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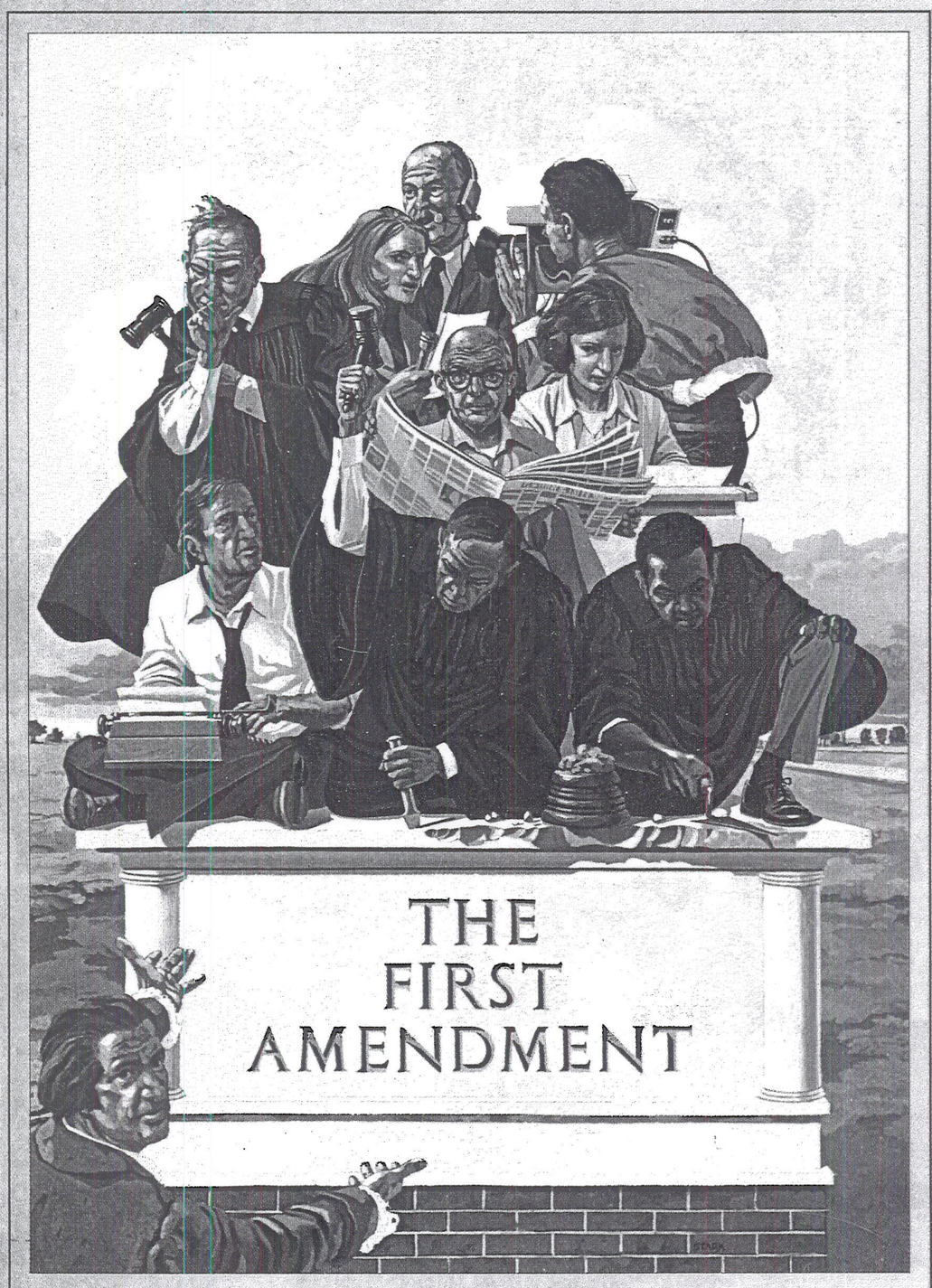

Introduction by William O. Douglas

Quill

THE FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

INTRODUCTION BY WILLIAM O. DOUGLAS

THE FIRST AMENDMENT is a weathervane and there are ominous signs everywhere that the values it embraces may be in for stormy weather. Decisions concerning the depth and scope of First Amendment rights have been momentous since the 1930s when these rights were made applicable to the States by reason of the Fourteenth Amendment. Various forces since World War I have worked to curtail First Amendment rights in the interest of "states' rights" and of "national security." As a nation our federalism cannot allow disparate treatment—for literature, movies, public debate, speech, and press—dependent on the whims or prejudices of local groups. So far as basic freedoms are concerned there must be national standards, lest the most illiterate and the least civilized factions lower us to their prejudices and condition the mass media and national publications to the lowest common denominator.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The word "no" does not seem to be ambiguous, though many judges read the words "Congress shall make no law" to mean "Congress may make some laws."

The word "freedom" may to some have elasticity. The word "speech" to others may mean something less than—or different from—the word "expression"; and the word "press" to others means only the conventional type of newspaper and does not encompass television or radio.

The word "freedom" in terms of speech or press had no restrictive meaning when the First Amendment was ratified in 1791; but the idea persisted at the local or state level that "offensive" ideas should be punished. And, at that time, so far as the First Amendment was concerned, "offensive" or any other ideas could be punished, for the First Amendment was a part of the Bill of Rights, which

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at the beginning applied only to the federal regime.[1]

The instrument necessary for change came in 1868, shortly after the Civil War, when the Fourteenth Amendment was adopted. Section One of the Fourteenth Amendment guaranteed against state action "the privileges or immunities of citizens of the United States" and it forbade the States from denying any persons "liberty" without Due Process of Law. It was not until 1931, however, that the Speech and Press Clause of the First Amendment was held to restrict the States. Thus, it has only been during the last 45 years that the States have been compelled to live up to First Amendment requirements, and it is understandable why the folklore and tradition of states rights have stood in the way of reordering state laws to conform with the federal standard.

State compliance is compelled

Today, however, in 1976 — the year of our Bicentennial — any discussion of the Speech and Press Clause of the First Amendment must proceed on the assumption that what is denied the Federal Government is likewise denied the States. A provision of the Bill of Rights applicable to the States by reason of the Fourteenth Amendment is not "watered down."[2]

It has long been stated as dictum that obscenity is not a part of "speech" or "press" guaranteed by the First Amendment, but that premise has no foundation in our legal history. The justification used for banning "obscene" publications is that they are "offensive" to many people.[3] No one, however, has been able satisfactorily to define "offensive" in a neutral or objective fashion. What one person, or group of people, finds offensive might not be at all offensive to another person or group of people. With this thought in mind I started compiling a list of themes, topics, and exegeses that were "offensive" to me. The list grew and grew. What if a community's list of "offensive" utterances equaled mine? What if the community's standards, not the national standards, determined whether a speaker or publisher or merchant is sent to prison for an "obscene" publication?[4] If a community can make criminal one "offensive" idea, what bars it from making criminal another "offensive" idea? The First Amendment says nothing about "speech" or "press" that is inoffensive. It allows all utterances, all publications to be made with impunity.

All ideas are potentially inciting. The purpose of the freedom of speech and freedom of the press clauses in the First Amendment is not merely to enlighten or comfort people, but to offer challenging and provocative and annoying ideas as well. One gets the impression from reading conventional discussions of the First Amendment that the frame of discourse and debate must be within the framework of the existing system and compatible with its basic tenets. That, of course, is the Russian philosophy. Our First Amendment is designed to protect our dissenters. Ideas have a market place, and it was assumed by Jefferson and Madison that that market is open to all ideas. That has not, however, been the direction in which judge-made law has evolved.

All ideas must be protected

Beliefs under our system are sacrosanct. What one believes is beyond the reach of government. "Do you believe in God?" "Do you believe in socialism?" These are not permissible questions for House or Senate committees to ask a witness on pain of contempt. The First Amendment's broad philosophy was stated by Chief Justice Warren in *Watkins v. United States*, 354 US 178, 200, where he wrote: "There is no congressional power to expose for the sake of exposure." *Watkins*, however, was the most advanced position taken; later decisions suggested a retreat.

The battle to preserve individual liberties under the First Amendment is not new. In 1887, Charles B. Reynolds — an ex-Methodist minister who renounced the Bible and started preaching the gospel of free thought — was indicted, tried, and convicted under a New Jersey blasphemy statute. Robert Ingersoll was Reynolds's attorney. Ingersoll told the jury:

The battle of preservation is old

> . . . This statute, under which this indictment is found, is unconstitutional, because it does abridge the liberty of speech; it does exactly that which the Constitution emphatically says shall not be done.

. . . If every man has not the right to think, the people of New Jersey had no right to make a statute, or to adopt a Constitution—no jury has the right to render a verdict, and no court to pass its sentence.

. . . In other words, without liberty of thought, no human being has the right to form a judgment. Without liberty there can be no such thing as conscience, no such thing as justice. All human actions—all good, all bad—have for a foundation the idea of human liberty, and without Liberty there can be no vice, and there can be no virtue. Take the word Liberty from human speech and all the other words become poor, withered, meaningless sounds—but with that word realized, with that word understood, the world becomes a paradise.

. . . Gladly would I give up the splendors of the nineteenth century—gladly would I forget every invention that has leaped from the brain of man—gladly would I see all books ashes, all works of art destroyed, all statues broken, and all the triumphs of the world lost—gladly, joyously would I go back to the abodes and dens of savagery, if necessary to preserve the inestimable gem of human liberty.

. . . Thomas Jefferson entertained about the same views entertained by the defendant in this case, and he was made President of the United States. . . I sincerely hope that it will never be necessary again, under the flag of the United States—that flag for which has been shed the bravest and best blood of the world, under that flag in defense of which New Jersey poured out her best and bravest blood—I hope it will never be necessary again for a man to stand before a jury and plead for the Liberty of Speech.[5]

Ingersoll's words, spoken almost 90 years ago, are as valid today as they were when uttered. Nevertheless, when ideas have been perceived as too threatening or too dangerous or too "offensive," courts and juries have knuckled under to the hysteria of the times. No nation made up of mature, integrated people should allow that to happen. Perhaps, as some profess, the First Amendment is too strong a doctrine for us. Perhaps those who read it as containing only "admonitions of moderation"[6] are politically more acceptable to middle-America. But the theory of law under a Constitution is to raise the level of conscience and conduct, not to cater to the lower passions and prejudices of the uninformed among us.

There is a growing tendency of an increasingly powerful government to make the citizen walk submissively to the rightist philosophies now in the ascendancy. It may be that those pressures plus the easy use of electronic surveillance and the invasion of privacy will combine to end an era that brought us close to the Jeffersonian ideal. ■

1. *Barron v. Mayor and City Council*, 7 Pet. (32 US) 243.
2. *Malloy v. Hogan*, 378 US 1, 10 (Brennan, J.); see also *Johnson v. Louisiana*, 406 US 356, 384 (Douglas, J., dissenting.)
3. *Miller v. California*, 413 US 15; *Paris Adult Theatre v. Slaton*, 413 US 49.
4. *Miller v. California*, 413 US 15.
5. See Shapiro, "Blasphemy Trial," in At Ease (Sunday magazine of the Bergen *Evening Record*), May 20, 1973, at p. 20.
6. L. Hand, *The Spirit of Liberty* 278 (Dilliard ed. 1960).

THE FIRST AMENDMENT | *HISTORY*

BORN OF STRUGGLE

By J. Edward Gerald

FREEDOM OF SPEECH and of the press are derived from centuries of political and religious struggle in England.

Insofar as the historical record shows, the struggle began when William the Conqueror sought to consolidate his rule. William conceived of himself as a national landlord and of his subjects as tenants on his property. Thus, his concepts of power came at once into conflict with British custom by which the landholders long since had accepted a state of interdependence with yeomen and farmers arising in a common need for defense, for shared labor, and for a rule of law defined by community tradition and consent.

Custom, while not necessarily uniform from community to community, had great weight as the common law, and William and his heirs found the people unwilling to set it aside. Prolonged friction, discussion, action and reaction among the common people, the nobility, the clergy and the Crown produced a political party system out of which evolved the Parliament, the courts, the king as a creature of the Constitution, and the executive as the creature of the Parliament. The political objective of the Crown during this evolution was to establish its authority and national uniformity in law.

In partisan terms, the objective was to win, to dominate, to tax and to control; and the means to the end were often brutal, corrupt and treacherous. These words in fact connote the spirit of feudalism, and the suffering gave rise to aspirations of Englishmen for stable political and civil rights. The printing press was used with such power by political adversaries that freedom of speech and press were the last of the great Anglo-American liberties to take constitutional form. The violence with which the press was treated is so recent that memory of it produces the fear of government which pervades the mind of Twentieth Century journalism. An attempt to separate the First Amendment from other political liberties fails to pass the test of history. Full support of the legal and cultural system is required to gather information, to speak and to write.

The political objective of British reformist society was to make power systematic, equitable and predictable. This meant confining the king, in his use of power, to customary legal channels which could not readily be set aside. The Stuart kings, for example, often used intimidation and reprisal where they lacked political consent. Eventually the Parliament became supreme, mainly because, alone in a system of obtuse institutions, it seemed responsive to the people. The guarantees of our Bill of Rights support freedoms that Englishmen learned to cherish because they were abridged or denied.

