Social Education 83(2), p. 68–71

Freedom of the Press: Challenges to this Pillar of Democracy

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"Our liberty depends on the freedom of the press, and that cannot be limited without being lost," Thomas Jefferson wrote to a friend in 1786.

More than two centuries later, is the news media still seen as a pillar of freedom, a bulwark against tyranny?

The role of the news media in our society has become a constant battleground. In a Gallup Poll last October, only 45 percent of Americans had a high degree or a fair amount of trust in the news media to fairly report the news. President Donald Trump attacks the credibility of the media almost daily. Cable organizations are labeled as liberal or conservative instead of as just news. Information flows on social media and Internet sites at lightning-fast speed with no way to verify accuracy.

What is the role of the news media in our society today? What rights and legal protections guard the news media against encroachment by government? To whom do protections for news media apply in an era in which the Internet and social media platforms make everyone a potential publisher?

To explore these questions, let us start with some background.

What became the First Amendment was introduced by James Madison in the first U.S. House of Representatives in 1789 and ratified by the states in 1791. The language of the First Amendment relevant to this discussion says, "Congress shall make no law ... abridging the freedom of speech, or of the press...." That is not the way the text began. Madison's early draft discussed more fully the protections for the written word. He wrote, "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The U.S. Senate pared the language closer to the final result that we now know.

Freedom to Criticize the Government

An essential concept in the history of freedom of the press and freedom of speech, predating the First Amendment, has been much debated: the freedom to criticize the government. In 1735, long before the creation of the United States, John Peter Zenger, printer of the *New York Weekly Journal*, a newspaper critical of then-Governor William Cosby, was tried for seditious libel–the crime of ridiculing the government, or as practiced in England, ridiculing the king. A jury acquitted Zenger after his lawyer persuaded them of what was then a novel concept—that Zenger should be allowed to demonstrate that the statements were true, as a defense. This outcome raised consciousness in the colonies about the importance of a press that was free to criticize government.

Not long after the First Amendment was ratified, however, Congress passed the Sedition Act of 1798, which allowed for the criminal prosecution of those who brought the president or the government into disrepute and ridicule. Passed by the Federalists under President John Adams, the law was used to convict some 10 Republicans loyal to Thomas Jefferson. When he assumed the presidency, Jefferson pardoned the convicted.

Noteworthy in that deeply partisan struggle is that newspapers of the day identified largely with one party or the other, as did pamphlets and other writings that served as the catalyst for the prosecutions.

The constitutionality of the Sedition Act of 1798 under the First Amendment was never tested in the U.S. Supreme Court at the time. It would be another 166 years before the Court, in *New York Times v. Sullivan* (1964), would declare, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."

Actual Malice

The ruling in *New York Times v. Sullivan* was a critical step in the Supreme Court's protection for freedom of the press. First, the Court appeared to bury, decisively and perhaps for all time, the idea that individual speakers or publishers could be punished for criticism of government under a theory of seditious libel. The ideal, the Court said, was "a profound national commitment to the principle

The New York Times **resumed publication of its series of articles based on the secret Pentagon papers in its July 1, 1971 edition, after it was given the green light by the U.S. Supreme Court. (AP Photo/Jim Wells)**

that debate on public issues should be uninhibited, robust, and wide-open."

Second, the Court set a very high bar for public officials, later extended to public figures, to be able to recover damages from the news media for false and libelous statements. The Court adopted the "actual malice" test that requires a public figure to demonstrate either recklessness or deliberate falsehood by the news media. This standard makes it difficult for those in the public eye to win libel verdicts, but there are still regularly some who try and who complain about the high standard. When the subject of alleged libel is a private person or topics that are not of general public interest, the Supreme Court has afforded substantially less protection for publishers and speakers. But the focus of debate today remains the tough actual malice standard.

President Trump has on more than one occasion been one of those complainers, vowing a year ago "to take a strong look at our country's libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts." Although libel is a matter of the laws of the 50 states, over which the president has no authority, he continued, "Our current libel laws are a sham and a disgrace and do not represent American values or American fairness." It is important to note that Trump's criticism of libel law thus far has attacked the actual malice standard but has not formally proposed reviving the concept of seditious libel.

Yet while the president does not seek to revive seditious libel, a lawsuit filed last fall accuses him and his administration of using federal power to retaliate against journalists whose reporting he does not like. The writer's organization PEN America alleged in a complaint filed in U.S. District Court in Manhattan that "journalists who report on the president or his administration reasonably believe they face a credible threat of government retaliation for carrying out the duties of their profession. President Trump has thus intentionally hung a sword of Damocles over the heads of countless writers, journalists and media entities." This pattern of activity violates the First Amendment, the lawsuit alleges.

No Special Protections

New York Times v. Sullivan is also one of numerous examples of an important principle that the Supreme Court has followed regarding freedom of the press, namely that the press is not really entitled to special protections that are separate from or more extensive than the public generally. In ruling that L.B. Sullivan, police commissioner of Montgomery, Alabama, could not recover damages from the *New York Times* for errors in a published civil rights advertisement because there was

no actual malice, the Court applied the same First Amendment standard to repel his damage claims against four individual ministers who were leaders of the civil rights movement and whose names appeared in the advertisement. In the libel context, most lawsuits still seem to involve some form of news media defendant, and the law of actual malice has developed largely in a media context.

