2004, stacks of copies of *The Trojan Horse*,<sup>23</sup> a left-leaning alternative publication, were allegedly stolen on the campus of the University of Southern California (“USC”).<sup>24</sup> The issue focused on the Israeli and Palestinian conflict. Editor Joshua Holland “suspects pro-Israeli students were involved in the thefts because the paper ‘didn’t paint Israeli occupation in as positive a light as the mainstream media.’ He said by some, the issue was perceived as anti-Semitic.”<sup>25</sup>

- In February 2004, the Student Press Law Center reported on its website that “[a] homecoming queen nominee at the University of Central Florida was punished by the school for directing other students to throw away stacks of the student newspaper, which reported that she had a criminal record.”<sup>26</sup> It was noted that “[a]t the time of the theft, [Katie] Noland was a candidate for homecoming queen. An article in the newspaper reported that she pleaded guilty in 2000 to charges of felony burglary and grand larceny involving the theft of a roommate’s computer.”<sup>27</sup>

- In March 2004, the *Fresno Bee* reported that “[a]n editorial cartoon was cut out from about 300 copies of the COS [College of the Sequoias] student newspaper, *The Campus*, on display at several newsstands. The cartoon, which was on the second page of the 10-page edition, depicted a humorous take on Gov. [Arnold] Schwarzenegger’s attitudes about gay marriage.”<sup>28</sup>

- Also in March 2004, *Pipe Dream*, the student newspaper at Binghamton University in New York, reported that the editors of a monthly, student-run conservative magazine called *The Binghamton Review* had accused the student government president, Jordan Peck, of

22. See *supra* notes 2–9 and accompanying text.

23. THE TROJAN HORSE, Jan. 27, 2004, at <http://www.troho.com/issues/2004-1-27/index.html>.

24. *Copies of Alternative College Paper Stolen at Calif. University, Editor Says*, STUDENT PRESS LAW CENTER, Feb. 9, 2004, at [http://www.splc.org/newsflash\\_archives.asp?id=738&year=2004](http://www.splc.org/newsflash_archives.asp?id=738&year=2004).

25. *Id.*

26. *Fla. University Punishes Student for Her Role in Campus Newspaper Theft*, STUDENT PRESS LAW CENTER, Feb. 23, 2004, at [http://www.splc.org/newsflash\\_archives.asp?id=751&year=2004](http://www.splc.org/newsflash_archives.asp?id=751&year=2004).

27. *Id.*

28. Tim Bragg, *Student Paper at COS Marred*, THE FRESNO BEE, Mar. 18, 2004, at B1.

stealing and throwing away at least fifty copies of the magazine.<sup>29</sup> Peck reportedly admitted to the *Pipe Dream* “that he had erred in deciding to throw out the newspapers,”<sup>30</sup> but contended that “the *Review* endangers”<sup>31</sup> the student government association at the University.

- In April 2004, a building operation coordinator at the University of Missouri at Kansas City allegedly removed almost 450 copies of the *University News*, the University’s independent student newspaper.<sup>32</sup> This was allegedly done because of an article called “Sex at Swinney.”<sup>33</sup> This article described “[s]tories of sexual activity in the sauna rooms and showers” at a campus recreational facility.<sup>34</sup>

- In another incident in April 2004, security personnel at La Roche College in Pittsburgh, Pennsylvania “removed copies of the student newspaper from its campus, saying an opinion column supporting condom use could have been misinterpreted by families who visited the Catholic school . . . .”<sup>35</sup> A university official told a reporter for the *Pittsburgh Post-Gazette* that “La Roche was not trying to stifle student expression or interfere with the campus press,”<sup>36</sup> but that “the piece was at odds with La Roche’s religious values and could have created a wrong impression about the college at a time when students are deciding where to enroll.”<sup>37</sup>

- In May 2004, approximately 2500 copies of the *Poly Post*, the free student newspaper of California State Polytechnic University, Pomona, were pilfered from distribution bins.<sup>38</sup> Luis Gomez, editor-in-chief of the newspaper, told the Associated Press that “[a] front page story about one of the candidates in the election probably caused it to be stolen.”<sup>39</sup> In an article published in his own paper, Gomez added, “[i]t’s not fair . . . I believe we are victims in this political crossfire among some ASI election

29. Matt Chayes, *Peck Investigated for Dumping Review*, PIPE DREAM, Mar. 19, 2004, at <http://www.bupipedream.com/031904/news/n1.htm>.

30. *Id.*

31. *Id.*

32. Nick Barron, *Newspaper Removal Hurts Relations Between UMKC and the U-News*, UNIVERSITY NEWS, Apr. 19, 2004, at [http://www.unews.com/global\\_user\\_elements/printpage.cfm?storyid=664884](http://www.unews.com/global_user_elements/printpage.cfm?storyid=664884).

33. See Yusuf Al-Siddiq, *Sex at Swinney*, UNIVERSITY NEWS, Apr. 12, 2004, available at <http://www.unews.com/news/2004/04/12/news/sex-at.swinney-657828.shtml>.

34. *Id.*

35. Bill Schackner, *Copies of Student Paper Confiscated, La Roche Says Column, Religious Values at Odds*, PITTSBURGH POST-GAZETTE (PA.), Apr. 21, 2004, at A-15.

36. *Id.*

37. *Id.*

38. *If Newspapers Were Free, Could They Have Been Stolen?*, ASSOC. PRESS NEWSWIRES, May 25, 2004.

39. *Id.*

candidates who have used the paper as a political tool.”<sup>40</sup>

• Also in May 2004, the *New Times* in Florida reported that officials at the North Broward Hospital District were “tossing copies of this newspaper into the garbage. Hundreds of papers containing *New Times* columnist Bob Norman’s reports on the corrupt district have mysteriously disappeared from the racks at or near its four hospitals and 30-odd clinics.”<sup>41</sup>

Holland, in an exclusive e-mail written to the author of this law journal article wrote the following:

While the content of the issue was in keeping with our editorial direction, we did include a rebuttal of our criticisms from a pro-Israeli activist. I can also say—as a Jew myself—that there was no sympathy for Palestinian terrorists nor calls for the destruction of Israel. The issue was critical but not ‘off the range’ of acceptable political discourse. However, accusations of anti-semitism [sic] and sometimes threatening rhetoric greeted the issue’s release.<sup>42</sup>

And what was the reaction from USC? According to Holland, it was “[n]ot much. The Daily Trojan wrote an editorial condemning the thefts, and I believe the head of student affairs sent an e-mail to SCSU and USC Hillel warning them against such acts.”<sup>43</sup>

Each of these incidents from the first five months of 2004 follows a number of similar incidents involving the theft and/or removal of newspapers in 2003.<sup>44</sup> In forty-eight states, this problem is worsening in

40. Jana Rae Corpuz, *2,500 Poly Post Newspapers Reported Stolen*, POLY POST (Pomona, Cal.), May 25, 2004, at <http://www.thepolypost.com/story.php?story=1937>.

41. *Stepping on Freedom of the Press*, NEW TIMES (Broward-Palm Beach, Fla.), May 6, 2004, at <http://www.newtimespbp.com/issues/2004-05-06/tailpipe.html>.

42. E-mail from Joshua Holland, Editor-in-Chief, TROJAN HORSE, to Clay Calvert, Associate Professor of Communications and Law, Pennsylvania State University (May 19, 2004, 13:26:03 PST) (on file with author).

43. *Id.*

44. See Chris Gillon, *Thousands of The Daily Campus Stolen Friday*, THE DAILY CAMPUS (Storrs, Conn.), Mar. 3, 2003, at <http://www.dailycampus.com/news/2003/03/03/news/Thousands.Of.The.Daily.Campus.Stolen.Friday-384038.shtml> (describing how “[a]bout 9000 copies of The Daily Campus were stolen Friday from The Daily Campus Building and several dozen delivery locations on campus”); *Local Briefs*, TELEGRAPH HERALD (Dubuque, Ia.), Oct. 10, 2003, at A3 (describing how “[t]he theft of 3,000 copies of the University of Wisconsin-Platteville’s weekly campus newspaper, the Exponent, has triggered a campus-wide investigation” and noting that the papers were valued at \$3700); Megan Rooney, *Sense and Censorship*, CHRON. OF HIGHER EDUC., June 13, 2003, at A6 (describing how 2000 copies of the Student Voice, University of Wisconsin at River Falls student newspaper, were stolen by three); Alicia Wittmeyer, *Daily Cals Stolen Following Accusations of Racism*, DAILY CALIFORNIAN (Berkeley, Cal.), May 8, 2003, at

the absence of statewide legislation designed to deter theft. In particular, newspaper theft has been a problem on college campuses since the early 1990s. For instance, in 1993 at the University of Pennsylvania in Philadelphia, “a group of frustrated black Penn students confiscated and trashed one day’s Daily Pennsylvanian press run.”<sup>45</sup> This occurred after “a white Penn junior named Gregory Pavlik wrote an opinion column in the student newspaper, the Daily Pennsylvanian, complaining that Penn relaxed its admissions and disciplinary practices for blacks.”<sup>46</sup> That same year, less than 200 miles away, there were several incidents of newspaper theft at the main campus of the Pennsylvania State University. In one such incident, 6000 copies of a conservative newspaper called *The Lionhearted* disappeared only to later appear “in flames on the lawn of a university trustee” who helped sponsor the publication.<sup>47</sup> Attacks on conservative college newspapers across the United States continue today. Accordingly, Melissa Seckora wrote in October 2002 in the *National Review*:

In recent times, conservative publications on campus have suffered an unprecedented amount of what might be called censorship by theft. And hardly anyone appears to be bothered. Most irritating is the lack of response from college administrators who apparently care more about political correctness than about the freedom and dignity of students.<sup>48</sup>

George Garneau defined the trend of newspaper thefts a decade ago in *Editor & Publisher* magazine when he wrote: “[w]elcome to the latest craze in the rough-and-tumble world of campus journalism: stealing newspapers because you don’t like what’s in them.”<sup>49</sup> He added that, “[t]heft of newspapers is just the latest tactic used against the perennially besieged college press.”<sup>50</sup>

Paul McMasters, the former executive director of the Freedom Forum First Amendment Center at Vanderbilt University, citing data compiled by

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<http://www.dailycal.org/particle.php?id=11538> (describing how approximately 2400 copies of the *Daily Californian* were stolen from Sproul Plaza on the campus of the University of California at Berkeley in May 2003 “after a series of protests against two pieces run in the paper during the past two weeks—an April 25 editorial cartoon depicting North Korean leader Kim Jong-II and a May 6 news article about a Cal football player’s arrest”).