Great value is placed upon treaties between government and the people which recognize these rights. Magna Carta (1215) resulted from a physical confrontation between King John and his subjects, and in it the king gave up his efforts to set up his own system of property control. He accepted limits on his taxing powers. Key provisions of the charter could be pleaded in court and thus became constitutional in nature. An example is Chapter 39 which was later construed as the right to trial by jury under due process of law.

The Petition of Right (1628) required the consent of Parliament to certain taxes, and it denounced arrest, detention or molestation of persons who refused to pay illegal

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levies.

The Bill of Rights (1689), the direct inspiration of the Ameri-

> *[The First Amendment] . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.*
>
> —JUDGE LEARNED HAND

can counterpart, stated individual rights and basic limitations on government. The election of members of Parliament was regularized and the members were promised that they would not be questioned elsewhere for what they said in debate. The anomalous prerogative of the king was ended and the right to bear arms was protected. The jury system was bolstered and independence was promised to the courts because guarantees of rights are of doubtful worth unless the judges are strong enough to stare down the king.

In the colonies, the Americans certainly were aware of their rights as Englishmen and frustrated because colonial governments did not meet expectations. Several colonies issued declarations of rights ahead of the British Bill of Rights of 1689 aimed at governors who modeled their prerogative on the king, and home legislatures, which fancied themselves as little parliaments.

Actions of colonial governments were subject to appeal to the Privy Council. The colonists followed Sir Edward Coke in believing that a government which acts in excess of its powers can be restrained by court decrees and that any aggrieved party may bring such a suit. Judicial review was an accomplished fact in the colonies before adoption of the Constitution.

American declarations which preceded the British Bill of Rights expressed the philosophical basis for the coming American government. The political and the religious struggle had been indistinguishable in Britain. Indeed, the idea of toleration of religious differences, as it spread among the people, made tolerance of freedom of speech and press possible.

Maryland promised religious toleration in 1649. Freedom of speech and petition in public meetings were guaranteed in the Massachusetts Body of Liberties (1641), along with protection against the taking of property without just compensation. Massachusetts promised accused persons bail, right to counsel and trial by jury. The Magna Carta guarantees of life, liberty and property were restated along with equal protection of the laws. The colony also confirmed a right of free access to public records.

The Pennsylvania Frame of Government (1682) limited the powers of government and guaranteed religious toleration and trial by jury. The Pennsylvania Charter of Privileges (1701) carried forward the due process guarantees of the Magna Carta and had an unusual provision whereby it might be amended. Religious freedom, however, was preserved against change.

Inalienable Rights

The early charters made substantial contributions to the federal Bill of Rights. The Americans, unlike the British, looked upon their declarations as beyond the reach of the crown. Moreover, the principles expressed and the experience of government gave Americans a determination to resist interference. The extent of that determination was tested in the events of Revolution and by James Otis and Patrick Henry when they argued that fundamental rights are above the reach of government.

They were arguing not only for a declaration of rights but for judicial review of legislation conflicting with the guarantee. The same implicit assumption characterized the adoption of the federal Bill of Rights later on. Their working platform was the Declaration of Rights and Grievances (1765) adopted under Henry's leadership by the Virginia House of Burgesses.

The Boston Town Meeting Committee, which drafted the "Rights of the Colonists and a List of Infringements and Violations of Rights" (1772), stated British principles in terms of natural rights as well as the Magna Carta and thereby added new propaganda resources in the campaign against England. Freedom of speech and press, while not directly mentioned, were perhaps implicit in this provision:

"The Absolute Rights of Englishmen and all freemen in and out of civil society, are principally, personal security personal liberty and private property." Due process, as in the Fifth Amendment, and safeguards against unlawful search and seizure, as in the Fourth Amendment, clearly are presaged by this document.

When the Continental Congress issued its "Declarations and Resolves" (1774) and its "Address to the Inhabitants of Quebec" (1774), the eventual form and content of the Bill of Rights became well defined. The second document contained the first declaration of the right of freedom of press and freedom of assembly.

The Virginia Declaration of Rights (1776) is often termed the first true American bill of rights. Since the delegates who signed it were elected, their work is characterized as the first guarantee of protection for the rights of individuals included in a written American constitution.

> *When the press is free and every man able to read, all is safe.*
>
> —THOMAS JEFFERSON

George Mason, as a member of the committee, drafted the Declaration of Rights, which was adopted June 12, 1776. Madison, a fellow committeeman, was later to draft the federal Bill of Rights. Mason wrote in a guarantee of freedom of speech and press that was the direct precursor of the First Amendment. Eight states that later joined in writing the Constitution included bills of rights in their state declarations.

The Bill of Rights was omitted from the original Constitution, but the sponsors agreed to add it as soon as the first Congress met. Thomas Jefferson wrote to Madison Dec. 20, 1787, that the people are entitled to a bill of rights guarantee "against every government on earth, general or particular, and that no just government should refuse [the guarantees], or rest [them] on inference." Madison introduced the amendments in 1789. He said he sought primarily to "guard against the legislative, for it is the most powerful, and most likely to be abused." He also wanted a remedy for abuses by the executive and by the "body of the people operating by majority against the minority." One of Madison's early proposals prohibited state violations of freedom of conscience, the press and of the guarantee of trial by jury, but it was eliminated during debate.

Fear of Liberty

Revolution is not accomplished in an atmosphere of freedom and tolerance. The great words of freedom that preceded and those that made up the Bill of Rights were written in a time of political anxiety and tension. The disposition of the community was to allow freedom of writers and speakers who were respectful of the existing regime and to take reprisals against some others less respectful. The John Peter Zenger case (1735) was celebrated by libertarians as a landmark, but it left in effect the common law of criminal libel, and this law was used by state and federal courts after adoption of the Bill of Rights.

The campaign for adoption of the Constitution and the Bill of Rights engendered fear of too much liberty as well as of not enough. The Federalist Party in the midst of war-like tensions punished its political enemies under the Alien and Sedition Acts passed for that purpose. While Jefferson destroyed the Federalist Party in the election of 1800 and the Alien and Sedition Acts were not renewed, historian Leonard Levy presents evidence that, like John Milton, Jefferson found some speakers dangerous and some thoughts undeserving of toleration. Nevertheless, the republican tract writers, inspired by the legislation, produced a new theory of liberty of the press that came to be realized in *New York Times v. Sullivan* 160 years later.

In spite of federal and state laws withholding the power to do so, judges insisted until 1941 upon inherent power to hold critics on charges of criminal contempt — a variant of the law of seditious libel. The definition of freedom of press, derived from Blackstone and modified by Alexander Hamilton in Croswell's libel case, limited the plea of truth as a defense in criticism of public officials to proof of "good motives and justifiable ends." Moreover, one consequence of the political influence of Jefferson and Madison was that the states could do as they pleased in Bill of Rights matters without hindrance from the federal government. Even after the Fourteenth Amendment was ratified in 1868 expressly authorizing, in Section 5, federal enforcement, the Supreme Court prevented the federal power from directly reaching individual citizens deprived of, or in danger of being deprived of, fundamental First Amendment rights under state law. In fact, the federal power did not come to be used as a friend of civil liberty in the states until the 1930s when a sense of national shame arose over repression of political dissent.

> *Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinion calculated to embarrass the government?*
>
> —NIKOLAI LENIN

In part, the sense of shame was generated by scholars and polemicists who recalled the abuse of the First Amendment by both sides during the Civil War and World War I. The new sense of liberty and learning which some lawyers and judges brought to their work produced critical evaluation of court history and new urgency to aid the underprivileged at the bar.

Extended Protection

It was in 1931 that the Court, after giving notice of intention in 1925, came to abrogate state actions adjudged in conflict with the First Amendment by applying the due process clause of the Fourteenth Amendment. Chief Justice Charles Evans Hughes wrote the opinion in *Near v. Minnesota* invalidating a state law which authorized prepublication censorship. The same principle was reiterated by the Court in the Pentagon Papers case in 1971. Six years after the Near decision, Hughes wrote the opinion in *DeJonge v. Oregon*, which protected the First Amendment right of association and assembly, extending protection even to radicals when they associate peacefully to petition for redress of grievance. This protection did not extend to officers of the Communist Party of the United States in 1951, for they were found guilty of organizing the party to teach and advocate the violent overthrow of government. The Smith Act under which they were convicted was the first sedition law since 1798.

From this point on to the present day, the Court has steadily enlarged the protection of the Bill of Rights, sometimes in the face of vehement legislative and judicial protest, particularly from the states. The use of the criminal contempt power to punish criticism arising outside the courtroom was ended in 1941. Justice Hugo Black wrote the opinion, and a strong Court majority refused to yield to subsequent resistance by state courts. The Court said the contempt power could not be used except in the face of clear and present danger to the authority of the government.

Case by case, the Court moved to peel away the thick and calloused layers of social, economic and political indifference to long-postponed enjoyment of the Bill of Rights. A poor and desperate defendant in a minority criminal case, who told the Court he had been

denied counsel and wrongfully convicted, won a ruling that, state customs notwithstanding, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

Prior decisions, some of them by more conservative courts, had prepared the ground for the right-to-counsel decision and, once taken, the petition led to further interposition of federal standards to support fair play in custody and in court for all persons. Since arrest, detention and deprivation of counsel are tested procedures used by the aggressive state against writers and speakers, access to counsel heavily supports the First Amendment.

Protecting the Critics

The Court since 1931 had shown concern for improving the press as an instrument of self-government. The black revolution provided a case in which Alabama used its libel laws to harass the New York *Times* and threaten any other newspaper carrying the liberation message into the South. The Court swept aside the state obstruction and rewrote Alexander Hamilton's definition of libel in the Croswell case to put public officials, already privileged in law, and their critics on a more or less equal footing, thus energizing public criticism of government.

The same rules soon were extended to comment about public men, and the Court tentatively, but uncertainly, tested the idea of placing on all persons caught up in public events the burden of proving malice in libel cases. However, almost immediately, it restored private persons to a traditional position, adding only that compensation for actual injury could not be collected without proof that the medium is at fault. The New York *Times* test of "knowledge of falsity or reckless disregard for the truth" applies to claims of punitive damages.

The Federal Communications Commission right-of-reply rule for broadcasters, which journalism regards as a breach of the First Amendment, has been upheld by the Court. The Court unanimously refused, however, to support a Florida right-to-reply statute adopted for political candidates who regard themselves as assailed by a newspaper.

The journalism establishment finds itself somewhat divided on its request for a confidential privilege, based on the First Amendment, to justify refusal to testify about information given in confidence for publication. The media claim was lost in a sharply divided Court, and precipitous erosion of executive privilege in the aftermath of Watergate seems further to have weakened the claims of the press.

The extent to which evidence in criminal cases should be given to the press and freely published is, in Chief Justice Warren Burger's words, a question "almost as old as the Republic." The Court strengthened the power of trial judges to control the release of information to the public by law enforcement officials in 1966 but said events in open court could be reported. When the Nebraska courts ordered the press not to report evidence heard in an open hearing, the Supreme Court overturned the order in a unanimous 1976 decision. In so doing, the Court said it could not choose, even in this instance, between the First and the Sixth amendments, but that only in the gravest circumstances could the First Amendment be breached. Moreover, enforcing silence on the press would not necessarily assure a fair trial, the Court said.

The remaining topic of First Amendment activity since 1931 is obscenity. The Court courageously has ended the Comstock age of prudery and has legalized communication about sex. Obscenity, as political controversy, has caused the Court to compromise between local and national standards of constitutional law. Within its stated rules, the Court plainly is prepared to accept a variety of state actions.

The Court has also turned back to the states some standards of criminal law formerly held to a single national norm.

Under Chief Justice Burger, the Court has not made its First Amendment intentions entirely clear. The broadcast media are controlled, the print media are not. Some basic guarantees are national, some are local. Will the Court — despite support for the print media — continue to keep the American press free, or will it return the press to the repressive state and local option conditions from which Chief Justice Hughes and his Court rescued it in 1931? Only time and the election returns will tell. ■

For Further Reading

Hugo LaFayette Black, "A Constitutional Faith." New York: Alfred A. Knopf, 1968.

Edmund Cahn (ed.), "The Great Rights." New York: Macmillan, 1963.

Zechariah Chafee Jr., "Free Speech in the United States." Cambridge: Harvard University Press, 1948.

Thomas M. Cooley, "A Treatise on the Constitutional Limitations," 2 vols. Boston: Little, Brown, 1927.

Charles Fairman, Stanley Morrison (with an introduction by Leonard W. Levy), "The Fourteenth Amendment and the Bill of Rights: The Incorporation Theory." New York: DaCapo, 1970.

Leonard W. Levy (ed.), "Freedom of the Press from Zenger to Jefferson." Indianapolis: Bobbs-Merrill, 1966.

Alpheus Thomas Mason, "Security Through Freedom: American Political Thought and Practice." Ithaca: Cornell University Press, 1955. Chapter 6, "Can Freedom Conquer Fear?" p. 182.

Harold L. Nelson (ed.), "Freedom of the Press from Hamilton to the Warren Court." Indianapolis: Bobbs-Merrill, 1967.

