COMMENTARY

Legal Foundations of Press Freedom in the United States

By Jane E. Kirtley
Silha Professor of Media Ethics and Law at the School of Journalism
and Mass Communications, University of Minnesota

Virtually all of the law that has defined press freedom in the United States is derived from the First Amendment to the U.S. Constitution. Is that freedom as "absolute" as the words would suggest? The U.S. Supreme Court has been trying to answer that question for more than 200 years.

Ask just about any American about freedom of the press in the United States—and stand back! You're likely to get an earful about how "the media" are irresponsible. After all, they invade the privacy of individuals. They report lots of government secrets. And they do these things to sell more newspapers, or to get higher viewer ratings.

Or so the conventional wisdom goes. A survey conducted by the Freedom Forum's First Amendment Center in 2002 reported that 42 percent of those polled thought that the press has "too much" freedom. Whether that's accurate or not is a matter of opinion, but it is indisputable that U.S. law is sweeping in its protection of the rights of the news media, making its press, at least on paper, among the freest in the world.

But where did these rights come from? How have they developed and expanded over the years? What is the future for freedom of the press in the United States?

Historical Roots

U.S. law is derived from English common law. This means that the Constitution and statutes must be interpreted by judges, typically through opinions rendered in cases brought to trial by individual litigants or by the state. The Supreme Court of the United States is the final arbiter of what the Constitution means and whether

statutes or lower court decisions are consistent with its terms.

Prior to the American Revolution, the British colonies in North America were subject to many of the laws passed by Parliament to control freedom of expression. These included statutes requiring publishers to be licensed by the government, which effectively meant that material would be reviewed by a government official before it was published to determine whether it conformed to laws prohibiting blasphemy, obscenity, or saying anything that criticized the Crown, the latter known as seditious libel.

By the 1720s, American colonists had begun to chafe under these restrictions. Benjamin Franklin's *Pennsylvania Gazette* published the essays of "Cato," the pseudonym of two British journalists, who argued that "Freedom of Speech is ever the Symptom as well as the Effect of good Government." In 1734, John Peter Zenger, a New York printer, was charged with seditious libel for having printed anonymous criticism of the colonial governor general in his newspaper, the *Weekly Journal*. After spending nearly one year in jail awaiting trial, he was acquitted by a jury who refused to follow the judge's instructions and convict him. Zenger's lawyer, a retired attorney from Philadelphia named Andrew Hamilton, convinced the jury that no man should be subject to criminal penalties simply for criticizing the government, especially when the facts he reported were true—resulting in one of the earliest examples of "jury nullification" in what was to become the United States.

Following the Revolutionary War, the newly independent United States created a tripartite national government defined under a Constitution that, initially, had no Bill of Rights. Not until 1791 did the states ratify the first 10 amendments to the Constitution, which include the 45 words comprising the First Amendment: "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."

Virtually all of the law that has defined press freedom in the United States is derived from that short absolute phrase. It is a prohibition on federal (and, through the Fourteenth Amendment, state) government action, censorship, and control over the media. It does not attempt to define "the press," nor does it predicate the exercise of rights on the fulfillment of duties or responsibilities.

But is the First Amendment as "absolute" as the words themselves would suggest? The answer is one that the U.S. Supreme Court has been trying to answer for more than 200 years.

Prior Restraints

The strong antipathy to government suppression of controversial publications crystallized into one of the first Supreme Court decisions defining freedom of the press, *Near v. Minnesota,* 283 U.S. 697 (1931). The high court invalidated a state statute that permitted officials to prohibit publication of "malicious, scandalous, and defamatory" newspapers. The statute further required publishers who had been enjoined to obtain court approval before resuming publication. The Supreme Court ruled that "prior restraints" are presumed to violate the First Amendment. However, the opinion by Chief Justice Charles Evans Hughes noted that the constitutional protection is "not absolutely unlimited," suggesting that, for example, publication of the details of troop movements in wartime, obscenity, or incitement to acts of violence might be subject to restrictions.

Nevertheless, in the years following the *Near* decision, the Supreme Court has continued to strike down attempts to restrict the press, including in instances where the government claims that publication would violate national security. One of the most dramatic examples was the "Pentagon Papers" case, *New York Times Co. v. United States,* 403 U.S. 713 (1971). In this case, the Nixon administration sought court orders to stop the *New York Times* and the *Washington Post* from publishing classified documents pertaining to the Vietnam War. In a brief, unsigned opinion, the high court ruled that the government had failed to meet the heavy burden imposed upon it by the Constitution because it did not prove that publication would result in direct, immediate, and irreparable harm to the national interest.

