Protecting First Amendment Rights of Defendants by Limiting Plaintiffs' Access to the Courts: Procedural Approaches to Noerr and Sullivan

Minn. L. Rev. Editorial Board

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I. INTRODUCTION

Whenever a court hears a case in which one person has injured another through the exercise of his first amendment rights, the court is faced with a significant conflict of values. If the injured party is allowed to recover, the defendant will have been forced to pay a price for engaging in activity protected by the Constitution. Moreover, because that price has been exacted, both the defendant and others similarly situated may be more circumspect in the future, thus depriving society of the benefits that come from a free and robust exercise of those rights. Conversely, if the injured party is denied redress, he clearly has suffered a wrong for which there will be no recovery. Beyond the obvious detriment to the individual, denying recovery for actual injuries also carries with it costs for society. Since the public retains the ultimate constitutional prerogative, no right will long survive unless tolerated by the public. Thus, although the cost to society of an individual unredressed injury may well be insignificant, an aggregation of unredressed injuries resulting from the unfettered exercise of first amendment rights may actually threaten the continued existence of those rights.

This conflict of values has confronted the United States Supreme Court in two distinct contexts: antitrust1 and libel.2 Reflecting the conflict, the Court’s resolution in both contexts has been a compromise. Generally, this compromise favors the first amendment, and in both contexts, potential defendants now enjoy a broad privilege that provides significant protection even for activity that is actually injurious and of marginal value to society. But in neither context is the privilege absolute: recovery is still possible if the plaintiff can prove that the defendant’s intent was such that the activity constituted an abuse of the privilege.3

The compromise struck by the Court, however, has not resolved all aspects of the conflict that engendered it. Insofar as the privilege

that was established is not absolute, at least some parties will be allowed to recover. The problem is to determine which claims fall within the exception and which fall outside. This determination requires a trial, which itself exemplifies the conflict of values. Forcing the defendant to defend himself is a disincentive to his continued practice of the activities that gave rise to the suit. On the other hand, if the plaintiff is denied an opportunity for a meaningful hearing on the merits of his claim, the exceptions established by the Court are abandoned and the privileges become absolute. The problem, therefore, is to ascertain the merits of a case before the disincentives of trial create an intolerable burden on the defendant's rights.4

Within the past dozen years, four different circuit courts of appeal have confronted this problem.5 Each has suggested that the presence of a first amendment interest requires that the plaintiff be able to meet various extraordinary standards at different pretrial stages before the suit will be allowed to continue.6 This Note examines the burdens that these courts have imposed on plaintiffs and their efficacy in achieving a rational compromise between the first amend-

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4. The dilemma of determining a case on its merits without generating disincentives or disadvantages to the defendant is not unique to first amendment cases. There is never any value in dismissing a meritorious claim or forcing a defendant to defend a suit that is without merit. The question in every case is whether the probability that the plaintiff will prevail is significant enough to allow the case to proceed through trial. It is the addition of societal interests in free and robust speech that justifies the special treatment of first amendment cases.


6. With the exception of Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967), which referred to New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966), the opinions of the four circuit courts did not take notice of the similarity in approach or the potential impact on the Federal Rules of Civil Procedure that they share. The striking lack of interchange between the circuits on the matter of constitutionally justified procedural modifications is evident, for example, in Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977). There, the only authorities cited by the court to support its proposal that higher pleading standards be imposed were cases imposing limits on substantive rights that conflicted with the first amendment. See id. at 1082-84. It is difficult to explain why the Franchise Realty court overlooked more relevant precedents to support its rationale, Connor, Buckley, and Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967), having all been decided by that time. Indeed, Connor is considered important enough to warrant common casebook treatment. See, e.g., R. FIELD & B. KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 710 (3d ed. 1973).
ment rights of defendants and the equally important rights of plaintiffs to a meaningful adjudication of their claims.  

II. JUDICIAL RESPONSES TO THE PROBLEM OF PROCEEDING TO TRIAL

A. THE SUBSTANTIVE CONTEXTS

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court was confronted with a potential conflict between the defendants' first amendment right to petition the government and the legislative policies underlying the Sherman Antitrust Act. The defendant railroads allegedly had conspired to conduct a lobbying and publicity campaign against their trucking competitors that was "designed to foster the adoption and retention of legislative policies that were intended to facilitate competition." The court held that "the substantive context in which a public protest has occurred is a relevant factor in determining whether the protest is protected by the First Amendment."  

In *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966), the court first proposed a higher jurisdictional standard, see *id.* at 571, and then resolved the case on its merits, see *id.* at 577. In *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967), the court first proposed that forum non conveniens be given constitutional stature, see *id.* at 183, and then stated that no such hardship was apparent on the facts of the case before it, see *id.* at 184. In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977), the court first held that the plaintiff's claim did not fulfill the ordinary requirements of *Fed. R. Civ. P. 12(b)(6)*, see *542 F.2d* at 1079, and then stated that in any type of case where a plaintiff seeks a remedy for conduct protected by the first amendment, a higher pleadings standard should be required, see *id.* at 1082-83. In *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967), the court first implied that in first amendment cases it would be appropriate to require of plaintiff a more convincing showing than is normally required to survive a motion for summary judgment, see *id.* at 967-68, and then concluded that the plaintiff's showing was insufficient to survive the ordinary requirements of *Fed. R. Civ. P. 56*, see 365 F.2d at 969-70.  

Three factors, however, justify the conclusion that these cases are valuable as precedents. First, despite the equivocation, the revised standards do in fact appear to have played a role in the decision of at least *Connor*, *Keogh*, and *Franchise Realty*. Second, other courts have applied or accepted the standards established by these cases. See *Edwards v. Associated Press*, 512 F.2d 258, 286-67 (5th Cir. 1975) (noting and limiting the *Connor* jurisdictional standard); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970) (accepting the *Keogh* summary judgment standard); *Ernest S. Hahn, Inc. v. CODDING*, 423 F.Supp. 913, 914, 917 (N.D. Cal. 1976) (applying the *Franchise Realty* pleadings standard). Finally, even if the courts' language is only dicta, the consideration given to the relationship between the first amendment and the rules of civil procedure in these cases is too lengthy and detailed to be ignored. At the very least, the cases manifest an attitude of four circuits favoring a revision of procedural rules in first amendment cases.

7. The most basic criticism of the approaches taken by the circuit courts is that the procedural modifications they purport to establish are of uncertain precedential value because of the equivocal manner in which the holding of each case is framed.  

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10. See 365 U.S. at 129.
of laws and law enforcement practices destructive of the trucking business" and to create "an atmosphere of distaste for the truckers among the general public."

The aim of the railroad group clearly was to improve their long-distance freight business at the plaintiffs' expense and hence appeared to be a violation of the Sherman Act, but the concerted activity was prima facie protected by the first amendment because it involved communication with the public and the legislature. Although the Supreme Court avoided the constitutional question and ruled instead that Congress had not intended the antitrust laws to reach lobbying activities, it is quite clear that constitutional implications entered into the Court's decision, and later cases have justified the limitation on similar suits in explicitly constitutional terms.

11. Id.
12. The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).
13. See 365 U.S. at 131. One specific allegation in the complaint was that the "defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the 'Fair Truck Bill,' which would have permitted truckers to carry heavier loads over Pennsylvania roads." Id. at 130 (footnote omitted).
14. Regarding the defendants' contention of first amendment privilege, the Court said, "Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses." Id. Specifically, the Court found that the "agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned" by the Sherman Act were essentially dissimilar, id. at 136, and that Congress had not intended the antitrust laws to reach the former, see id. at 137.
15. The Court found that, in a representative democracy, government "depends upon the ability of the people to make their wishes known to their representatives." Id. at 137. The Court expressed concern about the danger that plaintiff's construction of the Sherman Act posed to this process:

To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. (footnote omitted). The Court further found that applying the Sherman Act to legislative lobbying activities would impair the constitutional right to petition the government:

Such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. . . . For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.

Id. at 138.
16. For example, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), was a case involving attempts by a group of trucking companies to inhibit
Although the *Noerr* immunity is broad,\(^7\) it is not absolute. Liability remains when actions, "ostensibly directed toward influencing governmental action, [are] a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."\(^8\) Likewise, the "sham" exception operates when the defendant's conduct is not a good faith petitioning effort but a means of interfering with the plaintiff's own right of access to the government.\(^9\)

by a pattern of baseless litigation the plaintiffs' attempts to obtain operating licenses. Justice Douglas, writing for the majority, said, "[Defendants], of course, have the right of access to the agencies and courts to be heard [in opposition to] applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment." Id. at 513. Thus, as Professor First noted, "[t]he implicit constitutional grounds of *Noerr* . . . were explicitly stated in . . . California Motor Transport." First, supra note 3, at 38-39.

The concurring opinion of Justice Stewart in *California Motor Transport* indicates further the constitutional nature of the *Noerr* opinion:

In the *Noerr* case this Court held . . . that a conspiracy . . . to influence legislative and executive action . . . was wholly immune from the antitrust laws. This conclusion, we held, was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment.

404 U.S. at 516 (footnotes omitted). Justice Stewart also felt that the Court in *California Motor Transport* did not go far enough to protect "important First Amendment values" and that the Court thereby "retreat[ed] from *Noerr*." Id.

