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THE FIRST AMENDMENT AND THE FREE PRESS: A COMMENT ON SOME NEW TRENDS AND SOME OLD THEORIES

*William W. Van Alstyne**

After years of ever-advancing success in the Supreme Court,¹ the "fourth estate" of newspapers now finds itself uncomfortably hemmed in by an emerging succession of losses.² Providing financial solace to libel plaintiffs has contracted the definition of a public figure, again exposing publications to substantial liability for mere marginal inaccuracy.³ Providing more elbow room for evidence-

* Perkins Professor of Law, Duke University. (This article is adapted from a paper prepared for the American Bar Association's Extended Session in Sydney, Australia, August 12, 1980. The original title, assigned by an ABA Special Committee, was quite different: Why No First Amendment?—The Role of the Press in Relation to Justice. Neither Australia nor New Zealand has any equivalent of our first amendment. As the occasion of this joint session of the ABA was to compare legal developments in these countries (as well as in the United States) in commemoration of the bicentenary of William Blackstone's death in 1780, the original point of the title was to raise a challenge to our ANZUS colleagues: Why *don't* they have any first amendment? Given that condition, what indeed *is* the role of the press in their schemes of social justice?

A portion of that emphasis in the original paper has been retained, but it is now made incidental to a related subject of more immediate domestic interest in the United States. We differ from our down-under allies not merely in having a first amendment which protects freedom of expression in general; it explicitly [and separately?] protects "the freedom of the press" in particular. The question has lately arisen as to why our own Supreme Court has made less of that fact than many have urged it to do: *i.e.*, why has "the press" not been specially and separately regarded for purposes of first amendment analysis? The editors of the *Hofstra Law Review* recently published a Symposium on that subject. 7 HOFSTRA L. REV. 559 (1979). This adapted paper is offered merely as a postscript to that Symposium.)

1. See cases cited at notes 22-31 *infra*.

2. See cases cited at notes 32-42 *infra*. But see *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

3. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See also *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

seeking police now contemplates rummaging through newspaper files.⁴ State statutory privileges respecting a journalist's confidential sources are made to yield to the discovery interests of criminal defendants.⁵ And first amendment press claims of editorial privacy are subordinated to an infinite discovery process relentlessly pressed by civil plaintiffs.⁶

As the immunity and privacy of the newspapers' own enterprise seem less secure than may reasonably have been supposed in the recent past, the press' access to sources of information has also been curtailed. Thus, rather unconvincing administrative objections to press access to a very troubled jail have been held sufficient to limit the press to little more than a guided tour.⁷ And whatever may be the uncertain case when a criminal case comes to actual trial,⁸ pretrial hearings—where a very large portion of cases are disposed of—appear not to be a place which journalists have significant standing to attend.⁹

More exposed in its own accountability and more foreclosed from investigating public accountability, the press has also encoun-

4. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

5. *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

6. *Herbert v. Lando*, 441 U.S. 153 (1979).

7. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

8. *E.g., Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

9. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). If certain dicta in *Houchins v. KQED*, 438 U.S. 1 (1978), and in *Gannett* represent a majority of the Supreme Court (as I do not think they do), the contraction of access would be very great indeed. Thus, concurring in *Gannett*, Mr. Justice Rehnquist declared:

Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings.

443 U.S. at 404 (Rehnquist, J., concurring) (emphasis added). And in *Houchins*, Chief Justice Burger stated that the extent, if any, to which a prison may be open to third-party access is a question which "invites the Court to involve itself in what is clearly a legislative task which the Constitution has left [wholly?] to the political processes." 438 U.S. at 12 (Burger, C.J., majority opinion). Neither statement commanded a majority in either case, however, and in fact there is no contemporary Supreme Court authority for either proposition as so broadly asserted. *Cf. Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2830-31 (1980) (Stevens, J., concurring) ("Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. . . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.") (citations omitted) (footnote omitted).

tered newly sustained restrictions even in respect to its most conventional activity—disseminating news and views. This gloomy conclusion appears to be particularly warranted if one's view of "the press" is not restricted to merely conventional newspapers, but includes its electronic cousin and its pamphleteering nephews, as well as its scatological offspring. Thus, "adult" book stores may be confined by zoning.¹⁰ Thus, the decision in *FCC v. Pacifica Foundation*¹¹ (sustaining a restriction on radio broadcasts of a ribald political satire) is restrictively reminiscent of the earlier discarded English test of obscenity which permitted the government to bar language offensive to the most vulnerable persons.¹² Thus, too, political placards may be forbidden by government in places where commercial placards may nonetheless be displayed.¹³ Moreover, the decision in *Greer v. Spock*¹⁴ (sustaining a military commander's ban of leaflet distribution anywhere on an immense base laced with open highways and in many respects suitable for distribution of ordinary political materials) cuts down the public forum for the dissident and unconventional who lack newspapers of their own.

The ostensible trend against the press may renew debate over a suggestion originally put forward by one of the associate justices of the Supreme Court.¹⁵ Little less than a decade ago, Mr. Justice Stewart suggested that there may be distinctive functions and features of "the press" that ought to be noticed doctrinally by the Supreme Court. The first amendment itself appears on its face to imply the appropriateness of treating "press" cases as not merely fungible with "speech" cases in first amendment adjudication.¹⁶ Accordingly, and especially if it is true that "the press" (even as confined to some subset such as professional journalists and newspa-

10. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

11. 438 U.S. 726 (1978).

12. *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).

13. *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). *But cf.* *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (declaring unconstitutional an ordinance permitting peaceful labor picketing, but prohibiting other peaceful picketing, of schools).

14. 424 U.S. 828, 840 (1976). For a related (and equally severe) decision, see *Brown v. Glines*, 444 U.S. 348 (1980).

15. See Address by Mr. Justice Stewart, before the Yale Law School Sesquicentennial Convocation, New Haven, Conn. (Nov. 2, 1974), reprinted in part as *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

16. The first amendment sets forth an explicit, additional, prohibition of laws abridging freedom of the press ("Congress shall make no law . . . abridging the freedom of speech, or [the freedom] of the press . . .") U.S. CONST. amend. I (emphasis added).

pers of general circulation) has recently been singled out with particular neglect by the Supreme Court, recurring to Mr. Justice Stewart's suggestion may now seem more timely than when originally advanced. That is, reconsideration of the idea may commend itself as yielding some prospect of providing a better shelter than the poor shelter press claims appear now to receive. Moreover, even if it were not true that "the press" is in fact worse off than others seeking adjudication of their first amendment claims, the idea of reconsidering the logic of addressing "press" claims differently (and more sympathetically) might still commend itself. If all are faring badly under today's judicial renderings of the first amendment, that yields no reason why at least journalists and newspapers of general circulation should not seek an appropriate, more sheltered place of their own—especially if the first amendment itself contemplates that shelter.

The literature on this subject is, however, already very substantial,¹⁷ and there is surely no purpose to be served by pretending to reinvent the wheel. Thus, this is but a comment on the subject, and it proceeds briefly in three parts. First, simply for perspective, it examines whether the press' own published impression that it has recently been treated with particular judicial harshness is well taken, *i.e.*, is "the press" currently worse off under the first amendment than others whose first amendment claims have also been addressed by the Court in recent years? Second, it reexamines whether the press should be treated differently than others, at least insofar as that press (or some definable part of the press) is critically linked with the larger public's ability to inform its own speech. That is, why, indeed, is there as yet no "special"

17. I am heavily indebted to a great deal of that writing. See, *e.g.*, Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Blanchard, *The Institutional Press and its First Amendment Privileges*, 1978 SUP. CT. REV. 225; Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979); Jaxa-Debicki, *Problems in Defining the Institutional Status of the Press*, 11 RICH. L. REV. 177 (1976); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655 (1979); Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979); Comment, *Examining the Institutional Interpretation of the Press Clause*, 58 TEX. L. REV. 171 (1979). See also Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977).

first amendment fitted appropriately both to the press clause and to the obvious relationship between the public interest and the special protection of professional journalists? And third, virtually as a postscript, consideration of this subject in terms of our first amendment provides an appropriate place to say something about a subject that should be interesting even to people understandably impatient with the triviality of so much we write about particular, recent, narrow, and merely fashionable topics of constitutional law. The third section explores the issue of whether the existence of a first amendment ultimately makes a difference between the degree of American press freedom and the degree of press freedom enjoyed in such similar countries as Australia, England and New Zealand.

IS "THE PRESS" WORSE OFF THAN OTHERS?

One clear impression emerges from this survey of more than 175 years of press reaction to various freedom of expression issues in the United States. It is that, except when their own freedom was discernibly at stake, established general circulation newspapers have tended to go along with efforts to suppress deviations from the prevailing political and social orthodoxies of their time and place rather than to support the right to dissent.¹⁸

The felt need of professional journalists for greater breathing room within the first amendment admittedly does not and need not depend upon a belief that the press has received peculiarly short shrift in the courts. Nonetheless, an impression that newspapers are disfavored as a class is not without significant weight. If current first amendment doctrine, though "neutral" on its face, seems to weigh in with special harshness whenever a journalist or a newspaper is the litigant, then we are already at least half way home: We have made the case that new doctrines are needed to offset the de facto judicial prejudice against the press. The question as to whether "the press" is practically worse off than others asserting standing under the first amendment is not, therefore, of mere casual academic interest. The answer tends to affect our common sense respecting the appropriateness of "reinterpreting" the first amendment to combat any unfairness facilitated by the manipulability of current doctrines.

