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No Pay, No Play: Trial Broadcast Fees Are Constitutional

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NO PAY, NO PLAY: TRIAL BROADCAST FEES ARE CONSTITUTIONAL

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I. INTRODUCTION

Two obstacles loom in the way of responding to the Honorable William L. Howard.[1] The first of these barriers is one shared with all law review authors who respond to critiques of their proposals. As Cecil Rhodes said just before dying, "so much to do"[2] and in this case, so little time (and space)!

The second difficulty is relatively unusual. As any attorney knows, arguing with a judge is not wise.[3] Moreover, in this instance, the opposition is not any ordinary judge, but the imposing figure of The Honorable William L. Howard. Judge Howard has received national attention and respect for his

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1. This reply responds to The Honorable William L. Howard, *Televised Trials: Can the Government Market Electronic Access?*, 49 S.C. L. REV. 55 (1997), which is an analysis of the constitutional implications of my proposal to charge broadcast fees to those who wish to televise criminal trials and then to forward those fees to crime victims, as detailed in Stephen D. Easton, *Whose Life Is It, Anyway?: A Proposal for Redistributing Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. REV. 1 (1997).

2. JOHN BARTLETT, FAMILIAR QUOTATIONS 564 (Justin Kaplan ed., 16th ed. 1992). The entirety of Rhodes last words, which perhaps is more applicable to this effort, was "So little done—so much to do." *Id.*

3. I am aware of the attorneys' axiom of avoidance of disputes with judges. Stephen D. Easton, *A Guide to the Care and Feeding of Judges*, THE PROSECUTOR, July/Aug. 1997, at 36, 37 ("Rule VII: Pick Your Battles (Especially Your Battles with the Judge) Carefully."). Nonetheless, given Judge Howard's incorrect (in my view) argument that the broadcast-fees-for-victims proposal violates the Constitution, I am left with no choice other than outlining my disagreement. *Id.* at 37-38 ("Unfortunately, you cannot always get the judge to agree with you, and you sometimes have to disagree with the judge . . . .").

knowledge of the issues surrounding cameras in the courtroom, based upon his experience in the Susan Smith case. He is also held in high regard in his home state of South Carolina, as is evidenced by his recent election to the South Carolina Court of Appeals.

Undaunted by these challenges, this brief reply will outline why the proposal of broadcast fees for victims is allowed under the Constitution. This reply will respond to the issues raised by Judge Howard's article in roughly the same order he raised them. First, Part II will confirm that the broadcast-fees-for-victims proposal is not an improper selective economic burden or tax on the media. Next, Part III will contend that the proposal does not establish a means for government censorship of the media. Then, Part IV will assert that it does not improperly place an economic burden on one segment of the press or otherwise discriminate against the press. Finally, Part V will reiterate the propriety of government sale of broadcast, and many other, rights.

II. THE BROADCAST-FEES-FOR-VICTIMS PROPOSAL DOES NOT IMPOSE AN IMPROPER TAX ON THE MEDIA

Judge Howard first suggests that the broadcast-fees-for-victims proposal constitutes "a financial burden singularly applicable to the press"[4] that is disallowed under the United States Supreme Court's media taxation cases. This suggestion results from an overly expansive reading and application of this case law.

The case primarily relied upon by Judge Howard, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[5] is readily distinguishable. In *Minneapolis Star & Tribune Co.*, the State of Minnesota enacted a use tax on the paper and ink used by publishers.[6] The tax applied only to publishers who used more than $100,000 of ink and paper in a calendar year.[7] The Supreme Court held that this selective ink and paper use tax was an unconstitutional "special tax that applies only to certain publications protected by the First Amendment."[8]

Unlike the ink and paper tax in *Minneapolis Star & Tribune Co.*, the broadcast-fees-for-victims proposal involves entirely voluntary payments—not unavoidable taxes. To produce a large circulation paper in Minnesota, a publisher had to use more than $100,000 of ink and paper and therefore had to pay the ink and paper tax. Under the broadcast-fees-for-victims proposal,

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4. Howard, *supra* note 1, at 58.

5. 460 U.S. 575 (1983).

6. *Id.* at 577.