17. The broadest statement of the immunity appeared in *UMW v. Pennington*, 381 U.S. 657 (1965), where the Court stated that efforts "to influence public officials regardless of intent or purpose" were protected. Id. at 670. The Court retreated somewhat from this characterization in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12 (1972).

The *Noerr* antitrust immunity has been applied to a wide range of anticompetitive activity designed to influence the decisions of officials in all branches of government. See id. (judicial officials and administrative agencies); *UMW v. Pennington*, 381 U.S. 657, 669-70 (1965) (executive officials); Eastern R.R. Presidents Conference v. *Noerr Motor Freight*, Inc., 365 U.S. 127 (1961) (legislators).


19. Liability turns on abuse of the petitioning process, see Note, supra note 3, at 304, and can be avoided by a showing of genuine interest on the part of the defendant, see *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1366 (10th Cir. 1972).
The problem of reconciling the right to recover damages with the protection extended by the first amendment again confronted the Court in *New York Times Co. v. Sullivan.* After the *New York Times* published an advertisement complaining of police misconduct during a racial disturbance in Montgomery, Alabama, Sullivan claimed that, since he was responsible for the police action, certain misstatements in the advertisement personally defamed him. The trial judge submitted the case to the jury under instructions that the statements in the advertisement were not protected by the common law privilege of "fair comment" concerning the conduct of public

Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 885 (D.N.J. 1967). Courts have held that the "sham" exception was adequately pleaded in cases where the plaintiff alleged that the defendants had pooled resources to harass the plaintiff before a state licensing board, see California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509, 511 (1972); the defendant had repeatedly and baselessly opposed the plaintiff's pursuits at Civil Aeronautics Board actions, see Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064 (D. Hawaii 1972), aff'd, 489 F.2d 203 (9th Cir. 1973), cert. denied, 417 U.S. 913 (1974); the defendant had made repetitious filings of proceedings before a state administrative board, see Otter Tail Power Co. v. United States, 410 U.S. 366, 379-80, *on remand*, 360 F. Supp. 451 (D. Minn. 1973), aff'd mem., 417 U.S. 910 (1974); the defendant had carried out a campaign before the Food and Drug Administration to suppress and misconstrue information regarding a drug that the plaintiff was merchandising, see Israel v. Baxter Laboratories, Inc., 468 F.2d 272 (D.C. Cir. 1972).


21. Sullivan was an elected official of the City of Montgomery, Alabama. As Commissioner of Public Affairs his duties included supervision of the Police Department. *Id.* at 256.

22. The advertisement stated that "police armed with shotguns and tear-gas ringed the . . . campus," that "[the students'] dining hall was padlocked in an attempt to starve them into submission," *id.* at 292 app., that Dr. Martin Luther King's home had been bombed, and that he had been arrested seven times on what were implied to have been questionable grounds and had been assaulted by officers, *see id.* Actually, the police had merely been deployed near the school on three occasions and had never "ringed" it. *See id.* at 259. Further, the dining hall was never padlocked, the police had earnestly sought to apprehend the bombers, King had only been arrested four times, and the officers denied that an assault had ever occurred. *See id.*

23. *See id.* at 262. Traditionally, the "fair comment" privilege had applied only to opinions voiced about the conduct of public officers. *See, e.g.,* White v. Fletcher, 90 So. 2d 129 (Fla. 1955); Morgan v. Bulletin Co., 369 Pa. 349, 85 A.2d 869 (1952). Prior to Sullivan, a few courts had conferred the privilege on false factual assertions made for the public benefit with an honest belief in their truth. *See Coleman v. MacLennan, 78 Kan. 711, 723, 98 P. 281, 285 (1908). Most state courts, however, had refused to extend the privilege to protect factual falsehoods, regardless of the publisher's intent. *See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 819 & n.6 (4th ed. 1971). The rationale behind this restricted application of the privilege was that while public officials must expect criticism, they would be discouraged from seeking office if they were not protected against misrepresentations. *See Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893). It was argued that should candidates be thus discouraged from
Focusing on whether the narrow scope of the Alabama "fair comment" doctrine abridged rights guaranteed by the Constitution, the Supreme Court held that the first amendment conferred a privilege on publishers that extended to falsehoods about public officials, unless the plaintiff could prove that the statement was made with "actual malice." As subsequently extended, the Sullivan "actual malice" test requires of the plaintiff clear and convincing proof that the defendant publisher made the statement about a public person either with knowledge of its falsity or with a reckless disregard of its truth or falsity.

Despite differences in approach, both Noerr and Sullivan were motivated by similar considerations. In order to protect valued first amendment activity, both cases limited a means of redress for actual injury by altering the nature and extent of proof necessary to recover.

The Sullivan Court reasoned that a change in substantive standards of proof was necessary to avoid self-censorship by publishers.

seeking office, the public interest would suffer. Twenty-six states accepted this rationale, while only nine held that false statements made in good faith were privileged.


24. 376 U.S. at 256.
25. Id. at 279-80.
26. See id. at 285-86.
27. Although the Sullivan case was framed in terms of public officials, see id. at 279, the doctrine has subsequently been extended to include public persons. This latter concept, as currently defined, includes persons occupying a role of prominence in the affairs of society or thrust to the forefront of particular public controversies to influence the resolution of issues involved. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).


29. See 376 U.S. at 279. The Court compared the inhibiting effect of a state criminal libel statute and the inhibition generated by a civil libel suit:

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who
Focusing on publishers' perceptions, the Court specifically recognized that the fear of damage awards inevitably inhibits free speech by forcing the publisher to guarantee the accuracy of all he prints on pain of substantial libel judgments. Moreover, the Court also recognized that the threat of suit, independent of the probability of losing, might also deter a publisher from printing that which he could not guarantee to be true. In this regard, the Court pointed to two trial-related disincentives: trial costs—the actual out-of-pocket expense of defending libel suits—and inconvenience and temporal loss. Such expenses can be substantial. The cost of defending a libel suit may run from $20,000 to $100,000, and long-arm statutes make it possible to sue a publisher in virtually any forum into which his publications are sent. By creating the constitutional privilege, the Court appar-

would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

Id. at 277-78 (footnote omitted).

30. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" Id. at 279.

The Court's characterization of libel judgments as "virtually unlimited in amount" is not hyperbole. Commissioner Sullivan was awarded $500,000 for a libel that did not even name him. See id. at 257-58. In other cases, substantial awards have been made even though actual injuries were established as only nominal. See, e.g., Goldwater v. Ginzberg, 414 F.2d 324 (2d Cir.) (one dollar compensatory damages, $75,000 punitive damages), cert. denied, 396 U.S. 1049 (1969); Reynolds v. Pegler, 223 F.2d 429 (2d Cir.) (one dollar compensatory damages, $175,000 punitive damages), cert. denied, 350 U.S. 846 (1955).

31. Under [the Alabama court] rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule [in Alabama] thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id. at 279 (citations omitted). That self-censorship due to fear of litigation alone can and does occur is evident. See Hume, The Mayor, The Times and the Lawyers, More, August 1974, at 17 (reporting that the New York Times decided not to print a story for fear of extended litigation despite its lawyer's assurances that it would ultimately prevail and that [More], a journalism review, refrained from printing the story for the same reason).

32. See 376 U.S. at 279.

33. See id. at 277, 278.

34. See Anderson, Libel and Press Self-Censorship, 53 TEX. L. REV. 422, 435-36 (1975) (analyzing the effect of economic disincentives on defendants' willingness to publish or to pursue the defense of libel actions).

35. The long-arm statutes that pose the gravest threat to publishers are those providing for exercise of jurisdiction upon the occurrence of a single tort in the forum. A number of states have such laws. See, e.g., CONN. GEN. STAT. § 33-411(c) (1975); Public Act 80-923, § 904, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1977); IOWA CODE § 617.3 (1971); MINN. STAT. § 303.13(1), (3) (1976). For analyses of the relationship
ently intended to abate these economic disincentives and thereby relieve the publisher of the burden of guaranteeing the accuracy of everything he publishes.36

Likewise, the Noerr decision, though it was not stated in constitutional terms,37 was justified in part by a similar concern for the chilling effect that potential antitrust liability would have on defendants' efforts to press their view upon the government.38 The threat of treble damages, of course, may seriously inhibit marginal activity,39 but even when a businessman is certain that his activities are protected, the magnitude of the discovery and trial preparation costs associated with antitrust suits makes such suits "a most potent weapon to deter the exercise of First Amendment rights."40

These economic disincentives can burden the first amendment rights of Noerr-Sullivan type defendants at various times and by various means. Initially, a publisher or businessman faces the pros-between long-arm jurisdiction, libel law, and the first amendment, see Note, Jurisdiction—Libel—First Amendment's Role in Determining Place of Trial in Libel Actions, 66 Mich. L. Rev. 542 (1968) [hereinafter cited as First Amendment's Role]; Note, Can the "Long-Arm" Reach Out-of-State Publishers?, 43 Notre Dame Law. 83 (1967); Note, Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases, 34 U. Chi. L. Rev. 436 (1967) [hereinafter cited as Constitutional Limitations].

