

January 1990

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Recommended Citation

Lawrence H. Cooke, *The Free Press: Essential to Robust Debates*, 10 Pace L. Rev. 1 (1990)

DOI: <https://doi.org/10.58948/2331-3528.1455>

Available at: <https://digitalcommons.pace.edu/plr/vol10/iss1/1>

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PACE LAW REVIEW

Volume 10

Winter 1990

Number 1

Speech

The Free Press: Essential To Robust Debates†

Lawrence H. Cooke††

It is exciting to be a part of this reception tendered to the 1989-1990 Pace Law Review Associates.

Indeed, it is a delight just to be at Pace Law — with its 800 challenging students, 47 percent of whom are women, its ever gracious staff, its highly regarded faculty and its dynamic administration.

Thank you, each one of you, for making me feel so welcome. You have demonstrated that you are keenly interested in exertions to establish and maintain high standards for the legal profession. Pace Law Review, born only a decade ago, is an exemplar of such an effort. Consistently offering quality material submitted by students and outside authors of reknown, the Review functions to apprise its readers of recent developments in

† Remarks of Lawrence H. Cooke at the reception honoring the 1989-90 Pace Law Review Associates, on the tenth anniversary of the Pace Law Review.

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the law, evaluating these developments and fostering stimulating thinking among the bench and bar.

Justice Brandeis early on recognized the educational potential of such publications and encouraged their development and use in enlightening the legal fraternities. Constructive criticism of the courts and their decisions and in-depth analyses of particular topics provide intellectual strengths and valuable guidance for future advocacy and decision-making. Today, law reviews continue to provide a forum for legal debate in and beyond the courthouse. The Pace Law Review, in this fine tradition, makes available scholarship of the highest order and affords to students and those admitted the opportunity and incentive to publish the results of meticulous research into noteworthy issues, to the end of advancing our knowledge and our understanding of the law.

You, as associates of the Law Review, are serving in the media. Or, should we more accurately call it the working press? As editors, reporters, business managers, and faculty advisors, as the case may be, your interest in the First Amendment can be taken for granted. Let me read it to you again: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹ There is then a distinction between the freedoms of "speech" and of the "press," and the question presents itself as to whether it is a proverbial distinction without a difference. The Supreme Court has pointed out to us that all these rights, though not identical, are inseparable.²

Professor of Law David Anderson of the University of Texas pointed out in a law review article a few years ago that Chief Justice Warren Burger during his tenure, while conceding that the Supreme Court has never squarely resolved the question, urged that the institutional press should not be accorded any

1. U.S. CONST. amend. I.

2. For example, the Supreme Court has consistently held that the freedom of press does not impart separate and independent rights not available under the freedom of speech. See *Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Houchins v. KQED, Inc.*, 438 U.S. 1, 8-9 (1978); *Zurcher v. Stanford Daily*, 436 U.S. 547, 563-67 (1978); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-10 (1978). To date, no Supreme Court decision has rested squarely on the press clause independent of the speech clause.

freedoms under the press clause not accorded ordinary citizens under the speech clause.³ Former Justice Potter Stewart was of a different mind: he opined that the press clause is a structural provision of the Constitution designed to provide an additional check on official power, and that its primary effect is to protect editorial autonomy.⁴

What does legislative history reveal? On the one hand, one might urge that there is nothing, since in 1787 there was an overwhelming consensus in the Constitutional Convention that the Bill of Rights was unnecessary.⁵ On the other hand, the sentiments and words of the press clause find root in a 1768 resolution of the Massachusetts House refusing the colonial Governor's request that the *Boston Gazette* be subjected to grand jury scrutiny for seditious libel. In defiance, the House declared: "The Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."⁶

In 1774, shortly before the War of Independence, the Continental Congress, looking for support from Quebec, outlined the American objective. "The importance of [the freedom of the press] consists . . . in its ready communication . . . whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."⁷

The first freedom of press clauses appeared in eleven state constitutions adopted during the Revolution.⁸ Of these, nine contained freedom of the press provisions set forth in general terms.⁹ Pennsylvania had the only state constitution which protected freedom of speech as well as of the press.¹⁰ Significantly,

3. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 459-60, (1983).

