Spring 2008

The Silent Treatment: Retaliatory Government Shut-Outs Of The Press

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THE SILENT TREATMENT: RETALIATORY GOVERNMENT SHUT-OUTS OF THE PRESS

by

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INTRODUCTION

During his term in late 2004, Governor Robert Ehrlich of Maryland issued a directive that spurred one of the most high-profile cases of retaliation against critical news media.[145] On November 18, 2004, Ehrlich blacklisted two reporters in response to articles they had written by issuing the following instruction to his administration:

> Effective immediately, no one in the Executive Department or Agencies is to speak with [*Baltimore Sun* reporter] David Nitkin or [*Baltimore Sun* columnist] Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads.[146]

The Governor described his directive as "the only arrow in [his] quiver."[147] The reporters were also excluded from press briefings that other *Sun* reporters were allowed to attend.[148] Government officials returned phone calls and emails from all other reporters except Nitkin and Olesker.[149] The reporters and the *Baltimore Sun* sued the Governor, his press secretary and his deputy director of communications in *Baltimore Sun Co. v. Ehrlich.* Ultimately the reporters and their newspaper-employer failed in their claim against the Governor.[150]

Although *Baltimore Sun* is the most scrutinized recent case in which government retaliates by boycotting or shutting-out certain members of the

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[*] Samia Khan received J.D. from University of Kansas School of Law in May 2008.
[145] Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 413 (4th Cir. 2006).
[146] *Id.* at 413.
[147] *Id.* at 420.
[148] *Id.* at 414.
[149] *Id.*
[150] *See id.* at 421 (affirming District Court's judgment for defendant).

press,[151] it is by no means the first. In *Chicago Reader v. Sheahan*,[152] a reporter was denied access to an area of a prison where the press routinely received access.[153] Though she had previously been given access to the prison, the reporter was barred after she wrote an article that scrutinized questionable actions by prison officials.[154] Whereas the *Baltimore Sun* court found the Governor's directive did not amount to actionable retaliation,[155] the *Chicago Reader* court held for the press plaintiff.[156] How are these two cases of retaliatory press shut-outs so different that they warrant contrary decisions?

Government retaliation against critical press is a serious First Amendment issue. When the government shuts out or boycotts certain reporters or news organizations it deems "unobjective" or critical, it risks being sued for retaliation.[157] However, retaliatory shut-out cases, which are the focus of this Article, have been difficult for press plaintiffs to win in recent years.[158] In light of several of these recent decisions, government officials appear to have a great deal of latitude in shutting out members of the press in response to critical news or editorial opinions. In order for reporters to operate without fear, they may need to refrain from saying anything less than favorable about government affairs. With more opportunities for government officials to skirt the First Amendment, more reporters will be chilled from speaking openly on matters of political and public significance – speech that is the hallmark of First Amendment-protected expression.

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[151] *See, e.g.*, Joseph S. Johnston, Comment, *A Poisoned Arrow In His Quiver: Why Forbidding an Entire Branch of Government from Communicating with a Reporter Violates the First Amendment*, 36 U. BALT. L. REV. 135 (2006) (analyzing ruling in *Baltimore Sun* case); Amalia L. Fenton, *The Maryland Survey: 2005-2006: Recent Decisions: The United States Court of Appeals for the Fourth Circuit:* Baltimore Sun Co. v. Ehrlich: *A Departure from Uniform First Amendment Protections at the Expense of a Disfavored Profession*, 66 MD. L. REV. 1328 (2007); Arthur Santana, *Federal Judge Hears Arguments on Ehrlich's Baltimore Sun Ban*, WASH. POST., at B10 (Jan. 29, 2005) (reporting arguments made by both sides' attorneys during hearing); James Dao, *Maryland Governor Is Sued Over Step Against Journalists*, N.Y. TIMES, at A12, (Dec. 4, 2004) (reporting on suit filed by *Baltimore Sun* and events leading up to it).

[152] Chicago Reader v. Sheahan, 141 F. Supp. 2d 1142 (N.D. Ill. 2001).

[153] *Id.* at 1143.

[154] *Id.* at 1146.

[155] *See Baltimore Sun*, 437 F.3d at 420-21 ("As speech reflecting the Governor's own views and intent, the directive is not actionable because it is only the Governor's opinion and because he himself need not talk to reporters.").

[156] *Chicago Reader*, 141 F. Supp. 2d at 1147.

[157] *See Baltimore Sun*, 437 F. 3d at 413; *see also infra* Part II.A-B (describing cases involving retaliatory government actions in response to criticism).

[158] *See infra* note 81 and accompanying text (noting the unsuccessful nature of shut-out claims).

Part II of this Article describes retaliation claims brought by the press. Attention is first given to shut-out cases, but Part II also looks at other forms of retaliation by the government against the press. This part also discusses the government-press relationship, the negative perceptions of the press, and how this may affect the courts. Part III takes a closer look at the shut-out claim, the potential areas for courts to misapply the analysis and how these factors intertwine. This part also addresses the different approaches a press plaintiff can take to combat a retaliatory shut-out and the confusion involved with each. Part IV proposes a return to clarity in shut-out claim analysis. First, to adequately protect the press's First Amendment rights, courts must not be influenced by negative attitudes or perceptions regarding the press. The courts must then apply a more uniform and clear-minded approach, harkening back to the not-too-distant days of *Chicago Reader*.

I
BACKGROUND

A. Examples of Shut-outs

Shut-outs against the news media are gaining attention as a frequent form of retaliation in the last few years.[159] This form of retaliation can occur against particular reporters or entire news organizations. Shut-outs can involve barring reporters from government forums or denying them access to government employees and documents. In *Chicago Reader*, discussed above, a reporter was denied access to a prison to observe and conduct interviews as research for a story. The Cook County Department of Corrections, which the defendants operated, had a "written policy encouraging media access to the jail."[160] The reporter had previously gained regular access to some prison areas and had interviewed prisoners and prison officials.[161] As a result of her research, the reporter wrote an article about a lawsuit that alleged the prison subjected female but not male prisoners to strip searches.[162] After the strip search article was published, the reporter tried to gain access to a prison program area to observe a class offered to prisoners.[163] Although other accredited members of the press were routinely given access to these areas,

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[159] *See infra*, note 80 and accompanying text (noting the recent increase in shut-out cases); *infra* notes 271-76 and accompanying text (discussing the most recent press shut-out case).
[160] *Chicago Reader*, 141 F. Supp. 2d at 1143.
[161] *See id.* (stating that reporter was denied access to a staging area for strip searches but was given access to interviews and program areas of the prison).
[162] *Id.*
[163] *Id.*

this particular reporter was denied.[164] Prison officials claimed they did not deny the reporter access in response to criticism of the sheriff and police officials contained in the strip-search article "but because she misled them about the content of her article."[165]

In *Youngstown v. McKelvey*,[166] *The Business Journal*, a publication in Youngstown, Ohio, ran articles criticizing the actions of Mayor George M. McKelvey and his administration in the construction of a convention center.[167] A few weeks after the critical articles appeared, McKelvey issued a directive instructing city officials not to speak with any reporters from *The Business Journal*.[168] In addition, city officials denied the *Journal* access to information regarding the convocation center, and failed to fill public records requests from any its reporters.[169] The District Court in *Youngstown* decided in favor of the Mayor, holding the press plaintiffs did not prove all the elements of their claim.[170]

Raycom v. Campbell,[171] involved a shut-out in the broadcast context. A television station aired a story reporting that Cleveland police officers earned $84 thousand for 2300 hours of overtime that had accumulated for driving or escorting members of Mayor Jane L. Campbell's family around town and on out-of-town trips.[172] Following the story, the Mayor issued an edict that prohibited city officials and employees from speaking to any reporters from the station except through formal document requests.[173] The court denied the plaintiffs' motion for a temporary restraining order, ruling that they were unlikely to succeed on the merits.[174]

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[164] *See id.* at 1143 (noting that the program areas were classes and other group activities were held was not open to the general public but other members of the press were routinely given access).
[165] *Id.* at 1146.
[166] Youngstown Publ. Co. v. McKelvey, No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005), vacating as moot No. 05-3842, 2006 WL 1792215 (6th Cir. June 27, 2006) (By the time the appeal for this case was heard a new Mayor had taken office and formally rescinded the edict. The court found that the plaintiffs had not established that the conduct was capable of repetition).
[167] *See Youngstown*, 2006 WL 1792215 at 1 ("Beginning in February 2003, the *Business Journal* began publishing news articles criticizing Mayor McKelvey's agreement to purchase land for a proposed convocation center at a price allegedly higher than its value.").
[168] *Id.*
[169] *Id.*
[170] *Id.* at 9.
[171] Raycom Nat'l Inc. v. Campbell, 361 F. Supp. 2d 679 (N.D. Ohio 2004).
[172] *Id.* at 681.
[173] *Id.*
[174] *Id.* at 688.

In *Borreca v. Fasi*,[175] the mayor of Honolulu ordered his employees to bar a reporter with the *Honolulu Star-Bulletin* from attending a press conference that was open to the rest of the press.[176] The mayor also refused to talk to the reporter. After reading the reporter's articles and hearing that the reporter had called him a "crook," the mayor labeled the reporter as "irresponsible, inaccurate, biased, and malicious in reporting on the mayor and the city administration."[177] The court granted the reporter's preliminary injunction, enjoining the mayor and his office from barring the reporter from news conferences that other press members were allowed to attend.[178]

A similar situation occurred in *Times Picayune Publishing Co. v. Lee*.[179] In Sheriff Harry Lee's opinion the *Times-Picayune* news coverage of his office was "inaccurate and systematically biased against him."[180] After failing to print a correction that he demanded, Lee ordered all of his public information officers to stop notifying the newspaper about press conferences and bar its reporters from attending press conferences.[181] He also ordered his employees not to answer any questions from *Times-Picayune* reporters, unless the questions were submitted in writing.[182] The District Court granted a preliminary injunction to the *Times-Picayune* against Sheriff Lee.[183]

Government shut-outs in retaliation for critical coverage take the form of "denied access" to government forums or documents as in *Chicago Reader*, as a denial of access to public employees as in *Baltimore Sun*, or as a combination of both as in *Youngstown*. In any of these forms the underlying problem is retaliation that has a chilling effect on speech.

B. Other Types of Retaliation Against the Press

Government displeasure with critical press has manifested itself in a variety of retaliatory actions. While shut-outs are commonly used, they are not the exclusive retaliatory means that media organizations have challenged as a violation of First Amendment rights.

