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Daniel Schorr

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# The 1996 Mathew O. Tobriner Memorial Lecture

## The First Amendment Under Pressure

by  
DANIEL SCHORR†

The last time I spoke at a school in the Bay Area was in 1977 at Berkeley. I was a Regents Professor in Berkeley's Journalism School, a refugee from the CIA, CBS, and Congress back East. My subject was "Limits on Freedom of the Press," and I argued, with some passion, that there shouldn't be many. My views were colored by what I had recently been through on the First Amendment war front.

I had been summoned before the House Ethics Committee in public session and required to name the source from which I had obtained the draft of a report of the House Intelligence Committee on CIA and FBI malfeasances, a report that the House had voted to suppress. If I did not comply, I was warned, I would be subject to being cited for contempt of Congress. That carried the penalty of a stiff prison sentence and a fine. The Supreme Court had ruled, in *Branzburg v. Hayes*, that the First Amendment afforded no absolute protection for a journalist's sources,<sup>1</sup> and so the prospect of jail, as my lawyer, Joseph Califano, explained to me, was very real.

The hearing was being carried live on public television, and it must have elicited some response around the country. At the end of the day, the committee retired into executive session and voted 6 to 5 against holding me in contempt. Considering the initial hostility of most of the members, condemning me for arrogant disregard for the will of Congress, the committee's hand may well have been stayed, in the end, by a word from constituents, expressing support for a beleaguered reporter's First Amendment defense.

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† Veteran reporter-commentator Daniel Schorr, the last of Edward R. Murrow's legendary CBS team still fully active in journalism, currently interprets national and international events as senior news analyst for National Public Radio.

1. *Branzburg v. Hayes*, 408 U.S. 665, 708-09 (1972).

I am not sure that the public today would rally that way behind a reporter defending a First Amendment right, or "privilege," as it is called in the law. "Privilege" is an interesting word. In its first dictionary meaning: a special advantage, like "the privileges of the very rich;" then, legal immunities for officials, like the President's "executive privilege;" finally, citizen immunities, like lawyer-client privilege, doctor-patient privilege, priest-penitent privilege, and the Fifth Amendment privilege against self-incrimination. And how about First Amendment reporter-source privilege? That is less securely anchored in law and in popular acceptance.

Ultimately, privilege must depend on public support, and support for press privilege has ebbed in these twenty years. In part, this is because the First Amendment has been stretched to cover a variety of activities that do not enjoy public approval. We have recently witnessed campaigns against violence and pornography on television, against gangsta rap records, and against exploitative talk shows. All of these enjoy First Amendment protection, but stretching the First Amendment to shield activities regarded as antisocial only weakens support for the First Amendment. I can remember Jules Feiffer, at a conference of the American Civil Liberties Union, being asked how the ACLU could defend *Hustler* magazine.<sup>2</sup> He said, "In the civil liberties business we sometimes have to defend people we wouldn't have dinner with."<sup>3</sup>

By the age of 18, according to the National Coalition on Television Violence, the average American will have seen 200,000 acts of violence, including 40,000 murders.<sup>4</sup> All protected by the First Amendment. According to *USA Today*, of forty-five sex scenes counted in a sample television week, only four involved married couples; thirty-nine involved adulterers or unmarried persons.<sup>5</sup> And in none was there indication of anyone using condoms. (For some things First Amendment protection isn't sufficient.)

At my advanced age, I can remember a more innocent age on television. In 1950, the words "hell" and "damn" were first used on the CBS Arthur Godfrey show.<sup>6</sup> In 1961, Yvette Mimieux showed the first woman's navel on a *Dr. Kildare* episode.<sup>7</sup> Television has come a

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2. Jules Feiffer, Conference of the American Civil Liberties Union.

3. *Id.*

4. Christopher Lee Philips, *Task Force on TV Violence*, BROADCASTING & CABLE, June 14, 1993, at 69.

5. Barbara Hansen & Carol Knopes, *TV vs. Reality*, USA TODAY, July 6, 1993, at 1A.

6. Sheila Muto, *Television: From Here to Immodesty: Milestones in the Toppling of TV's Taboos*, WALL ST. J., Sept. 15, 1995, at B1.

7. *Id.*

long way since, baby. But now television is on a collision course not only with those concerned about religious values, but those more generally concerned about children and about the level of taste in America.

I wish I could encapsulate the journalism part of the information-entertainment-infotainment spectrum and say, "This, at least, deserves the public's full support." But journalism no longer exists in isolation. The "press" has become absorbed into "the news media," which, in turn are being absorbed into mega-media conglomerates. Will ABC investigate Disney? Will Fox investigate Murdoch and Gingrich?

