1981

Prologue

Donald M. Gillmor

Prologue

Donald M. Gillmor*

On May 28-29, 1981, academicians representing law, journalism, history, political science, philosophy, and library science met at Spring Hill, west of Minneapolis, with lawyers, judges, reporters, editors, and graduate students to mark the fiftieth anniversary of the United States Supreme Court's landmark ruling in *Near v. Minnesota*.[1] Yale Law School professor Owen Fiss said that the conference "was probably the best birthday party a case ever had."

In *Near*, a state law for the first time was held to violate the freedom of press clause of the United States Constitution by imposing a prior restraint. Prior restraints, however, were not forbidden absolutely by the Court's ruling, and it is in part the "exceptions" of *Near* that make the case a crucial element in a continuing dialogue on the meaning of the speech and press guarantees of the first amendment.

The following papers were meant to be read prior to the symposium so that at the conference a premium could be placed on discourse. The result was a dialogue characterized by many of the participants as the most intellectually stimulating they had ever experienced in such a setting. Much of the credit for the ease and vitality of the conversation belongs to Floyd Abrams, a distinguished first amendment advocate who moderated the symposium. The entire conference was recorded so that the participants' remarks could accurately be reproduced here.

Paul L. Murphy, University of Minnesota historian, observed in discussing his paper, the first of the conference, that *Near* was an important step in recasting the fourteenth amendment and redefining the term "liberty" in the due process clause of that vital constitutional provision. *Near* had an important impact on the state police power and brought to a sig-

* Professor of Journalism and Mass Communication, University of Minnesota. He was program committee chairman for the *Near v. Minnesota* 50th Anniversary Symposium.

1. 283 U.S. 697 (1931).

nificant new stage Louis Brandeis's long crusade for restating the word liberty in terms of human rather than property rights. It extended the incorporation theory launched by Justice Edward T. Sanford in *Gitlow v. New York*,[2] and in time it would lead to the deregulation and decriminalization of expression, belief, and association.

Murphy and a number of discussants saw in Chief Justice Charles Evans Hughes's opinion for the Court reflections of the thinking of a legal realist. Hughes asked what the consequences of a prior restraint would be, and how the Minnesota public nuisance law[3] would work. Legal realism itself may have represented a "paradigm shift," said Murphy, a change in the social climate, a climate now ready to accommodate changes in legal values, concepts, and practices. The resulting liberal tradition also may have been a legacy of that branch of the Progressive movement which felt so strongly about its philosophy of free speech that it was willing to depart from a philosophy of judicial review that displayed a decided deference to the will of the legislature and opposed substantive limitations on its powers.

Symposium participants disagreed on what a 5-4 decision affirming *Near* would have meant. Other state legislatures may have followed Minnesota's lead; liberating economic and intellectual forces, however, rapidly gathering momentum in the New Deal period, may have already outpaced such possibilities.

Jesse Choper of the University of California-Berkeley Law School said that if the Court would have affirmed *Near*, there might have been positive gain for feedom of speech and press. The Court, in *Fiske v. Kansas*[4] and in *Stromberg v. California*,[5] had already ruled in favor of freedom of speech; cases following *Near*, therefore, might have been decided more directly on substantive first amendment grounds, that is on their merits, and the Court might have come more quickly to its vagueness and overbreadth doctrines, had *Near* been affirmed. Instead, Choper added, the Court in *Near* relied on a procedural technique to resolve the case because it happened to involve an injunction.

John Hart Ely of Harvard Law School also would have placed the "paradigm shift" farther back in time. Ely was not

2. 268 U.S. 652 (1925).
3. Act of Apr. 20, 1925, ch. 285, 1925 Minn. Laws 358.
4. 274 U.S. 380 (1927).
5. 283 U.S. 359 (1931).

convinced that the Court of the 1920s was wedded to regulation and the police power, nor was he certain that the Taft Court would not have voted the same way in *Near*, given the stirring rhetoric of freedom one finds in such cases as *Lochner v. New York*,[6] *Coppage v. Kansas*,[7] *Pierce v. Society of Sisters*,[8] and *Meyer v. Nebraska*.[9]

Garry Wills, author, critic, and professor of history at Northwestern University, presented the second paper of the conference. Although Professor Wills's paper is not reproduced in this issue of the *Minnesota Law Review*, the following paragraphs briefly summarize his oral presentation.

Wills identified *Near v. Minnesota* issues at the time of the Constitution's ratification. Why then, if the ban on prior restraints, or licensing, was almost an irrelevance, a matter settled by 1787, does it reemerge as an embattled right in 1931? The Alien and Sedition Acts of 1798, Wills believes, were the great derailer of the first amendment freedom dialogue in America, and they revived the threat that the framers feared most: legislative and executive restraint of free speech, legislative restraint meaning subsequent punishment for publication. For Jefferson there had been a legacy of freedom in the people at the time of the Constitution's passage. The Alien and Sedition Acts revoked it.

