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United States Court of Appeals,
Fourth Circuit.

Michael ANDREW, Plaintiff-Appellant,

v.

Kevin P. CLARK (In his personal capacity); Leonard Hamm, Baltimore Police Commissioner (In his personal and official capacity); Baltimore Police Department; Kenneth Blackwell, Deputy Police Commissioner, Defendants-Appellees.

National Fraternal Order of Police; National Employment Lawyers Association; Public Citizen, Inc.; The American Civil Liberties Union of Maryland; Government Accountability Project; Reporters Committee For Freedom of the Press, Amici Supporting Appellant.

Michael Andrew, Plaintiff-Appellant,

v.

Kevin P. Clark (In his personal capacity); Leonard Hamm, Baltimore Police Commissioner (In his personal and official capacity); Baltimore Police Department; Kenneth Blackwell, Deputy Police Commissioner, Defendants-Appellees.

National Fraternal Order of Police; National Employment Lawyers Association; Public Citizen, Inc.; The American Civil Liberties Union of Maryland; Government Accountability Project; Reporters Committee For Freedom of the Press, Amici Supporting Appellant.

Nos. 07-1184, 07-1247.

Argued: Jan. 27, 2009.

Decided: April 2, 2009.

Background: Former city police commander brought § 1983 action against former and current city police commissioners, alleging his employment was terminated in retaliation for releasing an internal memorandum to a newspaper reporter. The United States District Court for the District of Maryland, Andre M. Davis, J., entered order dismissing commander's complaint, and he appealed.

Holding: The Court of Appeals, Alarcon, Senior Circuit Judge, held that commander's second-level retaliation claim involved a matter of public concern.

Vacated and remanded in part and affirmed in part.

Wilkinson, Circuit Judge, filed concurring opinion.

West Headnotes

[1] Federal Civil Procedure 170A ↪1831

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1827 Determination

170Ak1831 k. Fact Issues. Most

Cited Cases

Whether police commander wrote memorandum, outlining his concerns about police department's handling of shooting of suspect, was part of his official duties, for First Amendment purposes, was not conceded by commander, but rather, was disputed issue of material fact that could not be decided on motion to dismiss commander's § 1983 action alleging that he was terminated in retaliation for releasing memorandum to newspaper. U.S.C.A. Const. Amend. 1; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Constitutional Law 92 ↪1955

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(P) Public Employees and Officials

92k1955 k. Police and Other Public Safety Officials. Most Cited Cases

Municipal Corporations 268 ↪185(1)

268 Municipal Corporations

268V Officers, Agents, and Employees
 268V(B) Municipal Departments and Of-
 ficers Thereof
 268k179 Police
 268k185 Suspension and Removal of
 Policemen

268k185(1) k. Grounds for Remov-
 al or Suspension. Most Cited Cases
 Former city police commander's second-level retali-
 ation claim, alleging his employment was termin-
 ated because he threatened to file a lawsuit challen-
 ging an internal affairs investigation purportedly
 initiated in retaliation for his release to a newspaper
 reporter of an internal memorandum he prepared
 outlining his concerns about police department's
 handling of incident in which an officer shot and
 killed a perpetrator, involved a matter of public
 concern for First Amendment purposes. U.S.C.A.
 Const. Amend. 1.

[3] Constitutional Law 92 ↪4171

92 Constitutional Law
 92XXVII Due Process
 92XXVII(G) Particular Issues and Applica-
 tions
 92XXVII(G)7 Labor, Employment, and
 Public Officials
 92k4163 Public Employment Relation-
 ships
 92k4171 k. Termination or Dis-
 charge. Most Cited Cases

Municipal Corporations 268 ↪185(14)

268 Municipal Corporations
 268V Officers, Agents, and Employees
 268V(B) Municipal Departments and Of-
 ficers Thereof
 268k179 Police
 268k185 Suspension and Removal of
 Policemen
 268k185(14) k. Reinstatement.
 Most Cited Cases
 Former city police commander's allegations that,
 under state law, officers terminated from command

level positions were guaranteed a return to position
 from which they were previously elevated and that
 commander's employment was terminated without
 return to his prior position in retaliation for releas-
 ing an internal memorandum to a newspaper report-
 er were sufficient to state procedural due process
 claim, even though commander was an at-will em-
 ployee. U.S.C.A. Const. Amend. 14.

[4] Federal Civil Procedure 170A ↪2497.1

170A Federal Civil Procedure
 170AXVII Judgment
 170AXVII(C) Summary Judgment
 170AXVII(C)2 Particular Cases
 170Ak2497 Employees and Employ-
 ment Discrimination, Actions Involving
 170Ak2497.1 k. In General. Most
 Cited Cases

Federal Civil Procedure 170A ↪2547.1

170A Federal Civil Procedure
 170AXVII Judgment
 170AXVII(C) Summary Judgment
 170AXVII(C)3 Proceedings
 170Ak2547 Hearing and Determina-
 tion
 170Ak2547.1 k. In General. Most
 Cited Cases

In § 1983 action alleging that police commander
 was improperly terminated in retaliation for releas-
 ing memorandum to newspaper outlining his con-
 cerns about police department's handling of shoot-
 ing of suspect, district court did not abuse its dis-
 cretion in denying commander's unopposed motion
 for partial summary judgment on ground that his
 memorandum related to matter of public concern
 and that *Pickering* balancing test weighed in his fa-
 vor, given apparent disputed facts regarding nature
 of commander's speech and lack of developed re-
 cord. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule
 56(e)(2), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ↪411

170A Federal Civil Procedure
 170AIII Process
 170AIII(B) Service
 170AIII(B)1 In General
 170Ak411 k. In General. Most Cited

Cases

District court did not abuse its discretion in denying former city police commander's motion for costs and fees related to effecting personal service on a defendant in commander's § 1983 action alleging his employment was terminated in retaliation for releasing an internal memorandum to a newspaper reporter, notwithstanding commander's argument that the defendant refused to waive service and had a history of evading service; the defendant was personally served less than two months after commander requested waiver of personal service and within 120 period required to effectuate service. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 4(d)(1), 28 U.S.C.A.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (1:04-cv-03772-AMD). **ARGUED:**Howard Benjamin Hoffman, Rockville, Maryland, for Appellant.Bonnie Ilene Robin-Vergeer, Public Citizen Litigation Group, Washington, D.C., for Amici Supporting Appellant. William Rowe Phelan, Jr., Baltimore City Department of Law, Baltimore, Maryland, for Appellees. **ON BRIEF:**Karen Stakem Hornig, Chief Legal Counsel, Office of Legal Affairs, Baltimore Police Department, Baltimore, Maryland; George A. Nilson, City Solicitor, Baltimore City Department of Law, Baltimore, Maryland, for Appellees. Larry H. James, Christina L. Corl, Lindsay L. Ford, Crabbe, Brown & James, L.L.P., Columbus, Ohio, for National Fraternal Order of Police, Amicus Supporting Appellant.

Before WILLIAMS, Chief Judge, WILKINSON, Circuit Judge, and Arthur L. ALARCÓN, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Vacated and remanded in part and affirmed in part by published opinion. Senior Judge ALARCÓN wrote the opinion, in which Chief Judge WILLIAMS joined. Judge WILKINSON wrote a separate concurring opinion.

OPINION

ALARCÓN, Senior Circuit Judge:

*1 Michael Andrew appeals from the district court's order granting the Defendants' motion to dismiss this 42 U.S.C. § 1983 civil rights action for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Andrew named as defendants two former Baltimore Police Department ("BPD") police commissioners and a BPD deputy police commissioner. Andrew contends that the district court erred in determining that the allegations in his complaint did not demonstrate that the Defendants violated his First Amendment right to freedom of speech by retaliating against him for releasing an internal memorandum ("Andrew Memorandum") to a reporter for the *Baltimore Sun*. In his memorandum, Andrew requested that an investigation be conducted to determine whether the use of deadly force by a tactical unit of the BPD against a barricaded suspect was justified and properly conducted. Andrew argues that the retaliation was improper because as a citizen, he has a First Amendment right to speak about a matter of public concern. The district court concluded that Andrew's Memorandum was not protected by the First Amendment under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), because it "never lost its character as speech pursuant to his official duties simply by virtue of the wider dissemination he elected to give it after his recommendations were ignored by the police commissioner." *Andrew v. Clark*, 472 F.Supp.2d 659, 662 n. 4 (D.Md.2007).

We vacate the district court's order dismissing this action and remand for further proceedings because

Andrew has alleged facts in his second amended complaint that could entitle him to relief on his First Amendment claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (“[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”).

For the reasons discussed below, we also hold that the district court erred in dismissing Andrew's petition and procedural due process claims. We affirm the denial of Andrew's motion for partial summary judgment, and the denial of his motion for fees and costs incurred in effectuating service on Defendant Kevin P. Clark.

I

Because the district court dismissed this action pursuant to Rule 12(b)(6), we treat each of the allegations in the second amended complaint as true. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 367 (4th Cir.1998) (“We review a dismissal for failure to state a claim *de novo*, drawing all reasonable inferences in favor of the plaintiff and accepting the allegations that are stated in the complaint as true.”).

Andrew was employed by the Baltimore Police Department from June 1973 until his employment was terminated in September 2004. At the time of his termination, Andrew served as a Major, a command level rank.

On or about December 8, 2003, an elderly man named Cephus Smith killed his landlord over a rent increase and barricaded himself in his apartment. Andrew was the commander of the Eastern District of the BPD and responded to the barricade situation. There were four commanders at the scene of the barricade. The senior officer was Colonel Carl Gutberlet. Andrew's only duty at the crime scene was to supervise the officers assigned to perimeter street control. Andrew requested that a Technical

Assistance Response Unit (“TARU”) look inside the suspect's apartment to gain additional intelligence. He also instructed the BPD officers to continue their attempts to negotiate with the suspect. TARU officers under the command of another BPD official arrived at the scene. The unit entered the suspect's apartment and shot and killed the suspect (the “Smith shooting”).

*2 Following the Smith shooting, Andrew repeatedly asked that the BPD include him in a review and investigation of the shooting given the fact that there were no hostages and no evidence that the suspect intended to commit further violence from within his apartment. Despite his requests, Andrew was not included in any BPD investigation of the Smith shooting.

On December 17, 2003, Andrew submitted his memorandum to Defendant Kevin P. Clark, the former police commissioner of the BPD, in which Andrew expressed his concern regarding whether the Smith shooting was justified and whether it was handled properly. Andrew asserted that the TARU officers had not exhausted all peaceful non-lethal options and that the department had unnecessarily placed officers in harm's way.

Andrew was not under a duty to write the memorandum as part of his official responsibilities. He had not previously written similar memoranda after other officer-involved shootings. Andrew would not have been derelict in his duties as a BPD commander, nor would he have suffered any employment consequences, had he not written the memorandum. The memorandum was characterized by Clark as “unauthorized.” The task of investigating officer-involved shootings falls upon the BPD's Homicide Unit and the Internal Affairs Division. Andrew did not work within either of these units nor did he have any control over their investigations. Clark ignored the Andrew Memorandum.

Thereafter, Andrew contacted a reporter from the *Baltimore Sun* newspaper, explained the situation, and provided the reporter with a copy of his

memorandum. Andrew did not serve as a media spokesperson for the BPD. He provided his memorandum to the *Baltimore Sun* reporter because of his concern for public safety.

On January 6, 2004, the *Baltimore Sun* published an article (the “*Sun* Article”) regarding the Smith shooting. It highlighted the concerns raised in the Andrew Memorandum. Following publication of the *Sun* Article, the BPD subjected Andrew to an Internal Affairs investigation. He was charged with giving confidential internal information to the media. As a result, Andrew lost command of the BPD's Eastern District and was placed in a less desirable position in the Evidence Control Unit. He also did not receive a stipend of \$3,900 a year he had previously received as a BPD District Commander.

In July 2004, Clark ordered Andrew to retire. Andrew responded that he would retire only if the pending Internal Affairs charges against him were dismissed and he was awarded paid time off. Clark did not accept Andrew's offer. Nevertheless, Defendant Kenneth Blackwell, a BPD deputy police commissioner, provided Andrew with paid time off. Subsequently, Andrew was placed on “out of pay” status. His compensation and benefits were terminated. Thereafter, Andrew returned to the BPD and made himself available for work.

After returning to work and not receiving any pay, Andrew's counsel sent letters to the BPD's Office of Legal Affairs, complaining that Andrew's First Amendment rights were being violated. Andrew's counsel also advised the City Solicitor that Andrew intended to bring multiple claims under Maryland law against Defendants for violating his civil rights.

*3 Andrew also wrote Blackwell, requesting information about his status. Blackwell responded to Andrew that he was “handling this all wrong.” Andrew was given a personnel order, dated October 27, 2004, which terminated his employment effective September 20, 2004, for “failing to respond to the Fire and Police Retirement Office.”

On November 10, 2004, the then Mayor of Baltimore removed Clark as the BPD police commissioner. Clark was replaced by Defendant Leonard Hamm. Prior to Clark's termination, Hamm had sympathized with Andrew regarding his situation. Hamm had expressed an interest in retaining Andrew as a member of his command staff. When Hamm learned that Andrew was preparing to sue the BPD, however, his attitude changed. He maintained the termination order originally issued by Clark. Hamm received notice of the instant lawsuit on December 3, 2004. On that date, he ordered Andrew to return to work. In an exchange of correspondence, Hamm indicated that Andrew had not been reinstated but was in a “no pay status,” and that if Andrew refused to return to work, he would be deemed to have abandoned his position with the BPD. Andrew returned to work at the BPD. He was not returned to his position as a Major and the Internal Affairs charges against him have not been dropped.

II

On November 29, 2004, Andrew filed this action. Defendants filed a joint motion to dismiss Andrew's first amended complaint. Thereafter, Andrew attempted to file a second amended complaint. The district court granted Andrew's request for leave to file a second amended complaint and looked to the allegations in the second amended complaint in order to decide Defendants' motion to dismiss.

The district court granted the Defendants' joint motion to dismiss the federal claims with prejudice. It also dismissed without prejudice the supplemental state claims for lack of subject matter jurisdiction. Andrew filed a timely notice of appeal.

The district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331, as Andrew alleged claims under 42 U.S.C. § 1983. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

III

A

[1] Andrew contends that the district court erred in dismissing his § 1983 claim as a “matter of law” based on its conclusion that “[n]o reasonable juror could reasonably find that the ‘internal memorandum’ was other than ‘speech pursuant to plaintiff’s official duties.’” *Andrew*, 472 F.Supp.2d at 663.

In reviewing a motion to dismiss an action pursuant to Rule 12(b)(6), the Supreme Court instructed in *Bell Atlantic* that we must determine whether it is plausible that the factual allegations in the complaint are “enough to raise a right to relief above the speculative level[.]” 550 U.S. at 555. In *Bell Atlantic*, the Court reasoned as follows:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

*4 *Id.* (internal quotation marks, citations, and alterations omitted). We are persuaded by our “look for plausibility in this complaint” that Andrew has alleged sufficient facts to assert a right to relief above the speculative level. *Id.* at 564.

In Count I of his second amended complaint, Andrew stated that providing the *Baltimore Sun* reporter “with his views and concerns regarding the shooting death of Mr. Cyphus Smith[] was protected expression regarding a matter of public concern; that his interest in First Amendment expression outweighs whatever interest the Defendants had regarding maintaining control over the workplace [.]” Andrew argues that it was unnecessary for the district court to determine whether his memorandum was executed pursuant to his official duties “because the act for which [he] was terminated for

[sic], the dissemination of his memorandum to [the] press, was clearly not an act pursuant to his official duties.”

The district court’s conclusion that the Andrew Memorandum was “speech pursuant to [his] official duties” was based upon its erroneous conclusion that “Plaintiff [had] concede[d] that, as Eastern District Commander, he was ‘routinely required to provide an overview, findings and recommendations as to all significant incidents including shootings that occurred within his district.’” *Andrew*, 472 F.Supp.2d at 661, 663.

Nowhere in the record does Andrew make such a concession. In fact, in paragraph 18 of the second amended complaint Andrew specifically alleged that Clark had characterized his memorandum as “unauthorized,” and that he had not written such a memorandum about other police-involved shootings.

During oral argument, the court inquired of counsel for the Appellees whether Andrew had conceded that he wrote the memorandum as part of his official duties. Appellees’ counsel forthrightly replied:

Before I do anything else, I want to say that the question Judge Alarcón had about the concession by the Plaintiff-as much as I hate to say this-there was no concession that writing the memorandum was part of his job. The statement referred to by the district judge was taken from one of the Defendants’ memoranda.^{FN1}

Thus, the question whether the Andrew Memorandum was written as part of his official duties was a disputed issue of material fact that cannot be decided on a motion to dismiss pursuant to Rule 12(b)(6). See *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir.2007) (district court may not resolve factual disputes on Rule 12(b)(6) motion without converting motion into one for summary judgment under Rule 56).^{FN2}

Therefore, the district court erred in concluding that

“[n]o reasonable juror could reasonably find that the ‘internal memorandum’ was other than ‘speech pursuant to plaintiff’s official duties.’ Accordingly, the First Amendment claim fails as a matter of law.” *Andrew*, 472 F.Supp.2d at 663.

B

In setting forth the basis for its conclusion that Andrew had failed to assert facts that would support a claim for a violation of his First Amendment rights, the district court accurately summarized the rule announced in *Garcetti* as follows: “[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and therefore are not insulated from ‘managerial discipline’ based on such statements.” *Andrew*, 472 F.Supp.2d at 661 (quoting *Garcetti*, 547 U.S. at 424). The district court failed, however, to recognize that the Supreme Court also stressed in *Garcetti* that “the parties in this case do not dispute that [the plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework of the scope of an employee’s duties in cases where there is room for serious debate.” *Id.* at 424. Accordingly, because the parties do not agree that the facts demonstrate that Andrew wrote his memorandum as part of his official duties, contrary to the district court’s conclusion, the facts alleged in Andrew’s second amended complaint do not “render *Garcetti* wholly applicable.” *Andrew*, 472 F.Supp.2d at 663. At this stage of the proceedings in this matter, we must conclude that there is “room for serious debate” regarding whether Andrew had an official responsibility to submit a memorandum regarding the Smith shooting.

*5 The district court also stated that *Garcetti* had “significantly modif [ied] the longstanding test of public employee First Amendment protection derived in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 [] (1968).” *Andrew*, 472 F.Supp.2d at 661. In rejecting Andrew’s citizen

speech claim, the district court commented that

[t]he gravamen of plaintiff’s claim seems to be that when he elected to “go public” by handing a copy of his “internal memorandum” to a representative of the media, *he converted what is undeniably speech effected pursuant to his employment duties into “citizen speech” on a “matter of public concern.”* I can find nothing in *Garcetti* or in the more persuasively-reasoned cases that have interpreted *Garcetti* to support this view: that the Supreme Court’s plain intention to carve out an enclave of unprotected speech by public employees is so limited.

472 F.Supp.2d at 662 (emphasis added and citations omitted).

We disagree with the district court’s conclusion that *Garcetti* significantly modified the *Pickering* test regarding the protection of a public employee’s First Amendment right to speak as a citizen about matters of public concern. In fact, in *Garcetti* the Court cited *Pickering* for the following principles:

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no *First Amendment* cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the *possibility* of a *First Amendment* claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.

Garcetti, 547 U.S. at 418 (emphasis added and internal citations omitted).

Because there was no dispute in *Garcetti* that the plaintiff wrote his disposition as part of his employment duties, the Court held that “his allegation of unconstitutional retaliation must fail.” *Id.* at 424. In this matter, Andrew has alleged that the preparation of his memorandum was *not* part of his official duties. At this stage of the pretrial proceedings, the district court was required to accept that statement as true. Because of its mistaken belief that Andrew had conceded that he wrote his memorandum as part of his official duties, the district court failed to consider whether it could determine, based on the facts alleged in the second amended complaint, whether Andrew’s dissemination of his memorandum was citizen speech regarding a matter of public concern, or whether the publication of it affected the operation of the BPD, as required by *Garcetti* and *Pickering*.

*6 Whether Andrew’s delivery of his memorandum to a reporter for the *Baltimore Sun* “addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (emphasis added). Only if Andrew’s speech is found to address a matter of public concern does the court then “seek ‘a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” *Id.* at 142 (quoting *Pickering*, 391 U.S. at 568) (alteration omitted). Resolution of these questions will depend upon the results of discovery as tested by a motion for summary judgment.

IV

[2] We also determine that the district court erred in dismissing Andrew’s petition claims on the grounds

that his claims did not, as a matter of law, involve issues of public concern. Andrew maintains that his petition claims implicate a matter of public concern, namely “whether the BPD retaliates against police commanders who publicly disagree with the necessity of a police-involved shooting[.]”

Andrew alleged that he was retaliated against for petitioning the government to redress his grievances. Specifically, Andrew alleged a form of second-level retaliation—that he was terminated in retaliation for threatening to file suit regarding the original retaliation he faced upon disseminating his memorandum to the press. The facts alleged in the second amended complaint are similar to those found in *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir.2004). In *Kirby*, this Court held that the plaintiff police officer’s second-level retaliation claim implicated matters of public concern for First Amendment purposes even though his initial speech related to a private matter. *Id.* at 449 (finding that plaintiff’s “grievance and lawsuit concerned a subject of much greater interest to the public, namely whether the police chief and his lieutenant retaliated against Kirby for providing truthful testimony”) (emphasis omitted).

The district court concluded that Andrew’s petition claims fail as a matter of law because they concerned “matters of a wholly personal dimension, i.e., his desire to seek damages and obtain injunctive relief aimed at getting back his job.” *Andrew*, 472 F.Supp.2d at 663 n. 5. We disagree. Andrew has asserted viable petition claims because he alleges that the first-level retaliation was an Internal Affairs investigation due to his distribution of his memorandum to the press, and that the second level of retaliation was his termination for threatening to file suit for the first level of retaliation. Accordingly, the district court erred in dismissing Andrew’s petition claims.

V

[3] The district court also rejected Andrew’s pro-

--- F.3d ----, 2009 WL 867976 (C.A.4 (Md.))

(Cite as: 2009 WL 867976 (C.A.4 (Md.)))

cedural due process claims. It held that his “attempt to transform a state law claim for reinstatement to a lower rank into a federal procedural due process claim fails” because “there is no *federal procedural due process issue* [] presented” and Andrew was at most “not entitled to a *hearing*, he was entitled to a *job*.” *Andrew*, 472 F.Supp.2d at 664, 664 n. 6 (emphasis in original).

*7 As the district court properly pointed out, “[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (citing U.S. CONST. amend. XIV; *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). “Only after finding the deprivation of a protected interest do we look to see if the State’s procedures comport with due process.” *Sullivan*, 526 U.S. at 59 (citation omitted). A government employee “has a protected property interest in continued public employment only if he can show a ‘legitimate claim of entitlement’ to his job under state or local law.” *Luy v. Baltimore Police Dep’t*, 326 F.Supp.2d 682, 689 (D.Md.2004) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). “A public employee in an at-will position cannot establish such an entitlement, and thus cannot claim any Fourteenth Amendment due process protection.” *Id.* at 689-90 (citing *inter alia*, *Pittman v. Wilson County*, 839 F.2d 225, 229 (4th Cir.1988)).

However, the Supreme Court has held that even if a government employee is at-will, he may still allege an entitlement to termination “for cause” if he can show the existence of “rules and understandings, promulgated and fostered by state officials” promoting such a procedure. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). In *Perry*, the Court held, in relevant part:

[R]espondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate

claim of entitlement to continued employment absent “sufficient cause.” ...[W]e agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of “the policies and practices of the institution.” Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Perry, 408 U.S. at 602-03 (citations omitted).

Maryland law suggests that Andrew, who was a Major at the time of his termination, served “at [the] pleasure” of the Commissioner. See Pub. Loc. L. Md. Art. 4 § 16-7(3).^{FN3} Nevertheless, Andrew argues that, pursuant to *Perry*, he could only be terminated for cause and with a hearing. Andrew alleges in Count IX of the second amended complaint that:

[A] mutual implied understanding existed within the BPD ... that an individual who serves the BPD as a command level official, such as [himself] ... has a right to a fair and impartial investigation and/or to return to his highest level civil service rank (Captain or below), if his services are no longer desired; whereupon [he] could only be terminated for cause and according to the laws of the State of Maryland and the City of Baltimore, along with the rules, regulations, and orders of the BPD.

*8 In support, Andrew relies on somewhat ambiguous provisions of Maryland law, providing that:

Notwithstanding any provisions of this section, or of this subtitle, the Commissioner may make any appointment to the Department above the rank of captain, without examination, except that no such position shall be filled by a police officer within the Department of a rank less than lieutenant, and where any such appointment is made the police officer so appointed shall, upon the termination of his service in such position, *be returned to the*

rank from which he was elevated, or to such higher rank as he became eligible to serve in during his appointment.

Pub. Loc. L. Md. Art. 4 § 16-10(d) (emphasis added). Relying upon this provision, Andrew alleges that he could not be terminated entirely, but would instead be demoted to the rank from which he was elevated (that is, demoted to a Lieutenant). While this interpretation may appear a bit strained, we must draw all inferences in the light most favorable to Andrew. The district court itself noted that there was “some uncertainty” as to how to resolve what seemed to be a “guarantee of a lower-level job upon the termination of [one’s] appointment to a command level position[.]” *Andrew*, 472 F.Supp.2d at 664. Based upon Andrew’s allegations that he was a 31-year veteran of the BPD, that there was a guarantee of a lower-level job upon termination of a command level position, and that Clark demoted (rather than terminated) other command level officials, Andrew has alleged valid procedural due process claims and should “be given an opportunity to prove the legitimacy of his claim of such entitlement in light of the policies and practices of the institution.” *Perry*, 408 U.S. at 603 (internal quotation marks and citations omitted).