18. J. LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* 279 (1980).

But important or not, the subject will not long detain us. Occasional editorial assertions to the contrary notwithstanding,¹⁹ the answer to the question is "No." The press is not worse off than others, and the larger profile of first amendment cases of the immediate past decade provides no foundation at all for such a claim. Rather, what may more accurately be observed is a more general tendency that a number of recent press cases merely reflect: an overall conservative judicial rendering of the first amendment. In brief, press cases have simply been treated the same as other first amendment claims, which is to say not very well or at least not as well as some roughly equivalent claims were treated in the recent past. The retrenchment is a general one,²⁰ however, and provides no basis for "special" press solicitude or the fashioning of special press doctrines. The malaise, if it is a malaise, is one endured by a larger body of first amendment persons. Correspondingly, the redress, if there is need for redress, should likewise respond equally and across the board.

A review of the principal cases illustrates an earlier greater and now lesser valuing of free speech in general. In 1964, in *New York Times Co. v. Sullivan*,²¹ the Supreme Court extolled "the principle that debate on public issues should be uninhibited, robust, and wide-open,"²² sufficient to subordinate interests in reputation to protect even defamatory errors carelessly resulting from hurried journalism. In 1971, the court italicized that preference for a very free expression in *Rosenbloom v. Metromedia, Inc.*,²³ de-

19. For examples of the severe reaction of some of the press to recent Supreme Court decisions, see Address by Mr. Justice Brennan at the Dedication of the S. I. Newhouse Center for Law and Justice, in Newark, N.J. (October 17, 1979), reprinted at 32 RUTGERS L. REV. 173, 174-75, 178, 180 (1979). See also J. LOFTON, *supra* note 18 *passim*.

20. A major exception to this statement may appear to be required by the fact that "commercial" speech, formerly unprotected under the first amendment, see, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942), has in recent years received substantial first amendment protection. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 366-82 (1977); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 91-92 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). But, for reasons more elaborately examined elsewhere, these cases may more appropriately be viewed as part of a renewed interest by the Supreme Court in rights of property and of entrepreneurial prerogative. See Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, LAW & CONTEMP. PROB., Summer, 1980, at 66.

21. 376 U.S. 254 (1964).

22. *Id.* at 270.

23. 403 U.S. 29, 32 (1971).

claring that the same highly protective view of the first amendment would also apply to private persons attracting general interest. That free speech would be given robust protection indeed was signaled in the principal obscenity decision of *Redrup v. New York*²⁴ in 1967: Not only was the "most vulnerable" person test of *Regina v. Hicklin*²⁵ regarded as altogether impermissible under the first amendment, but *whatever* the sexual explicitness of material, as long as it was neither thrust upon unwilling adults nor vended to minors, the first amendment completely insulated it from police interference.²⁶

That the Court meant seriously what it said about "uninhibited, robust, and wide-open" speech was never made clearer than in the 1971 decision of *Cohen v. California*,²⁷ reversing a breach-of-peace conviction of one exhibiting his views of the Vietnam War by the plainly visible words "Fuck the Draft" on his jacket, worn in the public corridors of the Los Angeles county courthouse. Not the least remarkable feature of the case was that it was not Mr. Justice Douglas who wrote the majority opinion so powerfully applying the first amendment. Rather, it was "conservative" Justice Harlan who did so. That the public forum was very broad was also confirmed in *Brown v. Louisiana*,²⁸ the 1966 decision reversing a breach-of-peace conviction for a silent protest vigil inside the anteroom of a public library. It was followed by *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,²⁹ extending the first amendment even into the parking lot of a private shopping mall as a place where nondisruptive picketing could not be enjoined. And in 1969, the Court in *Brandenburg v. Ohio*³⁰ reformulated the clear and present danger test more concretely to provide fuller first amendment protection even for criminal advocacy

24. 386 U.S. 767 (1967) (per curiam).

25. L.R. 3 Q.B. 360 (1868); see text accompanying note 12 *supra*.

26. *Redrup v. New York* was a per curiam decision that had an important impact upon subsequent obscenity cases. The Court in *Redrup* suggested that the first amendment bars any conviction for obscenity unless the defendant has: (1) sold the alleged material to juveniles; (2) thrust the material upon unwilling adults; or (3) made sales in a "pandering" fashion, *i.e.*, advertising that emphasizes the sexually titillating nature of the material. Subsequently, courts utilized *Redrup* to reverse many obscenity convictions. See Teeter & Pember, *The Retreat from Obscenity: Redrup v. New York*, 21 HASTINGS L.J. 175, 188 nn. 95-97 (1969).

27. 403 U.S. 15 (1971).

28. 383 U.S. 131 (1966).

29. 391 U.S. 308 (1968).

30. 395 U.S. 444 (1969) (per curiam).

than can be found in any previous single case. "The constitutional guarantees of free speech and free press," the Court declared, "do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³¹

These were, by any fair reckoning, the brightest days for robust free speech and press we have seen in the American Republic. Some no doubt also regard them as among our worst, marked by a declining civility, a shrillness, and a constitutional permissiveness sometimes verging on social anarchy. Be that as it may, they clearly marked the high valuation of free-speech and free-press rights under a powerful and controlling first amendment.

And that decade is now long gone. *Metromedia* has been overruled,³² and the constitutional law of libel is now so very complicated once again that editors must be extremely careful before publishing materials that juries might find damaging to reputation. *Logan Valley* has been overruled as well,³³ so that the dimensions of the public forum available to lower classes have shrunk back to streets and to parks. The *Redrup* "test"³⁴ that adults may elect to read or see whatever they wish from the marketplace, without the state's presuming to sanitize that marketplace, is overruled.³⁵ Instead, such material may be totally criminalized except when judges deem it to be possessed of "serious literary, artistic, political, or scientific value."³⁶ And in these and in other decisions³⁷ of the past decade, we are made fully mindful that constitutional

31. *Id.* at 447 (footnote omitted).

32. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) (repudiating the plurality opinion in *Metromedia*). See also cases cited at note 3 *supra*; Note, *Whither the Limited-Purpose Public Figure?*, 8 HOFSTRA L. REV. 403, 423 (1980) ("Since *Gertz* the Supreme Court has enhanced the protection of individual reputations by continually refining the public-figure category; the result has been less protection for the press.").

33. *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976). But cf. *PruneYard Shopping Center v. Robins*, 100 S. Ct. 2035 (1980) (upholding California constitutional provision permitting exercise of free speech on privately owned shopping center property).

34. 386 U.S. 767 (1967); see text accompanying note 24 *supra*.

35. *Miller v. California*, 413 U.S. 15 (1973).

36. *Id.* at 24, 26. For a recent example of how the reigning "standard" operates, see *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

37. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*); cases cited at notes 10-11, 13-14 *supra*.

provisions are by no means self-defining or self-executing; they depend most conspicuously upon the temper, background, mood, and commitment of judges granted the power to apply them. Lately, free-speech and free-press rights have run into a new mood—a mood that esteems repute more dearly than speech, majoritarian notions of “decency” more preciously than freedom, and the exclusivity of property more emphatically than the communicative prerogatives of the relatively unwell-to-do.³⁸

These passing observations may scarcely be consoling either to the press or to libertarians in general. They are not offered for that purpose. They may nonetheless impose some larger perspective on the narrowness of press preoccupation with only those cases it finds peculiarly offensive to itself. The decision in *Houchins v. KQED, Inc.*³⁹ (sharply limiting access to jails), the judgment in *Time, Inc. v. Firestone*⁴⁰ (unleashing libel actions), and the opinion in *Gannett v. DePasquale*⁴¹ (foreclosing coverage of pretrial hearings), drew especially virulent editorial condemnation.⁴² But there was nothing special about these decisions: They are pieces in a mosaic descriptive of the seventies in which civility regained some slight edge that it had lost during the riskier, frontier first amendment days toward the end of the Warren Court. These decisions merely bound the press by limitations similarly binding upon others.

Finally, in one respect, at least, it may be well that this was so. For if, as suggested in the quotation opening this brief section, the press has a parochial tendency to take editorial alarm only when its own freedom is discernibly at stake, perhaps it is just as well that current first amendment doctrine makes no distinction between newspapers and unaffiliated citizens. That “we all lose” when the least among us loses is itself a thought worth remembering. That “the press” also has something at stake in the first amendment, though “the press” is not now the particular litigant in the Supreme Court, is not the worst doctrine we might want for our Constitution.

38. See Van Alstyne, *supra* note 20.

39. 438 U.S. 1 (1978).

40. 424 U.S. 448 (1976).

41. 443 U.S. 368 (1979).

42. E.g., Lewis, *The Open Disarray of Closed Justice*, N.Y. Times, Aug. 18, 1979, at A18, col. 1.

SHOULD "THE PRESS" BE TREATED DIFFERENTLY
THAN OTHERS? WHY, INDEED,
NO SPECIAL FIRST AMENDMENT?

Though the press has not fared worse than others under the first amendment, neither has it fared any better. Whether in respect to claims of access, privilege, libel standards, or still other concerns, it has been treated generally the same as others have been treated. There is, however, a distinct press clause in the first amendment. Moreover, the press is frequently described metaphorically as a "fourth estate" of government, which nonetheless institutionally stands apart from government, "checking" it through vigilant inquiry, publication, and editorial criticism.⁴³ Accordingly, the suggestion has been pressed with increasing frequency that "the press" should be treated differently and better.