Fredrick S. Siebert, "Freedom of the Press in England 1476-1776." Urbana: University of Illinois Press, 1952.

Bernard Schwartz, "The Bill of Rights: A Documentary History," 2 vols. New York: Chelsea House and McGraw-Hill, 1971.

Charles Warren, "The Making of the Constitution." Boston: Little, Brown, 1937. Chapter 2, "The Delegates, the Public, and the Press," p. 55.

THE FIRST AMENDMENT

FIRST AND SIXTH SIBLING RIVALRY

By Richard M. Schmidt Jr.

THE FIRST AMENDMENT written to the Constitution provided in part: "Congress shall make no law . . . abridging the freedom of speech or of the press."

The Sixth provided in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . ."

For the 185 years since their adoption, the two amendments have found themselves in an uncomfortable relationship, if not one that in recent years has become outright combative.

As the U.S. Supreme Court noted in its most recent and most significant press case involving the conflict: "The problems presented by this case [*Nebraska Press Association v. Hugh Stuart*] are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press."

One of the earliest cases to reach the Supreme Court involving the problem of free press and fair trial was *United States v. Reid* (1851). The defendant, accused of murder, demanded a new trial because two jury members allegedly had read a newspaper account of the proceedings while the trial was in progress. However, the Supreme Court stated, "There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict."

As early as 1878, the Supreme Court (*Reynolds v. United States*) stated, "The theory of the law is a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is, almost as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely anyone can be found among those best fitted to be jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality."

In the Reynolds case, the Court quoted from Chief Justice John Marshall's opinion in the trial of Aaron Burr in 1807, stating, "Light impressions which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, will constitute a sufficient objection to him."

In 1976, the Court again turned to the Burr trial. Chief Justice Warren Burger said, "The trial . . . presented Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching voir dire [interrogation] of the two panels eventually called and rendered a substantial opinion on the purposes of voir dire and the standards to be applied. . . . Burr was acquitted, so there was no reason for appellate review to examine the problem of prejudicial pretrial publicity."

For the first half of the 20th Century the battle of free press-fair trial was relatively quiescent with one notable exception, that being Bruno Hauptmann's internationally publicized trial for the abduction and murder of the Lindbergh child. The carnival atmosphere of that trial was widely criticized in retrospect by not only the bench and bar but the press.

In 1961, the case of *Irvin v. Dowd* reached the United States Supreme Court. For the first time in history the Court reversed a state court conviction on the sole ground of prejudicial pretrial publicity. The defendant had been indicted for murder, was granted a change of venue to an adjoining county, denied a second change of venue and a continuance. Ten murders within a four-month period had been committed in the county in which he was indicted, and, shortly after the arrest of the defendant, the police issued a press release stating he had confessed to six of the murders. Radio stations in the community broadcast citizens' opinions as to the defen-

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dant's guilt and their suggestions as to what punishment he should receive. The press stories in both print and the electronic outlets referred to the defendant's past convictions for other crimes, his juvenile record, a military court-martial and accusations that he was a parole violator.

The jury of twelve ultimately selected contained eight jurors who in voir dire examination had expressed the opinion that the defendant was guilty as charged.

An Impossible Standard

The Supreme Court reversed the conviction but stated:

"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality, would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

In the early 1960s, a person was charged with kidnaping, murder and bank robbery in Louisiana. In a 20-minute film interview with the local sheriff the defendant's confession was broadcast over television on three consecutive days to an audience of more than 100,000 people out of a total population in the area where he was to be tried of approximately 150,000.

The defendant was convicted by a jury, two of the members of which were deputy sheriffs of the parish where the trial was held, and three members who stated on voir dire they had seen the televised interview. The Supreme Court, in the majority opinion (*Rideau v. Louisiana*) reversing the conviction, referred to the lower court proceedings as a "kangaroo court" and pointed out that the defendant had no lawyer to advise him of his right to stand mute on camera.

In 1965, the Supreme Court dealt with the question of whether the televising of a criminal trial, over the objections of the defendant, interfered with the due process guarantee in the Fourteenth Amendment. In a 5-4 decision, the Court held on the facts of the case as presented that the defendant was prevented from obtaining a fair trial (*Estes v. Texas*).

Next came the watershed decision of *Sheppard v. Maxwell.*

Dr. Sam Sheppard was convicted in 1954 in Ohio for the murder of his wife. The various appeals in this case had gone all the way to the U.S. Supreme Court, which denied review in 1956. Later, he filed an application for a writ of habeas corpus alleging that he had been deprived of a fair trial because of the court's failure to protect him from prejudicial publicity. In 1966 the U.S. Supreme Court, in a majority opinion written by Justice Tom C. Clark, held that the "carnival atmosphere" at the trial, coupled with the pervasive pretrial publicity containing what the Court considered to be prejudicial material, made a fair trial impossible.

In recent years, the Sheppard case has been misinterpreted by many as making permissible gag orders on the press and denying the press access to information concerning criminal trials. The Supreme Court had outlined methods of protecting the right to fair trial, such as change of trial venue, postponement of the trial until public attention subsides, intensive voir dire (interrogation of prospective jurors), and emphatic and clear instructions to the jury to decide the issues only on evidence presented in open court. However, Justice Clark made clear that the Court was not suggesting, or even intimating, "gagging" the press. In his opinion he stated, "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for 'what transpires in the courtroom is public property.'"

Prior to *Sheppard v. Maxwell,* various press organizations throughout the country began to work with the organized bar and in some instances with representatives of the bench to open up a dialogue and develop statements of "principles," "codes," or "guidelines" relating to pretrial publicity and the coverage of trials by the press. Among the states pioneering in this effort were Washington, Oregon and Colorado.

While differing in many details, all acknowledged presumption of a defendant's innocence and his right to a fair trial. And all of the statements recognized the right and responsibility of the press to inform the public of the conduct of its criminal justice system. Most of the statements also urged that the press not publish — particularly just before the start of a trial — any information concerning a confession or a prior criminal record.

At the national level, the American Bar Association's Advisory Committee on Fair Trial and Free Press, chaired by Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court, issued a report which became extremely controversial with the media, particularly as to the use of contempt power in certain circumstances against the press. But even this 1968 report clearly disavowed any "direct restrictions on the media."

Recommended Procedures

In 1975, the committee issued a "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press." But, again, this report, while not universally acclaimed by the press, unequivocally rejected the imposition of any direct restraints upon the media. The report states, "It is clear that the free flow of information concerning court business is important and necessary not only to the requirements of a free press and a fair and public trial, but the greater public understanding of the judicial function and the rule of law . . ."

Until the 1970s, the courts appeared to be content with reversing convictions of those whose trials they thought had been prejudiced by pretrial publicity. Then, despite the repeated statements of the highest court in the land concerning prior restraints on the press and the various press guidelines and studies which cautioned against any direct restraints on the press, a wave of gag orders began to be entered by lower courts.

In 1971, a U.S. District Court in Louisiana ordered that ". . . no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. . . ." The Baton Rouge *State Times* defied the order, as did its sister paper, the *Morning Advocate.* The reporters who wrote the stories were found in criminal contempt. On appeal, the Fifth Circuit Court of Appeals found the order of the lower court to be an unconstitutional prior restraint on freedom of the press. But it also held that the reporters were obligated to obey the order until it was reversed and that the court *could* hold the reporters in contempt even though the order was unconstitutional. The U.S. Supreme Court denied review.

The Baton Rouge case appeared to encourage trial courts throughout the country to enter gag orders upon the motion of the defense, the prosecution, or upon their own initiative, and the First and Sixth amendments appeared to be engaged in mortal combat.

Then, in October 1975, six members of one family were murdered in a small Nebraska town. A suspect was arrested and the event was given widespread news coverage locally and nationally. The prosecuting and defense attorneys joined in asking the court with initial jurisdiction to enter a restricting order because of the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, impaneling of an impartial jury and tend to prevent a fair trial." Local and national news organizations jumped into the battle. Action was taken to overturn the lower courts' rulings in the Nebraska Supreme Court and the U.S. Supreme Court. While denying a motion to expedite review or to stay the order of the State District Court pending the defendant's trial, the U.S. Supreme Court, for the first time, agreed to review whether the press could be enjoined from publishing news on pending criminal trial proceedings.

The Court stated, after reviewing previous cases of prior restraint, but not specifically concerning the defendant's right to fair trial, "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Further, "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."

The Major Responsibility

The Court also said, ". . . [P]retrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity — the measures described in *Sheppard* [*v. Maxwell*] — may well determine whether the defendant received a trial consistent with the requirements of due process. . ."

Justice William J. Brennan Jr., joined by Justices Potter Stewart and Thurgood Marshall, went further than the majority opinion: ". . . Damage to that Sixth Amendment right could never be considered so direct, immediate and irreparable, and based on such proof rather than speculation, that prior restraints on the press could be justified on this basis." And, they continued, ". . .[T]he press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges."

However, the Court's *majority* opinion emphasized that its ruling was confined to the record before it. It refused to rule out the possibility that in some future case a showing of an adequate threat to a fair trial would possess ". . . the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed."

Recognizing the extraordinary protections afforded by the First Amendment, the Court discussed what it described as obligations of the press under the First Amendment ". . . something in the nature of a fiduciary duty to exercise the protected rights responsibly — a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

"The authors of the Bill of Rights did not undertake to assign priorities between First Amendment and Sixth Amendment rights ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined."

While refusing to elevate First Amendment rights above the Sixth Amendment, the Court did say, ". . . [T]he barriers to prior restraint remain high and the presumption against its use continues intact." This in itself should serve to cool the conflict. ■

NEAR v. MINNESOTA, 283 United States Reports 697 (1931).
Chief Justice Hughes, for the Court, ruled that Minnesota could not censor even a scandalous, defamatory, and blackmailing newspaper. This decision forbids prepublication censorship.

DE JONGE v. OREGON, 299 U. S. 353 (1937).
A state may not limit peaceful assembly even when it acts in fear of subversive activity.

LOVELL v. GRIFFIN, 303 U. S. 444 (1938).
State and local governments may not discriminate between applicants for use of the streets for religious or political communication.

BRIDGES v. CALIFORNIA, 314 U. S. 252 (1941).
Courts may not hold editors in contempt to punish them for what they write except in the presence of clear and present danger to the court's authority.

NEW YORK TIMES v. SULLIVAN, 376 U. S. 255 (1964).
(The first in a series of cases requiring the states to adopt a national definition of libel.) Public officials and public persons may not collect damages for libel except when they can prove that what was published was false or was published with reckless disregard of whether it was false or not.

ESTES v. TEXAS, 381 U. S. 532 (1965).
Television cameras may not be used in the courtroom.

THE FIRST AMENDMENT

First Amendment freedoms, as they exist today, are not found in so many words in the Constitution. Instead, they have been developed in the course of litigation in which state standards of freedom were tested, through the due process clause of the Fourteenth Amendment, against the federal First Amendment standard and found wanting. The federal standard prevails only so long as a majority of the Supreme Court says so. These cases express limits on state action of this kind.

— J. Edward Gerald

MILLS v. ALABAMA, 384 U. S. 214 (1966).
A state, acting under its powers to regulate elections and to prevent corrupt practices, may not require a newspaper to be silent on matters of politics on election day or any other day.

SHEPPARD v. MAXWELL, 384 U. S. 333 (1966).
Trial judges have authority, and must use it, to prevent law enforcement officials from prejudicing trials through dissemination of information or opinions which affect the outcome of a case. However, the courts may not require the press to remain silent about events in open court.

MILE-STONES

MILLER v. CALIFORNIA, 413 U. S. 15 (1973).
Together with *Roth v. United States* and *Alberts v. California*, 354 U. S. 476 (1957), this case states rules for regulation of obscene communication and distributes regulatory power between the states and the federal courts.

BRANZBURG v. HAYES, 408 U. S. 665 (1972).
The Court declined to give journalists the right to keep confidential the names of sources of information used in published or broadcast stories.

PAPISH v. BOARD OF CURATORS, 410 U. S. 667 (1973).
The First Amendment does not permit a state, in this instance a state university, to impose a standard of its own with respect to the content of speech.

MIAMI HERALD PUBLISHING CO. v. TORNILLO, 418 U. S. 241 (1974).
A Florida law which granted political candidates a right to reply to personal attacks in newspapers was overruled unanimously. The Court said "press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated."

NEBRASKA PRESS ASSOCIATION v. STUART, 44 Law Week 5149 (June 30, 1976).
The order of the Nebraska judge banning press publication of information obtained in open court, or from other sources, is prior restraint which violates the constitutional guarantee of freedom of the press.

