The First Amendment: A Symposium - An Introduction

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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol67/iss4/2

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THE FIRST AMENDMENT: A SYMPOSIUM

AN INTRODUCTION

BY JEROME A. BARRON*

The Kentucky Law Journal in choosing to conduct a symposium on recent developments in media law has chosen for itself a topic both significant and mercurial. The significance of the law of freedom of expression needs no demonstration in a society ordered by the first amendment. But we should also be aware of the mercurial or elusive quality of efforts to attempt to capture the meaning of freedom of expression in the context of specific controversies between the individual and the media or between government and the media.

As a result of the influential voice of Mr. Justice Stewart, considerable attention has been directed to the view that the Press Clause of the first amendment gives special and unique protection to the press as an institution. Indeed, Mr. Justice Stewart has suggested that the press, as a matter of constitutional design, was intended to serve as a fourth branch of government. From such a perspective, legal obligations which fall upon the press should be regarded with particular suspicion. The Free Speech Clause of the first amendment, on the other hand, is seen as protecting the free expression rights of the rest of us. The troublesome implication of this view is that the Free Speech Clause confers less in the way of constitutional protection on individuals than the Press Clause confers on the media. The special status of the press theory is an entirely understandable phenomenon. Much of its origin may be attributed to the useful role the press played in ferreting out the sins of government during the Watergate affair. The special status of the

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1 See Mr. Justice Stewart's 1975 Yale Law School lecture on the meaning of the Press Clause, Stewart, "Or of the Press" 26 HASTINGS L.J. 631 (1975).

2 Id. at 633-34.
press theory may at least be understood partially as a post-Watergate phenomenon.

If one reflects on the contents of this first amendment symposium issue, it will be apparent, I believe, that our first amendment theory is now preoccupied with the question of whether the status of the party seeking first amendment protection should affect his claim to that protection. Should there be a hierarchy of first amendment rights? Should the journalist be accorded a first amendment status that would be denied to others? The articles in this symposium directly grapple with these questions.

Professor Yasser's paper in this symposium dealing with the cross-ownership question raises an issue that carries reverberations from that debate. If a newspaper is forbidden by the FCC to own a broadcast station in the same community, does that restriction unconstitutionally deny to newspapers an option for expression that is open to others? The Supreme Court in the cross-ownership case rejected this argument. Justice Marshall responded to it by saying that newspapers would still have an opportunity to establish a broadcast voice in a community in which it did not already publish a newspaper. In the cross-ownership case, the Court chose to emphasize the first amendment rights of the public over an absolute first amendment claim by the media. The Court, in rejecting the argument that a cross-ownership ban forfeited, contrary to the first amendment, a newspaper's right to a broadcast voice in the community in which it published, chose to rely on the Red Lion decision, which gave priority to public rights and to diversity of expression, rather than on Miami Herald Publishing Co. v. Tornillo, which extolled the paramountcy of media rights of expression. The reasoning of the cross-ownership case is at least implicitly a rejection of the special status of the media thesis.

Similarly, Professor Hunter's paper on Herbert v. Lando

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3 Id. at 800.
involves yet another chapter in the debate on whether a special constitutional status should be accorded to the press. Judge Oakes of the Second Circuit had specifically relied in his concurrence on Mr. Justice Stewart's special status\textsuperscript{9} thesis for a conclusion justifying the creation of yet another legal obstacle—a doctrine of editorial privilege—in the path of individual plaintiffs seeking redress for libel under the \textit{Sullivan-Gertz}\textsuperscript{10} rules. Further revision of the \textit{Sullivan-Gertz} doctrine to accommodate the actual malice test to the objectives of a first amendment theory which accords special status to the press would have been an unworkable endeavor. Either the \textit{Sullivan-Gertz} rules giving citizen critics the benefit of an actual malice standard should be applied with equal vigor to non-media as well as media defendants or else the proponents of an editorial privilege amendment to the \textit{Sullivan-Gertz} doctrine should frankly confront what I believe is the true source of their displeasure. The real point of their discomfort, in my opinion, is the actual malice test itself in that its use in federal discovery burdens editorial judgment. But this burden, as was emphasized in the Supreme Court decision in \textit{Lando}, was assumed to be part of the bag and baggage of the actual malice test when it was fashioned in the \textit{New York Times v. Sullivan} case. The accommodation between the values of untrammeled publication and the values of reputational integrity was struck—advisedly—in the actual malice test. In the \textit{Sullivan} case, a majority of the Supreme Court declined to give an absolute priority to untrammeled publication over redress for reputational injury by creating an absolute privilege for the benefit of libel defendants in suits brought by public plaintiffs. Mr. Justice Black in the \textit{Sullivan} case had argued—unsuccessfully—for the creation of just such an absolute privilege.\textsuperscript{11}