45. Dan Rottenberg, *Haunted by Water Buffalo*, PHILADELPHIA MAG., Jan. 2004, at 58.

46. *Id.*

47. ROBERT D. RICHARDS, *FREEDOM’S VOICE* 40 (1998).

48. Melissa Seckora, *Stop, Thief!: The Trials of Conservative Publications on Campus*, NAT’L REV., Oct. 14, 2002, at 46–47.

49. George Garneau, *Censorship by Theft: Stealing Newspapers Is the Latest Craze for People Trying to Silence the Campus Press*, EDITOR & PUBLISHER, Dec. 24, 1994, at 15.

50. *Id.*

the Student Press Law Center, wrote one year before Garneau:

This new version of book-burning has happened at Southern Vermont College, Dartmouth, Yale, Highland (Kan.) Community Junior College, University of Wisconsin-Stout, University of Wisconsin-Madison, University of Central Arkansas, Trenton (N.J.) State College, Northern Illinois University, California Polytechnic State University, Bucknell University, Florida State University, North Carolina State University, North Adams (Mass.) State College, and University of Miami (Fla.).<sup>51</sup>

The trend of newspaper theft—particularly free college newspapers—that began slightly more than a decade ago continues today with no apparent end in sight. In fact, “more than 120 college student newspaper thefts have been reported to the Student Press Law Center” in the past five years, a figure that many experts feel “does not reflect the true extent of the problem because newspaper thefts often go unnoticed or unreported.”<sup>52</sup>

### III. SHOPLIFTING IN THE MARKETPLACE OF IDEAS: WHY LEGISLATIVE ACTION IS NECESSARY

There are many legitimate reasons why a person may not like the content of a newspaper. For instance, he or she might perceive the stories and articles to be biased<sup>53</sup>—a trait that contradicts the fundamental journalistic tenet of objectivity,<sup>54</sup> whereby journalists “strive to keep their personal preferences and opinions out of news stories, to achieve balance in coverage, and to rely on credible and responsible news sources.”<sup>55</sup> Such perceptions of bias, whether correct or not, are far from rare. As Professor Kathleen Hall Jamieson of the University of Pennsylvania observed, “[a] common criticism of the media, especially the East Coast-based, nationally

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51. Paul McMasters, *Shop Talk at Thirty: Trashing the Campus Press, or Censorship as Expression*, EDITOR & PUBLISHER, Nov. 13, 1993, at 48.

52. *Taking Out the Trash*, STUDENT PRESS LAW CENTER, Spring 2004, at 30, at <http://www.splc.org/report.asp>.

53. See generally ERIC ALTERMAN, *WHAT LIBERAL MEDIA?: THE TRUTH ABOUT BIAS AND THE NEWS* (2003) (discussing whether the news media is biased towards a liberal perspective).

54. See RON F. SMITH, *GROPING FOR ETHICS IN JOURNALISM* 77 (Iowa State Press, 5th ed. 1983) (writing that “many would argue that objectivity is and should remain a fundamental part of journalism,” and noting that objectivity for some “is a professional obligation that can be practiced”); PHILIP PATTERSON & LEE WILKINS, *MEDIA ETHICS: ISSUES & CASES* 20 (Phillip A. Butcher & Valerie Raymond eds., 2002) (discussing “the journalistic ideal of objectivity” and writing that “[w]hile objectivity has many definitions, it may be considered, most simply, a mechanism that allows journalists to divorce fact from opinion. Journalists view objectivity as refusing to allow individual bias to influence what they report or how they cover it”).

55. LOUIS ALVIN DAY, *ETHICS IN MEDIA COMMUNICATIONS: CASES & CONTROVERSIES* 36 (Ryan E. Vesely et al. eds., Wadsworth 2003).

circulated *New York Times* and *Washington Post*, is that their reporting has a definite slant left of center.”<sup>56</sup>

Likewise, one might not like a newspaper’s content because he or she finds it too dull or, conversely, too sensational.<sup>57</sup> A reader also might not enjoy the content of a particular paper because he or she believes it is irrelevant or unimportant. Or perhaps one may disdain the political viewpoints of a newspaper expressed in its editorial pages and by its columnists.<sup>58</sup>

But do any or all of the above-mentioned reasons provide sufficient justification for an individual to abscond with stacks and bundles of free newspapers, such that many other potential readers are deprived of the opportunity to consume content that they might enjoy?

The answer to that question, when viewed through the lens of three fundamental First Amendment theories and doctrines—the marketplace of ideas theory, the doctrine of counterspeech, and prohibition on viewpoint-based restraints of speech—is a resounding no. Although the First Amendment applies only to government restrictions on expression rather than to acts of private individuals designed to squelch speech (*i.e.* private people stealing otherwise free newspapers),<sup>59</sup> the creation and adoption of statutes protecting against newspaper theft—laws protecting and affecting a free press—constitutes state action sufficient to make a First Amendment critique relevant.<sup>60</sup> The analysis of the question of newspaper theft, from the perspective of each of these theories, is set forth below.

#### A. *The Marketplace of Ideas and Private Prior Restraints on Speech*

Professor Matthew Bunker of the University of Alabama wrote in his recent book, *Critiquing Free Speech*,<sup>61</sup> that the marketplace of ideas theory

56. KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA* 105 (Karen Austin et al. eds., Wadsworth 2001).

57. Stephanie Penick, *Naperville City Council Should Talk Less, Listen More to Its Citizens*, CHICAGO DAILY HERALD, Feb. 18, 2003, at D3.

58. *Letters*, PENSACOLA NEWS JOURNAL, Oct. 6, 2003, at 7A.

59. See ROBERT TRAGER & DONNA L. DICKERSON, *FREEDOM OF EXPRESSION IN THE 21<sup>ST</sup> CENTURY* 84 (Wendy Westgate ed., Pine Forge Press 1999) (writing that “[i]n the United States, the First Amendment restrains government at all levels, leaving the private citizen or organization free to sanction expression”).

60. Cf. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 488 (Erwin Chemerinsky et al. eds., Aspen Publishers 2d ed. 2002) (writing that “statutes, both federal and state, can apply constitutional norms to private conduct”).

61. MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* (Lawrence Erlbaum Assoc. 2001).

“represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.”<sup>62</sup> This theory embodies what Professor Daniel Farber calls “[t]he truth-seeking rationale for free expression.”<sup>63</sup> Although the theory predates him, United States Supreme Court Justice Oliver Wendell Holmes, Jr., introduced the marketplace rationale for protecting speech to First Amendment case law eighty-five years ago.<sup>64</sup> In his dissent in *Abrams v. United States*,<sup>65</sup> Holmes famously wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>66</sup>

Today, the economic-based<sup>67</sup> marketplace metaphor “consistently dominates the Supreme Court’s discussion of freedom of speech.”<sup>68</sup> Although it is often criticized by academics,<sup>69</sup> Professor Martin Redish observes that “[o]ver the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which

62. *Id.* at 2.

63. DANIEL A. FARBER, *THE FIRST AMENDMENT 4* (The Foundation Press, 2d ed. 2003).

64. See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 237 (University of California Press 1991) (writing that Holmes “introduced” the marketplace of ideas theory into First Amendment jurisprudence).

65. 250 U.S. 616 (1919).

66. *Id.* at 630 (Holmes, J., dissenting); see also Joseph A. Russomanno, “*The Firebrand of My Youth*”: Holmes, Emerson and Freedom of Expression, 5 COMM. L. & POL’Y 33, 34 (2000) (Holmes’ dissent in *Abrams* “marked . . . a transformation in American First Amendment jurisprudence.” In particular, it marked a more expansive and libertarian interpretation of the First Amendment. *Id.* at 40, 45); see also LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 18 (1986) (observing that “within the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech”).

67. See Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 542 (1998) (observing that the marketplace metaphor “suggests a hands-off approach to speech regulation. Economic marketplace forces, not legislators, should guide and control the creation and distribution of messages”).

68. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (Oxford University Press, 1989); see also W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a rather recent review of the Court’s use of the marketplace metaphor).

69. See generally Robert Jensen, *First Amendment Potluck*, 3 COMM. L. & POL’Y 563, 573-76 (1998) (setting forth various critiques of the marketplace of ideas metaphor).

contrasting ideas compete for acceptance among a consuming public.”<sup>70</sup> The premise of this idealistically free and fair competition of ideas is that the truth will be discovered, or, at the very least, conceptions of the truth will be tested and challenged.<sup>71</sup>

It is important to understand that under the marketplace theory, “unpopular opinion should not be suppressed.”<sup>72</sup> As Professor Bunker explains, elaborating on John Stuart Mill’s 1859 conception of a marketplace of ideas, which pre-dated Holmes’ dissent in *Abrams*, “doing battle with incorrect opinions is the only way an educated person can be quite sure of her premises. Without deep knowledge of competing opinions and the cultivation of the ability to defend one’s own views, the received opinion is held as dead dogma only.”<sup>73</sup> Thus, it should be, as Justice Antonin Scalia recently wrote for the Court in a unanimous opinion in *Virginia v. Hicks*<sup>74</sup> in 2003, “an *uninhibited* marketplace of ideas.”<sup>75</sup>

The marketplace metaphor is clearly relevant to the location where many newspaper thefts take place—namely, college campuses. The United States Supreme Court has made it apparent that it conceptualizes universities as marketplaces of ideas.<sup>76</sup> More than thirty years ago, in *Healy v. James*,<sup>77</sup> the Court observed that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”<sup>78</sup>

Engaging in acts of newspaper theft because one objects to its content contradicts the fundamental premise of the marketplace metaphor. *All* ideas, true or false, offensive or pleasant, should be given the opportunity to be heard and to compete freely and fairly to gain acceptance, because “[t]he First Amendment protects expression, be it of the popular variety or

70. Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083 (1999).

71. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 753 (Erwin Chemerinsky et al. eds., Aspen Publishers 1997). The theory is attacked by some scholars, however, as “unpersuasive as an account of the search for social and political truth.” Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1352 (1998).

72. BUNKER, *supra* note 61, at 4 (discussing John Stuart Mill’s “defense of free speech in ‘On Liberty’”).

73. *Id.*

74. *Virginia v. Hicks*, 539 U.S. 113 (2003).

75. *Id.* at 119 (emphasis added).

76. See generally Clay Calvert, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, 53 ME. L. REV. 53, 62–65 (2001) (describing the United States Supreme Court’s view of universities as marketplaces of ideas).

77. *Healy v. James*, 408 U.S. 169 (1972).

78. *Id.* at 180 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

not.”<sup>79</sup> There should be an “*uninhibited* marketplace of ideas.”<sup>80</sup> To steal newspapers is to inhibit the marketplace of ideas—it is to remove content before it has a chance to be read by others, to whisk it away before it may compete to influence and impact others’ conceptions of what is true or false. Moreover, as Professor Patrick M. Garry recently observed, “[a]ccording to the marketplace metaphor first articulated by Justice Holmes, the First Amendment has an interest in abundance: the more speech, the better.”<sup>81</sup> Stealing a stack of free newspapers prevents more speech and thwarts a “free trade in ideas”<sup>82</sup> because it prevents ideas from being traded in the first place.

Consequently, newspaper theft amounts to a private form of prior restraint on speech—an act of private censorship that stops speech before it can be received by others. As one federal appellate court recently observed, a prior restraint exists “when the government can deny access to a forum for expression before the expression occurs.”<sup>83</sup> When a person steals a stack of newspapers, he or she is ultimately denying the public access to a forum of expression before the expression can be read.

There is considerable agreement “among legal historians that the First Amendment was intended primarily as a protection against prior restraints on expression.”<sup>84</sup> Typically, a “prior restraint is considered the worst kind of abridgment, and it is permitted only in rare situations when harmful expression could not adequately be punished after the fact.”<sup>85</sup> In the case of the theft of free newspapers, there is *never* a harm or injury so serious as to justify the takings in question; rather, the expression in question is usually harmful only to the person or persons who steal the newspapers.<sup>86</sup> The censorship is purely self-serving; it is not serving the public by protecting it from some greater harm at a macro or societal level.

For instance, Tom Bates took copies of the *Daily Californian* because the newspaper had endorsed his opponent for mayor. Therefore, he most likely believed the paper’s content would harm his chance of being

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79. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).

80. *Hicks*, 539 U.S. at 119 (emphasis added).

81. Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 184 (2004).

82. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

83. *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000).

84. JOHN D. ZELEZNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 50* (Shona Burke et al. eds., Wadsworth 2004).

85. *Id.* at 47.

86. See Joe Garner, *Aspen Papers Taken Out of Racks; Publications May Have Been Grabbed to Hide Arrest Story*, ROCKY MOUNTAIN NEWS, Aug. 29, 2003, at 3B.

elected.<sup>87</sup> The only person possibly harmed by reading that edition of the *Daily Californian* would have been Bates.

Or consider the August 2003 case in Colorado, when approximately 8000 copies of three free newspapers—the *Aspen Daily News*, *Aspen Times*, and *Glenwood Springs Post Independent*—were allegedly taken before dawn by “a man and woman piling newspaper bundles into their vehicle.”<sup>88</sup> The newspapers’ editors believed that this particular couple had taken the newspapers because the papers had reported they were arrested on drug charges—the kind of unflattering news that no one wants reported about oneself.<sup>89</sup> Troy Hooper, associate editor of the *Aspen Daily News*, remarked, “I’ve left them messages, and, if they had not done it, I imagine they would have called me back.”<sup>90</sup> As with the case involving Bates, the apparent purpose in taking the newspapers was to prevent harm to the individuals doing the pilfering. It was not about preventing harm to the newspapers’ readers or to the public at large.

Another example is the case previously described in Part I, where homecoming queen nominee Katie Noland stole about 1000 copies of the student newspaper in Florida because it accurately reported that she had pled guilty to felony burglary and grand larceny charges.<sup>91</sup> Like Bates, Noland was a candidate for an elected position at the time the offending issue of the newspaper was published and would have been the only person harmed by the student newspaper’s article about her criminal past.<sup>92</sup> Apparently Bates, Noland, and the couple in Aspen are true believers in the well-worn cliché that “no news is good news.”

Additionally, under the marketplace of ideas theory, the newspapers in each of the above-mentioned incidents ideally would be protected from theft by statutes because they provide information that informs debate and discussion about matters of public concern. As previously mentioned, Bates and Noland were candidates for elected office, whereas the couple in Aspen was charged with criminal activity. Just because people do not like what is printed about them does not give them the right to steal the medium in which the speech is printed. The remedy in the United States for false speech that harms one’s reputation is *not* a prior restraint or injunction barring the publication and dissemination of that speech. Rather, it is a

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87. See *supra* notes 2–9 and accompanying text (describing the theft of newspapers by Tom Bates).

88. *Garner*, *supra* note 86, at 3B.

89. *Id.*

90. *Id.*

91. See *supra* notes 26–27 and accompanying text.

92. See *supra* notes 26–27 and accompanying text.

lawsuit for monetary damages based on defamation<sup>93</sup> filed *subsequent* to its publication.<sup>94</sup>

For instance, if the *Daily Californian* editorial had said something false about Tom Bates that harmed his reputation, he could have pursued a defamation action.<sup>95</sup> Bates chose a self-help remedy of stealing speech. However, his action contravened both the marketplace of ideas theory of free speech and general principles against prior restraints on expression. As the next section suggests, there is an alternative and perfectly acceptable self-help remedy recognized in First Amendment jurisprudence that Bates could have—and should have—chosen to pursue: counterspeech.

### B. *Newspaper Theft and the Doctrine of Counterspeech*

Closely tied to the notion of the marketplace of ideas in First Amendment jurisprudence is the doctrine of counterspeech. Under this doctrine, the preferred remedy for speech that one finds offensive or disagreeable is *not* to remove it from the marketplace—the unfortunate tactic engaged in by those who steal free newspapers because of allegedly objectionable content—but, rather, to add more speech to the marketplace to counter it.<sup>96</sup> It was Justice Louis Brandeis who articulated the doctrine in 1927, opining when confronted with objectionable speech, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>97</sup>

Stealing newspapers contravenes this maxim. It is an act that is tantamount to the “enforced silence” to which Brandeis so objected. The proper remedy should be to forcefully argue against the offending expression rather than to silence it. With regard to newspapers, this might take several forms, including writing a letter to the editor or purchasing an advertisement in the newspaper to express one’s views. Additionally, one

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93. PAUL SIEGEL, *COMMUNICATION LAW IN AMERICA* 83 (Molly Taylor & Karen Hanson eds., Allyn and Bacon 2002) (stating that defamation, including its written form known as libel and its spoken form known as slander, may be “defined as false statements of fact disseminated about a person that result in damage to that person’s reputation”).

94. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 368 (Robert C. Clark et al. eds., Foundation Press 2nd ed. 2003) (observing that there is “special hostility to prior restraint as distinguished from subsequent punishment . . .”).

95. See CAL. CIV. CODE § 44 (West 2003).

96. See generally Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (2000) (describing the counterspeech doctrine, identifying its strengths and weaknesses, and providing some relatively recent examples of its application in real-world settings).

97. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

might seek out other media outlets in the same area or media market as the newspaper to which one objects, in order to mount a counter attack through speech. The self-help remedy of speech in these three forms represent examples of the kind of “more speech” to which Brandeis referred.<sup>98</sup> The theft of newspapers, based upon objections to the subject matter contained therein, contradicts the time-honored remedy of counterspeech embraced in First Amendment jurisprudence and in the heart of a civil libertarian perspective of free speech today.<sup>99</sup>

### C. Viewpoint-Based Regulations of Expression

Tom Bates pilfered copies of the *Daily Californian* because he did not like the viewpoint taken by the student newspaper—it had endorsed his opponent for mayor.<sup>100</sup> Had the newspaper endorsed Bates, it is reasonably safe to say, he would not have engaged in his censorship-by-theft tactics.

It would be patently unconstitutional if the government had taken similar action against a newspaper because it did not like the particular viewpoint taken by a newspaper on a given issue. Why? Because the United States Supreme Court “generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment.”<sup>101</sup> As the late Justice William Brennan once wrote in a dissenting opinion, “[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’”<sup>102</sup> Thus, the legal reality is “[w]here the Government itself does not speak or subsidize transmittal of a message it favors, viewpoint-based distinctions are improper.”<sup>103</sup>

Illustrating the Court’s embrace of viewpoint neutrality, and its rejection of viewpoint-based censorship, Professor Erwin Chemerinsky writes that “it would be clearly unconstitutional for the government to say that pro-choice demonstrations are allowed in the park but anti-abortion

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98. *Id.*

99. Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU’s Top Card-Carrying Member*, 13 GEO. MASON U. CIV. RTS. L.J. 185, 198 (2003). She contends that “on the whole, society is better off if we resist censorship and use counter-speech,” noting that “even though not everybody is going to be persuadable to rational positions through counter-speech, there’s no chance of persuasion if we don’t hear their ideas at all because of censorship.” *Id.* at 199.

