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CASENOTE

Nelson v. McClatchy Newspapers: What Happens When Freedom of the Press Collides with Free Speech?

I. INTRODUCTION

On May 8, 1997, the Supreme Court of Washington decided *Nelson v. McClatchy Newspapers*.¹ The Court determined that a state law prohibiting employment discrimination based upon an employee's political conduct could not be constitutionally applied to newspaper publishers.²

This case presented a conflict between two well-established, but polar principles in First Amendment jurisprudence.³ The plaintiff, former *Tacoma News Tribune* (hereinafter referred to as "the *Tribune*") reporter Sandra Nelson, argued that the free press has "no special immunity from the application of general laws" and, therefore, is prohibited from engaging in employment discrimination.⁴ Conversely, the defendant, McClatchy Newspapers, maintained that the First Amendment shields newspaper publishers from statutory interference with their control of editorial content.⁵

1. 936 P.2d 1123 (Wash. 1997).

2. *See id.* At least thirty-seven states have enacted statutes protecting the political activities or opinions of employees from coercion or retaliation by employers. *See* Mark T. Carroll, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 58 (1981); *see, e.g.*, MASS. GEN. LAWS ANN. Ch. 56, § 33 (1999) (prohibiting an employer from reducing an employee's wages or ordering a dismissal in order to influence his vote); NEV. REV. STAT. § 613.040 (1995) (prohibiting interference with an employee's "engaging in politics or becoming a candidate for any public office").

3. *See Nelson*, 936 P.2d at 1130-31.

4. *Id.* at 1130 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) and holding that an editorial employee's discharge was prohibited under the NLRA and that such prohibition was not an unconstitutional abridgment of freedom of the press); *see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) (finding that an ordinance prohibiting sex-designated advertising for non-exempt job opportunities did not violate a newspaper's First Amendment rights); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-95 (1946) (ruling that an act setting minimum wages would not violate the First Amendment if applied to the newspaper publishing business); *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (holding that newspaper publishers are equally subject to antitrust laws).

5. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (invalidating a state statute requiring newspapers to print replies of political candidates whose character or record had been assailed in the newspaper); *see also Columbia Broad. Sys. v. Democratic Nat'l Committee*,

This Casenote addresses the impact of *Nelson v. McClatchy Newspapers* in the newsroom as it relates to the enforcement of employment discrimination statutes.⁶ It argues that the *Nelson* decision may facilitate camouflaged discrimination by media employers in the guise of “control of editorial content” and the “appearance of objectivity.” Additionally, it expresses concern over the vast political influence held by newspaper publishers, who have unfettered authority to force political abstinence on their employees. This power is particularly disturbing in this era of media industry consolidation.⁷

This Casenote discusses case law precedent involving legislative regulation of newspapers. It concludes that the *Nelson* decision is an unjustified extension of *Miami Herald v. Tornillo* because employment statutes do not implicate the editorial content of the newspaper where the protected employee activity has no relation to job performance.

Additionally, this Casenote focuses on the consequences of treating journalists as second-class citizens by denying them their fundamental right of access to the political process. It also critiques the journalistic ideal of complete objectivity.

Many media organizations presently enforce ethical codes that contain overbroad and counterproductive restrictions on the private lives of their employees.⁸ These ethical standards inhibit pluralism in news reporting and result in the suppression of many compelling stories and viewpoints.⁹ This Casenote concludes by providing suggestions on how media organizations can amend their journalistic codes of ethics in a manner that will allow them to protect their product’s integrity while simultaneously affording journalists greater freedom to explore their identities as citizens, both on and off the job.¹⁰

412 U.S. 94 (1973) (holding that the FCC properly refused to compel broadcasters to accept political advertising).

6. Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his . . . employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2 (a)(1) (1994).