VI

[4] Andrew also argues that the district court erred in denying his motion for partial summary judgment on the ground that, procedurally, the motion was unopposed by Defendants. On the merits, Andrew argues that there is no genuine issue of material fact that his delivery of his memorandum to the press related to a matter of public concern and that the *Pickering* balancing test weighs in his favor. We hold that the district court did not err in denying Andrew’s motion for partial summary judgment.

Rule 56(e)(2) of the Federal Rules of Civil Procedure provides as follows:

When a motion for summary judgment is properly

made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment *should, if appropriate*, be entered against that party.

Fed.R.Civ.P. 56(e)(2) (emphasis added). The Advisory Committee Notes to Rule 56 highlight that the language was amended from the stricter “shall [if appropriate]” language to the more discretionary “should [if appropriate]” language. *See* Fed.R.Civ.P.R. 56(e) (2007 Amendments). The Advisory Committee Notes also highlight the discretion that district courts are given to deny summary judgment motions even when the standard appears to have been met. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil* § 2728 (3d ed.2008) (“the court has discretion to deny a Rule 56 motion”); *see also* *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir.1984) (“Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it.”) (citing Wright & Miller).

*9 Accordingly, given: (1) the discretion accorded district courts in deciding whether or not to grant motions for summary judgment; (2) the apparent disputed facts regarding the nature of Andrew’s speech, highlighted in the above discussion; and (3) the lack of a developed record at this stage in proceedings, we conclude that the district court did not abuse its discretion in denying Andrew’s motion for partial summary judgment.

VII

[5] Andrew further claims that the district court abused its discretion in denying his motion for costs and fees associated with effectuating personal service on Clark. Andrew argues that the district court’s order “ignored the plain weight of the evid-

ence that Clark, who had a history of evading service, had refused to waive service."We disagree.

Rule 4(d) of the Federal Rules of Civil Procedure provides that a plaintiff may request that a defendant waive service of a summons. Fed.R.Civ.P. 4(d)(1). Such notice and request must, among other things, "give the defendant a reasonable time of *at least* 30 days after the request was sent" to return the waiver. *Id.* 4(d)(1)(F) (emphasis added). A plaintiff must serve a defendant within 120 days of filing the complaint. *Id.* 4(m).

While this court has not expressly ruled on the applicable standard of review in deciding motions for costs and fees brought pursuant to Rule 4(d), the Ninth Circuit has held, and we agree, that the appropriate standard of review is abuse of discretion. *See Estate of Darulis v. Garate, et al.*, 401 F.3d 1060, 1063 (9th Cir.2005) ("Darulis contends that because the defendants failed to waive service of process, he is entitled to an award of the costs he incurred in effecting service on the defendants. We review the district court's denial of costs for an abuse of discretion.") (citation omitted).

Here, the initial complaint was filed on November 29, 2004 and Clark was served on January 29, 2005. As the district court noted, the complaint itself alleged that Clark was a New York citizen who maintained a "temporary home" in Maryland. Andrew retained a process server on January 3, 2005, even though Clark was mailed the request for waiver of service to his temporary Maryland home only on December 2, 2004. Clark was personally served in New York on January 29, 2005, less than two months after the waiver was requested, and on the same day that a certified letter was signed for in New York by someone acting on his behalf at his New York address. Clark was served "well within" the 120 day period required to effectuate service.

While Andrew may not agree with the district court's decision that he failed to afford Clark a reasonable time to waive service, the above facts provide ample support for the district court's con-

clusion. Accordingly, we affirm.

CONCLUSION

For the reasons discussed above, we vacate and remand, for further proceedings consistent with this opinion, the district court's dismissal of Andrew's First Amendment claims, petition claims, and procedural due process claims. We affirm the district court's denial of Andrew's motion for partial summary judgment and affirm the district court's denial of Andrew's fee and costs motion.

***10 VACATED AND REMANDED IN PART AND AFFIRMED IN PART**

WILKINSON, Circuit Judge, concurring:

I agree that the dismissal of Andrew's First Amendment claims was premature. In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), the employee spoke on a matter as a part of his official duties. Here, as the court notes, that is very much in dispute. In *Garcetti*, the employee did not distribute the statement to a news organization. Here he did. And the matter about which Andrew spoke was not just an office quarrel or routine personnel action, but a question of real public importance, namely whether a police shooting of a citizen was justified and whether the investigation of that shooting was less than forthcoming.

To throw out this citizen who took his concerns to the press on a motion to dismiss would have profound adverse effects on accountability in government. And those effects would be felt at a particularly parlous time. It is well known that the advent of the Internet and the economic downturn have caused traditional news organizations throughout the country to lose circulation and advertising revenue to an unforeseen extent. As a result, the staffs and bureaus of newsgathering organizations-newspapers and television stations alike-have been shuttered or shrunk. Municipal and statehouse coverage in particular has too often been reduced to low-hanging fruit. The in-depth investigative report, so essential to exposure of public malfeas-

ance, may seem a luxury even in the best of economic times, because such reports take time to develop and involve many dry (and commercially unproductive) runs. And in these most difficult of times, not only investigative coverage, but substantive reports on matters of critical public policy are increasingly shortchanged. So, for many reasons and on many fronts, intense scrutiny of the inner workings of massive public bureaucracies charged with major public responsibilities is in deep trouble.

The verdict is still out on whether the Internet and the online ventures of traditional journalistic enterprises can help fill the void left by less comprehensive print and network coverage of public business. While the Internet has produced information in vast quantities, speedy access to breaking news, more interactive discussion of public affairs and a healthy surfeit of unabashed opinion, much of its content remains derivative and dependent on mainstream media reportage. It likewise remains to be seen whether the web-or other forms of modern media-can replicate the deep sourcing and accumulated insights of the seasoned beat reporter and whether niche publications and proliferating sites and outlets can provide the community focus on governmental shortcomings that professional and independent metropolitan dailies have historically brought to bear.

There are pros and cons to the changing media landscape, and I do not pretend to know what assets and debits the future media mix will bring. But this I do know-that the First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine. That scrutiny is impossible without some assistance from inside sources such as Michael Andrew. Indeed, it may be more important than ever that such sources carry the story to the reporter, because there are, sad to say, fewer shoeleather journalists to ferret the story out.

*11 So I concur in Judge Alarcón's fine opinion, because it recognizes this core First Amendment concern with the actual workings-not just the

speeches and reports and handouts-of our public bodies. This case may seem a small one, involving a single incident in a single locality, but smaller cases are often not without larger implications. The court is right to note that at this early stage, we cannot foresee who will prevail. But as the state grows more layered and impacts lives more profoundly, it seems inimical to First Amendment principles to treat too summarily those who bring, often at some personal risk, its operations into public view. It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.

FN1. In their joint motion to dismiss, Defendants asserted: "As Plaintiff prepared the memorandum pursuant to his official duties, he has no First Amendment cause of action based on the Department's reaction to his publication of his speech."

FN2. The district court declined to convert Defendants' 12(b)(6) motion into one for summary judgment. (*See* Joint Appendix ("JA") 31 ("I disagree with the assertion that the substance of defendants' motion is one for summary judgment; the rudimentary attachments to the motion to dismiss do not, in my view, inevitably convert the motion into a motion under Rule 56.").)

FN3. Public Local Law Article 4 § 16-11 also provides that "[a]ll members of the Department, *except those serving at the pleasure of the Commissioner...* shall be retained in the Department during good behavior and efficiency and may be dismissed or removed[] from the Department only for cause[.]" (Emphasis added.)

C.A.4 (Md.),2009.

Andrew v. Clark

--- F.3d ---, 2009 WL 867976 (C.A.4 (Md.))

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

vs.

2:08-cr-94-FtM-99DNF

SAMIR NEL CABRERA

OPINION AND ORDER

_____ This matter comes before the Court on a Motion to Allow "Live Blog" From Laptop Computer or Cell Phone in Courtroom (Doc. #93) filed on March 16, 2009, by Multimedia Holdings Corporation, d/b/a "News-Press", and two of the newspapers' reporters, Dick Hogan and Patrick Gillespie. These interveners seek an order allowing them to bring and use a laptop computer or cell phone into the courtroom during the sentencing hearing of the criminal defendant in this case so that they can "live blog" the proceeding as it occurs. They argue that with the advent of the electronic media over the internet, it is expected that news events be covered in a timely if not instantaneous fashion, and "live blogging" will greatly enhance the ability of the News-Press to perform that function. Otherwise, the newspaper reporters will be relegated to taking notes "with a pad and pencil."

The interveners rely on internet accounts of several district judges in other states who have allowed "live blogging" in a

criminal case.¹ The Court has found no published federal opinion, and interveners have cited none, which approves of such "live blogging" in a criminal case. Rule 53 of the Federal Rules of Criminal Procedure generally prohibits broadcasting of federal judicial proceedings: "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." FED. R. CRIM. P. 53. Interveners had cited no federal statute or other rule in the Federal Rules of Criminal Procedure which would authorize the broadcasting requested by the motion. The former version of Rule 53 was upheld against a First Amendment challenge in United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983). Such broadcasting of court proceedings is also prohibited by Local Rule 4.11(a)(2), Local Rules of the United States District Court for the Middle District of Florida. Since the purpose of bringing the computer or cell phone into the courtroom is to engage in conduct prohibited by the federal and local rules, the Court finds no reason to authorize such equipment in the courtroom.

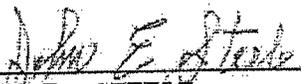
Accordingly, it is now

ORDERED:

¹"The term 'blog' is a portmanteau of 'Web log' and is a term referring to an online journal or diary." Doe v. MySpace, Inc., 528 F.3d 413, 415 n.1 (5th Cir. 2008).

The Motion to Allow "Live Blog" From Laptop Computer or Cell Phone in Courtroom (Doc. #93) is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 21st day of April, 2009.



JOHN E. STEELE
United States District Judge

Copies:
Counsel of Record
Counsel for Interveners

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO Address: City and County Building 1437 Bannock Street Denver, CO 80202	
<hr/> Plaintiff: THE PEOPLE OF THE STATE OF COLORADO v. Defendant: WILLIE CLARK	COURT USE ONLY Case No. 08CR10425 Courtroom 11
<hr/> Plaintiff: THE PEOPLE OF THE STATE OF COLORADO v. Defendants: BRIAN HICKS WILLIE CLARK SHUN BIRCH	<hr/> Case Nos. 08CR10479 08CR10480 08CR10481 Courtroom 11
DECORUM ORDER (COMBINING CASES)	

This matter comes before the Court following the previous Decorum Order in the above captioned cases. The Court has reviewed the respective pleadings filed on issues involving the media by the above captioned Defendants, by the People, and by media representatives (hereinafter "Media") and the United States Attorney's Offices. The Court has also reviewed applicable authority, the Court's respective files, and has heard argument by all counsel. The Court is fully advised.

These cases involve two separate homicide proceedings. The first, involving only Defendant Willie Clark, arises from the death of Darrent Williams. The second case, involving Mr. Clark and the remaining two Defendants, arises from the death of Kalonniann Clark. These cases have garnered significant media attention, and because of this, the Court has elected to issue an Order that will govern all future hearings, including trial, that occur in any of the above captioned cases. This Order shall govern all proceedings from this point forward, absent further specific Court Order.

The facts of the first of these cases involve the death of a high profile victim, Mr. Williams, who was at the time of his death a member of the Denver Broncos. The witness list

in that case includes other high profile witnesses, as well as a witness who is currently under the protection of the United States Marshal through the Federal Witness Security Program pursuant to 18 U.S.C. §§ 3521-3528 (1999). Those statutes require an independent assessment of a serious threat toward the witness. In the above captioned cases, there have been allegations of potential witness intimidation and threats to witnesses¹. This Court has not yet been requested to make any determinations regarding witness protection in that case.

The named victim in the other case, Ms. Clark, was a witness in a previous felony prosecution, and was allegedly murdered in order to prevent the successful prosecution of that case. There are allegations of the continuing potential of witness intimidation and threats in that case as well.

Immediately following the unsealing of the Indictment in the case involving Mr. Clark alone, the Court received media inquiries and requests for Expanded Media Coverage (EMC) under the terms of Canon 3(A)(8) of the Colorado Code of Judicial Conduct. This Court previously entered an Order in that case, allowing a camera to be present in the courtroom at the time of the advisement. On that date, photographs of the Defendant were published and utilized by various local and national media outlets. Those photographs have also been used in connection with ongoing proceedings in both of these cases. Further, on the same date of that initial proceeding involving an EMC Order from this Court, Defendant's counsel at the time of the hearing in this matter advised that there were media representatives outside of Courtroom 11 who asked questions of Mr. Clark while he was being transported to the Courtroom from the holding cells, also located on the fourth floor of the Courthouse.

In proceedings following that initial Advisement, this Court denied a further EMC Request on December 18, 2008 (for the 08CR10425 case) and again on January 29, 2009 (for the remaining three cases).

Because of anticipated requests in the future for EMC, the Court elected to hold an Omnibus Hearing on April 17, 2009, and provided notice to the attorneys who have, in the past, appeared before the Court to represent those media outlets. In the Court's view, this procedure was the most likely to provide all parties and interested outlets the opportunity to participate in a meaningful way to provide the Court with all positions on the issues raised by EMC. An Order governing all proceedings in the above captioned cases will best serve the interests of all of the direct parties to this case, the media representatives and the public. This Order is intended to bind any person or entity wishing to attend any proceeding in the above captioned cases, whether they were present at the time of this Court's hearing or not.

Some factual context is required for a complete understanding of this Order. The fourth floor of the Denver City and County Building houses seven District Court felony Criminal Divisions (Courtrooms 10, 11, 12, 13, 16 and 17) as well as the Jury Commissioner's Office, the holding cells of the Denver Sheriff's Department, and the City Council Chambers for the City and County of Denver. When individuals in the custody of the Sheriff's Department are removed from the holding cells, they are walked down the hallways of the fourth floor, with

¹ The U.S. Marshal's Service has requested that this Court enter Orders restricting the public's view of this witness, and U.S. Marshals appearing with that witness. The Court defers any such Orders until closer to trial.

appropriate restraints, depending upon the nature of their custody and the nature of the proceedings involved. It is frequently the case that an individual Judge will enter an Order that a Denver inmate will be clothed in civilian clothing, with no visible restraints, for purposes of trial. The District Attorney's Office also routinely uses offices located on the third and fourth floors of the building as an area to hold various witnesses who will testify, both during trial and in hearings. Those witnesses are often escorted to the various courtrooms on that same floor.

Depending upon the time of day and the day of the week, it is common to have potential jurors, Defendants in and out of custody (including those in civilian clothing and those who have visible restraints, such as handcuffs, shackles or belt chains), witnesses, spectators, District Attorneys and Defense Attorneys, individuals with business before the City Council and employees, as well as judges, together on the fourth floor. This situation requires careful and appropriate security measures to be taken, often with additional Sheriff's Deputies assigned in the hallways of the courthouse, especially on the fourth floor. At the time of the hearing, however, Captain Jodi Blair (who is in direct supervision of the courthouse) indicated that there have been recent cutbacks in the Sheriff's Department, which may directly impact the number of Sheriff's Deputies available and assigned to general security on the fourth floor.

Adding to this general state of concern are high profile cases, which often include not only intense media scrutiny, but also additional members of the public who wish to attend proceedings. While this Court is devoted to the idea that the courts must be operated so as to be accessible to the public unless specifically authorized to be a closed proceeding, this does not necessarily require the Court to allow EMC of all proceedings. Instead, the Court must directly balance the respective rights of the direct parties to the case against allowing additional access, through the media, of various proceedings.

It is axiomatic that the rights of the defendant to a fair trial are the highest priority of the Court: "No right ranks higher than the right of the accused to a fair trial." Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). The mere existence of a camera in a courtroom, however, does not *per se* violate a defendant's Due Process rights. Chandler v. Florida, 449 U.S. 560 (1981). Existing authority makes it clear that, while the Court must take great care to grant public access to criminal proceedings, the issue of "public access" is not identical to EMC. Simply put, there is no constitutional right to use of cameras or audio-transmitting devices, as conceded by the media representatives in their brief. *See, e.g.* United States v. Edmonds, 785 F.2d 1293 (5th Cir. 1986). The First Amendment provides for a right to attend trial (*see, United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1985)), "rather than a license allowing cameras or tape-recorders into the courthouse * * *." The rights of the press to access a criminal proceeding are "no greater than those of any other member of the public." Nixon v. Warner Communications, Inc., 435 U.S. 589, 609, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) quoting Estes v. Texas, 381 U.S. 532, 589, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)(Harlan, J., concurring).

The Media has argued to this Court that there is a "presumption" in favor of media access, which may only be rebutted with specific evidence. The Media cites People v. Wiegard, 727 P.2d 383 (Colo.App.1986) in favor of this proposition. The Court respectfully disagrees with this statement of the applicable law. The Court concludes that while it has been

given the *discretionary authority* to allow EMC, there is no *presumption* in favor of EMC. Instead, this Court must balance the impact of such coverage not only against those important rights held by a criminal defendant, but also against security issues in any given case (including protection of members of the public), and security issues involving witnesses who may be harmed. It is no stretch for this Court to conclude that there is a credible issue of witness safety in these cases, given the nature of the allegations in the Kalonniann Clark case. Only after all of these respective rights and concerns have been addressed does this Court ultimately consider its own interests in the case, which involve the decorum and dignity of the Court's proceedings. While media coverage in courtrooms has become commonplace, there are significantly unique facts and circumstances in the above captioned cases which require a separate analysis.

Courts have the "broad discretion to determine what actions are necessary to regulate the courtroom." People v. Marquantte, 923 P.2d 180, 183 (Colo.App. 1995) *citing* People v. Angel, 790 P.2d 844 (Colo.App. 1989). In Marquantte, the trial court was faced with reports of witness intimidation occurring in the hallway during trial. Unfortunately, those episodes are not uncommon during trials in the Denver District Court. For this reason, this Court concludes that under the specific circumstances of this case, the Court's broad discretion extends to the hallways of the City and County Building, especially those on the fourth floor. The Court concludes that those hallways do not constitute public forums during Court hours which would require this Court to utilize a strict scrutiny analysis as to the exercise of any First Amendment rights (including, but not limited to: conducting interviews of willing participants; photography of individuals in the hallways; and access to any person appearing in the hallway for purposes of asking questions). The Colorado Supreme Court in People v. Aleem, 149 P.3d 765 (Colo. 2007) examined the issues surrounding a court's power to restrict the exercise of free speech in a courtroom setting. While the Court stopped short of concluding that courthouses themselves are non-public *fora*, the Court recited precedent holding that other areas of a courthouse outside of the courtroom itself may not be a public forum. *See, Huminski v. Corsones*, 396 F.3d 53, 90-91 (2d Cir. 2005) in which the Court noted:

The function of a courthouse and its courtrooms is principally to facilitate the smooth operation of a government's judicial functions. A courthouse serves

"to provide a locus in which civil and criminal disputes can be adjudicated. Within this staid environment, the presiding judge is charged with the responsibility of maintaining proper order and decorum. In carrying out this responsibility, the judge must ensure that the courthouse is a place in which rational reflection and disinterested judgment will not be disrupted.... [T]he proper discharge of these responsibilities includes the right (and, indeed, the duty) to limit, to the extent practicable, the appearance of favoritism in judicial proceedings, and particularly, the appearance of political partiality."

Berner v. Delahanty, 129 F.3d 20, 26 (1st Cir. 1997)(citations omitted), *cert. denied*, 523 U.S. 1023, 118 S.Ct. 1305, 140 L.Ed.2d 370 (1998).

Id. at 90-91. *See also*, United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 83 L.Ed.2d 736 (1983); and Sefick v. Gardner, 164 F.3d 370, 372 (7th Cir. 1998) (“The lobby of the [federal] courthouse is not a traditional public forum or a designated public forum, not a place open to the public for the presentation of views. No one can hold a political rally in the lobby of a federal courthouse. It is a nonpublic forum” (citation and internal quotation marks omitted)), *cert. denied*, 527 U.S. 1035, 119 S.Ct. 2393, 144 L.Ed.2d 794 (1999).

Instead, the Court concludes that because of the unique design and use of the fourth floor of this Courthouse, the hallways of the fourth floor are a reasonable extension of the Courtrooms located on the floor, during the hours that the Courts are in session. As the Supreme Court noted in Aleem, *supra*:

* * * A courtroom is for the adjudication of civil and criminal disputes. To fulfill this purpose, courtrooms demand intense concentration on important matters. Hence, the disruption created by expressive activity within a courtroom weighs heavily against the conclusion that a courtroom is a public forum. Further, courts have not granted general public access to the courtroom for expressive use. The mere fact that the public is admitted to the courtroom does not render it a public forum.

Id., at 776, case citations omitted. While Aleem dealt exclusively with First Amendment issues within the confines of a courtroom, those policy considerations apply equally to the unique circumstances of the fourth floor of the Denver City and County Building. Those hallways demand no less intense concentration on the safe transport of prisoners, jurors, witnesses, attorneys, spectators, the public in general, and court staff in that hallway, especially in a case garnering such high profile attention. The dangers implicit in these cases to not only the safety of those participants during these hearings and trials, but also the general public, require this Court to enter Orders that are designed to minimize the disruptions and security considerations during the time proceedings are held in these cases. Further, there is a significant danger that media contacts with parties or witnesses in the hallways would directly impact the fairness of a proceeding, and potentially disrupt other Court proceedings occurring on the fourth floor. Indeed, there has been more than one trial in which a mistrial was declared as a direct consequence of media contacts with witnesses or parties in the hallways in full view of jurors². In Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 885 (3rd Cir. 1958), the Court reasoned that, “[r]ealizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding out things about everybody else * * *. We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry

² People v. Thomas Charles Armstrong, as reported by Felisa Cardona of the Denver Post, January 3, 2008 (“*Comments near jurors bring a mistrial ruling*”) Article ID: 1391832; Further, in People v. Kevin Adams, Denver Case No. 07CR4691, the Court declared a mistrial on October 15, 2008 when a member of the media attempted to interview a criminal Defendant during trial, in full view of jurors.

from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments of the Constitution. If a judge may, for the purpose of maintaining order and decorum, control the taking of pictures in his own court-room it can hardly be successfully argued that his power stops when one closes the court-room door." (emphasis supplied). For those reasons, the Court concludes that it has authority to control the use of those hallways when necessary in order to effectuate the purposes cited in Canon 3(A)(8).

As the Court conceded at the time of this hearing, the Court concludes that the outside of the courthouse, especially the front steps of the courthouse, constitutes a public forum. Those front steps and entrances have historically been utilized for purposes of public gatherings and speeches, and this Court will not interfere with that use. Accordingly, this Court does not intend to issue any Orders restricting the access of the public or the media as to the outside of the courthouse.

The Request for EMC specifically requests that this Court allow one single still camera, and one single video camera in the courtroom; that the Court allow various members of the media to use a wide variety of electronic devices to not only take notes of the proceedings, but also to email and send other messages to their respective media outlets with updates, and also to post "blogs" in real time, directly from the Courtroom. They suggest that various limitations might be placed, including issuing permits or badges that must be worn, indicating that members of the media are allowed to utilize these electronic devices, and that they would also agree, with this access, that they would not utilize cameras in the hallways outside of this Courtroom. The media representatives argue further that this Court should not impose limitations on the media in the hallways of the fourth floor of the Denver City and County Building, and argue that those hallways (with the exception of the hallway directly outside of Courtroom 11) are public forums, both because routinely the media have utilized those hallways to photograph individuals and also to interview them, but also because the fourth floor hallway has a mixed use, which includes the City Council Chambers, and that the hall in front of those Chambers have historically been used as a public forum.

All Defendants initially object to the use of cameras in the Courtroom, but concede that this Court could appropriately allow those cameras under the Rule. They also indicate a preference that no cameras be allowed outside of the Courtroom to film the Defendants as they are walked from the holding cells to the Courtroom. Defendant's respective counsel have advised the Court that, in a previous hearing, a member or members of the media attempted to speak directly to one Defendant, and that this was improper given the clear Constitutional rights of any criminal defendant to remain silent. This situation is of great concern to this Court. The Court knows of no legitimate purpose for any member of the public or the media to ask questions directly of a criminally charged Defendant on camera. Defendants' counsel also argues that this type of media intrusion, once made public, subjects that Defendant to a potentially tainted jury pool because members of the public may not understand that right. Further, counsel for Mr. Clark raises the legitimate question of whether intense media coverage of his first trial, where he is the only Defendant, would seriously prejudice him as to the next trial, in which he is one of three Defendants. One other Defendant's counsel provided this Court with information from a criminal trial that occurred recently in this Courthouse, showing this Court that certain inflammatory photographs of an exhibit, and the parties to the case,

remain on that media website. (Exh. "A" at hearing). This counsel argued to this Court at the hearing that photographs serve little purpose other than to sensationalize criminal proceedings, and commercialize dramatic testimony. Counsel for the media outlets provided this Court with a different context, and argued that the conclusions reached by Defendants' counsel were insufficient reason to deny EMC.