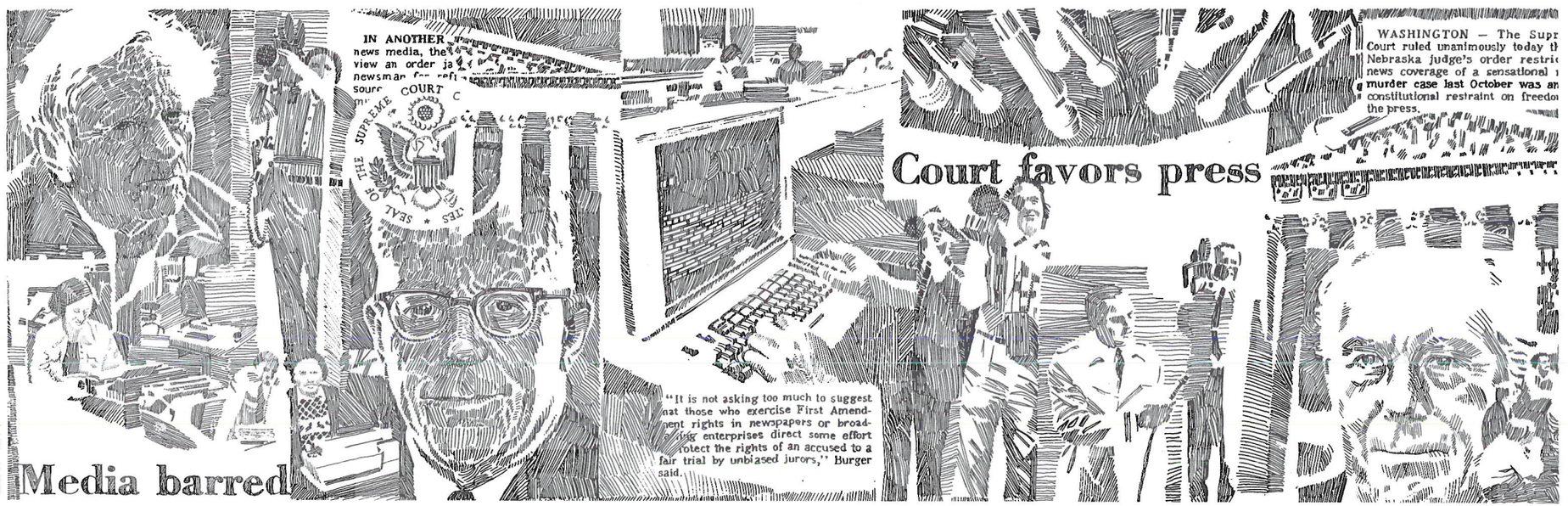
The following cases are examples of those based o court review of federal actions alone:

UNITED STATES v. RUMELY, 345 U. S. 41 (1953).
The Congress, in deference to the First Amendmen may not force a person discussing political issues to re veal the names of those who are contributing money t that person's support.

RED LION BROADCASTING CO. v. FEDERAL COM MUNICATIONS COMMISSION, 395 U. S. 367 (1969 The FCC imposes upon licensed broadcasters a rul known as the Fairness Doctrine, which, among othe things, obligates licensees to provide time for reply t persons in political controversy who have been attacke in a broadcast. The rule, which journalists say effectivel deprives them of control of their work, nevertheless wa upheld, 7-0, by the members of the Court voting at th time.

NEW YORK TIMES COMPANY v. UNITED STATE 403 U. S. 713 (1971).
The Court ruled that the Justice Department did no prove in this instance that the national interest in su pressing publication of the Pentagon Papers was mo important than preserving the privileges of the Fir Amendment.

Note: The full text of the cases may be found i *United States Reports*. In the Pentagon Papers cas above, for example, the citation is to Volume 403 *United States Reports*, page 713. The year, given parenthesis, is the date of the decision by the Court.



THE FIRST AMENDMENT | *RADIO AND TELEVISION*

TREATED LIKE... DISTANT COUSINS

By William Small

IT WAS ALMOST as if those fine fellows, our Founding Fathers, had sat down with quill pen in hand and Walter Cronkite in mind to frame the First Amendment thusly: "Congress shall make no law . . . abridging the freedom of speech, or of the press except, of course, on radio and television. There, Congress shall feel free to set government standards on fairness in news, bureaucratic definitions on what constitutes a need to reply, and slide-rule obligations on the care and treatment of political candidates."

If they didn't indicate such foresight, the Founding Fathers should be here today to see their political descendants do it for them. Jefferson and Madison and all those other fellows might find it hard to hide a smile as they see political figures and federal appointees and even Supreme Court justices rationalize why certain parts of the press can be fully free but some others free some of the time, partly so, in most cases.

The late Justice Hugo Black felt the First Amendment was absolute, it meant just what it said. The prevailing belief in most quarters is that this isn't quite so in the case of broadcasting.

Had broadcast journalism not emerged in recent times as the source for most of the people to get most of their news, this might be wryly amusing. It is not.

There are cliches to defend the bend-the-amendment position. One is that "the airwaves belong to the people." Former Secretary of State Dean Rusk, who has little patience with that one, has noted that the North Star and gravity also "belong to the people."

It has been noted that the government's right to regulate content because it is delivered over publicly owned airwaves means, with equal logic, that the government can regulate newspapers and magazines which are delivered over publicly owned streets or through the publicly owned post office.

Regardless of who owns the airwaves, the more important question is how they are used and, in terms of a free press, is the government's hand going to have a grip on that usage.

There is the scarcity argument. It states that government must license radio and television because the broadcast spectrum is limited. This is true; however, "limited" and "scarce" are not the same thing. As many have pointed out, there are several times as many radio and TV stations broadcasting daily as there are daily newspapers in America. Not everyone can own a television station, but very few of us can start a daily newspaper either.

Scarcity was the core of the so-called Red Lion decision by the Supreme Court in 1969. This was a definitive high-court ruling on the question of how far the Federal Communications Commission can go in imposing a "fairness doctrine." The Court, in fact, ruled that the FCC can go all the way, that the First Amendment was *not* fully applicable to the broadcaster.

The Court said in Red Lion, "Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment." Agreed. That is exactly what the original legislation of radio was meant to do, to control the broadcast spectrum so that — as happened in the 1920s — one broadcaster does not infringe on the broadcast channel of the next. It is quite a different thing to extend that concept to the insertion of government into what is being said.

The Red Lion ruling also said, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." That, too, is a common argument in favor of a controlled broadcast press. It assumes, somehow, that broadcasters are oblivious or callous towards their viewers. A strong argument can be made that that is not the case.

Take the Fairness Doctrine. William S. Paley, the chairman of CBS, noted that "we in broadcasting have no quarrel with fair coverage of news and public issues. We insisted on it, and lived by it, as the record shows, before the Fairness Doctrine came into being. What we object to is setting up the government as the arbiter of the fairness of our coverage — usurping the function of those directly responsible for news and public affairs broadcasts."

"Fairness" has such a marvelous ring. How can one oppose it? Paley noted, "Whenever I hear the misnomer, 'Fairness Doctrine,' I am reminded of Voltaire's remark about the Holy Roman Empire — that it was neither holy, nor Roman, nor an empire."

Paley called the Fairness Doctrine "an open defiance of the First Amendment. We all would be outraged if the government were allowed to impose standards of fairness on the contents of newspapers or magazines . . . Yet, under the Fairness Doctrine, we are enduring a situation where government — through an administrative agency — can impose such standards on the contents of broadcast journalism. Thus, we find full First Amendment protection denied to the very media — radio and television — that have become the primary source of news and information for the American public."

The irony of the Fairness Doctrine is that broadcasters can fulfill it by tucking away an interview or a contrary viewpoint somewhere in the schedule. NBC found the FCC insisting that it do so after it produced a first-rate documentary called "Pensions: The Broken Promise" in September 1972. On the same day that "Pensions" won a Peabody Award as "a shining example of constructive and superlative investigative reporting," the FCC ruled that it should have presented more material on those pension plans that were sound and reliable. NBC could have had someone on the "Today" show or elsewhere to placate the Washington bureaucrats. Instead, it went to court to fight the ruling.

Up through the courts it went, and the FCC was reversed. Finally, the Court of Appeals ruled for "Pensions" and the Supreme Court rejected a request to review. Julian Goodman, chairman of NBC, two and a half tedious years later, noted that "over those months, as NBC's legal expenses mounted and lawyers' time burned away, there were those who said, 'Why don't you give them five minutes and talk about good pension plans and get rid of it? What can it cost?' I suspect that Samuel Adams in 1773 heard someone say, 'Come on, Sam. Pay the tax on the tea. What difference does a few dollars make?' The cost, quite simply, is our freedom."

Goodman concluded, "It is easier for broadcasters to steer clear of controversial issues because of the high price tag that can be placed on freedom of expression. It *is* easier to give in. But it is not in the public interest."

It means lawyers and money to fight and only five minutes of air time to give in. Give in enough, however, and you have the most damaging impact of government in

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the newsroom, the so-called "chilling" effect of the "Fairness Doctrine." Richard Salant, president of CBS News, once noted that FCC inquiries result in reporters, producers, executives stopping and spending days "to dig out stuff and try to reconstruct why they did what they did." You don't have to do that often before your enthusiasm for taking on controversy slows down.

The Supreme Court, in Red Lion, did not find this persuasive. In a critical review of that decision in the *Texas Law Review* (April, 1974), P. M. Schenkkan wrote, "The Court approved an entire system of direct government intervention in broadcasting upon a mere hypothesis of public injury and dismissed the possible chilling effect as mere speculation."

There are those who argue that the government imposition of "fairness" means many voices will be heard. There are others who contend that not more voices but fewer will be heard and those opinions will be bland and safe.

Americans don't lack exposure to ideas if they seek them out. One estimate is that the average American probably has access to at least eight radio stations, two newspapers, all the magazines he can afford, and six or seven television channels. The danger in the information flow is not the scarcity of voices but hearing some who have nothing to say.

Fed Up

If all of this has the ring of a broadcast journalist who is sick and tired of intrusions into the daily work of editorial judgments by the need to worry about and respond to the specter of the bureaucrat in the newsroom, it is just that. Let editors edit, reporters report. The public will, as it should, be the proper judge.

In the political arena, the equal time provisions of Section 315 create similar problems. You can't set up debates between candidates. You can't do documentaries involving candidates except when they are incidental to the main subject which, therefore, can't be "them." One presidential election ago, before candidate George Wallace was shot, CBS had to kill an hour-long documentary about the Wallace movement. It was an important political phenomenon and deserved better than death in the cutting room.

Under the political equal-time provisions, a violation of Section 315 means equal time for lots of candidates (maybe as many as 100 declared or would-be candidates in 1976), ranging from Lar (America First) Daly, who has run for president seven times going back to 1948 and for the Senate seven and the House thrice and three times for governor of Illinois, to Merril Riddick, an 80-year-old Montana prospector who believes in the Puritan ethic and turning garbage into electricity. Giving time, and lots of it, to these minor figures, no matter how pure their motives, is what keeps us from a repetition of broadcasts like the Kennedy-Nixon debates of 1960.

> *For the First Amendment does not speak equivocally. It prohibits any law 'abridging freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*
>
> —JUSTICE HUGO L. BLACK

Broadcasters have found few sympathizers to their problems. One came, unsolicited, last October when the chairman of the Federal Trade Commission, Lewis A. Engman, gave an eloquent speech to the UCLA law school on the Fairness Doctrine. He spoke to the traditional arguments from scarcity of channels to multiplicity of voices and finally addressed the question of the intent of the framers of the First Amendment, saying, of the contention that they would have excluded broadcasting from its protection, "That is literalism requiring suspension of reason to accept."

Chairman Engman asks us to "Recall [that] the 18th Century philosophical underpinning for the First Amendment was that no one had the right to control the speech of anyone else. Freedom to express one's opinion was deemed an inalienable right which could not be abrogated by government.

"The fashionable mid-20th-Century explanation that the First Amendment is a legal expression of our conviction that if everyone were allowed to speak his mind, the truth would somehow emerge, may be correct. But it was not the reason the First Amendment was adopted.

"It is crucial that this be understood. For, to suggest that freedom of speech is merely a privilege granted by the government in the belief that it will lead to truth — which some have done in embracing the Fairness Doctrine — is to suggest that freedom of speech is no more than a political expedient. Government might as easily decide the opposite — that uninhibited speech was a nuisance, that it resulted in rumor, gossip, lies and self-serving half-truths; that it was not, therefore, in the public interest. More than a few governments around the world have reached precisely that conclusion."

The Principle Stands

Broadcasters have tried again and again to show that they belong under the full protection of the First Amendment. Few in government, hardly any in the courts, and not many in the general public hear them. In the case of *CBS v. the Democratic National Committee*, Justice William O. Douglas, was one of the few.

He wrote, "My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications."

Said Douglas, "One hard and fast principle which it announces is that government should keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it . . ." ■

TODAY'S GOD-FATHERS

By Lyle Denniston

IT IS STILL a "First Amendment Court."

The nine justices who now sit on the Supreme Court remain the heirs, if not always with complete enthusiasm, to the tradition that makes the First Amendment special. They, too, look at claimed threats to free press and free speech with care, and, sometimes, with deep suspicion.

This is, however, a different "First Amendment Court."

No longer is there a justice who would write a "Carolene footnote," as Harlan Fiske Stone did in 1938, and thus set the stage for giving the First a "preferred position" in the Constitution.

No longer is there a justice who insists that the First is an absolute, that the mandate against laws to control free expression means "no law." Hugo L. Black and William O. Douglas proclaimed that for a generation. But they, too, have departed.