100. N.Y. TIMES, *supra* note 7 and accompanying text.

101. SULLIVAN & GUNTHER, *supra* note 94, at 212.

102. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

103. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 300 (D. N.J. 2003).

[sic] demonstrations are not allowed.”<sup>104</sup> Phrased differently a dozen years ago, Justice Antonin Scalia explained why a St. Paul, Minnesota ordinance targeting certain categories of hate speech was an example of a viewpoint-based regulation: “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”<sup>105</sup>

Viewpoint-based objections to content compel the theft of free newspapers across the United States.<sup>106</sup> For instance, as discussed earlier, copies of *The Trojan Horse* were taken in early 2004 because some students allegedly did not like the editorial viewpoint taken by the alternative newspaper at the University of Southern California.<sup>107</sup> Thus, theft of free newspapers typically occurs when a viewpoint or position is taken by a publication that is somehow negative toward the thief. In contrast, when the viewpoint or position expressed in news or editorial pages is positive, theft does not occur.

Certainly, everyone would like only positive news and opinions to be expressed about them in newspapers, but newspapers are not supposed to be public relations vehicles. As the United States Supreme Court put it, “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”<sup>108</sup> Disgruntled readers are not supposed to play the role of super-editor. They do not have the right to engage in the practice of what might be described as *editorial control by theft*.

Imagine if during the presidential campaign of 2004, George W. Bush and/or John Kerry stole and trashed copies of every newspaper that contained an editorial, column, or pundit commentary that expressed negative viewpoints about them. Not only would it be outrageous, it would constitute viewpoint-based censorship by government officials. That is, however, precisely what is happening on a much smaller scale at newspapers stands across the country when individuals purloin papers based upon negative viewpoints about their candidacies. That is, after all, precisely what Tom Bates did in Berkeley, California when he confiscated and threw away bundles of *The Daily Californian* because of its editorial position against him.

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104. CHEMERINSKY, *supra* note 60, at 904.

105. R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

106. See *supra* notes 47-50 and accompanying text.

107. See *supra* notes 24-25 and accompanying text.

108. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

In a nutshell, the actions of newspaper thieves are indicative of the decidedly viewpoint-based mentality laid bare in the title of the Nat Hentoff book, “Free Speech for Me—But Not for Thee.”<sup>109</sup> In the eyes of those who steal newspapers because of disagreement over their content, the “not for thee” subjected to censorship is the newspaper.

#### D. Summary

The theft of free newspapers contradicts the underlying premises of the marketplace of ideas, eviscerates the principle of counterspeech, and violates the admonition against viewpoint-based regulations of expression. Putting these theories and doctrines aside, who are the real victims of newspaper theft?:

- *Journalists*: their effort, knowledge, and work product is kept from public consumption;

- *Advertisers*: their paid advertisements, which are designed to garner more business, never reach the public; and

- *Readers*: they are deprived of the opportunity to receive speech, ranging from politics to sports to entertainment, or advertising content, stretching from two-line classified ads to display ads to circulars.

It is this last group of individuals—the readers, who might pick up a copy of a free newspaper had it not otherwise been stolen—who is harmed the most. They are deprived of an unenumerated First Amendment right to receive speech. In particular, the United States Supreme Court has opined that “[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive, the right to read* and freedom of inquiry, freedom of thought, and freedom to teach . . . .”<sup>110</sup> The Court has also held, in the context of adopting a qualified First Amendment right of access to criminal trials, that “[f]ree speech carries with it *some freedom to listen*.”<sup>111</sup> Newspaper theft deprives readers of the right to receive speech, regardless of whether the information sought is core political speech, such as an editorial about a candidate for public office like Tom Bates in Berkeley<sup>112</sup> or advertisements for lawful goods and services, which receive a lower level of First Amendment

109. NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* (Harper Collins 1992).

110. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citations omitted) (emphasis added).

111. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (emphasis added).

112. See *Virginia v. Black*, 538 U.S. 343, 365 (2003) (describing “core political speech” and stating that such expression is “at the core of what the First Amendment is designed to protect”).

protection.<sup>113</sup>

Having explicated these principles, interests, and injuries in mind, this article will now examine and analyze the legislation that has been adopted in the United States to address the First Amendment concerns regarding the theft of free newspapers.

#### IV. FEW AND FAR BETWEEN: THE LEGISLATIVE RESPONSE TO THE THEFT OF FREE NEWSPAPERS

As noted in the Introduction, only two states—Colorado and Maryland—have adopted legislation to address the problems created by the theft of free newspapers.<sup>114</sup> The legislation in Colorado is so recent that it only went into effect in July 2004.<sup>115</sup> Such a meager response is mirrored at the local level, where only San Francisco and Berkeley, California, have enacted measures to deal with the issue.<sup>116</sup> This part of the article sets forth the relevant sections and provisions of these four different laws, and compares and contrasts their strengths and weaknesses. In addition, this part also examines another tactic that employs the opposite approach to newspaper theft used by censorship supporters to suppress newspaper readership, namely, attempts to *purchase*, rather than to *steal*, all copies of a particular edition of a fee-charged newspaper so others will not be exposed to its content.

##### A. Colorado

“We’re not investigating this as anything. . . . There’s no crime in stealing free newspapers, although it may be unethical and immoral.”<sup>117</sup> That’s how Sergeant Chris Maniscalchi of the Basalt Police Department in Colorado responded after approximately “8000 copies of the *Aspen Daily News*, *The Aspen Times* and the *Glenwood Springs Post Independent* were emptied out of news racks in the Roaring Fork Valley before dawn”<sup>118</sup> on August 27, 2003. Today in Colorado, however, the situation is very

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113. See ZELEZNY, *supra* note 84, at 470 (writing that the United States Supreme Court has “concluded that commercial speech is accorded lesser protection than other constitutionally guaranteed expression”).

114. See COLO. REV. STAT. § 18-4-419 (2004); MD. CODE ANN., CRIM. § 7-106 (Supp. 2003).

115. COLO. REV. STAT. § 18-4-419.

116. See BERKELEY, CAL., MUN. CODE § 13.54 (2003); SAN FRANCISCO, CAL., MUN. POLICE CODE § 630 (1999).

117. Garner, *supra* note 86.

118. *Id.*

different and Maniscalchi would have something to investigate.

On April 13, 2004, less than one year after the incident in the Roaring Fork Valley, the Colorado Governor signed into law House Bill 04-1057.<sup>119</sup> The Bill amended Colorado law to include the misdemeanor crime of newspaper theft.<sup>120</sup> The official legislative intent behind the measure provides in pertinent part that “[i]n order to protect the freedom of the press as expressed in the First Amendment of the United States Constitution, there must be criminal sanctions for newspaper theft.”<sup>121</sup> The bill also provides that “although a district attorney can prosecute the theft of a compensatory newspaper, it is the intent of the general assembly to provide a criminal penalty in the case of the theft of a complimentary newspaper.”<sup>122</sup> The new law, in turn, defines newspaper theft as follows:

A person commits the offense of newspaper theft when that person obtains or exerts unauthorized control over more than five copies of an edition of a newspaper from a newspaper distribution container owned or leased by the newspaper publisher with the intent to prevent other individuals from reading that edition of the newspaper. Control is unauthorized if there is a notice on the newspaper or on the newspaper distribution container that possession of more than five copies with intent to prevent other individuals from reading that edition of the newspaper is illegal.<sup>123</sup>

The new law specifically applies to free newspapers—periodicals distributed “on a complimentary basis”—and to “any student periodical distributed at any institution of higher education.”<sup>124</sup> It thus directly sweeps up and includes a favorite target of newspaper thieves—the college press.<sup>125</sup> The provision encompassing student newspapers resulted from an amendment to the original bill proposed by Senate President John Andrews, a Republican from Centennial.<sup>126</sup> During debate on House Bill 04-1057, Andrews reportedly told the Senate State Affairs Committee that “[t]here have been a number of incidents in Colorado and across the

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119. H.B.04-1057, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).

120. COLO. REV. STAT. § 18-4-419.

121. H.B. 04-1057, 64th Gen. Assem., 2d Reg. Sess.

122. *Id.*

123. *Id.*

124. *Id.*

125. See *supra* notes 25-54 and accompanying text (describing the theft of college newspapers).

126. Julia C. Martinez, *Measure Blocks 'Theft' of Free Student Newspapers: Andrews Targets Liberal Censorship* WESTLAW.COM, at 2004 WL 59320249.

country where student newspapers have been stolen. . . . This goes to the issue of academic freedom.”<sup>127</sup>

The terms “newspaper” and “periodical” are also defined in such a way as to include daily, weekly, and even monthly publications, regardless of whether they appear in broadsheet or tabloid format.<sup>128</sup> That statute also sweeps up and applies to free newspapers regardless of their subject matter, provided that the content is about “matters of public interest.”<sup>129</sup>

At this point, it is important to note three characteristics of the Colorado newspaper theft provision which, as will be illustrated later, help one to compare it with both the Maryland law and the local legislation in San Francisco and Berkeley, California. In particular, the Colorado law features:

- *A numerical requirement*: a precise minimum quantity of newspapers must be taken for the crime of newspaper theft to occur—six;

- *A notice requirement*: a burden is imposed on newspaper publishers to take the affirmative step of placing a notice on either their newspapers or their distribution containers making it clear that possession of more than five copies of the publication with intent to prevent other individuals from reading it is illegal; and

- *A mens rea requirement regarding deprivation of reading*: the state of mind required to commit the act of newspaper theft is defined in terms of an “intent to prevent other individuals from reading that edition of the newspaper.”<sup>130</sup>

The statute’s numerical requirement of taking more than five copies, which serves as a kind of floor above which the taking of newspapers may become a crime, is unique among the statutes and ordinances described in this part of the article. Under San Francisco’s ordinance, for instance, the crime of newspaper theft may occur with the taking of only “more than one copy of a newspaper.”<sup>131</sup> The same holds true for Berkeley, which prohibits the removal of “more than one copy of a newspaper.”<sup>132</sup> Maryland’s statute is devoid of any numerical requirement and, instead,

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127. *Id.*

128. H.B. 04-1057, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004) (providing in relevant part: “[n]ewspaper’ means a periodical that includes news, editorials, opinion, features, or other matters of public interest that is distributed on a complimentary basis,” and that a “[p]eriodical’ means a publication produced on a regular interval”).