7. See generally BEN BAGDIKIAN, *THE MEDIA MONOPOLY* (1997).

8. For example, reporters for *The Denver Post* are not allowed to serve on community-related boards or school boards. See TOM GOLDSTEIN, *THE NEWS AT ANY COST* 38 (1985). At *The Philadelphia Inquirer*, the code of ethics warns against activities such as “wearing an antiwar button at a rally.” Karen Schneider & Marc Gunther, *Those Newsroom Ethics Codes*, COLUM. JOURNALISM REV., July/Aug. 1985, at 56, 57. CBS News holds all employees responsible for ensuring that no family members come into conflict with its policy. See *id.*

9. See generally Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221 (1992).

10. For the purpose of this Casenote, the term “newspaper” refers only to “[n]ewspapers that exist primarily to disseminate ideas but not ideology.” Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 544 (1982). A partisan paper can arguably qualify as an “amplifying organization” in which the employer’s First Amendment rights are proxies for the

The statute at issue, Revised Code of Washington § 42.17.680(2) of the Fair Campaign Practices Act, states in full:

No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.¹¹

Sandra Nelson worked as a reporter for the *Tribune* from 1983-1990, covering the city's schools and state educational issues.¹² During her off-duty hours, she was a gay rights activist and a member of the Freedom Socialist Party.¹³ Among other causes, Nelson visibly promoted a ballot initiative to restore a city ordinance prohibiting employment and housing discrimination based upon sexual orientation.¹⁴

The *Tribune*, like many other newspapers and media organizations, required all of its reporters to refrain from engaging in any publicly visible political involvement.¹⁵ The *Tribune* justified this mandate by asserting that their employees' political activities compromised the newspaper's credibility and appearance of objectivity to its readers and advertisers.¹⁶ When Nelson's employers learned of her political activism, they informed Nelson that her conduct violated the newspaper's ethical standards.¹⁷ Although Nelson had never reported on issues

expressive and associational rights of its members." *Id.* at 538. See *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 979 (D. Mass 1983) (holding that publication of the *Monitor* was primarily a "religious activity," enabling the *Monitor* to "apply a test of religious affiliation to candidates of employment").

11. This subsection was part of a legislative package that placed limits on campaign contributions in order to prevent individuals or large organizations from using their financial strength to "exercise a disproportionate or controlling influence on the election of candidates." WASH. REV. CODE § 42.17.610(1).

12. See *Nelson v. McClatchy Newspapers*, 936 P.2d 1123, 1124, 1125 (Wash. 1997). As an "education beat" reporter, Nelson's responsibilities included researching and writing stories concerning local school districts, as well as legislative and regulatory developments at the state level involving education issues. See Respondents Brief in Opposition at 3, *Nelson v. McClatchy Newspapers*, 118 S.Ct. 175 (1997) (No. 97-187). Prior to her transfer, Nelson received "excellent" performance evaluations and regular raises from the *Tribune*. Additionally, her work for the *Tribune* earned her journalistic awards from the Freedom Foundation, the Daughters of the American Revolution, and the Society of Professional Journalists. See Brief of Appellant at 4, *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997) (No. 62943-9).

13. See Brief of Appellant at 4-5, *Nelson* (No. 62943-9).

14. Nelson attended and helped organize rallies and demonstrations in support of the initiative. Nelson was also responsible for gathering endorsements and campaigning door-to-door. See Brief of Respondent at 7, *Nelson* (No. 62943-9).

15. See *Nelson*, 936 P.2d at 1125. In 1983, an Ohio University study found that seventy-five percent of news organizations maintained some type of prohibition on reporters' political activism. See Karen Schneider & Marc Gunther, *Those Newsroom Ethics Codes*, COLUM. JOURNALISM REV., July-Aug. 1985, at 55.