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The present justices believe — and act on the belief — that the First Amendment must be weighed in a judicial balance. One of them, Harry A. Blackmun, put it most simply five years ago: "The First Amendment, after all, is only one part of an entire Constitution."

The use of the constitutional "balancing test" is easier for some than for others, to be sure. The present Court has some nearly predictable First Amendment votes waiting to be cast on any given case. But the predictability is only *nearly* there; any real certainty on free expression cases ended with Justice Douglas's retirement last November.

It is symbolic, and revealing, that Douglas's successor — John Paul Stevens — would have made this comment during his Senate confirmation hearings:

I don't think that I could say that whenever there is a conflict between the First Amendment and the Fourteenth that you can count on me to rule for the First, because the facts might not quite fit . . .

Thus, he gave the Court an added vote for the approach that is already dominant there. Stevens, like his brethren, is not likely to judge First Amendment cases by a simple, invariable, mathematical formula.

Within the present membership of the Court, though, there are occasional signs of some discomfort with the balancing process. A few justices, while not devoted to easy formulas, become impatient now and then with an extended analysis of the "social values" that might be weighed against the First Amendment's virtues.

Justice Potter Stewart, perhaps the nearest there is to a hard-and-fast defender of the First Amendment on the present Court, once complained in dissent:

So long as members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values," that Amendment will remain in grave jeopardy. . . . I believe the constitutional guarantee of a free press is more than precatory. I believe it is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country.

Even Stewart, however, is not routinely on the side of the First Amendment defenders. With him, as with all of the present justices, a case-by-case or issue-by-issue review offers the only reliable index of his First Amendment views.

Following is an overview of each justice's interpretation and application of the First Amendment. The order here reflects seniority, based on actual years of service rather than rank on the Court. The overview is followed by an elaboration of the specific cases the justices have been involved in and their opinions.

WILLIAM J. BRENNAN JR. is the Supreme Court's most prolific writer on the First Amendment. Throughout his 20 years on the Court, he has been a specialist in the field. When there is a majority that shares his basic liberalism on free expression, Brennan frequently writes the controlling opinions. His most significant work has been on libel, obscenity and privacy cases.

In recent years, the liberal majority of the "Warren court" has dwindled, particularly in the field of obscenity. Earlier, however, Brennan helped lead the Court almost to the point of eliminating prosecutions for sale of "dirty" films, books and magazines, and almost to the point of making futile any libel lawsuit based on stories about public issues.

His most important opinions in the obscenity field — *Roth v. U.S.*, *Jacobellis v. Ohio*, and *Memoirs v. Massachusetts* — are no longer the law of the land. Their basic formula for judging obscenity has been rewritten by the present majority. The parts of it that remain are interpreted differently. Brennan has abandoned it himself.

His sweeping opinion on libel — *N.Y. Times v. Sullivan* — is intact, but its impact has been narrowed. His attempt to push the "*N.Y. Times* rule" to an ultimate never commanded more than two other justices' support, and it has now been repudiated by the Court.

His landmark decision on publicity and the right of privacy — *Time, Inc. v. Hill* — remains the law, but may be threatened in future test cases.

POTTER STEWART has a simpler faith in the First Amendment than any other justice now on the Court. He is not a purist or absolutist, as Black or Douglas were, but, like them, he has no trouble defining his approach to issues of free expression.

With Brennan, he has been a leader in the Court's work on libel and obscenity. And while they agree on most issues in those fields, Stewart's views are more plain.

In his 18 years on the Court, Stewart has written many major opinions in First Amendment cases, but none are the ranking precedents that Brennan's have been.

Although he favors the broadest press freedom in covering public affairs, Stewart has been more concerned than Brennan about the impact of publicity upon the lives of private individuals.

And, while he supports fully the press's right to cover governmental affairs without direct interference, he does hold the view that the government has no special duty to provide information to the press.

BYRON R. WHITE has been growing increasingly impatient with the nation's press. In his 14 years on the Court, his comments about the claims and attitudes of the press have grown steadily more sarcastic and disapproving.

He has made it most clear that his support of the First Amendment — which began strong and generally remains so — is in no way related to the performance of the press, or to its claims. The Constitution, he indicates, gives him no choice but to allow the channels of communication to the people to remain open:

Technology has immeasurably increased the power of the press to do both good and evil. Vast communications combines have been built into profitable ventures. My interest is not in protecting the treasuries of communicators but in implementing the First Amendment by insuring that effective communication which is essential to the continued functioning of our free society.

His most important opinion in this field — the Branzburg ruling in 1972 on confidentiality of sources — speaks approvingly of a constitutional right to "seek out the news," but then goes on to denounce the press for attempts to protect "a private system of informers."

In the "Pentagon Papers" case, White's opinion amounts to a strong invitation to Congress to pass criminal laws to punish the press for disclosing secret government documents.

It is not clear where his basic cynicism about the press originated, but it is clear that it is now well developed.

THURGOOD MARSHALL started three major efforts to broaden First Amendment rights, and found two of them soon frustrated. The third may now be threatened as well.

If one of his constitutional innovations had flowered, it might have led to a near-revolution in the law of obscenity. If the other, now scuttled, had proceeded, it would have led to a definite revolution in communications law in general. It is still unclear where the third might lead — if it lasts.

Marshall's Stanley opinion in 1969 was a landmark because it suggested that the Court might free the channels of distribution for "dirty" books, magazines and films. His Logan Valley opinion in 1968 seemed to indicate that shopping centers were to be treated like city streets, and, thus, open to demonstrations and picketing. His Pickering opinion in 1968 still holds promise — though it is now somewhat endangered — of freeing government employes to speak their minds.

WARREN E. BURGER, the chief justice, is sure that the press abuses its rights, but he is nonetheless one of the best friends of the press, constitutionally. He shares some of White's cynicism about the press's performance, but he is basically more devoted to its rights.

There is one definite area of hostility in his First Amendment jurisprudence: obscenity. One of his most important acts was to shape an opinion that has all but stopped obscenity appeals from reaching the Court.

His most important rulings in other free expression cases have strongly supported the press: his Nebraska gag order opinion this year, his Tornillo right-to-reply opinion in 1974, and his 1973 CBS opinion regarding political advertising. He also would have gone all the way with Brennan on libel law, before a majority overcame them.

HARRY A. BLACKMUN is experimenting with First Amendment liberalism. The justice who spoke of the First as, "after all, only one part of an entire Constitution," seems to be finding that one part rather compelling.

It was his opinion that, for the first time, applied the First Amendment to live theater — and thus freed the naughty rock musical "Hair" to go on the boards again.

It was his opinion that finally made the breakthrough for advertising, putting it clearly under First Amendment safeguards.

He was the only conservative on the Court to vote against the use of zoning power to control the spread of the "porno trade."

And he added a third vote to the Brennan-Burger opinion that would have extended to its furthest point the press's protection from libel suits.

Deeply resentful of the suggestion that he was only Burger's "Minnesota twin" on the Court, Blackmun, while sharing some First Amendment stands with Burger, took others which the chief justice would not.

LEWIS F. POWELL JR. is, much of the time, the Supreme Court's translator on the First Amendment. On at least four significant occasions, he has been the author of the final word on free expression issues.

His Gertz opinion, putting together a melange of views that had been lying about in various justices' opinions, is now the guidebook on libel law. His separate opinion in the Firestone decision applying the Gertz approach kept that new ruling somewhat in check, and defined its scope more precisely as did his separate opinion in the Branzburg case on newsmen's sources. And, most important, so did his separate opinion in the Nebraska gag order decision.

Like Blackmun, Powell has been doing some experimenting with First Amendment liberalism.

WILLIAM H. REHNQUIST is the Court's most conservative justice in First Amendment rulings. Because there is still a moderate-to-liberal majority, he has had few opportunities to add to the body of law in this field. But his Firestone ruling this year, on a libel case growing out of a sensational "jet set" divorce proceeding, gave him a chance to display some fundamental conservatism.

In the field of obscenity, Rehnquist generally has gone along with those justices who want to use "disturbing the peace," "public nuisance" and zoning laws to check obscenity.

He joined the Nebraska gag order ruling, the Branzburg decision on journalists' sources, the Tornillo ruling on right of reply (even while embracing Brennan's idea that some "retraction" might be compelled) and the CBS advertising case.

JOHN PAUL STEVENS, in his first case on the First Amendment, loosed a theory that was as new to the Court as he himself was. Never before had a justice suggested that the amendment may sometimes be read as if half of it were not there. His notion of a variable form of obscenity — not illegal and thus not to be totally banned, but questionable enough to be treated differently from other expression — does not yet command a majority on the Court. It is only one vote short of that, however.

Stevens's only other action so far on a First Amendment case in the Court, in the Nebraska gag case, put him near the most liberal view.

While a judge on the 7th Circuit Court of Appeals, Stevens had remarked "how difficult it is to evaluate subtle effects of publicity" in a prominent trial. In such cases, he argued, the judge should order a short continuance to allow publicity to recede.

One of Stevens's most significant First Amendment rulings while a circuit judge was his decision in the Gertz case — a decision that the Supreme Court overturned with its ruling in 1974.

In his 1972 opinion, Stevens had drawn a significant distinction in libel law that apparently would have reduced the press's protection somewhat below what was then thought available under Supreme Court rulings.

He said that the "*N.Y. Times* rule" would not apply to a case involving a private individual unless there was "significant public interest" in the issue being discussed in the news story, adding the word "significant."

He commented:

We have included the word "significant" because we are convinced that areas of privacy remain beyond the coverage of the N.Y. Times *protective shield. In our view, mere public curiosity about private matters is not the kind of "public interest" that the standard contemplates.*

In another circuit court libel ruling, which Stevens joined, the court rejected an argument that sponsors of TV shows were not protected by the *Times* rule — an issue the Supreme Court has never faced. "To follow this logic," the circuit court said, "would leave the First Amendment a meaningless phrase in most areas of the media."

Herewith, as stated, is an elaboration of each of the justices' First Amendment views. The lead-in quotation for each is either the justice's best-known comment in this area or a summation. →

William J. Brennan Jr.

There is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.
—N.Y. Times v. Sullivan
376 U.S. 254 (1964)

Libel

The **N.Y. Times** rule, emerging in Brennan's 1964 opinion, makes it very difficult for a public official to win a libel suit. The plaintiff wins only by proving that what is printed about his official conduct or about anything touching on his fitness for office was false, and was published with "knowledge that it was false or with reckless disregard of whether it was false or not."

That standard is based on the theory that "erroneous statement is inevitable in free debate," and that it must be protected even though it is erroneous in order to give "breathing space" to the First Amendment guarantee of free expression.

Brennan either wrote or joined later opinions extending the basic rule to appointed public officials or key government employes, and to candidates for public office and to "public figures" — that is, people not in official positions but nevertheless "intimately involved in the resolution of important public questions" or famous enough to "shape events in areas of concern to society at large."

In his **Rosenbloom** opinion in 1971, Brennan suggested that the rule apply to any lawsuit based on a story about "a subject of public or general interest" or "an issue of public or general concern." He did not have a majority for that then, and the idea was rejected completely by the Court in 1974 in the **Gertz** case.

Obscenity

In his first term on the Court, Brennan wrote his most important opinion on obscenity — **Roth v. U.S.** (1957). In it, the Court declared that obscenity is not protected by the First Amendment.

That ruling also began the process of defining obscenity, describing it as something that the average person, relying on "contemporary community standards," would consider to be appealing only to "prurient interest." The opinion stressed that this had to emerge as "the dominant theme of the material taken as a whole."

In the **Jacobellis** decision (1964), Brennan added the requirement that obscene material had to be shown to be "utterly without redeeming social importance." The word "utterly" was emphasized. In the **Memoirs** ("Fanny Hill") ruling in 1966, Brennan's opinion formalized the **Roth** and **Jacobellis** requirements into a three-step formula;

an item would not be obscene unless it failed all three steps. On the same day in 1966, in the **Ginzburg v. United States** decision, Brennan made it clear that the manner in which a book, magazine or film was offered — that is, if it was distributed in a "pandering" way to exploit its obscene character — might be taken as an indication of its obscenity.

Brennan spoke for the Court in the **Ginsberg v. State of New York** case in 1968 allowing states to punish those who sold obscene materials to teenagers. This was a general exception to the **Roth-Jacobellis-Memoirs** formula for judging obscenity.

When a Court majority in 1973, in the **Miller** and **Paris Adult Theatre** cases, relaxed the Brennan-fashioned standards so that officials could more freely prosecute vendors of "adult" materials, Brennan himself abandoned his formula. He said no controls should exist on obscenity except those needed to protect juveniles and "unconsenting adults" who otherwise could not avoid seeing the materials.

Brennan's basic ruling spelling out the steps that must be followed before movies may be censored (Freedman, 1965) is still the law. That was extended by the Court to live theater in 1975.

The senior justice has opposed efforts — through the use of "disturbing-the-peace," "public-nuisance" or zoning laws — to control obscenity.

Privacy

The Court has had few opportunities to rule upon the constitutionality of invasion-of-privacy lawsuits against the press. But Brennan's basic opinion in the **Time, Inc.** case (1967) is still the key ruling. It provides that, if the publication is false or "fictitious," it must be judged by the **N.Y. Times** rule testing whether the falsehood was intentional and calculated.