The People object to the media requests, citing concerns about witness protection, and concerns about limitations on available security on the fourth floor. The United States Attorney also provided this Court with specific information regarding their requirements for security for any witness within the federal witness protection program, and indicated that photographs of either that witness or witnesses, or the Marshals assigned to protect them, would have a significant security impact and direct impact on the safety of those people.

Captain Blair advised the Court that she shared certain concerns about interactions between people in custody, victims' and defendants' families and friends, witnesses, attorneys and jurors on the fourth floor. She also advised the Court that there have been budget cuts in the Sheriff's Department that are likely to directly impact available security.

At the hearing, the Media conceded that in recent experiences with direct electronic transmissions (blogging) from the courtroom, certain inaccurate information was provided to the public. This information was generally in the form of inaccurate information about the appearance of certain witnesses during those proceedings. The Court is concerned, given the number of high profile witnesses in these cases, that such inaccuracies will result in improper and undue emphasis on certain testimony to the exclusion of other evidence in the trial, and also the consequence that the Court will have to address the distractions of large crowds seeking entrance into the Courtroom, and addressing the further consequence of advising those same crowds in the event witness scheduling is not accurately reported. The Court is mindful that the Media has its own rules of professional conduct, requiring that members of the Media take care to report accurate information, but the use of immediate electronic transmissions from the courtroom reduces the time for investigation, and for corroboration of that information, before it is shared with the public.

It is nothing new for the courts, under certain circumstances, to severely limit the use of cameras or other recording devices, and to prohibit their use not only in the courtroom itself, but in the courthouse. In Seymour v. United States, 373 F.2d 629 (C.A. Tex. 1967), the Court upheld a trial court's entry of the following Standing Order:

Misc. Order No. 381 (December 17, 1965), subscribed by each judge of the Northern District of Texas, provides: STANDING ORDERThe Judicial Conference of the United States having adopted the following resolution: 'RESOLVED, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and

that they ought not be permitted in any federal court'; and the 'environs' of the courtroom having been generally interpreted to include all areas upon the same floor of the building upon which the courtrooms are located, IT IS ORDERED that the taking of photographs or broadcasting or televising in connection with any judicial proceeding on or from the same floor of the building on which courtrooms are located is forbidden.

In that case, a member of the media had been adjudged guilty of Contempt for his violation of that Standing Order. That finding was affirmed. The Court noted at page 632:

It is beyond argument that a trial court must be afforded ample latitude to insure that an accused receives a fair trial comporting with fundamental due-process requirements- a proceeding conducted in an atmosphere of procedural decorum and as free as possible from the threat of prejudicial publicity. A defendant in a criminal proceeding should not be 'forced to run a gantlet of reporters and photographers' each time he enters or leaves the courtroom. *See Sheppard v. Maxwell*, 384 U.S. 333, 354, 86 S.Ct. 1507, 1518, 16 L.Ed.2d 600 (1966). The Supreme Court has recently observed that

"Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effecting prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. * * * Reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

Sheppard v. Maxwell, *supra*, 384 U.S. at 362-363, 86 S.Ct. at 1522, at L.Ed.2d at 620. (Emphasis added.)

The Court is not convinced that there is an overriding purpose that justifies the admission of cameras in the Courtroom in these cases. Any such purpose is equally served (as it has been for decades before Canon 3(A)(8) was adopted) by Media accurately reporting the occurrences of the day during any given proceeding. Indeed, even the presence of a camera inside the courtroom, or in the hallways of the courthouse, can lead to intimidation of jurors and witnesses alike. Protection of the private information and potentially the identities of the jurors who will be selected to try these cases is a paramount concern of this Court, given the intense public scrutiny of these cases. It is this Court's intention to preserve, to the best of its ability, the jurors' confidentiality, because that has a direct impact on those jurors' abilities to listen carefully to the evidence presented at trial, and to make a decision based only on that information, and not based upon information outside of the courtroom, or based upon a perception of public pressure.

All of this information leads the Court to conclude that, both as a matter of security of witnesses, jurors, court staff and members of the public, and also to protect the individual Defendants' Due Process rights, that it is appropriate to enter an Order prohibiting any person (media representative or not) from photographing any person involved as a witness, attorney, Court staff member or juror, in these cases. Further, after consideration of all of the varied interests in this case, the Court believes that the overriding interests of conducting a fair trial, ensuring the decorum of court proceedings, and preserving the security and safety of members of the public, as well as other direct participants in this trial, require the entry of specific Orders about the use of cameras and other electronic devices. The Court concludes that the significant potential that these proceedings will be unfairly sensationalized, and that inaccurate information will be provided to members of the public, thus increasing the risk of interference in a fair trial, justifies restrictions on those devices during these proceedings.

Because there is no efficient or effective way to identify media representatives from members of the general public who are present in this Courthouse on any given day, THE COURT ORDERS that no camera of any kind (video, still, cell phone or computer) shall be used on the fourth floor of the City and County Building from the hours of 8:00 a.m. until 5:30 p.m. on any day for which a proceeding in these cases is scheduled, unless otherwise ordered. A copy of a Court Order advising of this prohibition will be posted throughout the Fourth Floor to provide notice to all persons who are present as to this prohibition, and this Order shall be enforced through the Denver Sheriff's Department. Any person in violation of this portion of the Court Order will be subject to further process, including, but not limited to, contempt proceedings, and any electronic device used in derogation of this Order shall be confiscated pending further Court Order. This Order is required, in the Court's view, to protect witnesses and jurors from potential intimidation, and to prevent dissemination of any image of any witness or juror to the general public. The very real potential of danger to parties, witnesses, jurors, attorneys and Court staff require this Order.

THE COURT FURTHER ORDERS that the fourth floor hallways shall not be utilized by any person to conduct an interview of any person during those same hours, in order to minimize the disruption to this, and other, Courtrooms conducting business during those hours. Instead, the Court will make City Council Chambers available for this purpose, upon the request of any member of the media to use those Chambers. Within the confines of City Council Chambers only, the Court will allow the use of video or still cameras by members of the media, in order to record such interview. Any such camera shall not be directed outside of those Chambers to record images of persons who are in the fourth floor hallway.

THE COURT FURTHER ORDERS that no camera of any kind will be allowed inside Courtroom 11. The Court finds insufficient reason to allow this EMC, given the continuing issues of security, and also the Due Process rights of the individual Defendants. While there may well be cases where cameras in the Courtroom are appropriate and reasonable (this Court has previously allowed such access), the Court is convinced that the nature of these specific cases, along with the potential risk for witnesses weigh against allowing EMC. The Court takes no position on the availability of sketch artists within the Courtroom, but Orders that no image or depiction of any kind will be allowed as to any juror, the Court or the Court's staff. The

Court may enter further Orders, as necessary and appropriate, regarding any potential witness involved in the case.

THE COURT FURTHER ORDERS that it will allow one or more audio microphones to be utilized inside the Courtroom, in order to allow audio access to proceedings in these cases. The specifics of this arrangement will require that there be a specific proposal made to the Court as to the location, control and transmission of that audio. The Court must also involve Court employees in that process, in order to assure that there would be no recording or broadcast of attorney/client communications, or sidebar discussions with the bench and any party. In this respect, therefore, the Court GRANTS the Request for EMC. In the Court's view, this microphone serves a legitimate purpose of allowing contemporaneous reporting to the public of the proceedings in the Courtroom, with little or no potential of creating a dangerous situation to any witness, juror or Court staff. The Court would be amenable to considering that a "satellite" room be set up, so that media representatives could listen to the proceedings in real time, so long as adequate arrangements consistent with the Court's resources can be made. If said "satellite" room is made available the same restrictions regarding EMC and electronic transmissions apply. In the event any party wishes to request this arrangement, they should make a specific request so that the Court may arrange for them to meet with Court personnel to determine how audio will be set up.

THE COURT FURTHER ORDERS that no person shall use any electronic device for the purposes of sending an email communication, text message, blogging or tweeting, taking a photograph or otherwise directly communicating with any person or entity outside of the Courtroom during any proceeding attended by that person within the Courtroom itself. The Court is unable to differentiate in a meaningful and effective manner between members of the public who seek to send such communications, and media representatives who seek to send those communications for legitimate purposes. There is a significant risk that those communications would be utilized in order to place witnesses, parties, attorneys, jurors or Court staff in physical jeopardy. While the Court recognizes that it is never the intention of media representatives to have that impact, the Court nonetheless recognizes that public dissemination of information such as timing of witnesses being present, identifying information for witnesses and other such information makes the potential that the information will be used for nefarious purposes more likely than it would be in the absence of such immediate communication. This Order is not intended to prohibit such communication by members of the media who are present from making such contacts outside of the fourth floor during breaks in the proceedings.

THE COURT FURTHER ORDERS that it shall make available, on a first-come, first-serve basis, two rows of benches in the Courtroom for the use of media representatives. In that section only, the Court would allow the use of a laptop computer for the purposes of taking notes only, but any such laptop must have any available camera lens and microphone disabled. Further, any media representative using a laptop must comply fully with other Orders of this Court involving contemporaneous communication outside of the Courtroom.

This Order shall remain in full force and effect as to any proceeding in the above captioned cases. A brief version of this Order shall be posted on the Fourth Floor of the City and County Building, and on the outside of Courtroom 11 to serve as notice to all persons as to

the contents of this Order. The Court reserves the right to amend this Order *sua sponte* in the future, should an amendment be appropriate. In the event of any Request for Expanded Media Coverage being filed by any person or entity, the Court will provide a copy of this Order to the requesting party. This Order shall also be made available electronically on the Colorado State Judicial Branch website at: <http://www.courts.state.co.us/Media/Opinions.cfm> for review by any member of the public. Questions about this Order should be directed to either Rob McCallum or Jon Sarché, Public Information Officers through the State Court Administrator's Office, at that same website, <http://www.courts.state.co.us/Media/Index.cfm> or by telephone at 303-837-3633 for Rob McCallum, or 303-837-3644 for Jon Sarché.

DATED: Tuesday, May 19, 2009

BY THE COURT:



Christina M. Habas
District Court Judge

cc: All Counsel of record

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO Address: City and County Building 1437 Bannock Street Denver, CO 80202	COURT USE ONLY Case Nos. 08CR10479 08CR10480 08CR10481 Courtroom 11
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO v. Defendants: BRIAN HICKS WILLIE CLARK SHUN BIRCH	
DECORUM ORDER (COMBINING CASES)	

THIS ORDER governs all persons who are present during the hours of 8:00 a.m. and 5:30 p.m. on the Fourth Floor of the City and County Building. THE COURT ORDERS that no person shall use a camera, whether a still camera, video camera, cell phone camera, or other object for purposes of taking photographs of any person, on the Fourth Floor, including but not limited to the confines of Courtroom 11, except within the direct confines of the City Council Chambers, or as otherwise allowed by specific Court Order.

IN THE EVENT OF VIOLATION OF THIS ORDER, the person who has possession of the camera shall be subject to further Court proceedings, including, but not limited to, proceedings for Contempt of Court for violation of this Court Order. A copy of this Order shall be posted in several conspicuous places on the Fourth Floor, and shall be made available to any person upon request by the Clerk of Courtroom 11.

WITHIN COURTROOM 11, no person shall use any telecommunication or electronic device of any kind, including but not limited to cell phones, Blackberry devices, iPhones, laptop computers or any other electronic device for the purposes of transmitting emails, texts, blogs or other communications, **without prior Court approval**. In the event any person utilizes any such device within the Courtroom in violation of this Order, the device shall be immediately confiscated, and the person subject to further Court proceedings, including, but not limited to, proceedings for Contempt of Court for violation of this Court Order.

DATED: Tuesday, May 19, 2009

BY THE COURT:



Christina M. Habas
District Court Judge

Newspapers in the 21st Century

SUE CLARK-JOHNSON

I am a journalist. Retired perhaps, but still a journalist.

I love what journalism represents, what it means. I know you do, too.

I know Barbara Wall [Gannett VP and associate general counsel] and David Bodney [Steptoe & Johnson], and how deeply they believe in press freedom. Through them and the other media attorneys I have had the good fortune to be guided by in more than forty years in journalism, I know that you love representing the press and that you are as committed to the First Amendment and all its implications for a free society as I am.

I grew up in this business. Of late, I have been thinking a lot about my journalist father, who died the year I became managing editor at a small newspaper in Niagara Falls, New York. He started out working for William Randolph Hearst Sr. My father always said he wanted to see and report from a “box seat to life” . . . he wrote about what he saw on an old Underwood, and his stories were published in publications like the now-defunct *The American Weekly*.

During my forty-one years as a journalist, I too had a box seat, although oftentimes I was the first woman in some of them. Like my father, I saw and reported on life and witnessed and participated in the dramatic change in our business.

Everything *he* knew about this business has changed—just as everything I have known has changed.

Well, maybe not everything.

What this business *stands for* has not.

Sue Clark-Johnson retired in May 2008 as president of Gannett's Newspaper Division after a forty-year career in journalism that included, among other things, service as chairman and CEO of Phoenix Newspapers, Inc.; senior group president of Pacific Newspaper Group; and publisher and CEO of The Arizona Republic. This article is based on her February 6, 2009, keynote address at the Forum's 14th Annual Conference in Scottsdale, Arizona.

We stand for truth and for the public's right to know . . .

In every town, every city across this country, dedicated newspaper reporters have done so for generations.

Since I retired last spring, I have been asked often what I am most proud of. It isn't being the first woman, or top positions I have held. It is being a participant in the good journalism that has helped rectify wrongs. As one example: when I was an editor in Niagara Falls, a reporter brought me a jar of what looked like black tar. He said people were dying in a neighborhood called Love Canal and they believed this black substance was the cause.

We had it analyzed and relentlessly wrote news stories documenting health findings and the suffering of families living there. The chemical company that had used that neighborhood as a dumping ground before houses were built put extraordinary pressure on the publisher to stop. So did the Chamber of Commerce. The publisher asked me whether I was absolutely sure we were right. I said yes . . . and you know the rest of the story.

That's what newspaper journalists did, what they are doing now, and what I believe they will continue to do. The words may come to you in print, on your laptop, or on your iPod. But the work will continue.

Journalists do not do this work by themselves. I have worked with media lawyers in many cities and newspapers. I have seen the passion in their eyes and in their legal arguments for doing the right thing.

I learned very early on the value of media lawyers. John Quinn, a revered news executive at Gannett during its growth heyday of the '70s and '80s, said that “courage and care must go together in aggressive journalism. No solid story should be blocked by the mere existence of risk, but no real risk should be bypassed in judging just how solid the story is . . . the rights of a free press must be, and will be, vigorously protected within Gannett newsrooms

with the best of editing and legal talent, each in its own province. Lawyers are not going to be allowed to play journalist—and vice versa.”

Will Newspapers Survive?

So journalists and lawyers are aligned in our beliefs and in our fears. I am worried that the business of newspapering and the very foundation of a democratic society won't survive. So are you. I am going to take a few minutes to talk about how real the threat is, and let's see if you and I have reason to be worried.

A 2000 survey asked Americans what products they would want to see survive in the twenty-first century. The No. 2 product on the list of things people wanted to stay around was the newspaper. Oreos cookies were No. 1. Considering Americans' love of Oreos, I didn't think No. 2 was bad at all.

How could newspapers not survive? After all, we served such a crucial role in our communities. We had tremendous clout, and that clout was earned because we had credibility. We were the only media (and still are, really) that kept a close watch on how government spends your tax dollars. We reported on crime and courts and city councils and land use. We told people where they could go to have fun. We reported on their high school, college, and pro sports teams. We told people who was born, who was getting married, who had a baby, who got divorced, and who died. We told them what their stocks were doing and what businesses were opening and closing. We told them where to find good deals. We told them who was hiring and how to apply. We told them what houses were for sale and for how much. We were a marketplace of ideas and a marketplace for retailers and people to sell things. We brought communities together because just about everyone read the paper.

We anticipated survival well into the twenty-first century, although it was only in 1910 that the essential features of the recognizable modern American

newspaper emerged, according to *A Brief History of American Journalism*. The first successful newspaper was the Boston News-letter in 1704, which was heavily subsidized by the colonial government—so I guess government subsidies are part of our country's DNA after all. By the eve of the Revolutionary War, more than two dozen newspapers were in existence, and they were a major force that influenced public opinion regarding political independence. When the Bill of Rights was ratified in 1791, freedom of the press was guaranteed, and American newspapers began to take on a central role in national affairs.

Before the advent of newspapers in early seventeenth-century Europe, reports of events—in other words, news—were spread by word of mouth or by letters to friends and families. In its review of a recent Washington, D.C., exhibit of Renaissance journalism, the *New York Times* said that the story of how journalism became a public enterprise in Renaissance England is actually a history of how a public itself took shape . . . and how another kind of identity emerged out of a monarchical society, one based on increased literacy and impassioned written argument. The newspaper evolved as the creator and mirror of its public. *Political modernity, said the reviewer, is almost unimaginable without that relationship.*

And it is that relationship that you and I worry about surviving.

The Color of Money

In short, for the last 400 years, newspapers were necessary. Newspapers mattered. And, because we mattered, we were also very profitable.

Citizen Kane, in responding to his top financial adviser that they had lost \$1 million that year, said, "You're right. I did lose \$1 million last year. I expect to lose \$1 million this year. I expect to lose \$1 million every year. At the rate of \$1 million a year, I'll have to close this place in sixty years."

That was sixty-eight years ago.

Today, most newspapers are still profitable, but not as profitable as in the past. I like to believe that we are still necessary and that we still matter despite the media noise of cell phone pictures, You Tube, Facebook, Sirius XM, 24/7 screaming cable talking heads, bloggers, twitterers, and flickers. *The Economist* observed last fall that, if

the 2008 election proved anything, it is that the media are hardly the monolithic, agenda-setting forces they may have been before the Internet and cable.

Today, citizens get to pick their filters. Human nature being what it is, many people opt for filters that feed their own preconceptions. In other words, ever-expanding new media permit people to ratify their own worldviews without straying too far afield. Conservatives watch Fox and listen to Rush. Liberals watch Keith Olbermann and Rachel Maddow.

The reports of the extraordinary negative influence of competing media noise on the future of newspapers are true. But, interestingly enough, it is the newspaper that still reaches the most people every day with the unmatched credibility of decades behind it. We're holding on to our audience better than our competitors. On a daily basis, according to the Newspaper Association of America, U.S. print papers reach 51 percent of all U.S. adults, ranking them the single largest media in virtually every market on any given day.

The Perfect Storm?

But we are caught smack in the middle of that perfect storm of enormous systemic and cyclical factors. The systemic factors were already causing an unprecedented shift in the basic business model of the newspaper industry, changing the way that we generate, compile, and distribute news and information—and the way readers consume it. Then along came the economic upheaval, which has threatened to engulf many businesses, not just ours. For newspapers, the recession means serious declines in advertising revenue in addition to the revenue shifts from print to websites. Newspaper advertising is synonymous with cars, real estate, retail department stores, and banks. And we know what trouble they are all in.

Two of the fastest, and among the only, growing news magazines are *The Economist* and *The Week*, a weekly print aggregator of news culled from newspapers around the country and the world. This tells us something—people can get the day's headlines online, on TV, or both. But at some point, they want it synthesized and complete, ergo *The Week*, or analyzed and placed in context, thus *The Economist*.

The Newspaper as Watchdog

But newspapers do have one thing that

other media don't.

We have an entrenched, valuable brand that, for all our foibles, is a fundamental cornerstone of the democratic process in this country.

We have a strong tradition and credibility as watchdogs and guardians of the First Amendment, a tradition that is getting stronger because of the new tools we have at our command. Last spring, the Pew Foundation reported that many of the top website destinations are traditional brands such as *USA Today*, the *New York Times*, and the *Washington Post*, thereby demonstrating, according to the Pew Foundation, that people still want what newspaper companies produce—good, credible reporting.

So, given all this, what about newspapers?

First, it's important to consider what makes a newspaper? Is it the "paper" or the "news"? If we can all agree that the news is the important part, then the paper is just the delivery mechanism, the way that you get the news.

Eduardo Hauser, a former media lawyer and entrepreneur who started *daily.me.com*, an online news aggregator, said at a recent Online News Association meeting that "journalism and newspapers are two different things and content creation can no longer be tied to a single platform . . . good journalism will survive and, in fact, the web will foster a golden age for journalism."

William Powers, the *National Review's* media critic and a 2006 Shorenstein Fellow, published a Harvard white paper with the catchy title "Hamlet's Blackberry: Why Paper Is Eternal," in which he reminds us that newspaper journalists produce the vast majority of the journalism that really matters—the groundbreaking work that illuminates the dark places in society and keeps governments honest. TV and radio follow the lead of newspapers. Most of the substantial reportage on Yahoo, Google, and similar sites is derived from newspaper fare. In a speech last year, John Carroll, former editor of the *Los Angeles Times*, estimated that no less than 80 percent of America's news originates in newspapers.

Dean Singleton, CEO of the Media-News Group, said earlier this year at an Aspen Institute forum on the media: "Don't feel sorry for the newspaper business. It's not a dying business; it's a changing one."

A New Business Model?

We can't change the world around us, so we have to change ourselves. And we have been doing just that. Most of us are building new business models that are indeed transformative. In short, we have replaced our single print product with a full, rich media mix.

But the current recession is and will continue to take its toll: *The Seattle Post-Intelligencer* published its last print edition on March 17, 2009. The Scripps-owned *Rocky Mountain News* published its last issue on February 27, 2009, and Gannett-owned *Tucson Citizen* will close soon if buyers are not found. The Tribune Company, owner of the *Chicago Tribune*, the *Los Angeles Times*, and the *Baltimore Sun*, has declared bankruptcy as has the *Philadelphia Inquirer*. The *New York Times* is trying to sell most of its brand new building and has sold a \$300 million financial interest in the company to a Mexican billionaire. And I believe more newspapers, including metros, will close this year. Thousands of newspaper workers are being laid off across the country. The newspapers that survive this recession will continue to grow multiple delivery platforms and right-size cost structures that reflect the new realities, both media and economic. The business model will include:

- Core newspapers in some form and perhaps with a different frequency of distribution.
- Internet operations, including iPods, cell phones, twitter messages, streaming video . . . you name it.
- Niche print and online products and publications. When I retired last spring, Gannett had almost 1,000 print publications operating in our markets, targeted toward very specific audiences—by geography, by age, by interest. We were developing niche websites appealing to moms, kids, sports, and music, among others, and all geared toward local markets.

We are embracing the Internet for what it offers rather than simply as a new delivery mechanism for old content. The new digital platforms have become our friends, not our enemies, giving us the power to broaden our reach every minute of the day. *New York Times* publisher Arthur Sulzburger expects the

paper to stop printing in his lifetime. "I do not care when we print our last newsprint edition," he told USC's *Online Journalism Review*. "We will remain the major source of news and information in this country and perhaps the world."

The questions are these: Will advertising revenue move to the Internet? Can it support the newsgathering operation? Will both print and online subscribers be willing to pay for content of particular interest to them on the platform they desire? Can companies survive the recession to implement new business models successfully?

Muddying this dilemma is the fact that Internet advertising is in its infancy and not just for newspapers. Very few people have found profitability yet in the Internet. As of last summer, even Politico, the website that burst into prominence during the 2008 campaign, started a weekly print product, which is responsible for much of its revenue. And, as reported in company earnings during the fourth quarter of 2008, advertising has dropped for online companies as well. So the Web may not be the Holy Grail after all.

For those that survive the current fiscal crisis, I believe that we will find the right revenue-producing model for Internet. Print will survive in some form, also with a new business model of support. "Newspapers of the future will be very different, better and more profitable than ever," predicts a World Association of Newspapers report on newspapers in 2020, but only "if they embrace change and innovation without losing the core and soul of the business of journalism."

What Will Newspapers Look Like?

Different. Newspapers are very expensive to write, print, and distribute seven days a week. A former Merrill Lynch newspaper analyst, Lauren Rich Fine, summed up what many believe. Newspapers need to get out of the print and distribution costs. If newspapers can find new business models that cut print and distribution costs while preserving the best of print on some days, they can theoretically offset the lower ad revenue from the online venue. Nearly a dozen or so newspapers have announced plans to scale back seven-day products to three, four, or five days a week.

Newspapers are getting smaller. Paper width size itself is shrinking. Remember when you had to hold your

arms out wide to read an open *Wall Street Journal*? And the number of pages is already far less than what it was, primarily as a factor of advertising. Fewer ads mean fewer news pages.

Unprofitable papers with strong brands will fold their print products and put their remaining resources, primarily the journalists, to work on the Web. The *Christian Science Monitor* has already announced such a plan. And newspapers aren't alone . . . magazines are struggling as well. Half a dozen, including *Domino*, a popular home design magazine, have closed. The Hearst Corp. shuttered *Cosmopolitan* after the December issue, but will keep and expand its website.

What will newspapers look like? . . . Different.

Distribution will change. Fewer papers will be sent to home delivery customers, who will be selected by sophisticated demographic selection, geographic targeting, or both. That experiment is already underway in Detroit where newspapers are delivered only a few days a week, leaving subscribers with the option of buying single copies or relying on the Web.

Newspaper prices will increase. By and large, baby boomers will be able to afford price hikes so pricing alone will shrink circulation to more affordable cost structures. Consider this. High speed Internet costs \$50 a month. Cable TV runs at least \$50 a month. It costs \$4 a week or \$16 a month to have someone drop a newspaper on your doorstep, if you pay full price. It costs the newspaper more than \$4 a week to get it there. A full week of a home delivered paper costs about the same as a Starbucks vente latte.

