The First Amendment and Its Protections

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Now is the time for all good men and women to come to the aid of the First Amendment.

It is under attack.

The Supreme Court has recently held that journalists, over the objection of a defendant, may not be admitted to pretrial hearings,[1] although most criminal cases are disposed of by plea bargaining, a form of pretrial hearing.

The search of a student newspaper pursuant to a general warrant has been upheld, notwithstanding that a simple subpoena would have served every legitimate governmental interest.[2]

Newspaper reporters have been sentenced to jail for failure to reveal their sources despite the fact that those sources were distrustful of government and would only confide to the reporters under a pledge of confidentiality.[3]

Judges have issued gag orders preventing comment on so-called public trials on the ground that publicity would undermine fair trials.[4]

The Court's opinions on what is obscene are, to say the least, unilluminating. The best clarification it has been able to proffer is that of Justice Stewart, who could not define it, but said, "I know it when I see it."[5]

The strictures against libel laws enunciated in *New York*

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1. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).
2. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
3. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).
4. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
5. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Times Co. v. Sullivan[6] have been cut back, and libel laws revitalized in the area of public conduct.[7]

The establishment clause of the First Amendment has been weakened to permit varying forms of aid to parochial schools.[8]

Notwithstanding the opinion of the Supreme Court outlawing prayers in public schools,[9] Congress and the state legislatures, with widespread public support, are seeking to circumvent the Supreme Court's prayer decision.[10]

There is also increasing public opposition to peaceful speech and demonstrations by unpopular groups.

In light of this assault on the First Amendment, it is appropriate to analyze its meaning and its importance to the functioning of our democratic society.

The First Amendment, as its title indicates, is article I of the Bill of Rights. It provides:

> Congress shall make no laws 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 people peaceably to assemble, and to petition the Government for a redress of grievances.[11]

One will note from this language that the First Amendment is absolute in its terms. *Congress shall make no laws.* No statement could be more categoric than this.

Justice Cardozo referred to the First Amendment as the "preferred" freedom which lies at the very core of our democracy.[12] He aptly said freedom of expression is "the matrix, the indispensable condition of nearly every form of freedom."[13]

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6. 376 U.S. 254 (1964).

7. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

8. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

9. School Dist. v. Schempp, 374 U.S. 203 (1963).

10. The Helms Amendment, passed by the Senate and pending before the House Judiciary Committee, would exempt any state regulation of prayer in public schools from review by the federal courts. S. 450, 96th Cong., 1st Sess., 126 CONG. REC. D1157 (1980).

11. U.S. CONST. amend. I.

12. For an analysis (and criticism) of the concept of the First Amendment as a "preferred" freedom, see Justice Frankfurter's concurring opinion in Kovacs v. Cooper, 336 U.S. 77, 90-96 (1949).

13. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

Why, then, is the plain language of the Constitution limited, or in some cases even disregarded?

The assigned reason, in many instances, is our national security. Limitation, in an undefined way, is said to be necessary for the common defense.

William Pitt, the elder, said, "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."[14]

The basic creed of First Amendment safeguards was eloquently expressed long ago (1937) by Chief Justice Charles Evan Hughes in these words:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[15]

This great Chief Justice also said, in the case of *Near v. Minnesota,*[16] that prior restraint of publication negated the essential purpose of the First Amendment.[17] Prior restraint, in layman's terms, means censorship—and censorship is the direct antithesis of freedom of speech and of the press.[18]

Trial judges, presumably with the sanction of the Supreme Court, are issuing gag orders, preventing reporters from saying in the press or on television what is going on in a public trial. The alleged justification for such gag orders is that they are necessary to ensure defendants fair trials which might be prejudiced by excessive publicity. In legal terms, judges are "balancing" the First Amendment right to a free press against Sixth Amendment safe-

14. Speech by William Pitt, House of Commons (Nov. 18, 1783) *reprinted in* J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 496 (14th ed. 1968).

15. De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

16. 283 U.S. 697 (1931).

17. *Id.* at 713-23.

18. Chief Justice Hughes concluded that "[i]f such a statute, authorizing suppression . . . is constitutionally valid, . . . it would be but a step to a complete system of censorship." *Id.* at 721.

guards of a fair trial.[19] And the balance is being weighed in favor of the Sixth Amendment to the prejudice of the First.[20]

I personally can see no justification for gag orders. I have been a lawyer and a judge for more than fifty years. I am firmly committed to the principle that anyone accused of a crime is entitled to a fair trial. But there are ways of ensuring a fair trial and guarding against the influence of excessive publicity on juries without resorting to gag orders.

Juries may be sequestered and denied access during the course of a trial to newspapers and television. The venue of a trail may be removed from a locality which has been saturated with excess publicity to one which, in popular parlance, could not care less about the trial in question. And jurors are not foolish men and women. Studies show that juries are singularly unaffected by publicity in cases before them.[21] By and large juries reach their verdicts on the evidence before them.

As I have said earlier, reporters are lodged in jail because they have refused to reveal their sources. I should have thought that we would have learned from Watergate that to expose corruption by those in high office, reporters need confidential sources and must protect these sources in order to gain the information essential for such exposures.

This is not to say that reporters can or are entitled to claim immunity from testifying as to their own personal observation of criminal actions; in such a situation, they must testify like the rest of us. Nor is it to say that sources should not be revealed where the information derived is not such as to jeopardize sources from governmental retribution. It is to say that in those special cases where sources will only speak to journalists because of reasonable fear of governmental retribution, then those sources should be protected.