36. See 376 U.S. at 282-83.
37. See note 14 supra and accompanying text.
38. The Court voiced the concern that holding the Sherman Act applicable to petitioning activities "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches . . . [rely] upon the ability of the people to make their wishes known to their representatives." Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

The aggregation of constituent interests is necessary to a representative system of government, and petitioning the government in an effort to further one's business interests has been accorded first amendment protection. See, e.g., Sacramento Coca-Cola Bottling Co. v. Chauffeurs Local 150, 440 F.2d 1096 (9th Cir.), cert. denied, 404 U.S. 826 (1971). See generally Richardson, Lobbying and Public Relations—Sensitive, Suspect or Worse?, 10 Antitrust Bull. 507, 508 (1965); Walden, More About Noerr—Lobbying, Antitrust and the Right to Petition, 14 U.C.L.A. L. Rev. 1211, 1212-13 (1967). Indeed, business groups form one of the most significant pressure groups lobbying before Congress. See Congressional Quarterly Services, Legislators and the Lobbyists 11 (1965).

40. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076, 1082 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977). Attorneys' fees and discovery costs in antitrust actions can reach staggering levels. See Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970) ($7,500,000 awarded for attorneys' fees); Armstrong, The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Procedure, 43 A.B.A.J. 693, 695 (1957) (describing a case in which the defendants spent about one million dollars in discovery costs before capitulating and settling for $75,000, and in which, even after settlement, the defendants remained convinced that the plaintiff's case lacked merit).
pect of a lawsuit whenever a news story is printed or concerted anti-
competitive lobbying activity is conducted. Thus, even before a story
is set into print or competitors organize, the disincentives of litigation
may pose a threat to the conduct of protected activity. Furthermore,
should the publisher or businessman become a defendant in a civil
action, he will likely forbear from conduct similar to the challenged
activity both during and after the suit. Finally, the continuing costs
of litigation may force a settlement even where the defendant would
ultimately have prevailed, thus bringing about the very evil Noerr
and Sullivan were specifically designed to prevent.

By requiring higher standards of proof, the Court in Noerr and
Sullivan sought to minimize the inhibition of first amendment ac-
tivity caused by litigation. The result of those standards is to deny
redress to some plaintiffs who have suffered actual damage caused by
defendants' conduct. Where the injury to a plaintiff's reputation or
business interests is incidental to the bona fide practice of an activity
apparently protected by the first amendment, the advantages of ro-
bust speech and informed decisionmaking were viewed by the Court
as outweighing those of redress.

By articulating exceptions to the Noerr-Sullivan privilege in
cases of intentional or reckless injury, however, the Court recognized
that the right to engage in first amendment activities is not absolute,
but must be balanced against the right to redress. While broad
social interests sought to be advanced by the first amendment may
outweigh individual interests in redressing negligently inflicted inju-
ries, an exception to the privilege is warranted if the defendant's
actions are sufficiently egregious.

Since the availability of the Noerr-Sullivan privilege depends,
in part, on the manner in which the defendant actually expressed
himself, the standards articulated in Sullivan and Noerr can be effec-
tively applied only at the end of the litigation process, after the fac-
tual record is complete and a directed verdict is moved or the jury is
instructed. Thus, while the Noerr-Sullivan standards ameliorate the

41. See Armstrong, supra note 40; Stevens, Defamation of Political Figures;

42. The rights of free speech, press, and petition are not unlimited, but are
balanced against other interests. See Citizen Publishing Co. v. United States, 394
retained by Noerr and Sullivan through the exceptions to liability provided by the
"sham" and "actual malice" tests.

43. Thus, where the plaintiff can show that the defendant knowingly or reck-
lessly published a falsehood or deliberately conspired to bar meaningful access, the
first amendment's veil of protection is removed and redress is allowed. See New York
disincentive of damages for defendants who are confident that they
can prove that their activities are protected, they leave unresolved
the problem of substantial discovery and trial costs. The defendant
is responsible for the expenses of litigation even if he should ulti-
mately prevail,⁴ and the substantial inconvenience involved in vind-
cating himself is unrecompensed. To the extent that these substan-
tial economic disincentives continue to inhibit protected first amend-
ment activity, the problem identified by Noerr and Sullivan remains.

B. JUDICIAL RESPONSES

Although the Supreme Court has not addressed the problem of
the economic disincentives incident to litigation, several circuit
courts have suggested that, in order to ameliorate the burden that
trial imposes on defendants' first amendment rights, plaintiffs should
be compelled to satisfy extraordinary standards at various pretrial
stages in order to avoid dismissal.⁴⁵

This suggestion was first made by the Court of Appeals for the
Fifth Circuit in New York Times Co. v. Connor.⁴⁶ In 1960, the New
York Times had sent a reporter to cover the racial situation in Bir-
mingham, Alabama. The story that emerged attributed to City Com-
missioner Connor certain racially derogatory statements and actions.
Connor brought a suit for libel in federal court under Alabama's long-
arm jurisdiction statute, and a $40,000 verdict was returned by the
jury.⁴⁷ On appeal, the newspaper argued that, given its relatively
insignificant contact with Alabama,⁴⁸ the assertion of personal jurisd-

⁴⁴ For example, the editor of Nation reports that his magazine "cannot afford
the luxury of winning a libel action. About a year ago we were sued for libel and the
case was thrown out—but it cost us $7,500 to win." McWilliams, Is Muckraking Com-
ming Back?, COLUM. JOURNALISM REV., Fall 1970, at 8, 15.

⁴⁵ See Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive
Bd., 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977); Buckley v. New
York Post Corp., 373 F.2d 175 (2d Cir. 1967); New York Times Co. v. Connor, 365 F.2d
567 (5th Cir. 1966); Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert.

The United States Supreme Court has never explicitly approved the use of proce-
dural devices to protect the defendant from the chilling effects arising out of the
pendency of litigation; where petitions for certiorari have been filed, however, they
have been denied. See, e.g., Franchise Realty Interstate Corp. v. San Francisco Local
Joint Executive Bd., 430 U.S. 940 (1977), denying cert. to 542 F.2d 1076 (9th Cir. 1976);
Thompson v. Evening Star Newspaper Co., 393 U.S. 884, denying cert. to 394 F.2d 774
to 365 F.2d 965 (D.C. Cir. 1966).

⁴⁶ 365 F.2d 567 (5th Cir. 1966), cert. denied, 385 U.S. 1011 (1967).

⁴⁷ See id. at 568-69.

⁴⁸ The New York Times had no office, regular employees, or agents in Alabama.
It mailed to Alabama subscribers an average of 395 daily papers out of a total circula-
tion of 650,000 and about 2,455 Sunday papers out of a total circulation of 1,300,000.
diction did not comport with the due process requirements of *International Shoe Co. v. Washington.* Facing the issue of whether long-arm jurisdiction should be asserted over the newspaper corporation, the Fifth Circuit held that first amendment considerations surrounding the law of libel required a showing of greater state contact by a foreign corporation than would be necessary to gain jurisdiction for other tortious activities.

The jurisdictional standard articulated in *Connor* measures contact in terms of the revenue yielded by a particular forum, proposing that courts decline jurisdiction when revenue derived from the forum is insufficient to justify continued distribution of a publication should the publisher lose a libel action in the forum. This standard is based on the premise articulated in *Sullivan* that self-censorship will result if defendants are not protected from litigation. Self-censorship by ceasing distribution of a publication within a state is seen as inhibiting the first amendment rights of both the publisher and the reader and as most likely to occur in jurisdictions where revenue from circulation is too small to outweigh the economic dis

The advertising revenue it received from Alabama constituted between 25/1000 and 46/1000 of one percent of the firm's total advertising revenues. Its sales revenue from Alabama amounted to 23/1000 of one percent of total sales revenue. It purchased, on occasion, work done by Alabama residents who were employed by other businesses and worked for the *Times* as "stringers" only. The staff reporter who did the allegedly libelous article spent five days in Alabama and wrote it while on a plane returning to New York. *See id.* at 570.

49. 326 U.S. 310 (1945).
50. *See* 365 F.2d at 572.
51. *See id.* at 569-71.
52. *See id.* at 572-73.
53. There is some general support for the proposition that the reader has a constitutionally protected right to receive those publications whose circulation would be curtailed should a publisher be discouraged from future distribution in the forum state.