Another common method of retaliation that public officials have used

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[175] Borreca v. Fasi, 369 F.Supp. 906 (D. Haw. 1974).
[176] *Id.* at 907-08.
[177] *Id.* at 907.
[178] *Id.* at 911.
[179] Times Picayune Publ'g Co. v. Lee, No. 88-1325, 1988 WL 36491 at 1 (E.D. La. 1988).
[180] *Id.* at 1.
[181] *Id.* at 2.
[182] *Id.*
[183] *Id.* at 11.

is withholding advertising the government body had previously given to a particular news organization. In *North Mississippi Communications, Inc. v. Jones*,[184] owners of the *North Mississippi Times* initiated a lawsuit against the county board, claiming that the board violated the newspaper's First Amendment rights by withholding advertising in retaliation for "highly critical" articles that the paper had published about the board's activities.[185] The *North Mississippi Times* began publishing critical articles beginning in 1975. Before mid-1977, the county board had given an equal number of advertisements to the *Times* and the *Olive Branch Tribune*, a much smaller county newspaper. Beginning in mid-1977, the board opted to give almost all of its advertisements to the *Tribune*. By 1978, the *Times* received only fourteen notices while the *Tribune*, despite having a much smaller circulation, received 291.[186] After a series of appeals and remands, the Court of Appeals reversed the District Court's ruling and held in favor of the *Times*.[187] The case was remanded for additional findings of fact.[188]

A similar scenario occurred in *El Dia, Inc. v. Rossello*.[189] Beginning in January 1997, *El Nueva Dia*, a Spanish daily newspaper with circulation in Puerto Rico, published articles detailing instances of fraud and waste in Governor Pedro J. Rossello's administration.[190] On April 13, 1997, the paper published an article critical of Rossello's term in office. The next day eighteen government agencies that had previously routinely advertised with the newspaper terminated their advertising contracts.[191] In proving retaliatory motive, the newspaper showed that the governor and members of his administration offered to return advertising to the paper if it began publishing favorable articles.[192] The Court of Appeals affirmed the District Court's denial of the defendant's motion to dismiss.[193]

Government retaliation can also occur as an overt retaliatory harassment or conspiracy. In *McBride v. Village of Michiana*,[194] a reporter sued several government officials for their retaliatory actions in response to

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[184] N. Miss. Commc'ns, Inc. v. Jones, 951 F.2d 652 (5th Cir. 1992).
[185] *Id.* at 653.
[186] *Id.*
[187] *Id.* at 655.
[188] *Id.* at 657.
[189] El Dia, Inc. v. Rossello 165 F.3d 106 (1st Cir. 1999).
[190] *Id.* at 108.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 111.
[194] McBride v. Village of Michiana, 100 F.3d 457 (6th Cir. 1996).

her "less-than-glowing" political articles.[195] McBride accused the officials of repeatedly calling her employer to urge she be taken off the political beat, and threatening a boycott if she was not removed from covering politics.[196] One of the officials called McBride's potential employer and urged the employer not to hire McBride.[197] The court affirmed the denial of qualified immunity to the defendant and remanded for a determination of which of the defendant's acts constituted improper retaliation.[198]

Rossignol v. Voorhaar[199] involved an elaborate conspiracy to silence criticism by buying out all the copies of a paper. In *Rossignol*, several deputies and the Sheriff in St. Mary's County, Maryland conspired to buy out every copy of the election-day issue of Rossignol's newspaper, *St. Mary's Today*, from newsstands across the county before the general public could purchase the paper.[200] The issue included critical articles on County Sheriff Richard Voorhaar and his friend Richard Fritz, a candidate for St. Mary's County State's Attorney.[201] The front-page story reported that Fritz had been convicted of rape.[202] Another article reported that Voorhaar assigned a deputy who had complained of sexual harassment to work directly under the supervision of the harasser.[203] After conversations and meetings at the office and at their homes, a group of deputies decided to form two teams to buy out all of the copies of the issue and hold a bonfire party upon completion of the plan.[204] The conspirators "viewed the seizure as a 'good opportunity' for two things: 'to piss [Rossignol] off' and to 'protest [their] disagreement' with Rossignol's 'irresponsible journalism.'"[205]

On the night before the election, off-duty officers in plain clothes drove to various vendors and purchased their entire stock of newspapers.[206] Later that night, after learning of the plan, Rossignol drove to the vendors to

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[195] *Id.* at 459.
[196] *Id.*
[197] *Id.*
[198] *See id.* at 462 (stating that "the district court should differentiate between those alleged improprieties by the defendants that constitute protected expressions of the defendants' own ideas . . . [and] those allegations that involve intimidation, harassment, and retribution directed toward McBride solely to punish her for choosing to exercise one of the basic freedoms upon which our society is founded.").
[199] Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003).
[200] *Id.* at 519-20.
[201] *Id.* at 519.
[202] *Id.* at 520.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

replenish their stock. The deputies followed him and bought out the new stock as well.[207] Voorhar and Fritz supported the plan. Voorhaar contributed $500 to help defray costs, and wished his deputies good luck.[208] Fritz helped map out the plan, and researched the plan's constitutionality, advising the deputies that it was legal under both Maryland and federal law.[209] The Fourth Circuit Court of Appeals reversed and remanded the trial court's grant of summary judgment to defendants.[210]

Government officials may impose financial burdens and taxes on certain publications as a form of retaliation. In *Grosjean v. American Press Co.,* nine newspaper publishers in Louisiana brought suit to enjoin enforcement of a Louisiana statute imposing a tax.[211] The statute in question imposed a 2% tax on publications with circulations of 20,000 copies or more per week.[212] It affected only thirteen publications out of more than 120 weekly newspapers in the state.[213] Although the Supreme Court focused on curtailment of First Amendment freedoms without explicitly mentioning retaliation, the Court did note that the form of the tax was suspicious because it penalized the publishers and limited the circulation of "a selected group of newspapers."[214] The Court noted that publishers had demonstrated that the tax was aimed at large papers that had criticized former Louisiana Governor and then-U.S. Senator Huey Long. Long and other government officials referenced the tax as a tax on "lying newspapers."[215] In holding for the newspapers, the *Grosjean* Court looked at the tax "in the light of its history and of its present setting" and viewed it as "a deliberate and calculated device in the guise of a tax to limit the circulation of information."[216]

Retaliation in the broadcast context can occur through a number of regulatory actions, including fines and failure to renew or revocation of licenses. However, because the FCC has regulatory power over broadcasters,[217] they are generally afforded less freedom from government interference with speech.[218]

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[207] *Id.*
[208] *Id.* at 521.
[209] *See id.*
[210] *See id.* at 519.
[211] Grossjean v. American Press Co., 297 U.S. 233, 240 (1936).
[212] *See id.*
[213] *See id.* at 240-41.
[214] *Id.* at 251.
[215] *Id.*
[216] *Grosjean,* 297 U.S. at 250.
[217] 47 U.S.C. § 303 (2000) (authorizes FCC's regulatory power for public convenience and interest).
[218] Broadcasters still must allow political candidates the right to equal time. *See* 47 U.S.C. §

Although, all forms of retaliation can occur against both print and broadcast media members, many recent retaliation cases deal with shut-outs.[219] Recent press boycott cases have been less successful, in comparison, to claims brought against other forms of government retaliation.[220] Is the shut-out retaliation claim itself harder to bring, or are the courts shifting their attitudes against press in retaliation claims? Or is it both?

C. Government and the Press: An Unbalanced Relationship?

When examined in the context of attitudes towards the government-press relationship, it may be no surprise that the instances of actionable government retaliation against critical news coverage seem to have increased. The convoluted analysis in recent shut-out cases seems to reflect non-interventionist attitude on the part of courts. This laissez-faire attitude may be due to the public's negative perception of the press, which is either shared by or has an influence on the courts. Also, courts may be too focused on the mutual antagonism historically inherent in the government-press relationship. In concentrating too much on the mutual rights of government officials and

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315 (2000). *See also* 47 U.S.C. § 503(b) (states fines which can be levied against broadcasters); 47 U.S.C. § 312 (states administrative sanctions). However, there are some regulatory actions in the broadcast context that may reach the level of retaliation. *See* Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet?: Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35, 47-50 (1997-98) (discussing Nixon's strategy to intimidate broadcasters that aired unfavorable coverage of the administration). The Nixon administration intimidated broadcast networks such as CBS to begin reporting more favorable coverage of the administration by threatening their license. During coverage of the Watergate scandal, the Nixon administration also threatened license renewals of television stations owned by the Washington Post. *See* Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1153-1154 (discussing Nixon's attacks on license renewal attempts by the Washington Post's stations in Florida). *See generally* LUCAS A. POWE JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (University of California Press 1987) (discussing regulatory threats to broadcasters, including Nixon's attacks on certain networks). "Nixon, it was learned later, told aides, 'The main thing is The Post is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it renewed.' Suddenly, four challenges were filed against the company's Florida TV license renewals, triggering a 50 percent plunge in the price of Post stock." *See* J.Y. Smith & Noel Epstein, *Katharine Graham Dies at 84*, THE WASHINGTON POST COMPANY, July 18, 2001, http://www.washpostco.com/history-kgraham-obituary.htm (last visited Feb. 9, 2008).

[219] In the last six years such cases as *Baltimore Sun*, *Youngstown*, *Raycom* and *Chicago Reader* all involved shut-outs, whereas many of the cases detailing other forms of retaliation occurred before 2000.

[220] *See* Bill Tretbar et al., "News Boycotts," Media Law Seminar, Kansas Bar Association, Oct. 20, 2006, *available at* http://www.fleeson.com/Publications.htm (last visited Feb. 9, 2008) (stating that claims brought based on forms of retaliation other than shut-outs are more successful).

reporters to shape their respective messages, the courts are blind to when the government becomes the dominant force in the relationship. Both of these factors may serve as the latent motivation in the courts' decisions against press plaintiffs in the recent shut-out cases.

Presumably a government official who respects the press' First Amendment rights is one who tolerates dissent. Justice Brennan said that government officials must be "men of fortitude, able to thrive in a hardy climate."[221] Securing an environment that insulates First Amendment freedoms requires a government that is equally tolerant of publicly aired criticism, as it is of speech that is neutral or flattering of the administration.[222] Such an environment is necessary in order to prevent the government from "skewing or distorting public debate" and "acting with certain illegitimate ideological motives" which creates "government-imposed orthodoxy or thought-control."[223] When the government retaliates in response to criticism and chills further criticism, the danger of government thought-control becomes a possibility.

The relationship between the government and media has always been one of manipulation. American history is riddled with accounts of a power struggle between the press and the administration over the release of information to the public. This "often stormy relationship" stretches back to the leak of the Jay Treaty during George Washington's administration.[224] During Theodore Roosevelt's presidency the government-press relationship was marked by a bullying of the press to generate the right kind of publicity. Roosevelt decided which reporters would cover him and which would have access to the news.[225] His personality was marked by "disdain for crusading journalism" and "high-handedness in dealing with those who opposed him."[226] He adeptly manipulated the press' coverage from what was termed his "bully pulpit."[227] As the sophistication of the press evolved, the manipulation became less one-sided:

Presidential-press relations in the modern era assumes that each

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[221] New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).
[222] *See* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1108-09 (2005) (discussing the anti-discrimination value of the First Amendment which stresses the government's duty to be equally tolerant or intolerant of all speech).
[223] *Id.* at 1109.
[224] GEORGE JUERGENS, NEWS FROM THE WHITE HOUSE 266 (University of Chicago Press 1981).
[225] *Id.* at 64.
[226] *Id.* at 79.
[227] *See id.* at 41-90 (describing the methods Roosevelt used to manipulate the press).

> possesses weapons against the other. If the president has ways to manipulate the news and punish or reward individual reporters, the press is not helpless in asserting its own prerogatives. In a sense, the unique tension in their relationship arises from the countervailing power between them.[228]

A manipulative tug-of-war occurs in most government-press dealings, and is not exclusive to the current era. It is, in a way, essential and inherent to the business.[229] A certain amount of mutual antagonism is an essential element in the government-media exchange:

> The press and the government are, and always should be, antagonists. The government is trying to withhold information, the press is trying to relate that information to the public...If there isn't that antagonism and that conflict, the press isn't doing [its] job.[230]

Government officials have many, potentially legitimate, means of message control. They can choose to stay silent or engage in counter-speech. Many government officials expend substantial resources on public relations to counter criticism with their own message.[231] A government official may form close relationships with reporters in hopes of gaining favorable coverage or field more questions from friendly reporters at press conferences.[232] The White House has also been known to offer pre-packaged news pieces to

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[228] *Id.* at 66.

[229] For a general discussion on politics, press coverage and the public debate, *see* LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS (University of Chicago Press 2000).

[230] *See* Daniel M. Faber, *Coopting the Journalist's Privilege: Of Sources and Spray Paint*, 23 N. M. L. REV. 435, 442 (1993) (quoting an interview transcript with Professor William Dixon).

[231] *See* Christopher Lee, *Update: Prepackaged News*, WASHINGTON POST, Feb. 14, 2006, at A13 (reporting on the controversy over federal public relations spending). Between 2003 and end of 2005, seven federal departments under the Bush administration spent a total of $1.6 billion on contracts with public relations firms and advertising agencies.