On foundations of language, logic, and function, a respectable case can thus be made that "the role of the press" in relation to social justice requires not some "special" first amendment, but merely recognition, long overdue, that within the existing first amendment there is an explicit acknowledgment that laws valid as applied to others may not be equally valid when applied to the press. Among the several scholars, lawyers, and judges who have urged that the press by some means be treated better, perhaps Justices Powell and Douglas have put the point most emphatically: "In seeking out the news," Mr. Justice Powell has said, "the press . . . acts as an agent of the public at large."⁴⁴ Mr. Justice Douglas has declared:

In dealing with the free press guarantee, it is important to note that the interest it protects is not possessed by the media themselves. . . . "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. . . ."⁴⁵

Thus, the role of the press, whatever else it may also be, is allegedly first and foremost that of public fiduciary: To alert the public to defects and incidents of corruption in government; to dis-

43. See, e.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RESEARCH J. 521.

44. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

45. *Pell v. Procunier*, 417 U.S. 817, 839-40 (1974) (Douglas, J., dissenting) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting)).

cover and disseminate information about conditions otherwise kept from public view or which, if not hidden in a legal sense, are nonetheless unlikely to be discovered except by persons (namely, journalists) whose vocation it is to search them out and bring them to public attention as a catalyst for informed and democratic response. Though most important as a check on government, the responsibility of the press presumably extends to investigation and reporting of the private sector as well—insofar as the public cannot act with respect to private manipulations and abuses if it is kept uninformed of them by restraints laid down by laws and/or court decisions that throttle the press.

The argument, as best as I understand it, is therefore not that private speech or personal writings should in any respect be newly denigrated or deemed in any fashion less protected than each is presently protected under the first amendment. It is, rather, that in certain cases the vocational affiliation of a journalist with a regularly published newspaper of general circulation must not be regarded by courts as though it were without *additional* legal significance.⁴⁶ Allegedly, the press has a special first amendment significance of its own because a third-party first amendment interest—namely, “the public’s right to know”—is at once engaged in cases involving journalists, whereas that vital third-party interest is either not engaged at all or at best is only more remotely engaged when the case does not implicate the public’s own champion, *its* fourth estate, “the press.”

A single example may be sufficient to illustrate the argument. Surely it is true that mere considerations of administrative convenience are more than adequate cause to disallow ordinary vendors from forcing access to courtrooms, jails, and executive sessions of boards of county supervisors to see whether someone there might wish to respond to their solicitations. We have no doubt that this exclusion raises no substantial first amendment issue, even if we concede that, while within that courtroom, jail, or county office meeting room, the vendor might notice things he might subsequently mention to others as “odd,” disturbing, or out of the ordinary. Surely, it is also true, however, that we would not claim there is no substantial first amendment issue when a New York

46. The theme is emphatically developed, and several explicit examples are provided in Abrams, *supra* note 17, at 583-87. See also Nimmer, *supra* note 17; Sack, *supra* note 17, at 633-37, 648-54.

Times reporter or an AP stringer presents his credentials at the same door.

As a regulation of mere reasonable time, place, and manner, a flat, no-exceptions prohibition on commercial inquiries in courtrooms, jails, and executive chambers is assuredly valid.⁴⁷ Conversely, even as a regulation of mere reasonable time, place, and manner, a flat no-exceptions prohibition on news gathering in courtrooms, jails, and executive chambers, however, is assuredly doubtful—and almost certainly unconstitutional.⁴⁸ And Why? Presumably because the vendor's case only remotely engages any plausible public first amendment interest. In contrast, the journalist's case seems at once substantially and directly to engage two powerfully combined first amendment interests: the first amendment "freedom of the press" and, through the protection of that freedom, the public's "right" to know—a right without which the public's own freedom of speech can be but uninformed or misinformed.

I take it that the force of the argument for preferred press treatment may be readily extended to other areas of frequent controversy to round out a wider circumference of first amendment press rights in general. Thus, persons reposing confidence in private citizens who they anticipate might be subpoenaed to disclose that confidential information may be less willing to share what they know. But that potential loss of speech is one which is overcome by the "fair trial" needs of a criminal defendant, the indictment functions of grand juries, or even the legislative, fact-finding obligations of congressional committees. However, the case is arguably a different one when the individual facing subpoena is a journalist (who has come to some litigant's attention solely because the journalist's newspaper brought to public knowledge what the public

47. Although "commercial speech" (*i.e.*, communication proposing a sale or exchange) is no longer orphaned from the first amendment (*see* cases cited at note 19 *supra*), it remains subject to time, place, and manner restrictions far more severe than access restrictions applicable to noncommercial inquiries. *Compare* *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951) *with* *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943); *compare* *In re Primus*, 436 U.S. 412, 426-32 (1978) *with* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-62 (1978).

48. *Richmond Newspapers, Inc., v. Virginia*, 100 S. Ct. 2814 (1980). But is this the proper comparison? Is there any reason to suppose, for instance, that a flat ban on vendors in courtrooms would be invalid as applied to a newspaper vendor? Note that subject to some equivocation, *see* note 60 *infra*, the Court in *Richmond News* is careful not to undermine the position it took in *Saxbe and Pell*, *see* notes 44-45 *supra*, rejecting claims of "special" first amendment standing for "the press."

will be unable to learn about at all if those providing journalists with information must fear subpoenas). A reporter allegedly requires heightened first amendment protection, albeit not especially for himself and not merely for the immediate benefit of his informant. He requires it, rather, in order that the public interest in knowledge about serious matters not be impeded.⁴⁹ It is arguably contradictory to lay upon a journalist a professional command (a first amendment "duty" as it were) to report the results of his investigations to the public—and simultaneously subject him to conditions that render his performance of that very duty impossible. Yet, if a journalist cannot guarantee confidentiality to his sources, he often cannot perform his duty—and if he must go to prison as a condition of doing his job as a journalist, then not just he, but all the public, is worse off. Similarly, in ordinary libel cases a standard of liability for "negligent" damaging falsehood may very well be the appropriate general standard. But the self-censoring rules which newspapers will be forced to adopt if that standard is applied to them would compel them to suppress much truthful and important material as well; "reckless" carelessness in publishing damaging falsehoods should be required in damage actions brought against journalists in their professional capacity—lest the public's "right to know" be impaired.⁵⁰

In these and myriad other ways, then, a "system" of differentiated first amendment freedoms for the regularly reporting press can be articulated. Quite concretely, that system, if approved, may ambitiously secure greater protection to the regularly reporting press than to individuals in cases where public reporting is not involved or at best is tenuously involved. This system would provide the regularly reporting press with: (1) More substantial entitlements of access; (2) more substantial entitlements of confidentiality;

49. But see *Branzburg v. Hayes*, 408 U.S. 665 (1972). (But note that if newspaper reporters were able to invoke some degree of first amendment privilege, the "privilege" would not necessarily be different from or greater than that provided to many others with first amendment standing. See, e.g., *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).)

50. An excellent analysis defending the prudential wisdom of first amendment doctrines against criticism that they are excessively protective (i.e., shielding false and sometimes damaging speech unimportant to any first amendment value) is provided by BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978). As Professor BeVier notes, such doctrines do not currently favor or disfavor journalists vis-a-vis others who speak or write on issues of political significance.

(3) more substantial protections from libel; (4) more substantial exemptions from injunctions; and (5) more substantial immunities from searches and seizures. Moreover, to be fair to the argument, let us be quite clear that at no point does this "system" of exceptional press freedoms presume to assert an absolute immunity. Rather, it is a claim merely of a more limited accountability founded on the special linkage of the regularly reporting press to "the public's right to know."

If this appeal were otherwise sound, I do not think it would be vulnerable to criticism merely because there will be foreseeable difficulties in defining "the press." To be sure, that is a problem which we do not now have, insofar as there has been no Supreme Court ratification of this theory. No need has yet arisen in any case to define the "regularly reporting" press, to distinguish "professional" journalists, or even to determine whether the theory is appropriately limited only to those who are "journalists" (rather than, say, "authors" or "potential publishers"). But if the theory were sound, objections based on difficulties of definition would obviously not be conclusive per se. After all, those several state legislatures that have already adopted statutes⁵¹ establishing some kind of "reporter's privilege" have not found it impossible to draw some useful and presumably defensible lines. We have no reason to imagine that the problem would be insuperable if, aided by those legislative suggestions, the Supreme Court were to constitutionalize a "preferred" position for the regularly reporting press.⁵²

But despite the highly plausible logic that can thus be brought to bear to define additional free-press protections, the case for doing so is nonetheless very uneasy. Indeed, despite my own best effort to restate the case convincingly, on balance the case may be highly vulnerable on its merit. There are at least two reasons that make it much weaker than it first appears.

For one thing, in virtually every instance where the "public's right to know" is present—as the essential basis to assert a special press claim—that special public interest will simultaneously be off-

51. *E.g.*, ILL. ANN. STAT. ch. 51, §§ 111-119 (Smith-Hurd) (Supp. 1980-1981); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976).