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

*Lamont v. Postmaster Gen.,* 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (citations omitted); *cf. Procunier v. Martinez,* 416 U.S. 396 (1974) (censorship of direct, personal correspondence involves incidental and impermissible restrictions on the right of free speech of prisoners and their correspondents); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) ("The . . . freedom of speech and press . . . embraces the right to distribute literature, . . . and necessarily protects the right to receive it.").
centives of possible litigation.\textsuperscript{54} An alternative approach to the Connor revenue-based test of jurisdictional appropriateness was suggested by the Second Circuit in \textit{Buckley v. New York Post Corp.}\textsuperscript{55} William F. Buckley, Jr., brought a libel action in his home state of Connecticut against the New York Post, alleging that the defendant had maliciously published two defamatory editorials.\textsuperscript{56} After removal to the Federal District Court for Connecticut, the Post sought dismissal on the ground that Buckley had not secured personal jurisdiction over it. The trial court, echoing the due process concerns of Connor, dismissed the complaint for lack of jurisdiction.\textsuperscript{57}

On appeal, the Second Circuit avoided a direct attack on Connor's rationale,\textsuperscript{58} carefully distinguishing between the issue of jurisdiction and the issue of the role of the first amendment in the determination of a forum.\textsuperscript{59} In reversing the district court, the Buckley court reasoned that the objectives of Sullivan could be achieved without distorting jurisdictional doctrine if the issue of forum appropriateness included an analysis of a number of factors relating to convenience rather than mere contact.\textsuperscript{60} The court therefore established forum non conveniens as the proper method of ensuring that the location of a law suit is not unduly burdensome for

\textsuperscript{54} The court did not focus on any particular costs, but spoke in general terms of the possibility that first amendment rights would be inhibited:

\begin{quote}
[N]ewspapers with even one copy circulating within a state would conceivably be subjected to libel action and the risk of large judgments at the hands of local juries incensed by the out-of-state newspaper's coverage of local events. In the face of this very real risk, could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of his liability?
\end{quote}

365 F.2d at 572.

\textsuperscript{55} 373 F.2d 175 (2d Cir. 1967).

\textsuperscript{56} About two thousand papers containing the editorials reached Connecticut. \textit{Id.} at 182.


\textsuperscript{58} The Buckley court said that the principle adduced by Connor was that "jurisdiction . . . cannot be asserted consistently with due process 'where the size of [the publisher's] circulation does not balance the danger of his liability.'" 373 F.2d at 182 (quoting \textit{New York Times Co. v. Connor}, 365 F.2d 567, 572 (5th Cir. 1966)). The court then observed that applying a procedural protection to publishers "go[es] not to 'jurisdiction' over the defendant, . . . but to the consistency with the First Amendment's objectives of the state's exercising jurisdiction in a particular case." \textit{Id.} at 183. Analogizing to a tax case, the court in Buckley concluded that the minimum contact requirement for the purposes of dismissing a libel claim should "not be the minimum contact requirement of the Fourteenth Amendment due process clause," but rather the suitability of the forum for promoting the first amendment. \textit{Id.}

\textsuperscript{59} \textit{See id.} at 184; note 58 supra.

\textsuperscript{60} \textit{See} 373 F.2d at 183.
defendants in first amendment cases. The Buckley court implicitly assumed that considerations of convenience corresponded with the level of contact that a publisher maintained with a state. The court reasoned that as a defendant’s contact with a state decreased, the expenditure of funds for transportation, investigation, and preparation would increase. Equating higher costs with inconvenience, the Buckley court concluded that economic disincentives could be circumvented if courts applied a test that judged a forum’s appropriateness based upon its comparative convenience.

In Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board, the Ninth Circuit dealt with the problem of litigation in first amendment cases by focusing on the specificity of the pleadings. The case involved an antitrust claim brought under the Noerr “sham” exception. The plaintiffs, subsidiaries of a restaurant chain that sought to obtain construction permits, alleged that the defendants had conspired to oppose repeatedly and baselessly their permit applications. The complaint set forth the conclusory allegations necessary to state a claim under the Noerr “sham” exception, but did not incorporate any specific factual background. Acknowledging that the Federal Rules of Civil Procedure did not require the dismissal of the complaint, the Franchise Realty court held that in any case where the plaintiff asserts a cause of action arising out of conduct that is prima facie protected by the first amendment the complaint must set forth specific factual allegations concerning the transaction giving rise to the suit. Expressing a concern for the particular susceptibility of antitrust litigation to the unchecked and “long drawn out process of discovery [that] can be both harrassing

61. See id. In determining whether a particular forum will serve as a convenient location for litigation, courts may consider the place of the injury, the location of evidence and witnesses, the possibility of forum shopping, the court’s familiarity with the law to be applied, the residence and domicile of the parties, the possibility of joining other parties, the pendency of other actions, docket conditions in the forum, and the financial status of the parties. See generally Annot., 1 A.L.R. Fed. 15, 59-103 (1969).

62. See 373 F.2d at 183-84.

63. 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977).

64. See id. at 1078.

65. See id.

66. The majority in Franchise Realty conceded that, under ordinary circumstances, “the conclusory nature of plaintiff’s allegations might warrant greater indulgence, for the dismissal of a complaint is normally proper under Rule 12(b)(6) only if ‘it appears beyond doubt that the plaintiff(s) can prove no set of facts in support of (their) claim which would entitle (them) to relief.’” Id. at 1082 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

67. See id.
and expensive,"\textsuperscript{68} the court reasoned that in such cases "the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required."\textsuperscript{69}

The specificity necessary to satisfy the \textit{Franchise Realty} standard is unclear, but the court did demand that complaints contain "allegations of the specific activities, not protected by \textit{Noerr}."\textsuperscript{70} While the \textit{Franchise Realty} court refused to characterize its standard as adoption of "a rule that so-called ‘fact’ pleading, as distinguished from ‘notice’ pleading, is required,"\textsuperscript{71} it criticized notice pleading for failing to eliminate the frivolous cases that create economic disincentives to the exercise of first amendment rights:

Regardless of what the actual facts might be, what plaintiff interested in deterring his competitors’ opposition before a governmental body would fail to recite in its complaint the conclusory “access-barring” incantation? And what competitor, knowing that its participation in administrative proceedings might result in expensive and burdensome litigation . . . would not thereby feel pressured to forego presenting its views to the government?\textsuperscript{72}

The conclusion of the \textit{Franchise Realty} court was, therefore, that given the importance of first amendment rights, the tradition of allowing plaintiffs every opportunity to show that their claims warrant court action was inappropriate,\textsuperscript{73} and a greater scrutiny of claims was justified.

\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1083.
\textsuperscript{70} Id. at 1082.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Contrary to the \textit{Franchise Realty} court, the Federal Rules of Civil Procedure stress “a short and plain statement of the claim showing that the pleader is entitled to relief.” \textit{Fed. R. Civ. P. 8(a)}. The only exception is for allegations of fraud or mistake, see id. 9(b), and even such allegations require only “what is under the circumstances an adequate statement of the fact transactions to identify it with reasonable certainty, not to set forth all its details.” Clark & Moore, \textit{A New Federal Civil Procedure} (pt. 2), 44 \textit{Yale L.J.} 1291, 1302 (1935).

Case law interpretation of the rules points almost entirely to a requirement of notice pleading only. The test of sufficiency as to whether a complaint states a claim upon which relief can be granted is whether the complaint is “wholly frivolous.” \textit{Radovich v. National Football League}, 352 U.S. 445, 453 (1957). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” \textit{Scheuer v. Rhodes}, 416 U.S. 232, 236 (1974). A complaint will be allowed, even where recovery appears remote, see id., so long as it fulfills the function of giving fair notice to the defendant of the nature of the suit against him, see \textit{First Nat’l Bank v. McGuire}, 184 F.2d 620, 624-25 (7th Cir. 1950), such that he may formulate an answer, see \textit{Taylerson v. American Airlines, Inc.}, 183 F. Supp. 882, 884 (S.D.N.Y. 1960). Whether this function has been fulfilled is deter-
In *Washington Post Co. v. Keogh,* the Circuit Court of Appeals for the District of Columbia proposed that, in order to ameliorate the chilling effect that trial had on defendants' first amendment rights, the courts should more closely scrutinize the merits of a plaintiff's claim in summary judgment proceedings. The plaintiff in *Keogh*, a United States congressman from New York, brought an action against the *Post* and one of its syndicated columnists for allegedly libelous statements appearing in two columns. The newspaper moved the district court for summary judgment on the ground that the record raised no genuine issue as to "actual malice."

Generally, a summary judgment motion requires the nonmoving party to demonstrate that his claim presents "a genuine issue for trial." Absent such a demonstration, a dismissal will be ordered.
The burden of persuasion is on the movant, however, and any doubt as to whether an issue of material fact exists must be resolved against him. Under the traditional approach, therefore, where there is a question about the defendant's subjective state of mind, the defendant's summary judgment motion is likely to be denied.

Since the issue in *Keogh* involved the defendant's subjective state of mind and the district court found itself in doubt, it followed the traditional presumption and denied the motion for summary judgment. The circuit court reversed, however, reasoning that the traditional approach, which would allow the issue to proceed to trial, had a chilling effect on the exercise of first amendment activities. The court suggested that the present presumption against the defendant

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80. See *Moutoux v. Gulling Auto Elec., Inc.*, 295 F.2d 573, 576 (7th Cir. 1961) (grant of summary judgment to defendant in antitrust suit reversed); United States v. Kansas Gas & Elec. Co., 287 F.2d 601, 604 (10th Cir. 1961) (summary judgment not proper where there is a good faith dispute on an issue); *Van Brode Milling Co. v. Kravex Mfg. Corp.*, 21 F.R.D. 246, 249 (E.D.N.Y. 1957) ("Any reasonable doubt should be resolved against the movant.").

Thus, where credible evidence is presented on both sides, the motion for summary judgment will be denied. See *Olinger v. American Sav. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969) (per curiam) (reversing a summary judgment for defendant) ("It is apparent that both charges are at least capable of defamatory meaning.").