The Court majority has continued to follow that approach, but some doubt has emerged that it will be strictly applied in cases where the person involved is not famous or well-known.

Brennan shares the prevailing view that the press may not be sued for violating privacy if it prints stories about public court hearings or trials.

Trials

From his earliest years on the Court, Brennan has accepted the view that "prejudicial publicity" may so impair an accused person's right to a fair trial that judges should take steps to insulate jurors from the press coverage.

He has gone along with several major decisions striking down convictions because judges failed to transfer the case, postpone it, or control what lawyers and police said about the case. He has no apparent objections to court orders banning comment on confessions and other damaging evidence by lawyers, court aides, witnesses and police.

While he has supported controls on reporters' conduct inside the courtroom during trials, he dissented when the Court ruled that it was unconstitutional to allow television cameras to cover trials, in the **Estes** case in 1972.

Brennan, in the **Nebraska** case, was totally opposed to any court orders telling the press what it can or cannot publish about any kind of court case.

He also has opposed any bans on press interviews with prison inmates.

Press Controls

As Brennan sees it, no court can issue any direct controls on the press's right to publish stories, except in a very narrow "national security" category. He joined the **Pentagon Papers** ruling in 1971, commenting:

> Only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea [in wartime] can support even the issuance of an interim restraining order.

He did not go along with some justices' suggestions in that case that the press could be prosecuted criminally for publishing government secrets.

Brennan also opposed the Court ruling that permitted grand juries to question reporters about their confidential sources for stories about crime (**Branzburg**, 1972). He favors a form of "constitutional privilege" of confidentiality for journalists.

Although he supported the **Tornillo** decision in 1974 striking down a law giving a person a right to reply to a newspaper's story, Brennan did indicate that he favors some sort of a law to compel newspapers or magazines to print "retractions" for stories proven to be "calculated falsehoods."

Broadcasting

Brennan shares the majority view that radio and television broadcasting may be subjected to government controls that would be unconstitutional if applied to the printed press. He supported the 1969 ruling, in the **Red Lion** case, upholding the Federal Communications Commission's Fairness Doctrine. That permits those who have been criticized on the air or whose views on a key issue have been ridiculed on a broadcast to insist that their side be aired, too.

Unlike the present majority, he also feels that broadcasters may be forced to accept paid advertising on controversial issues, with the FCC backing that up with compulsory orders. He dissented from the **CBS** decision in 1973 which ruled that broadcasters had a right not to be forced to sell TV time for controversial messages.

Advertising

For years, Brennan has been a part of the movement to bring "commercial speech" — that is, advertising in newspapers and magazines — under the First Amendment's protection. He supported the **Bigelow** ruling last year, permitting abortion referral ads despite a state law, and he went along with this year's **Virginia Pharmacy** decision finally making it clear that advertising is protected free speech. That decision still allows regulation of false or misleading ads, and of broadcast ads. Brennan favors full freedom of advertising on public transit buses or trains.

On the other hand, Brennan has supported curbs on want-ads which list jobs according to sex qualifications.

Potter Stewart

I have reached the conclusion that criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . But I know it when I see it.
—Jacobellis v. Ohio (concurring)
378 U.S. 184 (1964)

Libel

From his early support of the **N.Y. Times** rule, Stewart has consistently spoken strongly in defense of the press's right to cover public persons and their actions. He has just as consistently stressed his concern about "the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt."

He noted in 1966: "The First and Fourteenth amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars."

A year later, he split with Brennan when the Court extended the **N.Y. Times** rule to public figures in the **Curtis Publishing** case. Stewart favored John Marshall Harlan's approach, judging libel in the press about public figures not by the "calculated falsehood" rule but by a standard of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

However, in the **Monitor Patriot** decision in 1971, it was Stewart's opinion that extended the **Times** rule to candidates for public office. "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." And that, he added, includes stories about past criminal conduct.

When Brennan sought in the **Rosenbloom** ruling in 1971 to extend the **Times** rule to all stories about matters of public or general interest, Stewart opted instead for a theory that would

restrict libel verdicts in favor of private individuals to "proved, actual injuries."

A combination of that approach, and the one Harlan had spelled out in the 1967 **Curtis Publishing** case, ultimately was adopted by a bare majority of the Court in the **Gertz** decision in 1974. Stewart joined that without reservation. He also joined the **Firestone** ruling this year, expanding the **Gertz** approach, but he did so with reservations.

Obscenity

Stewart's personal approach to obscenity cases — "I-know-it-when-I-see-it" — never commanded the support of other justices. He stayed with it, however, until joining Brennan's new approach in the **Miller** and **Paris Adult Theatre** cases in 1973. That is, he favors no controls except those affecting materials for minors and for "unconsenting adults."

When Brennan in the **Ginzburg** opinion extended obscenity controls to the manner in which the items were packaged and marketed, Stewart dissented. He then wrote one of his most eloquent statements against censorship, saying that it reflected a society's "lack of confidence in itself," and adding:

> . . . Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression, they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand.

In a concurring opinion in the **Ginsberg** ruling in 1968, he offered his rationale for curbing obscenity for minors. It was one that would support the ultimate position to which he moved:

> A society of free choice presupposes the capacity of its members to choose. When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees . . . A child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

He supports movie censorship controls as defined by the **Freedman** ruling, but opposes obscenity controls through "disturbing-the-peace," "public-nuisance" or zoning laws, commenting that "the Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant."

Privacy

Stewart supported Brennan's opinion in the **Time, Inc.** case, applying the **N.Y. Times** rule of calculated falsehood to invasion-of-privacy cases. He applied that principle himself in upholding privacy damage verdicts in the **Cantrell** case in 1974, in which a Cleveland Plain Dealer reporter "had portrayed the Cantrells in a false light through knowing and reckless truth." But Stewart hinted that the **N.Y. Times** rule might not be applied routinely in all privacy cases.

Trials

While he has voted to overturn criminal convictions because of "prejudicial publicity," Stewart has never favored direct controls on press accounts of trials. He was one of the dissenters, too, when the Court banned television from criminal courtrooms, in the **Estes** case. He also joined Brennan's sweeping opinion in the **Nebraska gag order** case, denouncing any form of direct judicial restraint on publicity about the criminal justice system.

In his **Estes** dissent, he remarked that the suggestion of the majority that "there are limits upon the public's right to know what goes on in the courts causes me deep concern." He added:

> The idea of imposing upon any

medium of communication the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. . . . Where there is no disruption of the essential requirement of the fair and orderly administration of justice, freedom of discussion should be given the widest range.

Press Controls

Stewart's opinions in the **Pell** and **Saxbe** cases in 1974 established the rule, for the Court, that the press may be barred from interviewing prison inmates. In the **Pell** ruling, he offered his view that the government has no "affirmative duty" to provide information specially to the press.

While he went along with the ruling allowing newspapers to publish the **Pentagon Papers** in 1971, Stewart commented that "undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets."

He wrote the dissent from the **Branzburg** ruling in 1972 which permitted subpoenas to force newsmen to reveal their sources to grand juries. "The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society," Stewart said.

He opposes right-of-reply laws, and did not join Brennan's suggestion that some "retraction" laws would be valid.

Broadcasting

Although joining the **Red Lion** ruling in 1969 upholding the Fairness Doctrine for broadcasters, Stewart has made clear that it was as far as he was willing to go with controls on broadcasters.

He wrote a major concurring opinion in 1973 in the **CBS** case on political advertising, arguing that "the First Amendment prohibits the government from imposing controls upon the press. Private broadcasters are surely part of the press." Forcing broadcasters to accept political ads against their will, he argued, would interfere with their freedom of editorial choice.

Advertising

Stewart favors controls on false or deceptive advertising, but he stops there. He filed a strong dissent in 1973 in the **Pittsburgh Press** case when the Court upheld controls on sex-based job want-ads, accusing the majority of giving the government permission "to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages." He also favored the **Bigelow** and **Virginia Pharmacy** rulings, doing away with the 1942 ruling that ads were not protected by the First Amendment because they merely promoted commercial transactions.

Protests, Picketing

Over the years, Stewart has voted to protect the free expression of civil rights demonstrators, and at one point shared the view that labor picketing, too, was protected by the First Amendment. However, in rulings this year, in the **Greer** case and then in the **Hudgens** case, he wrote the Court's opinions cutting back on these forms of expression. The **Greer** ruling barred political campaigners from making anti-war speeches on military bases, and the **Hudgens** decision withdrew First Amendment protection from labor picketing in shopping center malls.

Byron R. White

We are asked to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.
—Branzburg v. Hayes
408 U.S. 665 (1971)

Libel

A supporter of the **N.Y. Times** rule from the beginning, White added an important extension of it in his **St. Amant** ruling in 1968. He defined the "reckless conduct" standard as one requiring proof that the reporter or his editors "entertained serious doubts as to the truth of his publication."

After that, however, his libel opinions showed a developing hostility to press attempts to avoid damage verdicts. In a concurring opinion in the **Brester** case in 1970, he argued against anything that would "immunize professional communicators from liability for their use of ambiguous language . . . I see no reason why the members of a skilled calling should not be held to the standard of their craft."

When Brennan's **Rosenbloom** opinion in 1971 sought to broaden press protection almost to the point of immunity, White protested, saying the Court should not write "a constitutional rule protecting a whole range of damaging falsehoods."

In the **Gertz** case, he began his dissent by commenting: "I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law."

He continued his objection to the **Gertz** formula by dissenting from this year's **Firestone** ruling.

Obscenity

White never accepted the Brennan thesis that "social importance" would justify distribution of some otherwise obscene items. He did accept the other facets of the **Roth** formula, but then switched to support the **Miller** and **Paris Adult Theatre** reinterpretations of that approach. Since then, he has been uninterested in reviewing obscenity convictions.

When the Court applied the **Freedman** rule on movie censorship limits to stage plays, White did not go along. He voted to uphold the power of city officials to decide what kinds of entertainment could be put on in city-owned theaters or forums.

He dissented again, when the Court rejected the "public nuisance" approach to controlling nudity in drive-in movies. He joined the majority when it approved zoning restrictions as a way of limiting "adult" entertainment outlets.

Privacy

White wrote the key opinion in the Court's still-new attempt to define a right of privacy and its relationship to the press. In the **Cox Broadcasting** case last year, White said:

> Powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the state may protect him from intrusion by the press, with all its attendant publicity.

In that case, however, he confined the ruling to support for the press's

right to carry news stories about open records used in open court hearings. This decision also spoke approvingly of the press as a conduit for information to citizens about the conduct of their government.

Earlier, White supported applying the **N.Y. Times** rule to privacy lawsuits against "calculated falsehoods."

Trials

White was one of the dissenters in the **Estes** case in 1965 when the Court banned television from courtrooms in criminal cases. He said he was not yet prepared to reach the constitutional question raised by live broadcasting of trials.

He has favored judicial orders that would reduce the impact of "prejudicial publicity" on criminal cases, but made it clear he does not favor direct controls on the press's coverage of those cases. He said he had "grave doubt" whether such controls "would ever be justifiable," and joined the **Nebraska gag order** decision.

Press Controls

The **Branzburg** decision, announced in an opinion by White, was the first to face the question of reporters' right to keep the names of their news sources confidential.

The ruling is notable both for recognizing, for the first time, a form of constitutional protection for the process of newsgathering, and for refusing to concede that that process depends upon confidentiality.

Repeatedly, the White opinion poses a conflict between the supposedly purely private interests of the press and the public interests of the criminal justice system. "Private restraints on the flow of information" are insufficient, he wrote, to override "public interests."

The opinion does close with the assurance that "official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources" would not be allowed.

In his **Pentagon Papers** opinion, White declared flatly: "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations." He spoke approvingly of criminal punishment for press disclosure of secrets, and commented that the government was "mistaken" in trying to get a court order to stop the stories instead of filing criminal charges.

In the **Tornillo** case in 1974, he supported the decision against right-of-reply laws, but took the occasion to remark:

> The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

Broadcasting

White is the author of the current Court majority's view that broadcasting has different First Amendment rights than the print media.

His opinion for the Court in the **Red Lion** case in 1969 likens government controls on broadcasting to controls on "sound-amplifying equipment," and relies upon the limited number of frequencies to justify the constitutionality of the Fairness Doctrine.

> There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Again, White stressed the source of First Amendment freedoms:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

White did go along with the 1973 **CBS** ruling regarding political advertising.

Advertising

White was not a part of the effort, intensified last year in the **Bigelow** case, to provide First Amendment protection for advertising. He had supported rulings putting controls on sex-based job want-ads, and putting transit-car card advertising beyond First Amendment protections. But he did join the Court this year in the **Virginia Pharmacy** case which put ads under the safeguards of free expression.

Thurgood Marshall

The Constitution protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society.
—Stanley v. Georgia
394 U.S. 557 (1969)

Obscenity

If there is a right to "receive" ideas, there presumably is a corollary right to "dispense" them. That was the logical outgrowth that might have emerged from Marshall's **Stanley** decision.