Jefferson's and Madison's criticisms of federal power, said Wills, are not enough to explain why the "living" document (the Constitution) refused to grow in the expected direction toward broader protection of liberties. For that, we must put the blame where Jefferson's earlier theory put it—on lack of virtue in the people, and particularly on the failure of slavery to die away as Jefferson expected and hoped. Once our "great anomaly" had been removed by the Civil War, Wills noted, the extension of constitutional protections could finally occur. "Seen in that light, *Near v. Minnesota* is not the belated escape from a 'legacy of suppression' left us from the ratifying period, but the fulfillment of an implied pledge from that time."

Although prior restraints and injunctions were not tools of repression at the time of the Revolution, Wills added, Madison's concern in writing the Bill of Rights was to protect citizen against citizen (mobs, majorities, and popularly elected

6. 198 U.S. 45 (1905).
7. 236 U.S. 1 (1915).
8. 268 U.S. 510 (1925).
9. 262 U.S. 390 (1923).

assemblies)—the kind of nativism that had called for passage of the Alien and Sedition Acts. Jefferson and Madison had experienced repression, especially in the terrible treatment of the Loyalists by both mobs and popularly elected governments. It was the responsibility of the Republic to protect dissent from the intolerance of a factious majority. A theory of free speech and press—both *a priori* the rights of citizenship—was implied, if not fully articulated, by the framers.

Much of the discussion at this point focused on the strengths and weaknesses of constitutional historian Leonard Levy's theses.[10] Levy, while validly arguing that the first amendment was a product of political expediency rather than a sign of any reasoned commitment to civil liberties, may be wrong in suggesting that the framers were not even thinking about the rights of expression. Press historian Dwight Teeter of the University of Texas College of Communication believes that Levy, while correct in many of his assumptions, undervalued the contribution of the press of the period, especially Philadelphia newspapers of the 1780s. Printers of those papers, in speaking against seditious libel, at least for their own freedom of expression, created a rhetoric of freedom that was to have important consequences.

The participants agreed, consistent with Levy's theories, that Jefferson did commit offenses against civil liberties during his second term under a kind of McCarthyite fear of treason; Jefferson sometimes saw the first amendment as a states' rights instrument that gave the states power to control and punish the press. Madison was very much alone in trying to extend the reach of the first amendment and, in Wills's view, was a more consistent and profound political thinker than Jefferson. Madison was interested primarily in freedom of religion, a multiplicity of religious sects, and following therefrom myriad political factions.

Thomas Scanlon, a Princeton professor of philosophy, wondered what conceptual continuity there might be between present and past theories of freedom of expression. New affirmative claims, such as access rights and confidentiality of reporters' sources, may appeal to the same ideal of freedom of expression. Since the means of reaching our goal of freedom of discussion are always out of date and the threats to that goal change, the goal might be stated in a way that goes beyond the

10. L. LEVY, JEFFERSON AND CIVIL LIBERTIES (1963); L. LEVY, LEGACY OF SUPPRESSION (1960).

means. Is the goal embodied in the speech and press clause or is the clause a list of means? Our aspirations may be different than those of the framers.

Continuity for Madison, said Wills, was being open to new issues. Speech would be an educational tool in support of a more general republican ethos, and it would be a set of guidelines by which a free people would be encouraged to develop freedom without being fixed to one procedure or another.

Michigan law professor Vincent Blasi, in an unusually comprehensive and original paper, searches for the elements of prior restraint. In doing so, he begins the construction of a theory of prior restraint in which injunctions and licensing systems are linked to one another and to subsequent punishments such as criminal prohibitions and civil liability rules. Five common attributes of these elements are identified and compared. They are (1) self-censorship, (2) adjudications resulting in formal abstract decision making, (3) prohibitions that are invoked and enforced too readily, (4) an unusual capacity to distort audience response, and (5) implicit premises that are antithetical to the philosophy of limited government.

Near, says Blasi, represents a judgment more complex and more historically grounded than any facile equation of injunctions with licensing systems would suggest. Furthermore, Justice Pierce Butler's dissent in *Near* never has been answered.

Why look for linkages between prototypic injunctions and licensing systems? One reason, says Blasi, is historical, since a fixed point in our constitutional tradition is the rejection of licensing systems, and insofar as you can connect licensing systems with injunctions, you mobilize the force of history against injunctions. Secondly, individual decisions have a kind of gravitational force in subsequent constitutional analysis. Once in place, a case like *Near* continues to exert its own vitality and magnetism in the clustering of libertarian notions. Finally, a general theory of prior restraint and the use of prototypes will help us deal with other cases and other forms of prior restraint in practical ways.