81. The traditional approach results in the submission to the jury of all matters involving the defendant's subjective mental state, see *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1969), *cert. denied*, 404 U.S. 864 (1971), unless there has been insufficient evidence presented by the plaintiff. See *Perry v. Columbia Broadcasting Sys., Inc.*, 499 F.2d 797, 802 (7th Cir.) (affidavits of defendant were uncontroverted), *cert. denied*, 419 U.S. 1125 (1973); *Miller v. News Syndicate Co.*, 445 F.2d 356, 358 (2d Cir. 1971) (no evidence of actual malice shown by plaintiff); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800, 802 (8th Cir. 1968) ("unopposed material"). See also *LaBruzzi v. Associated Press*, 353 F. Supp. 979, 982 (W.D. Mo. 1973):

Federal courts are reluctant to deprive a litigant of the opportunity to present his case to a jury. . . . However, where it is clear that the record has been fully developed . . . and such record demonstrates that, construing all of the facts and inferences . . . in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, the granting of summary judgment is proper.

be removed in order to better reflect the goals of Sullivan.\textsuperscript{83} While there is dispute as to the validity of this particular standard,\textsuperscript{84} there is substantial support for liberal use of the summary judgment in certain types of libel cases.\textsuperscript{85} In an effort to resolve doubts about the higher standard, Judge J. Skelly Wright, author of the Keogh opinion, has suggested a procedure to be followed.\textsuperscript{86} Under this restatement of the Keogh test, the trial court should first apply the Sullivan test of actual malice to the facts as presented in all affidavits. If the court finds from this evidence that the plaintiff


\textsuperscript{86} See Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), cert. denied, 398 U.S. 940 (1970). Judge Wright's concurrence in Wasserman is used in this Note because of the ambiguity of the Keogh opinion. While Keogh has generally been viewed as setting a new standard, see, e.g., id.; Grant v. Esquire, 367 F. Supp. 876, 881 (S.D.N.Y. 1973); Goldwater v. Ginzburg, 261 F. Supp. 784, 788 (S.D.N.Y. 1966), aff'd, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970), the actual parameters of that new standard were never clear from the language of the opinion.
could not prove actual malice, it should grant summary judgment. If the court finds that the plaintiff can prove actual malice with convincing clarity, it should deny the defendant's summary judgment motion and proceed with trial. The trial court should then examine the plaintiff's presentation both at the close of the plaintiff's case and after the defendant has rested, judging the credibility of the witnesses and drawing all logical inferences from the evidence to determine whether these show actual malice with convincing clarity. If they do not, the court should entertain a defense motion for summary judgment. If actual malice is clearly indicated, however, the court should submit the case to the jury under a Sullivan actual malice instruction without indicating that the evidence appears to the judge to show malice with convincing clarity. If the jury finds actual malice, the court should award judgment to the plaintiff. Finally, it may be inferred from this discussion that should the case go to the jury and it reasonably finds a lack of actual malice, the verdict for the defendant should be upheld on a motion for judgment notwithstanding the verdict.87

Judge Wright concludes that the "two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection . . . that Sullivan sought to make secure in areas of public concern."88 Initially, this conclusion appears sound, since the defendant is made to bear the costs of trial only when the judge feels that the plaintiff will ultimately prevail and that the defendant's activities have placed him outside the protection afforded by the substantive standards. The jury serves as final decisionmaker simply to ensure that every opportunity has been given the defendant to demonstrate that his actions deserve the substantive protections of Sullivan.

III. EVALUATING THE APPLICATION OF PROCEDURAL STANDARDS TO NOERR-SULLIVAN CASES

A. A Standard for Evaluating Procedural Devices

As noted earlier, there inheres in first amendment litigation a conflict between the right of an injured plaintiff to a meaningful adjudication of his claim and the right of the defendant to engage in certain protected activities without interference or harassment. This conflict is reflected in the Supreme Court's creation of both privileges and exceptions in Noerr-Sullivan litigation: the privileges manifest a concern that the inconvenience of being sued will inhibit the free exercise of valued rights; the exceptions indicate a value

88. Id. at 923.
judgment that protecting abusive, intentional, or reckless exercises of those rights is not worth the costs.

It is important to recognize that there are two sets of values at stake in this area. On the one hand, it is clear that litigation itself, regardless of its outcome, imposes burdens on the free exercise of first amendment rights. On the other hand, admitting this fact does not settle the issue because not all such activity is protected, and the plaintiff is entitled to recover if he has been injured by unprotected activities. Since a plaintiff may be entitled to recover, it follows that he is entitled to bring an action to enforce that right. In bringing that action, however, the plaintiff imposes burdens on the defendant that can only be justified if the plaintiff ultimately prevails. If the plaintiff loses, the defendant will have been penalized, through litigation costs, for exercising his protected rights.

Any resolution of this conflict must simultaneously achieve two goals. First, it must consistently relieve the defendant of some meaningful portion of the expenses of litigation. Unless it does this, any burden it places on the plaintiff cannot be justified. Second, it must preserve to the plaintiff a meaningful opportunity to prove that the defendant's activities were of the sort deemed unprotected. In order for the opportunity to be meaningful, the decision whether to allow the plaintiff to proceed with his suit must be rationally related to the probabilities that he will be able to prove that the activities of the defendant are unprotected. That is, the decision whether to proceed must be based upon an evaluation of the merits of the case.

The difficulties of achieving both objectives are apparent. A rational restriction on the number and duration of such suits requires an analysis of facts that can only be made available to the court through a process that imposes significant expenses on the defendant. The problem presented is thus the difficulty of making decisions based on facts, yet keeping the cost of ascertaining those facts insubstantial enough so as not to inhibit the defendant's first amendment activities. If a procedural resolution of this problem is possible, it must be accomplished by gathering facts early enough in the trial process to keep costs under control.

The effectiveness of any procedural tool must, therefore, be judged not merely by its efficacy in protecting the interests that underlie the Noerr-Sullivan privileges, but also those that are implicit in the exceptions. Reflecting the objective behind the privileges, the procedural device must effectively limit the economic disincentives to which the defendant is exposed. Reflecting the objective behind the exceptions, the device must also distinguish on their merits those cases that should and should not be allowed to advance to trial.
B. APPLYING THE STANDARD

Applying this standard to the four cases described above, it is clear that each of the procedural devices that they propose as a mechanism for protecting the defendant from some of the burdens of trial fails to promote one or both of the Noerr-Sullivan objectives.

Connor and Buckley both require the plaintiff to make an extraordinary showing of forum appropriateness in order to avoid dismissal. Insofar as both approaches theoretically do no more than force the plaintiff to bring suit elsewhere, they provide at best an incremental protection to defendants, relieving them only of that portion of pretrial costs associated with traveling to the less convenient forum. Thus, these remedies do little to protect the defendant from those costs, principally attorneys' fees and discovery costs, that he will incur irrespective of where the trial is held. Moreover, these remedies do nothing to protect those defendants who satisfy the higher standards, nor do they provide any reliable way for potential defendants to determine whether they will ultimately qualify for even the minimal protection these devices afford. Given these limitations, one must seriously question the overall efficacy of these remedies in enhancing the free exercise of first amendment rights.

In addition to providing only minimal protection for the defendant, these jurisdictional remedies impose some significant costs on the plaintiff, especially in libel cases. First, the plaintiff must bear

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89. See notes 46-88 supra and accompanying text.
90. Location of trial will, however, significantly affect the possibility of excessive judgments due to jury bias. The prospect of such bias drew the attention of both the Buckley and Connor courts. See Buckley v. New York Post Corp., 373 F.2d 175, 182 n.8 (2d Cir. 1967); New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966). Excessive jury verdicts do not indicate a failure of procedural rules, but instead suggest a misapplication of the substantive rules of Sullivan by a biased jury. If, indeed, the principal problem is jury prejudice, approaches that provide for the selection of a forum on the basis of convenience or the level of revenue received from the jurisdiction are irrational because such considerations are at most related only coincidentally to the problem of prejudice. The logical solution to jury bias would be an approach that would provide either for the selection of a forum to avoid local jury prejudice or for a reexamination of the trial for bias. Change of venue is an example of the first approach, and de novo review by appellate courts is an example of the second. See New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966).
91. See, e.g., Curtis Publishing Co. v. Golino, 383 F.2d 586, 590 (5th Cir. 1967), discussed at note 93 infra.
92. The proposals of Connor and Buckley for modifications of the rules for determining jurisdictional appropriateness are less applicable to antitrust litigation since such suits arise from conflicts between business competitors that are likely to be doing business in the same forum. Nonetheless, to the extent that conflicts between firms competing in interstate commerce can occur in petitioning Congress, questions of jurisdiction may be relevant.
the incremental costs of traveling to a more distant forum. Second, he faces the difficulty of getting his witnesses to that forum, a difficulty that is compounded by the fact that most of the important witnesses in a libel case will reside in the place where the defamation occurred and not where it was written. Finally, forcing the libel plaintiff to sue in a different forum vitiates his ability to vindicate his reputation in the eyes of the only people that matter—his friends, neighbors, and business associates.