[232] *See* Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 418 (4th Cir. 2006) (stating plaintiffs conceded "that a public official's selective preferential communication to his favorite reporter or reporters would not give the much larger class of unrewarded reporters retaliation claims"); Kevin T. Baine et al., *Making Sense of the Reporter Boycott Cases*, Media Law Resource Center Bulletin, No. 4, Part A, 30 (December 2005) ("A government official may seek to secure the advantages of granting favored access to reporters . . . but an official may not exclude a reporter from the ordinary channels through which the government communicates to the press in general. . . .").

television stations, touting government policies.[233]

In light of an inherent tendency for some manipulation, courts may be reluctant to find a First Amendment violation when it seems a government official is simply controlling his message by picking and choosing which reporters receive information.[234] The Fourth Circuit Court of Appeals in *Baltimore Sun* made special mention of the fact that government officials often favor certain reporters whose expression they approve.[235] Government treatment of access as a matter of favor or disfavor is part of the "pervasive and everyday relationship between government officials and the press."[236]

The shut-out cases that courts have addressed do not just involve a controlled release of information. They often involve a direct retaliation against criticism and implicate the ability of other government employees to speak freely. Naturally the antagonism to information control may be neither healthy nor unhealthy, but simply the way our political system works.[237] When the manipulation reaches the point beyond crafting a message to overt retaliation, however, the antagonistic balance reaches an unhealthy point. Courts must be able to recognize when this occurs. The fear of government retaliation effectively works to stop further criticism and stifling of the press. If First Amendment ideals are upheld, this would not be part of the inherent antagonism in the government-press relationship. Even if mutual manipulation and antagonism are a part of the deal, the courts must step in when they reach damaging levels.

Government retaliation is not the only arena for observing the imbalanced manipulation of the press. Public officials have taken the favoring of reporters to a new level. In September 2006, the *Miami Herald* learned two of its reporters had accepted government pay for appearing on U.S. radio and television programs, aired in Cuba, aimed at undermining the Castro administration.[238] One of the *Miami Herald* reporters received almost

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[233] *See* Lee, *supra* note 88 ("[A] spat erupted between the [Government Accountability Office] and the White House over whether the government's practice of feeding TV stations pre-packaged, ready-to-air news stories that touted administration policies (but did not disclose the government as the source) amounted to 'covert propaganda.'").

[234] *See* Baine, *supra* note 93, at 28-30 (arguing that a government official should not be punished for declining to speak for a reporter, and notes the necessity for government officials to have the ability to control their message and agenda for policymaking purposes).

[235] *See Baltimore Sun Co.*, 437 F.3d at 418.

[236] *Id.*

[237] *See* Potter Stewart, *Or of the Press*, 50 HASTINGS L. J. 705, 708-710 (1999) (arguing that as the fourth branch of the government the press was intended to be a part of the "tug and pull of the political forces," engaged in some amount of friction with the other branches). *See* Potter Stewart's article for a general defense of the press's influence.

[238] Oscar Corral, *10 Miami Journalists Take U.S. Pay*, MIAMI HERALD, Sept. 8, 2006, at 1A.

$175,000 in compensation from the government, dating back to 2001.[239] The *Miami Herald* immediately fired the reporters for conflict of interest.[240]

Another element of a potentially unhealthy relationship between the government and the press is the negative perception of the news media. The causes and effects of these perceptions of the press are manifold. The government's increased aggressive manipulation may be caused by a general view of news media as a negative force,[241] which the press may have fostered by being too hostile.[242] Or the press's hostility may be the direct effect of dealing with officials who view it as the enemy. Much discussion has surfaced focusing on press bias and the growing distrust of the press.[243] Disdain for news media seems to have evolved not only in the government but in the general public as well.

In 2005, the public's level of confidence in newspapers dropped seven percentage points.[244] The press's power to mold American politics is

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[239] *U.S. Only Hurts Itself by Paying Journalists; Cynicism Proved Correct in Cuba; Was Wrong in Sudan*, MINNEAPOLIS STAR TRIB., at 8A (Sept. 12, 2006).

[240] *Id. But see* Christina Hoag & Kathleen Mcgrory, *El Nuevo Herald dismissals protested*, MIAMI HERALD, Sept. 20, 2006, at 3B (reporting on Cuban exiles protesting the firing of the reporters).

[241] *See* Mark Jurkowitz, *Communication or Manipulation?*, BOSTON GLOBE (March 7, 2005), available at http://www.boston.com/ae/books/articles/2005/03/07/communication_or_manipulation (reporting on the uneasy adversarial relationship between the Bush administration and the press).

[242] *See* Michael Socolow, *At War: The Government and the Media*, BOSTON GLOBE, Dec. 12, 2005, at A23, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/12/13/at_war_government_and_the_media ("Skepticism is healthy, but too many journalists practice reporting informed by a pessimistic cynicism. This corrosive attitude is damaging the news industry; newspaper circulation and TV news viewership continue to decline."). *But see* Michael Schudson, *Why Democracies Need an Unlovable Press*, *in* FREEING THE PRESS 77-84 (Timothy E. Cook ed. 2005) (discussing characteristics of the press that "few regard as ennobling about the press," but "make news a valuable force in democratic society.").

[243] *See generally* L. BRENT BOZELL III ET AL., AND THAT'S THE WAY IT ISN'T: A REFERENCE GUIDE TO MEDIA BIAS (Media Research Center 1990); JAMES M. FALLOWS, BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY (Knopf Publishing Group 1996); Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 9 (2005). W. Lance Bennett, *The Twilight of Mass Media News*, *in* FREEING THE PRESS 121 (Timothy E. Cook ed. 2005)

[244] Project for Excellence in Journalism and Rick Edmonds of The Poynter Institute, *Public Attitudes*, THE STATE OF THE NEWS MEDIA 2006: AN ANNUAL REPORT ON AMERICAN JOURNALISM, PROJECT FOR EXCELLENCE IN JOURNALISM, *available at* http://www.stateofthenewsmedia.org/2006/narrative_newspapers_publicattitudes.asp?cat=7&media=3 (last visited Feb. 10, 2008).

undeniable.[245] The negative attitude towards media becomes palpable when the press abuses its power, like in an incident such as CBS news anchor Dan Rather's use of discredited documents.[246]

> [T]he 24-hour cacophony of media criticism 'has a way of really increasing the volume on a given scandal,' such as the unproven documents about President Bush's fractured military career that tarnished Dan Rather's tenure at CBS News and led to his early retirement from the network.[247]

Even press plaintiffs are not immune from having their journalistic integrity impugned. One of the plaintiff reporters in the *Baltimore Sun* suit recently resigned amid allegations of plagiarism.[248] The problem may be further compounded as the watchdog goals of the press become influenced by profit-driven ideals, and the lines between opinion, entertainment, and information become blurred.[249] In refusing to protect the press, courts may be influenced by the attitude that contemporary news media are failing to uphold its journalistic duties and causing more harm than good.[250] As the public loses

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[245] *See* KATHLEEN HALL JAMIESON & PAUL WALDMAN, THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD 95-129 (2003) (discussing how the press shapes political outcomes).

[246] *See* Nick Madigan, *Policing the Press*, BALT. SUN, Jan. 14, 2007, at 1F (discussing criticisms of the news media).

[247] *Id.*

[248] *See* Paul Moore, *Failure to Credit Others' Words Breaks Cardinal Rule*, BALT. SUN, Jan. 8, 2006, at 2F (quoting Olesker as saying, "I am sorry to say that in the course of doing those columns I unintentionally screwed up a handful of paragraphs. I am embarrassed by my sloppiness."); Nick Madigan, *Longtime Sun Columnist Olesker Resigns; Decision Comes Amid Questions Over Attribution*, BALT. SUN, Jan. 4, 2006, at 1B. (reporting on allegations against Olesker).

[249] *See* W. Lance Bennett, *The Twilight of Mass Media News*, *in* FREEING THE PRESS 117-121 (Timothy E. Cook ed., 2005) (discussing change in news content and stating that "[T]he most ironic result of journalism that maximizes profit over robust, free-wheeling debate is that it undermines the confidence of people in the information they receive, along with regard for the journalists who produce it."). *Compare* Regina G. Lawrence, *Daily News and First Amendment Ideals*, *in* FREEING THE PRESS 90-91(Timothy E. Cook ed., 2005) (explaining the watchdog ideal, which "serves as a crucial counterweight to governmental power"), *with* Diana Owen, *"New Media" and Contemporary Interpretations of Freedom of the Press*, *in* FREEING THE PRESS 143-56 (Timothy E. Cook ed., 2005) (discussing the increase in new media and the effect on the traditional press, stating that the focus in the new media culture is anything that can stimulate audience attention, regardless of whether it contributes to the greater good of the community).

[250] LEE C. BOLLINGER, IMAGES OF A FREE PRESS 24-39 (1991) (discussing the costs of courts' tendency to protect the autonomous press).

its respect for the news media, so may the courts. [251] Perhaps the shut-out retaliation cases, which are more common in recent years, have become the courts' outlet to reflect its own impatience with the press.

The government's traditional capacity to control its message, coupled with growing distrust of the press, has created a "tension between the press and the government [that] has hypertrophied to the point that neither is acting in the public interest."[252] Unchecked hostility and tension serve as the backdrop to retaliatory shut-out claims. As shut-out claims become increasingly unsuccessful, courts demonstrate an unwillingness to engage in the power struggle, thereby causing even more hostile battles for information. Negative attitudes directed at the press likely contribute to the courts' reluctance to find for press plaintiffs. Courts must recognize that a continued refusal to approach these cases perpetuates an unhealthy relationship and unchecked manipulation of the press. Such an approach will only further frustrate the press's role in serving the public. A hands-off approach is completely ineffective in taming government manipulation that reaches unbalanced and actionable levels.

II
SHUT-OUTS: A CLOSER LOOK

A. Potential Difficulties in Retaliatory Shut-out Claims

Despite the greater volume of shut-out retaliation cases, or perhaps because of it, press plaintiffs have a tougher time succeeding against retaliatory shut-outs, and the legal issues surrounding shut-outs are more convoluted. The success rate for press retaliation claims seems to be decreasing only in the shut-out context. Perhaps the courts have had their fill of press retaliation cases and the press in general, seeing no need to approach the issues with clarity. Two interrelated themes are common culprits in muddying shut-out claims: right of access and the "prerogatives of the office holder."[253] The former issue relates to whether the press has a right to access information not generally available to the public. The latter is a phrase used to describe government officials' interest as an employer, as well as their First Amendment rights in constructing their message and choosing when to

[251] *See* Jack M. Weiss, *Introduction, in* FREEING THE PRESS 71-72 (Timothy E. Cook ed., 2005) (discussing whether courts should take press performance into account when making decisions).
[252] Socolow, *supra* note 103.
[253] *See* Baine, *supra* note 93, at 27.

speak.[254]

1. *Finding Retaliatory Action in the Shut-Out*

One problem may be that the retaliation does not seem as explicit in shut-outs as in other claims of retaliatory First Amendment violations. In cases of retaliatory shut-outs, the government action often includes blocking reporters who speak to people for interviews or comment. The courts may be unwilling to find any retaliatory act that affects the press's First Amendment rights in cases that involve an official's exercise of his or her own First Amendment right not to speak to certain people or reporters.[255] When officials refuse to talk to certain reporters, it is just a matter of choice. Any government employee has the First Amendment right to choose not to speak with certain reporters or newspapers.[256] First Amendment protections extend to freedom of speech and expression, in addition to freedom from being compelled to speak.[257] A political candidate "who has First Amendment rights and is unencumbered by First Amendment obligations when he runs for office, does not lose all of his First Amendment rights when he is elected."[258] Additionally, an individual official can grant favor to certain reporters or manipulate the release of their message to shape their agenda and policy.[259] Furthermore, forbidding subordinate officials and employees from speaking to a press organization can be viewed as purely managerial: securing loyalty and

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[254] *See* Baine, *supra* note 93, at 27-30 (describing the prerogatives of the office holder exercising his First Amendment rights and in securing "one voice" for policymaking purposes).

[255] *See* Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 687 (4th Cir. 2000) (stating that when a retaliation claim *only involves retaliatory speech* by a public official it is not enough to constitute an adverse effect on plaintiff's free speech rights "in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow") (emphasis added); *infra* note 124-29 and accompanying text (discussing the analysis in Baltimore Sun regarding the government official's speech).

[256] *See* McBride v. Village of Michiana, No. 93-1641, 1994 WL 396143, at 6 (W.D. Mich. July 28, 1994) (J. Nelson, J., concurring) ("Public officials are under no constitutional obligation to speak to the press at all, moreover, whether diplomatically or undiplomatically. . . ."); Baine, *supra* note 93, at 27-30 (stating there is no basis for a retaliation claim where an individual employee or official chooses not to speak to the press). *But see* Baine, *supra* note 93, at 31 (stating that a public information or press officer's duty is to communicate to the press, therefore his First Amendment rights are curtailed and he cannot decide not to respond to a reporter's inquires because he disagrees with the coverage).