52. For an amplification of the argument that problems of appropriate definition alone are insufficient to balk at the recognition of preferred press rights, see *Abrams*, *supra* note 17, at 580-83. For a concrete example of a "reporter's shield" law (applied to defeat a civil libel plaintiff's discovery), see *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 277 (3d Cir. 1980).

set and cancelled out by a countervailing reason of the same weightiness. Ironically, that cancelling, countervailing reason is itself inseparable from what the public is made to know by the regularly reporting press. Consider, for instance, the paradox of applying the argument of special protection to protect the regularly reporting press more than others might be protected in libel cases.

An individual who carelessly defames another in a private letter or in the course of a conversation with a friend may, to an extent that he may thereafter be sued successfully for libel or for slander, thus be more inhibited than he otherwise would be in his speaking and writing. Recovery is nonetheless allowed, and such recovery is deemed consistent with the first amendment, because we do not suppose that free speech should always be subsidized by those whom it palpably injures.⁵³ Rather, the libeler or slanderer is occasionally made to bear the cost of provable harm resulting from his speech or writing, and we do not regard this as inconsistent with the first amendment. The argument to require something more before a newspaper or journalist may be held liable in a like circumstance, we have seen, is predicated on the theory that the journalist is fiduciary of the public's right to know. Though the same observation applies to the individual, who may be inhibited from speaking or writing true statements as well as falsehoods, the loss of the public's right to know is not thought to be of the same magnitude.

On the other hand, the very fact that the careless falsehoods of a journalist are published in a newspaper of general circulation—that they are not just spoken to a single friend or written in a single private letter—commensurately magnifies the injury done to the defamed person. Surely it would be most ironic if, in cases of defamation, the rule of law were that (a) the greater the circulation of the libel to the public, then (b) the greater the constitutional privilege of the libeler.

Exactly the same cancelling consideration applies against special claims by reporters in regard to the general conflict of "fair trial" and "free press." An individual who would tell others that he knows of evidence the prosecution possesses but cannot use⁵⁴ may

53. The point is made forcefully in a recent article by Professor Ingber who developed quite a powerful argument for reinstating libel actions albeit with far more elaborate refinements than current doctrine recognizes. See Ingber, *supra* note 17, at 850-58.

54. *E.g.*, evidence excluded under some mere rule of evidence or evidence barred by operation of a constitutionally mandated exclusionary rule.

have only a trivial effect on the ability of the accused to secure a fair trial; if the teller's tale is but a fragment of private, circulating gossip, there may be little difficulty in impaneling a literate jury neither affected by nor even aware of it. However, if a journalist publishes the same story in his newspaper of general circulation (the very condition of invoking "the public's right to know") the danger posed by pretrial publication is far more clear and present than were a newspaper of general circulation not involved. Again, it would be ironic if the rule of law in pretrial-restraint cases were that (a) the greater the likelihood that publication will increase the difficulties of securing a fair and impartial jury, then (b) the greater the constitutional exemption of the publisher from pretrial restraints.

In some measure, the same observation can be offered as well in attempting to apply the theory of preferred protection for the press even in respect to confidentiality of news sources. Superior protection of such confidentiality is thought to be important because the public (and not just the newspaper) will suffer if individuals supplying information must fear the subsequent disclosure of their identities. On the other hand, superior protection from forced disclosure of news sources may also mean merely that journalists are at greater liberty to *invent* the news; a priori, greater immunity from having to validate a story plainly can be as much an incentive for sensationalized fiction as for the fearless reporting of actual corruption. And we have ample a posteriori experience in this country to know that the supposition is true. The regularly reporting press in the United States includes the *National Enquirer*, *True Detective*, *The Globe*, and an enormous staple of lesser tabloids and journals, as well as the *New York Times* and *The Christian Science Monitor*. Again, it would be a most peculiar rule of law which would provide that (a) incentives for profit by fictionalizing stories in the regularly reporting press (and exceptional protection of source confidentiality is one such incentive) should be greater than (b) incentives furnished to those not published either generally or for profit.

None of this is to say that "the press" should therefore be treated *less well*⁵⁵ under the first amendment than unaffiliated per-

55. Although that, in fact, was the original manner in which the press was distinguished under English law. See note 71 *infra* and accompanying text. May it have been explicitly to insure that "speech," though mass-produced by inexpensive presses, was *not* to be treated on that account as systematically different from more

sons, isolated pamphleteers, etc. But insofar as "the public's right to know"⁵⁶ is invoked as the principled distinction to establish preferred status for the regularly reporting press, it is a distinction that assuredly cuts both ways. The conjunction of freedom of the press with "the public interest" is a conjunction a priori adequate to distinguish the regularly reporting press from all others, to be sure. But the distinction it yields is logically a distinction that may render newspapers more, rather than less, accountable for what they publish: (a) less entitlement to withhold sources (in order that the public may know the source and thus be better able to judge for itself the credibility of the report); (b) less immunity from pretrial restraint (in order that the accused not be substantially handicapped in securing a fair trial); and (c) greater liability for damaging and false reports (in keeping with the magnitude of reputational harm commensurate with public circulation of the falsehood from a seemingly credible source).

To make the point plainer still, consider the comparison between "special" first amendment protections for journalists, and "special" first amendment protections for academics.⁵⁷ It is now fairly familiar learning that at least in respect to their professional utterances (e.g., their selection of material for use in the classroom), public school teachers and public university professors are protected by a latitude of first amendment protection greater than that which can be successfully asserted by other kinds of public employees—protection identified with their "academic" freedom, i.e., their duties as academics.⁵⁸ What is less frequently noted in

ordinary (i.e., oral) expression, that the first amendment was composed as it was? Compare *Abrams*, *supra* note 17, with *Lange*, *supra* note 17.

56. For a recent, highly critical review of this alleged right, see BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980).

57. See generally R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); Lovejoy, *Academic Freedom*, in 1 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 384-87 (1930). For discussions attempting to develop a coherent first amendment subset of "academic freedom" (as distinct from protecting faculty members merely as citizens in respect to speaking and writing nonprofessionally about controversial political subjects, see, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 568-70 (1968)); see Van Alstyne, *The Specific Theory of Academic Freedom and the General Issues of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM* 59 (E. Pincoffs ed. 1972).

58. See, e.g., *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1152-55 (N.D. Ala. 1980); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). *Epperson v. Arkansas*, 393 U.S. 97 (1968), is paradigmatically an academic freedom case, but was in fact decided wholly without reference to academic freedom.

respect to academic freedom, however, is that it is by no means a one-way street, that is, it is not a concept that merely enlarges the first amendment status of academics. It is quite true that first amendment-rooted claims of academic freedom will enable a professional educator to address theories pertinent to the general subject of his instruction, and/or to utilize certain instructional materials despite the contrary demand of the state, and to resist the state on a first amendment claim of academic freedom. It is also true, however, that there is a trade-off properly imposed upon professional academics. While they may defend against charges of insubordination—insofar as they ignore public law directives that foreclose a professionally defensible treatment of a given subject—on grounds of academic freedom, they are simultaneously subject to a professionally taxing standard of accountability. That is, academics are subject to a higher standard of care than one of but ordinary, layman's care.

An academic cannot be discharged because of the felt perniciousness of what he exposes as a germane theory in a course on political theory, on anthropology, on psychology, on astronomy. He may readily be discharged insofar as the presentation lacks professionalism, however, though publication of the same unprofessional (or merely nonprofessional) presentation in general would not be punishable and would, rather, merely enrich the author.⁵⁹ The first amendment frees the general public to be "careless" in declaring what the law is, in writing and in publishing what the law is, though anything more than the most casual investigation would have disclosed that the cases relied upon and cited in the presentation have long since been overruled, or the statute said to be dispositive has in fact been repealed. Chronic carelessness of this genre is more than adequate cause to propose the termination of an academic, however, and not "despite" claims of academic freedom but, rather, as implicitly consistent with special academic obligation—an obligation of professional care. The "system" of first amendment academic freedom is, in this respect, symmetrical: atypical prerogatives of professional discretion in the selection and presentation of teaching and research; atypical requirements of accountability applicable to the professional.

Equivalently, were journalists to be "specially" regarded under the press clause of the first amendment, the question is an

59. See the discussion in Van Alstyne, *supra* note 57.

open one: In what respects might they be "special"? One answer (not the answer some of the press may have been thinking about) is that they are to be "specially" accountable, *i.e.*, more answerable than laymen. A symmetry may thus emerge in respect to reporters that trades off some special advantages for some special liabilities. For instance, if journalists may assert access to certain public facilities either in "first amendment preference" to laypersons (as when space is limited)⁶⁰ or in first amendment exclusion of laypersons (as when the meeting is "closed"), it may follow symmetrically that the ensuing published story must meet a standard of professionalism commensurate with the privileged standing of the reporter. A "careless" story, a story misreporting what was said, a story shaded to leave out of account pertinent counterpoints developed in the course of the meeting, thus becomes professionally irresponsible, giving rise to the termination of the journalist's employment and/or liability. By no means, however, would such a story be adequate to sustain a cause of action for damages, a retraction, or something else if published on the authority of one acquiring it under no claim of special first amendment access. The point does not necessarily mean that journalists (and their newspaper employers) can make no case at all for special first amendment treatment. It does, however, indicate that they must simultaneously take into account the full, logical implications of that treatment.