The effect of these burdens on the plaintiff is to make suit at once both more expensive and less worthwhile. Thus, the result of dismissing the suit on jurisdictional or forum non conveniens grounds may, as a practical matter, be to prevent it from being brought at all. Such a result, of course, makes these remedies more effective in protecting the defendant's first amendment rights; but this efficacy is purchased at the expense of rationality. There is nothing in the determinations of forum appropriateness that even remotely addresses the question whether the plaintiff should be permitted to recover. As a consequence, the jurisdictional approaches of Connor and Buckley are both underinclusive and overinclusive, protecting defendants, not from claims that lack merit, but from claims by plaintiffs who cannot afford to sue in a more distant forum. Ultimately, therefore, using jurisdiction and forum non conveniens to protect defendants' exercise of their first amendment rights is in any event only minimally efficacious and only in a more or less random, nonrational manner.

A similar charge can be leveled at the higher pleadings standard proposed by Franchise Realty. There is no doubt that the liberal pleadings standard provided by the Federal Rules of Civil Procedure significantly enhances the ability of plaintiffs to subject defendants

93. Perhaps implicitly recognizing these problems, subsequent courts have not applied the approach of Connor. See, e.g., Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir.) ("Later Fifth Circuit cases . . . suggest that the Fifth Circuit is not at this time adhering to the early rule [enunciated in Connor]."), cert. denied, 432 U.S. 911 (1977); Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967).

In Golino, the Fifth Circuit relied on the "basic differences between the business activities, purposes, and motivations of a publisher of a newspaper, albeit one of worldwide influence, and a publisher of national magazines," id. at 590, and held that the Connor rule did not apply to magazines. The difference is that "a newspaper, no matter how popular, depends primarily upon circulation in the vicinity of its publication. Circulation in other areas may well be welcomed, but it is not critical to the newspaper's continued existence." Id. The distinction is a dubious one, and if Connor retains validity at all after Golino, it probably stands only for the proposition that first amendment considerations are "relevant" to a determination of the jurisdictional question. Id. at 572.

For other criticisms of the Connor decision, see First Amendment's Role, supra note 35, at 545-48; Constitutional Limitations, supra note 35; Comment, Long-Arm Jurisdiction over Publishers: To Chill a Mocking Word, 67 COLUM. L. REV. 342, 355-64 (1967).
to harassing litigation. A complaint in a case raising Noerr-Sullivan issues can easily fulfill notice pleading requirements by reciting the elements that Noerr and Sullivan respectively identified as necessary to support a claim. Thus, the notice serving policy of the Federal Rules permits substantial economic disincentives to accrue before a meaningful determination of the merits of the plaintiff's claim is possible. But Franchise Realty's requirement of greater specificity in pleadings, though it is apparently more closely related to the merits of the plaintiff's claim than are the devices propounded in Connor and Buckley, may ultimately prove to be no more effective or rational than jurisdiction and forum non conveniens in resolving the conflict between the defendant's first amendment rights and the plaintiff's right to a meaningful hearing on the merits of his claim.

First, the higher pleadings standard may be ineffective in actually protecting the defendant from the threat of litigation. To the extent that attorneys perceive the Franchise Realty standard to be apposite, they can be expected either to formulate complaints presenting multifarious, alternative, and hypothetical averments covering all possible factual transactions, or to pursue one or two theories and then seek to amend if those prove unwarranted. In either case,


95. This concern was voiced in Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076, 1082-83 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977).

96. The plaintiff's course of action will be controlled by the availability of the privilege of amending his complaint. Should courts seek to protect defendants by restricting leave to amend, plaintiffs will pursue the first course, and the objective of
greater discovery costs will be generated and the exercise of first amendment rights will thereby be inhibited.

Second, the apparent utility of pleadings in distinguishing between meritorious and nonmeritorious claims is illusory, for it is rooted in the erroneous assumption that a plaintiff with a legitimate claim will be able to set forth the specific facts that, if proved, will justify a recovery. Ironically, the difficulty underlying this assumption is nowhere better illustrated than in cases raising Noerr-Sullivan issues. The critical issues in such cases—sham intent and actual malice—involves the defendant's state of mind. It is unrealistic to expect that specific facts giving rise to an inference as to the defendant's state of mind will be consistently available to the plaintiff before the action is commenced. Thus, by demanding that the plaintiff state such facts in his pleadings, the Franchise Realty rule

insulating defendants from trial preparation costs will be defeated. The second alternative will be followed by plaintiffs in the event courts continue a policy of allowing amendment of complaints.

The need for plaintiffs to resort to these approaches is created by the paucity of facts available at the pleadings stage. As Professor Sutherland has pointed out, "[t]he great weakness of pleading as a means for developing and presenting issues of fact for trial [lies] in its total lack of any means for testing the factual basis for the pleader's allegations and denials." Sutherland, The Theory and Practice of Pre-Trial Procedure, 36 Mich. L. Rev. 215, 216 (1937). While there are sanctions available against false pleadings, see Fed. R. Civ. P. 11, they are probably helpful only in the most outrageous cases, and enforcement is difficult even then. See generally Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 34-42 (1976). Such sanctions are not likely to have a deterrent effect beyond that of an attorney's general standard of ethics and sense of professional pride. See also id. at 52-61. On the other hand, since willfully placing false or fraudulent allegations in a complaint permits the court to leave the plaintiff as it finds him, see, e.g., Chew Wing Luk v. Dulles, 268 F.2d 824 (9th Cir. 1959), the prospect of Rule 11 sanctions for attorneys who sign pleadings unconvinced that they are filed in good faith, see, e.g., Dodrill v. New York Cent. R.R., 253 F. Supp. 564 (D. Ohio 1966), may be a sufficient disincentive itself in some cases.

97. In both antitrust and libel cases, the plaintiff knows far less about the factual transaction than does the defendant. See generally Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962). The Supreme Court has stressed the need for allowing the plaintiff ample opportunity to discover the facts before dismissal: "[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976) (quoting Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962)). Further, the complexity of modern antitrust litigation may prevent the plaintiff from stating the facts even if he has them at his disposal. See Sandridge v. Rogers, 256 F.2d 269 (7th Cir. 1958); Louisiana Farmers' Protective Union v. Great Atl. & Pac. Tea Co., 131 F.2d 419 (8th Cir. 1942).

98. The Federal Rules seem to reflect this concept, since "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b).
runs significant and unacceptable risks of denying plaintiffs an opportunity to be heard irrespective of the actual merits of the claim. Since such an outcome seriously undermines the goal of ensuring that plaintiffs are not subjected to abusive exercises of first amendment rights, an alternative that is more rationally related to the merits of the case is needed.

Assuming some discovery must be allowed in order to determine the merits of a case, the logical device for resolving the problem of allowing the case to proceed to trial would appear to be a motion for summary judgment. 99 When the Keogh test is applied to require that plaintiffs meet a higher standard of proof in order to avoid dismissal, this requirement alleviates at least that portion of the litigation expenses incurred in the actual trial of the case.

It is ironic, however, that the very process that makes summary judgment a rational means of distinguishing between meritorious and nonmeritorious claims—allowing discovery to proceed to the point where enough facts are available to allow an intelligent evaluation of the merits of the plaintiff's case—also limits its ultimate efficacy in terms of protecting the defendant. The discovery process necessarily generates significant costs for the defendant, and while the higher procedural standard may reduce trial costs, it leaves unresolved the disincentive of high pretrial expenses.

IV. AN ALTERNATIVE APPROACH

The Noerr-Sullivan standards create a dilemma that no procedural device is capable of resolving. Although pretrial tools may effectively reduce some of the disincentives of litigation, 100 it should be

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99. A motion for summary judgment questions the presence of a genuine issue of material fact, Fed. R. Civ. P. 56(c), and provides a means for determining whether a claim justifies court action.

100. A modest reduction of pretrial costs could be facilitated by restricting discovery to matters that relate to the substantive standards of Noerr and Sullivan. Limitation of discovery is the broad purpose of protective orders under the Federal Rules, see Fed. R. Civ. P. 26(c), and trial courts have discretion to order full disclosure of relevant information while protecting the parties from annoyance and excessive expense. See Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D.N.Y. 1971); 4 Moore's Federal Practice ¶ 26.67, at 26-487 (2d ed. 1976). Courts will limit inquiry into matters that are not proper subjects of discovery. See, e.g., Williams v. Thomas Jefferson Univ., 343 F. Supp. 1131, 1132 (E.D. Pa. 1972) (names of those receiving abortions not provided due to possibility of embarrassment); La Cotonniere de Moislains v. H. & B. Am. Mach. Co., 19 F.R.D. 6, 8 (D. Mass. 1956) (inquiry allowed as to the substance but not the appropriateness of arbitrator's decision). Courts may also issue protective orders postponing discovery as to certain matters until others have been decided. See, e.g., DeLong Corp. v. Lucas, 138 F. Supp. 805, 809 (S.D.N.Y. 1956); Fed. R. Civ. P. 26(d). To obtain a protective order, however, the proponent must demonstrate "good cause." See id. 26(c); 4 Moore's Federal Practice ¶¶ 26.67-.68, at 26-487,-491 (2d ed.
clear that a procedural approach to this problem is fundamentally misconceived. So long as the only available method of protecting the defendant is to dismiss the plaintiff's claim, there is an inevitable tradeoff between efficacy and rationality: the more protection that is afforded to the defendant, the more likely it is that meritorious claims will be dismissed. The task, therefore, is to limit effectively

1976) (standard for good cause may vary with the type of protection sought). But since the objective of discovery is to provide full disclosure of facts, see, e.g., Zucker v. Sable, 72 F.R.D. 1 (S.D.N.Y. 1975), courts generally are not inclined to restrict discovery absent a showing of bad faith. See 4 Moore's Federal Practice ¶ 26.72, at 26-532 to -533 (2d ed. 1976) (bad faith may include discovery conducted in a manner that will annoy, embarrass, or oppress a party).

