University of Miami Law Review

Volume 34
Number 4 *Fifth Annual Baron de Hirsh Meyer Lecture Series*

Article 2

7-1-1980

The First Amendment and the Press

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university of miami law review

VOLUME 34 JULY 1980 NUMBER 4

Fifth Annual Baron de Hirsch Meyer Lecture Series

A Gathering of Legal Scholars to Discuss
"The First Amendment: A Special Privilege for the Press?"

Foreword: The First Amendment and the Press

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The first amendment occupies an important and unique place in the history of our republic. It is more than a rule of law; it is an honored tradition within our society. The words of the first amendment are seen by the courts as "magic words," the touchstone of a natural law. The first amendment, therefore, has a most positive aura about it. Everyone wishes to be viewed as favoring the first amendment's tradition of freedom of speech, press, assembly, petition, and, by implication, association.[1] Just what it means to be in favor of this tradition, however, requires analyses and answers about which reasonable people may differ.

Justice Cardozo set the stage for our inquiry when he called freedom of thought and speech (and I would add freedom of the press, assembly, petition, and association) "the matrix, the indispensable condition of nearly every other form of freedom."[2] The central issue posed by this statement is not what "purposes" the

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1. Freedom of association is not specifically mentioned in the text of the first amendment. It has been judicially recognized, however, as deriving from the rights of speech and assembly. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

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

first amendment serves within our society, for that merely begs the fundamental question. Rather, the issue is whether freedom of speech[3] should be regarded as an end in itself—an expression of the kind of people we wish to be and the kind of society we wish to have—or whether freedom of speech should be regarded merely as a means to an end such as self-government or the discovery and dissemination of "objective" truth. Thus, any concept of freedom of speech must begin by discussing the implications of Justice Cardozo's statement.

Philosophers, legal commentators, Justices of the Supreme Court, and other judges have relied on three basic paradigms or models of the first amendment. These models, in turn, constitute the theoretical bases upon which first amendment protections are built.

The first and most common theory of free speech—the "marketplace of ideas" paradigm—offers little more than an instrumental role for the first amendment. Proponents of this model claim that truth (*with a capital T*) or the most illuminating perspective or solution can be discovered through the process of debate, free from any kind of governmental interference. The model has strong historical support. The classic statement of this model was articulated first by John Milton[4] and later by John Stuart Mill.[5] Justice Holmes gave judicial support for this view of the first amendment in his famous dissent in *Abrams v. United States*:[6]

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3. In this foreword, I use the term "freedom of speech" to represent the first amendment freedoms of press, assembly, petition, and association. I do not include freedom of religion within this category.

4. J. MILTON, *Areopagitica*, in AREOPAGITICA AND OTHER PROSE WRITINGS BY JOHN MILTON (W. Haller ed. 1927). *E.g.*, even "bad books . . . to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate. . . . [A]ll opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest." *Id.* at 19-20. More graphically:

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?

Id. at 59.

5. J.S. MILL, *On Liberty*, in SELECTED WRITINGS OF JOHN STUART MILL 135-36 (M. Cowling ed. 1968):

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race . . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

6. 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

The Supreme Court continues to rely primarily on the "marketplace of ideas" paradigm in determining what speech is protected under the first amendment.[7]

Yet critics of this model claim that, for several reasons, it fails to meet its goal: the discovery of "objective" truth. First, the critics claim that truth is not and cannot ever be objective; second, they claim that the market analogy fails because of monopoly control of the media. These points, coupled with the fact that many groups lack any access to the media, make the "marketplace of ideas" model less than a complete explanation of free speech.

The second theory of free speech—the "self-government" model—views free speech as an essential element of self-government in a democratic society, through which real freedom is defined, realized, and secured.[8] Under this theory, freedom of speech is vital for effective political participation. Freedom of speech makes it possible to publicize and hence root out violations of other rights against the "people." Without such freedom, the government could simply silence those whose rights it invaded. Proponents of the "self-government" theory, most notably Professor Alexander Meiklejohn,[9] would narrow the protection of speech to public discourse on issues of civic importance. This island of discourse would be absolutely protected; everything outside the island would receive only minimal due process protection. Critics contend that the category of absolute protection is much too narrow and must therefore be expanded to include information, however indirect, that would help the citizen make informed choices about public issues. Even with expanded protection, however, the question would remain why participation in government should be valued.

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7. *See, e.g.*, Justice Brennan's opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 & n.13, 279 n.19 (1964).