And, I think it entirely nonsensical that, with or without a warrant, the offices of student newspapers should be ransacked when a subpoena, subject to challenge, will serve the purpose of

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19. In *Gannett*, the Supreme Court noted with approval that "the trial court balanced the 'constitutional rights of the press and the public' against the 'defendants' right to a fair trial." Gannett Co. v. DePasquale, 443 U.S. at 392.

20. *See id.* at 393.

21. *See* TWENTIETH CENTURY FUND, INC., RIGHTS IN CONFLICT: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON JUSTICE, PUBLICITY & THE FIRST AMENDMENT (1976).

law enforcement.[22] I am not aware that in our country such newspapers—whatever their political views—constitute a clear and present danger to our government.[23]

I simply could not conceive that the Supreme Court, despite its language in a case already decided about pretrial hearings, would hold that the defendant alone can determine whether a trial should be public or private. We, the people, have an interest in public trials. The history of Ango-American law demonstrates the evils arising from Star Chamber proceedings. The situation in totalitarian countries, such as the Soviet Union, bears witness that closed trials are a menace to the freedoms we cherish. I was confident that upon reflection the court would not endorse secret trials. My confidence is vindicated by the Court's decision in *Richmond Newspapers, Inc. v. Virginia.*[24]

The cases involving the First Amendment separation of church and state lack consistency, and evidence a desire to permit more aid to parochial education and preference for religion than the Constitution and the Founding Fathers envisioned.[25]

We are again becoming intolerant of dissenting voices, forget-

22. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978). In one recent case the offices of a Boise, Idaho, television station (KBCI TV) were searched pursuant to a general search warrant for video taped interviews with inmates at the Idaho state penitentiary taped during a prison riot in July. *Open Up, It's the Police,* TIME, Aug. 11, 1980, at 55. The prosecutor intended to use the tapes as evidence against the rioting prisoners and also intended to call reporter Bob Loy, who made the tapes, as a witness for the prosecution. Loy had gone into the prison at the request of the inmates. N.Y. Times, July 28, 1980, § A, at 14, col. 1.

23. In response to the decision in *Zurcher,* Congress has passed legislation designed to protect journalists from such searches which was signed by the President on October 13, 1980. The Privacy Protection Act of 1980, P.L. 96-440, 94 Stat. 1879 (1980). In a recent letter to leaders of the House and Senate, current editors of the *Stanford Daily* claimed that since the 1971 raid on the *Daily,* in at least 26 instances "police have used search warrants to 'harass, intimidate and terrorize' the news media, doctors, lawyers and others not suspected of crime themselves." The Recorder, Aug. 13, 1980, at 1, col. 2. Acknowledging that the bills passed do protect journalists, they accuse Congress of "knuckl[ing] under to law enforcement groups" and failing to act upon the more than 20 bills that would protect the privacy of all Americans. *See, e.g.,* H.R. 368, 96th Cong., 1st Sess., 125 CONG. REC. H166 (1979) (currently pending before the House Committees on Judiciary and Interstate and Foreign Commerce). Their compilation cites searches pursuant to warrants of newspapers (*Berkeley Barb, Los Angeles Star, Flint Michigan Voice*), television and radio stations (KPFA, Berkeley, Ca.; KPOO, KRON, KPIX, KGO, San Francisco, Ca.; KTVO, Oakland; KPFK, Los Angeles; WJAR, Providence, R.I.) as well as attorney files and medical records.

24. 100 S. Ct. 2814 (1980).

25. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Board of Educ. v. Allen, 392 U.S. 236 (1968).

ful that our nation was founded and forged by dissenters and that while they are often misguided, on occasion they are right. The First Amendment protects freedom of expression: as a corollary, it imposes a duty to listen to views which, at first blush, we deem abhorrent.

When I was on the Supreme Court we handed down an opinion saying that First Amendment freedoms need "breathing space" to survive.[26] This is an elementary truth and we must be eternally vigilant to ensure that "breathing space" is provided. But the simple fact is that the First Amendment is being denied adequate "breathing space."

This is not to say that the Supreme Court has not vindicated First Amendment rights on a number of occasions and in important cases. The *Pentagon Papers* case[27] is a classic application of the doctrine that prior restraint is inimical to First Amendment safeguards. But in totality, who can deny that protection of the right to free speech and a free press is all too often honored in the breach rather than in the observance?

Public opinion polls demonstrate that the public is cynical about what it reads in newspapers and hears on the tube. I share this cynicism. Much of what we read and hear is neither accurate nor informative. Unscrupulous politicians are not the only demagogues among us. Some newspaper columnists, editorial writers and reporters can be demagogic also.

In this day and age of chain newspapers and of network reporting, there is all too little exercise of the responsibility implicit in the liberty accorded by the First Amendment. If the press is to remain free, it must be responsible. As long as it is responsible, it will remain free. The temptation is great to restrain or censor irresponsible reporting in the interest of truth and accuracy. But as Benjamin Franklin said more than 200 years ago: "Of course, we ought to prevent abuses of the Press; but to whom do we entrust the power of doing so?"

26. NAACP v. Button, 371 U.S. 415, 433 (1963).
27. New York Times Co. v. United States, 403 U.S. 713 (1971).