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

17. See *id.*

related to her activism, her employers feared that their readers might question the neutrality of her work or the newspaper's credibility in general.¹⁸

Nelson continued her activities and, as a consequence, was punished with a disciplinary transfer to a copy editor position.¹⁹ Although Nelson maintained the salary, benefits, and seniority she had earned as a reporter, she no longer investigated or wrote articles.²⁰ Additionally, her new position required her to work nights and weekends.²¹ Nelson was told her transfer would not be rescinded "if she continued to engage in political activism."²²

Two years later, Nelson brought suit against her employer for a violation of Revised Code of Washington § 42.17.680(2), the employment discrimination provision of Washington's Fair Campaign Practice Act. Nelson asked the court to require the *Tribune* to reinstate her as a reporter.²³ The trial court granted McClatchy Newspapers' motion for summary judgment and dismissed Nelson's suit.²⁴ The court held that the defendants had a right under the First Amendment to force political neutrality on its reporters to "protect the newspaper's unbiased content, both in fact and as perceived by its readers."²⁵

Nelson appealed to the Washington Supreme Court.²⁶ That court found that "choosing an editorial staff is a core press function, at least where that choice is based on editorial consideration."²⁷ The Court reasoned that the power of a privately owned newspaper to advance its own

18. *See id.*

19. *See id.* After Nelson was transferred from education reporter, members of the teachers union, the school district and the Tacoma school board opposed the ouster. *See* Terry Tang, *How Freedom of the Press Stole a Reporter's Freedom*, SEATTLE TIMES, May 17, 1996 at B6. According to Nelson, her reassignment was a "drudgery and affront to her career." Timothy Egan, *Gay Reporter Wants to Be Activist*, N.Y. TIMES, Aug. 10, 1996.

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

21. *See id.*

22. Brief of Respondent at 8, *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997) (No. 62943-9).

23. *See id.* at 9. Nelson did not allege that she was discriminated against on the basis of her sexual orientation. The board of the National Lesbian and Gay Journalists Association (NLGJA) voted not to support Nelson in her lawsuit, reasoning that the issue was not discrimination against a gay journalist but whether journalists should be involved in political campaigns. *See* James Wallace, *Newswoman Loses Appeal of Lawsuits*, SEATTLE POST-INTELLIGENCER, Feb. 21, 1997. *But see* Brief of Amicus Curiae National Lawyers Guild and Sixty-Seven Co-Signers at 4-6, *Nelson* (No. 62943-9) (accusing the *Tribune* of expressing animus towards Nelson's socialist feminist politics which "harken[s] back to the McCarthy era when news organizations fired employees for alleged Communist affiliations and then justified the firing with reference to objectivity and credibility").

24. *See Nelson*, 936 P.2d at 1126.

25. Brief of Appellant at 13, *Nelson* (No. 62943-9).

26. *See Nelson*, 936 P.2d 1123.

27. *Id.* at 1133.

political, social, and economic views is bounded by two factors — the acceptance of a sufficient number of readers and the journalistic integrity of its editors and publishers.²⁸ Therefore, the Court held that a state law infringing on the publisher's discretion in choosing an editorial staff is unconstitutional as applied to the publisher.²⁹ The United States Supreme Court left the ruling intact, denying certiorari review without comment.³⁰

II. PERSPECTIVE

The *Nelson* court relied heavily upon the United States Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*³¹ for the proposition that the state absolutely may not regulate the content of a newspaper.³² At issue in *Tornillo* was a Florida "right-of-access" statute that required newspapers to publish a reply by any political candidate whose personal character or official record was assailed by that newspaper.³³ The *Miami Herald* challenged the statute on First Amendment grounds in an action for a declaratory judgment against a political candidate who had asserted a right of reply.³⁴ The Court held that it is unconstitutional for the government to compel newspapers to "publish that which *reason* tells them should not be published."³⁵ The Court was particularly concerned that the statute "exact[s] a penalty on the basis of the *content* of a newspaper."³⁶ The *Nelson* court inexplicably refused to distinguish Washington's anti-discrimination statute, which merely addressed the publisher's employment practices, from the statute in *Tornillo*, which compelled publication of specific content and thus plainly violated the First Amendment.³⁷

The holding in *Passaic Daily News v. NLRB*³⁸ illustrates the dichotomy between editorial discretion in selecting what to print and manage-

28. *See id.* at 1131.

29. *See id.* at 1133.

30. *See Nelson v. McClatchy Newspapers*, 118 S. Ct. 175 (1997).

31. 418 U.S. 241 (1974).

32. *See id.* at 258.

33. *See id.* at 243. FLA. STAT. § 104.38 (1973) required newspapers to "immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply."