8. *Cf.* Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793 (1980) (to achieve success of a self-governing democracy there must be accountability through an informed public).

9. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT (1948).

One response has been the third model of free speech: the paradigm of "personhood."

Proponents of this theory[10] see freedom of speech as the necessary context for any meaningful concept of liberty, not in the instrumental sense of the two other models, but in the constitutive sense that a society of silenced but "otherwise free" persons is unthinkable outside a religious retreat. Freedom of speech is seen as an end in itself—as a constitutive part of personal autonomy and as a basis for self-fulfillment.[11] Critics of the "personhood" paradigm argue, however, that this model is too constricted in its vision, because it ignores the necessity of freedom of speech for any properly functioning democracy.

Thus, each model of freedom of speech is open to some form of criticism. Yet any satisfactory theory of free speech must come to terms with the implications of each of these models. More importantly, any satisfactory theory of free speech must draw upon the underlying theories of each model. Similarly, any satisfactory view of the role of the press must rest on an analysis of just what the first amendment stands for in our society. Indeed, much of the recent controversy about the role of the press can be traced directly to a failure to analyze properly the values undergirding the first amendment's tradition of freedom of speech and press.

Recent encounters between the press and the courts have not gone well for first amendment claims. The courts have limited the press not only in its access to newsgathering, but also in its ability to distribute what it obtains.[12] For example, the courts have contracted the definition of a public figure and exposed publications to large liabilities for minimal inaccuracies that were scarcely careless;[13] allowed searches of news premises based on a warrant for "mere evidence" of someone else's possible crimes;[14] jailed a reporter and levied heavy fines on his employer, the *New York Times*, despite his claim of a first amendment privilege not to divulge confidential sources sought by a criminal defendant;[15] upheld the exclusion of media representatives from a county jail;[16] and

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10. *See, e.g.*, Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

11. *See* Comment, 34 U. MIAMI L. REV. 1043 (1980).

12. The Court has similarly limited the broadcast media in their ability to disseminate information. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

13. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

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

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

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

barred the press from courtroom access in a pretrial hearing.[17] The work product of the courts concerning these and other first amendment claims has been variously labeled by the press and other commentators as a "disaster," a relentless "assault" on the press, and a "dismantling" of the first amendment.[18] The Fifth Annual Baron de Hirsch Meyer Lecture Series, therefore, is both timely and significant, since the distinguished participants have addressed questions central to this first amendment controversy. And given the prominence of the speakers and the wide variations in their views, the debate has proved to be quite lively.

The basic issue addressed by the authors is whether the press should enjoy special protection under the first amendment. This issue, in turn, requires analysis of two separate but intertwined questions. First, whether the press clause of the first amendment provides protection for the press that is independent from the protection provided others under the speech clause. Second, whether the press requires special constitutional protection because of the role it plays as a watchdog on government—as a fourth institution outside the government that serves as an additional check on the three official branches.[19]

The authors discuss these issues through an analysis of access claims to governmental information. More specifically, they address the theoretical difficulties of deciding when the first amendment entitles the press and the public to obtain information the government seeks to withhold.

During the 1970's, the Supreme Court repeatedly rejected claims of either a special press right of access or a general public right of access to information the government was unwilling to release.[20] In 1980, however, the Supreme Court endorsed an access

17. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

18. *See, e.g.*, Reston, *Courts and the Press*, N.Y. Times, April 20, 1979, § 1 at 31, col. 6; *id.* at 20, col. 1; *id.* April 23, 1979, § 4 at 9, col. 3.

19. *See* Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980).

20. *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Houchins v. KQED, Inc., 438 U.S. 1 (1978). Even the Justice most likely to recognize the special status of the "fourth estate" under the press clause, Justice Stewart, implied that the government could deny access to information as well as punish its theft. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848-49 (1965). To Stewart, the press clause merely barred the government from prohibiting or punishing the publication of information once the press obtained it. More significantly, the only support on the Court for right of access claims came from those Justices who relied more generally on first amendment principles rather than on the press clause. *See* Justice Powell's dissenting opinions in Saxbe v. Washington Post Co., 417 U.S. 843, 861-64 (1974), and Pell v. Procunier, 417 U.S. 817, 835 (1974).

claim to criminal trials by a vote of seven to one.[21] In *Richmond Newspapers, Inc. v. Virginia*,[22] the Court held that the right of the press and the public to attend criminal trials is implicit in the guarantees of the first amendment.