7. *See id.* at 578 ("Ink and paper used in publications became the only items subject to the use tax . . . .").

8. *Id.* at 581.

no person or entity will ever have to pay for the right to broadcast trials. Those who wish to avoid paying broadcast fees will have the full power to do so. By choosing not to record or broadcast images from inside the courtroom, any entity will entirely avoid the economic burden of the broadcast-fees-for-victims proposal.[9]

Unlike ink and paper for the publishing industry, courtroom cameras are not a necessity for television producers. Even television networks that specialize in coverage of trials, including Cable TV and CNN, can cover those trials without operating cameras inside courtrooms. These networks and other television producers have extensively covered many trials without courtroom cameras, including the Mike Tyson rape trial,[10] the Polly Klaas kidnapping and murder trial,[11] the World Trade Center bombing trial,[12] the Timothy McVeigh Oklahoma City federal building bombing trial,[13] and Judge Howard's own Susan Smith trial.[14]

While television producers undoubtedly would have preferred to place cameras inside these courtrooms, the Constitution did not require these trials to be televised. Because neither the Supreme Court nor the federal courts of appeals have recognized a First Amendment right to televise trials,[15] the broadcast-fees-for-victims proposal does not infringe upon any First Amendment right. Newspaper publishers have a well-recognized First Amendment right to publish, and exercising this right requires use of ink and paper. Television producers have no First Amendment right to broadcast criminal trials. Producers can freely exercise the First Amendment rights that they do

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9. The commentator that Judge Howard repeatedly cites recognizes that the voluntary nature of courtroom broadcast fees place them outside the Supreme Court's media tax cases. See David W. Burcham, *High-Profile Trials: Can Government Sell the "Right" to Broadcast the Proceedings?*, 3 UCLA ENT. L. REV. 169, 195 (1996), stating:

> [N]ot . . . all members of the targeted group would be burdened by the tax, but only those desiring to broadcast a court proceeding. Given this . . . structure, a court would be unlikely to find that a fees-for-feed policy would present the 'danger of censorship' inherent in . . . discrimination [that targets a subset of a larger group].

10. Indiana is one of three states that do not allow cameras in their courtrooms, Easton, *supra* note 1, at 14.

11. Hugh Dellios, *U.S. Justice System Hit by Simpson Trial Fallout*, CHI. TRIB., Sept. 18, 1995, at 1.

12. Robert Schmidt, *Novel Camera Issue at Play in Bombing Case*, RECORDER (SAN FRANCISCO), June 11, 1996, at 1.

13. *Id.*

14. Dellios, *supra* note 11, at 10.

15. *See* Easton, *supra* note 1, at 48 & nn.250-51; *see also* Burcham, *supra* note 9, at 174 ("The media has no constitutional right to record the events by camera or magnetic tape, or to televise the proceedings.").

possess, namely the right to attend and cover all public trials,[16] without ever paying broadcast fees.[17]

III. THE BROADCAST-FEES-FOR-VICTIMS PROPOSAL DOES NOT ESTABLISH A MEANS FOR GOVERNMENT CENSORSHIP

Despite Judge Howard's characterization of the argument as a "classic syllogism,"[18] the absence of a First Amendment right to broadcast trials does indeed establish a constitutionally legitimate basis for charging fees to those who wish to broadcast trials. Of course, the absence of a constitutional right to televise trials does not mean that any conceivable rule regulating the televising of trials would be acceptable, regardless of its provisions. Certainly, some conceivable rules allowing courtroom cameras would be unconstitutional. For example, a rule allowing cameras in courtrooms or providing for a discount on broadcast fees only if television producers agreed to praise the judge would be constitutionally suspect and presumably prohibited. Either rule would be a constitutionally impermissible content-based restriction. According to the Supreme Court, "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[19]

As Judge Howard concedes,[20] the broadcast-fees-for-victims proposal is content-neutral.[21] Once an entity pays the applicable broadcast fee, use of the television feeds that it acquires in its programming is unrestricted.[22] Similarly, the entity can choose not to pay the broadcast fee and thereafter exercise its First Amendment right to cover the trial with whatever content it desires, including criticism of the court.