[257] For a general discussion on compelled speech, *see* David W. Ogden, *Is There a First Amendment "Right to Remain Silent"?: The Supreme Court's Compelled Speech Doctrine*, 40 FED. B. NEWS & J. 368 (1993).

[258] Baine, *supra* note 93, at 27.

[259] *See* Baine, *supra* note 93, at 29-30 (stating that very little harm to First Amendment interests occurs when an administration grants some reporters special access).

ensuring employees speak with one voice when implementing policies.

It would not be hard to use this rationale to argue against a retaliatory First Amendment violation. However, when officials selectively bar specific members of the press who have aired criticism, the retaliation is evident. In cases such as *Baltimore Sun*, the directive makes the purposes of the boycott clear: a response for a failure to "objectively report."[260] Such a response is a content-based response to the published material. A reporter could subsequently be chilled from any similar critical coverage for fear of being the subject to a similar shut-out directive. In many shut-out cases not only is the retaliation clear from the context and circumstances, but the conduct often goes beyond spinning a message.

Yet courts such as the one in the *Baltimore Sun* case refuse to find a retaliatory response from what appears to be a clear instance of retaliation. The plaintiff's shut-out retaliation claim must challenge adverse conduct or speech.[261] Noting the volume of state government articles written after Ehrlich's directive, the court stated that Nitkin and Olesker, the *Baltimore Sun* reporters subjected to the shut-out, were not actually chilled, and therefore another reporter would suffer nothing more than de minimis inconvenience.[262] The court also rejected the plaintiffs' alternative argument that "the Governor openly expressed a malicious intent to chill its speech and that the Governor's speech expressing such intent would alter a reasonable reporter's speech."[263] Plaintiffs were specifically referring to Ehrlich's "'combat metaphor,' describing publicly his directive as 'the only arrow in [his] quiver.'"[264]

Having determined that Ehrlich's conduct in denying access to the reporters did not constitute a substantial adverse impact,[265] the court turned to his speech. To bring a retaliation claim, Governor Ehrlich's speech had to concern private information about the reporter or "intimate that punishment, sanction, or adverse regulatory action [would] imminently follow."[266]

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[260] Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 413 (D. Md. 2006). *See* Johnston, *supra* note 7, at 150-66 (arguing that the *Ehrlich* court erroneously failed to examine the viewpoint-based nature of the Mayor's action and the broad nature of his ban).

[261] *Baltimore Sun*, 437 F.3d at 420.

[262] *See id.* at 419 ("Nitkin's and Olesker's actual response attests to the *de minimis* impact that the Governor's directive would have on reporters of ordinary firmness.") (original emphasis).

[263] *Id.* at 420.

[264] *Id.*

[265] *See id.* ("[A] reporter endures only de minimis inconvenience when a government official denies the reporter access to discretionary information or refuses to answer the reporter's questions . . . .").

[266] *Id.* (emphasis and citation omitted)

Denying discretionary access or refusing to answer questions did not constitute such a threat in the court's eyes.[267] Because the Governor only expressed his "views," "opinion" and "intent," and "need not talk to reporters," the court found no retaliatory conduct or speech which was adverse to a reporter's First Amendment interest.[268] By aggrandizing Ehrlich's "prerogative" to speak to reporters at his choosing, the court failed to appreciate the scope and context of the directive. Ehrlich's directive went beyond "opinion" by not only "intimating" a sanction, but actually implementing one.

2. *Government Employee Speech*

Although a government official may have the right to "insist on a consistent message" from those given the responsibility of communicating with the public, the First Amendment rights of subordinate employees are also implicated in an order to boycott the press.[269] Recent decisions indicate that trying to defend a public employee's First Amendment rights will not make shut-out cases any easier for the press to win. Courts seem less likely to recognize an employee's right to speak, at least when it is in the employee's official capacity. In *Garcetti v. Ceballos*,[270] the Court held that public employees had no First Amendment right to speak in their *official* capacity.[271] For example, an employee could be fired for complaining to his or her superiors concerning some job-related issue.[272]

The Supreme Court in *Garcetti* acknowledged that its jurisprudence in matters of employee-speech recognizes the constitutional rights of public employees.[273] It also noted the "importance of promoting the public's interest

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[267] *Id.* at 420-21 ("[H]is *only* arrow was to deny discretionary access and refuse to answer questions and that no further action would be taken against Nitkin and Olesker.") (original emphasis).
[268] *Id.* at 421.
[269] *See* Baine, *supra* note 93, at 30-31 (stating that although a government official may grant and order his subordinates to grant special access to reporters, he "may not . . . instruct officials who would have occasion to speak to reporters never to speak to a particular reporter.").
[270] Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).
[271] *See id.* at 1960 (noting that Ceballos' criticism of a search warrant, contained in disposition memo to his supervisor, occurred as part of his official duties as a prosecutor, and therefore was not insulated from employer discipline).
[272] See *id.* at 1958 ("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.").
[273] *Id.* at 1958.

in receiving the well-informed views of government employees engaging in civic discussion."[274] However, under the *Pickering* balancing test, there is a definite concern for the employer's interest in effective and efficient operation as a public entity.[275] The *Garcetti* Court stated that the first prong of the *Pickering* test asks whether the employer reacted to an employee speaking as a citizen on a matter of public concern.[276] The second prong takes the employer's interest into account and asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[277]

Although the Court of Appeals in *Garcetti* found for the employee because there was no disruption in the public employer's operation, the Supreme Court reversed.[278] Restrictions based on speech owing "its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[279] Despite the court's assurance that its decision did not reverse precedent protecting a public employee's interest in speaking as a private citizen and contributing to civic discourse,[280] the recent decision creates two problems for the press' shut-out claims.

First, the opinion creates a gray area in some practical applications of the arbitrary line it draws between an employee's official role and role as a private citizen. The Court notes that a public employee's letter to a newspaper, which is akin to the facts in *Pickering*, would be afforded some First Amendment protection.[281] It offers the letter in *Pickering* as an example of speech that "had no official significance and bore similarities to letters submitted by numerous citizens every day."[282] Suppose a government employee writes a letter to the editor, or a guest editorial, that identifies his name. In such a circumstance, the theoretical line distinguishing his official role from his rights as a private citizen is virtually non-existent. What if the

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[274] *Id.*
[275] *See id.* at 1960 ("Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations."); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (stating the need for a balance between the interests of a public employee, "as a citizen, 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.").
[276] *Garcetti*, 125 S. Ct. at 1958.
[277] *Id.*
[278] *Id.* at 1957.
[279] *Id.* at 1960.
[280] *Id.*
[281] *Id.* at 1961.
[282] *Id.* at 1960.

employee absent-mindedly spoke to a reporter over a cell phone in his office instead of using his home phone? Does it matter if the government official happens to be the public relations director?[283] Does that speech bear "official significance," and subsequently offer no protection? Or is that a "statement[] . . . made outside the duties of employment"?[284] There seems to be difficulty in discerning what is connected to "official responsibilities,"[285] considering that "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[286]

Secondly, the *Garcetti* Court places a significant amount of weight on the public employer's interest in its effective operation. Even if a court finds a subordinate public employee's speech is not in his official capacity, any adverse action taken by the employer is still subject to the *Pickering* balancing test.[287] The *Garcetti* Court calls attention to both the government's broad discretion to regulate speech as an employer and the precedents which afforded "government employers sufficient discretion to manage their operations."[288] Most notably the Court states that if "a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[289]

Although *Garcetti*'s holding invites employees to speak to the press in their private capacity,[290] it casts a shadow on First Amendment protections. The decision may shield public employees who leak to the press.[291] A shut-out could chill a reporter as it would block the ability to gather even mundane information, which no employee would risk to "leak." In sum, the opinion hints at the court's eagerness to protect the interests of government entities to effectively operate. The press faces a "lose-lose" situation by trying to defeat

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[283] *See* Baine, *supra* note 93, at 31 (stating that a public information or press officer is "acting on behalf of the government in a special way").
[284] *Garcetti*, 126 S. Ct. at 1961.
[285] *Id.*
[286] *Id.* at 1960.
[287] *See id.* at 1958 ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.").
[288] *Id.* at 1958, 1960.
[289] *Id.*
[290] *See id.* ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.").
[291] *See* Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 485 n.398 (2006) (citing *Garcetti* dissent in stating "that the majority holding offered more cover for public employees to complain to the press than to their supervisors, which, if true, provides an incentive to leak").

a shut-out by defending subordinate employees' First Amendment rights. If a press plaintiff attempted to defend employee speech that defies a shut-out directive in an official capacity—whatever that may be—no protection would be afforded under *Garcetti*. But if the shut-out order happens to also target speech of the employee as a private citizen, it still "requires a delicate balancing of the competing interests surrounding the speech and its consequences."[292]

3. *Framing the Claim*

One of the biggest problems, and the bulk of this Article's discussion, is the way this type of retaliation claim is framed.[293] Most press retaliation claims are brought under 42 U.S.C. § 1983.[294] The problem occurs when the claim is approached as a right of access issue rather than a restriction on constitutionally protected political speech. Courts have consistently stated that the rights of the press are no greater than the rights of the general public.[295] The First Amendment does not grant special privileges to the press' right to gather information.[296] The development of law regarding press access has varied depending on what information or forum is involved.[297] But when discussing the press' "right of access" to news and information, the general principle is that "the right of the news media . . . is merely the right of the public."[298]

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[292] *Garcetti*, 126 S. Ct. at 1961.

[293] *See* Judith F. Bonilla, et al., *Anatomy of a First Amendment Retaliation Claim*, Media Law Resource Center Bulletin, No. 4, Part A, 17-19 (December 2005) (discussing problems with framing of a retaliation claim).

[294] *See id.* at 5 ("Procedurally, retaliation claims fall within the 42 U.S.C. § 1983 jurisdictional umbrella.").

[295] *See* JETHRO K. LIEBERMAN, FREE SPEECH, FREE PRESS AND THE LAW 128-29 (1980) ("The Supreme Court has declared in many cases that the press has no special rights, and that it stands on no higher footing than do individual Americans as far as the First Amendment is concerned."); BERNARD SCHWARTZ, CONSTITUTIONAL ISSUES: FREEDOM OF THE PRESS 30 (1992) ("The press has only the same access as the general public.").

[296] *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 198-199 (1991) (stating that "[t]he press's right of access to people and places has proven more difficult to establish than the right to publish"); SCHWARTZ, *supra* note 156, at 30 ("There is no constitutional right of access for the press as such. Where members of the public have such a right, the press does also.").

[297] *See* LYRISSA BARNETT LIDSKY AND R. GEORGE WRIGHT, FREEDOM OF THE PRESS 149-166 (discussing the development of press access in different contexts); POWE, *supra* note 157, at 190-99 (discussing history and development of law concerning press access); SCHWARTZ, *supra* note 156, at 30-51 (discussing legal development of press access to various forums).

[298] SCHWARTZ, *supra* note 156, at 30 (quoting Chief Justice Warren). *But see id.* at 131-39 (arguing that the Framers' intended to offer the press, as an institution and the Fourth Estate, protection beyond the free speech clause). Although courts do not recognize special privileges

In recent shut-out cases, courts have concentrated on the press' limited right of access, either to conduct interviews or enter forums that the government controls.[299] Instead of focusing on the critical speech that drew the shut-out, courts focus on the access restrictions imposed.[300] The focus *should* be on the initial critical speech—the constitutionally protected speech that caused the shut-out. Fearing another shut-out, similar political speech could subsequently be chilled or tamed, resulting in a deprivation of First Amendment rights. Focusing on the press's right of access to information complicates the way courts analyze the elements of a section 1983 claim.