"The mere private possession of obscene matter cannot constitutionally be made a crime," the ruling declared. It went on to assert the "fundamental" right to receive ideas, and the right to mull over those ideas in private without governmental interference. It also spoke of a citizen's "right to satisfy his intellectual and emotional needs in the privacy of his own home."

That carried with it the implication that there was such a thing as a "consenting adult's right" to obtain obscene materials. But that implication was cut off, less than two years later, by White's opinion in the **Reidel** case. It confined **Stanley** to its facts, and remarked that the decision had not created "a right to do business in obscenity."

In general, Marshall shared the Brennan-Stewart view on the legal tests for obscenity, and abandoned that view when they did in 1973.

Libel, Privacy

Marshall's views on libel have closely paralleled those of Brennan and Stewart; he adopted the **N.Y. Times** rule as his standard, and went along with most of its extensions. However, he wrote the 1971 **Rosenbloom** concurring opinion for himself and Stewart, declining to take Brennan's last step which applied the rule to all stories on issues of "public or general concern." Instead, Marshall and Stewart chose to argue for more protection for private individuals' reputations. Marshall joined the **Gertz** ruling. However, he dissented from the **Firestone** ruling this year, preferring not to insulate the reputations of private persons who exploited the press's interest in them.

He has shared the view that the **N.Y. Times** rule applies to privacy cases, and supports full press coverage — despite privacy invasions — of open-court proceedings.

Trials

Most of the court's rulings on "prejudicial publicity" arose before Mar-

shall joined the Court. But he did write the **Murph the Surf** ruling last year, rejecting the argument that a conviction should be reversed every time it was shown that the jurors had known about the accused person's criminal past. In the **Nebraska gag order** case, he joined Brennan in arguing against all forms of court controls on press coverage of the courts.

Press Controls

Marshall accepted the view, in the **Pentagon Papers** case, that the government could use "traditional criminal law to protect the country," but did support the newspapers' right to publish the Pentagon Papers.

He joined the liberal dissenters on a journalist's right to keep sources confidential, and he shared the objection to the ban on news reporters' interviews with prison inmates. He supported the **Tornillo** ruling against right-of-reply laws.

Broadcasting

Like Brennan, Marshall found the First Amendment would allow the Fairness Doctrine and saw in that amendment sufficient federal power to force broadcasters to accept controversial ads against their wishes.

Advertising

His First Amendment liberalism has led Marshall to support the effort to extend protection to advertising in general, but it did not keep him from supporting controls on sex-based job want-ads.

Picketing

Marshall is perhaps the only justice

in history to learn, four years late, that a key decision of his had been overruled. His **Logan Valley** picketing decision, written in 1968, was apparently scuttled in 1972, although the Court did not say so until this year.

In the original ruling, Marshall wrote for the Court, upholding the right of labor pickets to parade their dispute onto the private parking lot of a shopping center. The First Amendment protected that as much as it would have safeguarded peaceful picketing on public streets, the Court decided.

But in the **Lloyd** decision in 1972, the Court seemed to say that shopping centers were to be reserved for shopping, not for protest marches. It was not clear at the time that the Court meant to kill the **Logan Valley** precedent. This year, however, Stewart's **Hudgens** opinion explicitly withdrew First Amendment protection from labor picketing at shopping malls, and said that this, in fact, had been done in the **Lloyd** ruling.

Marshall's other major ruling for the Court — in the **Pickering** case in 1968 — said teachers could criticize the school system, at least on some issues. So far, the Court has left the basic decision intact. But this year, it has begun taking away federal judicial supervision of state and local personnel matters, and, subsequently, **Pickering** seems to be a weakened precedent.

Warren E. Burger

For better or worse, editing is what editors are for; and editing is selection and choice of material.

—CBS v. Democratic National Committee, 412 U.S. 94 (1973)

Libel

By the time Burger joined the Court, the **N.Y. Times** rule was well-entrenched. He went along with it, uncritically, and supported its extensions.

When Brennan's **Rosenbloom** opinion came out in 1971, Burger was one of its few supporters. He simply added his name to the Brennan view that the special protection for the press in libel cases should extend all the way to any "subject of public or general interest."

When the **Gertz** ruling emerged in 1974, he dissented, saying he was opposed to having the Supreme Court make a broad, new declaration affecting all state libel laws. He said he thought the law should go on developing as it had on a case-by-case basis. But when the **Gertz** ruling was applied for the first time — and extended — in this year's **Firestone** ruling, he joined in that. (The **Firestone** decision raised considerably the risks of libel in press coverage of sensational court cases involving famous, private persons.)

Obscenity

With obvious satisfaction, Burger proclaimed in the **Miller** decision in 1973 that "for the first time since **Roth** was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."

It was his opinion that did it. Rejecting the old — and now discarded — Brennan formula, the chief justice fashioned his own. The test would still be the average person's judgment, applying "contemporary community standards," as to whether an item was appealing to a "prurient interest."

But its key was that the only thing banned was a portrayal of specific sex-

ual conduct. The only way a work with such a portrayal would be saved would be to have "serious literary, artistic, political, or scientific value." Gone was the old standard of general "social value" or "social importance." And gone was Brennan's insistence that the "community" standard be a nationwide one.

Something else new was added: controls on obscenity could be justified as a community's way of cleaning up "the quality of life" there. This was not defined.

In later cases, Burger has also favored — in dissent, in some cases — the use of "public-nuisance" and zoning laws to control the spread of "adult" entertainment, and the power of city officials to ban nude theater from municipal facilities.

Privacy

Burger has taken no significant role in the Court's limited work so far on privacy lawsuits, though he joined some of those rulings.

Trials

The chief justice's one major effort on "prejudicial publicity" is the Court's most important decision ever on that issue. Although his **Nebraska gag order** decision lectures the press about its duty to "protect the rights of an accused to a fair trial by unbiased jurors," the ruling in practical terms leaves that duty fundamentally to the press.

Even while rejecting the notion that the First Amendment is an "absolute" ban on all judicial orders against prejudicial publicity, the Burger opinion leaves so little room constitutionally for such orders that few would fit within its limits.

Basically, the decision requires judges to try every other technique in their discretion before they even consider attempts at direct press controls. Moreover, the doubts the ruling casts upon the efficiency of any such press controls would seem to discourage their use, by and large.

Press Controls

In his **Tornillo** decision, Burger again showed his sensitivity about what he calls "press responsibility," but he also made it clear that press discretion about what to publish remains secure. Striking down a right-of-reply law, he commented:

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

His opinion continued, saying that government interference in choosing news content was forbidden by the Constitution.

Burger's underlying aversion to the press's behavior, hinted at in the **Tornillo** case, is evident in his **Pentagon Papers** opinion. He suggested that the New York Times had as much duty as a taxi driver or a Supreme Court justice would have to go to the authorities upon obtaining stolen property.

He endorsed much of what White wrote about "penal sanctions" for those who get or hold secret papers, and he added a now-famous footnote warning the press that the Court might use "whatever judicial measures may be required" to protect the secrecy of the Court's own internal workings.

Burger supported the **Branzburg** ruling's emphasis on the criminal justice system's need for the testimony of journalists like for that of anyone else who knows about a crime.

Broadcasting

Some of the chief justice's most soaring rhetoric about the right of the press to make up its own editorial mind comes in his ruling upholding CBS's refusal to accept ads that it did not want. In fact, it comes close to giving broadcasters most of the editorial discretion that most of them want.

Rather than using the argument of the **Red Lion** case that the limited number of frequencies makes strong government intervention necessary, Burger suggested that "the right to exercise editorial judgment was granted to the broadcaster" by Congress.

The opinion is based, however, not on the broadcaster's First Amendment rights — which would make them secure — but upon Congress's language in the Communications Act. And Burger does note that "at some future date" Congress or the government might devise "some kind of limited right of access."

Advertising

Burger has sided with critics of the idea that advertising has less protection because it is "commercial" communication. He dissented from the Court's approval of a ban on sex-based job want-ads, saying:

> I believe the First Amendment freedom of press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials, or advertising, as it sees fit. . . . The readers are the ultimate "controllers" no matter what excesses are indulged in by even a flamboyant or venal press.

The chief justice supported the **Bigelow-Virginia Pharmacy** combination of rulings that found full protection for advertising in the First Amendment.

Canvassing

Burger has handled the Court's recent reviews of the First Amendment claims of those who would peddle wares or ideas door-to-door. He wrote the 1971 ruling in the **Keefe** case allowing leafletting to protect a realty dealer's "blockbusting" tactics, and he wrote this year's **Hynes** decision that permits local officials to limit house-to-house canvassing, at least to the point of requiring canvassers to sign in with the police.

Harry A. Blackmun

A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

—Southeastern v. Conrad 420 U.S. 546 (1975)

Obscenity

Until 1975, the Supreme Court had never said whether the legitimate stage was constitutionally considered "expression." Because the Court has long drawn a First Amendment distinction between "speech" and "conduct," and because live theater was some of each, the issue was in considerable doubt.

Blackmun's opinion in the **Southeastern Promotions** case settled it definitely:

> By its nature, theater is the acting out — or the singing out — of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard.

The Court then proceeded to give stage plays the same kind of protection from instant censorship that movies received in Brennan's **Freedman** ruling.

The Blackmun opinion did not stumble over the fact that the specific play at issue — "Hair" — included simulated sex acts. That, apparently, makes no difference constitutionally (although it did to dissenters Burger and White).

On other obscenity issues, Blackmun has joined the views of the prevailing conservative majority in favor of the new **Miller-Paris** standard, and he has favored "disturbing the peace" laws as a way of controlling public profanity.

He dissented, though, on the use of zoning laws to control the location of "adult" theaters and bookstores. "This may be a permissible way to control pawn shops, pool halls, and other regulated uses . . . It is not an acceptable way . . . to decide who will be permitted to exhibit what films in what places."

Advertising

Blackmun, the author of the Court's controversial decisions on abortion, used an abortion referral advertisement case as the first step toward putting ads under First Amendment protection.

His **Bigelow** opinion last year, striking down a state law against promoting abortion services, noted that "speech is not stripped of First Amendment protection merely because it appears in the form of paid commercial advertisements."

The next step was a logical one. In the **Virginia Pharmacy** case this year, Blackmun took the Court the rest of the way, and virtually overruled the 1942 precedent which treated "commercial speech" as unprotected. He noted that his **Bigelow** opinion had caused that idea to "all but pass from the scene."

Blackmun had also objected when the Court upheld the ban on sex-based job want-ads in the **Pittsburgh Press** case in 1973. But he had written the opinion the next year, in the **Lehman** case, concluding that transit-car card space was not "a First Amendment forum" open to all advertising.

Libel, Privacy, Trials

Blackmun, having joined the **Rosenbloom** ruling that would have put libel verdicts almost out of reach, would have remained with that position. However, he felt obliged to cast the deciding vote in the **Gertz** case, so that that ruling would spell out both broadly and specifically the constitutional rules governing libel laws. He also went along when the Court applied and extended **Gertz** in the **Firestone** ruling this year.

He has had no notable role in the few privacy rulings.

In the **Nebraska gag order** case, he joined the Burger opinion fully.

Press Controls, Broadcasting

The strongest statement of Blackmun's views against "First Amendment absolutism" came in his **Pentagon Papers** opinion. "Each provision of the Constitution is important," he said, "and I cannot subscribe to the doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions."

He had no difficulty accepting the **Branzburg** news-source ruling.

Blackmun voted, for his own reasons only, to support the **CBS** ruling on unwanted TV ads.

Lewis F. Powell Jr.

Under the First Amendment there is no such thing as a false idea . . . But there is no constitutional value in false statements of fact.

Gertz v. Welch 418 U.S. 323 (1974)

Libel

"We must lay down broad rules of general application," Powell wrote at the beginning of his **Gertz** opinion in 1974. The rules brought about a revo-

lution in libel law, not altogether favorable to the press.

Under **Gertz**, no one can collect for libel without some proof that the publication was at fault; gone is the "libel per se" approach that awarded damages merely for the publication of something that defamed, whether anyone was at fault.

The private individual can collect more easily than he could under the **N.Y. Times** rule (which still applies to public officials and public figures), but

only if he is willing to be satisfied with damages for his actual injury. If he wants to collect more, he has to meet the tougher **Times** rule.

In addition, the definition of "public figure" is narrowed somewhat, the **Rosenbloom** theory of "public interest" as the key to invoking the **Times** rule is discarded and the definition of defamation is tightened.

Powell, in interpreting **Gertz** since that time, has insisted that it also laid down the rule that truth is a complete defense in libel cases.

In applying the **Gertz** decision to this year's **Firestone** ruling, Powell may have spared publications from libel suits for merely misunderstanding court rulings in cases involving nonpublic figures — a threat that seemed apparent in the main **Firestone** opinion.

Press Controls

It is sometimes suggested that, in closely divided cases, Powell casts two half-votes: half one way, half the other. That seemed most evident in the **Branzburg** decision in 1972.

Although he agreed that journalists had no constitutional right to refuse to reveal their sources to inquiring grand juries, his separate opinion virtually invited reporters to come back to the courthouse with regularity if too many subpoenas were served on them.