A second, intimately related consideration also suggests that the press should not advance a claim to preferred first amendment treatment as a fiduciary of "the public" and the public's vaunted "right" to know. Currently, despite the colloquial identification of the press as "a fourth estate," insofar as the press has power of its own (that often usefully checks and balances the established power of government) it may operate most effectively and most legitimately precisely because it forms no part of government. Each journal, whether trashy and truckling or fearless and admirable, does not now submit its editorial autonomy to public regulation.

60. Dicta in *Richmond Newspapers* raise this as a real possibility. See 100 S. Ct. at 2830 n.18 (Burger, C.J., majority opinion); *id.* at 2840 n.3 (Stewart, J., concurring). Compare those two with the more careful noting of the problem by Mr. Justice Brennan. *Id.* at 2832 n.2 (Brennan, Marshall, J.J., concurring in judgment). This way of resolving "scarcity" of access by conferring special preferred access rights upon journalists (or, indeed, upon only certain journalists) may at once be employed to impose a legal demand of greater accountability, accuracy, and care of what they alone are thus especially privileged to see and to record. See text accompanying note 72 *infra*.

The point is an important one. It was made most emphatically in the Supreme Court's unanimous decision in *Miami Herald Publishing Co. v. Tornillo*,⁶¹ invalidating a state statute requiring a newspaper to furnish "reply" space to any candidate for public office dealt with in disparaging fashion by that paper. Quoting Chafee's observation that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper,"⁶² the Court denied the propriety of a statute that attempted, even to the extent to furnishing a mere right of personal reply, to interfere with the editorial autonomy of newspapers. In doing so, the Court was but echoing an observation offered more than a century and a half earlier by Thomas Jefferson:

I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of these who write them . . . It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.⁶³

It is exactly the same spirit that led Mr. Justice Douglas in *C.B.S. v. Democratic Nat'l Comm.*⁶⁴ to disagree vigorously with the very different holding of the Court in *Red Lion Broadcasting Co. v. FCC*,⁶⁵ which sustained the FCC's regulatory demand that radio and television licensees at once notify and offer free reply time to any person dealt with disparagingly in the context of some controversial public topic. "Both TV and radio news broadcasts, Douglas noted, 'frequently tip the news one direction or another and even try to turn a public figure into a character of disrepute.'"⁶⁶ "Yet," he quite rightly observed, "so do the newspapers and the maga-

61. 418 U.S. 241 (1974).

62. 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947), quoted at 418 U.S. at 258.

63. T. JEFFERSON, DEMOCRACY 150-51 (S. Padover ed. 1939). See also Jefferson's reflections on newspapers in his letter to John Norvell, written in 1807:

Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle. . . . I will add, that the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors.

Letter from Thomas Jefferson to John Norvell, from Washington (June 11, 1807), reprinted in part in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 581, 581 (A. Koch & W. Peden eds. 1944) [hereinafter cited as THOMAS JEFFERSON].

64. 412 U.S. 94 (1973).

65. 395 U.S. 367 (1969) (Justice Douglas did not participate in the *Red Lion* case.).

66. 412 U.S. at 155 (1973) (Douglas, J., concurring in judgment).

zines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of Government.”⁶⁷

But note at once how this important security of the fourth estate from the encumbrance of public regulation respecting the content of private commercial publications may be at risk if one’s accent is not on the freedom of the press but is, rather, on the public’s right to know. In the *Red Lion* case, the Court accepted the view that radio and television are not like newspapers and magazines; they are, rather, licensees permitted *special* access to a limited number of airwaves which are awarded without charge. The superior and exclusive access right provided to a given licensee for a particular wavelength and territory is not determined by some random lottery among applicants; it is determined by choosing among rival applicants the one whose proposed programs will best serve “the public interest,” with each such licensee “agreeing” as well to abide by additional program content regulations believed to assure that public interest. Here, the Supreme Court declared, “[I]t is the right of the viewers and listeners, *not the right of the broadcasters*, which is paramount.”⁶⁸

It takes little imagination to understand how readily adaptable that dictum would be to any claim a newspaper might make successfully for special first amendment treatment linked to the “public right to know.” As some say, “[i]n dealing with the free press guarantee, it is important to note that the interest it protects is not possessed by the media themselves,”⁶⁹ but by the public. That view, however, has double-edged implications. If only an accredited newspaper reporter may inspect a jail, though a member of the NAACP, a representative of some splinter political party, or a feature writer of a pulp magazine may not, then surely it will become reasonable to attach strings to the privilege so extended to “accredited” journalists alone. If only members of “the [special] press” may attend a pretrial suppression hearing, undoubtedly it seems just to impose additional restrictions of “fairness” and limitation on the story the press reporters are privileged to file. If reporters can be successfully sued for libel only if their damaging falsehoods were “reckless,” while common back fence gossips may be successfully sued for merely “negligent” libel, then surely it is

67. *Id.*

68. 395 U.S. 367, 390 (1969) (dictum) (emphasis added) (citations omitted).

69. *Pell v. Procunier*, 417 U.S. 817, 839-40 (1974) (Douglas, J., dissenting).

also fair for reporters to be more, rather than less, subject to subpoenas and written interrogatories compelling disclosure of their sources—to determine whether in fact they were reckless. The greater privilege of a reporter in regard to defamation (to serve the public's right to know) may entail a greater duty (to serve the public's right to know his sources)—or so, at least, a consistent, logical, and altogether straightforward argument can be made.⁷⁰

Not long after William Caxton introduced the first "modern" press to England (a Guttenburg press with movable type), the Crown recognized the special ability of such instruments to reach large audiences cheaply. The recognition that the press was therefore "special" developed virtually at once into a regime of special regulation: No press could be owned except as registered, and nothing could be printed save what the Stationer's Monopoly and Star Chamber determined to be in the public interest. Precisely because the press was special in its capacity to influence the public's "right to know" in England, it was thought suitable to impose a special order to secure it from unsafe and promiscuous uses.⁷¹

Today's *deja vu* of that controversy is cosmetically distinguishable. While each owner of a mimeograph machine or each person with access to a Xerox copier is not so inextricably linked with the public interest to warrant distinctive treatment under the first amendment, working journalists and most if not all of the regularly reporting press may be thus distinctively linked. As to them, the issue is not fundamentally different from what it became in England, after 1476. It is recast in terms of the separateness of the press clause and notions of fiduciary privilege to serve "the public right to know." But the lure is still to command their separation from others also sheltered by the first amendment—to find "different" standards suitable for "the press."

To be sure, we have been examining the controversy from the perspective of argument that seeks only specially to *advantage* "the press," rather than to disadvantage it. But the difficulty of the argument is that the best reasons for favoring a privileged press are

70. For a discussion of techniques of imposing access rights to newspapers on behalf of third parties, based partly on arguments directed against every sort of any special governmental aid involved in the newspaper business, see Yackle, *Confessions of a Horizontalist: A Dialogue on the First Amendment*, 27 KAN. L. REV. 541 (1979).

71. See F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776* (1952), and the several references in W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1924). See also Abrams, *supra* note 17, at 575 n.79 (1979).

identically the best reasons for imposing special burdens upon that same press. We have carried over from the English libel *per se*, and we have already imposed upon radio and television substantial "public" obligations—in exchange for exclusive, cost-free licensing privileges—that illustrate how these trade-offs tend inevitably to work themselves out.⁷² There is no reason to suppose that the matter will be different for newspapers should they, too, "succeed" in securing particular rights, privileges, exemptions, or immunities that a crank pamphleteer, for example, cannot claim under a single and indivisible amendment.⁷³

My own conclusion is, therefore, that it is not *infeasible* to define a class of journalists and to give special first amendment protections to those scribes. Rather, it would be a *mistake* to do so. Presumably the definitional line would have to be drawn in relation to the cohort of journalists who are "responsible," who will not merely march to their own interests or those of commercial publishing firms, but who faithfully abide by "public interest" standards—standards that make them more like commentators on the BBC: admirable, restrained, and less free than the muckrakers and the lone pamphleteers. For all journalists to aspire to be professional, ethical, altruistic, and mindful of the public interest in their work is assuredly desirable. It seems doubtful, however, that either the press or the public would gain much from a constitutional separation that would establish caste distinctions within the fourth estate: one group enjoying certain additional privileges, but subject also to certain additional accountabilities; the "rest," indistinguishable from any person who may own a mimeograph machine, having only "ordinary" first amendment rights, but unburdened by the extra baggage of a fiduciary's "public" obligations. I thus agree wholeheartedly with the well-stated conclusions of Anthony Lewis, who covered the Supreme Court for the *New York Times* for many years:

Freedom of the press arose historically as an individual liberty. Eighteenth-century Americans saw it in those terms, and the same view is reflected in Supreme Court decisions; freedom of

72. See, e.g., Powe, "Or of the [Broadcast] Press," 55 TEX. L. REV. 39 (1976); Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539 (1978).

73. The same point is very persuasively developed in Blanchard, *supra* note 17. See BeVier, *supra* note 56; Bezanson, *supra* note 17; Lange, *supra* note 17; Lewis, *supra* note 17; Comment, *supra* note 17, at 190-96.

speech and of the press, Chief Justice Hughes said, are "fundamental personal rights." To depart from that principle—to adopt a corporate view of the freedom of the press, applying the press clause of the first amendment on special terms to the "institution" of the news media—would be a drastic and unwelcome change in American constitutional premises. It would read the Constitution as protecting a particular class rather than a common set of values. And we have come to understand, after much struggle, that the Constitution "neither knows nor tolerates classes among citizens."⁷⁴

WHAT DIFFERENCE DOES THE FIRST AMENDMENT MAKE?