The *Baltimore Sun* court focused on the limited invitations and discretionary nature of the press briefings from which the reporters were barred rather than the overall effect of the retaliation. The court stated that the Governor's shut-out directive did not adversely affect the reporters' exercise of constitutional rights by denying *discretionary access*.[301] The court's analysis mentions that Nitkin and Olesker's reporting was not affected by the shut-out because they continued writing political articles.[302] Again turning to access, the court notes that Nitkin and Olesker continued to report on the government "despite the inconvenience of relying on and scrutinizing other sources to garner comments from the Maryland executive department."[303] The court does not question what effect the shut-out may have had on the *content* of subsequent speech, focusing only on its *volume*.

If analysis of the claim transforms into a right of access problem, there may be little hope for prevailing against retaliation. In a legal battle, the press' right of access to information is a weaker weapon compared to its right

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for the press, they may recognize the press' special role. *See* BOLLINGER, *supra* note 111, at 19-21 (discussing the importance the press' role in the political system has played in First Amendment doctrine); LIEBERMAN, *supra* note 156, at 128 (stating that although the freedom of the press is the right of every individual, there is only a small group of people, particularly journalists, avail themselves of it).

[299] *See* Part III.B.1 (discussing the right of access problem in greater depth).

[300] *See* Bonilla, *supra* note 154 (stating that problems with the section 1983 occurs when "the protection accorded to the speech that drew the retaliation" is confused "with the retaliatory act itself.").

[301] *See* Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 418 (4th Cir. 2006) (stating that "no actionable retaliation claim arises when a government official denies a reporter access to discretionarily afforded information.").

[302] *See id.* at 415 (noting that the *Baltimore Sun* did not maintain that the directive actually chilled the reporters' speech). "The Governor pointed out that during the eight weeks before the directive, Nitkin wrote 45 articles related to state government and Olesker 1, and during the eight weeks after the directive, Nitkin wrote 43 and Olesker 1." *Id.*

[303] *Id.* at 419.

under the First Amendment to report on government issues. However, if both the court and the press plaintiff focus attention on the chilling effects on constitutionally protected political commentary, the claim is stronger.[304]

All of this confusion related to retaliatory shut-outs creates unnecessary difficulty for press plaintiffs defending First Amendment rights from government retaliation. An open attitude to a more uniform and clear-minded approach is needed.

B. Combating Shut-Outs

1. *The First Amendment and Section 1983*

Generally, a press retaliation suit is a section 1983 claim. Congress enacted 42 U.S.C. § 1983 to create "broad civil remedies" for a violation of federally protected rights:[305]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[306]

Section 1983's core purpose is to address deprivation or violation of constitutional rights.[307] The most common deficit in a shut-out claim is of the press' First Amendment rights.[308]

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[304] *See* Bonilla, *supra* note 154, at 17 ("[I]t is essential for press plaintiffs to establish that their First Amendment protected activity drew the retaliation, and to stress from the outset that they *need not* establish a First Amendment right to what the government took away in response.").
[305] *Id.* at 5.
[306] 42 U.S.C. § 1983 (2000).
[307] Brett D. Baber, *For Every Right There is a Remedy: Civil Rights Litigation Pursuant to 42 U.S.C. § 1983*, 9 ME. B.J. 226, 228 (1994).
[308] *But see infra* Part III.B.3 (discussing section 1983 claim based on deprivation of Equal Protection rights).

The most common use of a section 1983 claim for retaliation in response to the exercise of First Amendment rights has been in the employment context, such as for retaliatory discharge of public employees for complaining to a higher-up official.[309] In *Chicago Reader*, the court recognized a reporter's claim against a government shut-out from access to the prison. In doing so, it transferred analytical concepts from an employee retaliation situation to a non-employee claim. The court said:

> Recent dicta from the Seventh Circuit further suggests [that] there is no critical distinction between the injury standards in employment and non-employment retaliation cases. 'They are not, of course, even limited to employment. Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable... if the circumstances are such as to make such a refusal an effective deterrent to the exercise of a fragile liberty.'[310]

As long as the retaliatory government action that results in a First Amendment violation is "under color of state law," it is available to media organizations to the same extent.[311]

A claim brought concerning a retaliatory violation of First Amendment rights has its own particular elements under section 1983 as "each protection guaranteed by the Bill of Rights has its own body of law."[312] A prima facie case of retaliation must comprise three allegations: (1) "the plaintiff was engaged in constitutionally protected speech," (2) "the defendant's retaliatory action adversely affects First Amendment activity," and (3) "a causal relationship exists between protected speech and the retaliatory action." [313]

The first prong hinges on whether there is speech and whether the

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[309] *See generally* Hon. Harvey Brown & Sarah V. Kerrigan, *42 U.S.C. § 1983: The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619 (1995).

[310] *Chicago Reader*, 141 F. Supp. 2d at 1145 (citing Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000)).

[311] *See* Baber, *supra* note 168, at 228 ("If the potential defendant was acting in a capacity as a state or local government official at the time of the offending conduct, the "color of state law" requirement is satisfied.").

[312] *Id.*

[313] Bonilla, *supra* note 154, at 5. *See also* Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 416 (D. Md. 2006) ("A retaliation claim under 42 U.S.C. § 1983 must establish that the government responded to the plaintiff's constitutionally protected activity with conduct or speech that would chill or adversely affect his protected activity.").

speech is protected. [314] In most cases where the government retaliates against the press, it is in response to some criticism that it feels is unwarranted or not objective.[315] This type of speech, which often involves the efficacy of certain government administrations, officials and political candidates, is deemed core political speech. [316] Citing a series of precedents, the court in *New York Times Co. v. Sullivan* stated:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.[317]

The *New York Times* court, which was deciding a government official's civil libel suit for a newspaper's editorial advertisement, went on to say its decision was considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [318] The expression by the press, in reporting, discussing or evaluating the government, falls squarely within this core political speech on which courts place a heavy emphasis on protecting.

The second prong of the retaliatory claim is the heart of most of the analysis, as well as most of the obstacles for the media. Retaliatory conduct may adversely affect a press plaintiff's First Amendment rights, even if the retaliatory conduct is not unlawful.[319] In *North Mississippi*, although the *Times* won the advertising bid, the Board reserved the ability to dole out

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[314] *Baltimore Sun*, 437 F.3d 410.
[315] *See, e.g., id.* at 413
[316] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47 (1995) (categorizing speech on public issues, such as ballot issues and political candidates, as core political speech that requires exacting scrutiny).
[317] New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (citations omitted).
[318] *Id.*
[319] *See* Bonilla, *supra* note 154, at 4 ("retaliatory action which is otherwise lawful may adversely impact First Amendment protected speech").

advertisements between the *Times* and *Tribune* on a discretionary basis.[320] So arguably, the Board was not acting unlawfully when it decided to give more of its advertisements to the *Tribune* after the *Times'* critical article. In *Rossignol,* the deputies did what they had a legal right to do: buy newspapers. And even before their plan was carried out, the candidate for State's Attorney, who the newspaper had criticized, advised them on the legality of their actions. Analyzing the claim as a content-based reaction, regardless of what the action was, can play a key role in reaching a more clear-minded approach to shut-out claims.

The third prong of a section 1983 claim for retaliation is in shut-out claims. There may be variations between circuits regarding analysis of the causation element.[321] However satisfaction of this prong should be obvious where the "official pronouncement of the retaliation made plain that the First Amendment activity caused the retaliation."[322] Even if the defendants do not concede that their actions are in response to criticism, in many cases it is not contested that some consideration of the reporter's work-product caused the resulting shut-out.[323]

A press plaintiff's section 1983 claim for retaliatory First Amendment violation can encounter several problems. Courts have recently denied several media claims of retaliation on the basis of right of access. Right of access plays a significant role in misapplication of the second prong of the claim: adverse impact. In *Youngstown*, *Raycom* and *Baltimore Sun* the court found that the government's actions had not blocked the plaintiffs from information generally available to the public.[324] There is no constitutionally guaranteed

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[320] *See North Mississippi,* 951 F.2d at 653; s*ee also* Bonilla, *supra* note 154, at 15 (discussing *El Dia* and stating that "[t]he fact that the government is not legally obligated to buy advertising in the first place was immaterial to the First Circuit's analysis.").

[321] *See* Bonilla, *supra* note 154, at 15-16 ("In First Amendment retaliation claims, some circuits do not follow the traditional models for 'but for' proximate causation and legal causation.").

[322] *Id.* at 17.

[323] *See* Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 413 (D. Md. 2006) (quoting Governor's directive, which stated that certain reporters were failing to report objectively); Times-Picayune Pub. Corp. v. Lee, Civ. A. No. 88-1325, 1988 WL 36491 at 6 (E.D. La. April 15, 1988) (stating that the shut-out directive and policies were a result of dissatisfaction with the newspaper's accuracy); Chicago Reader v. Sheahan, 141 F. Supp. 2d 1142, 1146 (N.D. Ill. 2001) (stating that defendants asserted that reporter had misled them about the content of a previous article).

[324] *See* Youngstown Pub. Co. v. McKelvey, No. 4:05 CV 00625, 2005 WL 1153996, 9 (N.D. Ohio May 16, 2005), vacated on appeal and dismissed as moot, No. 05-3842, 2006 WL 1792215 (6th Cir. June 27, 2006) ("The oral and memorandized No-Comment policies adversely affect access to information not otherwise available to the public."); Raycom Nat'l Inc. v. Campbell, 361 F. Supp. 2d 679, 684 (N.D. Ohio 2004) (stating that the plaintiff had

right of access to interviews and other information not available to the public.[325] Therefore, the plaintiffs had not pleaded any government action which adversely affected their constitutionally protected activity.[326]

Press plaintiffs should focus their argument in such a way that "establishes that their First Amendment protected activity drew the retaliation, and to stress at the outset that they *need not* establish a First Amendment right to what the government took away in response."[327] However, the responsibility should be placed on the courts as well to recognize that press plaintiffs need not prove entitlement to access. If a court incorrectly strays into the right of access issue, the government can easily avoid accountability for retaliatory shut-outs; though the implications on free speech and free press are the same as with other forms of retaliation.

Federal courts generally apply an objective standard for the adverse impact prong, that is whether "a 'person of ordinary fitness' would be deterred from engaging in First Amendment activities as a result of the government's retaliation."[328] Courts may confuse the chill issue with the chill effect, if any, that the plaintiffs actually experienced. The *Baltimore Sun* court looked to whether a reasonable person of ordinary firmness, similarly situated, would be

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been "denied access to information available to the public generally"); *Baltimore Sun*, 437 F.3d at 418 ("[N]o actionable retaliation claim arises when a government official denies a reporter access to discretionarily afforded information or refuses to answer questions.").

[325] *See Raycom*, 361 F. Supp. 2d at 682 ("As a general rule, the First Amendment 'does not guarantee the press a constitutional right of special access to information not available to the public generally.'").

[326] *See Youngstown*, 2005 WL 1153996 at 9 (stating that because the shut-out did not bar the reporters from information available to the public generally, the policies did not "otherwise adversely affect *The Business Journal*'s ability to publish news reports questioning the actions of City government officials"); *Baltimore Sun*, 437 F.3d at 418-20 (stating that denial of discretionarily afforded information does not constitute actionable retaliation because there is only de minimis inconvenience and not a substantial adverse impact).

[327] Bonilla, *supra* note 154, at 17. *Raycom* may be an example of how framing the claim incorrectly can create a right of access disaster. The television station in *Raycom* argued that "it ha[d] a constitutionally protected right to gather and report information," instead of noting it's constitutionally protected right to speak critically about the government. *Raycom*, 361 F. Supp. 2d at 682.