34. *See Tornillo*, 418 U.S. at 245.

35. *Id.* at 256 (emphasis added) (internal quotations omitted).

36. *Id.* (emphasis added).

37. *See Nelson v. McClatchy Newspapers*, 936 P.2d 1123, 1133 (Wash. 1997) (Dolliver, J., dissenting) (stating that no one has "alleged that application of the statute would impinge upon the newspaper's exclusive right to determine what to print"); *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543 (D.C. Cir. 1984).

38. 736 F.2d 1543 (D.C. Cir. 1984).

rial discretion in choosing whom to employ.³⁹ In *Passaic Daily News*, a newspaper canceled a weekly column and demoted the columnist because he helped organize a labor union.⁴⁰ The National Labor Relations Board ("NLRB") ordered the newspaper to cease violating the columnist's rights under the National Labor Relations Act, to reinstate the columnist, and resume publication of his column.⁴¹ The newspaper asserted that "if government may not dictate what words a newspaper can or cannot print, then it may not question the editorial decision making-process which precedes the printing."⁴²

The court expressly rejected this argument when it upheld the NLRB's order. It ruled, however, that because of the First Amendment's protection of a newspaper's content, the NLRB could not compel publication of the reporter's weekly column as a remedy for the illegal demotion.⁴³ Thus, unlike *Nelson*, the court in *Passaic Daily News* properly ordered the newspaper to adhere to the applicable employment laws while allowing the publishers to retain full editorial discretion. McClatchy Newspapers similarly should have been ordered to comply with the statute but permitted to retain control of the content of its publication by editing Nelson's articles and being alert for biases in her reporting.⁴⁴ This solution would not unfairly burden the *Tribune* because it could still dismiss Sandra Nelson or take other managerial action against her if any actual bias appeared in her articles.

There is no denying that a newspaper's efforts to preserve its editorial integrity are crucial to its operation and within the protection of the First Amendment.⁴⁵ However, policies that are related to a newspaper's public credibility are not automatically immune from judicial scrutiny. The D.C. Circuit Court of Appeals has recognized this proposition.⁴⁶ According to the D.C. Circuit's ruling in *Newspaper Guild of Greater*

39. See *id.* at 1558; see also *Associated Press v. NLRB*, 301 U.S. 103, 131 (1936) (rejecting the argument that under the First Amendment, a newspaper "must have absolute and unrestricted freedom to employ and to discharge" news editors).

40. See *Passaic Daily News*, 736 F.2d at 1547-48.

41. See *id.* at 1548.

42. *Id.* at 1556 n.20.

43. See *id.* at 1558.

44. See *Nelson v. McClatchy Newspapers*, 936 P.2d 1123, 1145-46 (Wash. 1997) (Dolliver, J., dissenting).

45. See *Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d 550, 560-1 (1980) ("credibility is central to their ultimate product and to the conduct of the enterprise"); *Columbia Broad. Sys. v. Democratic Nat'l Committee*, 412 U.S. 94, 117 (1972) ("The power of a privately owned newspaper . . . is bounded by only two factors: first, the acceptance of a sufficient number of readers . . . and, second, the journalistic integrity of its editors and publishers.").

46. See *Newspaper Guild of Greater Phil., Local 10 v. NLRB*, 636 F.2d 550, 560-1 (D.C. Cir. 1980) (holding that the substantive rules of a newspaper's ethical code which do not impact the credibility of the newspaper are properly the subject of collective bargaining).