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16. The First Amendment states that "Congress shall make no laws . . . abridging the freedom of press." U.S. CONST., Amend. 1.

17. *See infra* notes 30, 32.

18. Howard, *supra* note 1, at 57 n.18.

19. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984).

20. In Judge Howard's words, "Unless the description of television coverage of high-profile trials as entertainment is viewed as an underlying censorship motivation, the proposal is clearly content-neutral." Howard, *supra* note 1, at 68. The broadcast-fees-for-victims proposal is content-neutral regardless of whether television networks televise trials for entertainment or educational purposes because the proposal makes no distinction between these two motivations. *Cf.* Easton, *supra* note 1, app. (including no provisions distinguishing between educational and entertainment programming).

21. Judge Howard is not alone in recognizing that a system for charging broadcast fees is content-neutral. *See* Burcham, *supra* note 9, at 205 ("To be sure, levying a fee for access to the governmental property necessary to generate electronic feed is a type of 'content neutral' restriction.").

22. Easton, *supra* note 1, app. at 52.

The content-neutral nature of the broadcast-fees-for-victims proposal renders much of Judge Howard's analysis of the economic impact of the proposal inapplicable. A review of media tax cases reveals that the concern at the heart of these cases is the possibility of creating a means for government censorship of the media.[23]

The broadcast-fees-for-victims proposal does not create the means for a court to discriminate based upon content. If the courts discriminate based upon content, then that discrimination results from courts' authority to prohibit altogether the televising of trials. If television producers can establish that a court has decided whether to allow televising of trials, with or without broadcast fees, on the basis of content, then they might have a legitimate constitutional complaint. However, the ability of courts to prohibit televising of trials—not their ability to charge broadcast fees—establishes the means for potential content-based discrimination.

Until the courts recognize a First Amendment right to televise trials, content-neutral rules that limit or prohibit televising of trials can survive rational-basis scrutiny. The absence of a First Amendment right to televise trials also distinguishes the broadcast-fees-for-victims proposal from the unconstitutional Son of Sam law reviewed in *Simon & Schuster, Inc. v.*

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23. In reviewing its earlier decision in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court observed in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983):

> After noting that the tax was "single in kind" and that keying the tax to circulation curtailed the flow of information, this Court held the tax invalid as an abridgement of the freedom of the press. Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the Governor to each member of the state legislature described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying, 2c [sic] a lie."

Id. at 579-80 (citations omitted).

The *Minneapolis Star & Tribune Co.* decision itself is based upon concerns about the potential use of the tax to censor the media:

> When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Id. at 585.

A 1987 Supreme Court decision was similarly based upon censorship concerns. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) ("[T]his case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*.").

Members of the New York State Crime Victims Board.[24] The New York Son of Sam statute was an attempt to capture the proceeds of books written by those who committed crimes. Under the statute, publishers had to pay all contractual royalties to the Crime Victims Board, rather than to the author, whenever books or other materials mentioned crimes committed by the author.[25] The Supreme Court held that the First Amendment gave either the author or the publisher the right to produce such materials and that the Son of Sam law imposed an impermissible "financial disincentive only on speech of a particular content."[26]

If the First Amendment gave broadcasters the right to televise trials, they could credibly argue that limitations on that right would be unconstitutional. In the absence of that right, Judge Howard could constitutionally refuse to allow the televising of the Susan Smith trial, and future judges can condition their grant of the privilege to televise trials upon content-neutral rules requiring television producers to pay broadcast fees.

IV. THE BROADCAST-FEES-FOR-VICTIMS PROPOSAL DOES NOT UNCONSTITUTIONALLY DISCRIMINATE

The broadcast-fees-for-victims proposal also does not run afoul of the equal protection doctrine because it does not discriminate among or against the media. Judge Howard erroneously believes that "the Easton proposal does single out an element of the press for special treatment."[27] Although the proposal requires the payment of broadcast fees as a prerequisite to electronic media coverage, the term electronic media coverage is defined broadly enough to include all media, not just television or even broadcasting outlets. The proposal states, "'Electronic media coverage' means any photographing, recording, or broadcasting of court proceedings by the media using television, radio, photographic, or recording equipment."[28] Therefore, any media agency that wished to use equipment to record or broadcast courtroom proceedings would be required to pay broadcast fees.[29] Although television producers almost certainly would be the most likely media personnel willing to pay broadcast fees, radio stations, newspapers, magazines, and even book writers

24. 502 U.S. 105 (1991).