[328] Bonilla, *supra* note 154, at 11-12. Bonilla notes some inconsistency in the circuits regarding the test applied for the adverse impact prong. The Second Circuit may apply a subjective test to a press retaliation claim. This test requires plaintiffs to "demonstrate that they are actually chilled by the defendant's retaliatory conduct." *Id.* at 13. The Sixth Circuit, on the other hand, may incorporate the subjective circumstances of the individual plaintiff, and look at what would chill a "journalist of ordinary firmness." *Id.* at 14. Regardless of which test is used the type of "chill" involved should be examined with an eye for whether content is toned down not just whether articles about the government are written at all.

chilled in light of the circumstances presented.[329] Essentially, the court looked to how a reasonable reporter of ordinary firmness would react to the Governor's actions.[330] It noted that, "the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity."[331] Because the shut-out reporters in *Baltimore Sun* continued to write government articles, the court stated that there was no substantial adverse chilling impact.[332] However, the court failed to realize that a shut-out could still chill otherwise critical reporters if it coerces them to alter their content even if it does not terminate their writing completely. The court's underwhelming mention of the chilling effect on content was that the reporters had "continued to write stories for *The Sun*, to comment, to criticize, and otherwise to speak with the full protection of the First Amendment."[333] The *Raycom* plaintiffs may have had a harder time succeeding because evidence existed to show that they had continued to write articles with critical content after the shut-out. Nevertheless, the plaintiff's conduct is not the *only* evidence of a retaliatory shut-out's chilling effect. If the focus of the claim is the speech that drew the retaliation and not what the "government took away in response," then the focus of the chilling effect should be whether the volume *or* the content of all similar speech could be chilled. Reporters may rework the content of political speech if they are vulnerable to a government sanction, such as a shut-out.

Right of access also potentially muddies the causation prong of the 1983 claim. As discussed in Part II.A.1, detecting retaliatory conduct or speech in shut-out cases may cause confusion in the court's analysis. Finding retaliatory motive for the third prong involves similar problems:

> A claim of retaliation for the exercise of First Amendment rights requires the plaintiff to prove that he suffered adverse action because of his exercise of protected rights, or, to put it another way, that 'the defendants' actions [were] motivated by [the plaintiff's] constitutionally protected speech…' The plaintiff cannot conceivably prevail without introducing evidence of, and arguing, the motivation of those who made the decision he attacks…[334]

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[329] *Baltimore Sun*, 437 F.3d at 416.
[330] *See id.* at 419 (using the terms "reporter of ordinary firmness" and "objectively reasonable plaintiff").
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] Karen M. Blum, *Section 1983: Qualified Immunity*, 748 P.L.I. 79, 124 (Oct. 26-27, 2006).

However, because a public official has the ability to grant favors to certain reporters or to refuse to talk to anyone, reporters aren't given unlimited ability to speak to that official by virtue of their office. In *Youngstown*, the court noted the general and limited access distinction and rule that offers right of access only where there is a forum open to all members of the press, which "permits 'the common and widely accepted practice among politicians of granting an exclusive interview to a particular reporter' and 'equally widespread practice of public officials declining to speak to reporters whom they view as untrustworthy.'"[335] Because reporters do not have unlimited right of access, government officials may argue that they are simply exercising their First Amendment right not to speak with certain reporters as opposed to exercising retaliatory objectives.

Despite this argument, it should not be difficult for a court to detect when an official is granting a favor to reporters as a way to shape their message accurately versus categorically denying certain news organizations the same privileges available to every other reporter. First, clear retaliatory action usually involves ordering other employees to do the same. Second, even if the official attempts to mask the retaliation by framing it as granting certain reporters favors, most of the cases brought before the court involve undisputed evidence of a definite retaliatory motive. It should be clear when the action is done in response to criticism and rises to a level that unfairly restricts a reporter's access to information to the point where it chills critical speech. The causation prong of the section 1983 claim in cases where there is evidence of definite retaliation resulting from critical coverage should be easily satisfied.

Right of access issues have complicated most of the analysis for section 1983 claims brought for retaliatory shut-outs. In the future, courts should leave this issue out of their analysis, or at the very least, apply it correctly.

2. *Third-Party First Amendment Claim*

When courts complicate right of access issues with elements of a section 1983 claim, they do so erroneously. But, in the event that the discussion is wedded to the access issue, press plaintiffs may still be able to turn it in their favor. Denial of access to government employees or officials for comment and interviews is at the heart of many recent shut-out cases. In cases where the shut-out involves an order by a government official to

[335] *Youngstown*, 2005 WL 1153996, at 6 (quoting Snyder v. Ringgold, 1998 WL 13528 (4th Cir. 1998)).

subordinate employees, prohibiting them from talking to the press, a claim may be brought to defend the First Amendment rights of those employees. Typically, the only person with standing to assert violation of a constitutional right by a state actor is the person whose right is violated.[336] Therefore, the press would not normally be able to bring an action asserting the First Amendment rights of another party. However, standing requirements are more flexible with First Amendment claims.[337] In the First Amendment context, overly broad legislation or government action can be challenged on the basis that it is likely to chill or prohibit someone else's protected speech. The overbreadth doctrine allows a plaintiff in some circumstances to bring a claim against government action that would challenge a third party's First Amendment rights.[338] These types of challenges are not defeated for lack of standing or injury in fact to the plaintiff.

In *Metromedia v. San Diego*, the Court specifically recognized challenges to overbroad government limitations on speech by newspapers as "those with the highest interest and the largest stake in a First Amendment controversy."[339] The relaxed standing requirements for First Amendment claims are also a "means of protecting individuals or groups who might be too fearful of punishment to challenge a statute, and whose speech is therefore chilled."[340] Thus, the overbreadth doctrine provides a remedy when government employees fear losing their jobs by speaking to reporters boycotted by their superiors.

A First Amendment challenge may be based on the fact that it "might chill" the first amendment rights of the plaintiff and "others not before the

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[336] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (discussing standing requirements, the first of which is plaintiff suffering an injury in fact); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) ("The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant.").

[337] *See* Maureen P. Haney, *Standing Issues in the Government Boycott Context*, Media Law Resource Center Bulletin, No 4. Part A, 41 (December 2004) (discussing the overbreadth doctrine's use in news boycott cases and stating, "for those who wish to assert free speech claims, flexibility appears to be the hallmark of the standing requirement in the context of First Amendment claims.").

[338] *See, e.g.*, Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.").

[339] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 (1981).

[340] Haney, *supra* note 198, at 42.

court."[341] The employees subject to the boycott order need not disapprove of the order or actually wish to speak to the press:

> What this case law can be assumed to mean, moreover, is not just that the media can assert claims based on an official's violation of non-party employees' rights as a general matter, but that there need not even be an allegation – let alone proof – that actual employees have in fact suffered *actual injury* from the effects of an official government boycott.[342]

Asserting a press plaintiff's third-party standing in a First Amendment challenge relating to its newsgathering ability may not be as effortless as it seems. When the press seeks to intervene to challenge gag orders on the basis that they restrain would-be speakers, courts have analyzed elements of standing in an exacting manner.[343] Federal courts may look to "[w]hether the news agencies are actually potential receivers of otherwise restrained speech."[344] Effectively, many courts will require news organizations to show injury in fact, and such a showing is sufficient if the organization can demonstrate "that, but for the challenged order, parties to the litigation would have spoken to the news media."[345] There must "reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so."[346] Nevertheless, such a showing may not be so difficult in the shut-out context. Often reporters are shut-out from speaking to employees and officials with whom they have previously had unfettered communication. Verbal contact with government employees in shut-out cases often only ends because of the order from above, and but for that order, communication would continue.[347]

In *Youngstown*, the court hinted at the *Pickering* test and the potential

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[341] *See, e.g.*, Clear Channel Outdoor Inc. v. Town Bd. of Windham, 352 F. Supp.2d 297, 302 (N.D.N.Y. 2005) (discussing exception to denial of third-party standing).

[342] Haney, *supra* note 198, at 42. (original emphasis) (citing plaintiff's brief in *Youngstown*).

[343] Koch v. Koch Indus., 6 F. Supp. 2d 1185, 1190 (D. Kan. 1998) ("The plaintiffs [] must show that the gag orders have caused them injury in fact and that their injury is likely to be redressed by a favorable decision.").

[344] *In re* Application of Dow Jones & Co., 842 F.2d 603, 607 (2d. Cir. 1988).

[345] Brown v. Damiani, 154 F. Supp. 2d 317, 320 (D. Conn. 2001).

[346] *Koch*, 6 F. Supp. 2d at 1190.

[347] *See Baltimore Sun Co.*, 437 F.3d at 413-14 (describing responses from Ehrlich's employees at Nitkin's attempts to seek comment). When *Baltimore Sun* reporter, David Nitkin, attempted to speak to several members of Governor Ehrlich's administration after Ehrlich issued the shut-out against him, responses included: "David, I *can't* talk to you," and "[T]he ban is still in effect." *Id.* This indicates that had the ban not been in place, Nitkin may have received comment from those employees.

for a First Amendment claim involving public employee speech. The court noted that though the No-Comment policy did not form the basis for a retaliation claim, it could be an unconstitutional prior restraint "in so far as it forbids city employees from speaking on issues of public concern."[348] The *Pickering* Court recognized "that statements by public officials on matters of public concern must be accorded First Amendment protection."[349]

Still another potential problem remains with this claim. The *Pickering* test, particularly after *Garcetti*, does not guarantee that a public employee's speech will be offered categorical protection even if it pertains to matters of public concern. After determining the speech pertains to a matter of public concern, the *Pickering* balancing test examines the interest of the employee "in commenting upon matters of public concern" versus the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[350]

The Supreme Court's decision in *Garcetti*, as discussed above, may cast a cloud over the importance of a public employee's First Amendment rights. If the Court is willing to allow public employers to discipline a public employee for complaining of government misconduct to his or her superiors, it may not be willing to allow the press to defend the same employees' First Amendment rights as a third-party plaintiff. Even in analyzing whether a government entity can exercise its broad discretion to restrict an employee speaking as a private citizen, the Court will look to whether that speech has some "potential to affect the entity's operation."[351] The *Garcetti* Court mentions, almost in passing, that its decision is limited in scope and does not apply to situations such as those in *Pickering*, which involved a teacher's claim of retaliation resulting from a letter written to the newspaper.[352]

Applied to a third-party press claim, the *Garcetti* analysis indicates that a press plaintiff's argument that a shut-out directive is overbroad would fail if the directive only restricts public employees from speaking in their

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[348] *Youngstown Publ. Co.*, No. 4:05 CV 00625, 2005 WL 1153996 at 7, n.5 (N.D. Ohio May 16, 2005).
[349] Pickering v. Board of Education, 391 U.S. 563, 574 (1968).
[350] *Id.* at 568.
[351] *Garcetti*, 126 S. Ct. at 1958.
[352] *See id.* at 1961 ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper." (citation omitted)).

official capacity.[353] But moreover, even if the shut-out directive sweeps in speech as a private citizen, the claim does not become any easier. First, the courts would have to decide what circumstances constitute disobeying the directive in a private capacity versus an official capacity. And even if that line was clear, the decision would be based on a balancing of the employer's interest in operating efficiently and creating a consistent message.[354]

If a public employee did object to a shut-out directive, *Garcetti* would leave them no recourse if objecting would result in adverse employment action. Expressing concern to a superior, as was the case in *Garcetti*, is afforded no protection because it is in the employee's official capacity.[355] If the Supreme Court in *Garcetti* created such an arbitrary line for employee speech, another court has no reason to open its mind in the context of third-party press claims defending the rights of public employees, who themselves have not formally complained about a shut-out edict.[356]

3. *Equal Protection and Section 1983*

News organizations that have been targeted for retaliatory shut-outs may also bring an Equal Protection claim against the government. A press plaintiff will argue that singling out one reporter or news entity to shut out is discrimination in violation of the Equal Protection clause. *Raycom* involved such a claim. In *Raycom*, the Governor's edict prohibited Cleveland officials from speaking only with reporters from one television station.[357] The television station in *Raycom* combined its Equal Protection and First Amendment challenge under section 1983.[358]

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[353] *See Garcetti*, 126 S. Ct. at 1960 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications.").

[354] *See Garcetti*, 126 S. Ct. at 1960-61 (discussing the employer's interest in restricting employee speech); Baine, *supra* note 93, at 27-29 (discussing a government officials' interest in creating a consistent message and "one voice").

[355] *Garcetti*, 126 S. Ct. at 1959 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance.") (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)).

[356] *See* Dick Meyer, *Whistleblowing in the Wind*, CBS News, June 1, 2006, http://www.cbsnews.com/stories/2006/06/01/opinion/meyer/main1673109.shtml (discussing the limited protection now afforded to government whistleblowers after the *Garcetti* decision).

