The New Reality

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Anthony Lewis, Nieman Fellow '57, columnist for *The New York Times* and Lecturer on Law, Harvard Law School, gave the following address at the annual Christmas dinner of the Signet Society in Cambridge, Massachusetts.

Martin Chuzzlewit, the hero of Dicken's novel of that name, sails to the United States on a packet boat. As the boat reaches New York harbor, it is boarded by a gang of newsboys who shout out the latest in their papers — the New York Stabber, the Plunderer, the Peeper, the Family Spy and so on. "Here's the Sewer!" cries one of them, "The New York Sewer. . . . A full account of the Ball at Mrs. White's last night. . . . with the Sewer's own particulars of the private lives of all the ladies that was there! . . . Here's the Sewer's exposure of the Wall Street Gang, and the Sewer's exposure of the Washington gang, and the Sewer's exclusive account of a flagrant act of dishonesty committed by the Secretary of State when he was eight years old; now communicated, at a great expense, by his own nurse."

Illustration of Martin Chuzzlewit by Phiz
The Riverside Press, Cambridge, Massachusetts, 1868

Well, Dickens could be extravagant, and in *Martin Chuzzlewit* he vented some extremely unhappy feelings about the United States. But just a few years earlier, in 1835, a most judicious foreign observer who deeply admired this country indicated similar doubts about the uninhibited character of the American press. In *Democracy in America*, Alexis de Tocqueville quoted a rancid newspaper attack on President Jackson as, among other things, corrupt, ambitious, intriguing and shameless. De Tocqueville said:

"I admit that I do not feel toward freedom of the press the complete and instantaneous love which one affords to things by their nature supremely good. I love it more from considering the evils it prevents than on account of the good it does."

Nowadays the American press feels unloved, especially by judges. Cases decided in the last few years have left many editors and reporters with an acute sense of living under threat from the law. One of those cases involved Myron Farber, a *New York Times* reporter who was jailed for contempt when he refused to produce his notes for possible use by the defendant in a murder trial. After that, a *Wall Street Journal* reporter wrote:

"The judiciary — certainly not all of it, but enough of it to lay down the law — has for all practical purposes declared war against the press."

Another case involved the Stanford *Daily*, Palo Alto, California. The undergraduate paper covered a violent demonstration at Stanford University in which a number of people were badly hurt. The police, with no other clues to the identity of the assailants, got a warrant and searched the paper's offices for photographs of the event — and the Supreme Court upheld that search. Carl T. Rowan, the newspaper columnist, called it "an atrociously un-American ruling" and said:

"History will probably judge this to be one of the worst Supreme Courts in our history."

Just the other day Jack Anderson, the investigative columnist, commented:

"Crazy as it may seem, the current Supreme Court is systematically working to repeal the United States Constitution."

Strong words. Can they be true? Have our courts forgotten the First Amendment? Or why is there this feeling of embattlement, of hostility between the law and the press?

American courts cannot fairly be charged with any general insensitivity to freedom of expression. Over the last two decades judges, especially those on the Supreme Court of the United States, have interpreted the First Amendment generously, even imaginatively, to protect freedom of speech and press. They have given editors what I think is beyond doubt the widest measure of legally enforceable independence that exists, perhaps that ever has existed, in any country.

Consider libel as an example. Before 1964 there were no constitutional limits of any kind on libel actions. That is, no award of damages for a defamatory publication — however large, however outlandish — was then thought to infringe on the freedom to publish under the First Amendment. Since then the Supreme Court has read the Constitution to put sophisticated limits on a libel action. It has transformed the American law of libel. There are still serious burdens in its application, notably the cost of defending lawsuits. But compared with, say, Britain, the threat of libel actions to freedom of expression is minimal.

In recent years, the press has acquired significant new legal protections in other areas, too. The Supreme Court decided, in the Pentagon Papers case, that a newspaper could not under existing law be restrained from publishing top-secret documents that the government insisted might compromise the national security. The Court has similarly said no to what the press calls gag orders — injunctions prohibiting publication of a defendant's confession and other such material before or during the trial of a criminal case.

Those are among many recent legal victories for the press. Why, then, the feeling of anxiety, almost of persecution by judges? It stems primarily, I believe, from concern over the protection of confidential sources. The fear that the names of sources may be discovered in unannounced police searches of newspaper offices explains the very critical reaction to the Supreme Court's decision in the Stanford *Daily* case. And the need to protect the identity of sources was the main legal argument made by Myron Farber and his employer in resisting the demand for his notes.

The argument is straightforward. Information about wrongdoing in our society can often come only from people who fear retaliation if their names become known. So reporters may have to promise confidentiality if they are to get the story — and their effectiveness in the future depends on keeping their promises. The Constitution must protect this essential aspect of journalism.