129. *Id.*

130. *Id.*

131. SAN FRANCISCO, CAL., MUN. POLICE CODE § 630(c)(1) (1999).

132. BERKELEY, CAL., MUN. CODE § 13.54.030 (2003).

simply applies to the unauthorized control exerted “over newspapers.”<sup>133</sup> Why Colorado requires a higher number of papers to be taken before a crime can occur, and why the specific sum of more than five newspapers was chosen, is unclear from the legislative intent drafted into House Bill 04-1057.<sup>134</sup> In practical terms, however, the difference between taking two copies of a newspaper (the more-than-one standard set by San Francisco and Berkeley) and six copies of a newspaper is insignificant. Why? Because, as suggested earlier in this article by several specific cases, many individuals who pilfer free newspapers take bundles and stacks of newspapers far exceeding the threshold amounts of any of the four statutes discussed here.<sup>135</sup>

The notice requirement—a kind of warning to potential thieves, something akin to the posting of no-trespassing signs on one’s private real property—was supported by the executive director of the Colorado District Attorneys Council, Peter Weir, who contended that the measure would be nearly impossible to enforce without it.<sup>136</sup> Despite Weir’s assertion, none of the other three statutes—Maryland, San Francisco, and Berkeley—with laws targeting newspaper theft impose such a notice obligation on publishers in order to protect themselves.

The *mens rea* requirement is completely logical. By limiting application of the new law to those individuals who take more than five papers in order to deprive others of the opportunity to read the content contained therein, the statute excludes from its reach an individual who takes a dozen or so copies of a newspaper because it features his or her photograph and the individual wants to send copies to friends and relatives. There are, in other words, some quite benign and otherwise harmless reasons why one might remove multiple copies of free newspapers from distribution racks.

One important limitation on the Colorado law that could become crucial in its future application is that it applies only to the removal of papers from “a newspaper distribution container owned or leased by the newspaper publisher.”<sup>137</sup> By its terms, the statute would *not* include or apply to the taking of newspapers in bundles and stacks that often are dropped off in the early morning hours at the front doors of stores, hotels,

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133. MD. CODE ANN., CRIM. § 7-106(b) (2003).

134. H.B. 04-1057, 64th Gen. Assem., 2d Reg. Sess.

135. Burress, *supra* note 2, at A25 (illustrating threshold liability in Berkeley, California, where Tom Bates reportedly absconded with about 1000 copies of the *Daily Californian*. Such a quantity renders the difference between two copies and six copies inconsequential).

136. Martinez, *supra* note 126.

137. COLO. REV. STAT. § 18-4-419 (2004).

and newsstands. Likewise, it also would not apply to the taking of free newspapers that are distributed by the publisher on driveways, lawns, and walkways of houses and apartments in residential neighborhoods. On the other hand, the college newspapers that are frequently the target of theft are seldom distributed in individual units to residences, so the limiting language may prove insignificant in some cases.

The Colorado bill, however, not only created a criminal punishment for the theft of free newspapers, but also revised the state's statutes to include a civil remedy.<sup>138</sup> That remedy not only allows newspaper publishers to sue those convicted of newspaper theft, but it also provides for civil actions filed by advertisers and readers who regularly read a particular paper.<sup>139</sup> Part of the value of damages is stipulated in the statute, entitling publishers to receive the amount of "ten dollars for each newspaper obtained in violation"<sup>140</sup> of the new criminal law against newspaper theft. This is in addition to actual damages, attorney fees, and costs as a so-called "civil penalty."<sup>141</sup> Advertisers and readers, on the other hand, may recover only actual damages, attorney fees, and costs.<sup>142</sup>

An interesting issue is how a judge or jury might reasonably be able to calculate the "actual damages" sustained by a newspaper reader who is deprived of reading an edition of a stolen newspaper. Phrased differently, the question becomes: how does one place a monetary value on the harm of being deprived of information, be it political, entertainment, business or commercial fare? Other than compensating the reader with the total value of coupons in a stolen edition, calculating damages is not an easy task when the reader does not suffer direct out-of-pocket expenses, such as a newspaper subscription fee. Nonetheless, it has been argued in other contexts that damage figures meant to compensate newspaper readers who are not themselves the subject of defamation can be determined.<sup>143</sup>

Interestingly, in 1996, New York attorney Rory Lancman first proposed a civil remedy—a new tort called "suppression"—to address the wrong that occurs when a private individual (a non-governmental actor)

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138. *Id.* § 13-21-123.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See Clay Calvert & Robert D. Richards, *Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 24 (2003) (arguing the readers of *The New York Times* should be entitled to collect damages from both the paper and Jayson Blair based upon causes of action for fraud and negligence stemming from Blair's false reportage on matters of public concern).

steals newspapers.<sup>144</sup> Lancman wrote:

Citizens now feel free to destroy speech they do not agree with, and they do so with near impunity and with a brazenness never seen in this country from *government* interference. The battle for free speech is not being waged in the theater of government. Today, the front line in the battle for free speech is where private citizen meets private citizen. That battle must be joined.<sup>145</sup>

While the tort of suppression has yet to catch on, Colorado has joined the battle, as Lancman called for, with its statutory civil remedy for newspaper theft.

In summary, Colorado launched a two-pronged statutory strategy confronting the growing problem of free newspaper theft in 2004. The state has now provided criminal punishments for those who engage in newspaper theft and civil remedies for the victims of those crimes. Notably, the legislative intent behind these measures is explicitly grounded in First Amendment concerns for protecting free press.<sup>146</sup> Thus, principles and policies of First Amendment jurisprudence are made relevant to any critique of the new criminal and civil statutes.

### B. Maryland

Maryland was the first state to adopt a statute targeting the theft of free newspapers and the only state other than Colorado to have such a law today. The Maryland law, which makes newspaper theft a misdemeanor subject to a maximum of sixty days in jail and a maximum fine of \$500 or both,<sup>147</sup> arose a decade ago from Maryland House Bill 198, originally introduced in January 1994 and signed into law in May 1994.<sup>148</sup>

The Maryland statute is less detailed than its Colorado counterpart. It provides that “[a] person may not knowingly or willfully obtain or exert control that is unauthorized over newspapers with the intent to prevent another from reading the newspapers.”<sup>149</sup> The term “newspaper,” as used within the statute, is defined as “a periodical that is distributed on a

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144. See Rory Lancman, *Protecting Speech from Private Abridgement: Introducing the Tort of Suppression*, 25 SW. U. L. REV. 223, 238–62 (1996) (discussing the proposed tort of suppression and illustrating its necessity in light of the massive theft of copies of *The Daily Pennsylvanian*, the student newspaper at the University of Pennsylvania in 1993).

145. *Id.* at 263.

146. H.B. 04-1057, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).

147. MD. CODE ANN., CRIM. § 7-106(c) (2003).

148. H.R. 198, 408th Leg., 1st Reg. Sess. (Md. 1994).

149. MD. CODE ANN., CRIM. § 7-106(b).

complimentary or compensatory basis.”<sup>150</sup> Thus, the statute applies to the theft of both free and non-free newspapers. In turn, to “[e]xert control” means “to take, carry away, appropriate to a person’s own use or sell, convey, or transfer title to an interest in or possession of property.”<sup>151</sup>

The Maryland statute is very similar to the new Colorado law in terms of its intent requirement, which, in Maryland, is phrased as an “intent to prevent another [person] from reading the newspapers.”<sup>152</sup> Likewise, Colorado defines its intent requirement as an “intent to prevent other individuals from reading that edition of the newspaper.”<sup>153</sup>

Unlike its newer counterpart, however, the Maryland law does not establish a statutory minimum number of newspapers that must be taken in order for the misdemeanor of newspaper theft to occur.<sup>154</sup> Instead, the Maryland statute only uses the word “newspapers,”<sup>155</sup> suggesting that at least two newspapers must be taken. The author of this article, using a LEXIS-NEXIS search, could not locate any Maryland state court cases interpreting or clarifying the meaning of the newspaper theft statute.

Additionally, the Maryland statute does not establish a notice or warning requirement, unlike the Colorado law which imposes such requirements.<sup>156</sup> To this extent, the Maryland law is friendlier to newspaper publishers because they are not required to take any affirmative steps in order for their publications to fall within the statute’s ambit.

The Maryland law is also more favorable to publishers of free newspapers in another way. In particular, the statute does not confine or restrict the location where the crime of newspaper theft must transpire to a precise area. Colorado’s free newspaper theft law only makes it a crime to take newspapers from distribution containers “owned or leased by the newspaper publisher.”<sup>157</sup> However, there is no such limitation imposed under the Maryland statute. Unlike Colorado’s law, Maryland’s law thus punishes individuals who exert unauthorized control over free newspapers that are dropped off from a delivery truck in bundles and stacks in front of stores or newsstands before they open.<sup>158</sup>

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150. *Id.* § 7-106(a).

151. MD. CODE ANN., CRIM. § 7-101 (2002).

152. *Id.* § 7-106(b).

153. COLO. REV. STAT. § 18-4-419 (2004).

154. *See* MD. CODE ANN., CRIM. § 7-106(b).