4. Stewart, "Or Of The Press," 26 HASTINGS L.J. 631, 634 (1975).

5. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, 106-25 (1955).

6. Resolution of the Massachusetts House (1768), *quoted in*, L. LEVY, *LEGACY OF SUPPRESSION* 69 (1960).

7. Address to the Inhabitants of Quebec, 1774, *quoted in*, 1 *THE ROOTS OF THE BILL OF RIGHTS* 233 (B. Schwartz ed. 1980) [hereinafter SCHWARTZ].

8. Anderson, *supra* note 3, at 464.

9. *Id.*

10. The Pennsylvania provision read: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Schwartz, *supra* note 7, at 266.

Madison's first draft of what would become the First Amendment, as submitted to the First Congress, contained the language from Pennsylvania's Constitution, the only original state to give such protection to freedom of speech.¹¹ Despite a lengthy House discussion, the meaning of "freedom of the press" was not debated, and the redrafted language of a select committee — "The freedom of speech¹² — and of the press . . . shall not be infringed" was not disturbed.¹³ In the Senate, an attempt to limit freedom of the press by providing that it be protected "[i]n as ample a manner as hath at any time been secured by the common law" failed.¹⁴ This defeat of the proposed change had vast implications: it meant that the common law's half-hearted embrace of press freedom — no prior restraint but unlimited post-publication punishment — would not be an attribute of our Constitution. It meant that the law of the land would not provide the constitutional milieu for the imprisonment of editors because of their criticism of government. It kept the new government away from a dangerous and unworthy path.

The legislative history of the press clause is inconclusive, not only because that is the usual character of legislative history, but also because the Founding Fathers did not indicate what they meant by "freedom of the press." Some conclusions, however, are permissible. First, freedom of the press, whatever it meant, was a matter of great concern. Nine of the eleven states which adopted constitutions during the Revolution protected it.¹⁵ Every version of the Bill of Rights taken up by the First Congress included a press clause and no suggestion was made that it be deleted.

Second, freedom of the press was neither equated with nor viewed as a derivative of freedom of speech. The theory that the press clause was merely "complementary to and a natural extension of Speech Clause liberty," is not supported by historical events.¹⁶ Actually, the press clause was primary and the speech

11. Anderson, *supra* note 3, at 478.

12. *Id.*

13. 1 ANNALS OF CONGRESS 808 (1789).

14. JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (1789) (J. Gales & W. Seaton Printers 1820), *quoted in*, Anderson, *supra* note 3, at 480.

15. Anderson, *supra* note 3, at 464.

16. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, C.J.,

clause secondary.

"Third, there is no evidence that the framers intended to protect freedom of the press qualifiedly."¹⁷ In the debates of the Constitutional Convention and the First Congress, no one expressed any fear of the power of the press and no one suggested that it was necessary to balance the freedom of the press against other interests.¹⁸

Fourth, and most important, freedom of the press was regarded not merely as a desirable civil liberty, but as a matter integral to the framework of the new government. The underlying thrust of most, if not all, official declarations on the subject was that freedom of the press was a necessary constituent of self-government.¹⁹

Indeed, the Supreme Court, in *Time, Inc. v. Hill*²⁰ summed it up very well when it declared that the constitutional guarantee of freedom of the press is not so much for the benefit of the press as for the benefit of all the people, and that a "broadly defined freedom of the press assures the maintenance of our political system and an open society."²¹ Such a political course of action and such goals deserve our constant dedication. As a matter of fact, the strength of America, different than in any other country of the world, has been in its openness.

I am concerned. I am concerned about three important recent Supreme Court decisions which, with the spotlight focused on the much publicized flag desecration and abortion cases, went almost unnoticed.

In the first, decided on June 22, the "high court" upheld a jury verdict against the Hamilton, Ohio *Journal News*²² because its account about Connaughton, a political candidate, did not include information that would have made the story more balanced.²³ Until then, in a number of holdings, the Court refused

concurring).