In newspaper terms, that is a strong argument. There is no alternative to some use of confidential sources — Watergate shows that. But it does not follow that the Constitution protects journalists in this professional mechanism. Even less, in my opinion, does it follow that the interest of the journalist is the only one involved.

Another interest, for example, is law enforcement. In 1972 the interest of the press and of law enforcement clashed. In several cases grand juries were investigating crimes or possible crimes that reporters had witnessed. The reporters were called to testify. When they refused, they were held in contempt — and by a vote of five to four the Supreme Court upheld the contempt findings. The opinion, by Justice White, emphasized the ancient right of the grand jury to "every man's evidence."

A curious sidelight to that case was decided on June 29, 1972, just twelve days after an event at the Watergate in Washington, little noticed at the time. I think Justice White has to be credited with prescience for putting into his opinion a footnote about the importance of every man's evidence:

"Chief Justice Marshall," he noted, "opined that in proper circumstances a subpoena could be issued to the President of the United States."

Not too long afterwards a subpoena *was* issued to the President of the United States. He resisted, saying that he had a privilege to keep the intimate conversations in his office private. The Supreme Court agreed that there was such a Presidential privilege, but said that it could be overridden in the interest of law enforcement.

Are we to say, then, that law enforcement is so important that the constitutional privileges of presidents must bow to it — but that the interest of the press always comes first? I would not say that.

Or consider the Farber case. This time it was not the

prosecution that wanted the reporter's evidence but the defendant — a doctor who had been implicated in some hospital deaths by Farber's stories and who had then been indicted for five murders. Myron Farber says that his notes were irrelevant to the doctor's defense, and I believe him; he is a fine reporter who respects the demands of the law. But the press is not always the good guy. In McCarthy days the press sometimes treated individuals cruelly. Shouldn't someone named as a Communist in a redbaiting paper be able to find out the paper's evidence?

A defendant has some specific constitutional rights. One of them, secured by the Sixth Amendment, is the right "to have compulsory process for obtaining witnesses in his favor." If anyone doubts the importance of that right, or its part in a civilized system of criminal justice, think of the dissenters who at their trials in the Soviet Union are often prevented from calling witnesses in their favor.

When the press talks as if no rights other than its own were involved in these cases, its premise must be that the Constitution gives the press a unique status: an immunity from rules that bind others in our society. That view was given considerable standing when it was expressed five years ago, in a speech at Yale, by Mr. Justice Stewart of the Supreme Court.

His speech dealt with the press clause of the First Amendment, the last four words in the famous command: "Congress shall make no law... abridging the freedom of speech, or of the press." Justice Stewart said the authors of those words intended to give special protection to "the organized press" — newspapers, magazines, broadcasting — because it provided "organized, expert scrutiny of government."

As a matter of history, I do not think Justice Stewart's view is very convincing. He said the framers were conscious of Tudor and Stuart repression in England, where the press was "licensed, censored and bedeviled by prosecutions for seditious libel." True enough. But that repression was not aimed solely, or especially, at newspapers. The censors were just as severe toward books and pamphlets — "ofttimes huge volumes," as John Milton said in protest of the censorship.

There are also practical problems with Justice Stewart's thesis. One is definitional: Who would be included in "the organized press" and get special treatment? Would the concept be limited to established publications and broadcast stations, or would it include underground newspapers, journals of sexual exploitation, Wall Street tip sheets? In these days of the Xerox, what about the person suddenly inspired to circulate among the neighbors an angry attack on real estate speculators? Such questions would force the courts to go into the business of defining "the press," a form of judicial licensing that I think would not really please the press.

In today's world some people who are not editors or reporters may play important roles as communicators. There is the former CIA man who published a book on the final days in Vietnam without having it cleared first; when the Government tries to punish him by lawsuit, should his rights — or the interest of the First Amendment — be any less than in the case of a reporter? Or consider the Harvard professor who was subpoenaed by a Federal grand jury looking into the Pentagon Papers case and asked to reveal his sources for a scholarly study he had made of Vietnam; should he have to reply while Mr. Farber is exempt? When I put such cases to students, I find that they always want to define the professor and the CIA man as "the press," too; the cases are simply too compelling to be treated less sympathetically. But when you make the definition that broad, Justice Stewart's concept of press exceptionalism loses its meaning.

In dissent from the Stanford *Daily* decision, Justice Stewart expounded his view in these words:

"Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press."