Philadelphia, Local 10 v. NLRB, internal rules adopted to control an employee's off-duty conduct must be "reasonable" and limited to activities that "directly compromise" the integrity of the journalist or the publication.⁴⁷ Furthermore, when constructing these codes of ethics, the court explained that the newspaper's discretion "is not open-ended, but must be *narrowly tailored* to the protection of the core purposes of the enterprise."⁴⁸

Applying the standard announced by the D.C. Circuit Court, McClatchy Newspaper's restrictions on Sandra Nelson's conduct in her private life and her ultimate transfer to the copy desk are unreasonable. The *Tribune* failed to offer any evidence showing Nelson's lawful activities had any demonstrable adverse effect on the character or content of the *Tribune*.⁴⁹ The *Tribune* did not allege that they had lost advertising, readership, or profits due to Nelson's political activity.⁵⁰ In fact, there was no evidence that any readers, sources, or advertisers even knew that Nelson was politically active.⁵¹ Most importantly, the *Tribune* did not point to a single example of actual bias in Nelson's articles.⁵² Without evidence of either actual or perceived bias, the *Tribune's* asserted connection between Nelson's political activity and the content of the newspaper was based on conjecture. As such, it was too "attenuated, remote and speculative" to warrant a sweeping First Amendment privilege.⁵³

Prior to *Nelson v. McClatchy Newspapers*, only one federal district court had considered the contention that a newspaper was exempt from compliance with employment discrimination statutes.⁵⁴ That court flatly rejected this contention.⁵⁵ In a suit brought by an unsuccessful candidate for Managing Editor against a newspaper for an alleged gender discrimination violation, the district court in *Hausch v. Donrey of Nevada* rejected a newspaper publisher's argument "that applying Title VII to

47. *Id.* at 561.

48. *Id.* at 561 n.36 (emphasis added).

49. See Brief of Appellant at 10, *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997) (No. 62943-9).

50. See *id.*

51. See *id.* at 11. The *Tribune* never questioned Nelson's ability to write objectively and never declined to publish any article submitted by Nelson for this reason. See *id.*

52. See *id.*

53. See *Hausch v. Donrey of Nevada*, 833 F. Supp. 822, 832 n.9 (D. Nev. 1993); see also *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) (holding that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1971) ("[T]he first amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes"); cf. *University of Penn. v. E.E.O.C.*, 493 U.S. 182, 189 (1990) (refusing to recognize a claim by a university that it has a First Amendment exemption to Title VII).

54. See *Hausch v. Donrey of Nevada*, 833 F.Supp. 822 (D. Nev. 1993).

55. See *id.* at 832.

their newspaper business would, as a matter of law, violate their First Amendment rights.”⁵⁶ The Court refused “[i]n the absence of any indications of infringement . . . [to] recognize an expanded First Amendment right to discriminate in the hiring and firing of editorial employees in violation of Title VII.”⁵⁷

McClatchy Newspapers successfully distinguished *Hausch* by arguing that the alleged gender discrimination in *Hausch* involved an “immutable physical characteristic,” whereas the *Tribune*’s code of ethics merely addressed “voluntary conduct.”⁵⁸ This argument, however, cannot withstand scrutiny. First, neither Title VII nor § 42.17.680(2) of Washington’s Fair Campaign Practices Act⁵⁹ make a distinction between “physical characteristics” and “conduct.”⁶⁰ Second, this legal standard would allow newspapers to invoke the First Amendment to discriminate against employees based upon “conduct” such as the practice of religion and sexual behavior.⁶¹ For example, a newspaper could refuse to assign a person adhering to the Islamic faith to any foreign news beat in the Middle East, on the grounds that his or her religious “conduct” would taint the reporter and the newspaper with the appearance of partiality, and readers might view such reporting as prejudiced. By further example, a newspaper could prevent a gay journalist from writing about medical research on AIDS because his homosexual “conduct” might be perceived as compromising his objectivity on the subject matter. Newspapers could potentially prevent a practicing Catholic from writing about an abortion rally. The possibilities are endless.

Regrettably, these hypotheticals are not fanciful. The actions of other newspapers in enforcing similar codes of ethics reflect the breadth of the codes’ sweep. For example, in July 1989, the *Vero Beach Press-Journal* dismissed an education reporter for publicly endorsing abortion rights, although the reporter had affirmatively sought to ensure that she would not be assigned to cover abortion-related issues.⁶² The *Troy Times Record* terminated a reporter who had been selected as an alter-

56. *Id.* The Court failed to see how Title VII’s prohibitions directly or indirectly infringed on the Defendant’s First Amendment rights. The court distinguished *Tornillo* because Title VII in no way requires the newspaper to publish any material it does not wish to publish. *See id.* at 830.