The "Pentagon Papers" decision, like *Near,* does not declare that every prior restraint invariably violates the First Amendment. It makes clear, however, that it is up to the government to justify any attempt to stop the press from publishing. It is not up to the press to explain why it should be allowed to publish.

This strong presumption has extended even into types of

speech that the court in *Near* suggested could be restrained. In *Miller v. California,* 413 U.S. 15 (1973), the court reiterated that obscene speech enjoys no constitutional protection, but crafted a narrow definition of "obscenity" to ensure that material with serious literary, artistic, political, or scientific value could still be distributed. Similarly, even speech advocating the violent overthrow of the government in the abstract is protected as long as no imminent lawless action is likely to result *(Brandenburg v. Ohio,* 395 U.S. 444 (1969), *Hess v. Indiana,* 414 U.S. 105 (1973)).

The court went still further when it struck down a Florida statute requiring newspapers that editorially attacked a candidate for elected office to print the candidate's reply. In *Miami Herald v. Tornillo,* 418 U.S. 241 (1974), the Supreme Court held that compulsory publication is as much of a "prior restraint" as prohibiting publication would be. Although the justices acknowledged that the legislators' goal of encouraging the press to provide a forum for competing viewpoints was laudable, they found that the statute impermissibly usurped the rights of editors to express the views of their choice, and might even have the perverse effect of reducing political coverage. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and like many other virtues it cannot be legislated," Chief Justice Warren Burger wrote.

> "For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."
>
> Chief Justice William Rehnquist

Libel

Until 1964, under the common law of the United States, libel—the publication of false and defamatory statements about an individual—fell outside the protections of the Constitution. But in *New York Times v. Sullivan,* 376 U.S. 254 (1964), a case decided during the height of the civil rights movement in the United States, the Supreme Court recognized that in order to avoid chilling robust discussion and commentary about the actions of government officials, news organizations must be given breathing space to make some errors, in good faith, without facing liability. The high court ruled that public officials who wish to sue for libel would be required not only to prove that statements were false, but that the publisher either knew they were false or published them with "reckless disregard" for their truth or falsity.

This legal standard of fault, known as "actual malice," was subsequently extended to libel suits by public figures as well as government officials. The 50 states are permitted to determine the level of "fault"—actual malice, negligence, or something in between—in libel suits brought by private individuals, but the high court has made clear that some degree of fault must be demonstrated in order for any monetary damages award to be made.

Criminal Libel and "Insult Laws"

In spite of a long tradition of colorful political discourse, the Federalist-controlled Congress enacted a Sedition Act in 1798, ostensibly in response to hostile acts by the French Revolutionary government. The law proscribed spoken or written criticism of the government, and was utilized to convict and jail several journalists who supported the opposition party of Thomas Jefferson. That statute expired early in the 19th century.

Today, as a practical matter, expressions of opinion, however caustic or hurtful, are absolutely protected under U.S. law. Although several states enacted criminal libel statutes during the 19th century, the Supreme Court, in *Garrison v. Louisiana,* 379 U.S. 64 (1964), struck down the Louisiana law because it did not permit a defense of truth. In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), the high court declared that pure opinion—statements that can neither be proven true nor false—can never be the basis for a libel suit. And in *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988), the Supreme Court ruled that even "outrageous" and deliberate attacks on public figures may not be the basis for a lawsuit claiming emotional distress—what would be the equivalent in many countries to an assault on one's honor or dignity—unless the claimant is able to show that the publication contains false statements of fact, and that the statements were published with "actual malice."

"Were we to hold otherwise," Chief Justice William Rehnquist wrote, "there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject." Quoting from an earlier Supreme Court decision, the chief justice concluded, "[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."

Privacy

The U.S. Constitution does not explicitly articulate a right to privacy. Although the Supreme Court has interpreted the Fourth Amendment to protect individuals from unreasonable searches and seizures by the government, the concept of a right to be left alone by one's fellow citizens did not emerge in American jurisprudence until 1890, in an article by Louis D. Brandeis and his law partner in the *Harvard Law Review* ("The Right to Privacy," 4 *Harvard Law Review* 193). Since then, most states have recognized one or more of the four distinct types of invasion of privacy, which can be the basis for civil damages suits: intrusion on seclusion, publication of private facts, portraying someone in a false (but not necessarily defamatory) light, and misappropriation of an individual's name or image for commercial purposes without consent.