Blasi noted the argument of Professors Fiss[11] and Stephen Barnett[12] that the only reason for a presumption against injunctions is the presence of the collateral bar rule—the rule that a person who violates an injunction, as well as a licensing system, will not be able to raise first amendment defenses in

11. O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).
12. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977).

the ensuing contempt action. Take away the collateral bar rule, in other words, and there is no persuasive reason for disfavoring injunctions. Blasi disagrees and finds, absent the collateral bar rule, sufficient argument to justify his analytical frame.

Partly responsible for the fading of the distinction between prior restraints and subsequent punishments, said Blasi, is Floyd Abrams's masterful brief in *Landmark Communications v. Virginia*.[13] With the Pentagon Papers case[14] in mind, Abrams wondered whether we want people to disobey court injunctions. Is it advisable, he asked, to have a body of law which makes it easier for people to decide whether or not they should obey an injunction? It may well be that a very important force in protecting rights of expression, Blasi added, is inculcating a mentality of challenge against government in the minds of citizens, a frame of mind so far undeveloped in the case of speech injunctions. Injunctions, in Blasi's view, do represent an escalation of extraordinary legal command, a weapon that the government needs, but one that should be carefully rationed.

Erwin Knoll, editor of *The Progressive*, said that his decision to obey the injunction,[15] which delayed publication of an article on the "making" of a hydrogen bomb for more than six months, was "the most serious moral error I've made in my whole life." Knoll, however, would grant that the government has a responsibility for keeping short term secrets in time of war.

Knoll said that *Near* was invoked as a pretext for gagging his publication (a temporary restraining order and a preliminary injunction). The national security exception assures an emotionally charged climate in which no one will think rationally or constitutionally. "There was a reason," Knoll added, "for the first amendment to be written without exceptions of any kind—even those no one would question."

Professor Blasi, nevertheless, was concerned that the ethic of disobeying injunctions may cause government to escalate its efforts toward social control and to use more extreme forms of incapacitating speakers. He would avoid the totalitarian dynamic by obeying the court injunction. Professor Choper agreed on the basis that legislatures, and not courts, are the enemy of free speech and that authorizing the issuance of an injunction, as in the film censorship case, *Freedman v.*

13. 435 U.S. 829 (1978).
14. New York Times Co. v. United States, 403 U.S. 713 (1971).
15. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

Maryland,[16] may cure the evil of a licensing system. Anthony Lewis of the *New York Times* said that he would prefer subsequent punishments to the congenial and seductive prior restraint.

In terms of first amendment values, both Lewis and Professor Fiss found it puzzling that Editor Knoll would be indifferent to the question of access to government information, or what is frequently referred to as the "public's right to know." While an absolutist on the right to speak, Knoll believes the public's right to know to be unenforceable through any legal mechanism. In addition, he fears that any criteria of responsibility or respectability would undermine the first amendment. Floyd Abrams agreed that the press could be required to vindicate a public's right to know.

Professor Fiss contended that the first amendment, since it has so much to do with the process of self-government, must extend to the individual's passionate need to find out what is going on—what Professor Scanlon would call "a right to learn." Secrecy, Fiss added, is as much an affront to one's dignity as someone telling you not to speak. For Lyle Denniston of the *Baltimore Sun*, the first amendment is a regime of choice that imports no obligation to speak but protects any desire to speak.

Special privileges for journalists seemed to Minnesota political scientist Sam Krislov to be comparable to the Ayn Rand theory of architecture: journalistic egoism loses sight of any social purpose. Knoll would call that egoism the act of conscience in judging whether or not to publish, and he noted that the suppression of information can have catastrophic consequences.

"State courts," said Associate Justice Hans Linde of the Oregon Supreme Court, "treated the outcome of a revolution, and a revolutionary assertion, as just another restatement of the common law." He added that *Near* "stands as a warning against a common tactic—the tactic of seeking assent to a principle by conceding limits on its reach that may sound obvious in dicta but are not before the court. . . . In Supreme Court opinions, however, such limiting dicta often will appear to be necessary to the principle itself and later rise to overwhelm it. . . . If the first amendment is understood to bar the enactment of certain kinds of laws, if it focuses first on denying government certain powers before focusing on anyone's individual rights, then the crucial first amendment question is what kind

16. 380 U.S. 51 (1965).

of laws government may *not* make, in the form of statutes, or ordinances, or administrative rules, or executive or judicial orders, as a legal basis for adverse action against speech and press."

Judge Linde invoked the ghosts of establishment publishers who wrote the Minnesota statute at issue in *Near*. Those who do not care about respectability tempt the respectable press to save its own first amendment status by disavowing those who abuse the liberty of the press through their unspeakable publications. It would be better that they stand by an absolute principle.