57. *Id.* at 832.

58. Respondent’s Brief in Opposition at 15, *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997) (No. 97-187) (emphasis added).

59. WASH. REV. CODE § 42.17.680(2).

60. *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1994).

61. Although Title VII does not designate sexual orientation as a protected category from discrimination, several states and municipalities do prohibit employment discrimination on the basis of sexual orientation. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-81c (West 1995); HAW. REV. STAT. ANN. § 368-1 (Michie 1999); MASS. GEN. LAWS ANN. Ch. 151B, § 4 (Lexis 1999).

62. *See* Brief of Amicus Curiae Washington State Labor Council at 6-7, *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997) (No. 62943-9).

nate delegate to the 1980 Democratic National Convention, although she never reported about politics.⁶³ The Associated Press removed a reporter, who was a born-again Christian, from a state government beat after he expressed his religious views in an interview with a Christian newspaper.⁶⁴ The *Philadelphia Inquirer* once found an employee to be in violation of its ethics code where a film critic signed a petition protesting the deteriorated condition of a theater.⁶⁵

In the *Nelson* case, McClatchy Newspapers' determination that Sandra Nelson's activities created a conflict of interest was based purely on speculation about readership perception.⁶⁶ When attempting to discern the "confidence level" of their readership, newspapers are likely to reinforce community values, which may be based primarily on fear, hatred, and prejudice.⁶⁷ Consequently, newspapers are more likely to ask reporters who are members of controversial or minority groups to refrain from their public activities than reporters belonging to more conventional or popular associations.⁶⁸ For example, if Nelson sought to perform PTA work, or serve as a volunteer for the zoo, it is unlikely she would be transferred to copy editor, even if her activity created a genuine conflict of interest.⁶⁹ Although media employers' personnel decisions are purportedly viewpoint neutral, the difficulty in detecting bias provides media employers with the effective ability not to be viewpoint neutral. Moreover, *Nelson* dictates that the newspaper does not have the burden of proving any adverse reader reaction before demoting or dismissing the employee.⁷⁰

The adoption of less restrictive standards governing journalists' activism could promote political and sociological diversity among reporters. This heterogeneity may actually stimulate reader interest with refreshing and novel perspectives to media reporting. Thus, the standard justification for codes of ethics—preserving the support of the readership—may not be served if media employers are permitted to continue enforcing strict codes of ethics.

III. ANALYSIS

Restrictive conflict of interest standards are flawed because every

63. *See id.* at 7.

64. *See id.*

65. *See id.*

66. *See* Brief of Appellant at 9, *Nelson* (No. 62943-9).

67. *See* Brief of Amicus Curiae Washington State Labor Council at 3, *Nelson* (No. 62943-9).

68. *See id.*

69. *See* Mumia Abu-Jamal, *The Silencing of Sandy Nelson* (visited Nov. 1, 1998) <<http://www.socialism.com/fsarticles/vol117no2/mumia172.html>>.

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

journalist has an interest or affiliation, past or present, that an employer could perceive as compromising the newspaper's neutrality.⁷¹ Nonetheless, some newspaper editors mandate that reporters avoid all non-journalistic activities: Don't march in rallies, don't run for president of the school board, don't contribute to the fund for the new library, etc. Journalists, however, cannot be expected to live antiseptic lives, cut off from all forms of involvement other than their professional endeavors.⁷²

If journalists are going to insightfully understand the world about them—the world they are responsible for interpreting and explaining to the rest of us—how can they reach that level of understanding achieve if they deliberately remove themselves from public life? Abstinence from these activities may prevent conflicts of interest, but does little to increase journalists' sensitivity, understanding, and knowledge about the people and events they cover.⁷³ To the contrary, hands-on participation can provide journalists with the insight, experience, and perspective that will, in the long run, better equip them to comment on their community.⁷⁴