The *Richmond* decision is significant because it is the first case in which a majority of the Supreme Court found that the first amendment protects a right of access of the press and the public to information the government is unwilling to release. As such, *Richmond* becomes the focal point for debate on the scope of any future access claims. Speculations about the scope of any right of access of the press or the public to information the government seeks to withhold are made tenuous, however, by the limited nature of the decision.

The decision is limited in several ways. First, the case reached the Supreme Court on a very narrow issue: "[W]hether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure."[23] Second, the holding was similarly limited. The Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[24] Finally, and perhaps most significantly, the *Richmond* decision addressed a very specific factual setting.

In *Richmond*, the trial judge granted a defendant's motion to close to the public his fourth trial on a murder charge.[25] Although neither the prosecutor nor the two reporters then present in the courtroom objected to the motion, the trial court later granted their newspaper's request for a hearing on a motion to vacate the closure order. After the hearing, the judge denied the motion but made no findings in support of his conclusion that closure was appropriate. Furthermore, the judge did not inquire about possible alternative solutions to ensure a fair trial and did not recognize any constitutional right of the press or the public to attend the

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21. Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980).

22. *See* For further analysis of the *Richmond* decision, see 34 U. MIAMI L. REV. 937 (1980).

23. 100 S. Ct. at 2821.

24. *Id.* at 2830.

25. In granting the closure motion, the trial judge presumably relied on VA. CODE § 19.2-266 (1950), which provided that in all criminal trials "the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

trial.[26]

On these facts, the Supreme Court found a public and press right to attend criminal trials. The case does not mean that the first amendment rights of the press and the public to attend criminal trials are absolute. On the contrary, Chief Justice Burger's opinion makes it perfectly clear that access to criminal trials may be limited in some circumstances.[27] If access may sometimes be limited in such a context as that in *Richmond,* it is difficult even to speculate about access claims in other settings. And the Justices' opinions offer little help.

Not surprisingly, the Justices focused on somewhat different first amendment theories. Although all of the Justices except Justice Rehnquist reached the same conclusion, they traveled by different routes. One group of Justices (Chief Justice Burger and Justices White and Stevens) stressed the importance of public access to a criminal trial to ensure its fundamental fairness and "proper functioning."[28] Second, Justices Brennan and Marshall supported access to criminal trials to ensure the availability of information necessary for informed public debate.[29] Finally, Justices Stewart and Blackmun found both of these lines of reasoning to be signifi-

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26. The next day, the court granted the defendant's motion to strike the prosecution's evidence, excused the jury, and found the defendant not guilty. 100 S. Ct. at 2820.

27. *Id.* at 2830 n.18. There is no indication that the concurring Justices would disagree with Chief Justice Burger's position. On the contrary, even Justice Brennan claimed that in some circumstances it would be appropriate to close portions of the trial. He referred specifically to trials involving national security issues. 100 S. Ct. at 2839 n.24.

28. *Id.* at 2825-28. Chief Justice Burger's opinion tells us very little about future access claims. He makes little attempt to explain the constitutional underpinnings of an access right.

29. *Id.* at 2832-39. Justice Brennan's opinion is the only one in *Richmond* that attempts to create a theoretical basis for access claims. To Brennan, "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Id.* at 2833 (emphasis in original). But since all expression may be relevant information for individual development, and therefore input into government, the first amendment must distinguish the relevant information for the structural role it plays. If not, the stretch of the protection would be theoretically limitless. Justice Brennan therefore suggests that access must be open for information that will allow democracy to be meaningful. That, in turn, depends on "whether access to a particular government process is important in terms of that very process." *Id.* at 2834. Finally, "the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information." *Id.*

Yet Justice Brennan's analysis still leaves one wondering what particular values will help in differentiating among relevant kinds of information. Likewise, it fails to answer why self-development or the search for "truth" are not relevant values or, if they are, how and when one should employ them in any particular situation.

cant.[30] Furthermore, the *Richmond* decision is based on and limited by each of the Justices' views of the historic role and institutional purposes of public trials. Thus, the Court found only a limited right of access in a specific circumstance.

Given all of this, the contours of a right of access to information the government seeks to withhold remain uncertain. After *Richmond,* the question remains: To what extent does the right of access extend beyond criminal trials to other governmental information? Because *Richmond* was decided after the articles went to press, each of the articles in the Symposium should be read in light of this question. In addition, each of the authors has a somewhat different view of the first amendment. As you read their articles, you might ask what the limits of access claims would be under each of their theories.

30. *Id.* at 2839-43.