Professor Choper wondered if Judge Linde would accept precisely drawn statutes punishing or suppressing perjury, incitement to riot, false advertising, or advance information about the devaluation of the dollar. And Minnesota law professor Carl Auerbach noted in reference to the *Near* dissent, that the first amendment was not intended to protect constitutionally unprotected speech.

"If all speech were constitutionally protected," he said, "there would not be a subsequent punishment doctrine any more than there would be a prior restraint doctrine. When prior restraints or injunctions are used, you cannot tell ahead of time whether a particular publisher will publish protected or unprotected speech. The assumption of the prior restraint doctrine is that there will be subsequent punishment to deter constitutionally unprotected speech."

Linde argued that perjury and other well established crimes were not abolished by the freedom of press clause and that laws may prohibit specified acts other than acts of publishing. As a judge, however, he would not wish to decide where to put various kinds of expression on a spectrum of allowable and punishable speech.

In summary, Moderator Abrams observed that *Near* made it possible for Alexander Bickel and him to argue before the United States Supreme Court in the Pentagon Papers case that there were no prior restraints—even though there are, notably the peculiar exception for national security. Abrams said that he was very tempted, as an advocate, to characterize anything having the vaguest semblance to a prior restraint as a prior restraint, since prior restraints are somewhat of a taboo. Moreover, if prior restraints are designed to preserve government secrets, the cases that come to the Supreme Court suggest that they have failed totally. Carefully drawn laws would be more

effective, such as one that would make disclosure of CIA agents' names illegal. Although it is easier for the government to get a prior restraint than to make the decision to start a criminal prosecution, said Abrams, the latter can be more effective for the government and less dangerous for the press because harm done by publication is seldom discernible. The prior restraint doctrine, Abrams added, keeps judges from going down the wrong road.

Yale law professor Thomas Emerson was more pessimistic than Abrams in that he was disappointed by the record since 1931. No concrete rule against prior restraints has ever been fashioned by the courts, said Emerson, and almost every day a judge somewhere orders a prior restraint.

The "public's right to know" and "chilling effects," Abrams continued in summarizing, are phrases that advocates do not use because judges do not like them. While granting that the press does need certain privileges—for example, confidential sources and ways of keeping police out of newsrooms—if it is to be able to function as intended, Abrams rejects what he calls Erwin Knoll's "promiscuous" defiance of court orders. "One ought to pause a few seconds more before one says no to the rule of law."

Professor Emerson believes the right to know is part of the whole system of freedom of expression which involves affirmative social rights that cannot be separated from the right to communicate, although those rights may be in a more formative stage. We need, he said, new rules to deal with a new society.

Lyle Denniston was concerned about the amount of the "public policy baggage" of the courts that the private commercial press has had to carry since 1964 and *New York Times Co. v. Sullivan*.[17] Ethics, he believes, have become subordinated to law and to fundamental theories about how the communicative process is to be regimented and regularized.

"Why don't we let government in its relationship with its sovereign (the people) work out the question of a right to know and leave us in the private communicative business out of it. Let that be a public policy formulation between government and its auditors. . . . I know of no other field in which the rapidity is matched in the articulation of constitutional theory as it has been in the press area. And it has absorbed the whole

17. 376 U.S. 254 (1964).

discourse within newsrooms and within schools of journalism as to what the communicative experience is in a modern industralized society. . . . We might have done better as a practical matter had we proceeded into the modern era of investigative reporting on a theory of self-help, do it on our own, and, in fact, if we are confronted with libel lawsuits, privacy invasion lawsuits, subpoenas, administrative summonses, legal restraints, then let's find ways to abide that or . . . [reject] it and go to the slammer."

Both Denniston and Abrams would trade back some of the protection of *Sullivan* for what was lost in *Herbert v. Lando*,[18] a ruling permitting the plaintiff to probe the defendant's "state of mind."

Dean Jerome Barron of George Washington University's National Law Center disagreed, saying that *Sullivan* had achieved for the citizen-critic of government a much more vigorous and robust debate, and that *Herbert* may not prove to be a great tragedy any more than has the newsroom search case, *Zurcher v. The Stanford Daily*.[19]

The symposium concluded on a similar and appropriate note when journalist Anthony Lewis suggested that what made *Sullivan* a great case was the fact that Justice William Brennan based his opinion for the Court on the theory that there could be no seditious libel under the Constitution of the United States; that, says Lewis, is the neglected feature of *Near*. Had *Sullivan* been limited to that idea we might not have constitutionalized the newsroom.

18. 441 U.S. 153 (1979).
19. 436 U.S. 547 (1978).