



## Chiquita lesson: Libel isn't weapon of choice

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What does it say about the American press or the condition of First Amendment law at the turn of the century that the Gannett Co. has paid Chiquita Brands more than \$10 million and "renounced" a lengthy investigative report, substantial parts of which may have been true?

It is a watershed moment for the press. It tells us we have entered a dangerous new season. The days of "we-don't-settle" libel litigation are over. Libel, it turns out, may have been the least of Gannett's worries. Aggressive, well-funded business interests, public figures and celebrities of every stripe are using a new array of tort and common law claims to attack enterprise reporting. The assaults on newsgathering are finding receptive audiences in court. Judges, it should come as no surprise, harbor the same deepening contempt for the news media that is abroad in the land.

### **Show me the money**

This June, it was the money that stunned people first — a settlement north of \$10 million paid to avert a morass of litigation. The Cincinnati Enquirer's front-page apology was published on three separate days. A confidentiality agreement silenced any exculpatory explanations. There would be no spinning here.

Kirkland & Ellis, the Chicago law firm that had helped General Motors demolish "Dateline NBC's" story on exploding trucks, drove a hard bargain for Cincinnati financier Carl Lindner and his international fruit empire.

Beyond the breathtaking monetary settlement came the disturbing recognition that the Enquirer may have been squeezed to disavow a story with truthful elements. The newspaper's carefully crafted apology for "creating a false and misleading impression of Chiquita's business practices" seemed to be limited to information gathered through reporter Mike Gallagher's interception of company voice-mail messages. There was no

explicit retraction of the factual underpinnings or all key allegations of the 18-page series.

Two weeks after the apology, however, The New York Times reported that "some of the allegations (of Chiquita's chicanery) cannot be dismissed" as easily as the banana giant might want. "Determining the validity of the newspaper's claims is difficult," the Times said in a lengthy assessment by Douglas Frantz headlined "Chiquita Still Under Cloud After Newspaper's Retreat." The Securities and Exchange Commission continues to investigate assertions in the article that the company covered up a bribery scheme by employees in Colombia.

At the heart of the mystery lay one immutable truth: The editorial integrity of a newspaper (and its financial foundation) depends upon the journalistic integrity of its reporters. Theft is not protected First Amendment activity. Professional practices in newsgathering determine whether a newspaper prevails in a libel case or in a new generation of legal assaults aimed specifically at how reporters do their work, not the published fruits of their labors.

## **Evaporating rights**

The predicament posed by the Chiquita episode flows from the press' failure to win substantial constitutional protection for newsgathering. It tried to secure that protection — and gained a foothold — in *Branzburg vs. Hayes*, a 1972 case before the Supreme Court. By the narrowest of margins, the court rejected a journalist's privilege to shield confidential sources before a grand jury. But Justice Byron White's plurality opinion threw a crumb to the media, noting that "without some protection for seeking out the news, freedom of the press could be eviscerated." This wobbly endorsement is the closest the court has come to validating newsgathering as an indispensable part of journalistic freedoms.

While the First Amendment in the areas of libel, prior restraint, publication of so-called private facts, and access to judicial proceedings continued to develop throughout the 1970s and the early-to-mid 1980s, protection for newsgathering lagged behind, the weakest link in the chain. During the last 10 years, the development of all areas of First Amendment law has stagnated. Expansion of existing rights, let alone the establishment of new ones, has evaporated as the air has filled with the public's rising anger toward the media. The cases that the Supreme Court has decided in the last decade have focused more on how the press operates, not what it publishes. In the most important ruling, *Cohen vs. Cowles Media Co.*, the court held that the Constitution does not forbid states from imposing liability on news organizations for broken promises made to sources.

Ironically, the success of the press in constructing a bulwark against libel claims only refocused a bombardment against newsgathering techniques. Thus, in North Carolina, ABC defends not a libel claim but its use of hidden cameras in an investigation of grocery chain Food Lion. In Maine, NBC defends itself against charges that its correspondent misrepresented how "positive" a story on the trucking industry would be.

Both networks lost at trial.

And these are only civil cases. As Eve Burton, vice president and assistant general counsel of The Daily News in New York, observed recently in Communications Lawyer magazine, courts and law enforcement officials are finding "increasing comfort in using criminal statutes" to impede newsgathering. She identifies three types of laws that the government has turned into weapons against the press: criminal contempt and aiding and abetting; disorderly conduct, assault and obstruction of justice; and trespass and impersonation. These days, even Justice White's half-hearted sentiment looks hollow.

At the same time that courts are halting constitutional advances and expressing hostility toward the media's use of the freedoms it already possesses, the academic community has turned away from expansionist views of the First Amendment to an emphasis on "media responsibility." Scholarship has experienced a noticeable shift in focus from privileges to obligations. The seminal First Amendment article of a generation ago was Vincent Blasi's "The Checking Value in First Amendment Theory," an ode to the press' valuable role as guardian of a democracy. A quick tour through today's journals turns up titles such as "Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial" and "Leaks, Gags and Shields: Taking Responsibility."

### **Building (and settling) smart**

However vulnerable news organizations may feel, it is time for the press to develop a long-term strategy, as it did during the 1970s and 1980s when it built modern libel law case by case on the frame provided by *New York Times vs. Sullivan*. A long-term strategy to convince courts of the need to give newsgathering a measure of protection will require some savvy judgments about when to settle cases and when not to bring them at all. In other words, when to hold 'em and when to fold 'em.

Those kind of judgments built American libel law into a coherent body of cases providing substantial "breathing space" for the press to report falsity in the search for truth.

Employing a smart litigation strategy means not only crafting persuasive, carefully-tailored arguments but choosing cases with "good" facts. Obviously, for instance, the

law prefers to see reporters receive stolen documents "over the transom" than to have them participate in their heist. Yet, some forms of reportorial skullduggery or symbiosis with sources ought to be permitted in the search for important truths about public affairs.

We do not have to countenance lawbreaking as a protected newsgathering technique to recognize that reporters should not be seen in nebulous situations as common criminals. They have neither the criminal intent strictly required by our criminal law nor the same purposes as mafioso.

In other times, courts might have readily agreed. In the 1960s, when the press' problems in court often sprang from its efforts to cover the civil rights movement, news organizations made appealing litigants. A media that shadows every move of Monica Lewinsky and encircles Washington's federal courthouse with satellite trucks to "cover" virtually nothing does not evoke the same sympathy.

We can hardly be surprised that the press has fared badly in access cases brought in the Paula Jones case and Kenneth Starr's investigation. "Driven by profit and intense competition, gossip, speculation, and innuendo have replaced legitimate sources and attribution as the tools of the (journalistic) trade," fumed Judge Susan Webber Wright last spring when rejecting a media challenge to her pretrial gag order. The press earns more than a judicial tongue-lashing for bringing such claims — it sets adverse precedent.

The obvious corollary to settling or not pursuing unattractive cases is selecting and shaping the right ones. Typically, the "right stuff" will invoke core First Amendment principles, such as articles that expose serious corruption in political institutions or report on powerful private influences on our public life. Building broader constitutional protection for newsgathering is ultimately good business, too. "Boy, I think the truth is great," Ben Bradlee said at a speech at Harvard in 1991. "You sell a lot of papers from the truth."

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