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THE ROLE OF THE PRESS IN A FIRST AMENDMENT SOCIETY

Remarks* by
The Honorable Rose Elizabeth Bird
Chief Justice of California

It is a pleasure to be with you this afternoon. We are gathered to celebrate your achievements, and I am glad to be a part of that celebration. H.L. Mencken once remarked that a judge is a law student who gets to grade his own papers. If so, then a law school graduate might well be referred to as a law student who gets to take the bar exam. But that reality need not concern us today. Rather, today is a most auspicious time for taking pride in your accomplishments. However, this may well not be the most auspicious time for an appellate justice to be directing remarks toward the press.

As all of us are aware, the United States Supreme Court three weeks ago handed down its decision in *Herbert v. Lando*,¹ dealing with the law of libel as it relates to the press. Not having had an opportunity as yet to study the official opinion, I cannot analyze its legal merits. However, when the decision is viewed in conjunction with other recent cases affecting the press, there can be little doubt that we are living through a period of retrenchment in regard to first amendment freedoms. There are hints of a similar spirit of retrenchment regarding other parts of the Bill of Rights as well—most notably, the fourth amendment's protection against unreasonable searches and seizures. Whatever name one gives to the impulse of reform during the sixties and early seventies that expanded free speech rights along with civil rights and the rights of defendants in a criminal trial, that impulse has seemingly exhausted itself for the present.

I do not wish to paint an overly tragic picture. Fortunately, we are not in danger of slipping back into the anti-Bill of Rights mentality of the McCarthy years. But, in this period of quiet, perhaps it is our task to gather the strength needed to preserve

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* Chief Justice Bird's remarks were delivered at the University of Santa Clara School of Law, 128th Commencement, on May 12, 1979.

1. *Herbert v. Lando*, 99 S. Ct. 1635 (1979).

those rights which have been justly won over the last generation.

Let me begin, then, by reviewing some familiar principles. The first amendment does not exist to protect the majority, for the majority need no such protection in a society where they are already the sovereign. Simply by exercising legislative power, the majority can translate their beliefs into law. The first amendment is directed at preserving minority viewpoints, dissenting opinions, the individual's right to speak his own mind. Unorthodoxies are the stuff of which a first amendment society is made.

Part of the lingering unpopularity of the first amendment, then, is to be traced to the way it has long functioned to temper the exercise of raw majoritarian power, the way it has historically protected fringe groups and outspoken critics of the status quo. We often think of the New York Times or the Washington Post or CBS News as the parties which bring first amendment cases to the courts. We forget that it was also the Jehovah's Witnesses in the forties, the blacks in the fifties, and the anti-war protestors in the sixties that initiated the great test cases. With such sponsors, it should not surprise us to find that the first amendment enjoys a mixed popular reputation.

Fortunately, by now, it has become a firm axiom of American jurisprudence that one's right to speak in no way depends on whether one happens to agree with the majority views of the moment. If that were so, we would have a society based not on the freedom to speak, but only on the freedom to echo. The unpopular speaker, the critic, would be silenced sooner than the rest of us. The famed "marketplace of ideas" would shortly contain nothing more than the stale goods of conformity.

It is thus the judiciary's historic role, in cases involving the first amendment, to stand between the individual and the state, the orthodox and the unorthodox, and to carve out a protected space in which each of us is free to think as he or she chooses and to speak as he or she thinks in regard to public issues. Into this inner protected sphere, government may not intervene in order to outlaw certain ideas as "unwise, unfair, [or] un-American."² It is a platitude worth repeating that no society can be truly free which does not honor freedom of speech and freedom of the press. This is so for at least two reasons. First, the free trade of ideas is the very engine of self-

2. A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1948).

government. What would be the significance of voting in an election when the candidates were chosen by the state and the results preordained? In what sense would elected officials be *our* representatives unless we were free to criticize them? How could we form our views on a particular governmental policy, if the government had managed to keep the press from publishing vital information about that policy? In short, if citizens are to govern themselves in any meaningful sense, they must be able to think for themselves.