This essay has addressed recent cases involving the press wholly in first amendment terms. Admittedly very narrow in its preoccupation with constitutional doctrine, it is by no means atypical in this respect. Statutory and common law developments are doubtless of immense practical significance in their own right, but we take it virtually as given that when we "really" wish to know how safely or how freely publication can proceed against the persistent tendency to censor or to suppress, meaningful discussion will turn at once to the first amendment.

Indeed, the first amendment may be regarded as so central to the meaningful protection of free speech and press in the United States, that even Tocqueville's familiar observation⁷⁵ fails adequately to have anticipated the American propensity. It is not merely that political questions in this country have tended generally to have become adjudicated questions; it is, rather, that the most significant political and legal questions have tended to become constitutional questions. This appears emphatically to be so with respect to speech and press. Whether the subject is contempt of court, access to government places, privileges of confidentiality, varieties of prior restraint, standards of libel, the actionability of seditious utterance or something else still again, they are all first amendment questions with us. It scarcely strains the truth to suggest that in the United States, therefore, imagining a free press without a first amendment is as difficult conceptually as attempting to imagine a powerful Archimedean lever without a fulcrum. The

74. Lewis, *supra* note 17, at 626 (footnotes omitted).

75. "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Knopf ed. 1946).

very idea is a paradox. The first amendment *is* the fulcrum; it alone, ultimately, provides a reliable purchase for the leverage of a free, diverse, and boisterously robust press in the United States.

The assumption of first amendment centrality is not, of course, based simply on the presence of the amendment *per se*, that is, it is not derived merely from the "pie in the sky" rhetoric of the amendment itself: There is surely general recognition that a number of nations (including the Soviet Union) have some kind of parchment facsimile to the first amendment—but of no equivalent efficacy. Rather, reliance upon the first amendment as tending to make a critical difference in conditions of free speech and press takes into account not merely the amendment's own near-absolute language, but its structural outfitting within the legal system as well. That "outfitting" provides that the amendment has a positive law (rather than a merely precatory) significance; the amendment is established as part of the supreme law and discountenances all inconsistent lesser enactments. Its application is committed to life-tenured judges virtually unremovable by government. It may be invoked readily in litigation by private parties. It is alterable as supreme law solely by federal processes of amendment quite deliberately stacked against the feasibility of precipitate change—extraordinary two-thirds majorities of both houses of the national legislature must propose a change, unless, as has never happened, concurrent resolutions by two-thirds of the state legislatures precipitate an amending convention, and that change will fail unless three-fourths of the state legislatures separately concur in the change as well.⁷⁶ One, or another, or all of these features are lacking in India, in Korea, in Chile, in Saudi Arabia—to recite the names of some few countries jingoistically included in the "free world" to contrast them with "communist" countries—and insofar as they are lacking, conditions of press freedom seem, from time to time, to be utterly insecure.

Yet, if this much is true, it is also true that there are some national aberrations that would seem to give us pause. One such anomaly is that our own most look-alike neighbor, Canada, has no first amendment. The most recent efforts by the Canadian Prime Minister to put a U.S.-style bill of rights into the Canadian constitution, moreover, have been rebuffed. As reported by the Asso-

76. U.S. CONST. art. V.

ciated Press in early September, 1980, Mr. Trudeau's effort encountered strong opposition because provincial leaders "object to having the courts, rather than legislative bodies, interpret the application of such basic rights as freedom of speech or of the press, as in the United States."⁷⁷ In England, which we also do not reflexively dismiss as unfree or intolerant, the situation is the same. In 1980, the basic law of England is as Lord Chief Justice Holt observed it to be in 1700. "An Act of Parliament," he noted, "can do no wrong, though it may do several things that look pretty odd."⁷⁸ In New Zealand also, free speech and press disputes are resolved wholly without benefit of a written constitution.⁷⁹ And in Australia, there is a written constitution and, as in the United States, it is superintended by the power of judicial, substantive constitutional review. But the Australian Constitution has no provision extending substantive constitutional review to the protection of free speech or press, because Australia has no equivalent at all to our own first amendment.⁸⁰

77. Associated Press wire story, reprinted in *Durham Morning Herald*, Sept. 11, 1980, at 17C, col. 2. A similar account is given in *N.Y. Times*, Sept. 11, 1980, at A3, col. 4 (city ed.). For a subsequent report that an effort would be made (as predicted in the *N.Y. Times* article, *supra*) to secure an entrenched bill of rights without provincial approval, see *Christian Science Monitor*, Oct. 6, 1980, at 1, col. 2.

78. *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (1700). Evidently, the situation is essentially the same today: "In Britain, the phrase 'judicial review' is merely a flattering way of describing statutory interpretation—the judicial approach to which is confined by strict rules, though there are signs in recent cases of a more liberal approach developing." Scarman, *Fundamental Rights: The British Scene*, 78 COLUM. L. REV. 1575, 1585 (1978). See L. SCARMAN, *ENGLISH LAW* 76-82 (1974). For a recent review of developments in England, see Karst, *Judicial Review and the Channel Tunnel*, 53 S. CALIF. L. REV. 447, 447 (1980) ("The issue has not exactly captured the British public's interest.").

79. For a recent review of legal developments in New Zealand respecting the law and the press, see Burrows, *The Law and the Press*, 4 OTAGO L. REV. 119 (1978). While noting that there have been no prosecutions "for either blasphemy or sedition in New Zealand for a very long time," *id.* at 122, Burrows also comments that "that great journalistic event that we know simply as 'Watergate' would never have got off the ground in New Zealand or Britain . . ." *Id.* at 126. For additional views of free speech, the press, and a Bill of Rights for New Zealand, see *ESSAYS ON HUMAN RIGHTS* (9th ed. K. Keith, 1968).

80. For a recent review, see E. CAMPBELL & H. WHITMORE, *FREEDOM IN AUSTRALIA* (1973). In their most pertinent chapter ("Constitutional Protection of Human Rights"), the authors observe that "[e]xamples can be found of Australian laws, which, if judged by, say, the United States Bill of Rights, would probably be found unconstitutional." *Id.* at 455. Still they conclude, "We ourselves have yet to be persuaded that a Bill of Rights, especially of the entrenched and judicially enforceable variety, would inevitably provide better security against unwarranted invasions of individual liberty than is provided at present." *Id.* at 455. For two very recent com-

Despite stirrings in each of these countries, moreover, there currently appears to be no sufficient enthusiasm to adopt an American-style constitution with a first amendment provision "guaranteeing" free speech or a free press from governmental abridgment. In fact, therefore, it is not easy to match the actual conditions of free speech and press by uniformly correlating one's impressions of those actual conditions with the presence or absence of a first amendment, akin to our own, enforced by an entrenched judiciary equivalent to our own. On second impression, then, it is much less clear what difference a first amendment makes. Our domestic rhetoric (and "first amendment" preoccupations) suppose that it is indispensable to the adequate protection of free speech and a free press. Equally literate, English-speaking countries otherwise sharing a common legal system evidently regard such an entrenched provision as altogether dispensable and, evidently, not sufficiently useful even to be worth its occasional perplexities or marginal social costs. It is implausible to suppose that we may both be right about this matter.

It is quite possible, however, that "we" may both be quite wrong—at least insofar as the respective positions as described above do not significantly exaggerate the tendency domestically to regard an entrenched first amendment as indispensable, and the tendency among our Blackstone relatives to regard it as altogether inconsequential. As the occasion to prepare this brief review of one of our domestic first amendment issues was originally this larger occasion—that is, to examine comparatively the course of free-speech developments among the several former western colonies of England since the death of William Blackstone just two centuries ago—invariably the question of what difference the first amendment makes intruded itself into every comparison.

No confident single answer emerges, but I believe the American example, while much too frequently oversold (and thereby discredited by the extravagance of domestic claims), may yet commend itself abroad—at least, as in Canada, Australia, New Zealand, and in England, where conditions are not radically dissimilar from conditions here, and where there appears little to dread from a judiciary itself not very radical and unlikely to run amuck. I mean to extend this essay briefly, to offer a mild defense for this suggestion.

parative reviews of press rights in Australia and in New Zealand, see Hunt and McCarthy, *Why No First Amendment? The Role of the Press in Relationship to Justice*, in *AMERICAN/AUSTRALIAN/NEW ZEALAND LAW* 133, 147 (1980).

And to put the answer at the outset, it comes to this: A judicially enforceable, "entrenched" first amendment is doubtless not indispensable to the maintenance of free speech and, assuredly, provides no ultimate check at all against a persistent general spirit of intolerance. It may add a useful assistance to free speech and to a freer press than may otherwise tend to find stable support in its absence, however, and provision for such an amendment need not be seen at all as requiring a "trade off" for other kinds of protection which the legal system of a country otherwise already provides. As an estimate of whimsy, in comparing the precedents and writings among our western Blackstone cousins, I think the first amendment may make about a 12% difference (a great deal less than that in some areas, somewhat more in others)—not enough to be startling, yet, oddly, just enough to make it a safe venture—and thereby, quite possibly, a commendable one as well.