Fortunately, the Supreme Court did not recognize a special status for the press in their decision of the \textit{Lando} case. Professor Hunter suggests a sensible and sensitive approach to discovery in libel litigation that might help resolve \textit{Lando}-type

\begin{itemize}
\item \textsuperscript{9} 568 F.2d 974, 988 (2d Cir. 1977).
\end{itemize}
problems in the future. Such an approach is more receptive to the competing interests involved than that which would have been provided by the recognition of an editorial privilege in the Lando case. The interest of the media defendant in being free to engage in vigorous criticism of the public issues and public personalities of the day is extremely important, but the interest of the libel plaintiff in having at least a fair opportunity to attempt to vindicate his reputation in a libel suit is also important. That reputational interest should not be too easily subordinated in favor of an uncharted and imprecisely defined claim of editorial privilege.

In their article on the Zurcher case, Professor Dwight Teeter and Professor Griffin Singer make an effective and vigorous case for undoing the result in the Zurcher case. Whether the Zurcher decision will actually result in having the chilling and intimidating effect on journalism which they prophesy is, of course, as yet unclear. But perhaps a few additional things about Zurcher should be said. The Court was not passing on the wisdom of police searches of the newsroom but rather on whether the first amendment imposed any special or independent limitations on the workings of the fourth amendment. Professors Teeter and Singer think that this issue should have been resolved differently than it was. This controversy, of course, is merely another thread of the same color which clothes this entire symposium issue. Does the first amendment command that the media be given a special claim for exemption with respect to legal obligations that would otherwise fall on them in a neutral way? Teeter and Singer write tellingly of their lack of faith in the view that the press would be treated fairly by a "neutral magistrate." Journalists are right to fear any new and explicit infringement on their freedom. Whether the Zurcher decision is a new infringement or merely a recognition of what had been implicit in our law anyway—that the fourth amendment applies to media and non-media alike—is, of course, the issue. If Zurcher is merely an explicit recognition of what had been implicit, then perhaps Zurcher can be viewed as a clarification of the law since it constitutes at least an incremental step toward recognition of a contextual approach.

to first amendment problems.

Arguably, *Zurcher* is responsive to such a contextual approach. In *Zurcher*, Mr. Justice White for the Court specifically observed that where newspaper premises are the subject of a search, the requirements for specificity in the search warrant would be heightened: "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" Furthermore, the Court observed: "Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field."

It is, of course, true that the Court said in *Zurcher* that the text of the "Fourth Amendment has itself struck the balance between privacy and public need." But it should also be borne in mind that the Court stressed that in the context of a search of a newspaper, a particular measure of exactitude would be required if a search warrant is to withstand constitutional attack.

It is important to remember this requirement and not allow dissatisfaction with the *Zurcher* decision to be carried to the point that an overestimation of the impact of the decision itself becomes a self-fulfilling prophecy.

The problem of whether the first amendment should be interpreted to provide a special degree of protection to the media or whether a contextual approach should be taken has come up in other cases in the 1978 Term as well. Thus, in *Houchins v. KQED, Inc.*, the Court was presented with the following issue: Do the "news media have a constitutional right of access to a county jail, over and above that of other persons?" In *Houchins*, this question was asked in the context of whether the news media had a special right "to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and

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13 Id. at 564.
" Id.
" Id. at 559.
15 Id. at 3.
television." In *Houchins*, with only seven justices participating in the decision, the Court, per Chief Justice Burger in an opinion for the Court, joined only by Justices White and Rehnquist, concluded that "the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."

In *Houchins*, Mr. Justice Stewart joined in the result because he believed that the scope of the preliminary injunction issued by the district court was unwarranted. However, in a separate concurrence he stated that he thought that the television station involved in the case, KQED of San Francisco, was entitled to some limited injunctive relief. Furthermore, Justice Stewart made the intriguing remark in *Houchins* that the "Constitution does no more than assure the public and the press equal access once government has opened its doors." Does this mean that Justice Stewart has abandoned the precepts of his special status for the press theory? Not necessarily.

The point, Justice Stewart says, is that although both the press and the public should have equal access to public facilities such as prisons, "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public." Justice Stewart observes that the fact that the first amendment "speaks separately of freedom of speech and freedom of the press is no constitutional accident." The press, in his view, has special needs. Equal access for the press may mean something different from equal access for a member of the public. An ordinary citizen "can grasp reality with his own eyes and ears." But "equal access" may not really be provided to a television reporter unless he can "use cameras and sound equipment."