Print products will change and shrink. Distribution will change and shrink. Most important, costs will shrink, hopefully to a level that can sustain credible journalists for reportage—on the Web. Politico is an example of one business model. Former *Vanity Fair* and *New Yorker* editor Tina Brown last fall launched a news aggregation site called the dailybeast.com, which mixes news and opinion.

According to Brown, “magazines can only survive if they try to look ahead, do investigative reporting that anticipates news.” She points to the financial crisis as one situation that good reporting could have robustly anticipated and explained. Ariana Huffington made \$10 million with her news and information site last year, HuffingtonPost.com. Some companies are seeking philanthropic grants. Laid-off reporters are forming investigative teams and seeking alternative funding sources, or finding news niches to fill. One such example is the recently launched GlobalPost.com, which hires foreign correspondents to cover cities overseas where newspapers have closed bureaus.

New Models, New Risks?

But as we experiment with new modes of reporting and new models for journalism, new standards are appearing and that also brings legal risks.

Last fall, the SEC was reported to be “investigating the origin of a false report from a citizen journalist website, that Apple’s chief executive, Steven P. Jobs . . . had a heart attack and was hospitalized.” That anonymous statement “proved to be enough to send Apple’s stock plummeting. The company’s shares fell by more than 10 percent shortly after the report’s publication.” The shares did not rebound “until Apple representatives came forward to adamantly deny the claims . . . and the report was removed.” The AP pointed out that the website’s

“‘citizen journalists’ are not required to give their real name when registering.” And remember last fall when the *Orlando Sentinel* posted an outdated online story that carried no timeline date, causing United Airlines stock to plummet.

These examples reinforce the importance of credible journalism, and I believe provide a huge competitive advantage for newspaper company journalists. Yes, we’ll distribute the news and information differently, but one thing will not change: a free, open, and honest press that is a very cornerstone of a free society.

A few months ago, I heard a story on National Public Radio about an effort in Cambodia by American journalists to help a free press grow and prosper. One of the Cambodian journalists they were training said simply: “Journalism is to a free society what the sun is to the earth.”

The work we do—you and I—must continue. Who else will credibly shine light in dark corners? Who will fund and fight the First Amendment battles if not us?

The *Washington Post*’s Anne Hull commented last spring after the paper won a Pulitzer for the Walter Reed hospital stories: “As a journalist you go about your daily work life trying to get a story out or make someone’s life better or shine light on wrongdoing. . . . The Walter Reed stuff landed with a ferocious wallop. Washington—Congress, the Pentagon, the White House—all reacted in dramatic fashion. It was a

reminder to everyone in the *Post* newsroom that journalism is still this mighty tool for good.”

Reason enough for all of us to want, in fact, to demand the survival of credible newsgathering and reporting. Perhaps that will be in a different form. Perhaps not as a daily newspaper. But the substance and credibility and civility of what newspaper journalism has stood for are a treasure this country cannot do without.

It is my hope and belief that when we come out of this period of transition we will have transformed ourselves into something even better. After all, it was only nine years ago when the survey of Americans listed newspapers as the No. 2 product they wanted to stick around for the twenty-first century and beyond. Perhaps newspapers just didn’t change enough or fast enough in these past nine years.

But the makers of Oreos saw the need to change to keep up with consumer demands. We don’t just have one Oreo anymore. We have dozens. Oreo Wafer Sticks, Golden Oreos, Double Stuf Oreos, 100 calorie pack Oreos, and, yes, Mini Oreos, to list a few. We live in a world of niches. If there is an Oreo for every taste, maybe there needs to be a newspaper or trusted newspaper website for every type of news consumer. Our purpose and resolve are to do so. Our founding principles as a cornerstone of democracy demand nothing less. ☐

The New York TimesPRINTER-FRIENDLY FORMAT
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May 10, 2009

OP-ED COLUMNIST

The American Press on Suicide Watch

By FRANK RICH

IF you wanted to pick the moment when the American news business went on suicide watch, it was almost exactly three years ago. That's when Stephen Colbert, appearing at the annual White House Correspondents' Association dinner, delivered a monologue accusing his hosts of being stenographers who had, in essence, let the Bush White House get away with murder (or at least the war in Iraq). To prove the point, the partying journalists in the Washington Hilton ballroom could be seen (courtesy of C-Span) fawning over government potentates — in some cases the very “sources” who had fed all those fictional sightings of Saddam Hussein's W.M.D.

Colbert's routine did not kill. The Washington Post reported that it “fell flat.” The Times initially did not even mention it. But to the Beltway's bafflement, Colbert's riff went viral overnight, ultimately to have a marathon run as the most popular video on iTunes. The cultural disconnect between the journalism establishment and the public it aspires to serve could not have been more vividly dramatized.

The bad news about the news business has accelerated ever since. Newspaper circulations and revenues are in free fall. Legendary brands from The Los Angeles Times to The Philadelphia Inquirer are teetering. The New York Times Company threatened to close The Boston Globe if its employees didn't make substantial sacrifices in salaries and benefits. Other papers have died. The reporting ranks on network and local news alike are shriveling. You know it's bad when the Senate is moved, as it was last week, to weigh in with hearings on “The Future of Journalism.”

Not all is bleak on the Titanic, however. The White House correspondents' bacchanal was on tap for this weekend. And this time no one could accuse the revelers of failing to get down with the Colbert-iTunes-Facebook young folk: hip big-time journalists now stroke their fans with 140-character messages on Twitter. Or did. No sooner did boldface Washington media personalities ostentatiously embrace Twitter than Nielsen reported that more than 60 percent of Twitter users abandon it after a single month.

The causes of journalism's downfall — some self-inflicted, some beyond anyone's control (a worldwide economic meltdown) — are well known. To time-travel back to the dawn of the technological strand of the disaster, search YouTube for "[1981 primitive Internet report on KRON](#)." What you'll find is a 28-year-old local television news piece from San Francisco about a "far-fetched," pre-Web experiment by the city's two papers, The Chronicle and The Examiner, to distribute their wares to readers with home computers via primitive phone modems. Though there were at most 3,000 people in the Bay Area with PCs then, some 500 mailed in coupons for the service to The Chronicle alone. But, as the anchorwoman assures us at the end, with a two-hour download time (at \$5 an hour), "the new telepaper won't be much competition for the 20-cent street edition."

The rest is irreversible history. This far-fetched newspaper experiment soon faded, even in San Francisco, the gateway to Silicon Valley. Today The Examiner, once the [flagship of William Randolph Hearst's grand journalistic empire](#), exists in name only, as a [flimsy giveaway](#). The Chronicle is under [threat of closure](#).

But this self-destructive retreat from innovation is hardly novel in the history of American communications. In the last transformative tech revolution before the Internet — television's emergence in the late 1940s — the pattern was remarkably similar. The entertainment industry referred to TV as "the monster," and by 1951, the editor of the industry's trade paper, Variety, was fearful that the monster would "eventually swallow up practically all of show business." Movies had killed vaudeville a generation earlier. This new household appliance threatened to strangle radio, movies, the Broadway theater, nightclubs and the circus. And newspapers too: "NBC's New 'Today' Attacked by Papers as Competition" screamed a front-page Variety headline in 1952.

The vulnerable establishments in all these fields went nuts. Most movie studios pushed back against the future by refusing to sell their old movies to television or allow their stars to appear on it. Few seized the opportunity to produce programs for the new medium. Instead, some moguls tried to compete by exhibiting sports events by closed-circuit in networks of movie houses. In 1952-53, Cinerama, 3-D and Cinemascope were all heavily promoted to try to retain movie audiences. None of these desperate rear-guard actions could slow the video revolution. Movie newsreels, movie palaces, radio comedy and drama, and afternoon newspapers, among other staples of the American cultural diet, were all doomed.

And yet in 2009, Hollywood movie studios, radio and the Broadway theater, though smaller and much changed, are not dead. They learned to adapt and to collaborate with the monster.

In the Internet era, many sectors of American media have been re-enacting their at first

complacent and finally panicked behavior of 60 years ago. Few in the entertainment business saw the digital cancer spreading through their old business models until well after file-sharing, via Napster, had started decimating the music industry. It's not only journalism that is now struggling to plot a path to survival. But, with all due respect to show business, it's only journalism that's essential to a functioning democracy. And it's not just because — as we keep being tediously reminded — Thomas Jefferson said so.

Yes, journalists have made tons of mistakes and always will. But without their enterprise, to take a few representative recent examples, we would not have known about the wretched conditions for our veterans at Walter Reed, the government's warrantless wiretapping, the scams at Enron or steroids in baseball.

Such news gathering is not to be confused with opinion writing or bloviating — including that practiced here. Opinions can be stimulating and, for the audiences at Fox News and MSNBC, cathartic. We can spend hours surfing the posts of bloggers we like or despise, some of them gems, even as we might be moved to write our own blogs about local restaurants or the government documents we obsessively study online.

But opinions, however insightful or provocative and whether expressed online or in print or in prime time, are cheap. Reporting the news can be expensive. Some of it — monitoring the local school board, say — can and is being done by voluntary “citizen journalists” with time on their hands, integrity and a Web site. But we can't have serious opinions about America's role in combating the Taliban in Pakistan unless brave and knowledgeable correspondents (with security to protect them) tell us in real time what is actually going on there. We can't know what is happening behind closed doors at corrupt, hard-to-penetrate institutions in Washington or Wall Street unless teams of reporters armed with the appropriate technical expertise and assiduously developed contacts are digging night and day. Those reporters have to eat and pay rent, whether they work for print, a TV network, a Web operation or some new bottom-up news organism we can't yet imagine.

It's immaterial whether we find the fruits of their labors on paper, a laptop screen, a BlackBerry, a Kindle or podcast. But someone — and certainly not the government, with all its conflicted interests — must pay for this content and make every effort to police its fairness and accuracy. If we lose the last major news-gathering operations still standing, there will be no news on Google News unless Google shells out to replace them. It won't.

One of the freshest commentators on Internet culture, Clay Shirky, has written, correctly, that nobody really knows what form journalism will take in the evolving post-newspaper era. Looking back to the unpredictable social and cultural upheavals brought about by

Gutenberg's invention of movable type, he writes, "We're collectively living through 1500, when it's easier to see what's broken than what will replace it." So who will do the heavy journalistic lifting? "Whatever works." Every experiment must be tried, professional and amateur, whether by institutions like The Times or "some 19-year-old kid few of us have heard of."

What can't be reinvented is the wheel of commerce. Just because information wants to be free on the Internet doesn't mean it can always be free. Web advertising will never be profitable enough to support ambitious news gathering. If a public that thinks nothing of spending money on texting or pornography doesn't foot the bill for such reportage, it won't happen.

That's why the debate among journalists about possible forms of payment (subscriptions, NPR-style donations, iTunes-style micropayments, foundation grants) is inside baseball. So is the acrimonious sniping between old media and new. The real question is for the public, not journalists: Does it want to pony up for news, whatever the media that prevail?

It's all a matter of priorities. Not long ago, we laughed at the idea of pay TV. Free television was considered an inalienable American right (as long as it was paid for by advertisers). Then cable and satellite became the national standard.

By all means let's mock the old mainstream media as they preen and party on in a Washington ballroom. Let's deplore the tabloid journalism that, like the cockroach, will always be with us. But if a comprehensive array of real news is to be part of the picture as well, the time will soon arrive for us to put up or shut up. Whatever shape journalism ultimately takes in America, make no mistake that in the end we will get what we pay for.

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THE
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APRIL 14, 2009



Arianna Huffington

Posted April 10, 2009 | 06:43 PM (EST)

This is the print preview: [Back to normal view »](#)

The Debate Over Online News: It's the Consumer, Stupid



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The discussion about the aggregation and distribution of content on the web heated up this week when the Associated Press announced plans to "launch an industry initiative" designed "to protect news content" online.

The announcement -- characterized by the *New York Times*' Saul Hansell as a "war on search engines and aggregators" -- drew considerable fire, including blasts from Google, BusinessWeek, the Online Journalism Review, TechCrunch, and this classic broadside from Danny Sullivan at Search Engine Land.

The conversation continued last night when Charlie Rose invited me to discuss the issue with Tom Curley, AP's president and CEO. The video of the segment is below.

As you'll see, for me the key question is whether those of us working in the media (old and new) embrace and adapt to the radical changes brought about by the Internet or pretend that we can somehow hop into a journalistic Way Back Machine and return to a past that no longer exists and can't be resurrected.

As my compatriot Heraclites put it nearly 2,500 years ago: "You cannot step into the same river twice."

Towards the end of the segment, Charlie summed up what I was saying: "We have seen the future and it is here. It is a linked economy. It is search engines. It is online advertising. That's where the future is. And if you can't find your way to that, then you can't find your way." Precisely.

The great upheaval the news industry is going through is the result of a perfect storm of transformative technology, the advent of Craigslist, generational shifts in the way people find and consume news, and the dire impact the economic crisis has had on advertising. And there is no question that, as the industry moves forward and we figure out the new rules of the road, there will be -- and needs to be -- a great deal of experimentation with new revenue models.

But what won't work -- what can't work -- is to act like the last 15 years never happened, that we are still operating in the old content economy as opposed to the new link economy, and that the survival of the industry will be found by "protecting" content behind walled gardens.

We've seen that movie (and its many sequels, including TimesSelect). News consumers didn't like them, and they closed in a hurry.

And the answer can't be content creators huffing and puffing and trying to blow down Google and other news aggregators. That one falls under Be Careful What You Wish For. As Jeff Jarvis points out, doing that is a one-way ticket to oblivion -- and a 50 percent drop in traffic.

HuffPost has a good working relationship with AP -- we pay a monthly fee to license AP stories and photos. But I was really surprised to hear Tom Curley describe what he called "the Internet experience" as "a bomb. Unlimited competition, unlimited inventory, a bad customer experience."

A bomb? Really? Tell that to the consumer. And since when does "unlimited competition" and "unlimited inventory" (i.e., lots of options and choices and freedom) add up to "a bad customer experience"?

Indeed, it's just the opposite.

Can anyone seriously argue that this isn't a magnificent time for news consumers who can surf the net, use search engines, and go to news aggregators to access the best stories from countless sources around the world -- stories that are up-to-the-minute, not rolled out once a day? (That's one of the things we try to do at HuffPost: guide our readers to the most interesting and timely news and opinion from places they know and from places that we introduce them to, as well as offering them original reporting, 200 original blog posts a day, citizen journalism, and our new investigative fund). Online news also allows users to immediately comment on stories, as well as interact and form communities with other commenters.

Consumer habits have changed dramatically. People have gotten used to getting the news they want, when they want it, how they want it, and where they want it. And this change is here to stay.

In many ways, the news industry has appropriately adapted to these changes.

Take online video. Not that long ago, content providers were committed to the idea of requiring viewers to come to their site to view their content -- and railed against anyone who dared show even a short clip.

But content hoarding -- the walled garden -- didn't work. And instead of sticking their finger in the dike, trying to hold back the flow of innovation, smart companies began providing embeddable players that allowed their best stuff to be posted all over the web, accompanied by links and ads that helped generate additional traffic and revenue.

When I hear the heads of media companies talking about "restricting" content (as Curley did) or describing news aggregators as "parasites or tech tapeworms in the intestines of the Internet" (as the editor of the *Wall Street Journal* recently did), I can't help feeling the same way I did in 2001, when I was one of the cofounders of The Detroit Project, and watched as the heads of the auto industry decided that instead of embracing the future they would rather spend considerable energy and money lobbying the government for tax loopholes for gas-guzzling behemoths, fighting back fuel efficiency standards, and trying to convince consumers through billions in advertising that SUVs were the cars that would lead America into the 21st century.

Instead of trying to hold back the future, I suggest that media execs read *The Innovator's Dilemma* by Clayton Christensen (since I keep mentioning the book and giving copies to friends, I'm thrilled that Christensen is now blogging for HuffPost), and see what he has to say about "disruptive innovation" and how, instead of resisting it, you can seize the opportunities it provides.

Or go to any college, as I often do, and ask a group of students how many of them, during the campaign, saw Tina Fey doing Sarah Palin. It's usually 100 percent. Then ask how many saw it on *Saturday Night Live*. It's usually no more than one or two. Yes, *SNL* could have said tune in to NBC Saturday Night at 11:30 or don't see it at all. But Lorne Michaels and Jeff Zucker obviously don't want to go the way of Rick Wagoner and his Detroit buddies.

Delivering the keynote address at the Newspaper Association of America's annual conference on Tuesday, Google CEO Eric Schmidt cut right to the chase, telling the assembled newspaper men and women: "Try to figure out what your consumer wants. If you piss off enough of them, you will not have any of them."

After we posted the Charlie Rose segment, HuffPost commenter osage weighed in: "EVOLVE OR PERISH. If AP refuses to adapt to the demands of the internet marketplace, it will disappear just as surely as 5 1/4" floppy disks and public pay telephones have disappeared. Resistance is futile."

I'd love to hear your take. Fire away in the comments section.

Please join me on Twitter and Facebook.

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True/Slant: Angling for News Sponsors

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By Howard Kurtz
Washington Post Staff Writer
Monday, June 8, 2009

Hours after an Air France jet disappeared over the Atlantic last Monday, Miles O'Brien, dismissing "the often inaccurate reporting on aviation that is so prevalent in the mainstream media," offered some informed analysis.

"It was a dark and stormy night -- in a place that is home to the world's worst thunderstorms," he said. O'Brien noted that the Airbus A330 had a good record and "the crew had 'Sully-esque' seasoning."

But O'Brien wasn't reporting for CNN, which dumped him in December. He was posting on True/Slant, a Web site that is mapping a new relationship between journalists, readers and advertisers. In fact, O'Brien has already contacted such aerospace companies as Boeing and Lockheed Martin to sponsor his work at another site, and plans to do so for True/Slant.

If he had done that at CNN, says O'Brien, "I'd be fired, are you kidding?"

Lewis Dvorkin, founder of the site, which officially launches today after a trial run, makes no apologies for throwing out the old model. "It's tailored for the entrepreneurial journalist," he says. "We're enabling and empowering journalists to develop their own brand."

Dvorkin is a media veteran who has worked for the New York Times, Newsweek, Wall Street Journal, Forbes, AOL and TMZ.com. He is backed by \$3 million in funding from Forbes Media and Fuse Capital. True/Slant has 100 contributors, and unlike, say, the Huffington Post, where most writers blog for free, everyone is compensated in some form. "While it's not a lot of money, it's at least validating the worth of the journalism," says Diane Dimond, a veteran television correspondent who is one of the site's most prolific bloggers.

"I'm a believer," says O'Brien, whose Air France coverage drew 15,000 hits last week. "I haven't made any money off it yet, but I think there's something there." Still, he says, "you could easily get very cozy with your sources. You've got to watch that if you're calling people up asking for money. It is uncharted territory for the likes of me."

While some contributors receive a stipend, others have an equity stake or a share in advertising revenue that they solicit. Dvorkin says such contacts with advertisers would be disclosed and that True/Slant editors would step in if a writer tried to post inappropriate material about an advertiser. "I come from the land of traditional media standards," he says.

In another departure from the usual practice, companies will be offered their own pages on the Web site, but these would be clearly labeled as advertorials.

The online buzz phrase these days is "building community," as news organizations try to replicate the social success of Facebook. True/Slant contributors blog, put up video and "follow" each other, while readers can follow them and post comments of their own. At one point last week Dimond, who specializes in crime and justice issues, had 13 posts in five days.

"I have my little core group of followers who post comments," she says of her 118 fans. "It's not like the millions of people who watch you on TV, but it's certainly more personal. This is like an everyday conversation with a community that's interested in what I'm interested in. That's kind of cool."

Some contributors allow more personal glimpses of their lives than in other media venues.

"Suddenly I'm willing to reveal a little more," says ABC's Claire Shipman. "Blogging seems to be more personal. You find yourself saying, 'Should I really be saying that?', and then you click 'publish.'" The mother of two says on the site that her biggest regret is "not starting the breeding process earlier. I think I'd have a few more." She recalls the time that "I locked my son in our car when he was 2 outside of a Chinese food restaurant and could not get him out for an hour and had to make funny faces and noises all the while wanting to scream and cry."

Shipman, who is married to Jay Carney, now an aide to Vice President Biden, also reveals: "I told my current husband I'd be happy to use the wedding ring from my first marriage. I'm not sentimental. He said no."

Shipman and BBC's Katty Kay launched their page to promote their new book, "Womonomics." "We are looking to start a conversation," Shipman says, "and in this new Internet world, you really have to branch out and put your tentacles in a million different places. What True/Slant offers is a different audience than the 'Good Morning America' audience."

Despite its name, True/Slant has no obvious slant, with contributors from the left and right. They range from Rolling Stone's Matt Taibbi to Reason editor in chief Matt Welch to former New York Times business writer Claudia Deutsch, who confesses to "an all-consuming hatred for banks that is, I know, irrational." (Try saying that in the Times!) Denise Restauri writes "Tween Girl Confidential" and, her

profile notes, is married to Dvorkin.

The result is an eclectic, sometimes scattershot mix that explores culture as much as politics. Some recent headlines: "Dear Roland Burris: Stop Embarrassing Black People." "What Obama Should and Shouldn't Say to the Muslim World." "Is Single Motherhood (By Choice) Selfish?" "What's the Dopest Gimmick in Rock?" With virtually no promotion, True/Slant drew more than 250,000 unique visitors last month, according to Google Analytics. It is tiny -- run by six people from an office in Manhattan's SoHo district -- and could turn out to be a flash in the digital pan.

With newspapers and magazines laying off and shutting down, journalists are increasingly turning to the Web to promote themselves and their niche. Rather than toil for a single corporation, some are doing a little of everything: blogging, book-writing, TV-guesting and Twittering. That means sites such as True/Slant will spread like viruses, mutating into different forms.

For traditional journalists, the unaccustomed freedom is both liberating and daunting.

"Nobody assigns me stories," O'Brien says. "I post stuff and nobody edits me. If you say something wrong, you will hear about it in 10 seconds flat."

L.A. Romance

Mirthala Salinas, an anchor for the Telemundo station in Los Angeles, lost her job last year after having an affair with Mayor Antonio Villaraigosa. Salinas, who was first suspended, had occasionally covered the mayor, whose marriage broke up while they were an item.

Now Villaraigosa is at it again, dating Lu Parker, an anchor and reporter for KTLA-TV. A former Miss USA, Parker has a [Web site](#) that featured a bikini shot (until it was replaced last week by one of her in a dress) and election night video of her interviewing the mayor, who pronounced himself "spellbound" and "mesmerized" -- about Barack Obama's victory. Days before rival KNBC-TV broke the news about the relationship, Parker had read a story on the air about Villaraigosa weighing a run for governor.

KTLA News Director Jason Ball told the Los Angeles Times that "there is no issue" because Parker "doesn't cover politics generally." Really? A mayor is a city's top newsmaker, and Parker, it turns out, hadn't told her bosses about the relationship until it hit the headlines.

Truthiness Edition

It's no accident that the scowling visage of Stephen Colbert, with "Iraq" seemingly carved into his hair, stares out from the cover of Newsweek's new issue. Editor Jon Meacham thought it would be a grand (and buzzworthy) idea to tap the Comedy Central funnyman as a guest editor as Colbert -- to his credit -- was heading to Baghdad for a week of shows to focus attention on American troops there. "Some readers and critics will inevitably object, saying this is a publicity stunt," Meacham concedes in an editor's note. "To them I solemnly say: You are half-right." Sounds like a half-confession for the act of hiring a fake pundit.

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Thursday, Feb. 05, 2009

How to Save Your Newspaper

By Walter Isaacson

This story has been modified from its original version

During the past few months, the crisis in journalism has reached meltdown proportions. It is now possible to contemplate a time when some major cities will no longer have a newspaper and when magazines and network-news operations will employ no more than a handful of reporters.

There is, however, a striking and somewhat odd fact about this crisis. Newspapers have more readers than ever. Their content, as well as that of newsmagazines and other producers of traditional journalism, is more popular than ever — even (in fact, especially) among young people.

The problem is that fewer of these consumers are paying. Instead, news organizations are merrily giving away their news. According to a Pew Research Center study, a tipping point occurred last year more people in the U.S. got their news online for free than paid for it by buying newspapers and magazines. Who can blame them? Even an old print junkie like me has quit subscribing to the *New York Times*, because if it doesn't see fit to charge for its content, I'd feel like a fool paying for it.

This is not a business model that makes sense. Perhaps it appeared to when Web advertising was booming and every half-sentient publisher could pretend to be among the clan who "got it" by chanting the mantra that the ad-supported Web was "the future." But when Web advertising declined in the fourth quarter of 2008, free felt like the future of journalism only in the sense that a steep cliff is the future for a herd of lemmings. ([See who got the world into this financial mess.](#))

Newspapers and magazines traditionally have had three revenue sources: newsstand sales, subscriptions and advertising. The new business model relies only on the last of these. That makes for a wobbly stool even when the one leg is strong. When it weakens — as countless publishers have seen happen as a result of the recession — the stool can't possibly stand.

See pictures of the recession of 1958.

See TIME's Pictures of the Week.