155. *Id.*

156. *See id.*; COLO. REV. STAT. § 18-4-419 (discussing the notice requirement imposed under the Colorado statute).

157. *Id.*

158. *See* MD. CODE ANN., CRIM. § 7-106(b); COLO. REV. STAT. § 18-4-419.

### C. Berkeley, California

In October 2003, the City Council of Berkeley, California, with the sorry story of its current mayor pilfering papers hanging around its shoulders like an albatross, amended its municipal code “to prohibit the unauthorized removal of newspapers before they reach their intended reading public, including the unauthorized removal of newspapers circulated to the public free of charge, because such conduct injures the people of the City by depriving them of informative printed news, entertainment, and public notices.”<sup>159</sup> In an October 14, 2003 memorandum addressed to Mayor Tom Bates and the members of the City Council, Berkeley city manager, Weldon Rucker, in support of the measure, wrote:

There is no specific and clear law that prohibits the unauthorized removal of free newspapers from newsracks or other locations for the purpose of depriving others of the opportunity to read them. This ordinance would codify such a law so that the prosecutor has a clear basis to prosecute such conduct either as an infraction or misdemeanor, at the prosecutor’s discretion.<sup>160</sup>

Rucker noted that there would be no fiscal impact to Berkeley in adopting the new ordinance. He added that the measure was actually recommended by Mayor Tom Bates, apparently atoning for his own transgressions, and that it was “modeled on the City of San Francisco’s ordinance on the same subject passed in 1996.”<sup>161</sup>

In order to serve its goal of preventing the deprivation of information contained in free-of-charge newspapers,<sup>162</sup> the Berkeley statute is far more extensive than either of the two state laws described above.<sup>163</sup> In particular, this statute defines three key sections of the law: one to address theft from *newsracks*,<sup>164</sup> another to cover theft from *residential property*,<sup>165</sup> and a third

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159. BERKELEY, CAL., MUN. CODE § 13.54.010 (2003).

160. Memorandum from Weldon Rucker, City Manager of Berkeley, California, to the Honorable Mayor [Tom Bates] and Members of the City Council 1 (Oct. 14, 2003) [hereinafter Rucker Memorandum] (on file with author).

161. *Id.*

162. *See* BERKELEY, CAL., MUN. CODE § 13.54.010.

163. *See id.* § 13.54.020(A) (defining newspapers quite broadly—something favorable to free-press advocates everywhere and to publishers in that city—as “any publication made available to the public on a periodic basis (whether daily, weekly, monthly or quarterly), regardless of whether a fee is charged for the publication. ‘Newspaper’ includes magazine.”).

164. *Id.* § 13.54.020(B) (defining “newsracks” as “any self-service or coin-operated box, container, storage unit, or other dispenser, installed, used, or maintained for the display, distribution, or sale of newspapers”).

165. *Id.* § 13.54.020(C) (defining residential property as “any property attached or adjacent

to deal with theft from *drop locations* where newspapers are distributed prior to being placed in newsracks.<sup>166</sup>

To address theft from newsracks, Berkeley's municipal code now provides:

It shall be unlawful for any person to remove more than one copy of a newspaper from any newsrack, or to damage said newspapers, for the purpose of depriving others of the opportunity to read said newspapers. This prohibition shall not apply to the authorized representative of the owner or operator of any newsrack, or any publisher, authorized printer, or authorized distributor of said newspaper.<sup>167</sup>

The municipal code also makes it "unlawful for any person to remove a newspaper from any residential property, or to damage said newspaper, for the purpose of depriving others of the opportunity to read said newspapers"<sup>168</sup> and "for any person to remove a bundle from any storefront or bundle drop location, or to damage said newspapers, for the purpose of depriving others of the opportunity to read said newspapers."<sup>169</sup> In both of these cases, exceptions are made to protect the removal of the papers by the intended recipients. Thus, for example, the person who owns the residential property on which a free-of-charge newspaper is tossed, may remove it without penalty.<sup>170</sup>

At this point, it should be obvious that the Berkeley statute, while mirroring its Colorado and Maryland counterparts in terms of the intent requirement, is far more favorable to the publishers of free-of-charge newspapers than the law in Colorado. In particular, the Berkeley ordinance covers theft from three different locations—newsracks, private residences, and bundle drop locations—rather than only distribution containers owned or leased by the newspaper publisher.<sup>171</sup> But the Berkeley ordinance also goes farther than both the Colorado and Maryland laws in another important respect: it targets recycling agencies that might purchase stolen

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to a single-family residence, apartment, or other building used as a residential dwelling where a person would reasonably expect newspapers . . . [for] individuals residing in the building," including the front yard, driveway and mailbox).

166. *Id.* § 13.54.020(F) (defining "bundle drop locations" as a place "where bundles are placed for subsequent distribution or sale by authorized delivery persons, merchants, or retailers").

167. *Id.* § 13.54.030(A).

168. BERKELEY, CAL., MUN. CODE § 13.54.030(B) (2003).

169. *Id.* § 13.54.030(C).

170. *Id.* § 13.54.030(B).

171. *See id.* § 13.54.030.

newspapers from those who have taken them without authorization.<sup>172</sup> To this extent, the Berkeley ordinance provides, in relevant part, that:

It shall be unlawful for a recycler, or any other person or entity, to purchase more than one copy of any newspaper, or to obtain more than one copy of any newspaper through trade or barter, from any person selling or trading said newspapers under circumstances that are sufficient to give a reasonable person knowledge that the seller or trader has removed, taken, or appropriated such newspapers without authorization before they reached their intended reading public.<sup>173</sup>

The Berkeley law further requires recycling agencies to maintain records of individuals and companies who take mass quantities of newspapers.<sup>174</sup> This requirement provides police with possible leads on who might have taken newspapers should they disappear from the racks, like the *Daily Californian*, in the future.<sup>175</sup> This affirmative obligation imposed on recycling centers is an excellent move from the perspective of newspaper publishers.

#### D. San Francisco, California

As noted in Section C immediately above, the Berkeley ordinance was patterned after one adopted by the city across the bay, San Francisco, in 1996.<sup>176</sup> The incident that was the impetus for the adoption of San Francisco's law was somewhat similar to the incident involving Tom Bates' theft of the *Daily Californian* in Berkeley.

In May 1992, then San Francisco Police Chief Richard Hongisto<sup>177</sup> allegedly "ordered copies of the *Bay Times*, a biweekly newspaper read widely in the gay and lesbian community, taken from news racks."<sup>178</sup> because the newspaper ran "a sexually suggestive illustration of Hongisto

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172. *Id.* § 13.54.030(E).

173. *Id.*

174. BERKELEY, CAL., MUN. CODE § 13.54.030(E) (2003).

175. *See id.* § 13.54.040 (providing, in relevant part, that recycling agencies or individuals buying more "than 100 pounds per transaction, shall be required to record the following information for each such transaction: the seller's name, address, phone number, valid driver's license or California identification card number, automobile license plate number, amount of newspapers, and amount paid per transaction").

176. Rucker Memorandum, *supra* note 160, at 1.

177. *See* Jason Hoppin, *More Suits Than You Can Shake a Nightstick At*, RECORDER, Aug. 1, 2000, at 1 (describing the governmental positions held by Hongisto in San Francisco over the years, including sheriff, supervisor, assessor, and police chief, and his bankruptcy filing).

178. Bill Kisliuk, *Hongisto Escapes Punitive Damages in Bay Times Case*, RECORDER, Sept. 21, 1994, at 4.

with the headline, 'Dick's Cool New Tool: Martial Law.'<sup>179</sup> The reference to martial law occurred because Hongisto "had jailed hundreds of people during the Rodney King riots" shortly before that edition of the paper.<sup>180</sup> The suggestive illustration, in turn, was "a doctored cover photo of Hongisto clutching a nightstick rising from his groin[.]"<sup>181</sup> Hongisto was fired as police chief not long after he ordered copies of the *Bay Times* confiscated.<sup>182</sup>

Hongisto testified more than two years after the incident, during the trial of a civil rights lawsuit filed against him and the City of San Francisco by the publisher of the *Bay Times*,<sup>183</sup> that he "never intended to harm, or retaliate or prevent anyone from seeing or reading this newspaper."<sup>184</sup> He claimed, together with three officers involved in the incident, that they were intending to distribute the seized copies of the newspaper to all of the members of the San Francisco Police Department so that they could see the criticism Hongisto was receiving.<sup>185</sup> Hongisto even claimed not to be offended by the article.<sup>186</sup>

Hongisto's contention, however, did not carry the day in court.<sup>187</sup> In March 1995, United States District Court Judge D. Lowell Jensen ordered the City of San Francisco to pay approximately \$715,000 in attorneys' fees and damages in connection with the incident.<sup>188</sup> It should be pointed out that the Hongisto incident is different from all of the other incidents of newspaper theft described in this article because Hongisto was actually a government official who seized free newspapers, thus allowing for a civil rights lawsuit.<sup>189</sup> In contrast, Tom Bates was only a candidate in Berkeley

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179. Phillip Matier & Andrew Ross, *Another Hollywood Heavy Weighing Gubernatorial Bid*, S.F. CHRON., Feb. 4, 2004, at A17.

180. *Id.*

181. David Dietz et al., *Cops Reportedly Seized Papers at Hongisto's Urging*, S.F. CHRON., May 14, 1992, at A1.

182. Kisliuk, *supra* note 178, at 4.

183. *Coming Up, Inc. v. City & County of San Francisco*, 857 F. Supp. 711 (N.D. Cal. 1994).

184. Jim Doyle, *Hongisto Testifies on Seizure of Papers*, S.F. CHRON., Sept. 10, 1994, at A17.

185. *Id.*

186. See George Raine, *Hongisto Defends Bay Times Seizure*, S.F. EXAMINER, Sept. 10, 1994, at A-3 (quoting Hongisto for the proposition that, when asked on cross-examination whether he was offended by the article, "I think I had mixed feelings. I would not use the word offended").