The principal problem with commending the first amendment abroad is that it has been so extravagantly praised and extolled in the United States (even as reflected in our tendency to invoke it as a law of first recourse, rather than as a matter of last resort), that literate critics abroad, once piercing the fraudulence of such a claim, are at once inclined to dismiss the amendment as well. The argument that no parchment barrier (even assuming it may be judicially enforceable) is either a necessary or a sufficient proof against judicial vagary or persistent intolerance was made in this country very early and equally forcefully and well. It was altogether smartly put forward in Alexander Hamilton's own best argument against the usefulness of providing a Bill of Rights. In *Federalist* 84, Hamilton made his argument with particular reference to the pointlessness of providing special protection for freedom of the press, in terms I know to be still fashionable abroad:

What is the liberty of the press? Who can give it any definition which would 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. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.⁸¹

81. *THE FEDERALIST* No. 84, at 514-15 (A. Hamilton) (C. Rossiter ed. (1961)) (footnote omitted).

The point is well taken; American history is littered with illustrations which amply fulfill it. The first amendment did not forestall the enactment of the Sedition Act⁸² a bare seven years following its ratification,⁸³ it did not keep away the Espionage Act⁸⁴ following World War I,⁸⁵ it did not inhibit passage of the Smith Act⁸⁶ just prior to World War II⁸⁷—and all of these were sustained in highly repressive applications as not unconstitutional abridgments of speech or press.⁸⁸ Even publication of the Pentagon Papers (the revelations of which were rather mild and whose compromise of “national security” was not at all self-evident) failed to command unanimity of judicial protection against the effort to suppress that publication.⁸⁹

Indeed, not until 1931 was a single state statute invalidated in the United States by the Supreme Court on the ground that it trespassed the constitutional protection furnished to freedom of the press.⁹⁰ Moreover, not until 1965 was an Act of Congress held invalid by the Supreme Court on grounds that it violated the first amendment.⁹¹ As literate foreign jurists are well aware, moreover, sensitive and well-regarded contemporary American judges have evidently shared Hamilton’s very skeptical view. Thus, late in his career (that included Nuremberg as well as our own Supreme Court), Robert Jackson somberly observed: “I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions.”⁹² Much to the

82. Ch. 73, 1 Stat. 596 (1798) (expired March 3, 1801).

83. For a review of the early cases and a telling critique of the whole period, see L. LEVY, *THE LEGACY OF SUPPRESSION* (1960).

84. Ch. 30, 40 Stat. 217 (1917) (current version at U.S.C. §§ 792-799 (1976)); see also E. HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* (1963); J. LOFTON, *supra* note 18; F. WHARTON, *STATE TRIALS OF THE UNITED STATES* 333-44 (reprint 1970) (Phil. 1849).

85. The cases are fully (and critically) reviewed in Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

86. Ch. 439, § 2, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1976)).

87. The Smith Act is quoted, applied, and sustained in *Dennis v. United States*, 341 U.S. 494 (1951).

88. *E.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919).

89. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

90. See *Near v. Minnesota*, 283 U.S. 697 (1931).

91. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

92. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80 (1955).

same effect is the equally familiar observation of Judge Learned Hand:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.⁹³

I am aware of no satisfactory basis for dismissing these complaints because I think they are entirely well taken. Our own history stands against the notion that the first amendment is a sufficient condition against a general intolerance; it readily yields ample illustrations of zigzag vagaries of judicial "deference."⁹⁴

Nevertheless, it may also be true that these criticisms are actually *too* fundamental, *i.e.*, that they presuppose too strong a case proposed in defense of the first amendment, thus overlooking a more moderate view of the matter. The case cannot now be made and was not made in the beginning that the first amendment is either crucial or sufficient. Rather, the case was suggested, and may even now be maintained, that it is simply more helpful than not. Even the amendment's principal sponsors felt that it would be merely so. Discussing the subject in his correspondence with James Madison, Thomas Jefferson suggested that so far as relying on the people, elevation of particular rights in a permanent, written constitutional text might at least afford a visible source more helpful than mere omission as a reminder of those rights.⁹⁵ As to the courts, Jefferson noted (in anticipating *Marbury v. Madison*⁹⁶), a "declaration of rights" will "put into the hands of the judiciary" a "legal check" which, whatever the difficulties of marginal application, might be useful when popular sentiment flagged.⁹⁷ With no illusions that judges would be either sufficiently resolute or able without support to stand against every crisis, and with none that a

93. L. HAND, *THE SPIRIT OF LIBERTY* 189-90 (1953).

94. For a recent critique, the very title of which sums up this thesis, see Kurland, *The Irrelevance of The Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 *DRAKE L. REV.* 1 (1979-1980).

95. Letter from Thomas Jefferson to James Madison, from Paris (March 15, 1789), reprinted in part in THOMAS JEFFERSON, *supra* note 63, at 462, 462-64.

96. 5 U.S. (1 Cranch) 137 (1803).

97. Letter from Thomas Jefferson to James Madison, *supra* note 76, reprinted in part in THOMAS JEFFERSON, *supra* note 63, at 462, 462.

written Bill of Rights can per se keep the spirit of a free press alive, Jefferson concluded with a moderate optimism that even now seems surprisingly mature:

The declaration of rights, is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object. . . . But though it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen, with that brace the less.⁹⁸

A very nice phrase, "A brace the more," which is probably about what one would want: The first amendment as a useful reinforcement "not absolutely efficacious under all circumstances," but "rarely inefficacious."

The reflections by James Madison, the principal author of the first amendment, were no more pretentious than those of Jefferson. Writing to Jefferson on October 17, 1788, but a few months after the eleventh state had ratified the Constitution, Madison summed up his view in favor of adding a bill of rights in the following diffident observation: "I have favored it because I suppose it might be of use, and if properly executed could not be of disservice."⁹⁹ Then, a little less than a year later, addressing the House of Representatives in support of the Bill of Rights he has just proposed, his enthusiasm is correspondingly mild:

I will own that I never considered this provision so essential to the Federal Constitution as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless.¹⁰⁰

The value, he suggests in the same address in Congress is, in part: "[i]f they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."¹⁰¹ And Madison's notes, jotted down

98. *Id.*, reprinted in part in THOMAS JEFFERSON, *supra* note 63, at 462, 462-63.

99. Letter From James Madison to Thomas Jefferson, from New York (Oct. 17, 1788), reprinted in V THE WRITINGS OF JAMES MADISON 269, 271 (G. Hunt ed. 1904) [hereinafter cited as JAMES MADISON].

100. Address by James Madison before the United States House of Representatives (June 8, 1789), reprinted in V JAMES MADISON, *supra* note 99, at 370, 380.

101. *Id.*, reprinted in V JAMES MADISON, *supra* note 99, at 370, 385.

to guide this extemporaneous address in Congress, sum up the matter in this fashion: "Bill of Rights—useful not essential"¹⁰²

It is noteworthy that the vagaries of judicial construction, the unreliability of Bills of Rights in times of felt crisis, their ultimate inadequacy even against persistent majoritarian intolerance, are all anticipated by our first amendment's own principal backers who, presumably, would correspondingly find the actual subsequent political and judicial history of the first amendment no very great surprise. It is at least as noteworthy, however, that they could also readily locate an impressive series of adjudications granting point, purpose, and application to the first amendment when other "checks and balances" on majoritarian and parliamentary intolerance have failed.¹⁰³ It appears to furnish about "12% difference" for the better.

102. *Id.*, reprinted in V JAMES MADISON, *supra* note 99, at 370, 389.

103. Whether under the common law of seditious libel, the Race Relations Act, the official Secrets Act, varieties of contempt powers, anti-obscurity (or "decency" acts), privacy laws, disorderly conduct, breach of peace, commercial regulations, permit controls, parliamentary supremacy principles, or the simple absence of a "first amendment" as the basis for resisting equivalent "laws," it is at least highly doubtful whether equivalently protective decisions can be found among the English decisions for any but a very few of the following cases: *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Miami Herald Publishing Co., v. Tornillo*, 418 U.S. 241 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Cohen v. California*, 403 U.S. 15 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *United States v. Robel*, 389 U.S. 258 (1967); *Redrup v. New York*, 386 U.S. 767 (1967); *Time, Inc. v. Hill*, 385 U.S. 274 (1967); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Kunz v. New York*, 340 U.S. 290 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Thomas v. Collins*, 323 U.S. 516 (1945); *Hartzel v. United States*, 322 U.S. 680 (1944); *Bridges v. California*, 314 U.S. 252 (1941); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The vast majority of cases providing effective vindication of first amendment rights against state and local measures do not generate any review in the Supreme Court. For an impressive recent example, see *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir. 1978). See also *Skokie v. National Socialist Party*, 69 Ill. 2d 605, 373 N.E.2d 21, 14 Ill. Dec. 890 (1978).

So modest a difference, though conforming well to the expectations of the first amendment's own endorers, may of course seem deflating. But it ought not be so. Rather, it may furnish some additional circumstantial evidence that, at the margin, an equivalent provision equivalently superintended may usefully commend itself to prudent persons in other nations not dramatically dissimilar from our own.¹⁰⁴

CONCLUSION

Most of this essay has been devoted to the recent rediscovery of first amendment syntax. By paying a little more attention (than has recently been customary) to the actual text of the first amendment, it has been noted that the amendment may mean that different kinds of protection are to be provided for press-related freedoms than for speech-related freedoms. Thus, the amendment declares:

Congress shall make no law . . . abridging
the freedom of speech, or
[the freedom] of the press.