25. *Id.* at 108-11.

26. *Id.* at 116.

27. *See* Howard, *supra* note 1, at 69.

28. *See* Easton, *supra* note 1, app. at 51.

29. *Cf.* Burcham, *supra* note 9, at 177 ("The Court has not extended the First Amendment right of access to the electronic media. In *Estes v. Texas*, [381 U.S. 532 (1965),] the Court expressly rejected [the] claim[] that . . . to deny the right [to broadcast from the courtroom] discriminated against the electronic media in favor of the print media.").

would be required to pay the fee before broadcasting, photographing, or otherwise recording criminal trials.[30]

The almost certain reality that television networks would be more likely than other media outlets to pay the fees does not make the proposal discriminatory. The greater willingness of television networks to pay broadcast fees for many trials results from media outlets' internal calculations of the costs and benefits of paying the fees. The mere fact that television networks have more to gain financially than other media outlets does not render the proposal, which requires payment for the right to this financial gain, discriminatory.

Television networks also cannot credibly argue that they must be allowed to televise trials free of cost to produce a product equivalent to that of print reporters. Again, the important and currently undisputed holding of the courts is that the First Amendment does not guarantee the right to televise trials.[31] If any alleged right to compete on supposedly equal footing required televising of all public criminal trials,[32] then Judge Howard could not have kept television cameras out of the widely covered Susan Smith trial.

The broadcast-fees-for-victims proposal does not discriminate among media agencies. The proposal also does not discriminate against the media as a whole. Under the proposal, "any person or organization engaging in entertainment production or news gathering or reporting" must pay a fee for this privilege.[33] With this extremely broad definition, any person or entity that wishes to photograph, broadcast, or record criminal trials would be required to pay broadcast fees. This requirement would apply not only to traditional news media organizations such as television networks, radio stations, newspapers, and magazines, but also to anyone who would engage in "court feed brokering"—recording trials and reselling the right to use these images.[34] The broadcast fee requirement would even apply to home video

30. The broadcast-fees-for-victims proposal does not interfere with any media agency's ability to cover trials without the use of recording or broadcasting equipment. *See* Easton, *supra* note 1, app. at 51 ("This provision does not otherwise limit or restrict the right of the media to attend and report about court proceedings.") Under the proposal, reporters from newspapers, magazines, television stations, and radio stations (and even nonreporters) would be free to attend trials with notebooks in hand and to fully exercise their First Amendment rights to write and speak about these proceedings. They would be required to pay broadcast fees only if they wished to photograph, record, or broadcast trials. The lack of interference with all reporters' basic right of access to the courtroom, *sans* recording or broadcasting equipment, renders the proposal acceptable under the Equal Protection Clause. *See infra* note 32.

31. *Supra* note 15 and accompanying text.

32. *See* Burcham, *supra* note 9, at 188 ("[W]ith respect to the electronic media's treatment *vis a vis* the print media, no credible claim of discrimination can be sustained. Members of the electronic media who wish to attend a trial and engage in 'conventional' newsgathering activities enjoy the same constitutional right of access as other media representatives.").

33. *See* Easton, *supra* note 1, app. at 51 (defining the media agencies that would be required to pay broadcast fees).

34. *See id.* app. at 52 (allowing any entity that secures the right to exclusive coverage through

enthusiasts who wanted to record trial events for their own entertainment. By defining any person or entity who wishes to photograph or record trials as a media agency required to pay broadcast fees for this privilege, the proposal eliminates distinctions between traditional media outlets and other entities.[35] With this expansive coverage, the proposal does not discriminate between traditional media outlets and the general public, much less other potential media agencies.

Because the proposal discriminates neither against segments of the media nor against the media as a whole, rational-basis scrutiny is appropriate. Equal protection concerns do not constitutionally prevent the adoption of the proposal because the proposal easily satisfies this minimal standard.