187. Phillip Matier & Andrew Ross, *S.F. Stuck with Tab for Hongisto Antic*, S.F. CHRON., Mar. 10, 1995, at A11.

188. *Id.*

189. Doyle, *supra* note 184.

when he took the newspapers.<sup>190</sup> As Judge Jensen wrote in a 1994 order in the case, “there is no doubt that the Fourth Amendment generally provides a right not to have newspapers seized from newsracks without a warrant or probable cause.”<sup>191</sup> Judge Jensen added, “[t]here can be no doubt that publishers have a First Amendment right to distribute their papers without police interference based on content and all citizens have a Fourth Amendment right not to have their property seized without probable cause.”<sup>192</sup>

The San Francisco anti-newspaper theft law, that ultimately resulted from Hongisto’s censorial actions and upon which the Berkeley law is based, is so similar to the Berkeley ordinance that there are no significant differences warranting discussion in this article.<sup>193</sup> It is worth noting, however, that the official findings of San Francisco, unlike the purpose clause in Berkeley’s law, make direct reference to the First Amendment (the bill giving rise to Colorado’s law did the same thing<sup>194</sup>) and to the California State Constitution, thereby making clear the constitutional concerns at stake.<sup>195</sup> It is unclear why Berkeley, which basically copied everything else from the city across the bay, chose to omit such an important reference.

With the efforts of Colorado, Maryland, Berkeley and San Francisco to thwart and punish thieves of free newspapers in mind, this article now examines a very different approach, taken in at least one case, to keep people from reading a newspaper—namely, the purchase of all of the copies of for-sale newspapers.

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190. Charles Burress, *Berkeley Mayor Will Plead Guilty*, S.F. CHRON., Dec. 12, 2002, at A25.

191. *Coming Up, Inc.*, 857 F. Supp. at 715. (The Fourth Amendment provides that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”) U.S. CONST. amend. IV.

192. *Id.*

193. See SAN FRANCISCO, CAL., MUN. POLICE CODE § 630 (1999); BERKELEY, CAL., MUN. CODE § 13.54.030 (2003).

194. H.B. 04-1057, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).

195. See SAN FRANCISCO, CAL., MUN. POLICE CODE § 630(a)(2) (providing that the Board of Supervisors of the City and County of San Francisco “finds that the unauthorized removal of newspapers infringes on the right of the public to a free press under the First Amendment to the United States Constitution and Article I, Section 2 of the California Constitution, and the public’s right to express and exchange diverse ideas and opinions”).

*E. If You Can't Steal It, Then Buy It:  
Other Tactics of Newspaper Suppression*

So far this article has demonstrated that free newspapers across the United States are often targets of individuals who swipe bundles of particular press runs in order to prevent potential readers from viewing their contents. Newspapers that charge readers a fee to purchase a copy may also be the subject of efforts to thwart would-be readers from seeing their stories. Although it might seem far-fetched, one approach taken to suppress readership of a for-sale newspaper is to purchase all of the copies of an edition of the paper, thus leaving none available for others to buy and to read. When government officials conduct such bulk-purchasing, the First Amendment comes into play and civil rights violations may occur.

This is precisely what happened to *St. Mary's Today*, a weekly newspaper published by Kenneth C. Rossignol in St. Mary's County, Maryland, during the November 1998 elections.<sup>196</sup> In May 2004, United States District Judge William M. Nickerson ruled in *Rossignol v. Voorhaar*<sup>197</sup> that "the St. Mary's County state's attorney, the former sheriff and six deputies [were] liable for civil damages for violating the First Amendment rights of a local newspaper publisher when they participated in a plan to purchase newspapers en masse to keep unflattering stories away from the public . . . ."<sup>198</sup> The edition "contained a story about a 1965 rape charge against state's attorney Richard Fritz, who was seeking election."<sup>199</sup> The government employees in question went "to about 40 stores and 40 boxes, removing about 1,300 copies of the paper's 6,500 print run . . . ."<sup>200</sup>

A federal appellate court had previously ruled in this case that "[t]he seizure clearly contravened the most elemental tenets of First Amendment law. First, defendants targeted Rossignol's newspaper for suppression and retaliation because they disagreed with its viewpoint and intended to prevent its message from being disseminated. This by itself was sufficient

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196. See *Rossignol v. Voorhaar*, 316 F.3d 516, 519–21 (4th Cir. 2003) *cert denied*, 124 S. Ct. 135 (2003).

197. *Rossignol v. Voorhaar*, 321 F. Supp. 2d 642, 644 (D. Md. 2004).

198. Arthur Santana, *Publisher Wins Press-Rights Suit*, WASH. POST S. MD. EXTRA, May 13, 2004, at T03.

199. Foster Klug, *Supreme Court Refuses to Hear Newspaper Seizure Case*, A.P. NEWSWIRE, Oct. 7, 2003.

200. *Id.*

to violate the Constitution.”<sup>201</sup> The appellate court called the efforts of Sheriff Richard J. Voorhaar and his accomplices a “scheme to silence disrespectful speech”<sup>202</sup> that was “driven by a desire to retaliate against Rossignol’s past criticism of their fitness for office and to censor future criticism along the same lines.”<sup>203</sup> The U.S. Supreme Court denied the petition for writ of certiorari in October 2003, letting stand the appellate court’s ruling in favor of the newspaper.<sup>204</sup>

Although Rossignol and his newspaper ultimately prevailed in federal court,<sup>205</sup> it did not occur until after unknown assailants once again attempted to suppress the circulation of his newspaper. In February 2004, the *Washington Post* reported that approximately thirty of the estimated 200 newspaper dispensers of *St. Mary’s Today* had been sabotaged in St. Mary’s and Charles County by a person or persons who sealed “the coin slot[s] with foam insulation, making it impossible to buy the paper.”<sup>206</sup> The incident took place only ten days before a primary election for president, school board and judge.<sup>207</sup> Comparing it to the mass-purchase incident, Kenneth Rossignol remarked, “It’s like déjà vu all over again. This is incredibly similar.”<sup>208</sup>

As the two incidents involving Kenneth Rossignol indicate, there are several different ways in which newspapers may be prevented from reaching their intended audience. It may be accomplished by mass theft in the case of free newspapers, mass purchase in the case of for-sale newspapers, and mass obstruction by impeding access to newspapers through the placement of physical obstacles. While this article focuses on statutes designed to punish the theft of free newspapers, the development of legislation relating to actions intending to deprive others of the opportunity to read the newspapers’ content provides another uncharted area in need of future exploration.

#### V. IMPROVING LEGISLATION TO PROTECT FREE NEWSPAPERS & THE FIRST AMENDMENT

Based on this article’s analysis of the unfortunately few statutes

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201. *Rossignol*, 316 F.3d at 521.

202. *Id.* at 524.

203. *Id.* at 525.

204. *Voorhaar v. Rossignol*, 124 S. Ct. 135 (2003).

205. *Rossignol*, 316 F.3d at 528.

206. Michael Amon & Raymond McCaffrey, *Sheriff Criticizes Fritz’s Brochure*, WASH. POST S. MD. EXTRA, Feb. 26, 2004, at T02.

207. *Id.*

208. *Id.*

across the United States that now exist to punish the theft of free newspapers, there are several characteristics and qualities that future statutes should incorporate to protect publishers and to redress the wrongs caused by those who would steal such speech. These qualities include:

- *Situs*: The locations from which the thefts originate should be defined as expansively as possible, through the omission of specific locations in future statutory language. Colorado, in particular, severely limited the location from which acts of newspaper theft could occur, restricting it to only “a newspaper distribution container owned or leased by the newspaper publisher. . . .”<sup>209</sup> Berkeley, along with San Francisco, adds other locations from which a theft may occur, including residential property, bundle drop locations and storefronts.<sup>210</sup> The best path, however, is not to articulate a veritable laundry list of locations, but instead, to adopt the approach used by Maryland—not to identify any locations at all, and thereby, be able to regulate the crime anywhere it might occur. As previously mentioned, the Maryland statute provides that “[a] person may not knowingly or willfully obtain or exert control that is unauthorized over newspapers with the intent to prevent another from reading the newspapers.”<sup>211</sup> No location is specified to narrow the reach of the statute.

- *Newspaper*: The objects to which newspaper theft laws apply—newspapers—should be defined as broadly as possible. The Colorado law defined a newspaper, in relevant part, to mean “a periodical that includes news, editorials, opinion, features, or other matters of public interest that is distributed on a complimentary basis.”<sup>212</sup> Future statutes should add to this list, incorporating and identifying other forms of content such as entertainment, advertising, and sports. The addition of more categories of speech would, in turn, protect more categories of newspapers.

Furthermore, language should be added to future legislation making it clear that the format in which the publication appears—whether it is a broadsheet, tabloid, or magazine—does not make a difference in determining whether it is a newspaper. None of the four statutes examined above includes this provision. However, unlike its counterparts, Berkeley makes it clear the term newspaper “includes magazine.”<sup>213</sup> Although Berkeley borrowed much of its law from San Francisco, San Francisco failed to include magazines within its definition of newspapers.<sup>214</sup> Finally,

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209. COLO. REV. STAT. § 18-4-419 (2004).

210. BERKELEY MUN. CODE § 13.54.020(C)–(F) (2003).

211. MD. CODE ANN., CRIM. § 7-106(b) (2003).

212. COLO. REV. STAT. § 18-4-419(2)(b).

213. BERKELEY, CAL., MUN. CODE § 13.54.020(A).

214. SAN FRANCISCO, CAL., MUN. POLICE CODE § 630(b)(1) (1999) (defining newspaper as

the statutes should not be limited in reach to free newspapers, but should also apply to compensatory newspapers as well. In addition, the number of copies of a newspaper that must be taken for a crime to occur should be defined as “one or more” rather than anything higher, such as the more-than-five language in Colorado’s new law.<sup>215</sup> The theft of just one copy of a newspaper, be it a free publication or a paid one, harms one potential reader who otherwise would have been able to pick up that copy and read it.