There is a second, broader argument to make in support of the overriding importance of free speech, for not only is free speech the engine of self-government, it is the vehicle of self-development. As the philosopher John Stuart Mill pointed out almost a century ago, it is the struggle to think for one's self, to articulate one's own viewpoint, that awakens otherwise sleeping faculties and stretches the mind.³

The Constitution guarantees freedom of speech and of the press to each of us as individuals. Still, I think we must frankly acknowledge that the reality of an informed citizenry depends on the work of the organized press—the newspapers and the broadcast media. For it is only the press that has the resources to provide continuously and on a large scale sources of information and perspectives on public issues as a counterpoint to the news releases coming out of official governmental agencies. The right to speak is, after all, dependent on the right to hear, and the press acts as the ears for all of us. Quite simply, the press is the single most important check on governmental secrecy and deception that our citizens have.

In the aftermath of Vietnam and Watergate, the central role an independent press plays in a free society should be apparent to all. Those two national traumas have given rebirth to a kind of hardhitting journalism known today, rather dryly, as “investigative reporting.” In the best tradition of the old muckrakers who showed the dirt that had been swept under the rugs in Tammany Hall, a new generation of reporters found themselves once more taking on an adversary relationship to the government in general and to the presidency in particular.⁴

To many critics of the media, the Watergate affair is recalled as the starting point for a vast power trip by the press.

3. J.S. MILL, *On Liberty*, in *THREE ESSAYS BY J.S. MILL: ON LIBERTY; REPRESENTATIVE GOVERNMENT; THE SUBJECTION OF WOMEN* 69-91 (1940).

4. See Lewis, *Cantankerous, Obstinate, Ubiquitous: The Press*, 1975 UTAH L. REV. 75, 76.

These persons claim that the imperial press has merely replaced the imperial presidency and that we are destined to slip into a kind of "government by media." I cannot agree with this assessment. Rather, as Justice Stewart of the United States Supreme Court noted in a speech in 1974 at Yale Law School, the antagonism between the press and politics is exactly what was contemplated by the drafters of the first amendment.⁵ The founders knew all too well of the draconian British system where anyone could be prosecuted for sedition for daring to publish a criticism of the crown. In specifically guaranteeing freedom of the press, the founders opted for a new theory of "open" government: one where criticism and investigation of official misconduct would be the norm.

It is commonplace to refer to the press' special role in our constitutional system by calling it the fourth estate or the fourth branch of government. But to my mind, this is an inept phrase, conjuring up images of reporters hobnobbing with persons in power and forming an integral part of the "old boys' network."⁶ When the press is doing its job, it is decisively not part of government, but more like an outside auditor or like the invited but unwanted guest. Consider the following story recounted by New York Times reporter Anthony Lewis about some of the Watergate experiences of Washington Post reporters Woodward and Bernstein:

Woodward telephoned the White House, asked for Henry Kissinger and got through. He said they had information that Kissinger had authorized [wire] taps on his own assistants. Kissinger tried to handle the difficulty without actually lying, or rather without actually putting himself in a position to be caught lying. "I don't believe it was true," he said at one point. At another, asked whether he had approved the taps, he replied "almost never." Then suddenly he asked: "you aren't quoting me?" Woodward said sure he was. Kissinger then attempted, retroactively, to put the whole conversation on a background basis. Woodward resisted. "In five years in Washington," Kissinger said, "I've never been trapped into talking like this." That was doubtless true. He was used to dealing with big-name reporters, columnists, editors, and publishers who accepted *his* terms for the relationship. Woodward and

5. Stewart, *Of the Press*, 26 HASTINGS L.J. 631, 631 (1975).

6. See Lewis, *supra* note 4, at 82.

Bernstein did not care about a relationship with Henry Kissinger.⁷

Because they were content to be outsiders, they turned out to be better reporters.

If the press is to carry out its historic function in our society, then it must on occasion be accorded special protection.

In a recent decision, however, the United States Supreme Court ruled that a state prison can refuse to allow reporters to conduct interviews with individual prisoners inside prison gates.⁸ To my mind, such a decision is subject to criticism. The public has a genuine need to know more about conditions inside our prisons, and yet it would not be feasible to allow individual citizens routine or frequent access inside our maximum security facilities. Here then is one area where the press as an institution is well situated to serve as a listening post for all of us. By granting their right of access to the prisons, we will also be protecting our own right to know.