17. Anderson, *supra* note 3, at 488.

18. The Senate had one proposal to limit protection of the press to those protections afforded by common law; it was defeated. Anderson, *supra* note 3, at 481.

19. LEVY, *supra* note 6, at 145-62.

20. 385 U.S. 374 (1967).

21. *Id.* at 389.

22. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678 (1989).

23. *Id.* at 2697-98.

to impose liability on a newspaper for material it did not print or consider. Libel would be found only in what was printed.²⁴ The new case erodes that principle.

In the second matter, *DiSalle v. P.G. Publishing Co.*,²⁵ the Supreme Court refused to review a jury award of \$2,000,000 in punitive damages, \$210,000 in compensatory damages, and \$561,000 in interest against the *Pittsburgh Post Gazette*.²⁶ This confirmed the largest libel award ever given in this country. The newspaper was held responsible for publishing a defamatory statement from an official proceeding — in *DiSalle* a sworn statement in pretrial proceedings — that usually is not punishable if it is repeated in the context of a fair and accurate account of a judicial proceeding.²⁷

In the third, a nonmedia matter, the Court refused to find that there was a constitutional limitation on punitive damages.²⁸

I am troubled. I am troubled because imposing punitive damages in order to “punish” the press will have an enormously chilling effect. Libel suits inhibit journalists by making them excessively cautious about (and being able to prove) all of the facts. Journalists and authors should base their reporting on the facts; but sometimes a government, a corporation, or an individual hides and refuses to divulge them. In such instances, the press must be free to make legitimate inferences about public issues.

In libel cases, are courts to tell newspapers how to write and edit their stories in the first place? In judging malice, is a publication's persistent interest in uncovering wrongdoing — muckracking if you will — as in one of the *Tavoulareas v. Washington Post Co.*²⁹ decisions a few years ago — “relevant to the inquiry of whether a newspaper's employees acted in

24. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

25. *DiSalle v. P.G. Publishing Co.*, 375 Pa. Super. 510, 544 A.2d 1345 (1988), cert. denied, 109 S. Ct. 3216 (1989).

26. *Id.*

27. *Id.* at 530-31 n.10, 544 A.2d 1356 n.10.

28. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989) (eighth amendment excessive punishment clause does not apply to awards of punitive damages).

29. *Tavoulareas v. Washington Post Co.*, 759 F.2d 90 (D.C. Cir. 1985).

reckless disregard of whether a statement is false or not[?]"³⁰ Should jury verdicts in cases involving the First Amendment right of freedom of the press be subjected to the same appellate review as in a fall-down lawsuit, where a jury award may be set aside only after every favorable inference is accorded the award?

The implications for each of us are frightening. Are those in the media to stop looking into our halls of government, our businesses affected with a public interest, the public welfare? At the moment, a sword hovers over the head of every member of the press and media doing his or her job. It is in reality a sword over the Constitution itself. This danger must be fought in the courts, in the legislatures, and in public forums.

The press and the media, down through the years, have been the benefactors of the citizenry. Their efforts, their interest, their "hard-hitting investigative stories" seeking out illegalities, irregularities, and matters of public concern should be neither chilled nor barricaded.

Albert Camus, the French writer whose works express a courageous humanism, saw it this way: "A free press can of course be good or bad, but, most certainly, without freedom it will never be anything but bad . . ."³¹

I still find the holding of *New York Times v. Sullivan*³² very persuasive. It balances the scales between the free press and responsible reporting.

Punitive damages in libel cases tend to undermine the commonweal and should be severely restricted, if not abolished. The real purpose of a libel suit should be to offer a forum to prove what was said or written was false and to decree a full measure of compensatory damages, if warranted.

Media writers and commentators should be permitted to serve the common good as conspicuous contributors to the "uninhibited robust and wide open" debate on public issues envisioned by our Founding Fathers and confirmed by the Supreme Court in its 1964 *Sullivan* ground rules.

May the Pace Law Review continue to be distinguished by its mark of excellence!

30. *Id.* at 121.

31. A. Camus, *Defense of Freedom: Homage to an Exile*, in RESISTANCE, REBELLION, AND DEATH 102 (1961).

32. 376 U.S. 254 (1964).