Henry Luce, a co-founder of TIME, disdained the notion of giveaway publications that relied solely on ad revenue. He called that formula "morally abhorrent" and also "economically self-defeating." That was because he believed that good journalism required that a publication's primary duty be to its readers, not to its advertisers. In an advertising-only revenue model, the incentive is perverse. It is also self-defeating, because eventually you will weaken your bond with your readers if you do not feel directly dependent on them for your revenue. When a man knows he is to be hanged in a fortnight, Dr. Johnson said, it concentrates his mind wonderfully. Journalism's fortnight is upon us, and I suspect that 2009 will be remembered as the year news organizations realized that further rounds of cost-cutting would not stave off the hangman. (See the top 10 magazine covers of 2008.)

One option for survival being tried by some publications, such as the *Christian Science Monitor* and the *Detroit Free Press*, is to eliminate or drastically cut their print editions and focus on their free websites. Others may try to ride out the long winter, hope that their competitors die and pray that they will grab a large enough share of advertising to make a profitable go of it as free sites. That's fine. We need a variety of competing strategies.

These approaches, however, still make a publication completely beholden to its advertisers. So I am hoping that this year will see the dawn of a bold, old idea that will provide yet another option that some news organizations might choose: getting paid by users for the services they provide and the journalism they produce.

This notion of charging for content is an old idea not simply because newspapers and magazines have been doing it for more than four centuries. It's also something they used to do at the dawn of the online era, in the early 1990s. Back then there were a passel of online service companies, such as Prodigy, CompuServe, Delphi and AOL. They used to charge users for the minutes people spent

online, and it was naturally in their interest to keep the users online for as long as possible. As a result, good content was valued. When I was in charge of TIME's nascent online-media department back then, every year or so we would play off AOL and CompuServe; one year the bidding for our magazine and bulletin boards reached \$1 million.

[See TIME's Pictures of the Week.](#)

[See pictures of TIME's Wall Street covers.](#)

Then along came tools that made it easier for publications and users to venture onto the open Internet rather than remain in the walled gardens created by the online services. I remember talking to Louis Rossetto, then the editor of *Wired*, about ways to put our magazines directly online, and we decided that the best strategy was to use the hypertext markup language and transfer protocols that defined the World Wide Web. *Wired* and TIME made the plunge the same week in 1994, and within year most other publications had done so as well. We invented things like banner ads that brought in a rising tide of revenue, but the upshot was that we abandoned getting paid for content. ([See the 50 best websites of 2008.](#))

One of history's ironies is that hypertext — an embedded Web link that refers you to another page or site — had been invented by Ted Nelson in the early 1960s with the goal of enabling micropayments for content. He wanted to make sure that the people who created good stuff got rewarded for it. In his vision, all links on a page would facilitate the accrual of small, automatic payments for whatever content was accessed. Instead, the Web got caught up in the ethos that information wants to be free. Others smarter than we were had avoided that trap. For example, when Bill Gates noticed in 1976 that hobbyists were freely sharing Altair BASIC, a code he and his colleagues had written, he sent an open letter to members of the Homebrew Computer Club telling them to stop. "One thing you do is prevent good software from being written," he railed. "Who can afford to do professional work for nothing?"

The easy Internet ad dollars of the late 1990s enticed newspapers and magazines to put all of their content, plus a whole lot of blogs and whistles, onto their websites for free. But the bulk of the ad dollars has ended up flowing to groups that did not actually create much content but instead piggybacked on it: search engines, portals and some aggregators.

Another group that benefits from free journalism is Internet service providers. They get to charge customers \$20 to \$30 a month for access to the Web's trove of free content and services. As a result, it is not in their interest to facilitate easy ways for media creators to charge for their content. Thus we have a world in which phone companies have accustomed kids to paying up to 20 cents when they send a text message but it seems technologically and psychologically impossible to get people to pay 10 cents for a magazine, newspaper or newscast.

Currently a few newspapers, most notably the *Wall Street Journal*, charge for their online editions by requiring a monthly subscription. When Rupert Murdoch acquired the *Journal*, he ruminated publicly about dropping the fee. But Murdoch is, above all, a smart businessman. He took a look at the economics and decided it was lunacy to forgo the revenue — and that was even before the online ad market began contracting. Now his move looks really smart. Paid subscriptions for the *Journal's* website were up more than 7% in a very gloomy 2008. Plus, he spooked the *New York Times* into dropping its own halfhearted attempts to get subscription revenue, which were based on the (I think flawed) premise that it should charge for the paper's punditry rather than for its great reporting. (*Author's note: After publication the New York Times vehemently denied that their thinking was influenced by outside considerations; I accept their explanation.*)

[See the worst business deals of 2008.](#)

[See TIME's Pictures of the Week.](#)

But I don't think that subscriptions will solve everything — nor should they be the only way to charge for content. A person who wants one day's edition of a newspaper or is enticed by a link to an interesting article is rarely going to go through the cost and hassle of signing up for a subscription under today's clunky payment systems. The key to attracting online revenue, I think, is to come up with an iTunes-easy method of micropayment. We need something like digital coins or an E-ZPass digital wallet — a one-click system with a really simple interface that will permit impulse purchases of a newspaper, magazine, article, blog or video for a penny, nickel, dime or whatever the creator chooses to charge. ([See the 50 best inventions of 2008.](#))

Admittedly, the Internet is littered with failed micropayment companies. If you remember Flooz, Beenz, CyberCash, Bitpass, Peppercoin and DigiCash, it's probably because you lost money investing in them. Many tracts and blog entries have been written about how the concept can't work because o

bad tech or mental transaction costs.

But things have changed. "With newspapers entering bankruptcy even as their audience grows, the threat is not just to the companies that own them, but also to the news itself," wrote the savvy New York *Times* columnist David Carr last month in a column endorsing the idea of paid content. This creates a necessity that ought to be the mother of invention. In addition, our two most creative digital innovators have shown that a pay-per-drink model can work when it's made easy enough: Steve Jobs got music consumers (of all people) comfortable with the concept of paying 99 cents for a tune instead of Napsterizing an entire industry, and Jeff Bezos with his Kindle showed that consumers would buy electronic versions of books, magazines and newspapers if purchases could be done simply. (See [Apple's 10 best business moves](#).)

What Internet payment options are there today? PayPal is the most famous, but it has transaction costs too high for impulse buys of less than a dollar. The denizens of Facebook are embracing system like Spare Change, which allows them to charge their PayPal accounts or credit cards to get digital currency they can spend in small amounts. Similar services include Bee-Tokens and Tipjoy. Twitter users have Twitpay, which is a micropayment service for the micromessaging set. Gamers have their own digital currencies that can be used for impulse buys during online role-playing games. And real-world commuters are used to gizmos like E-ZPass, which deducts automatically from their prepaid account as they glide through a highway tollbooth.

Under a micropayment system, a newspaper might decide to charge a nickel for an article or a dime for that day's full edition or \$2 for a month's worth of Web access. Some surfers would balk, but I suspect most would merrily click through if it were cheap and easy enough.

The system could be used for all forms of media: magazines and blogs, games and apps, TV newscast and amateur videos, porn pictures and policy monographs, the reports of citizen journalists, recipes of great cooks and songs of garage bands. This would not only offer a lifeline to traditional media outlets but also nourish citizen journalists and bloggers. They have vastly enriched our realms of information and ideas, but most can't make much money at it. As a result, they tend to do it for the ego kick or as a civic contribution. A micropayment system would allow regular folks, the types who have to worry about feeding their families, to supplement their income by doing citizen journalism that is of value to their community.

When I used to go fishing in the bayous of Louisiana as a boy, my friend Thomas would sometimes steal ice from those machines outside gas stations. He had the theory that ice should be free. We didn't reflect much on who would make the ice if it were free, but fortunately we grew out of that phase. Likewise, those who believe that all content should be free should reflect on who will open bureaus in Baghdad or be able to fly off as freelancers to report in Rwanda under such a system.

I say this not because I am "evil," which is the description my daughter slings at those who want to charge for their Web content, music or apps. Instead, I say this because my daughter is very creative, and when she gets older, I want her to get paid for producing really neat stuff rather than come to me for money or decide that it makes more sense to be an investment banker.

I say this, too, because I love journalism. I think it is valuable and should be valued by its consumers. Charging for content forces discipline on journalists: they must produce things that people actually value. I suspect we will find that this necessity is actually liberating. The need to be valued by readers — serving them first and foremost rather than relying solely on advertising revenue — will allow the media once again to set their compass true to what journalism should always be about.

Isaacson, a former managing editor of TIME, is president and CEO of the Aspen Institute and author, most recently, of Einstein: His Life and Universe.

[See TIME's Pictures of the Week.](#)

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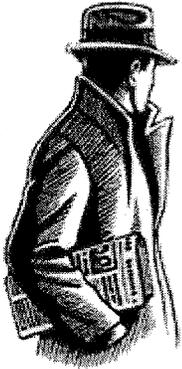
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Man Bites Blog: Hey, You Media Wimps! If You Want to Save Newspapers, Learn to Love Your iPhones, Then Go Join Facebook

By John Koblin, Matt Haber, Gillian Reagan and Doree Shafrir
February 24, 2009 | 8:16 p.m

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A democracy cannot function without a free press.

O.K., we know that, and you probably can't see another word about it. The point of what follows is practical.

We're in this unbelievable business morass, an indescribable battlefield. How do we get out of it?

Contributing to this catastrophe has been newspapers' stubborn refusal to consider any news-



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gathering and -analysis model other than the one that they were used to, one that, most crucially, relegated consumers to the role of passive readers instead of engaged users. It's a mistake that happens all over the Big Media Debate: misinterpreting the limitations of our print past as prescriptions for our media future.

The media of the 21st century is one that is blogged—not a negative thing, see later in the piece!—and merged with the users' own experiences and viewpoints synthesized with the original. If postmodernism came to literature in the '80s, it's got to come to journalism now.

The new engaged media should use professional journalism as the starting point for a more engaged consumer—but the professionalization of journalism that took place in the white-collar-college-kid 20th century should not get thrown out the window.

To see that axiom in action, just look at the case of Chauncey Bailey, the Oakland, Calif., reporter who was killed in 2007 for his reporting about the shady goings-on at Your Black Muslim Bakery.

As Tim Arango reported in *The New York Times*, a team of journalists—all of whom had been in some way downsized from their previous places of employment in traditional media outlets—working out of the nonprofit Center for Investigative Reporting at Berkeley advanced the story in a way that has led to the resignation of the city's chief of police and the uncovering of a much more vast conspiracy than even Mr. Bailey was thought to have uncovered.

Which, of course, raises the question of how this brave new journalistic world will be funded.

For too long, the focus has been on modifying the model that print media grew accustomed to: subscriptions plus newsstand sales plus advertising would, in the math of print media, equal profits. In **his *Time* cover story on the death of newspapers**, Walter Isaacson argued that online journalism had devalued its product by focusing too much on advertising; Mr. Isaacson wrote that this “makes for a wobbly stool even when the one leg is strong.”

>> **READ MATT HABER ON HOW IT ALL CAME TO THIS.**

>>**READ FELIX GILLETTE ON BROADCAST JOURNALISM'S "ONE-MAN BAND."**

His solution—charging users in micropayments for content—is not a new one, and merely attempts to impose an old solution on a new problem. But just look at ***Time's 25 Best Blogs of 2009***—a list that included such “blogs” as the Huffington Post, Talking Points Memo, and Mashable. Not only is it a list that could have been written almost anytime in the last five years, but it also continues this canard that media outlets that started online should be called “blogs”—a word that is now so broad as to be almost meaningless.

The most sane and possibly most workable proposal came from the Boston University professor Marshall W. Van Alstyne, **who gave a three-pronged plan to Freakonomics' Stephen Dubner a couple weeks ago:**

- (1) Media platforms should be bundled into technology platforms;
- (2) Premium access—one better than the failed TimesSelect project—will bring in revenue;
- (3) Publishers should work more on matching advertisers with users, which is a suggestion that might finally help break the growing, pernicious primacy of Google in raking in Internet ad dollars.

It's also a holistic point of view that does not raise the phony dichotomies publishers have been beating their heads against for more than a decade: paid content versus advertising; print versus digital; professional journalism versus “user-generated content”; blogging versus reporting.

The cover of *Time* promoting Mr. Isaacson's article was conceptually frustrating in several ways. It asked how to save print newspapers while never seeming to distinguish them from magazines, and it asked variously whether print can survive and whether journalism can survive.

“I think a lot of the conversation these days is myopic,” said Marcus Brauchli, the executive editor of *The Washington Post*. “The problem is how to monetize all content, which is not simply how to solve newspapers problems. Our problems are ultimately the same as the movie industry's, the book industry's, the magazine

industry's, the music industry's. We all meet on a vast, flat digital plane, which is a sort of Hobbesian, anarchic, unordered place.”

Solitary, nasty, brutish and short. That is unless the news media takes some control of this narrative.

NETWORKING

About two years after *The New York Times* and *The Washington Post* debuted their own independent Web sites (that wasn't until 1996!), two Stanford students, Sergey Brin and Larry Page, launched a search engine called Google. Their motto— first uttered by engineer in 2001 and reiterated in the company's IPO filing in 2004— would eventually become “Don't Be Evil.”

It would be a few years before Google graduated from being America's favorite search engine to arguably the single most powerful force in online journalism.

It began with the debut of **Google News**, launched in September 2002. The threat, that a news site bringing together content from across the web would break loyalties to hometown homepages, was obvious. Google News algorithms crawl the Web, aggregate headlines from more than 4,500 English-language news sources and then display several articles in clusters, based on topic and date. Articles are chosen based on how often and on what sites a story appears online. Google News claims that no human editors are handpicking stories or deciding which ones deserve top placement. “Traditionally, news readers first pick a publication and then look for headlines that interest them,” **according to Google News' “about” page**. “We do things a little differently, with the goal of offering our readers more personalized options and a wider variety of perspectives from which to choose.”

But it was a revolution in online advertising a year later, with the advent of **AdSense** in 2003, that a less public but more serious threat to the revenue models that were widely thought would soon support journalism online began to grow.

Advertisers and Web sites signed up for AdSense because it made advertising easy and cheap. Google's program matches text, picture and video ads to the particular

site's content and users. Publishers earned money from clicks or "impressions," or loads of an ad on the site. But Google essentially cut the revenue of newspapers by adding themselves in as middle men.

Robert Thomson, the managing editor of *The Wall Street Journal*, one of the few newspapers that charges successfully for its news site, recently described how Google eats away at everyone's profits **on *The Charlie Rose Show***. "I mean, the harsh way of just defining it, Google devalues everything it touches," he said. "Google is great for Google, but it's terrible for content providers, because it divides that content quantitatively rather than qualitatively. And if you are going to get people to pay for content, you have to encourage them to make qualitative decisions about that content."

The serving of these lower-cost remnant ads decelerated a process that journalism had come to depend upon, according to Jean-Philippe Maheu, chief digital officer at **Ogilvy**, the advertising firm.

"Right now if you look at newspaper and publishing houses, they do make money with digital advertising," he told *The Observer*. "The challenge is that revenue decline on the print side is moving faster than the growth of online revenue. That leaves a gap. A sizable gap. That's what you see for the major newspapers."

"Until the very end of last year we were growing dramatically in terms of our display advertising online," Denise Warren, general manager of NYTimes.com and senior vice president and chief advertising officer for the New York Times Media Group, told *The Observer*. "And our forecast—until the recession and its impact really became clear—was significant online advertising growth. What is difficult right now is to determine what the impact of the recession will be and how long that'll last versus were there true business prospects for Internet advertising."

Meanwhile the advertising dollars are going largely into higher-margin businesses that do not have to pay to maintain foreign bureaus, television studios, production departments or journalists' salaries.

"It's our judgment that we significantly outperformed the marketplace last year in terms of our revenue performance," Ms. Warren said. But it's a small marketplace for newspapers. "There's a pie of display advertising. Google, Yahoo do take 60

percent, 70 percent—I don't know what the numbers are—of the revenue off the table in terms of percentage of the pie that goes to search advertising; and there's a percentage for everyone else.”

“Everybody loves to hate Google and I think that's quite frankly an excuse,” Ms. Warren said. “You have to figure out how to generate revenue from your readers and/or from your advertisers. And you have to be focused to get that done. To blame Google? Or anyone else? To me, it's kind of a waste of energy. We don't do that.”

So perhaps instead of fighting Google for that 60 percent of the pie, news media ought to make themselves first on the next wave of advertising revenue possibilities. That means that The News must make itself a player in the larger online business.

They are already falling behind.

“There has been so much investment put into technology for online advertising, but I don't think we have the same investment to make the online branding better,” Mr. Maheu said. “The amount of investments right now are all focused on direct response; it's much, much more than the amount of investment for online branding. And that's for simple reasons. I think Google has shown the online medium is effective with direct response. That doesn't mean it won't be effective for branding. I think the industry as a whole, marketers, ad agencies, publishers, need to work together to improve what we can do with the Internet to create great brands or enhance the brands online.”

And branding is where newspapers, with their traditionally more attractive consumer demographic, might have a jump.

Yet at the highest demographics even, it appears the energy isn't focused here.

“We haven't figured out brand advertising, we are just beginning to,” said Drew Schutte, the chief revenue officer for Condé Nast Digital.

He called his company's products “passion reads” that are therefore protected from competition from “information” on the Web: Anyone can write about fashion, but only *Vogue* is *Vogue*.

“We also do agree that it’s something we have to figure out,” Mr. Schutte said. “It’s gotten pigeonholed in a direct-response mode. That’s lazy. The Internet helps in transactions and it’s a tremendous place for branding. We haven’t done any significant branding to date. If you ask somebody what was the last great Internet ad you saw, they’re hard-pressed to remember. And we’re all at fault at that a bit.”

FlipGloss, a California-based ad start-up that just launched their beta site last week, is one company offering a model for high-end publishers and brands. Their interactive Web advertising translates the visual experience of flipping through a magazine on the computer screen.

“We think about a woman sitting on a park bench flipping through a 600-page *Vogue* that she likely bought just as much for the advertising as she did for the content,” said co-founder and chief executive Kerry Trainor. “Those types of experiences point to something very powerful in a way that ads and content are commingled in those experiences.”

Users can hover on particular products on models and click them for more information and links to share on social networking sites like Facebook and Digg.

“Share anything that you want, just like tearing the ad out of the magazine and putting it in a purse,” Mr. Trainor said. “It’s really just allowing people to continue that natural path toward discovery.”

THE MEDIA IS ... DYING

What any publisher of online journalism will have to do to bring in the ad dollars of the future, besides mastering the kind of brand advertising that start-ups like FlipGloss are developing, and making themselves the right environments for those kinds of advertisements, is to take another lesson from the start-ups: The Web is a social medium.

“There’s a new theme in the online space,” Mr. Maheu of Ogilvy said. “Brand marketing is no longer one-way communication, which is what it’s like for print. You know: This is my story, take it or leave it. But digital? It’s so interactive. It lets you engage with consumers.”

Here's where the editors who have read a few too many "comments" on their site about gold investing and spam farming start to groan.

But if interactivity is the future of advertising, then the online news space must become interactive in order to get support from the advertisers.

Facebook is so popular because it connects people to their friends' experiences—all of their photos, videos, postings and personal preferences displayed in a pretty, "news feed" interface. Twitter caught on by creating a service that answered a simple question: What are my friends doing right now, with updates in real time.

Everyone in the new world has a status. Newspapers can take a lesson from "status culture" by integrating it into their sites. What are readers reading *right now*? How many people have their eyes on one story? Who are they emailing it to? Where are they blogging it? How are their friends using the site?

"I think *The New York Times*, you've done a great job of learning what are the users paying attention to, but you're not really reflecting that back to them in a reflected status," said Tim O'Reilly, chief executive officer of O'Reilly Media, Inc., a top computer book publishing company **during his keynote speech at *The New York Times'* Times Open event on Feb. 20**. He suggested that the *The Times* provide users with an opt-in sharing feature that would give the digital staff permission to publicly promote what their users are reading, and with whom they are sharing it.

Sites like **Techneme** and **Digg** feed into bloggers' competitive nature—displaying who specifically tipped them off to a news item and which blog has the best or most-read entry covering a news article, according to Mr. O'Reilly. Newspapers can do the same thing.

It's all about giving users attention, because that's mostly what people are looking for when they're online these days.

Mike Germano, president and creative director of **>carrot creative**, a marketing agency that specializes in social networking and new media for brands like MLB.com and JCPenney, said newspapers can engage readers in the comments section. Although many newspapers have been weary of validating commentors in the past, drowning in a sea of "anonymous" trolls, Mr. Germano predicts that

newspapers will start to see more and more commentors using their real names to participate in the conversation by using services like OpenID and Facebook Connect.

“On Facebook you were forced to be who you really are,” he said, noting the early days of Facebook when users needed a college email address to sign up. “When I see a comment now and it’s got that little [Facebook symbol] F, I know that is a real person,” he continued. “People take value in their Facebook profile, they’re not going to do something that could risk that.”

Once newspapers start validating their commentors, they will have more detailed data for their advertisers, according to Mr. Germano.

Newspapers can also learn something from Facebook’s preference toolbar by making their user experiences more personalized. How about customizable home pages for users? So when they go to NYTimes.com, it will display, say, only international news and science headlines, and eliminate maybe sports- and style-related articles. Users could set preferences to display more new podcasts or video posts and drag and drop any reporters' column into a specific space on their home page. And if they want their Twitter feed or del.icio.us links integrated into their home page, so they can see what their friends are reading, let them set that preference as well.

Unless newspaper sites can become facilitators of the new status culture, they will be left outside of it. And they will no longer be the places where advertisers want to meet customers.

“I think that basically marketers need to go where their customers are,” said Jim Brady, until recently of washingtonpost.com. “And if their customers are spending significant time on the Web, then they need to be there. They need to figure out a way to engage with their customers in meaningful ways. Whether that’s the Web, or mobile, or something that hasn’t even been invented yet.”

MOBILE MENTALITY

Josh Quittner, a San Francisco-based editor-at-large for *Time*, is pushing what he

somewhat awkwardly calls appazines—a hybrid of a magazine and interactive software served to mobile devices. (This, of course, should not be confused with early experiments in HyperCard Stacks and CD-ROM magazines that were cutting edge circa 1994.) Mr. Quittner is planning to make a presentation about appazines at Time Inc.'s quarterly management meeting in June.

It sounds like what Mr. O'Reilly was demonstrating on Feb. 20 when he gave an example the future of mobile by saying the word "Pizza" into his iPhone for an audience. **Google's Mobile iPhone App** found places to grab a slice within walking distance of his current location.

"This is going to happen with news," he said. "It's really quite remarkable how much our future is going to be driven by information exhaust from the devices we carry around with us," Mr. O'Reilly said. "We have to think about that future."

Savvy technologists like Mr. O'Reilly have been predicting a revolution in online news that most publishers seem to stumble right over. Forget the print edition. And even if *Times* masters their Web-based news portal, with all the open-source features and applications they want, their readers might not want to be getting their content from their desktop computer or their laptop.

The idea is this: The news must go mobile.

And if the news is to attract rather than follow advertisers, it must do so right now.

"Brand advertising hasn't transferred to mobile because no one has figured out how best to make that work," Ms. Warren, of *The Times*, said. "You have that issue in the background. Most of the customers who haven't really embraced it, at least for us anyway, are the luxury and goods manufacturers. They have web sites, of course, and they're obviously all online, but they've been more hesitant to move online because they're so fiercely protective of their brand. Brand advertising online, for many, has been elusive."

Lots of publishers acknowledge the importance of mobile but are playing a game of chicken with advertisers: We build some infrastructure, you pay some money, we build more, you pay more.

That at least was the approach outlined by Chuck Cordray, the general manager of

Hearst Magazines Digital Media.

“We are likely to continue to invest in the platform that we have on mobile,” he said. “But I’m not doubling down in 2009. We have enough presence and we’ll let advertising up to what we’ve built up now and then we’ll invest in at the next chance available.”

It may be a question of whether the chances aren’t already going to other kinds of businesses besides magazines. Some of us are already firing up our iPhones to read *The Times*’ headlines while we’re in bed or stirring some scrambled eggs for breakfast. But what if we could download a news application (for a reasonable fee) and get real-time news on our mobile phones as we walk to work? (There is already a *New York Times* download for the Amazon Kindle, priced at \$13.99). And for those who don’t want to actually read the news on those teeny tiny devices—what about listening to *The New York Times* through podcasts and audio recordings? Maybe Times reporters should file mp3s of their articles, reciting their reporting, along with their print stories, so people riding on the subway, and listening in their cars can participate. There’s already a slew of podcasts on the NYTimes.com site, but there are none based on the newest of the new information—like a radio station. Users could comment on the article, by calling into the Times and record a comment, which will be automatically transcribed and posted on the website.

Microblogging services, similar to Twitter, would also add a real-time element to mobile news. Reporters would blog up-to-the-minute “tweets” on where they are and what they are working on.

News won’t be a once a day update or even once an hour, like on blogs. It will be continuous and ambient—all around us through our handheld devices, according to Bill Spencer, an evangelist for mobile technology and co-founder of **viaPlace**, a location-based data service for mobile users.

“As events occur they’ll stream right to the individual,” he said. “You’re going to become entwined with information. Information is no longer a thing that you go to. It’s threaded into the technology.”

So how will all of this get monetized? Well, if Apple’s iPhone 3G has shown us anything, it’s that people will pay for convenience. To date, there have been more

than 300 million downloads from Apple's App Store. Thousands of applications cater to users' every whim, from an iFart application that is good for a laugh, to games like Texas Hold'Em to pass the time and users are willing to pay for them. According to a **new consumer report conducted by ABI Research**, more than 16 percent of U.S. smartphone users who installed mobile applications in 2008 spent between \$100 and \$499 on premium apps.