These comments by Mr. Justice Stewart in *Houchins* are particularly stimulating and provocative because they suggest
we may be taking his comments about a distinct meaning for the Press Clause too literally. It may be that a special status for the press is better understood as merely a plea for recognition that even conferral of equality under the first amendment is achievable only if it is approached in a specific context. Because of the nature of the broadcast journalist’s task, first amendment access to public facilities may provide a different measure of access to him than that which must be provided to a member of the general public. In my view, this is a far more acceptable rendition of the significance of separate mention of the freedom of the press in the first amendment than is an interpretation of the Press Clause which would place the media apart from others with respect to the reach of legal obligation.\(^2\)

Problems of whether distinct degrees of protection should be attributed to the Free Press Clause and the Free Speech Clause, respectively, arise in other areas as well, such as the continuing dilemma of resolving the competing claims of free press and fair trial. In his paper, Professor Rendleman discusses the procedural aspects of this dilemma. While noting that the *Nebraska Press*\(^2\) decision has restricted the likelihood that “gag orders” will be directed against the press,\(^27\) Professor Rendleman indicates that such orders are still being issued against the press directly or against them indirectly by restrictions on lawyers from speaking to the media concerning pending criminal litigation.\(^28\) Professor Rendleman argues for better procedural safeguards to protect the press when faced with a “gag order.” In particular, he urges that the media be given pre-order notice and an opportunity to challenge the order, that the media be given standing to challenge “gag orders”

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\(^7\) See also Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 St. Louis U.L.J. 654 (1975-76).

directed at their informants (trial participants), that prompt appellate review of gag orders be provided, and that the collateral bar rule be applied only if the media has challenged the order or failed to use an opportunity to challenge an order.

"Gag orders" directed not at the media but at lawyers pose special problems regarding whether the Free Press Clause and the Free Speech Clause provide different degrees of protection. Thus, while the press may be free from direct silence orders, their informants, particularly their lawyer informants, may well have to suffer in silence. Are the first amendment rights of lawyers entitled to less recognition than that of journalists? Here again we see the workings of the current cleavage in treatment between the media claimant to first amendment protection and the non-media claimant to first amendment protection. Mr. Justice Erickson's paper deals with a related issue—the first amendment aspects of limitations on confidentiality of lawyer disciplinary and disability proceedings.

Mr. Justice Erickson, in his paper, has addressed himself to the problems presented by Landmark Communications, Inc. v. Virginia. In Landmark, the Supreme Court held that the first amendment does not permit a newspaper to be punished for publishing accurate information about proceedings before a state judicial review commission. In Landmark, as in Nebraska Press, the Court, professing to use the clear and present danger doctrine, invalidated a barrier to press publication of information concerning the administration of justice. Would it be permissible to do an end run around the essential holdings of Nebraska Press and Landmark and allow restrictions on the sources of news—in this context, lawyers—that would not be permissible against journalists, the disseminators of news? The question is whether the state should have more latitude with respect to imposing restraints on the expression of lawyers than it does with respect to the imposition of such restraints on journalists. Mr. Justice Erickson appears to conclude that narrowly designed rules carefully written to target particular expression by lawyers may well be valid.

The Supreme Court has yet to pass directly on the question of the permissibility of some restraints on the expression of lawyers, a matter which it left, perhaps advisedly, to the lower courts in order that they might wrestle with the problem. Suppose, however, that the Court eventually decides to review a case raising these issues and that the Court by a majority reaches a result consistent with the views expressed in Mr. Justice Erickson's paper. Such a result would constitute, at least implicitly, acceptance of a special status for the press. It has been argued that use of the clear and present danger doctrine as the mechanism to enforce the heavy presumption against the validity of prior restraints in the form of "gag orders" against the press in reality constitutes the equivalent of an absolute prohibition against media "gag orders". If this is true, "gag orders" against journalists would be at least in practice a constitutional thing of the past while "gag orders" against lawyers would be much more likely to survive first amendment attack. Such a consequence would indeed make the strength of first amendment claims dependent upon the status of the claimant. The free press claim asserted by a journalist would be ranked higher in this new hierarchical approach to first amendment protection than the free speech claim of a lawyer. Although Professor Rendleman suggests that this distinction is based on a murky interpretation of the prior restraint doctrine itself and not the clear and present danger doctrine, the result is the same. Such a result would indeed give a special and distinct meaning to the Press Clause of the first amendment.