Although Powell's vote in the **Nebraska gag order** case did not seem crucial either way, that was its outward appearance only. His vote was decisive on the way judges would have to operate under that ruling, because without him, the Court would have split evenly on whether judges had any power at all to act against "prejudicial publicity" in the press.

Thus, his separate opinion actually specifies the steps judges must follow — a complex arrangement that makes it seem that, in practice, no judge could satisfy the Powell limitations.

In objecting to another kind of check on the press — the ban on interviews with prison inmates — Powell has spelled out a theory that would give reporters access to many quarters from which they are now barred:

> At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulation in terms more compelling than discretionary authority or administrative convenience.

Obscenity

Powell's most notable foray into First Amendment liberalism came in the **Erzoznik** case last year. He wrote the opinion striking down a "public nuisance" law used to forbid nude movie scenes on drive-in theater screens.

Otherwise, he supports the Burger approach, in the **Miller** and **Paris Adult Theatre** cases.

Other

Powell has taken a liberal approach in his 1972 opinion in the **Healy** case, strongly reaffirming First Amendment rights of students on college campuses.

He wrote the Court's opinion in the **Pittsburgh Press** case, upholding a ban on sex-based job want-ads, mainly on the grounds of the now-discredited "commercial speech" exception.

William H. Rehnquist

The details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues.
Time, Inc. v. Firestone
(slip opinion, March 2, 1976)

Libel

In his **Firestone** ruling this year, Rehnquist created the prospect that court cases in general might routinely lead to libel cases, even for minor faults in the coverage. In saying the **Gertz** decision did not apply in the case, Rehnquist said most people who come to court are not there by choice and thus they are not "public figures" involved in "public controversies."

The **Firestone** decision leaves with courts the judgment of whether a news account about the case was accurate, in a legal sense; if it was not, the publication loses.

And the ruling allows appeals courts to supply the interpretation of fault for a news account even if the jury at the trial did not consider fault.

Obscenity

In the field of obscenity, Rehnquist has written two significant rulings — **Jenkins** and **Hamling**, both in 1974 — providing that states may decide for themselves what "community" is to be the setting in which obscenity is judged. The Court, in the **Miller** and **Paris Adult Theatre** cases (which Rehnquist joined), had already ruled that the "community standard" is not a nationwide one, thus allowing for varying measures of obscenity.

Rehnquist generally has gone along with the justices who want to curb obscenity by using "disturbing the peace," "public nuisance" and zoning laws.

Advertising

In the **Virginia Pharmacy** case, he dissented alone, rejecting the idea that the First Amendment applies to "purely commercial endeavors." For the same reason, he dissented in **Bigelow.**

John Paul Stevens

There is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance.
Young v. American Mini Theatres
(slip opinion, June 24, 1976)

Obscenity

Stevens, in the opinion that upheld the use of zoning laws to try to stem the growth of "adult" stores, shops and theaters, put "erotic materials that have some arguably artistic value" on a lower level of constitutional protection. On a higher level, he said, was "political debate" about issues of "significance."

Apparently, his view is based on the premise that some forms of expression simply are less important to society. "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. . . . Few of us would march our sons and daughters off to war to preserve the citizen's right to see [adult films.]"

Trials

Stevens's stand on the **Nebraska gag order** case was on the liberal side. He said he might ultimately agree with Brennan's view that no gag order could ever be imposed on the press. For now, he said, he would say only that:

> The judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and it may not do so. ■

THE FIRST AMENDMENT | *THE FUTURE*

THE CHILD IN JEOPARDY

By Ben H. Bagdikian

THERE ARE MANY reasons why freedom of the press and expression are in danger, and one of them is the behavior of the news media themselves. Let me begin the sermon with readings from secular scriptures:

(1) The citizens of the Union of Socialist Soviet Republics are guaranteed by law (a) freedom of speech; (b) freedom of the press. . .
— Article 125, Constitution of the U.S.S.R.

(2) Question: Would the nation be better off, in your opinion, if every news article sent out of Washington was checked by a government agency to see that the facts are correct?
Answer: Yes, 63 per cent.
— Gallup Poll of American high school juniors and seniors, 1974.

Freedom of the press engraved in the First Amendment is simply a birth certificate. Nothing written on paper alone guarantees that the infant will survive. That is up to the American population and its leaders. If most surveys asking basic questions are correct, the child is in jeopardy.

Like any edict, the First Amendment will survive only if it is a living principle in the minds of its constituents and there is doubt that this is true in the United States today. An appalling number of Americans, including judges, legislators, doctors and some of the most powerful leaders in our society, give lip service to the Bill of Rights but are hostile or indifferent to the actual exercise of those freedoms. Lip service, like Article 125 of the Soviet Constitution, is not enough.

Any freedom always is in danger because that is the nature of freedom. If it means anything, then anyone is free to argue against freedom and this argument may be persuasive. It is the risk we take by saying anyone can say anything without prior restraint.

But there is another way a people may decide against freedom — by failing to experience it in their

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lives. And this is the reason some of our failure can be laid on the news media themselves.

Most of the press and broadcasting have accepted a narrow definition of what are legitimate political, economic and social subjects for news and commentary. As a result, they have, by their own publications and broadcasts, conditioned the public to accept as legitimate only the limited spectrum they see and hear.

Insular Majority

I am not talking about the small minority of the major media which regularly stimulate and display a broad spectrum of vigorous events and ideas. I am talking about the broad mass of daily papers and broadcasts whose content reflects a microscopic range of the real world of events and ideas, to whom maoist communism is not a legitimate subject, nor fascist totalitarianism, nor democratic socialism, nor syndicalism, nor a number of policies concerning the practical problems of society that simply lie outside the conventions of the mass media, but which exist as realities in the world and within the United States. If anyone doubts it, look at a random selection of 100 dailies or watch prime time for five week nights in a row. This is what two-thirds of the American population absorbs as the product of its mass communication (read "educational") system.

Our news media, with minor exceptions, accept the legitimacy of national security censorship by government, or unaccountability in corporate life, and either do not disturb or actively cooperate in the silence of local policy-making bodies doing public business. The minority that regularly does break through these barriers creates a sensation because it is so unusual.

Where they display historical events, or influence them, our news media do not stress the real reasons for freedom of the press and of expression. They seldom remind the public that one person's truth is another's anathema. We learn in school that Tom Paine was a great patriot whose writing helped win the Revolution. We don't teach perhaps the most important meaning of Paine's life, namely that he died broken and despised by his own society because he was considered a soiled-shirt radical by those who, with his help, rose to power. It is an important lesson: freedom of the press is revered in words by those in authority, but the desire to practice it is strongest among those without formal power. One of the corruptions of power is the desire to suppress information "for the public good."

Unless persons are taught the true evolution of freedom of the press, they cannot understand its importance. But teaching the truth about it is imprudent, because any honest lesson shows that the desire for suppression, for Star-Chamber proceedings, for official control of public information, for privacy in public matters exists today and always will.

> *We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth.*
>
> —Code of Ethics,
> The Society of Professional
> Journalists, Sigma Delta Chi

The conflict between the desire for free expression and the desire for restriction reflects the problem in society as a whole, and schools alone will not reverse tides of popular passion or ignorance. But if schools are not to be divorced from learning, then they must make their students think about their own society.

Education in the nature of freedom has to begin with education of teachers, who come out of colleges, are hired by school boards, and are subject to social pressures as anyone else. Here, again, the local community media are important. If the media support the effective teaching of intellectual freedom, they will be a powerful force in breaking the present cycle of morbidity in the Bill of Rights that continues largely through silence.

Teachers need to know that if they do their instruction well in the matter of the Bill of Rights they will be supported by media operators in their community. School boards, like Supreme Court justices, read the papers.

Should Dissidents Speak?

Then let teachers do with students what pollsters have done periodically with adults — ask if they believe in the Constitution and then ask if they believe that a Communist or a fascist should be allowed to speak in their community. Ask the students if they believe that a pro-Communist magazine or a pro-fascist newspaper should be permitted in the town's newsracks. If they say they believe in the Constitution but do not think people with ideas they dislike should be free to speak and publish, let this be the beginning of a serious discussion of what the Bill of Rights really means.

In high schools, for example, speakers on serious controversial and conflicting ideas should appear before civics classes — speakers who argue against capitalism and the free enterprise system, libertarians, democrats, republicans, socialists, John Birchers, and any other variety of points of view that exist; and by that program itself demonstrate the reality and legitimacy of free speech.

How often do we teach what happens in a society where the aggrieved are not free to complain and to have their media make their grievances heard? Do we put the First Amendment in the context of the need — today, not just in 1776 — to complain, to protest, to agitate, to react as a necessary part of a decent and viable society?

Do we also teach the effect on the individual human psyche of repression of spontaneous ideas and emotions, and therefore the importance for individuals to have the constitutional freedoms?

James Madison was a conservative against the Bill of Rights. I don't agree with his position, but there is a powerful insight in what he said against it (another proof that it is better to let people with disagreeable ideas speak out). Madison said in the *Federalist Papers*:

"What signifies a declaration that 'the Liberty of the press shall be inviolably preserved?' What is the Liberty of the Press? Who can give any definition which does not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any Constitution respecting it, must altogether depend on public opinion and on the general spirit of the people and of the Government."

What is American "public opinion" on press freedom?

On Feb. 28, 1973, Richard Nixon, then President, said to John Dean, then Nixon's faithful servant, speaking about their plans to bring the disobedient portion of the American press to heel: "One hell of a lot of people don't give one damn about this issue of suppression of the press."

One way or another, Nixon's judgment has been echoed over the years by a disturbing portion of the American public.

In May of 1961 Gallup found that 31 per cent of American adults would approve of "placing greater curbs, or controls, on what newspapers print." Another 14 per cent had no opinion. Forty-five per cent hostile or indifferent to uncontrolled publication is not a national commitment. Of those who approved greater controls, most thought it should be with national defense information.

Apparently, this attitude has not changed much since 1961. In 1973 Gallup asked, "Do you think that freedom of the press is endangered in this country or not?" Fifty-five per cent said no and 13 per cent didn't know.

Almost all of these people studied the Constitution in school but obviously as a piety rather than a living practice. Most read newspapers and watch television but they, like all Americans, see little in their mass media that reminds them of the full range of economic and social ideas in the world. Not seeing something on authoritative channels implies absence because of nonexistence or illegitimacy.

The fact that Archie Bunker and "Mary Hartman, Mary Hartman" could cause sensations in the media world is a sign of the stereotyped and constricted display of human emotions and ideas ordinarily disseminated.

Our media are only a narrow crack in the fence around the real world. Papers that carry a "conservative" and a "liberal" columnist, with George Will on one side and Jack Anderson on the other, are hardly displaying the real range of ideas available in society. Some think that Nicholas von Hoffman on the left and William Safire on the right are at the farthest possible extremes; but they are, in fact, moderate and pale reflections of the richness and variety of human thinking on public affairs. If one looks systematically at the kinds of people and life situations portrayed in newspapers and broadcasts, there, too, is the constricted view of human variety that leads consumers to a similar view of what is normal or legitimate.

> *Not for its own sake alone, but for the sake of society and good government, the press should be free. Publicity is the strong bond which unites the people and the government. Authority should do no act that will not bear the light.*
>
> —James A. Garfield

The mass media are a major socializing influence on American citizens. What they display and comment upon becomes a powerful influence on the priorities and the values of the population. What is in the media becomes legitimate subject matter in society. The converse is true: what is not included becomes illegitimate. Disagreement is inevitable in any mix of ideas, but outrage at the existence of an expression should not be.

I once asked the leading political columnist in the Soviet Union how it was that the Soviet Constitution guaranteed freedom of the press and yet so many writers were imprisoned. He replied, "Freedom of the press means freedom to print the truth, to be accurate and responsible." A few years ago at a lunch, former presidental aide John Ehrlichman condemned the "liberal press" as violating the First Amendment. I asked what he understood to be the meaning of the First Amendment. His answer was almost precisely the same as the columnist from *Pravda*. This is not an invidious comparison of Ehrlichman and the Soviet functionary. I think most of the people in the United States unfortunately hold the same view: freedom of the press applies only if they think the press is being "responsible." Yet, they seldom learn in a convincing way that what may be considered "irresponsible" at one time (Richard Nixon on the idea of normalizing relations with China in 1952) may become official policy at another time (Richard Nixon in 1972). And what is "wrong" for some people (gun control for members of the National Rifle Association) is "right" for others. And that society at its peril chokes off any idea at its point of expression.

When the newspaper trade magazine, *Editor & Publisher*, condemns Daniel Schorr as irresponsible for releasing information because the House of Representatives had voted to keep it secret, what are we to expect the lay public to think about the legitimacy of censorship?

In the Heart

Being against censorship is like being against sin — if it's merely verbal it is meaningless. Freedom of the press is never going to survive by ritual but by its rigorous demonstration in the daily product of our publications and our broadcasts. If the public continues to get a limited diet of social and economic information it will soon hate and forbid anything else.

Judge Learned Hand said, "Liberty lives in the hearts of men; if it dies there, no law, no courts, no Constitution can keep it alive."

Judge Hand almost certainly meant his word "men" to include women — and children. If freedom of expression becomes merely an empty slogan in the minds of enough children, it will be dead by the time they become adults. ■