In keeping with this rediscovery, it has not been much argued that "the press" must include literally any person who may happen to own or have access to any device capable of producing more than a single copy of printed matter. So broad a definition as this, leaving out virtually no one at all, fails usefully to say anything significant

104. In their seminal review of criminal jury trials in the United States (the right to such trials being a constitutional fixture of the sixth and fourteenth amendments, much as the right to free speech and press are constitutional fixtures of the first and fourteenth amendments), Harry Kalven and Hans Zeisel raised a similar question: The extent to which juries made any significant difference and, accordingly, whether as an institution, they were worth the bother. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). One part of their inquiry was to determine the extent to which juries tended to acquit an individual despite ample evidence of guilt, operating in this manner as an institutional veto on laws properly adopted and doubtless constitutional but simply not acceptable to some juries. Their best estimate was that the tendency of juries to do so was fairly slight, but nonetheless significant at least with respect to certain kinds of crimes. Thus they note at the very end: "We have noted that at this moment in history the jury's quarrel with the law is a slight one. But there have been times when the difference was larger and such times may come again." *Id.* at 499. Essentially, that is also what is being argued here with respect to the value of an entrenched first amendment as a limitation on parliamentary supremacy: For the most part, the difference between the judiciary's perception of what the first amendment allows and that of legislatures has in fact been a slight one. But there have been times when the difference was larger and such times may come again. When legislatures (and juries) share a joint intolerance, moreover, even a modest difference of judicial review may be important.

by way of distinguishing individual speakers or lone pamphleteers from those to whom the latter clause in the first amendment may in fact be specially addressed, namely, *the press*. Thus, to gain a more useful start on the problem, the more commonsense notion has been to begin with the most obvious and least controversial example of "the press," and thereafter to resolve the inclusion or exclusion of other parties by tests of functional verisimilitude with that press which, at a minimum, is indisputably part of "the press." The most obvious example of "the press" is the example of regularly published, privately owned newspapers of general circulation. Emphatically these were part of "the press" in 1791 when the first amendment was ratified. Surely they remain so today.

From this seemingly modest, attractive, safe, and altogether logical starting place, "the freedom" of this press thought to be specially protected by the clause is linked by argument with the general public's power of self-government. By emphasizing the general news-furnishing service of professional reporters associated with regularly published, privately owned competitive newspapers, the linkage with informing the public—acting as the public's "agent" as it were—is thought to be very significant. Its significance is in two parts. The first part is *doctrinal*, that is, it (allegedly) provides a basis for determining what is the freedom of the press that explains why the press may sometimes successfully rely upon first amendment privileges or immunities not available to others. The second part is *definitional*, that is, it (allegedly) provides a basis for determining who in addition to competitive newspapers of general circulation may also be members of "the press" that is meant to be specially protected by the press clause of the first amendment.

Doctrinally, the linkage between public information and newspapers of general circulation "as an agent of the public at large,"¹⁰⁵ or as "bring[ing] fulfillment to the public's right to know,"¹⁰⁶ is invoked to expand press freedoms beyond the mere speech freedoms of individuals, by way of analogy to doctrines of *ius tertii*. By relying upon first amendment rights in the public to receive information concerning public issues, and by noting that curtailment of newspaper publication and curtailment of reporters' claims of access, confidentiality, and immunity must necessarily operate to cut the public off from a primary and perhaps sole source of informa-

105. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

106. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

tion germane to the needs of self-government, the description of "the press" as public agent or fiduciary enables the press to argue that the third-party first amendment claims of the public are inextricably bound up with its own freedom. Thus, special access to courtrooms, legislative meetings, jails, etc., can be pressed in circumstances where the bar to entry might be valid against others. Similarly, subpoenas might be resisted—more importantly to protect prospective sources of significant information than prior confidential sources—which others might not successfully resist. And equally, limitations on liability that others might not successfully claim may be asserted—lest the intimidating effect of broad liability result in excessively squeamish editorial reluctance to publish anything other than demonstrably provable material. The general direction of the *ius tertii* argument, in rounding out the wider circumference of "the freedom" of the press thus comes readily into view.

Definitionally, the logical ramifications of "the press" as agent-of-the-public-right-to-know may very well presume to revise our notions as to what constitutes "the press." Currently, a political-party functionary, a merely curious citizen, an NAACP designee, a local radio station reporter, a budding author, and an AP stringer all have roughly the same first amendment credentials. Doctrinally, the proposed view of the press clause we have examined would appear to favor the AP stringer in a variety of significant ways—related to the press as agent of the public right to know—not applicable to the merely curious citizen. Definitionally, the local radio station reporter is more like the AP stringer than like the merely curious citizen. The political-party functionary, the NAACP designee, and the budding author are at the edge, arguably "in," but probably "out." To be sure, each has some communicative constituency in mind (in the case of the budding author the likely constituency may be somewhat speculative), although none otherwise fits any conventional notion of a member of "the press." Thus, in terms of the functional verisimilitude of each such person (*i.e.*, a reporting and informing function), each arguably has *some* third-party standing akin to that of the conventional reporter. From a less functional perspective of what may pass for a member of "the press," on the other hand, each tends to fail.

The approach is generally very beguiling, however, and perversely, the fact that it introduces a "new" issue into constitutional law probably actually adds to its attractiveness. Far from making one quake at the prospect of having to deal with an issue we have

not previously regarded as an issue at all, the idea of writing about and adjudicating who shall be deemed a member of "the press" for purposes of special first amendment privileges and immunities is positively charming. It is the very kind of thing lawyers and judges are most fond of doing: "Recognizing" a hard issue and proceeding to draw lines, offering distinctions, making comparisons—and expanding the complexity of constitutional law.

Nevertheless, spoilsport as it is, the burden of this essay has been to urge some further thought before rushing on like lawyers to the thrill of defining "the press" for purposes of applying a separate regime of first amendment analysis. And the reason for counselling such hesitation is not related to any problem associated with any difficulty of defining "the press"; to the contrary, lines can of course be proposed and the very prospect of redefining the fourth estate is itself so exciting that one's desire to get on with that task may make us impatient with any argument that would postpone it or deny its importance. The reason is, rather, to take stock of where this effort is likely to lead us, and what is likely to follow quite logically from the success of our efforts.

Essentially, I have argued that the newly imputed importance of relating freedom of "the press" to an "informed public" is a gift horse whose teeth should be closely examined by the donee. Many who link the press with a public right to know in fact have in mind a very logical and not-at-all-hidden agenda. It is the public agenda to rationalize new laws more adequately insuring that "the press" will serve the public right to know. It is the vision of a new equalitarianism quite hostile to the old libertarianism. It contemplates that a specially protected press shall also be, accordingly, specially responsive to community needs; that it not publish only what its proprietors deem fit or marketworthy; that it be fair, reflect diversity, and provide access; that it take on by force of first amendment doctrine what radio and television currently take on by force of the FCC.

I have argued also that while linking "the press" with the fact of its large audience may in some respects establish special privileges in that press, frequently the fact of the "large audience" yields a reason for greater liability (and greater susceptibility to prior restraints) than when no such large audience is implicated in the utterances of an individual. The larger the audience, the greater the danger of certain kinds of harm. Consequently, the greater the danger of certain kinds of harm, the greater is the justification for more severe standards of liability to avoid those harms.

The point, once again, is simply that the fact of "large audience," like the fact of "third-party interest," does not necessarily make for more protection. Frequently it is the datum that justifies greater liability. Press buffs may have imagined that a separate regime for "the press" must be all gain (and no loss) for reporters and for newspapers. A different forecast would have it that a separate regime for "the press" may yield a handful of advantages and a harvest of disadvantages.

In the end, however, my objection is still more fundamental. It is that the linkage of third-party interests is neither present in every case involving a newspaper nor absent in every case involving a citizen attached to no publication of any kind. It therefore cannot distinguish constitutional *clauses*, although it will often distinguish constitutional *cases*. Forced disclosure of other members' names of a widely disliked voluntary association, for instance, threatens the first amendment freedoms of those other members and not merely the first amendment freedom of the particular witness under subpoena. Insofar as that is true in a given case, it is a matter appropriately to be considered in determining whether, under the circumstances, the subpoenaed witness cannot be compelled to make that disclosure. And when it is true, moreover, it makes no difference at all that the witness is not a journalist, a reporter, or a member of "the press." Rather, it is an issue of proper first amendment solicitude that cuts across both clauses, applying "neutrally" for such weight as it deserves. The same is true in reverse. An individual who calls a witness to answer truthfully as to what the individual actually said to the witness at some earlier time (which discussion he now wants to be disclosed in court) has as good a claim to require an answer whether the witness is a reporter or whether he is some other person wholly unconnected with a newspaper. For the reporter to claim extra protection from having to respond to the very person whose actual conversation he now prefers not to have to repeat seems very strange indeed; it makes no sense at all so far as encouraging confidences by news sources when it is the news source himself who wants it brought out. This would also be the case if the witness were a doctor and the party seeking his testimony was his patient, or if the witness were an attorney, and the party seeking his testimony had been his client. Third-party first amendment interests thus do not systematically distinguish "press" cases from "speech" cases and, accordingly, cannot conceivably be serviceable as a litmus test either for defining "the press" or for guaranteeing it a "preferred" position.