To better protect first amendment rights, "good cause" could be deemed established when a defendant demonstrates either that he is a publisher, the plaintiff is a public figure, and the cause of action is a libel suit, or that he is a businessman, the plaintiff is a competitor, and the cause of action is an antitrust pleading under the Noerr "sham" exception. By granting a protective order limiting discovery to matters relevant to the elements of a cause of action based on Noerr-Sullivan, all costs of tangential inquiries might be averted, and a summary judgment proceeding could follow to ascertain the viability of the plaintiff's claim.

The efficacy of protective orders, though persuasive in theory, would be limited in practice. Protective orders could alleviate only a small portion of costs, since the very questions allowed under the order — elements of a cause of action respecting the malicious state of the defendant's mind — are those that necessitate the most discovery. Moreover, since extensive use of protective orders would undoubtedly precipitate extensive motion practice, the apparent cost savings may actually be illusory.

101. In addition to the four approaches discussed above, a fifth area in which a plaintiff in a first amendment case may find himself disadvantaged is in the scope of discovery. In Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), cert. granted, 98 S. Ct. 1483 (1978) (No. 77-1105), Chief Judge Kaufman held that the first amendment considerations surrounding the law of libel required that plaintiffs not be allowed to inquire into a newsman's subjective intent in, or reasons for, choosing to believe or ignore available sources. The court felt that such an inquiry endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the sine qua non of responsible journalism.

Id. at 980.

While neither the rationale nor the effect of Herbert is aimed at alleviating the burden of trial on the defendant's exercise of his first amendment rights, the case nonetheless has much in common with the cases discussed in this Note and may be criticized for many of the same reasons. In placing a potentially significant limitation on the types of information a plaintiff may obtain in seeking to prove actual malice, the court may have made it significantly more difficult for him to prove an essential element of his case. As in Connor, Buckley, and Franchise Realty, this limitation is imposed independent of the merits of the plaintiff's claim. Thus, it is possible that the success of the court's rule in protecting the rights that publishers derive from Sullivan will be purchased at the expense of the rights guaranteed to libel victims by the same case. In this context, Judge Kaufman's remark that "[i]t makes little
the costs of the defense without dismissing the suit.

Rather than tinkering with pretrial mechanisms to achieve incremental protection for defendants, the courts should recognize that the problem of disincentives must be directly confronted. There is an obvious and relatively simple means of ensuring plaintiffs a full opportunity to have their grievances adjudicated and still minimize the deterrent effects that the threat of litigation has on the free and robust exercise of first amendment rights: taxing the prevailing defendant’s costs to the plaintiff. Such a rule is the only way to provide the plaintiff with a full hearing on the merits of his claim and at the same time provide defendants with the assurance that, if they can show that their activities are protected, they will not be penalized.

Courts currently have the power to award a broad range of costs to the prevailing party. For example, a court in its discretion may order the losing party to pay court costs, the expenses of exemplification of documents and exhibits, and, under some circumstances, discovery costs. As a general sense to afford protection [to publishers] with one hand and take it away with the other, id. at 984, becomes ironic. There seems to be a far greater danger that the rule in Herbert will actually serve to take away the plaintiff’s right, also derived from Sullivan, to a meaningful adjudication on the merits of his claim.


103. The Federal Rules provide that the prevailing party may be allowed court costs unless the court directs otherwise. See Fed. R. Civ. P. 54(d). The rule is supplemented by numerous statutes; thus, costs may be taxed for the fees of the clerk and marshal, see 28 U.S.C. § 1920(1) (1970), the fees of the court reporter, see id. § 1920 (2), and docket fees, see id. §§ 1920(5), 1923.


105. Fees for witnesses may be paid as costs in the discretion of the court, see 28 U.S.C. § 1920(3) (1970), but are limited in amount, see id. § 1821. Expert witness expenses may be allowed but may not exceed those paid to regular witnesses. See Henkel v. Chicago, St. P., M. & O. Ry., 284 U.S. 444 (1932); Baum v. United States, 432 F.2d 85, 86 (5th Cir. 1970) (per curiam); cf. Fey v. Walston & Co., 493 F.2d 1036, 1056 (7th Cir. 1974) (allowing expenses for experts used in trial preparation). If a state policy allowing extra fees is applicable through diversity jurisdiction, however, the fees will be allowed. See 6 MOORE’S FEDERAL PRACTICE ¶ 54.77[5.-3], at 1735-37 & n. 9 (2d ed. 1976), and sources cited therein.

106. The power exists for courts to tax certain expenses of depositions as costs. See Wahl v. Carrier Mfg. Co., 511 F.2d 209 (7th Cir. 1975); Gillam v. A. Shyman, Inc., 31 F.R.D. 271 (D. Alas. 1962). The matter is left to the discretion of the courts. See
eral matter, however, the magnitude of such costs is likely to be insignificant in terms of the overall costs of litigation, and insofar as all such awards are made only in the discretion of the court, the probability of gaining even this much is uncertain. Moreover, the most significant limitation on the award of costs is the so-called “American rule,” which generally prohibits the award of attorneys’ fees to the prevailing party unless such an award is specifically allowed by statute.\textsuperscript{7} While the American rule has been widely criticized,\textsuperscript{8} it has been consistently followed by the courts\textsuperscript{9} and was recently affirmed as a valid, modern principle in \textit{Alyeska Pipeline Service Co. v. Wilderness Society}.\textsuperscript{10}

\textsuperscript{7} See \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc’y}, 421 U.S. 240, 247 (1975). There are four equitable exceptions to the American rule: (1) the “bad faith” exception allows attorneys’ fees to be awarded to “a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons,” \textit{F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.}, 417 U.S. 116, 129 (1974); (2) the “common fund” exception taxes costs when a party has acted by preserving or recovering a fund for the benefit of others in addition to himself, see \textit{Mills v. Electric Auto-Lite Co.}, 396 U.S. 375, 392-97 (1970); \textit{Rude v. Buchalter}, 286 U.S. 451 (1932); \textit{Trustees v. Greenough}, 105 U.S. 527 (1881); (3) the “substantial benefit” exception allows attorneys’ fees when a substantial benefit is conferred on a broader group than those suing despite the lack of recovery, see, e.g., \textit{Mills v. Electric Auto-Lite Co.}, 396 U.S. 375 (1970); \textit{Miller v. Carson}, 401 F. Supp. 835, 851-53 (M.D. Fla. 1975); and (4) the “private attorney general” rule provides for the award of attorneys’ fees to a party who sought the enforcement of a statute or who prosecuted a strong public policy, see \textit{La Raza Unida v. Volpe}, 57 F.R.D. 94 (N.D. Cal. 1972); cf. \textit{Newman v. Piggie Park Enterprises, Inc.}, 390 U.S. 400, 402 (1968) (per curiam) (attorneys’ fees awarded under statutory provision). The fourth exception has been significantly limited. See \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc’y}, 421 U.S. 240, 269 (1975).


\textsuperscript{10} 421 U.S. 240 (1975). The decision in \textit{Alyeska} has been criticized as unjustified, impractical, and disadvantageous to public interest litigation. See, e.g., \textit{Note, Attorney Fees: Exceptions to the American Rule}, 25 \textit{Drake L. Rev.} 717, 736-37 (1976);
The tradition of the American rule notwithstanding, the courts retain significant equitable powers to award attorneys' fees. A number of arguments justify the conclusion that courts should freely exercise these powers in an effort to protect defendants' first amendment rights. First, the American rule has a tenuous origin and should be rejected whenever justice makes the award of costs appropriate. Second, the Alyeska decision did not consider the first amendment as a factor in determining whether attorneys' fees should be awarded. Third, the power of equity in general gives courts author-


111. [The] federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," . . . and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."