Claims for intrusion and publication of private facts present the most significant legal challenges for journalists. They represent a genuine collision between competing societal interests. Although the Supreme Court has recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated" (*Branzburg v. Hayes*, 408 U.S. 655 (1972)), the high court has also made clear that the news media are not exempt from laws, such as criminal trespass statutes, which apply to the public in general, unless enforcement would unduly abridge the exercise of free press rights. Similarly, the right of the individual to a private life has been tacitly acknowledged by the court. However, because of the broad protection the Constitution grants to truthful speech, a news organization may publish even highly offensive "private facts" with impunity if it is able to demonstrate that the information is a matter of legitimate public interest and concern.

Access to Government Information and Proceedings

Consistent with English common law tradition, court proceedings in the United States have always been open to the public. But it was not until *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) that the Supreme Court recognized that the First Amendment confers a constitutional right of access to criminal proceedings to both the press and the public. As Chief Justice Burger wrote, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

The legislative branches of both the federal and state governments have generally conducted the bulk of their business in public. Access to the executive branch, however, has always been more elusive and problematic. As Justice Potter Stewart declared in a speech at Yale Law School in 1974, the First Amendment "is [not] a Freedom of information Act." ("Or of the Press," 26 *Hastings Law Journal* 631, 636 (1975)). In 1967, Congress attempted to remedy this deficiency by enacting the Freedom of Information Act, which created a presumption of openness for records created and held by executive branch agencies of the federal government, subject to nine categories of limited exemptions. The burden of justifying the denial of access to documents rests with the government. All 50 states have also adopted similar statutes that regulate disclosure of records generated by state and local government agencies.

Who Is "The Press"?

The First Amendment explicitly forbids Congress to single out the news media for regulation or punishment that would not be imposed on others, but sometimes the government may choose to recognize special privileges for journalists.

As a practical matter, this may be as simple as granting reporters the right to cross police lines at disaster scenes upon presentation of a "press pass" or proof of their employment. The question may take on constitutional dimensions, however, in the context of testimonial privileges, similar to those that protect members of certain professions, such as physicians and clergy, from being compelled to reveal confidential communications received in the course of their work. Although the Supreme Court has declined to recognize an all-encompassing journalist's privilege under the First Amendment (*Branzburg v. Hayes*, 408 U.S. 655 (1972)), 31

states and the District of Columbia have passed statutes that provide varying degrees of protection for reporters who wish to protect confidential sources and unpublished information, and most state courts have granted common law privileges to journalists, as well.

But who is a "journalist"? This has been a question that American courts have been loath to answer. After all, if the government can define who is entitled to act as a journalist, it can control who gathers and disseminates news. Yet, with the advent of the Internet, which allows anyone with access to a computer and a modem to publish his or her opinions to the world, how will the law determine who is entitled to claim those rights? The Internet is a medium that crosses borders instantaneously, enabling information and ideas to be disseminated in the twinkling of an eye. Determining whose standards and laws will apply to the speech and the speakers who use it to communicate will be one of the major jurisprudential challenges of the 21st century.

Conclusion

It is not easy to live with a free press. It means being challenged, dismayed, disrupted, disturbed, and outraged —every single day. And some days, Americans aren't so sure that the nation's founders made the right decision 200 years ago when they embraced a free press.

Where does a free press come from? Some would argue that it is a fundamental human right. And yet, history has demonstrated that, except for a very short period of time, it has been a right honored more in the breach than in the observance. James Madison has rightly been called "the Father of the Constitution," and of the First Amendment in particular, but the Constitution and the Bill of Rights have never been self-executing documents. They depend upon an independent judiciary to interpret them and to bring them to life.

As Justice Potter Stewart once reminded a gathering of lawyers, judges, and journalists, "Where do you think these rights came from? The stork didn't bring them! The judges did." (Lewis, "Why the Courts," 22 *Cardozo Law Review* 133, 145, (2000)) *www.cardoza.yu.edu/cardlrev/v22nl/lewis.pdf*

The opinions expressed in this article do not necessarily reflect the views or polices of the U.S. government.