In England, it still remains true that a newspaper which prints a falsehood about a governmental official may be subject to a massive libel suit. In America, at least until recently, the courts have taken a more balanced approach. In the leading case of *New York Times v. Sullivan*,⁹ Justice Brennan observed that this country has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁰ The court went on to note that the press might unduly hesitate to criticize an official out of fear that an unintentional error or false statement of fact here and there might subject them to a libel suit running in the millions of dollars.¹¹ In order to protect stringent criticism of government, the court decided to impose new and severe restrictions on the ability of a public official to sue the press. Henceforth, proof that the press had printed a false statement would not in itself entitle a public official to sue; he would additionally have to prove that the press published a lie with actual malice.¹²

7. *Id.* at 79.

8. *Pell v. Procunier*, 417 U.S. 817 (1974).

9. 376 U.S. 254 (1964).

10. *Id.* at 270.

11. *Id.* at 277.

12. *Id.* at 279-83.

Of course, we now know fifteen years later that the press would be asked to pay a price for the "actual malice" standard of *New York Times v. Sullivan*. It is as if the Supreme Court were saying to the press: "You cannot have your cake and eat it too. We will protect the press in libel suits by making plaintiffs prove the existence of actual malice behind the publication. But in return for this protection, the press must allow a plaintiff the opportunity to prove actual malice by opening records to him, by allowing him to ask editors and reporters about their state of mind while they prepared the story for publication."¹³ The press, of course, might well wonder whether the added protection given it by the "actual malice" standard is worth the price they are now asked to pay.

In a recent editorial on the *Lando* case, the Los Angeles Times suggested that part of that price would be a deep intrusion "into the internal process behind publication by opening to discovery ideas expressed within news organizations in conversations and memoranda."¹⁴

I can certainly understand that concern, as the deliberative process of an appellate court is similar to the process by which a news story is prepared. The frank exchange of ideas and views which is fostered by the privacy of the city room or the judge's chambers is a tempering device which can strengthen the end product, be it news story or judicial decision.

The role of the press and the protections which we accord it are today more important than ever before because we live in a society where belief in our government and in the strength of our institutions is declining. There is an old Chinese curse: "May you live in a time of transition." We are living in just such a time. Our society is characterized by impermanence and uncertainty, by mobility and alienation, by a curious blend of unrest and complacency. We are searching, but we are unsure of what we seek. Those institutions which once gave us strength and identity—the churches and synagogues, the schools, the neighborhood associations, even the family unit itself—are in disarray and retreat, unable at times even to protect themselves. Our governmental institutions are also undergoing the same crisis of confidence.

Amidst these confusing circumstances, the organized press

13. *Herbert v. Lando*, 99 S. Ct. at 1646-49.

14. *L.A. Times*, Apr. 19, 1979, pt. 2 (Metro), at 6, col. 1.

has been uniquely able to maintain its stature and in many ways has supplanted some of the functions once served by the faltering institutions to which I have referred. Perhaps most striking is the fact that the press has become the modern equivalent of peer pressure. Today, the press is the major vehicle through which we interact with each other in an otherwise impersonal society. It is now primarily through the press that we learn of each other's views on the burning issues of the day. And it is in response to the news that the press brings us that we in turn form our own views, soon to turn up as a statistic in a poll that may then influence the views of still others. Polls in particular become a kind of self-fulfilling prophecy: the more unpopular one is in this week's poll, the more tarnished one's image becomes, the weaker one seems, and the more unpopular one is likely to be in next month's poll. It is the rare individual who can stoically stand by his favorable view of a person in the face of growing condemnation by others. The space for making up one's own mind shrivels as we learn instantaneously and ceaselessly, with scientific accuracy, what our neighbors are thinking.

