

December 21, 1997

## Word & Image; A Case of Sheep v. Coyotes

By MAX FRANKEL

Unless you are planning to lace the carcasses of a few sheep with poison to trap coyotes that prey on your flock, you might think you have no stake in the recent decision from the United States Court of Appeals for the Ninth Circuit. But a case arising from concern for Montana's wildlife has prompted a First Amendment claim by television news crews. They contend that they have a right to barge into your home with the cops and to broadcast whatever happens, whether or not the police behave legally or have proved you guilty of a crime.

Most uncollegially, I am pleased to report that the media are losing this case. They had better gird themselves for a time when they will have to entertain the world without the razzle-dazzle execution of a search warrant. When this legal battle is finally exhausted, the cameras and cops may also have to curb other collusive ways they prey upon the unsuspecting. At the least, they may be required to read citizens something like their "Ted Turner rights" -- "You are in range of a hidden camera and have the right to demand that the TV guys reveal themselves and get out of your house."

I propose enshrining Turner alongside Miranda because his CNN and Turner Broadcasting System, both now merged into Time Warner, took the media's shameless claim to a right of trespass to a preposterous extreme. Hoping to catch a Montana rancher illegally killing bald eagles, the networks and agents of the U.S. Fish and Wildlife Service actually contracted in writing to stage a raid on which TV crews went disguised as agents and agents doubled as TV crews.

The victims of this collusion were Paul W. Berger and his wife, Erma, 71 and 81 years old at the time of the raid in March 1993. One or more of their former employees had claimed to have seen Berger -- several years earlier -- poisoning or shooting protected eagles. On the strength of that testimony, a judge gave the agents a warrant to search their ranch for a large cache of poison and a "graveyard of eagles." The judge, who knew nothing about the media deal, explicitly excluded the Berger home.

A 10-hour search of the 75,000-acre ranch, from the air and by 20 men on the ground, found only a small amount of poison, which Berger admitted using on sheep carcasses to kill coyotes that were making off with 400 of his 5,000 sheep each year. The raiders found two such carcass traps and a poisoned skunk, hawk and gull nearby. They also found two dead eagles, but neither had been poisoned or shot. Berger was nonetheless charged with the crime of killing 17 eagles, but a jury judged him guilty only of misusing poison, a misdemeanor.

The television crews, however, came away with more than eight hours of tape, including footage and sound recorded inside the Berger home. Their haul yielded a program, called "Ring of Death," which implied that Berger had killed hundreds of protected eagles and ascribed his acquittal to jury bias. The program was shown at least 10 times over CNN, TBS, CNN International and TNT Latin America.

A Federal district court saw nothing wrong in this cozy partnership between cops and cameras. The Bergers therefore had to appeal, counting on an award of damages to finance the suit. Their main gladiator became Henry H. Rossbacher, a Los Angeles attorney who in 1992-1994 won a similar challenge of a deal between the Secret Service and CBS News.

That path-breaking case was brought on behalf of Tawa Ayeni and her 5-year-old son, Kayode, who were filmed for TV in their Flatbush apartment despite their vigorous protests. A crew for "Street Stories," a news magazine, had swept in with agents looking for Mrs. Ayeni's husband, a suspect in a credit card fraud. The agents rudely forced mother and son to pose and let CBS aim its camera into every closet and drawer.

In Brooklyn as in Montana, the media tried to assert a First Amendment right to cover the news of a government action. They also argued that a search warrant gave agents temporary control of the targeted premises and thus the right to admit anyone they chose. But as every young reporter learns, the frequent collusion between the police and the press is rarely borne of a concern for the public. The cops love to perform for the media to demonstrate their skill and valor. And the press loves to glamorize the police, who gratefully give newspapers license to snatch a snapshot off the mantel and television to film people trapped unawares in their homes.

As Judge Jack Weinstein observed in deciding the Brooklyn case, the truly offended amendment in these cases is the Fourth, which guarantees "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" -- in a word, their privacy. As for the First Amendment, which so gloriously protects press freedom, it is "a shield, not a sword," the judge ruled; it protects a right to publish, not to trespass or to commit other crimes. He was upheld by the U.S. Court of Appeals for the Second Circuit, whose Chief Judge, Jon O. Newman, added that "a private home is not a sound stage for law enforcement theatrics."

The Montana case has now produced an equally strong condemnation from the Ninth Circuit. It virtually accused the Fish and Wildlife agents of seeking their warrant mainly to produce a television show, planning "to enhance its entertainment rather than its law enforcement value" and looking to provide "interesting sound bites and to portray themselves as tough, yet caring investigators."

The court refused to suppress the video and sound tapes of the Berger search because the Constitution forbids censorship even of ill-gotten information. But it cleared the way for damage suits to compensate the Bergers for trespass and invasions of privacy. It left no doubt about your Turner rights, about who in such cases are the sheep and who the coyotes.

[Copyright 2008 The New York Times Company](#) | [Home](#) | [Privacy Policy](#) | [Search](#) | [Corrections](#) | [XML](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Back to Top](#)