The Times already has an application that is free for download on various devices including the iPhone and the BlackBerry—with simple headlines and easy reading. But applications with added data, personalized content and social media would be more valuable. An initial fee of, say, \$1 for a newspaper application might be reasonable, along with a monthly updated version of the application at .50 cents a month. With paid subscriptions, users will get tons of news, data, syndicated content from other sites and services at their fingertips.

Ads on the application could be displayed in a traditional format, like on Web browsers with text-based ads or display ads at the top or bottom of the screen.

But publishers can also partner with advertisers to create innovative, interactive applications. For example, on Feb. 2, *Lucky* magazine released their **Lucky At Your Service iPhone application**. Designed to supplement their March issue, Lucky app users can browse through more than 70 shoes listed in their shoe guide, including ones chosen by editors and advertisers.

Greg Sterling, senior analyst for **Local Mobile Search**, a service that tracks the evolution of the mobile Internet, said these types of ad-infused applications are the perfect bait for major brands. "Publishers can say, 'Hey we're this really effective vehicle for you because of our demographics, so on and so forth, but we can also extend that into this really cutting edge iPhone application,'" he explained. "Suddenly it transforms that magazine into this interesting, multi-platform vehicle where the advertisers or the content can reach those loyal magazine readers as they're out in the world."

GOING HYPERLOCAL

Many of the smartphones in development now are being built with voice as an

afterthought and search, email, Twitter and Facebook-ing at the center of their functionality. But will long-form newspaper articles, ones that are a bit longer and more in-depth than 140 characters, be readable on these tiny handheld screens?

E-Ink, the company that built the technology used for electronic paper displays like the Amazon Kindle, has been developing technology to create more reader-friendly displays since 1993. "You want to read a bunch of magazines or you want to read a combination of books and magazines when you travel today," said Sriram Peruvemba, E-Ink's vice president of marketing. "You can put all those things on your device—literally thousands of documents, a small mini library that you can put in your briefcase."

Perhaps more newspapers should be meeting with mobile device manufacturers and designers to make sure they are catering to consuming news on the go. Can you imagine the next Google/New York Times Android-powered portable reading device?

Google "wants to have as much control of the development of mobile web advertising as they can," according to Mr. Sterling. "Google's advantage is that it has a lot of advertisers. If it says, 'Hey publishers, we've got all these advertisers! We can make it really easy for you to advertise once you launch your mobile Web site.'" Newspapers might want to pay close attention to how Google is utilizing their mobile ad network.

Luckily, newspapers have some time to get into the mobile business. Only 12 to 13 percent of phone users have smartphones like an iPhone or BlackBerry, according to Mr. Sterling. So it's time for newspapers to start thinking about how their users can get their news on their feet—before it's too late.

The irony of news that follows you wherever you go is that it is intensely local—just the kind of stuff news sites are jettisoning these days.

Consider **Patch**, the New York-based start-up co-founded by Tim Armstrong, Google's vice president of advertising sales. Funded by Polar Capital Group, Mr. Armstrong's private investment company, Patch launched three hyperlocal news sites in three New Jersey towns on Feb. 5: Maplewood, Millburn and South Orange. Each individual site combines hard-nosed journalism from professional reporters,

information from local government on everything from health department services to volunteer opportunities and various platforms for user participation with pictures, stories and blogs. Patch's sites don't just dispatch news articles—they are information portals.

Likewise, *The New York Times* Metro desk right now is in the process of creating a series of “microblogs” that would cover the same area of New Jersey, and potentially other outposts in the metropolitan area as well.

“It's the year 2009 and the way people are getting community-news specific information is largely through corkboards and bagel stores and kiosks in town squares,” Jon Brod, Patch's chief executive officer and co-founder, told *The Observer* over coffee earlier this month. “There's a huge opportunity there to really include people's local lives and strengthen communities through information and that's really what we're trying to do.”

“It was a problem everytown, everycommunity U.S.A. was experiencing,” he continued. “Community level news and information was really sparse, fragmented, disorganized and in a bunch of level, archaic.”

That's going to change--through the mobile phone future. Taking a pit stop at the coffee shop? Your hand-held device will find restaurant reviews from the newspaper, along with syndicated content from user-generated review sites like **Yelp** to get suggestions on the best espresso flavor from your friends.

As you climb out of the subway at 23rd and Broadway, you'll get a **Wikipedia** entry on the Flatiron building, with historical facts and figures, along with recent articles reporting on the latest news—including office space opening up, crimes in Madison Square Park, and the redesign of **Shake Shack's Web site** for those already thinking about getting a hamburger fix from chef Danny Meyer's version of a fast food joint.

After work, local happy hours and drink specials will be pinged to your phone as soon as you step back outside. This kind of feature is already being developed by small New York-based startup **Coovents**. In fact, most of these features are already available in various iPhone applications, but perhaps newspapers should start partnering with the start-ups making these new applications so they can add

the data sets to their Web and mobile libraries.

A combination of local news and location-based technology has the capacity to be the foundation of this kind of distribution system. It hasn't worked that well on the Web, but on the mobile Web, the first to become a local essential "app" on a phone is the first to unlock whatever ad dollars are out there.

THE PAY-MODEL DILEMMA

And if Patch came to this town—if it were the new business model for *The New York Times*, aggressively social, hyperlocal and therefore geo-targeted for advertisers and a better overall service for readers—but on a larger scale, with top-flight reporting and seriously breaking news at every zoom level, would people pay to read the "paper?"

One of the most boring disputes over the future of the media is whether a pay model or an advertising model will ultimately work. Even very hidebound print people forget that they "serve" ads in print only to readers who have already paid. The argument is that readers won't pay to read content; therefore no eyeballs; therefore no advertisers.

But if news sites entered these other areas—became social, hyperlocal, mobile—perhaps they could retake the center stage and bring paid readers and advertisers to the same place?

If it seems to require an infinite reorganization of the priorities of the media business to make paying readers and advertisers come together, perhaps it will require an infinite reorganization of the news media for journalism to survive?

"The really vital question is how we preserve good journalism and how to we ensure communities ... are being served by good journalism," said Mr. Brauchli of the *Post*. "Preserving good journalism is vital. That requires economic modes that'll support journalism."

"But I don't think it's just about newspapers. I happen to be a great fan of newspapers and I also think newspapers like typewriters are useful to journalism,

but aren't essential to journalism."

"I would argue that the people who are obsessing right now with the pay model are overthinking a basic part of our business," said Russ Stanton, editor of *The Los Angeles Times*.

He pointed out that subscriptions and newsstand sales have never been able to support print journalism without serious advertising revenue. So how can any pay model be expected to cover the costs of journalism online?

"Our industry, historically, has never charged full freight of what that costs. We cover our costs, but we don't make any money delivering it. We charge for the delivery; it doesn't come close to what it costs to produce it."

"I'm not a big fan of the pay model," Mr. Stanton said. "That horse left the barn. ... We tried with what we think is our highest value content, which is our entertainment report, and we put Calendar behind a paywall several years ago for the relatively nominal price of less than 10 dollars a month, and readers rejected it."

"If we had life to do over again, go back 12 or 15 years, that's what we should have done. Clearly that would have been a strategy we would have taken a second look at. I would argue it's too late now considering how far along this is and the cost of entry on that would be higher than anybody in our industry can afford to do right now."

"Let me start by talking about a little bit of history," *The New York Times'* Ms. Warren said. "This isn't new to us. We've been experimenting with and will continue to experiment with how to generate revenue from our end-users until the game is over—which of course it'll never be. I'm sure you know this, but it's helpful to remind folks. "When we first launched—I wasn't involved then—we charged international users for access. I think you know about TimesSelect. I think that's been fairly reported. We also have a lot of smaller revenue streams with charging users whether it's for Kindle, or whether it's from generating revenue from crossword puzzle usage, and we have a successful news service that sells our content to other news organizations. I think it's important everyone understands we generate a pretty decent amount of revenue, and I'm talking just digital, not

even print subscription revenue, which is enormous. We obviously have the experience here with charging our users.”

“What we need to be mindful how [a pay model] impacts our advertising stream. We believe we’ll have a successful advertising business.

“Again, we’re trying to remove the impact of the economy. So the conversation can’t be a binary one. ‘That’s the answer to all your problems and you’ll generate x millions of dollars.’ O.K., maybe! Does that charging, and the way we do that, impact the way we generate advertising revenue? We really have to analyze that extremely carefully.

“We’re studying the issue and if you’re going to look at history, that might lead us to conclude that advertising will be the lion’s share,” she said. “But don’t forget from our own experience is that we have a very, very sizeable amount of [paid circulation revenue] from print. There’s an enormous amount of money for subscriptions to *The New York Times*.”

So, this promised land, on the other side of the print/advertising divide, with news organizations acting as social networking sites and offering interactive advertising opportunities that work for advertisers, hyperlocal service content delivered to mobile devices and the devices that are yet to come: how do media organizations interested in preserving the future of a free press operating at the highest level of quality?

Is there any way but for news organizations, like search engines, telephone-line service providers, software developers, etc., who preceded them to make themselves the big players in the online development space? In other words, for the old media to take over the new?

“We do not view the competencies to be an [overall internet service provider] as our unique competitive advantage,” *The Times*’ Ms. Warren wrote in an email to *The Observer*. “But because our content/brand and the audience it serves is our unique advantage we do see ourselves as a platform. This explains the thinking behind several innovative things we’ve done recently: API’s, developer day, Times People, Times Extra, etc.”

“That’s totally counterproductive,” Mr. Brauchli said of the suggestion. “The history

of business innovation is littered with examples of companies that have attempted to have unique company specific platforms that are ultimately not probably accessible.”

Pace, Mr. Isaacson.

“There are examples of companies where it’s worked to a certain extent—like Apple—but there are plenty more examples where it does not work like the Beta versus VHS fight, or you know, even the Kindle. It’s a great product but it’s not a universally accepted product because there I think there aren’t standard or norms.”

“It requires innovation, not simply by newspaper companies, but by media companies in general working in close collaboration with the companies that dominate the internet and who have figured out ways of monetizing content over the internet, which is to say Google and Microsoft,” he said. “I do think there will be collaboration with the big technology companies.

So when the next Kindle, the next iPhone, are in development, should he and his publisher Katharine Weymouth be trying to get in the room to get a piece of the development pie for themselves?

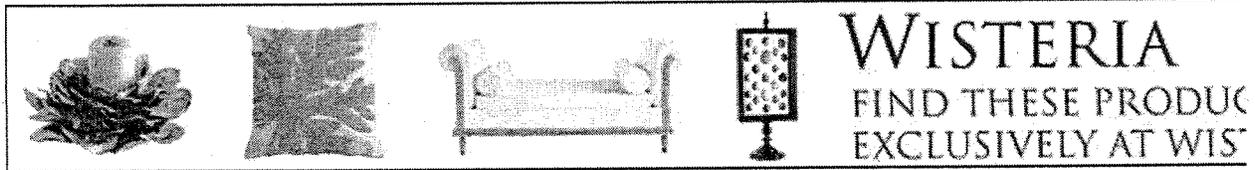
“At a simple level, yeah,” Mr. Brauchli said. “At a simple level we all have to be talking. I do think there’s a lot of conversation going on.”

And so the Googles and Microsofts of the world, it seems, will continue to drive development of the digital media, and leave the old-fashioned media to sort out what’s left among themselves.

Unless all of the old media, the ones who are paying for the news but not getting paid in turn, got together to bargain with the captains of the digital media. What might happen then?

“I think that can happen,” the *L.A. Times’* Mr. Stanton said. “I think the odds of that happening increase as the economy continues to deteriorate. ... It’s certainly not news that we’ve talked to [*The Washington Post*] over the last year to do something beyond our combined newswire operation.”

They haven’t yielded anything, yet.

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Friday, Jun. 05, 2009

How Twitter Will Change the Way We Live

By Steven Johnson

The one thing you can say for certain about Twitter is that it makes a terrible first impression. You hear about this new service that lets you send 140-character updates to your "followers," and you think, Why does the world need this, exactly? It's not as if we were all sitting around four years ago scratching our heads and saying, "If only there were a technology that would allow me to send a message to my 50 friends, alerting them in real time about my choice of breakfast cereal."

I, too, was skeptical at first. I had met Evan Williams, Twitter's co-creator, a couple of times in the dotcom '90s when he was launching Blogger.com. Back then, what people worried about was the threat that blogging posed to our attention span, with telegraphic, two-paragraph blog posts replacing long-format articles and books. With Twitter, Williams was launching a communications platform that limited you to a couple of sentences at most. What was next? Software that let you send a single punctuation mark to describe your mood? ([See the top 10 ways Twitter will change American business.](#))

And yet as millions of devotees have discovered, Twitter turns out to have unsuspected depth. In part this is because hearing about what your friends had for breakfast is actually more interesting than it sounds. The technology writer Clive Thompson calls this "ambient awareness": by following these quick, abbreviated status reports from members of your extended social network, you get a strangely satisfying glimpse of their daily routines. We don't think it at all moronic to start a phone call with a friend by asking how her day is going. Twitter gives you the same information without your even having to ask.

The social warmth of all those stray details shouldn't be taken lightly. But I think there is something even more profound in what has happened to Twitter over the past two years, something that says more about the culture that has embraced and expanded Twitter at such extraordinary speed. Yes, the breakfast-status updates turned out to be more interesting than we thought. But the key development with Twitter is how we've jury-rigged the system to do things that its creators never dreamed of.

In short, the most fascinating thing about Twitter is not what it's doing to us. It's what we're doing to it.

The Open Conversation

Earlier this year I attended a daylong conference in Manhattan devoted to education reform. Called Hacking Education, it was a small, private affair: 40-odd educators, entrepreneurs, scholars, philanthropists and venture capitalists, all engaged in a sprawling six-hour conversation about the future of schools. Twenty years ago, the ideas exchanged in that conversation would have been confined to the minds of the participants. Ten years ago, a transcript might have been published weeks or months later on the Web. Five years ago, a handful of participants might have blogged about their experiences after the fact. ([See the top 10 celebrity Twitter feeds.](#))

But this event was happening in 2009, so trailing behind the real-time, real-world conversation was an equally real-time conversation on Twitter. At the outset of the conference, our hosts announced that anyone who wanted to post live commentary about the event via Twitter should include the word *#hackedu* in his 140 characters. In the room, a large display screen showed a running feed of tweets. Then we all started talking, and as we did, a shadow conversation unfolded on the screen: summaries of someone's argument, the occasional joke, suggested links for further reading. At one point, a brief argument flared up between two participants in the room — a tense back-and-forth that transpired silently on the screen as the rest of us conversed in friendly tones.

At first, all these tweets came from inside the room and were created exclusively by conference participants tapping away on their laptops or BlackBerrys. But within half an hour or so, word began to seep out into the Twittersphere that an interesting conversation about the future of schools was happening at *#hackedu*. A few tweets appeared on the screen from strangers announcing that they were following the *#hackedu* thread. Then others joined the conversation, adding their observations or proposing topics for further exploration. A few experts grumbled publicly about how they hadn't been invited to the conference. Back in the room, we pulled interesting ideas and questions from the

screen and integrated them into our face-to-face conversation.

When the conference wrapped up at the end of the day, there was a public record of hundreds of tweets documenting the conversation. And the conversation continued — if you search Twitter for *#hackedu*, you'll find dozens of new comments posted over the past few weeks, even though the conference happened in early March.

Injecting Twitter into that conversation fundamentally changed the rules of engagement. It added a second layer of discussion and brought a wider audience into what would have been a private exchange. And it gave the event an afterlife on the Web. Yes, it was built entirely out of 140-character messages, but the sum total of those tweets added up to something truly substantive, like a suspension bridge made of pebbles.

[SI.com: See how Twitter is changing the face of sports.](#)

[See the best social-networking applications.](#)

The Super-Fresh Web

The basic mechanics of Twitter are remarkably simple. Users publish tweets — those 140-character messages — from a computer or mobile device. (The character limit allows tweets to be created and circulated via the SMS platform used by most mobile phones.) As a social network, Twitter revolves around the principle of followers. When you choose to follow another Twitter user, that user's tweets appear in reverse chronological order on your main Twitter page. If you follow 20 people, you'll see a mix of tweets scrolling down the page: breakfast-cereal updates, interesting new links, music recommendations, even musings on the future of education. Some celebrity Twitterers — most famously Ashton Kutcher — have crossed the million-follower mark, effectively giving them a broadcast-size audience. The average Twitter profile seems to be somewhere in the dozens: a collage of friends, colleagues and a handful of celebrities. The mix creates a media experience quite unlike anything that has come before it, strangely intimate and at the same time celebrity-obsessed. You glance at your Twitter feed over that first cup of coffee, and in a few seconds you find out that your nephew got into med school and [Shaquille O'Neal](#) just finished a cardio workout in Phoenix. ([See excerpts from the world's most popular Twitterers.](#))

In the past month, Twitter has added a search box that gives you a real-time view onto the chatter of

just about any topic imaginable. You can see conversations people are having about a presidential debate or the *American Idol* finale or Tiger Woods — or a conference in New York City on education reform. For as long as we've had the Internet in our homes, critics have bemoaned the demise of shared national experiences, like moon landings and "Who Shot J.R." cliff hangers — the folkloric American living room, all of us signing off in unison with Walter Cronkite, shattered into a million isolation booths. But watch a live mass-media event with Twitter open on your laptop and you'll see that the futurists had it wrong. We still have national events, but now when we have them, we're actually having a genuine, public conversation with a group that extends far beyond our nuclear family and our next-door neighbors. Some of that conversation is juvenile, of course, just as it was in our living room when we heckled Richard Nixon's Checkers speech. But some of it is moving, witty, observant, subversive.

Skeptics might wonder just how much subversion and wit is conveyable via 140-character updates. But in recent months Twitter users have begun to find a route around that limitation by employing Twitter as a pointing device instead of a communications channel: sharing links to longer articles, discussions, posts, videos — anything that lives behind a URL. Websites that once saw their traffic dominated by Google search queries are seeing a growing number of new visitors coming from "passed links" at social networks like Twitter and Facebook. This is what the naysayers fail to understand: it's just as easy to use Twitter to spread the word about a brilliant 10,000-word *New Yorker* article as it is to spread the word about your Lucky Charms habit.

Put those three elements together — social networks, live searching and link-sharing — and you have a cocktail that poses what may amount to the most interesting alternative to Google's near monopoly in searching. At its heart, Google's system is built around the slow, anonymous accumulation of authority: pages rise to the top of Google's search results according to, in part, how many links point to them, which tends to favor older pages that have had time to build an audience. That's a fantastic solution for finding high-quality needles in the immense, spam-plagued haystack that is the contemporary Web. But it's not a particularly useful solution for finding out what people are saying *right now*, the in-the-moment conversation that industry pioneer John Battelle calls the "super fresh" Web. Even in its toddlerhood, Twitter is a more efficient supplier of the super-fresh Web than Google. If you're looking for interesting articles or sites devoted to Kobe Bryant, you search Google. If you're looking for interesting comments from your extended social network about the three-pointer Kobe just made 30 seconds ago, you go to Twitter.

From Toasters to Microwaves

Because Twitter's co-founders — Evan Williams, Biz Stone and Jack Dorsey — are such a central-casting vision of start-up savvy (they're quotable and charming and have the extra glamour of using a loft in San Francisco's SoMa district as a headquarters instead of a bland office park in Silicon Valley), much of the media interest in Twitter has focused on the company. Will Ev and Biz sell to Google early or play long ball? (They have already turned down a reported \$500 million from Facebook.) It's an interesting question but not exactly a new plotline. Focusing on it makes you lose sight of the much more significant point about the Twitter platform: the fact that many of its core features and applications have been developed by people who are not on the Twitter payroll.

[Watch a video of the 2009 Weblog Awards.](#)

[Read "Twittering in Church, with the Pastor's O.K."](#)

This is not just a matter of people finding a new use for a tool designed to do something else. In Twitter's case, the users have been redesigning the tool itself. The convention of grouping a topic or event by the "hashtag" — #hackedu or #inauguration — was spontaneously invented by the Twitter user base (as was the convention of replying to another user with the @ symbol). The ability to search a live stream of tweets was developed by another start-up altogether, Summize, which Twitter purchased last year. (Full disclosure: I am an adviser to one of the minority investors in Summize.) Thanks to these innovations, following a live feed of tweets about an event — political debates or *Los* episodes — has become a central part of the Twitter experience. But just 12 months ago, that mode of interaction would have been technically impossible using Twitter. It's like inventing a toaster oven and then looking around a year later and seeing that your customers have of their own accord figured out a way to turn it into a microwave. ([See the 50 best inventions of 2008.](#))

One of the most telling facts about the Twitter platform is that the vast majority of its users interact with the service via software created by third parties. There are dozens of iPhone and BlackBerry applications — all created by enterprising amateur coders or small start-ups — that let you manage Twitter feeds. There are services that help you upload photos and link to them from your tweets, and programs that map other Twitizens who are near you geographically. Ironically, the tools you're offered if you visit Twitter.com have changed very little in the past two years. But there's an entire Home Depot of Twitter tools available everywhere else.

As the tools have multiplied, we're discovering extraordinary new things to do with them. Last month an anticommunist uprising in Moldova was organized via Twitter. Twitter has become so widely used

among political activists in China that the government recently blocked access to it, in an attempt to censor discussion of the 20th anniversary of the Tiananmen Square massacre. A service called SickCity scans the Twitter feeds from multiple urban areas, tracking references to flu and fever. Celebrity Twitterers like Kutcher have directed their vast followings toward charitable causes (in Kutcher's case, the Malaria No More organization).

Social networks are notoriously vulnerable to the fickle tastes of teens and 20-somethings (remember Friendster?), so it's entirely possible that three or four years from now, we'll have moved on to some Twitter successor. But the key elements of the Twitter platform — the follower structure, link-sharing, real-time searching — will persevere regardless of Twitter's fortunes, just as Web conventions like links, posts and feeds have endured over the past decade. In fact, every major channel of information will be Twitterfied in one way or another in the coming years:

News and opinion. Increasingly, the stories that come across our radar — news about a plane crash, a feisty Op-Ed, a gossip item — will arrive via the passed links of the people we follow. Instead of being built by some kind of artificially intelligent software algorithm, a customized newspaper will be compiled from all the articles being read that morning by your social network. This will lead to more news diversity and polarization at the same time: your networked front page will be more eclectic than any traditional-newspaper front page, but political partisans looking to enhance their own private echo chamber will be able to tune out opposing viewpoints more easily.

Searching. As the archive of links shared by Twitter users grows, the value of searching for information via your extended social network will start to rival Google's approach to the search. If you're looking for information on Benjamin Franklin, an essay shared by one of your favorite historians might well be more valuable than the top result on Google; if you're looking for advice on sibling rivalry, an article recommended by a friend of a friend might well be the best place to start.

Advertising. Today the language of advertising is dominated by the notion of impressions: how many times an advertiser can get its brand in front of a potential customer's eyeballs, whether on a billboard, a Web page or a NASCAR hood. But impressions are fleeting things, especially compared with the enduring relationships of followers. Successful businesses will have millions of Twitter followers (and will pay good money to attract them), and a whole new language of tweet-based customer interaction will evolve to keep those followers engaged: early access to new products or deals, live customer service, customer involvement in brainstorming for new products.

Not all these developments will be entirely positive. Most of us have learned firsthand how addictive the micro-events of our personal e-mail inbox can be. But with the ambient awareness of status updates from Twitter and Facebook, an entire new empire of distraction has opened up. It used to be that you compulsively checked your BlackBerry to see if anything new had happened in your personal life or career: e-mail from the boss, a reply from last night's date. Now you're compulsively checking your BlackBerry for news from other people's lives. And because, on Twitter at least, some of those people happen to be celebrities, the Twitter platform is likely to expand that strangely delusional relationship that we have to fame. When Oprah tweets a question about getting ticks off her dog, as she did recently, anyone can send an @ reply to her, and in that exchange, there is the semblance of a normal, everyday conversation between equals. But of course, Oprah has more than a million followers, and that isolated query probably elicited thousands of responses. Who knows what small fraction of her @ replies she has time to read? But from the fan's perspective, it feels refreshingly intimate: "As I was explaining to Oprah last night, when she asked about dog ticks ..."

[See the 50 best websites of 2008.](#)

[See 10 things to buy during the recession.](#)

End-User Innovation

The rapid-fire innovation we're seeing around Twitter is not new, of course. Facebook, whose audience is still several times as large as Twitter's, went from being a way to scope out the most attractive college freshmen to the Social Operating System of the Internet, supporting a vast ecosystem of new applications created by major media companies, individual hackers, game creators, political groups and charities. The Apple iPhone's long-term competitive advantage may well prove to be the more than 15,000 new applications that have been developed for the device, expanding its functionality in countless ingenious ways.

The history of the Web followed a similar pattern. A platform originally designed to help scholars share academic documents, it now lets you watch television shows, play poker with strangers around the world, publish your own newspaper, rediscover your high school girlfriend — and, yes, tell the world what you had for breakfast. Twitter serves as the best poster child for this new model of social creativity in part because these innovations have flowered at such breathtaking speed and in part because the platform is so simple. It's as if Twitter's creators dared us to do something interesting by giving us a platform with such draconian restrictions. And sure enough, we accepted the dare with relish. Just 140 characters? I wonder if I could use that to start a political uprising. ([See the 25 best](#)

blogs of 2009.)