[357] *See Raycom*, 361 F. Supp. 2d at 686 (N.D. Ohio 2004) (stating that plaintiff argued that "Mayor Campbell's edict does not apply to any other media organization and therefore constitutes unequal treatment in violation of the Fourteenth Amendment.").

[358] *Id.*

Arguing an Equal Protection violation may be difficult as the *Raycom* decision reveals. A claim for violation of Equal Protection rights under section 1983 must demonstrate that the "defendant acted with the intent or purpose to discriminate against the plaintiff based on membership in a protected class,"[359] or that the discrimination implicated a fundamental interest.[360] Discrimination involving a non-suspect class or a non-fundamental interest is evaluated under the highly deferential rational basis test.[361] The press undoubtedly is a non-suspect class as the *Raycom* court noted.[362] Therefore, unless the violation is of a fundamental interest the government discrimination need only have a rational relationship to a legitimate government purpose.[363]

Fundamental liberty interests are those either explicitly or implicitly guaranteed by the U.S. Constitution.[364] Government discrimination impinging on fundamental rights guaranteed by the Constitution, such as First Amendment rights, must serve a compelling state interest that cannot be satisfied by a less restrictive means.[365] At this point, right of access problems can enter into the Equal Protection analysis as well. The *Raycom* court denied the Equal Protection claim because the discrimination violated the ability to gather information and not the right to speak or publish.[366] The court stated

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[359] Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (citing Washington v. Davis, 426 U.S. 229, 239-40 (1976)).

[360] *See* Hydrick v. Hunter, 466 F.3d 676, 700 (9th Cir. 2006) ("Even though Plaintiffs do not constitute a suspect class, heightened scrutiny may be required where fundamental interests are at issue.").

[361] *See* Vacco v. Quill, 521 U.S. 793, 799 (1997) (stating that a classification or distinction that does not burden a fundamental right or target a suspect class will be upheld as long as it bears a rational relationship to a legitimate government end).

[362] *See Raycom*, 361 F. Supp. 2d at 686. ("[T]here is no dispute that WOIO is not a member of a suspect class"). The news media is not a class identified by any of the traditional indicia of suspectness: "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[363] *Raycom*, 361 F. Supp. 2d at 686.

[364] *See San Antonio*, 411 U.S. at 33 (analyzing whether the right to education is "explicitly or implicitly guaranteed by the Constitution").

[365] *See* Plyler v. Doe, 457 U.S. 202, 216-17 (stating that the State is required to demonstrate that classifications impinging on the exercise of fundamental rights have "been precisely tailored to serve a compelling governmental interest"); *San Antonio*, 411 U.S. at 17 (stating that applying strict scrutiny requires determination of whether fundamental right implicitly or explicitly protected by the Constitution is impinged by classification).

[366] *Raycom*, 361 F. Supp. 2d at 687 (stating that the right at issue is the right to access information and not the right to free speech).

that although the collection of information is an important aspect of First Amendment protection, it is not an absolute right.[367] It further stated that "'[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.'"[368] The court decided there was no fundamental liberty interest at issue and the rational basis test applied.[369] The court noted that the government had a legitimate interest in controlling its message and the mayor is not required to give the same access to reporters deemed untrustworthy.[370] The court held that this interest is rationally related to the boycott of the station's reporters.[371]

Right of access is again a problem with a section 1983 claim based on Equal Protection. The focus may be on the discriminatory grant of access and not on the discrimination's incursion on protected speech.[372] Arguably, the right of access issue could be extinguished if the courts were willing to accept the argument that the discrimination was intended to stifle fundamental First Amendment rights and classify reporters based on speech. The discrimination is based on the content of speech and its purpose is to prevent further criticism.[373] In *Quad-City Community News Service, Inc. v. Jebens*,[374] the press succeeded with an Equal Protection claim.[375] *Quad-City* involved government officials denying a newspaper access to documents and press

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[367] *Id.* at 686-87.

[368] *Id.* (citation omitted).

[369] *See id.* at 687 (stating that the Mayor's policy "need only bear a rational relationship to a legitimate state interest.").

[370] *See id.* (recognizing interest the government has in controlling the content of its own speech).

[371] *Id.*

[372] This is similar to the section 1983 claim based on First Amendment violations which should be framed to bring the court's attention to the initial speech instead of the right of access. *See* Part III.A.3.

[373] *See* Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) ("The danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment."). The *Anderson* court held that the trial court erred in allowing only one media outlet access to discovery material kept under a protective order. *Id.* The discrimination was not due to criticism, but was an effort to keep the protective order narrow and only release information for academic settings and learned journals. *Id.* Nevertheless, the Court of Appeals stated that no branch of government "can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information." *Id.*

[374] Quad-City Cmty. News Serv., Inc. v. Hon. John H. Jebens, Mayor, Davenport, Iowa, 334 F. Supp. 8 (S.D. Iowa 1971).

[375] *See id.* at 15, 19 (enjoining denial of access to certain reporters because government had made no showing of compelling interest).

passes that were available to other members of the press. Government discrimination occurred on the basis that the newspaper was not "legitimate" or "established,"[376] and may have expressed new and different editorial views.[377]

Regardless of right of access analysis, government discrimination that is based on the content of speech should receive strict scrutiny. In *Westinghouse Broadcasting Co. v. Dukakis*,[378] which involved non-union cameramen who were barred from various public meetings, the court discussed discrimination in forums open to all other members of the press:

> Public officials need not furnish information, other than public records, to any news agency. The opportunities to cover official news sources must be the same for all accredited news gatherers, however. All representatives of news organizations must not only be given equal access, but within reasonable limits, access with equal convenience to official news sources. This right is not absolute, but it may not be infringed upon by state officials in the absence of a compelling government interest to the contrary.[379]

The *Quad-City* court applied strict scrutiny to the press' Equal Protection claim. It stated that penalizing or restraining First Amendment rights by classifying which reporters will or will not be given similar access must serve a compelling government interest.[380] Promoting accuracy and objectivity is not a compelling interest for government officials dissatisfied with bias and criticism.[381]

Although a section 1983 Equal Protection challenge may not be the best course by itself, a press plaintiff should consider including it. Older shut-out cases such as *Quad-City* were more likely to result in victories for the press plaintiffs because the decisions emphasized the First Amendment

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[376] *Id.* at 12

[377] *See id.* at 13 ("Defendants may reasonably and perhaps rightly expect that Quad-City will publish interpretations of this information or editorial conclusions which differ vastly from those of other editors. But public officials cannot impede the free exercise of speech or press simply because the content is insulting, disturbing or critical.").

[378] Westinghouse Broad. Co. v. Dukakis, 409 F. Supp. 895 (D. Mass. 1976).

[379] *Id.* at 896.

[380] *Quad-City*, 334 F. Supp. at 15.

[381] Times-Picayune Pub., Corp. v. Lee, Civ. A. No. 88-1325, 1988 WL 36491, 10 (E.D. La. April 15, 1988).

implications of unequal access.[382] Correctly framing a section 1983 Equal Protection claim is just as critical as framing a section 1983 First Amendment retaliation claim. Arguing that the discriminatory access itself is a violation of Equal Protection will fail because there is no constitutionally protected fundamental First Amendment right to access information. The plaintiff must argue that content-based discriminatory access arbitrarily impinges on the free press rights of certain classes of reporters.

III
A CLEAR-MINDED APPROACH

In light of recent decisions concerning retaliatory shut outs that tend to demonstrate a decreasing likelihood of success for the press, courts must apply a more uniform approach. The analysis should be consistent in all cases in which the press suffers government retaliatory actions for engaging in constitutionally protected speech. Whether the retaliation involves withdrawing advertisements or refusing to let employees speak to a reporter, it all has same chilling effect on matters of public interest. The analysis in *Chicago Reader* serves the goal of curing the First Amendment violations of retaliatory conduct uniformly, without focusing on right of access or the prerogatives of the officeholder.

In *Chicago Reader*, the court conceded that a reporter could go to another avenue of information when one is not available.[383] However, the court also said that the "potential chilling effect" from the government's action in denying the reporter access to the prison "is so obvious experts are hardly necessary," because "[a] reporter might well tone down a critical article if she feared that jail officials might terminate, or even restrict, her future access.[384] The court noted that this is the type of chilling effect that the First Amendment prohibits.[385]

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[382] *Quad-City* was decided in 1971. *Times-Picayune*, which was decided in 1988, was also a victory for the press plaintiffs. The *Times-Picayune* court granted a preliminary injunction to the plaintiffs and applied strict scrutiny to the selective denial of access to critical reporters. The *Borreca v. Fasi* court, in 1974, also enjoined government officials from shutting out particular reporters. Borreca v. Fasi, 369 F. Supp. 906, 911 (D. Haw. 1974). Although the *Borreca* court did not address the merits of an equal protection claim, it stated that when First Amendment rights are involved the state interest in denying access to some reporters must be compelling. *Id.* at 909, 911.

[383] *See Chicago Reader*, 141 F. Supp. 2d at 1146 ("Reporters frequently do resort to alternate sources when first-hand observations are not possible, but that in no way negates that actually being there is optimal.").

[384] *Id.*

[385] *Id.*

The defendants in *Chicago Reader* argued that their boycott of the reporter was not motivated by criticism, but because the reporter misstated her purpose for the initial report.[386] However, the court rejected the defendants' effort to obscure retaliatory motivation. The court stated that this argument did not matter because the decision was still content-based.[387] Essentially, the retaliatory content-based motive was evident and definite from the circumstances and chain of events. If the court in this case focused on the content-based nature of the defendants' decision, there is no reason other courts cannot do the same.

Courts must change their attitude in analyzing section 1983 claims for shut-outs. Right of access analysis does not need to be involved in the inquiry. Instead, courts should treat shut-out cases the same as other press retaliation claims. In actionable shut-out cases, such as *Youngstown, Baltimore Sun* and *Raycom,* the retaliation is clearly a response to criticism. The *Chicago Reader* court notes that even minor forms of retaliation can have the same chilling effect as drastic measures.[388] If lawful conduct such as withholding advertising and buying out copies of a paper can constitute retaliation, then restricting employees' speech and barring reporters from access to forums open to their colleagues should be treated no differently. If it is a content-based response to political criticism, all forms of conduct potentially impinge on fundamental First Amendment rights and chill subsequent critical content.

By disregarding the right of access issue, courts can focus on the speech that would be chilled by the retaliatory conduct – specifically criticism. The denial of access is usually based on content that involves core political speech.[389] Furthermore, "even discretionary perquisites, if motivated by plaintiffs' views, violate the First Amendment."[390] This standard, as applied in *Chicago Reader*, uniformly recognizes the content-based nature of a retaliatory act.