The standard editing process employed in most newsrooms further discredits employers' purported concerns about the appearance of personal biases in editorial content.⁷⁵ As a reporter's initial draft of an article is usually extensively edited by at least one other person prior to publication, it is unlikely that elements of personal ideological bias would make their way into the final, published account.⁷⁶ Moreover, due to the proliferation of news sources on the internet, the growth of 24-hour-a-day news networks, and the availability of national editions of major newspapers, editors can check their own reporters' work against many other sources.⁷⁷

A reporter's awareness of his own potential biases may serve as an additional check on accuracy and fairness.⁷⁸ The ethic of objectivity and the desire to be promoted and gain respect from colleagues encourages journalists to take special precautions to guarantee fair coverage of ideo-

71. See Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 245 (1992).

72. See JOHN L. HULTENG, PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 28-30 (1981).

73. See *id.*

74. See *id.* at 30.

75. See Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 246 (1992).

76. See *id.*

77. See David Shaw, *Instant Consensus: How Media Gives Stories Same 'Spin'*, L.A. TIMES, Aug. 25, 1989, at 1, 33.

78. See Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 246-47 (1992).

logically adverse newsmakers.⁷⁹ These factors substantially undermine claims that bias will inevitably flow from personal involvement. This is true even where the reporter's outside activity *does* relate to an issue that implicates the reporter's beat.

In any case, the appearance of conflict is impossible to avoid completely. Despite newspapers' implementation of strict codes of ethics, opinion polls indicate that more than half of the public believes that journalists favor one side or the other when reporting political and social issues.⁸⁰

Newspapers publishers often regard themselves as exceptions to the policies that keep other staff members out of politics.⁸¹ Daily newspapers often accept valuable advertising from major corporations while simultaneously reporting on issues dear to the hearts of these corporations.⁸² On their editorial pages, newspapers opine on controversial issues covered in their news pages. If one accepts that news coverage can remain impartial despite the pressures of advertisers, grant money, and official editorial positions, then it is reasonable to accept that the activities of journalists that give the mere appearance of a conflict of interest also will not affect news coverage. If we do not make this allowance, it seems unfair to demand that journalists adhere to higher standards than that of their employers.

Sandra Nelson's circumstances at the *Tribune* provide an example of this double standard that seems to be in effect in many newsrooms. At the time of Nelson's transfer, *Tribune* publisher Kelso Gillenwater, along with counterparts at Seattle's two daily papers, promoted taxpayer funding for a new stadium for the Seattle Mariners baseball team.⁸³ The *Seattle Times* publisher Frank Blethen provided free advertising worth \$40,000 for the promotion of the new stadium.⁸⁴

Although publishers may not be directly involved in covering news

79. See MITCHELL STEPHENS, *A HISTORY OF NEWS* 266 (1988) (opining that most reporters bury their individual political attitudes when interviewing people with opposing views).

80. See David Rynecki, *How Are We Doing?*, *COLUM. JOURNALISM REV.*, Jan.-Feb. 1992 at 15.

81. See Karen Schneider & Marc Gunther, *Those Newsroom Ethics Codes*, *COLUM. JOURNALISM REV.*, July-Aug. 1985, at 55, 57.

82. Historical evidence and commentary suggests that the rise of advertising played a significant role in the decline of "partisan" newspapers. Advertisers "wanted less criticism of public officials and reminded publishers that partisanship hurt circulation and, consequently, advertising revenues." See Gerald J. Baldasty & Jeffrey B. Rutenbeck, *Money, Politics And Newspapers: The Business Environment of Press Partisanship in the Late 19th Century*, 15 *JOURNALISM HIST.* 60, 63 (1988).

83. Kelso Gillenwater subsequently agreed to chair the state Higher Education Coordinating Board. See Sandy Nelson, *Publishers Play the Game With Two Sets of Rules*, (visited Nov. 1, 1998), available in <<http://www.socialism.com/sandy.html>>.