V. THE BROADCAST-FEES-FOR-VICTIMS PROPOSAL IS A CONSTITUTIONAL GOVERNMENT SALE

As a final objection to the broadcast-fees-for-victims proposal, Judge Howard suggests that the proposal violates constitutional doctrine regarding proprietary action by governments and "forum analysis."[36] Again, however, this suggestion stems from a misunderstanding of the proposal.

Judge Howard asserts that the proposal "places the State's compelling interest of compensating crime victims in direct conflict with its fundamental responsibility to assure the defendant a fair trial."[37] This assertion seemingly ignores the inherent reality that any system allowing broadcasts of criminal trials places the interests of those who wish to broadcast in conflict with the state's responsibility to ensure a fair trial. The broadcast-fees-for-victims proposal does not create this conflict. Instead, the proposal merely divides the interest on the pro-television side of this balance between television producers and crime victims by transferring a portion of the interest from producers to victims.

The only way to eliminate the tension between those who wish to televise and the defendants who seek fair trials is to adopt a system that does not allow

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sealed bid auctions "to resell any images produced during its electronic media coverage").

35. In discussing New York's Son of Sam statute, the Supreme Court noted that a proposal with wide coverage does not include distinctions between traditional media outlets and other entities:

> Any "entity" that enters into such a contract [to produce a crime-based book] becomes by definition a medium of communication, if it was not one already. In any event, the characterization of an entity as a member of the "media" is irrelevant for these purposes. The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.

Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991).

36. *See* Howard, *supra* note 1, at 68-70.

37. *Id.* at 71.

televising trials under any circumstances. Simply ignoring the "compelling interest of compensating crime victims"[38] does nothing to eliminate this tension.

Furthermore, a government sale of broadcast privileges is constitutionally permissible. Judge Howard refers the reader to the analysis in David Burcham's law review article. However, Professor Burcham himself admits that current forum analysis would not prohibit collection of fees for broadcast privileges.[39] While Professor Burcham's argument for judicial adoption of a new line of reasoning[40] is academically interesting, his need to argue for new court reasoning merely underscores that government sale of broadcast privileges is allowed under current law.

Indeed, considering that a government can charge fees for a wide variety of rights, including the right to broadcast state-produced football games,[41] the right to use state-owned property incidentally in the course of a cable television business,[42] and even the right of parties to litigate in its courts,[43] the State should also be able to charge for the right to use and profit from state-sanctioned trials occurring on state property. While courtroom-televising networks will be no more anxious to pay government assessed fees than their counterparts in the football broadcasting, cable television, and litigating industries, these networks have no constitutional basis for claiming an exemption from fees for the right to broadcast trials.

VI. CONCLUSION

The Constitution does not prohibit the content-neutral, broadcast-fees-for-victims proposal. Additionally, the states have a compelling interest in compensating crime victims, and current financing of state-adopted programs for compensation of crime victims is inadequate. Given the compelling interest

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38. *Id.* Judge Howard is not alone in his recognition of the importance of compensating crime victims. *See Simon & Schuster, Inc.*, 502 U.S. at 118 ("There can be little doubt, on the other hand, that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them.").

39. *See* Burcham, *supra* note 9, at 200-01 ("No court has accepted the argument that courtrooms should be deemed traditional governmental fora for purposes of public and press access."); *id.* at 202-03 ("[E]xisting doctrine implicitly treats courtroom electronic access . . . as a separate, nonpublic forum. That is, government is free to exclude the public and press from this forum—consisting either of courtroom space or electronic feed—and reserve this property for government's own, nonpublic uses.") (footnote omitted).

40. *See id.* at 213 ("These differences suggest that courts should not slavishly adhere to the holdings and rationales in the government-as-proprietorcases when adjudicating the constitutional validity of a fees-for-feed policy.").

41. *See* Easton, *supra* note 1, at 42-43 & n.221.

42. *See id.* at 42 & n.218.

43. *See id.* at 42 & n.219.

of the states in compensating crime victims, charging television producers who seek to benefit from the trials that arise from crimes that harmed under-compensated victims would be a small and fully constitutional step in the right direction.