Government officials still have the prerogative to shape their messages.[391] The *Chicago Reader* court stated that the prison's press officer

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[386] *Id.*
[387] *Id.*
[388] *Chicago Reader,* 141 F. Supp. 2d at 1145.
[389] *See id.* at 1146 ("The DOC may not have had a legal obligation to admit Marlan. But it may not refuse to do so because she exercised her First Amendment rights.").
[390] *Id.*
[391] *See* Baine, *supra* note 93, at 27-31 (discussing when a retaliation claim should arise in light of the prerogatives of the office holder).

did not have to speak to the reporter if he did not trust her.[392] Any public official can exercise his or her First Amendment rights in refusing to speak to a reporter. However, public officials should not be able to respond to criticism by barring certain reporters from receiving privileges previously granted to them or granted to all other members of the press, nor should they be able to embroil subordinates in their decision. Doing so elevates the scope of the situation to actionable retaliation. Although *Chicago Reader* did not involve speech from subordinate employees to the same extent as *Baltimore Sun*, it protects against any content-based denial of a "privilege accorded other reporters."[393]

The courts must be willing to adopt an open attitude with regard to accepting media challenges to government actions that restrict the speech of subordinate employees. The third-party claim still remains an important tool in the press' efforts at combating retaliatory shut-outs.[394] However, in order to succeed, courts must steer away from the attitudes expressed in *Garcetti,* which emphasize the government employer's interest. Furthermore, courts must be more skeptical of the "traditional" antagonism between the government and the press. This would require adopting the opposite attitude of the *Baltimore Sun* court, which stated that "[i]t would be inconsistent with the journalist's accepted role in the 'rough and tumble' political arena to accept that a reporter of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting."[395]

Baltimore Sun comes closer to framing the issue correctly. The *Baltimore Sun* court looked at the chilling effect limited access would have on protected speech, rather than focusing on whether the press had a constitutional right to that access.[396] However, it is still an example of a court harping on the First Amendment rights of the officeholder and the press' lack of a special right of access. Unfortunately, the analysis takes a wrong-turn when it calls denying a reporter access to official comment a de minimis

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[392] *Chicago Reader*, 141 F. Supp. 2d at 1147.
[393] *Id.*
[394] *See* Haney, *supra* note 198, at 44 ("If the goal is eradication of an unconstitutional policy, then a claim for violation of Fist Amendment rights of government employees may well provide another arrow in the quiver for reporters and their media employers.").
[395] *Baltimore Sun*, 437 F.3d at 419.
[396] *See id.* at 418-419 (discussing whether the Governor's directive caused a chill on the reporters' speech).

inconvenience.[397] *Raycom* makes a similar mistake. The *Raycom* court recognized that a reporter's right to information that is generally available to the public means information available to other reporters.[398] In *Raycom*, the plaintiffs were not barred from information available to all other reporters because not every reporter was given an interview.[399] The *Raycom* court relied on the decision in *Snyder v. Ringgold*.[400] In *Snyder*, the reporter was labeled untrustworthy and the police department's public affairs director told employees not to go "off the record" with her.[401] The court stated that granting the plaintiff's injunction against a shut-out would grant her preferential treatment rather than equal treatment.[402] The court then made the spurious argument that if an interview was given to Barbara Walters one must also be given to the plaintiff.[403]

What all these cases ignore is that a shut-out creates a situation where only a few reporters are provided the opportunity to gain an interview, much less allow them to pick up the phone and ask a few questions. The privileges were taken away solely based on what the reporters wrote or said.[404] Formal shut-out edicts that bar all contact with a reporter are too much like "attempt[s] to use the powers of governmental office to intimidate or to discipline the press or one of its members because of what appears in print."[405] When there is a formal policy only banning certain reporters from comment and interviews, it effectively denies the reporters the same opportunities other

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[397] *See id.* at 416, 420 ("'[N]ot every [government] restriction is sufficient to chill the exercise of First Amendment rights,' we have recognized a distinction between an adverse impact that is actionable, on the one hand, and a de minimis inconvenience, on the other.").

[398] *See Raycom*, 361 F. Supp. 2d at 683-84 (stating that because a shut-out from interviews did not bar plaintiffs from access afforded to the press generally, as a shut-out from press conferences would, they had not been denied access generally available to the public).

[399] *See id.* (stating that plaintiffs did not allege that they were barred from information generally available to other members of the media). *See also Youngstown*, 2005 WL 1153996, at 6 (stating that "[t]he mere fact that a City employee may be approached or reached via telephone by any member of the press or public does not indicate that the City has opened a forum to all members of the press for the receipt of interviews and comments.").

[400] Snyder v. Ringgold, 40 F. Supp. 2d 714 (D. Md. 1999).

[401] *Id.* at 716.

[402] *Id.* at 718.

[403] *Id.*

[404] *See* Baine, *supra* note 93, at 31 (stating that government officials cannot instruct other officials or employees not to speak to reporters when they would otherwise "*have occasion*" to do so) (emphasis added).

[405] Borreca v. Fasi, 369 F. Supp. 906, 910 (D. Haw. 1974). *Snyder*, however, did not involve a formal restriction on the First Amendment rights of employees, but just a warning not to go "off the record" with the reporter. *Snyder*, 40 F. Supp. 2d at 716. Most of the government action involved the public affairs director choosing not to speak to the reporter. *Id.* The press' claim may have failed here without the court bringing access issues into the picture.

members of the press have.

Courts should notice that a content-based shut-out that is aimed at chilling criticism is more than a de minimis inconvenience, regardless of the form it takes. In *Davidian v. O'Mara*,[406] a freelance reporter sued government officials for restricting his access to public records after he wrote unflattering articles. [407] The court held for the defendants, stating that the government's actions were not severe enough to chill a person of ordinary firmness because they did not rise to the same level as in *McBride*, where officials harassed the reporter and contacted her potential employers.[408] Courts should not look for a severe level of harassment. The conduct in *North Mississippi* and *El Dia*, both involving retaliation by withholding advertisements, can hardly be called *severe* harassment. Nevertheless, the respective courts placed a heavier burden on the government in those cases. For example, the *North Mississippi* court applied a burden-shifting analysis in which the government had to prove that *none* of the advertisements were given to the *Tribune* instead of the *Times* for retaliatory reasons.[409] Shut-out retaliation cases should be viewed similarly.

A recent victory for press plaintiffs in *Citicasters Co. v. Finkbeiner*[410] may herald a turn for the better in shut-out cases.[411] In *Citicasters*, the court

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[406] Davidian v. O'Mara, 2000 WL 377342 (6th Cir. 2000).

[407] *Id.* at 1.

[408] *See id.* at 4 ("[W]e conclude that, unlike the adverse actions taken in *McBride*, the adverse conduct in this case is not severe enough to chill a person of ordinary firmness from continuing to publish unfavorable articles about city officials."). Davidian's claim would likely have failed anyway because there was no evidence of an order or policy to actually shut him out, and city officials were "generally cooperative." *Id.*

[409] N. Miss. Commc'ns, Inc. v. Jones, 951 F.2d 652, 656 (5th Cir. 1992).

[410] Citicasters Co. v. Finkbeiner, No. 07-CV-00117 (N.D. Ohio Jan. 31, 2007).

[411] *See* Lauren Melcher, *Radio Reporter Wins Injunction Against Mayor*, Reporters Committee for Freedom of the Press (Feb. 2, 2007), http://www.rcfp.org/news/2007/0202-new-radior.html (Last visited Feb. 8, 2008) (reporting on court's permanent injunction order in *Citicasters*).

However, *Citicasters* represents an anomalous case. Plaintiffs did not argue a section 1983 violation based on retaliation, even though retaliatory conduct was present. Therefore, plaintiffs did not have to meet the three prongs of a retaliation claim. Plaintiffs simply argued that the Mayor's shut-out was conduct which may readily recur, impairing First Amendment rights under color of law and " being presumptively unconstitutional" under section 1983. Permanent Injunction Order at 3-4, Citicasters Co. v. Finkbeiner, No. 07-CV-00117 (N.D. Ohio Jan. 31, 2007); Plaintiff's Motion and Memorandum in Support of Temporary Restraining Order and Preliminary Injunction at 10, Citicasters Co. v. Finkbeiner, No. 07-CV-00117 (N.D. Ohio Jan. 31, 2007) (distinguishing *Ehrlich* and stating "[t]he instant case is not a retaliation case.").

While this method may be another avenue for press plaintiffs to pursue in combating shut-outs, it may only be effective on the specific facts presented in *Citicasters*. This is

enjoined the Mayor of Toledo, Ohio from shutting out a radio station and a radio host from public news conferences.[412] In its order, the court seemed to revere the press' role in the political arena.[413] However, the premise of the decision draws arbitrary lines that do not translate into uniform analysis for all retaliation cases, much less all shut-out situations. *Citicasters* appears to again single out press conferences and other venues to which all reporters—that is to say, the general public—have access.[414] Emphasizing a press conference as a public event opens the door for government officials to argue their way out of accountability simply because interviews and comments from employees are not public events.[415] *Chicago Reader* does not seem to lend itself to such arbitrary distinctions. The reporter was shut out from prison areas open to the press, but it was not a forum to which all press members or the public received an affirmative invitation.[416] The prison areas were generally open to press members who chose to take advantage of that access, much like interviews and comments. There is no need to examine whether the shut-out involved something "public" in nature to which all other press is actively invited. The First Amendment implications are the same.[417]

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especially true when, as discussed, the court emphasizes the "public" nature of the press conferences involved in the shut-out. The greater concern is how to get courts to properly and uniformly frame all retaliatory press shut-out cases.

[412] Permanent Injunction Order at 1-2, Citicasters Co. v. Finkbeiner, No. 07-CV-00117 (N.D. Ohio Jan. 31, 2007) (stating that defendant denied the radio station notice of public news conferences and barred its radio host from entering a news conference). The court noted that the radio reporter and the Mayor previously had a difference of opinion and the Mayor considered him an entertainer and not a reporter. *Id.* at 2, 4.

[413] *See id.* at 6 (noting that during the hearing Judge James G. Carr stated, "More sunshine, more disinfectant, more light, more knowledge, a better informed public. That's a risk that I think is well worth imposing.").

[414] *See id.* at 4 (distinguishing *Baltimore Sun*-type situations, because a "briefing" is different from a public press conference). The court notes the difference between a briefing and a press conference: an official may call on and select a reporter to receive information in a briefing, whereas, press conferences are open to the public. *Id.* The court does note that the distinction was "semantic hair-splitting" and government officials might try to label a press conference as briefing in order to exclude reporters. *Id.* at 3-4. However, the court does nothing to clear up the distinction and instead perpetuates it by distinguishing *Baltimore Sun*. *Id.* at 4.

[415] *See* Baine, *supra* note 93, at 33-35 (discussing the concept of information and forums freely available to all the press and stating a "problem is the unduly rigid application of the notion of a forum"). Older, but successful, shut-out cases such as *Times-Picayune* and *Borreca* involved news conferences or other venues to which all members of the press were invited. *See* Part II.A (examining key press shut-out cases). There is a danger that courts will continue to focus on this distinction, which would allow government officials to bypass accountability for retaliatory acts by imposing No-Comment policies on employees.

[416] *See Chicago Reader*, 141 F. Supp. 2d at 1143 (stating that prison areas were "not accessible to the public, but accredited press members are routinely admitted").

[417] *See Chicago Reader*, 141 F. Supp. 2d at 1145 (stating that "retaliation need not be monstrous to be actionable under the First Amendment" and noting the low threshold for

The approach in *Chicago Reader,* if applied consistently, eliminates the right of access argument, uniformly applies an objective standard to the adverse impact test, easily finds retaliatory motive in shut-out cases and gives the proper amount of weight to the prerogatives of the officeholder. If the courts can get past the negative attitudes plaguing the press and address when government manipulation reaches dangerous levels, the *Chicago Reader* analysis would be a painless application. It still affords the government the opportunity to shape its message but not in a way that affects public criticism and the First Amendment rights of public employees.

IV
CONCLUSION

In bringing a retaliation claim based on a government shut-out, press plaintiffs can incorporate arguments that include a section 1983 claim, an equal protection claim, and a claim defending the First Amendment rights of public employees. The current state of retaliatory shut-out jurisprudence is anything but favorable for the press. However, with the right approach all of these claims should have some chance for success in the retaliatory shut-out context.

When it comes to definite instances of retaliation done subsequent to publicly aired criticism in the press, the chilling effect is the same regardless of the form it takes. In shut-out cases with clear evidence of retaliatory motive, all elements of the section 1983 claim are satisfied and the press' right of access should not be a factor in the decision.

The best way for a press claim challenging a retaliatory shut-out to succeed is if the courts apply a uniform approach. A uniform approach would look to whether the government's action is a content-based response that is intended to, and effectively would, censor and chill criticism. This is the approach used in *Chicago Reader* and should be the approach used by courts in subsequent shut-out cases. The courts have not offered a rational justification for any other analysis.

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retaliation that is considered sufficiently adverse to deter the plaintiff's exercise of constitutional rights); *Borreca*, 369 F. Supp. at 909-10 ("Requiring a newspaper's reporter to pass a subjective compatibility-accuracy test as a condition precedent to the right of that reporter to gather news is no different in kind from requiring a newspaper to submit its proposed news stories for editing as a condition precedent to the right of that newspaper to have a reporter cover the news. Each is a form of censorship."); *Times-Picayune*, 1988 WL 36491, at *9 ("Above all else, the First Amendment means that the government cannot restrict freedom of expression on the basis of its ideas, message or content.").

The government and the press have always and will always be involved in an antagonistic battle for the control of information. While the tension and negative attitudes related to this battle have been mounting, the courts must be free from outside influences and resume their role in even-handedly protecting First Amendment liberties.