In addition, it is almost exclusively through the press that most of us meet our leaders—by seeing their faces and hearing their voices. The press' view of Jimmy Carter becomes, for lack of exposure to any other view, our view. And most of us have the magical feeling that we have somehow met the President even though we haven't. An electronic sense of familiarity replaces the kind of face-to-face interactions characteristic of a passing social order. The role of the family, of schools, of political parties—as so many independent value centers shaping our views—waned steadily. In their place, we all increasingly become exposed to and caught up in the same network news.

The press has been presented with remarkable opportunities during this era of transition. It has at its disposal both the resources and the respect to effect positive change—to educate the public about this country and this world in which we live; to expose corruption and hypocrisy in our institutions and leaders, be they public or private; to raise our awareness of the need for change and to encourage our participation in the process. However, inherent in these opportunities are some very real and substantial dangers. Power carries with it its own potential for abuse, and the press must exercise great diligence if these potential abuses are to be recognized and responsibly controlled.

Let us explore some of these dangers and their particular consequences. As I noted earlier, the press must have the right to investigate fully and to speak freely if we are to have true freedom of the press. And the press must be accorded certain special protections in order to ensure its freedom. However, this allowance given to the press to criticize, even to criticize falsely in some cases, is not without its costs. In some instances, its price may be the good reputation of those wrongfully criticized.

The harm done to one's reputation by erroneous charges of corruption or dishonesty can never be fully undone, not by any amount of retraction or apology. For even an erased question mark still suffices to raise the question, where perhaps none existed before. Justice Brandeis once said that words could always be answered by more words, but in this context his observation is not quite accurate. Not everything said can be unsaid. Consider, for instance, the plight of the many individuals whom the late Senator Joseph McCarthy branded as disloyal in the 1950's. McCarthy manipulated the press for his own ends and used its power to focus intense, withering scrutiny on a selected few whom he sought to discredit and destroy. How could a reporter retract the emotional and economic harm that resulted from the intrusions into those persons' privacy and from the destruction of their reputation? How could more words, another story, possibly have restored what was taken from them?

In recent years, the Supreme Court has drawn what I believe to be an eminently sensible line between the need for aggressive reporting on the one hand and the right of the individual to protect his or her good name from false charges on the other. There is first a core area of news: within the area of reporting about the official conduct of governmental officials, the public's need to get the news is deemed to be so great that the press should be accorded a wide margin of error. The press should be encouraged to scrutinize, investigate, and criticize public officials. And it should be made liable for printing false charges only when it printed charges knowing they were false or in reckless disregard of the charges' truth or falsity.¹⁵

But as the press moves away from this core area, as they focus their attention on purely private citizens, they should be

15. *New York Times Co. v. Sullivan*, 376 U.S. at 280.

held more responsible for printing falsities and for invading one's privacy or injuring one's good name.¹⁶

Consider the following story reported in the *San Francisco Chronicle* on March 8, 1979.¹⁷ In the February 19th issue of the *New Yorker Magazine*, an article appeared describing in glowing terms an unknown little restaurant. The owner-chef allowed the reporter to interview him, but only on condition that his name not be used and the location of the restaurant not be given. The reporter kept to his agreement, noting that the owner was an intensely private individual who wished to avoid publicity.

Unfortunately, the owner-chef was not to be allowed his privacy. The *New Yorker* story became a media event in that city, and news people from other magazines and papers set out to "discover" the real name and location of the restaurant. They found it, of course: a small restaurant 100 miles from New York City in a tiny Pennsylvania village. Under assumed names, the restaurant critic and wine critic of the *New York Times* made reservations at the restaurant and then wrote articles that described the food at the restaurant as "truly awful," "border[ing] on the inedible." Stripped of both his privacy and his pride, the owner-chef now plans to sell his restaurant. When asked how it felt to be the recipient of so much unwanted media attention, he tellingly responded, "It feels like you're being clubbed. Clobbered. Steamrollered. Sledgehammered. I guess the press can't stand a vacuum. This time the vacuum was me." The story of the restaurant owner is a small story. But it reveals the hidden harm that can be caused when the press exhorts the means of investigative reporting over the ends of reporting significant news, when it exalts entertainment over substance.