- *State of Mind*: All four of the laws examined here are sufficient in framing the intent element as the removal of newspapers with the purpose of not allowing others to read them. As noted earlier, there may be legitimate reasons to take a stack of free newspapers, such as to cut out articles about oneself or a topic of interest and to send those articles to others. Legitimate uses must not be swept up in the reach of newspaper theft laws.

- *Recyclers*: Both Berkeley and San Francisco are wise to make the recyclers of newspapers subject to the reach of their newspaper theft ordinances. To the extent that neither Maryland nor Colorado includes such a provision in their statute, they are weakened in their force and effect. Future legislation should track that of both Berkeley and San Francisco in this area.

One quality that future legislation should *not* include is the notice or warning requirement like that contained in Colorado’s law.<sup>216</sup> This places an affirmative obligation on a newspaper to print a warning that the theft of more than five copies of a free newspaper is illegal. This arguably amounts to a compelled speech obligation, which raises serious First Amendment concerns.<sup>217</sup> Colorado compels free newspapers to carry a message if they want to enjoy statutory protection. Put differently, they are compelled to convey speech in order to opt into the law. The United States Court of Appeals for the Third Circuit observed in 2004 that just “[a]s the First Amendment may prevent the government from prohibiting speech, it may also prevent the government from compelling individuals to express certain views[.]”<sup>218</sup>

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“any publication made available to the public on a periodic basis (whether daily, weekly, monthly or quarterly), regardless of whether a fee is charged for the publication.”)

215. COLO. REV. STAT. § 18-4-419.

216. *Id.*

217. See generally *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004) (providing that “[t]he Speech Clause of the First Amendment protects at least two separate, yet related, rights: (1) the right to freedom of expression, and (2) the right to be free from compelled expression”) (emphasis added).

218. *Cochran v. Veneman*, 359 F.3d 263, 267 (3d Cir. 2004).

In summary, legislators should borrow from the best of the four statutes as analyzed in Part III, but be sure to incorporate the suggestions and ideas set forth in this part of the article. The keys are to: (1) not narrowly restrict the areas from which newspaper theft may occur; (2) broadly define the term "newspaper" to sweep up as many publications as possible; (3) include a *mens rea* requirement that protects legitimate removal and possession of multiple copies of newspapers; (4) impose obligations on recyclers, who might purchase stolen newspapers; and (5) exclude language imposing a notice or warning requirement on newspapers that essentially forces the publications to opt in to the law.

## V. CONCLUSION

Many states have criminal statutes punishing newspaper theft from public libraries.<sup>219</sup> Yet, only Colorado and Maryland have statutes punishing the theft of free newspapers.<sup>220</sup> Parsed differently, a person will face criminal sanctions in most states for removing a single copy of a newspaper from a public library, but face no legal repercussions for removing and destroying hundreds or thousands of copies of complimentary newspapers from a news rack.

This anomalous result indicates the theft of free newspapers is not on the radar screen of legislators across the country.<sup>221</sup> To change this

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219. See, e.g., ARK. CODE ANN. § 13-2-803(a)(1) (Supp. 2003) (providing that it is "unlawful for any person to remove library materials without authorization from the premises wherein such materials are maintained or to retain possession of library materials without authorization," where library materials are defined in § 13-2-802(1) to include newspapers); CAL. PENAL CODE § 490.5 (Deering 1998) (providing for the crime of petty theft of property from a merchant or a library and including newspapers as protected library materials); CONN. GEN. STAT. ANN. § 53(a)-119(12) (West 2004) (defining the crime of library theft and including as protected library materials "written or printed material regardless of physical form or characteristics," which would include newspapers); MISS. CODE ANN. § 39-3-303 (2001) (providing that "[i]t shall be unlawful for any person to remove library materials, without authorization, from the premises wherein such materials are maintained or to retain possession of library materials without authorization."); OKLA. STAT. ANN., tit. 21, § 1739 (West 2002) (defining the crime of library theft and including newspapers as protected library materials); 18 PA. CONS. STAT. ANN. § 3929.1 (West 2004) (providing for the crime of library theft and including newspapers as protected library materials).

220. COLO. REV. STAT. § 18-4-419; MD. CODE ANN., CRIM. § 7-106.

221. H.R. 1747, Gen. Assem., Reg. Sess. (Va. 1995). The bill, which was later vetoed on March 27, 1995, by Governor George Allen, provided in relevant part that:

Except with the consent of the publisher, no person shall take from a newsstand or other point of distribution, at any one time with intent to impede or prevent distribution, more than five newspapers or other periodicals that are distributed on a complimentary basis if the publisher has affixed, printed, or impressed upon the front of such publication a notice in

situation, lobbying efforts must be undertaken by and on behalf of newspaper publishers. However, the problem with this strategy is that publishers of free newspapers lack the financial resources to mount concerted lobbying efforts. Many alternative weeklies and college newspapers—frequent targets of newspaper theft—simply do not have the economic capacity to hire a lobbying firm or attorney to work the halls of state legislative houses.

What must take place, then, is that major newspaper groups—today, “newspaper ownership is being increasingly monopolized by a few media conglomerates, called *chains*”<sup>222</sup>—such as Gannett,<sup>223</sup> Knight Ridder<sup>224</sup> and McClatchy<sup>225</sup>—need to step forward to finance and underwrite the lobbying efforts on behalf of their colleagues at smaller newspapers that deliver their product free-of-charge to consumers. The major chains can afford the chore—in 2003, profit margins in the newspaper industry were “hovering around the 20 percent mark, compared to about a 12 percent margin for all industries.”<sup>226</sup> In the first quarter of 2004, Gannett “reported that net income rose 9.8 percent, to \$274.4 million, or \$1 a share, in the first quarter, from \$249.8 million, or 93 cents a share, in the period a year earlier.”<sup>227</sup>

But why should the major chains take on the responsibility of lobbying for legislation that primarily benefits free-of-charge college

bold type that not more than five such publications may be taken lawfully at any one time without the publisher’s consent and with the intent to impede or prevent distribution. (italics omitted).

222. JAMES R. WILSON & STAN LE ROY WILSON, *MASS MEDIA MASS CULTURE* 180 (5th ed. 2001).

223. Company Profile, Gannett website, at <http://www.gannett.com/map/gan007.htm> (“Gannett is the USA’s largest newspaper group in terms of circulation. The company’s 101 daily newspapers in the USA have a combined daily paid circulation of 7.6 million. They include *USA Today*, the nation’s largest-selling daily newspaper, with a circulation of approximately 2.3 million. *USA Today* is available in 60 countries worldwide.”) (last visited Aug 31, 2004).

224. See generally Knight Ridder website, at <http://www.kri.com> (indicating as owner of papers such as *The Philadelphia Inquirer* and *The Miami Herald*, it is “the second-largest newspaper publisher in the United States, it owns 31 dailies and operates the Real Cities network of more than 100 local news Web sites in 88 markets”) (last visited Oct. 16, 2004).

225. See The McClatchy Company, Overview of the McClatchy Company, at <http://www.mcclatchy.com/about/> (indicating The McClatchy Company, which is headquartered in Sacramento, California, owns “12 daily and 18 community newspapers with a combined average circulation of 1.4 million daily and 1.9 million Sunday. Over the decades, McClatchy newspapers’ many honors have included 12 Pulitzer Prizes, three of which were gold medals for public service”) (last visited Sept. 1, 2004).

226. JOSEPH R. DOMINICK, *THE DYNAMICS OF MASS COMMUNICATION: MEDIA IN THE DIGITAL AGE* 111 (8th ed. 2005).

227. Jacques Steinberg, *Earnings Fall at Times Co. But Increase at Gannett*, N.Y. TIMES, Apr. 13, 2004, at C4.

newspapers and not their own for-sale newspapers? Several reasons come to mind. First, the college newspapers are the training grounds for many journalists who go on to work at large chains. It makes sense, then, to protect the product of what amounts to your minor league system—a system for which the major chains otherwise carry no financial obligations but reap all of the benefits. Second, by protecting free newspapers at the college level, major chains would be helping to protect the papers that essentially train readers to be readers. College students who develop the habit of reading a college newspaper on a daily basis may, upon graduation, be more willing to subscribe to a for-charge newspaper. Thus, it makes good business sense for chains to protect free-of-charge college newspapers that serve as training grounds for both future journalists and future readers. Third, journalism is journalism, regardless of whether it is packaged in a free or for-sale format, and the First Amendment protection of the press does not hinge on whether a paper is sold to readers or whether it is given away. Beyond self-interest, then, major chains have a moral obligation to protect those engaged in the same profession and who practice their craft under the same blanket of freedom provided by the First Amendment, but who lack financial resources to undertake their own lobbying efforts.

The problem of free-newspaper theft has been ignored, not only in the pages of law journals but more importantly, in legislative houses and state capitols across the United States for too long. This article has demonstrated the need for new laws to address and punish the actions of those who would, quite literally, steal free speech and inhibit the functioning of the metaphorical marketplace of ideas. This is not, in other words, a call for legislation in search of a problem; rather, there is already a major problem in need of legislation.

This article also has analyzed and critiqued what few newspaper theft laws do exist and, in the process, it has proposed several suggestions for improving future legislation. The time has come for a concerted lobbying effort to change the situation in the forty-eight states in which it now is permissible to take and destroy hundreds and thousands of free newspapers for the sole purpose of preventing others from reading their content. There is little to nothing, unfortunately, to deter such conduct today outside of the laws in the four jurisdictions—the states of Colorado and Maryland, and the cities of Berkeley and San Francisco, California.