But this important principle that the news media is not entitled to special privilege has arisen in numerous other contexts, as well. When the Supreme Court recognized, in *Richmond Newspapers v. Virginia* (1980), that the First Amendment protects access to attend criminal trials, it was the right of the press and the public on which the justices opined. The Court has said that providing the news media access to information and events may serve as a proxy for general public access, but the right belongs to the public, not exclusively to the news media.

The practical result of this principle in recent decades is to mute the separate impact of the freedom of the press clause and effectively merge it with the guarantee of freedom of speech. This focus on the public right, rather than the media's, figured prominently in two important Supreme Court decisions, one in 1972 and the other in 1991.

In *Branzburg v. Hayes* (1972), the Supreme Court ruled that news reporters have no absolute First Amendment right to refuse to comply with grand jury subpoenas, that journalists must obey the law like anyone else called to give evidence and cannot decline because they have confidential sources. While many states have since passed shield laws protecting reporters and their sources, the First Amendment treats the press and the public the same. The Supreme Court extended this principle in another ruling, *Cohen v. Cowles Media* (1991), holding reporters and their newspaper liable for breaching a promise to keep the identity of a source confidential. The promise was legally enforceable like those made by any citizen, the Supreme Court said.

Prior Restraint

For much of the nation's history, the free press clause saw relatively little action. As ratified in 1791, both this clause and the free speech clause served only to protect rights from interference by the federal government and not by the states. It was not until 1925 (*Gitlow v. N.Y.*), for the free speech clause, and 1931 (*Near v. Minnesota*), for the press clause, that the Supreme Court also applied those protections to limit the power of state governments.

The case of *Near v. Minnesota* was the first to formally recognize one of the most widely accepted principles of freedom of speech and freedom of the press in this country: that the First Amendment prohibits prior restraints by government to prevent speech or publishing from taking place. A prior restraint is a government order—it could be from a court, a government official, or a legislative body—that prohibits expression before it occurs. In *Near*, the Supreme Court invalidated a Minnesota law that was used to get an injunction to prevent *The Saturday Press* from future publication after it printed stories tying politicians to gangsters. The Court drew a line of demarcation, saying that a publication might be stopped from disseminating the dates and times of troopship sailings during war because that information, in the hands of our enemies, would jeopardize the safety and security of troops. But criticism of government, even "reckless assaults," the Court said, could not be stopped from publication. The Court stated:

> The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.

After *Near*, the most famous case of prior restraint involved the publication in 1971 by the *New York Times*, the *Washington Post* and other newspapers of articles based on the top secret Pentagon Papers, a study commissioned by the U.S. military on the Vietnam War. The papers were leaked to the news media, and President Richard Nixon's Justice Department went to court repeatedly to block publication of secret details. Ultimately, the Supreme Court ruled strongly in *New York Times Co. v. United States* (1971) that court orders blocking publication were an unconstitutional prior restraint in violation of the First Amendment. But a majority of justices indicated in separate opinions that under some extreme circumstances, especially if there were a genuine threat to national security, a prior restraint might be justified.

Thus, while the general prohibition against prior restraints remains a bedrock principle of the First Amendment, skirmishes break out from time to time over whether and when a court may issue such an order.

Uncharted Waters

Where do these basic principles leave protection for the news media today? What does freedom of the press mean 228 years after the First Amendment officially became part of the Constitution?

There are many challenges that strain the capacity of the Supreme Court and the First Amendment. Perhaps foremost among them is the question of how to fit the ever-changing landscape of social media and Internet information sites into an existing First Amendment framework.

One issue that is a subject of constant debate is how to treat social media platforms for free speech purposes. The First Amendment by its terms and by Supreme Court interpretation applies only to limit government regulation of speech and press. That

means that in today's world, some of the biggest forums for expression, like Facebook and Twitter, are not subject to the First Amendment and may permit or prohibit speech as they see fit.

But what happens when government officials, like President Trump, use Twitter to make what appear to be official pronouncements. There is much uncharted water here. Last May, a federal judge in New York ruled that President Trump violated the rights of seven Twitter users whom the White House blocked from access to @**realdonaldtrump** because they had criticized him. The Justice Department has appealed that ruling.

This is just one example of the many kinds of First Amendment issues that will challenge traditional notions of freedom of speech and freedom of the press. The Supreme Court has scarcely scratched the surface of these forms of communication. In a June 2017 decision, *Packingham v. North Carolina*, the Supreme Court invalidated a state law that barred a convicted sex offender from accessing any sites on the Internet where minors might be present or might maintain their own pages. In an opinion by Justice Anthony Kennedy, who has since retired, the Supreme Court observed that the state law "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."

The First Amendment guarantee of freedom of the press has stood the test of time through vast changes in technology and communications, proliferation of the forms of expression, and dramatic and perpetual changes in societal values. What lies ahead will continue to challenge the strength of this pillar of democracy.

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