So in Justice Stewart's view the Constitution did not allow the police to get a warrant to search the offices of an undergraduate daily for photographs of a felony, a vicious mass assault. But the Constitution would allow an unannounced search through a lawyer's files, or the files of Daniel Ellsberg's psychiatrist, Dr. Fielding. To state the proposition is to refute it, I think. Such a mechanical concept of the Constitution would be utterly unacceptable to most Americans. The Constitution protects values, not particular classes of people. And there are values other than "the right to know." One is the right of an accused to defend himself effectively. Another is reputation, which Justice Stewart has convincingly said reflects "our basic concept of the essential dignity and worth of every human being." That is why the Supreme Court has not held all libel actions unconstitutional and why I think it will continue to allow some means, whether by damage suits or some other corrective process, for those who are defamed to vindicate their good names.

Finally, Justice Stewart has disappointed the press in one important respect. He said the press should have special protection for its sources because the Constitution protected "news-gathering." But he then vigorously rejected claims by the press that it had a right of access to

institutions closed by government action. When reporters wanted to see prisons which had been closed to them, Justice Stewart said they had no constitutional right to do so. And in July 1979, in perhaps the most important of all these cases, he wrote for a five to four majority of the Court in allowing New York State to hold an important pretrial hearing in a criminal case in a closed courtroom. That decision, in the Gannett case, aroused some more angry words from the editorial writers and columnists: this time, I think, with more justification.

Is there any way out of the conflict — a way to protect the vital *public* interest in a free press without a distorting constitutional favoritism for one institution? I think there may be.

Justice William J. Brennan, Jr. made an important contribution in a recent speech at Rutgers University. He chided the press for making exaggerated attacks on the Supreme Court, for overdoing the gloom and doom. He had dissented from the decisions that so outraged editors, he noted, but he did not think they were the end of the world — or of our amazingly free press. Then he made an interesting suggestion. He said the press was confusing two different aspects of the First Amendment in its blanket criticism of the press decisions.

One thing the First Amendment protects, Justice Brennan said, is speech as such: "the right of self-expression," "the right to speak out." That is the right that was involved in some of the classic free-speech opinions by Justices Holmes and Brandeis: the right of the streetcorner orator, the pacifist, the socialist newspaper — "freedom for the thought that we hate," as Holmes said.

But the First Amendment does more than that, Justice Brennan said. It "forbids the government from interfering with the communicative processes through which we citizens exercise our rights of self-government.... Another way of saying this is that the First Amendment protects the structure of communications necessary for the existence of our democracy."

That same thought about the two functions of the First Amendment was expressed twenty-five years ago in more moving words by Professor Zechariah Chafee of Harvard. "There is an individual interest," he said, "the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."

What is at stake in that second category is, in short, the ability of the American public to scrutinize its government — to scrutinize and criticize. Justice Brennan takes a broad view of what is necessarily involved in that public ability: wisely so, I think, in light of the way society has developed.

In the eighteenth century, newspapers did not usually provide the "organized, expert scrutiny of government" that Justice Stewart kindly attributed to them; they were political sheets, amazingly propagandistic in tone to our eyes. Democracy was simpler in that small country. But today the issues have become so complex and the public so remote from the political actors that it depends for its democratic role on what it gets from the political communications system. And that system has itself become much more complex. The soapbox orator is no longer the paradigm. We are in an age of giant media corporations: Time Inc., *The Washington Post*, the networks — and of large lobbying organizations, from the oil companies to the NAACP.

Justice Brennan's formulation takes account of the new reality. It recognizes that communication about government today is a complex process, and that the process must be protected in all its aspects if the central meaning of the First Amendment — the public's ability to hold the government accountable — is to work. It is a formulation that avoids any narrow definition of "the press" and protects whatever plays a part in the informational process. I think Justice Brennan's view would assure the public and its representative, the press, some access to official business — the right denied in the closed courtroom case — because there can be no accountability in secret.

But the price of that broad view is that it cannot give anyone absolute protection. The interests of the press, Justice Brennan said, have always to be weighed heavily — but weighed against other public interests: reputation, privacy, law enforcement and the like. For example, the rule would be that courtrooms are presumptively open — but the presumption could be overturned if a pretrial hearing involved material gravely prejudicial to a fair trial.

Justice Brennan told the press that it would be more effective in its criticism of the court "if bitterness does not cloud its vision, nor self-righteousness its judgment." He suggested that we reporters and editors might have to accept "a certain loss of innocence, a certain recognition that the press, like other institutions, must accommodate a variety of important social interests."

That seems to me to be good advice. I hope the press listens to the message, and I hope Justice Brennan's colleagues take up his suggestion that the First Amendment assures the accountability of government by protecting the informing function in its whole contemporary complexity.

I happen to have a deep affection for both the press and the courts. I think both institutions are vital to American freedom, and I worry when they are at war — even a war of words. I think the two of them owe it to the country, and to themselves, to begin learning more about each other. □