As these examples illustrate, when the press is used as an instrument by others or when the press engages in uncovering things sheerly for the sake of uncovering them, the power of the press can have devastating effects, destroying not only the individuals on whom it has focused but the concept of fairness as well.

There is a further danger posed by the changing economics of the news industry. The trend is toward a more monopolistic structure, with afternoon papers closing their doors, large

16. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

17. *S.F. Chronicle*, Mar. 8, 1979, at 6, col. 1.

chains buying out the surviving papers, and publishing houses being operated by television networks. Some major metropolitan areas now have only one newspaper. Many cities find their papers and TV stations owned by the same interest.

We thus enter the 1980's with the communications media controlled economically by fewer than before—expanding into areas of life left vacant by the breakdown of other institutions and exercising unsurpassed power to mold public opinion, to make or break an issue by withholding or granting print space or air time. For example, hardly any political protest is effective anymore unless the TV cameras are there. No candidate has a national political future anymore unless his or her style comes across well on the TV screen and unless he or she has the money with which to put his or her image there in the first place.

Over fifty years ago, Walter Lippmann astutely observed that the press was coming more and more “to be regarded as an organ of direct democracy.” He saw the press functioning much like the old initiative or referendum, except the press was able to filter and sample reader opinion on a day-to-day basis—with no need to wait any more for the November election. Lippmann went on to characterize the press as a “Court of Public Opinion, open day and night, [laying] down the law for everything all the time.”

Lippmann's description of the press may not have been borne out exactly by the passage of the years. Nonetheless, I think it is worth considering whether we are not now living through an era in which the press, rather than political parties, is becoming the organized force of politics.

The press has three major advantages over parties. First, the press is ubiquitous. It has the technological and economic power to be everywhere at once. Second, the press is constantly in session; one does not need to wait four years for the next big convention. Third, and most importantly, the press records public opinion more closely and more frequently than political parties. The poll, not the convention, is what makes or breaks a candidate these days. The details of party platforms are known only to a relative few; while the evening news, with its accent on the novel, the dramatic, the entertaining, reaches millions.

But it is its very closeness to public opinion that must give us pause when assessing the role of the press. We must remind ourselves that democratic government is not the same thing as

government by public opinion. If it were, there would be only precarious tolerance for individual rights; there would at best be only intermittent recognition of the rights of the minority. The majority, simply by expressing its opinion, would be able to exercise control. Public opinion can be the mightiest tyrant of all—self-righteous in viewing itself as the solitary voice of some mythic monolith known as the People and unyielding in its impatience with nonconformity.

With this in mind, we should not cease to applaud and support the press in its endeavors to shine light into the dark recesses of governmental decision making. But when the press simplifies things in the name of entertainment, when the press enshrines polls and public opinion as if they were always entitled to the final word in a democratic government, when the press is willing to disregard the individual's freedom of speech and right to privacy in favor of the untrammelled exercise of its own authority, we must balk. We must remind ourselves that even the press, which has contributed so greatly to this country's freedom, is capable of abusing its power.

The dangers I have been describing are imminently real, but fortunately they are susceptible to a solution which is particularly identified with our American democratic tradition. Self-regulation—whether of an individual, a profession, or an industry—is a time-tested means by which power can be responsibly exercised to achieve positive and creative ends.

With the special position the press enjoys in our society go certain obligations. There is an obligation to be above all accurate, to be objective, to be fair. To the extent that these criteria are met, the press serves our society well; to the extent that the press fails to meet these criteria, it betrays that society which gives it sustenance.

It would truly be a mistake for government to undertake the role of policing the press, for that is a confrontation in which neither participant would win and for which our citizens would all pay a heavy price. The first amendment lies at the heart of a free society. For government to use it as a sword against the press which it is intended to shield would be to risk the destruction of this vital principle of our democracy.

I am confident that such a confrontation will never occur because we are fortunate in America to have a press which has always been sensitive to the momentous responsibilities which its powers bring. Today, our citizens look to the press not only

as the disseminator of a vast array of information but also as a peer whose value judgments are given increasingly great respect. As that unique and powerful role evolves, let us all hope that the press retains its sensitivity to the tremendous impact it can have on the individuals and the society which it serves.

Thank you.