112. The "American rule," which denies attorneys' fees as costs, was first pronounced by the Supreme Court in 1796 using less than enthusiastic language: "We do not think that this charge [of attorneys' fees] ought to be allowed. The general practice of the United States is in opposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court." Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796). The policy of not taxing costs is unique among the courts of the world. See Ehrenzweig, supra note 108, at 793. The rule is based on the concept that "litigation is at best uncertain [and] one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included fees of their opponents' counsel." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

113. The Court's holding in Alyeska should not be controlling in first amendment cases for two reasons. First, the Alyeska decision, which refused attorneys' fees to
plaintiffs in an environmental class action suit, was in an area of law governed entirely by statute and thus should not be extended to situations where constitutional rights are being vindicated. Second, the Court was simply wrong. The Court concluded that "having considered [the American rule's] origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents." 421 U.S. at 247. The Court relied for guidance on an 1853 statute governing docket fees, Act of Feb. 26, 1853, ch. 80, § 1, 10 Stat. 161, and its modern equivalent, which sets dollar limits on certain fees, 28 U.S.C. §§ 1920, 1923(a) (1970). According to the Court, the docket fees statute was designed to "control the attorneys' fees recoverable by the prevailing party from the loser." 421 U.S. at 253. To construe congressional action as excluding court action appears inconsistent with the legislative history of the act, however, since the purpose of the original act was to correct the disparity in amounts awarded by the various courts. See Cong. Globe, 32d Cong., 2d Sess. 207 (1853) (remarks of Sen. Bradbury). See also H.R. Rep. No. 50, 32d Cong., 1st Sess. (1852). Indeed, the Supreme Court has said that the docket fees act "contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require." Trustees v. Greenough, 105 U.S. 527, 536 (1881); accord, Hall v. Cole, 412 U.S. 1, 12 (1973) (though statements in dissent to a house committee report indicated the feeling of some congressmen "that it would have been desirable and prudent to spell out unmistakably a right to attorney's fees," these statements "hardly amount to a definitive and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with sound and established equitable principles.") (quoting Yablonski v. UMW, 466 F.2d 424, 429 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973)); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-91 (1970) (inclusion of provisions in Securities Exchange Act of 1934 allowing recovery of attorneys' fees in specific suits "does not impinge [upon] the result we reach in the absence of statute"). . . . [T]he specific provisions . . . should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate. . . .") (quoting Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir. 1943)).

As to legislative silence regarding cost taxing generally, Senator John Tunney of California has said that "congressional silence . . . is merely a by-product of the legislative process and not a conscious signal to the courts of any kind. . . . [T]he subject of costs] often fails to surface during a legislative debate because the focus of concern is on other issues in the legislation." Tunney, Financing the Cost of Enforcing Legal Rights, 122 U. Pa. L. Rev. 632 (1974).

114. The establishment of first amendment privileges in Noerr and Sullivan indicates a value judgment by the Court that it is a social wrong to deter the defendant's exercise of protected activities. While leaving plaintiffs without redress may present an equitable argument on their behalf, the value judgment of the Court also indicates that equity will not be served by forcing defendants to bear the costs of defending themselves against claims that are not meritorious under Noerr or Sullivan. The present structure of rules against allowing Noerr-Sullivan defendants attorneys' fees does not preclude the award of such costs in equity. Indeed the development of the American rule was not based "upon any lack of power in the court, but because it was not deemed wise policy to allow attorney's fees to be taxed as costs in ordinary equity cases." Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 244 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1, 9 (1930) (holding general decree by lower
analogy to the equitable "bad faith" exception\footnote{115} can be made to support an award of attorneys' fees to prevailing defendants in \textit{Noerr-Sullivan} cases.\footnote{115}

Despite these arguments, the absence of statutory authority permitting the award of attorneys' fees to defendants in \textit{Noerr-Sullivan} cases\footnote{117} will present a substantial challenge to the imagination of the court, which allowed "taxation of costs," did not include attorneys' fees absent an express grant in the decree. The "power of a court of equity to give costs is wholly inherent in the court independent of any statutory authority, and solely according to the conscience of the court." \textit{Id.} at 240 (quoting \textit{Stallo v. Wagner}, 245 F. 636, 638 (2d Cir. 1917)).

\footnote{115}{\it See note 107 supra.}

\footnote{116}{The "bad faith" exception operates to allow attorneys' fees when a party has knowingly brought a spurious claim. \textit{See generally 6 Moore's Federal Practice \S\ 54.77(2), at 1709 (2d ed. 1978), and sources cited therein. While this device clearly could be used against litigation brought for harassment purposes, it remains ineffective against cases in which plaintiffs bring actions that they believe to be viable but that do not prove to be colorable. To reach these situations, courts would have to modify the "bad faith" approach to apply not only in cases where the party shows a design of oppression before the fact, but also in cases where the result of litigation is oppressive.

Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed . . . but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful [defendant]. . . . The vindication of their rights necessarily involves greater expense . . . than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. \textit{Rolax v. Atlantic Coast Line R.R.}, 186 F.2d 473, 481 (4th Cir. 1951). Courts may analogize from situations where plaintiffs vindicate rights of unjustified expense to those in which defendants who have been unjustly oppressed by the economic disincentives of litigation vindicate their rights to promote the public good. A similar expansion of the "bad faith" rule occurred in \textit{Bell v. School Bd.}, 321 F.2d 494 (4th Cir. 1963), in which the Court reversed the denial of attorneys' fees because school officials had consistently acted to deny plaintiffs their constitutional rights.

The new elements for an award based on "bad faith" thus seem to be a clearly defined and established right, and the need for judicial assistance in securing that right. Shifting fees in such a situation recognizes the unfairness of imposing the costs of litigation on the party who should have freely enjoyed his rights.

\textit{Comment, supra} note 108, at 661.

Thus, one avenue arguably open to the courts is to broaden the definition of oppressive conduct by plaintiffs to include the bringing of suits that prove nonmeritorious under \textit{Noerr or Sullivan}.

\footnote{117}{No federal libel statute exists, and while the Clayton Act provides a statutory basis to tax costs in favor of the prevailing party, \textit{see 15 U.S.C. \S\ 15 (1976), it limits that recovery to persons "injured . . . by reason of anything forbidden in the antitrust laws." This provision has been interpreted as limiting recovery of expenses
courts. Nevertheless, the vital purposes of the first amendment, which led the Supreme Court to restrict plaintiffs' right to redress in Noerr and Sullivan, provide a strong justification for taxing costs in favor of defendants in similar situations. This Note suggests that courts directly approach the protection of free and robust speech by some system of cost taxing. Ultimately such a system is no greater to plaintiffs only. See Byran Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3d Cir. 1967); Juneau Square Corp. v. First Wis. Nat'l Bank, 435 F. Supp. 1307, 1327 (E.D. Wis. 1977). Both of these cases base their restrictive construction on the apparent intent of Congress in the Clayton Act to provide a supplement to government litigation, thereby encouraging antitrust suits. See 374 F.2d at 651; 435 F. Supp. at 1327.

Since most courts would probably be reluctant to award costs to defendants absent an amendment to the Clayton Act specifically providing for recovery by prevailing defendants, the only possible alternative would be to apply a rationale based on the supremacy of the United States Constitution over legislative acts. Using this rationale, courts could read an award of defendants' costs into the Clayton Act as a necessary means of carrying forth the first amendment objectives of free and robust speech.

118. The Supreme Court has awarded attorneys' fees to protect constitutional rights absent specific statutory authority. In Bradley v. School Bd., 416 U.S. 696 (1974), the Court approved the award of fees in a case where plaintiffs sought to promote desegregation and civil rights under 42 U.S.C. § 1983 (1970), which does not explicitly provide for such an award. Although the district court had awarded $43,355 for attorneys' fees and $13,064.65 for expenses, the court of appeals reversed because of the lack of statutory authorization. See Bradley v. School Bd., 472 F.2d 318, 330-31 (4th Cir. 1972), rev'g 53 F.R.D. 28 (E.D. Va. 1971), rev'd, 416 U.S. 696 (1974). Congress subsequently enacted a provision that allowed recovery of fees. See Education Amendments of 1972, Pub. L. No. 92-318, § 718, 86 Stat. 235 (codified at 20 U.S.C. § 1617 (Supp. V 1975)). The Supreme Court stated that it would follow "the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. The Court decided that "the legislative history of § 718...would seem to provide at least implicit support for the application of the statute to pending cases." Id. at 716. It appears quite clear, however, that the goal of the Court was to promote the policy of the Constitution by protecting those who vindicate constitutional rights at significant economic disadvantage. To the extent that Sullivan and Noerr describe similar situations, the willingness of the Court to act to protect constitutional rights on any reasonable grounds appears evident.

119. Although this Note suggests taxing costs in principle without proposing the use of any particular system, certain logical guidelines can be set forth. To support the award of costs, a claim must unjustifiably threaten the exercise of first amendment rights. The finding of such a threat, however, goes to the merits of the case and thus it follows that costs can reasonably be assessed only at a point that follows a determination of the merits. The survival of a claim through the various stages of the litigation process may, therefore, be one criterion by which to measure the threat to first amendment rights. On this analysis, a fairly clear case might be made for taxing costs after a summary judgment determination that a case was not sufficiently colorable to warrant further proceedings. A case that survives summary judgment and is dismissed on a directed verdict presents a harder question. Clearly, however, any case that survives to be submitted to a jury has been proven colorable enough to justify withholding any cost taxing, since such submission requires that jurors could reasonably disagree about its lack of merit.
a break with tradition than is the alteration of procedural standards. It is, however, both a more effective and more rational way of achieving a resolution of the Noerr-Sullivan dilemma, for only by taxing costs can the dual objectives of ameliorating economic disincentives and preserving decisions on the merits of each case be achieved.