84. See *id.*

related to their own political activity, the fact of their participation in political affairs creates a real danger of affecting coverage by their subordinates who do have those beats.⁸⁵ Publishers argue that their own community participation is necessary to protect their investment in the newspapers.⁸⁶ Reporters and editors, however, also have stakes in their communities and should be permitted to exercise their rights as citizens to participate in their communities—as long as their participation does not interfere with their reporting.⁸⁷ This is especially true of journalists who are minorities or activists for less conventional causes. Their interests are often disproportionately underrepresented in the legislature, lobbying organizations, and society-at-large. Therefore, the removal of even a single activist from their cause may have a greater impact than removing an activist from a group that already has a guardian of their interest in the community or legislature.

The fact that the *Tribune* continued to employ Nelson as a copy editor, thereby giving her the responsibility of editing and rewriting all of the copy that goes into the paper, demonstrates that the *Tribune* publishers were *not* concerned about Nelson injecting her personal bias into the content of the paper.⁸⁸ The *Tribune* was apparently concerned with the potential of Nelson writing first draft copy, with a byline identifying her by name, causing some unknown hypothetical reader to react adversely to the newspaper.

A more appropriate journalistic code of ethics would allow journalists to participate freely in their communities, politics, and civic organizations outside of working hours. The participation would have to be in a personal capacity with no attempt to make a connection to the publisher.

As the United States Supreme Court has consistently emphasized, the right to participate in the political process is the guardian of all other rights.⁸⁹ The lesson of these decisions is that it is the paramount duty of

85. See generally Karen Schneider & Marc Gunther, *Those Newsroom Ethics Codes*, COLUM. JOURNALISM REV., July-Aug. 1985, at 55, 57.

86. See *id.*

87. See *id.*

88. As copy editor, Nelson was responsible for writing headlines, captions for photographs, and editing a wide variety of local and national stories. See Brief of Appellant at 37, *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997).

89. See, e.g., *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (“[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.”); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 629 (1969) (“The presumption of constitutionality and the approval given ‘rational’ classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.”) (footnote omitted).

courts to ensure that all persons have access, on an equal basis, to the political process by which they can defend their own rights and interests.

The implications of the *Nelson* decision reach far beyond the harmed media employees in the State of Washington. Under the "marketplace of ideas" rationale for free expression, we are all harmed in our search for truth whenever political speech is repressed.⁹⁰ Additionally, many states have enacted employment discrimination laws protecting political conduct.⁹¹ Therefore, the *Nelson* decision, which is the first to interpret such a statute in the context of the free press, may be particularly persuasive in other jurisdictions.

The *Nelson* decision renders media employees in the State of Washington second-class citizens deprived of their right to participate in the political process. This restriction is not only an affront to the individual liberty interests of reporters, but also may "effectively exclude from public discourse the most informed and articulate voices of the citizenry."⁹² The institutional imperative of avoiding the "appearance of impropriety" is simply an inadequate justification. Newspapers should amend their ethical standards to allow newsroom personnel, at a minimum, to retain their free speech and political participation rights as to outside activity that has no relation to the substance of their reporting.

In the meantime, journalists for many newspapers continue to walk a tightrope—somewhere between living their own lives as citizens of the world and staying as far away as possible from non-journalistic involvement that would reflect on their trustworthiness as journalists.

IV. CONCLUSION

Although it is difficult to decide to allow the State to interfere with a newspaper's internal policies, codes of ethics in the newsroom should contain a modicum of reason when they broadly restrict political activism. The claim that abstention from outside activity is integral to producing unbiased accounts does not withstand scrutiny.

In their zeal to demonstrate purity, news organizations often reach too far into the personal lives of their employees by regulating outside activities that pose no real conflict. As for the industry's concerns about its image problems, codes of ethics alone will not restore the public's trust. "What is required is fair and through reporting and vigilant edit-

90. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

91. See *supra* note 2.

92. Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 223 (1992).

ing—in short, professionalism on the job.”⁹³ Publishing a newspaper or producing a newscast is a lot more difficult than drafting an ethics code. Improving the performance of reporters and editors, however, will pay more dividends than worrying about what they do once they’ve left the office.

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93. Karen Schneider & Marc Gunther, *Those Newsroom Ethics Codes*, COLUM. JOURNALISM REV. July-Aug. 1985, at 55, 57.

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