The speed with which users have extended Twitter's platform points to a larger truth about modern innovation. When we talk about innovation and global competitiveness, we tend to fall back on the easy metric of patents and Ph.D.s. It turns out the U.S. share of both has been in steady decline since peaking in the early '70s. (In 1970, more than 50% of the world's graduate degrees in science and engineering were issued by U.S. universities.) Since the mid-'80s, a long progression of doomsayers have warned that our declining market share in the patents-and-Ph.D.s business augurs dark times for American innovation. The specific threats have changed. It was the Japanese who would destroy us in the '80s; now it's China and India.

But what actually happened to American innovation during that period? We came up with America Online, Netscape, Amazon, Google, Blogger, Wikipedia, Craigslist, TiVo, Netflix, eBay, the iPod and iPhone, Xbox, Facebook and Twitter itself. Sure, we didn't build the Prius or the Wii, but if you measure global innovation in terms of actual lifestyle-changing hit products and not just grad students, the U.S. has been lapping the field for the past 20 years.

How could the forecasts have been so wrong? The answer is that we've been tracking only part of the innovation story. If I go to grad school and invent a better mousetrap, I've created value, which I can protect with a patent and capitalize on by selling my invention to consumers. But if someone else figures out a way to use my mousetrap to replace his much more expensive washing machine, he's created value as well. We tend to put the emphasis on the first kind of value creation because there are a small number of inventors who earn giant paydays from their mousetraps and thus become celebrities. But there are hundreds of millions of consumers and small businesses that find value in these innovations by figuring out new ways to put them to use.

There are several varieties of this kind of innovation, and they go by different technical names. MIT professor Eric von Hippel calls one "end-user innovation," in which consumers actively modify a product to adapt it to their needs. In its short life, Twitter has been a hothouse of end-user innovation: the hashtag; searching; its 11,000 third-party applications; all those creative new uses of Twitter — some of them banal, some of them spam and some of them sublime. Think about the community invention of the @ reply. It took a service that was essentially a series of isolated microbroadcasts, each individual tweet an island, and turned Twitter into a truly conversational medium. All of these adoptions create new kinds of value in the wider economy, and none of them

actually originated at Twitter HQ. You don't need patents or Ph.D.s to build on this kind of platform.

This is what I ultimately find most inspiring about the Twitter phenomenon. We are living through the worst economic crisis in generations, with apocalyptic headlines threatening the end of capitalism as we know it, and yet in the middle of this chaos, the engineers at Twitter headquarters are scrambling to keep the servers up, application developers are releasing their latest builds, and ordinary users are figuring out all the ingenious ways to put these tools to use. There's a kind of resilience here that is worth savoring. The weather reports keep announcing that the sky is falling, but here we are — millions of us — sitting around trying to invent new ways to talk to one another.

Johnson is the author of six books, most recently The Invention of Air, and a co-founder of the local news website outside.in

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Judges Who Have Their Own Blogs

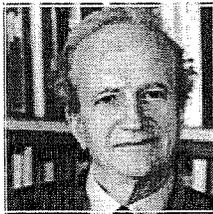
Judge Gertner on Blogging, Judicial Speech

Thursday, July 10, 2008

U.S. District Judge Nancy Gertner, who attracted the attention of bloggers and the news media earlier this year when she joined the roster of contributors to the new Slate legal blog, Convictions, shares her thoughts on judicial blogging and judicial speech in this week's episode of our legal-affairs podcast Lawyer2Lawyer.

Judge Gertner is the first Massachusetts judge -- federal or state -- to blog and one of only a handful of judges nationwide who blog. She believes strongly that judges should have more leeway to discuss their work, through blogs and other media. "The more we talk about what we do, the more we expose the shibboleths and the more maybe we can get back to respecting the institution," she tells us in this interview.

You can listen to or download the entire interview from this page. As always, you can keep up to date with all Lawyer2Lawyer programs by subscribing via RSS or using iTunes.



THE BECKER-POSNER BLOG

A BLOG BY GARY BECKER AND RICHARD POSNER



home

June 14, 2009

The Fatal Conceit: A Pay "Czar"-Becker

This week the Obama administration, acting through Secretary of the Treasury Geithner, appointed a pay czar to review, reject, and possibly set the pay of companies that received large amounts of federal assistance during the financial crisis. No appeals will be allowed from his decisions. The Czar, Kenneth Feinberg, will have broad authority over compensation for the top executives and 100 top employees at Bank of America, Citigroup, American International Group (AIG), General Motors, and a few other companies that received large federal bailout monies. This is surely one of the more preposterous ideas to come out of Washington.

The title of my post, "The Fatal Conceit", is taken from the title of a book published in 1988 by Friedrich Hayek. In this book Hayek attacks socialists for "the fatal conceit" that government officials can effectively determine prices and production through various forms of central planning without having the incentives and information available to firms in competitive markets. A closely related conceit is behind the belief that someone sitting in Washington can determine the pay to hundreds of executives and other employees.

The social purpose of competition and private enterprise is to provide quick responses to constantly changing market conditions. These responses include determining and changing the salaries, bonuses, and stock options of employees and top executives. Companies get into trouble and even fail when their decisions, including decisions on the quality of employees and their compensation, are less effective than decisions of their competitors.

All the companies that will have the pay of top employees under the control of the Czar compete against companies, both domestic and foreign, that will be free to set the pay of their employees. If these companies offer higher pay than the Czar allows for companies under his jurisdiction-whether this higher pay takes the form of bonuses or other forms, or whether fully justified or not-the controlled companies will lose their best employees to competitors, and they will have trouble attracting employees who are highly capable. The Czar could even be making serious mistakes if he just allowed the pay of companies under his control to match the pay offered by competitors. For it is plausible that companies in hock to the government may have to pay more than competitors to entice capable persons to take on the task of resurrecting

these companies. This is especially likely since Congress and the Treasury will be calling them to testify and second-guessing their decisions.

The background of the Czar, Kenneth Feinberg, is not reassuring in these respects. A lawyer, he first worked for the federal government, and then during the past several decades headed a law firm based in Washington. Since he apparently has never been an employee of any company other than the government and Washington law firms, how can this background prepare him to set the pay of large companies, such as AIG or GM, that are in highly competitive industries?

In recent interviews Mr. Feinberg claimed that excessive risk-taking fuelled the crisis, and that this risk-taking also led to excessive compensation. Surely, risk-taking has essentially nothing to do with the problems of GM and Chrysler, two of the companies under his wing. Growing leverage by banks of their limited capital base did contribute to the crisis, and perhaps that also greatly increased the pay of bank executives. However, even if this claim is entirely correct, I do not see how that can help him efficiently determine the pay of the (fortunately) few companies under his jurisdiction when their competitors can set the pay of their employees much more freely.

Defenders of the selection of Mr. Feinberg point to his almost three years spent as a pro bono Special Master of the fund that compensated victims of the 9/11 terrorist attacks. I do not know how well he carried out these duties, but determining compensation of victims is entirely different from what is required to set compensation of executives. As Special Master he had to assess the value of losses due to wrongful deaths and injuries. Although that assessment is not easy- it depends on lost earnings and other aspects of the so-called statistical value of life- it really has little to do with determining employee pay in a few companies engaged in highly competitive and changing industries.

The same fatal conceit behind the setting up of a pay Czar is also responsible for the belief that members of Congress and Washington officials are capable of steering GM and Chrysler toward profitable directions. This is behind the government pressure on these companies to shift toward small fuel-efficient cars, even though GM and Chrysler have been best at producing trucks and larger cars. Perhaps they will be able to make this shift, but it is far more likely that Honda, Kia, Toyota, and other foreign auto manufacturers that have been making small cars for decades will eat their lunch.

Posted by Gary Becker at [11:14 AM](#) | [Comments \(15\)](#) | [TrackBack \(0\)](#)

The Pay Czar and Compensation Issues--Posner's Comment

I agree with Professor Bebchuk of Harvard, and others, that there is a problem with the compensation of top executives at publicly held corporations (that is, corporations in which ownership is widely dispersed), so that control resides in the board of directors. The problem is that the individual directors do not have strong incentives to limit the

pay of the CEO and other top executives. By limiting his and their pay, the board would narrow the field of selection, and if the company got into trouble they would be criticized for having been penny wise and pound foolish in resisting their "compensation consultant's" advice to pay top dollar. In addition, the directors often owe their lucrative directorships, and their continuation in them, to the CEO. The movement toward "independent" directors (as distinct from directors who are officers of the corporation) does not cure the incentive problems, but rather compounds them by making the board less knowledgeable about the corporation.

So there is a basis for concern with the compensation of top management in publicly held corporations, but it is not a momentous concern and costly measures to ally it would not be justifiable. Modest measures, such as making it easier for shareholders to replace directors than under the existing, Soviet-style system in which shareholders vote for or against the slate proposed by management, and requiring full disclosure and monetization of all forms of compensation paid CEOs and other top executives, may be sensible; but nothing more should be attempted.

The solving of the overcompensation problem would have little if any effect on risk taking by bankers and other financiers, so probably any efforts to solve it should be postponed until the economy recovers from its present sickness.

A distinct problem is that of compensation of executives of firms that are owned or controlled by the federal government, such as General Motors, American International Group, Fannie Mae, and Freddie Mac, and (or) that are recipients of federal bailouts. These are troubled firms, and the concern is that management may try to funnel the federal moneys that the firms have received into dividends and bonuses so that shareholders and executives will be protected should the company fail completely. The danger in other words is that when a firm is teetering on the edge of bankruptcy, management may stiff the firms' creditors by funneling some of the firm's remaining assets to managers and shareholders. The time to deal with this problem, however, is when the bailout is made; suitable conditions can be attached to it. To instead appoint a "pay czar" to deal with executive salaries of bailout recipients on an ad hoc basis creates all the problems that Becker discusses.

These problems are especially grave with regard to General Motors and Chrysler, as these are fast-failing firms that need to be able to offer high salaries to attract able executives. Between efforts by the "pay czar" to limit these companies' flexibility in compensation, and the efforts by Congress to limit the companies' ability to import vehicles and close plants and dealerships, the government is doing to best to minimize its chances of ever recovering its \$60 billion investment in the two firms. This is called shooting oneself in the foot, or, alternatively, politics as usual.

Still another distinct problem is that of compensation practices of banks and other financial intermediaries. Here the problem is not the compensation of top management, but the compensation of traders and other investment officers at the operational level. The concern is that compensating them on the basis of the profitability of the individual deals that they make motivates them to take excessive risks. Suppose a deal has a positive expected value, but there is a 1 percent chance that it will fail in a way that imposes heavy costs on the corporation, and perhaps, because of the chain-reaction effect of the failure of a major bank (as we saw last September, when Lehman Brothers went broke), on the financial system as a whole. The trader who makes the deal may not worry much about that risk, because a 1 percent annual risk of disaster is very unlikely to materialize in the short run; the probability that an annual risk of 1 percent will materialize in 10 years is only 10 percent (actually a shade less).

Financial firms that worry as they should about such a catastrophic risk (since the firm makes many deals, which multiplies the risk of disaster), typically try to reduce it by employing "risk managers" who review proposed deals. Because this method of limiting risk failed to avert the financial collapse of last September, there are suggestions that it be supplemented or replaced by rules limiting the cash bonuses paid to traders, instead compensating them in restricted stock of the corporation, which they cannot sell for a number of years, or authorizing the corporation to "claw back" any bonus they receive should the risk involved in one or more of their deals later materialize and reduce or eliminate the profit that the corporation made on the deals.

It might seem that top management would have all the incentive it needed to prevent its subordinates from taking risks that would jeopardize the solvency of the company. But that is not true, because the private cost of bankruptcy is truncated by limited liability (the shareholders cannot be forced to pay the corporation's debts), but the social cost, as we have learned, can include a devastating global economic shock.

An external cost is a conventional justification for regulatory intervention--in principle. But the specific suggestions for curbing risk taking by traders are problematic. There are many influences on the value of a corporation's stock besides the outcome of a particular deal, and a claw-back possibility can greatly reduce the present value of a bonus, as well as complicating the recipient's tax and other financial planning. I conclude that it is premature to start regulating compensation practices in the banking industry; there are other ways of reducing financial risk that are less problematic.

Notice that this problem has nothing to do with boards of directors' inability under existing rules to control the compensation of top executives, because traders are not top executives. Management has no

incentive to overpay its subordinates! Nor has this problem anything to do with government ownership or control, or a risk of insolvency that might induce top management to try to appropriate a firm's remaining assets.

Any monkeying by government with compensation practices, especially below the top level of management and especially in financial firms, will impair the ability of American firms to compete with foreign firms. The banking business is thoroughly international, and unless all countries act in lock step with the United States in regulating compensation practices, many of our ablest financiers will be lured to foreign banks.

One can only hope that the appointment of a "pay czar" is merely a sop to ignorant public and congressional opinion, and that Mr. Feinberg will be suitably restrained in the exercise of his powers. Secretary of the Treasury Geithner seems unenthusiastic about the government's imposing more than cosmetic changes on corporate compensation practices. More power to him.

Posted by Richard Posner at [10:42 AM](#) | [Comments \(5\)](#) | [TrackBack \(0\)](#)

June 7, 2009

The Administration's Health Care Plan--Posner

It is understandable why there is widespread concern with the American system of health care. The nation spends about 15 percent of its very large Gross Domestic Product on health care, which is almost twice as much per capita as the nations that we consider our peers spend, yet outcomes, at least as measured by longevity, are no better in the United States than in those other nations, or for that matter in many much less wealthy nations. We provide much greater health care to elderly people at the end of their life than other nations do, though without much to show for it in increased longevity. Some 45 million people--15 percent of the population--have no health insurance, either private or public. They are either charity patients, or pay the full price of any medical treatment they receive--or at least are charged the full price, for a common sequel to an expensive medical procedure for an uninsured patient is the patient's declaring bankruptcy in order to wipe out his medical debt.

The Administration wants every American to have medical insurance. The details are unclear, but the thrust of the Administration's plan is those who can afford to buy medical insurance, either directly or through their employer, would be required to do so and that those who cannot would have their insurance subsidized. The cost to the government alone of the Administration's program is estimated by the Administration itself to be \$120 billion a year. How it will be financed remains up in the air, along with many other crucial details. Probably part of the cost will be defrayed by limiting the tax deductibility of employer-provided health insurance. But most of it, at least in the short run, will simply be added to the

government's huge budget deficit--so huge that amounts like \$120 billion are beginning to seem like small change.

The Administration claims that in the long run the aggregate cost of health care will actually fall. Indeed, the hope is that the \$120 billion annual cost will not have to be funded at all, but instead will be offset by various reforms that the Administration proposes, including digitization of health records, allocation of greater resources to preventive care, and evaluating the performance of hospitals and other medical providers more carefully, to determine which medical procedures are really useful, and limiting reimbursement to providers accordingly.

I don't think the program makes fiscal sense. If enacted in anything like the form that the Administration is urging on Congress, it would be immensely costly and would thus add significantly to our national debt, which is already growing at a fast clip because of the decline of tax revenues as a result of the current depression and the immense government expenditures on trying to speed economic recovery.

Ignored in estimates of the cost of the health care program is the effect of insurance on the demand for medical services. When people, because they lack health insurance, have to pay for medical services or encounter long queues in hospital emergency rooms, they have an incentive to economize on medical treatment. If they have health insurance, the marginal cost of treatment in excellent medical facilities falls to the cost of a deductible or copayment; and it is the marginal cost that the insured consumer of medical services confronts--the cost of the health insurance premium itself is a fixed cost, which is not affected by how much treatment the insured receives. Because the supply of medical services is not highly elastic, an increase in the demand for those services will increase average as well as total cost.

I would not object if a program of universal health insurance could be financed by reducing or eliminating the tax deductibility of health insurance. But only a modest reduction, if that, in its deductibility is politically feasible. The reforms that the Administration contends will not only pay for the program but also reduce the aggregate costs of health care in the United States are probably pie in the sky. Digitization of medical records does increase efficiency: it makes it easier to change doctors, track health histories, and coordinate medical services. But the net savings are likely to be modest or even negative, because anything that lowers the average cost of a given quality of health care increases demand, just as broadening insurance coverage does.

Preventive care--another efficiency measure touted by health-care reformers--is potentially very costly, because by definition it provides health services to people who are not yet ill. Advances in preventive care are not limited to telling people to exercise and eat healthful foods, but increasingly are dominated by massive and costly programs of screening and follow-up. Such programs, and the treatments that ensue for

persons found to have a treatable condition, may extend life, but often this means keeping alive very sick people who will require expensive care for the remainder of their prolonged life.

An effort to create a form of benchmark competition between hospitals and between doctors, by careful evaluation of outcomes and by using the results of the evaluation to calibrate reimbursement by insurers so that the best-performing health-care providers will be rewarded and the worst punished, is likely to founder on the difficulty of adjusting for differences in outcomes that are not attributable to the efficiency of the health-care provider.

In addition, efforts to limit treatment by limiting reimbursement, especially efforts by government to do so, are deeply unpalatable both to patients and to doctors and hospitals. A patient convinced by his doctor that a particular treatment is his only hope for continued life will not be reassured to be told that in the opinion of the government's experts, the treatment would not be cost-justified because it is very costly and is unlikely to be successful. Insurers, and employer health-benefits plans, try to do this kind of financial triage now, but their lack of success is reflected in the enormous annual cost of American health care.

A deep problem is the replacement, in the medical profession as in the legal profession, of a professional model of service with a business model. In the professional model, the service provider is assured a good but not extravagant income by limitations on competition, and in exchange he is expected to avoid exploiting the ignorance of patients as he could do by performing unnecessary or low-value procedures. In the business model, the service provider endeavors to maximize his net revenues. In the case of medicine, the disparity of knowledge between provider and patient, coupled with the fear and desperation that serious illness (or just the possibility of it) engenders, enables the profit-maximizing provider often to convince the patient to undergo costly low-value treatments. Certainly the profit-maximizing health-care provider will be very reluctant to refuse to provide a treatment that the patient insists upon, his insistence being made convincing by the fact that insurance will pay all or most of the cost. Insurers do try to limit their costs by refusing to approve low-value procedures--but in the face of combined pressure by provider and patient, the insurer is often forced to back down.

To return to the initial puzzle of why our peer nations are able to provide what seems, judging by outcomes, a level of health equal or superior to that of Americans at far lower cost, the only convincing answer is that the health-care providers in those nations limit treatment. I am not sure of the explanation, but the possibilities include: the professional model is more tenacious in societies less committed to free markets and a commercial culture than the United States; more of their hospitals are public and more of their doctors are public employees, who are therefore salaried rather than entrepreneurial; and Americans, being less fatalistic

than most other peoples, have a more intense demand for life-extending procedures. These are reasons why a national health plan modeled, as the Administration's appears to be, on the health plans of peer nations with much lower aggregate health costs is unlikely to work well, or at least to generate net cost savings.

Of course if people value extension of life very highly--and there is evidence that, in the United States at least, most people do--a very costly health care system may be cost-justified, in the sense that the benefits exceed the costs. Yet the benefits seem rather illusory, since the extra money we spend on health care does not seem to produce better outcomes. But international comparisons of health that are limited as they largely are to differences in longevity are crude. They ignore health benefits unrelated to longevity, such as the benefits conferred by cosmetic surgery and the possibility that the additional costs of health care in the United States enable people to live more dangerous, strenuous, or self-indulgent lives and by doing so confer utility.

Posted by Richard Posner at [4:27 PM](#) | [Comments \(47\)](#) | [TrackBack \(0\)](#)

Health Care-Becker

The best way to evaluate America's expensive health care system would be to estimate the effects of different kinds of healthcare on the quality and quantity of health for individuals of various ages, incomes, races, and other categories. To my knowledge, no researchers have come close to doing this. Instead, the American system has sometimes been found wanting simply because life expectancies in the United States are at best no better than those in France, Sweden, Japan, Germany, and other countries that spend considerably less on health care, both absolutely and relative to their GDPs.

Life expectancy is surely one supremely important measure of health since individuals in rich countries are willing to pay a lot even for small increases in their probabilities of surviving different ages (see the studies in the book "Measuring the Gains from Medical Research", ed. By Kevin M. Murphy and Robert Topel, 2003). Studies show that an additional year of life is worth over \$120,000 to the typical American adult, apparently also including older adults, where "worth" is measured by willingness to pay for a one-year improvement in length of life. One can easily see without a lot of fancy calculations that the large sums Americans are willing to pay for improvements in health imply that they would pay a considerable fraction of their incomes in order to achieve significant improvements in their life expectancy, and also in their quality of life. Similar conclusions apply to other countries since the willingness to pay in different countries for an additional year of life varies approximately proportionately to their per capita incomes.

Although such calculations show that improvements in life expectancy

are worth a lot to most people, national differences in life expectancies are a highly imperfect indicator of the effectiveness of health delivery systems. For example, life styles are important contributors to health, and the US fares poorly on many life style indicators, such as incidence of overweight and obese men, women, and teenagers. To get around such problems, some analysts compare not life expectancies but survival rates from different diseases. The US health system tends to look pretty good on these comparisons.

A study published in *Lancet Oncology* in 2007 calculates cancer survival rates for both men and women in the United States, the United Kingdom, and the European Union as a whole. The study claims that the most important determinants of cancer survival are early diagnosis, early treatment, and access to the best drugs, and that the United States does very well on all three criteria. Early diagnosis helps survival, but it may also distort the comparisons of five or even ten-year survival rates. In any case, the calculated five-year survival rates are much better in the US: they are about 65% for both men and women, while they are much lower in the other countries, especially for men. These apparent advantages in cancer survival rates are large enough to be worth a lot to persons having access to the American health system.

Several measures of the quality of life also favor the US. For example, hip and knee replacements, and cataract surgery, are far more readily available in the US than in Europe. The cancer survival and quality of life advantages enjoyed by US residents indicates that Americans get something for the large amount they spend on health care, but they do not indicate that the bang for the health buck is greater in the US, or even that the US health delivery system is reasonably efficient. Indeed, the American health system has several characteristics that may considerably lower its efficiency.

The American system ties medical insurance to employment by allowing company spending on medical premiums to be fully tax-deductible. Companies introduced health benefits during World War II in order to get around wage controls to be competitive in attracting employees. It was maintained as income tax rates increased during subsequent decades. This employer-based system is partly responsible for the high number of Americans who have no insurance coverage, since many small companies do not provide insurance to their employees. In addition, the system favors persons with high earnings since tax deductions for insurance premiums are worth more to them. A much better approach, so far opposed by President Obama, would provide a certain number of dollars each year to every person—perhaps \$2500— as tax credits to be used only to buy health insurance and pay for medical care. Unused amounts in any year would be folded into health savings accounts (see my discussion of these accounts and other health care issues in posts for April 15, 2007 and January 13, 2008), and unused balances in any year would be carried over to spend in later years. This approach gives the same tax incentives to everyone, and it would encourage individuals to economize on their health care spending since unused balances would be

available to spend in the future. It would also induce many persons without health insurance to get some since otherwise they lose access to this tax credit.

Health insurance is expensive in the US partly because most states mandate coverage of various health expenditures that have little to do with insurable risks. For example, the majority of states require insurance companies to cover the medical costs of all birth deliveries, even though these deliveries are mainly planned, and the expenses are known beforehand. The proper insurance approach would cover only unusual birth expenses caused by complications in the delivery and post delivery stages. By getting rid of unnecessary mandates, health insurance would become much cheaper, especially in states with the more onerous mandates.

The President wants to establish government-run health insurance companies to compete with private companies. This is a bad idea because experience from government-owned enterprises in other sectors conclusively shows that that they are run inefficiently, in good part because of political interference. Moreover, government enterprises do not compete fairly since they generally are subsidized, often generously and in hidden ways. Private health insurance companies in the US compete very strongly, although they are hampered by mandates and other regulations that frequently have nothing to do with effective and honest coverage of health needs.

Posted by Gary Becker at 4:06 PM | [Comments \(35\)](#) | [TrackBack \(0\)](#)

May 31, 2009

Is the World Economic Center of Gravity Moving to Asia? Becker

The short answer is "yes", although not immediately, and not inevitably. My reasons for an affirmative answer are partly demographic and partly economic. Asia has a large fraction of the world's population, and their biggest economies are generally experiencing rapid growth as they narrow the gap in living standards with the West.

To start with the demographics, about 4 billion persons, or almost 60% of the world's population, live in Asia. India and China alone have about 2 ½ billion individuals. Other Asian countries with populations in excess of 100 million are Japan, Indonesia, Pakistan and Bangladesh, while Vietnam and the Philippines each have almost 100 million persons. In addition, Asia's population is growing much faster than that of either Europe or North America, so that 20 years into the future, Asians will constitute more than 2/3 of the total world population.

By contrast, the whole European Union has only about 500 million people, and the very low birth rates in almost all countries within this Union imply that its population will be falling over time, unless offset by steep levels of immigration. The United States is still growing- partly fueled by considerable immigration- but more slowly than Asia's. As a

result, the populations of Europe and North America will decline over time, perhaps absolutely but surely relative to the growing numbers in the rest of the world.

Large populations alone do not have much impact on the world economy, as seen from the rather minor economic influence of both China and India prior to 1980, or the unimportance to the world economy of Sub-Saharan Africa's 800 million persons. Asia must have rapid economic growth during the coming several decades for it to become the major player in the economic world. Fortunately for them, China, India, Indonesia, Vietnam, and some of the other larger Asian countries discovered during the past 20 years many of the vital ingredients required to produce economic progress.