It is still too early to conclude that the Supreme Court has decisively rejected the theory that the Press Clause of the first amendment confers distinct protections on members of the institutional press. To be sure, most of the signs in the work of the Court in the 1978 Term point to that conclusion. Thus, in First National Bank v. Bellotti, the Court held that a state could not validly restrict the free speech of business corporations by prohibiting them from attempting to influence voting in a state referendum on matters of public importance not

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28 See Prettyman, supra note 27.
affecting the property or business of the corporation.

Justice Stewart's separate concurrence in the Landmark case is congenial to an interpretation of the first amendment that accords members of the press a constitutional status not enjoyed by others. The majority of the Court in Landmark concludes that the state is not justified, on the basis of a puzzling formulation of the clear and present danger doctrine, in punishing newspaper publication of the proceedings of a state judicial review commission. Mr. Justice Stewart reaches the same result by quite another route. The statute is invalid because it is directed to the press. Mr. Justice Stewart stated that he found "nothing in the Constitution to prevent Virginia from punishing those who violate" the confidentiality of its Judicial Inquiry and Review Commission proceeding. Justice Stewart then continued: "But in this case Virginia has extended its law to punish a newspaper, and that it cannot constitutionally do." But surely such a reading of the first amendment is at least open to question. The focus of such an approach is to give radical new significance to the Press Clause and at the same time to radically de-emphasize the Free Speech Clause. Doesn't the Free Speech Clause provide at least some basis in the Constitution against state restrictions on those who breach state-imposed confidentiality? It is possible, of course, as we noted earlier in the discussion of Justice Stewart's concurrence in Houchins, that his advocacy of a special degree of protection for the press by virtue of the Press Clause has been interpreted in too literal and wooden a way.

If the Landmark case contains the seeds of a doctrine permitting a greater degree of restriction on the expression of lawyers involved in disciplinary and disability proceedings than would be available if the expression of journalists were at issue, then it would be hard to conclude, as Chief Justice Burger does in his concurrence in Bellotti, that "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." Indeed, in Bellotti, Mr. Justice Powell for the Court rejected the notion that busi-

33 Id.
ness corporations might enjoy less first amendment protection than do others: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

In the contemporary controversy about the interpretation of the first amendment, we are not done with the quarrel between a hierarchical or an egalitarian approach to first amendment protection even if we decide to say that under the regime of the first amendment the media are more equal than others. For even if the media are deemed favored, claims of hierarchy and preference persist. In the view of the electronic media, they are the stepchild of the first amendment. Unlike the print media, they are burdened with a harness—the law of broadcast regulation with its obligations of fairness, equal time, and service in the public interest—not required of the print media. Thus, even if the Court should find that the Press Clause protects the media in a more direct and explicit way than it does others, the question of whether all media require the same measure of protection presents another dilemma. Professor Thain suggests that the *Pacifica* case provides at least part of the answer to this question. In prohibiting the broadcast of the "seven dirty words," the Court noted that restraints are permitted on the broadcast media that are not permitted on the print media. Thus the Court upheld a restriction upon speech, neither misleading nor deceptive, based on the type of media and the possible audience of that media. Extrapolating from *Pacifica*, Professor Thain predicts that the proposed FTC rules which would restrict certain types of advertising directed toward children should withstand constitutional scrutiny. Such advertising, Professor Thain argues, even if not proven to be misleading or deceptive, is subject to regulation because it is broadcast and because it is directed toward children.

A related question is addressed in Professor Heller's paper. Professor Heller suggests that, although the Supreme Court

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35 Id. at 777.
34 For an exposition of this view, see Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S. Car. L. Rev. 539 (1978).
36 Id. at 3040.
has struck down the "commercial speech" exception to the first amendment, it has created new problems by requiring an inquiry into the "possibility" that speech may "mislead the public." Instead of a hierarchy among the various forms of the media, we are faced with a hierarchy based upon the nature of the speech, i.e., is the speech capable of being "empirically" tested for truthfulness? Rather than venture into these "uncharted" waters, Professor Heller suggests a more useful distinction, one based on the value of speech to the "effective functioning of free government."

The thesis that the Press Clause confers a special and unique status on the press did not fare well in the Supreme Court this past term as the papers in this symposium illustrate. The editorial privilege case, the media cross-ownership case, the access to prisons case, the newspaper search case, and the case involving newspaper publication of the confidential proceedings of a state judicial review commission may all be viewed as constituting in some fashion a repudiation of the special status for the press thesis. We would do well to recall—before we reach any ultimate conclusions on recent advocacy on behalf of a hierarchical approach to the first amendment—the wise words of Mr. Justice Black in his dissent in *Kovacs v. Cooper*:

"There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no

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46 336 U.S. 77, 102 (1949).
reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.