These ingredients include first of all a reliance on private companies and competition, and a much smaller role for government direction of the economy. China started along this path in the late 1970s, while India began to throw off its socialist traditions in the late 1980s and early 1990s. Second in importance is the utilization of the world economy to find markets for Asian exports, and to attract foreign capital to finance its rapid industrialization, although India has lagged far behind China in using both world capital and world markets. Most Asian countries also have recognized that human capital is the foundation of modern knowledge-based economies, and they have begun to emphasize investments in education and training.

As a result of these and related policy shifts, Asia as a whole experienced rapid economic growth during the past 20 years, and has narrowed the gap in per capita incomes with the rich countries of Europe and North America. The major Asian economies are likely to continue to grow rapidly for the next decade, and perhaps well beyond that decade, given how far behind Asian per capita incomes still are, the thirst of most of its population to become rich like the West, and the momentum their economies have built up. I say "perhaps" beyond the next decade because one cannot be sure that leading Asian countries will not shift away from growth-producing policies in the more distant future.

its rapid growth in both per capita income and population implies that Asia's importance in the world economy will increase quite rapidly. As a result, Asia will become a far more important source of consumer demand not only for products made in Asia, but also for exports from America and the EU. In addition, it is likely that researchers and companies in Japan, China, India, and elsewhere in Asia will generate an increasing share of the world's important innovations.

Greater economic dominance of Asia does not necessarily mean that the United States will not continue to be the world's leader in per capita income and innovation. The development of Asia can stimulate the US and the EU economies by providing greater opportunities for trade, including valuable imports and large markets for its exports, and other advantages from having a more developed and larger Asia. The economic threat to the West is not Asia's development, but it is government excessive interference in the performance of markets, like the automobile bailout in the US, that may choke the very competitive system that created Western wealth, and demonstrated how to become

rich to countries elsewhere.

To be sure, as the economic center shifts to Asia, that continent will expect much greater influence over international institutions, like the IMF and the World Bank, a greater role in determining common international trade policies, more say on climate policies, and on many other world economic issues. The larger Asian countries will also expect to have a more important role in determining world security and anti-terrorist policies. On security issues and possibly on climate and some other international questions, major conflicts might well emerge between countries like China and India, and the United States and the EU.

Posted by Gary Becker at [9:59 PM](#) | [Comments \(35\)](#) | [TrackBack \(0\)](#)

Is Asia Becoming the Center of the World Economy? Posner

I am less bold than Becker, and so I will make no predictions about the future of the world economy. I do have some reservations about treating Asia as a unit, however. Even if one stops at the eastern border of Pakistan, the Asian countries are far from uniform in their economic prospects. For they include such politically and economically challenged nations as Pakistan, Bangladesh, and Burma, along with Australia and New Zealand, which are not culturally or ethnically Asian; and Japan, which has a rapidly declining population and is economically stagnant, albeit at a high level. The fact that there is such heterogeneity in the Asian world suggests that individual country factors predominate over factors that distinguish Asia as a whole from the other continents.

What is common to a number of the Asian countries is mercantilism, which is to say the policy of accumulating large cash balances (in the old days, it was gold) by devaluing the currency, so that exports are cheap and imports dear. The result is an export surplus; and if a country sells more than it buys, it takes in more foreign currency than it spends in its own currency. China, aggressively mercantilist, has accumulated almost two trillion U.S. dollars.

The mercantilist policy of China and other East Asian countries has been attributed to the financial trouble that a number of these countries got into in the late 1990s when their governments were pursuing the opposite policy--that of encouraging imports and, in particular, foreign investment in their countries. As a result (much like the United States in the 2000s!) these countries accumulated large foreign exchange deficits, which ballooned when the investors shifted many of their investments to other parts of the world. The deficits reached a level at which the countries had to push interest rates up to depression-causing levels in order to prevent the flight of capital from reaching a point at which the countries' credit systems would collapse.

Once burned, twice shy; the East Asian countries switched to an export-first policy, which by enabling them to accumulate large dollar balances have prevented a recurrence of capital flight. I am calling it "mercantilist"

but in part, perhaps major part, it should be viewed as precautionary--to prevent a repetition of the economic crisis of the 1990s. Yet China had already begun to emphasize exporting. The reason may lie in John Maynard Keynes's analysis of mercantilism. He argued that if domestic demand for goods and services is weak, perhaps because of a low propensity to consume, there is likely to be a lot of unemployment, as otherwise supply would exceed demand. By devaluing the currency and thus making exports cheaper and so increasing the demand for exports, government can increase employment, because the higher output is, whether consumed domestically or abroad, the more workers are needed. The Chinese population was (and is) poor, so domestic demand was weak, and overall demand and therefore output could be increased by pushing exports. The success of such a policy would depend on the foreign demand for goods that Chinese industry was able to produce at reasonable cost, but that demand proved to be strong. The large dollar balances accumulated as a consequence of the export-first policy were available for investment. As a result, China is today the world's largest creditor.

Should the United States and other debtor nations reduce their foreign borrowing, China's (and other East Asian countries') mercantilist policies will become less attractive because interest rates will fall. Moreover, as domestic demand in those countries grows, there will be pressure to make imports cheaper and to divert production from satisfying foreign demand to satisfying domestic demand. On both counts, trade balances will become more even.

But how even? Japan, despite its very high standard of living, had, until the current economic downturn, a strongly positive balance of trade. An unusually high propensity to save, coupled with an inefficient system for distributing consumer goods and services, keeps domestic demand down. It remains to be seen whether, as China's economy grows, it will become more like Japan, or more like the United States.

Posted by Richard Posner at 9:33 PM | [Comments \(28\)](#) | [TrackBack \(0\)](#)

May 24, 2009

A Soda or Calorie Tax to Reduce Obesity--Posner

Articles in the *New England Journal of Medicine* on April 30, and in the *New York Times* on May 19, discuss a proposal now before Congress to impose a tax on sugar-sweetened sodas in order to reduce obesity. Taxes are ordinarily intended to raise revenue, but some taxes, such as taxes on alcohol and tobacco--and on carbon emissions, should such a tax ever be passed--are designed not to raise revenue but to alter behavior, and the more they succeed in altering behavior the less revenue they generate.

Sugar-sweetened sodas are high in calories, are drunk in great quantity,

and because they have little nutritional value don't substitute for other foods; they are a net addition to caloric intake. The *NEJM* article estimates that consumption of such sodas adds an average of 125 to 150 calories per day to the average American's diet, and cites studies that estimate that the elasticity of demand for such products is about -1, so that a 10 percent soda tax could be expected to reduce consumption by about 10 percent, with the result, according to the author of reducing the average person's weight by about 2 pounds a year.

I am skeptical, because the author ignores the possibility of substituting untaxed sugar-sweetened foods or beverages. People who crave sugar will find no dearth of substitutes for sugar-sweetened sodas. Moreover, most consumers of these sodas are not and never will be obese. They may well be overweight, but all that that means is that they are heavier than the "ideal" weight calculated by physicians; if they are only slightly or even moderately heavier, the consequences for health or social or professional success are apparently slight.

To the extent that a soda tax would cause substitution of equally sugared foods, it would not only have no effect on obesity; it would yield no revenue--a material consideration because supporters of the tax hope, albeit inconsistently, that it will both reduce obesity significantly and contribute significantly to financing the Administration's ambitious and very costly program of health-care reform.

There are many obese Americans, in the sense of ones who are grossly overweight (with some being morbidly obese), and we should consider whether society should be concerned with obesity if not with mere overweight. Obesity impairs health, and, in most segments of the population it diminishes social and professional success as well, and so it can be regarded as self-destructive behavior. Some of it is involuntary--there are people whose genes make it virtually impossible for them to avoid becoming obese--but most obesity could be avoided by careful diet and exercise. The obese are people who by dietary choice and preference for a sedentary style of life have traded off the costs of obesity against the costs of being thin and have decided (at least in a "revealed preference" sense--they may not have consciously chosen a style of life that predisposes them to obesity) that the costs of thinness preponderate over the benefits. And in general we do not try to prevent people from making such tradeoffs.

But there are two situations in which preventing people from choosing the style of life that maximizes their utility can be defended (provided certain assumptions are made about cost and efficacy) on economic grounds. One is where consumers are unable to evaluate a product or to act upon their evaluation; another is where a voluntary transaction imposes costs on other people which the transactors do not take into account.

The first is a significant factor in the soda market. The sellers advertise

very heavily to children, who do not have the knowledge or the self-control that they would need to be able to resist such advertising. In well-ordered households, the parents regulate children's access to television and the Internet and know they should limit the children's consumption of sugar-flavored drinks and do limit it. But in many modern American households, especially but not only those in which there is only one parent, children's access to soda and soda advertising is not restricted.

The solution, though, is not a tax on sodas, as such a tax would have only a small effect. A ban on advertising would be preferable; it would probably impose only slight costs on adult consumers of such drinks, because the advertising of such drinks contains little information. It is true that such a ban would reduce new entry into the soda market and that this might lead to higher prices, but if so that would reinforce the effect on sales of the ban on advertising.

As to whether by increasing obesity the sale of sugar-flavored sodas imposes costs on other people besides the buyers, the evidence is mixed. Obese people have more health problems than the non-obese and hence higher annual medical costs; they also lose more time at work because of illness. Their poorer health increases the medical costs of other people in their insurance pools and reduces the productivity of their employers, assuming realistically that employers cannot selectively reduce the wages or health benefits of their obese employees. Cutting the other way, obese people have a reduced life expectancy, and the shorter a person's life, the less an above-average annual cost of medical care translates into an above-average total (lifetime) cost. But assuming nevertheless that the net social costs of obesity are positive, this would be a ground for arguing for taxing obesity, but such a tax would be unacceptable as well as cruel. The alternative of a soda tax would be unlikely to have much effect, for the reasons stated earlier.

Are there better ways of fighting obesity, assuming it is worth fighting? Probably not. Education would probably have very little effect, because almost all people know that being fat has bad consequences and that eating foods rich in sugar and butter and not exercising increase the likelihood of becoming obese. Obesity is concentrated in the lower middle class, which contains a high proportion of people who have very high discount rates, which prevents them from giving significant weight to the future consequences of present behavior.

Children may be ignorant about the costs of obesity and the effects on it of sugar, but because of lack of self-control and children's inability to imagine themselves as middle-aged adults, I doubt that trying to educate them in the dangers of drinking sugar-sweetened beverages would be effective.

A tax on calories, or on high-calorie foods or ingredients, would be difficult to design and administer and would impose welfare losses, without significant offsetting wealth gains, on thin people. A further

problem is that fattening foods, including sugar-flavored sodas, have fallen in price over time relative to fruits and vegetables and other healthful foods, so that a tax on calories would be highly regressive.

A modest measure would be to bar the sale or other provision of sugar-flavored sodas and other fattening foods in schools, and the substitution of nutritious low-calorie school lunches for the present fare. In addition, more school time could be allotted to physical education, which in recent years has diminished in most schools. The cost of these measures would be modest and they would have some effect in reducing obesity.

Posted by Richard Posner at [4:06 PM](#) | [Comments \(23\)](#) | [TrackBack \(1\)](#)

A Tax on Sodas? Becker

The number of overweight children and adults has grown sharply since 1980. The explanation is usually partly based on the increased availability of sodas and fast foods that have many calories. Also emphasized is the growing number of leisure hours spent at sedentary activities, such as watching television and using computers and cell phones. To combat obesity, an article in the April 30, 2009 New England Journal of Medicine by Brownell and Frieden argues for a tax on sugared beverages. I agree with Posner that this is a bad idea.

From the data presented by the authors of that article, only a very high excise tax on sugared beverages might reduce calorie intake enough to significantly affect the number of overweight and obese children and adults. According to these authors, sugar-sweetened beverages now account for about 10 to 15% of total calorie intake. They also claim that a review of various studies indicates that a 10% increase in the price of beverages reduces consumption by about 8%. These assumptions imply that a tax on beverages that increases its price by 10%-that means a 10 cent tax on a can of soda that sells for about \$1.00- would slightly reduce the intake of calories from sodas by 0.8% to 1.2%. Even this overstates the total effect on calorie consumption, given that consumers who like sugar would substitute toward cakes, candies, and fruit drinks that naturally have lots of sugar. The result of this tax on beverages would be at most a very small reduction in the intake of calories and sugar. Indeed, it is quite possible that since consumers do not only buy products on the basis of their sugar and calorie content, these substitutions away from beverages and toward sweets and other drinks induced by a tax on beverages could actually increase calorie and sugar consumption.

In addition, as Posner indicates, there is little reason to tax the many consumers of sodas and other sweetened beverages who do not become obese, and whose consumption does not cause any social problems. That is why the usual recommendation is not to tax all drinking, but only heavy drinking, or better still only the heavy drinkers who cause auto

accidents and other harm to innocent persons. A similar approach to the problem of overweight individuals would not tax consumption of beverages or fast foods, but would directly tax excess weight. Such a tax would be unusual to say the least, but it could be implemented if desired.

To me, calculations showing the minor effects of moderate taxes on sugared beverages on weight suggest that such taxes would be only the opening salvo in an effort to tax fast foods and other foods with many calories. One justification given by the authors of the New England Journal of Medicine article for caloric taxes is that the growing rate of obesity is partly due to ignorance of consumers, especially children, about the harmful health consequences of consuming many calories. It is also alleged to be partly due to the inability of consumers to act on the information they have because they are alleged to lack self control in their eating habits. These authors also argue that consumers who eat too much and become overweight impose costs on taxpayers since much medical care is financed out of government tax revenues. I do not find these arguments persuasive.

As Posner indicates, children without enough parental guidance and supervision are more likely than adults to be ignorant of the health consequences of high calorie intake, and children are also less able to exercise self-control over their eating. Very much offsetting this, however, is that the negative health consequences of being overweight and even obese will generally be significantly lower for children than for adults. The reason is that aside from very extreme obesity, the really harmful effects to overweight children will not usually kick in for another 25 or more years when they are in their forties or older. However, one can reasonably expect sizable progress during the coming decades in the development of drugs, such as lipitor, that will reduce the health consequences of high cholesterol and excess weight for heart conditions, diabetes, and some cancers. From that perspective, perhaps even ignorant and impulsive children are not acting so stupidly by indulging themselves in their eating since the future will likely see the development of drugs that will alleviate many serious medical conditions.

To be sure, taxpayers will pay for much of the cost of the development and use of these new drugs. This brings us to the argument that excess weight imposes costs on others through the health payment system. Yet such a health payment "externality" argument is hard to use consistently. Consider a person who significantly shortens his life because of heavy smoking, and thereby reduces the amount of public spending on him through social security, and subsidized health care. Would those who advocate taxes on beverages and other foods because obese persons make use of publicly funded health benefits support a subsidy to smoking if smoking cuts the use of health care and social security benefits? Clearly not, and nor should they. The same logic implies skepticism toward arguments to tax sugared beverages because obese persons make greater use of the health care system.

Many doctors and others who advocate taxing sugared beverages and

fast foods at heart do not believe that consumer taste for sugar and fast foods should be taken into account in devising public policy. Perhaps not, but they have to advance better arguments than they have done so far to justify policies that interfere with the exercise of these tastes and desires.

Posted by Gary Becker at [3:39 PM](#) | [Comments \(1901\)](#) | [TrackBack \(1\)](#)

May 17, 2009

The Conflict in Modern Conservatism Once Again-Becker

Posner and I decided to post again this week on the conservative movement because of the great interest in our discussion last week. I will try to respond to some of the thoughtful comments and criticisms, and clarify some of my claims.

I claimed in that post that the current Republican Party is trying to incorporate two inconsistent sets of beliefs: one is the support of competition and generally freer markets, and the other is the advocacy of interventionist policies on various social issues, such as gays in military, stem cell research, or in international affairs. Both these positions are often linked together as "conservative", but they involve contradictory views of government. I argued for a consistent conservative position that supports individual choices, and opposes big government. To be sure, government intervention may be required when individuals make decisions that impose sizable external costs (or benefits) on others that are not incorporated into their decisions. On this approach, however, the harmful (or beneficial) effects on others must be considerable before government actions would be justified because governments are generally so inefficient.

A blog by the excellent development economist William Easterly (http://blogs.nyu.edu/fas/dri/aidwatch/2009/05/confused_american_liberals_and.html) suggests a different definition of conservative beliefs, as do some of those who posted on our blog. Easterly argues that the true definition of a conservative is someone who respects traditions and existing institutions, and who wants to limit change. Although that is a common definition of the essence of conservatism, I do not believe it is a consistent or sensible one. I do agree that considerable respect for what has survived and thrived in the past is warranted, and my anti-big government conservative would certainly respect institutions that have performed well for a long time. However, conditions do change, sometimes in crucial ways, and a sensible conservative philosophy would recognize the necessity of changing one's views when this happens, even when that goes against venerable traditions.

To take one example, until the latter part of 19th century, married women in England were not allowed to own personal property, including

money, in their own name, Even though they had a long history in England and many other countries, such laws were discriminatory and undesirable. Note that some other countries, notably Islamic countries, did not have such laws. Another example: laws against divorce may have made sense in an environment where women did not work and had many children since women would have faced serious financial difficulties if their husbands divorced them (I say "may have" because laws might have protected women's rights to financial support if divorce had been allowed). For these reasons the great philosopher, David Hume, who was a strong supporter of freedom of choice, argued for laws against divorce. However, anti-divorce laws make little sense in the modern world when many married women work to earn a living, and they have few children. Therefore, a true conservative that generally opposes government involvement in private decisions would fully support laws that make divorce quite easy to obtain by both men and women.

Many comments on my discussion centered on the issue of abortion, and that is an especially difficult issue for someone who believes in individual rights. For there is an obvious conflict between the rights of women to control their bodies and their motherhood, and the rights of fetuses that might be far enough along in their development to be considered human beings. This is a very prominent example of the general difficulty of determining where to draw the line when the rights of children conflict with the rights of their parents. I do not claim to have a definitive resolution of this conflict in the case of abortion, or in some other parent-child conflicts. But I come down on the side of women's rights to make decisions about their body, except in very late term abortions where fetuses can survive outside a woman's body, and therefore can be considered real children.

Abortions often allow women to have children at later dates when they are better prepared emotionally and in other ways to have children. In effect, abortions in these cases would allow women to substitute children who would be born later, and would be better taken care of, for the fetuses that are aborted now. That seems to me to be a tradeoff worth making. Moreover, laws banning abortion would be difficult to enforce against wealthy women since they would be able to get abortions illegally under reasonably good conditions, including by going abroad. Poor women who want abortions would suffer the most from enforcement of an anti-abortion law, as they are the ones who mainly suffer from laws against the use of drugs and many other types of laws.

Conservatives are not isolationists on international affairs since they recognize that the interests of a country like the US are affected by what happens in other countries. This is clear in Reagan's successful efforts to wear down the Soviet Union during the Cold War, or in more contemporary efforts to anticipate terrorist attacks planned in other countries. However, just as with the use of government powers on purely domestic issues, conservatives would recognize that governmental foreign actions are usually very inefficient (as in conducting wars), and

are often driven by special interests. A conservative philosophy would limit governmental international interventions to cases where the risks from not taking actions are very large, and the interventions reasonably straightforward.

Posted by Gary Becker at 7:59 PM | [Comments \(68\)](#) | [TrackBack \(0\)](#)

Conservatism II--Posner's Comment

My post last week on the decline of the conservative movement in the United States received more than 200 comments. Many of them were very thoughtful, and many others were very shrill.

It is apparent that global warming, abortion, and guns, in approximately that order, arouse particular emotions among many passionate self-described conservatives. About the first of these three issues, I wish to clarify my position briefly. I do not think there is much doubt that carbon emissions generated by human activities increase the amount of carbon dioxide in the atmosphere and by doing so raise surface temperatures. How much they raise them and with what consequences remain uncertain. I merely think that the risk of catastrophic global warming is sufficiently great to warrant more vigorous remedial efforts than have been attempted thus far by the United States.

About abortion, my personal position is the same as Becker's. I will add only that I think the legality of abortion should be determined by legislatures rather than by courts. I think *Roe v. Wade* was a mistaken decision, though probably one that we shall have to live with.

Similarly, I think private gun ownership should be a matter for legislative determination, rather than judicial. The Second Amendment is unclear about whether there is a right to own guns for personal self-defense or hunting, and I don't think delving into eighteenth-century documents argued to bear on the meaning of the amendment is a sensible way of doing constitutional law in the twenty-first century.

Some commenters seem to believe that because I am critical of the current conservative movement, I must be a liberal--maybe even a left-wing Democrat. To those commenters, disbelief in global warming, in the regulation of gun ownership, and in the criminalization of early as well as late abortions is a litmus test of "true" conservatism. There are, in fact, multiple conservatisms, as Becker and I have emphasized. Like Becker, I believe in limited government and so do not support government activities that cannot be justified convincingly by reference to considerations of economic prosperity, basic individual liberties, or domestic or national security. I do not favor the curtailment of individual liberties on the basis of religious beliefs, nostalgia for the "good old days," or traditional social beliefs (such as distaste for racial minorities or homosexuals) that cannot be related to economic, libertarian, or security values. One of Reagan's great political achievements was to unite the

diverse conservatisms in a single political movement that managed to gain the support of a majority of the American people.

That unity has now dissolved, and it will require skillful political entrepreneurship plus overreaching by liberal politicians (or the kind of left-wing extremism that marred the late 1960s and early 1970s) to restore it.

The ideological division within the conservative movement has been compounded by a decline in intellectual and managerial competence--a tendency to substitute will for intelligence ("I believe it so it must be so"). Some commenters note the intellectual and ethical failings of liberals, and they are right to do so. But it is only at the Right, at present, that anti-intellectualism is embraced and extolled.

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Posted by Richard Posner at 5:43 PM | [Comments \(48\)](#) | [TrackBack \(0\)](#)

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The Right Place to Try Terrorism Cases

By John C. Coughenour
Sunday, July 27, 2008; Page B07

I have spent 27 years on the federal bench. In particular, my experience with the trial of Ahmed Ressaam, the "millennium bomber," leads me to worry about Attorney General Michael Mukasey's comments last week, urging Congress to pass legislation outlining judicial procedures for reviewing Guantanamo detainees' habeas petitions. As constituted, U.S. courts are not only an adequate venue for trying terrorism suspects but are also a tremendous asset in combating terrorism. Congress risks a grave error in creating a parallel system of terrorism courts unmoored from the constitutional values that have served our country so well for so long.

I have great sympathy for those charged with protecting our national security. That is an awesome responsibility. But this is not a choice between the existential threat of terrorism and the abstractions of a 200-year-old document. The choice is better framed as: Do we want our courts to be viewed as another tool in the "war on terrorism," or do we want them to stand as a bulwark against the corrupt ideology upon which terrorism feeds?

Detractors of the current system argue that the federal courts are ill-equipped for the unique challenges that terrorism trials pose. Such objections often begin with a false premise: that the threat of terrorism is too great to risk an "unsuccessful" prosecution by

adhering to procedural and evidentiary rules that could constrain prosecutors' abilities. This assumes that convictions are the yardstick by which success is measured. Courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court.

Critics raise more-legitimate concerns about whether judges have sufficient expertise over the subject matter of terrorism trials and whether the courts can adequately safeguard classified information. The truth is that judges are generalists. Just as they decide cases as varied as employment discrimination and bank robbery, they are capable of negotiating the complexities of terrorism trials. Last month in *Boumediene v. Bush*, the Supreme Court confirmed its confidence in the capability of federal courts. The justices explicitly rejected an attempt to carve away an area of federal court jurisdiction in service of the war against terrorism, saying: "We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance."

As for protecting classified information, courts are guided by the Classified Information Procedures Act, which played a prominent role during the trial of Ressam in my courtroom in 2001. I found the act's extensive protections to be more than adequate, but I also think that any shortcoming in the law can and should be addressed by further revision rather than by undermining the judiciary.

At the heart of this issue is the U.S. courts' insulation from the political branches. The courts' fidelity to legal precedent ensures that no matter which way the political winds blow, decisions pitting the interests of community safety against individual liberty will be circumspect and legitimate. Specialized terrorism tribunals, governed by separate rules, could respond to the perceived exigencies of the moment. If politically vulnerable actors start redesigning courts, it is conceivable that popular pressure would soon demand the admission of statements obtained by harsh interrogation techniques, or dictate that defense counsel cannot access information needed to mount a defense or cannot represent a defendant without undergoing a background check of undefined scope. Such practices are not without recent precedent at Guantanamo.

I also worry that special terrorism courts risk elevating the status of those who target innocent people. Despite the supposed grandeur of their aims, terrorists should surrender their liberty just like any other criminal.

At a time when our national security is so intimately linked with our ability to forge alliances and secure cooperation from countries that share or aspire to our fundamental values, we can ill afford to send the message that those values are negotiable or contingent. I recently participated in a seminar in Russia, where I have worked for 20 years to promote judicial reform. The seminar culminated in a mock trial with law students serving as jurors. Sharing the virtues of our independent judiciary and Constitution with those who represent Russia's future felt like a personal privilege. But I know this is also in our country's

strategic interest. I cannot help wondering if I will be able to speak with the same authority in the future if we lose confidence in the institutions that made us a model of reform in the first place.

John C. Coughenour is a federal judge in the Western District of Washington.