Look at this example of potential conflict of interest. Today at the annual meeting of the American Public Health Association in San Diego, medical researchers of the University of California, San Francisco are reporting on what happened to the popular school children's weekly, *The Weekly Reader*, after it was bought by a subsidiary of RJR Nabisco, maker of Camel cigarettes.<sup>8</sup> Whereas the Weekly's tobacco-related articles previously presented a consistently anti-smoking message, now the "presentation of the issue was significantly more consonant with the messages the industry likes to send."<sup>9</sup> And Joe Camel made frequent appearances, in one case in a full-page color cover picture.<sup>10</sup> The First Amendment protects that, too.

What has happened, meanwhile, to the public perception of the journalist? The image of the underpaid reporter with the press card in his greasy hatband is pretty well gone, and the newspaper he worked for is going. The news media figure today is a blow-dried million-dollar anchor person, more celebrated than the celebrities he or she covers.

The news program, occupying a little corner of a vast entertainment stage, is forced to compete with "Hard Copy" and other versions of reality that are not reality. So, NBC rigged a GM truck to explode, and ABC used actors to simulate an alleged American spy handing a briefcase full of secrets to a KGB agent.<sup>11</sup> And, for a thankfully short period several years ago, CBS News employed a casting director for a "news" magazine program.

Inside the industry there is some agonizing and soul-searching. Before the Radio-Television News Directors Association a few weeks ago, Andrew Lack, president of NBC News, talked of all the cops kicking down crackhouse doors and the victims sobbing about sexual

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8. Laura Beil, *Picking the Habit*, DALLAS MORNING NEWS, Nov. 20, 1995, at 6D.

9. *Id.*

10. *Id.*

11. Carleton R. Bryant, *Staging the News*, WASH. TIMES, Feb. 10, 1993, at A3.

molestation that have become the stuff of television news, and said, "We are, as a profession, going downhill in certain major respects."<sup>12</sup> All of this has the effect of putting a strain on the First Amendment because it erodes public support for what the journalist does. The fact is that the public tends to view the news media today as arrogant, insensitive, and self-serving—as self-serving as the institutions the press professes to monitor. Big Media is as unpopular as Big Government.

There are other strains. The tobacco industry clings to the sagging First Amendment much as the gun-slingers and pornographers do. The cigarette people invoke the First Amendment in court to resist regulations aimed at protecting children from the dangers of smoking. The First Amendment is not absolute. Commercial speech does not enjoy the same protection as political speech, or even the same protection as sex and violence.<sup>13</sup> You are not free to label food and drugs falsely, not free to misrepresent securities, nor to advertise the sale of heroin.<sup>14</sup>

Recently, the Supreme Court heard a case involving the claim that Rhode Island's ban on advertising liquor prices violates free speech.<sup>15</sup> A dozen or so other states have similar bans, which are obviously intended to reduce alcohol consumption.<sup>16</sup> The American Civil Liberties Union (ACLU) has joined conservative legal foundations to support the liquor industry. I understand why the A.C.L.U. feels it must defend the First Amendment in its most absolute and dissolute terms, but I wish it would concentrate on ordinary pornography, rather than the obscenity of using the First Amendment for profit at the expense of the public health.

My primary concern is that public support for the First Amendment, already at a low ebb, not be further weakened by the appearance of being invoked unreasonably. In the O.J. Simpson trial, the defense, at one point, considered calling as a witness Tracy Savage of

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12. Andrew Lack, *TV News Heads Downhill*, USA TODAY, Sept. 14, 1995, at 11A; Steve McClellan, *Lack Lays into TV News: in RTNDA Keynote, NBC President Says Profession Helping 'Dumb Down' America*, BROADCASTING & CABLE, Sept. 11, 1995, at 16.

13. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980) (setting the standard for protection of commercial speech as a four part test including whether or not the government interest is a substantial one).

14. See, e.g., *id.*; *Friedman v. Rogers*, 440 U.S. 1 (1979).

15. *44 Liquormart Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995).

16. See ORC Ann. 4301.03 (Anderson 1995); M. David LeBrun, Annotation, *Validity, Construction, and Effect of Statutes, Ordinances, or Regulations Prohibiting or Regulating Advertising of Intoxicating Liquors*, 20 ALR 4th 600 (1995).

television station KNBC.<sup>17</sup> She had reported that DNA tests showed that blood on a sock was that of Simpson's ex-wife.<sup>18</sup> Presumably she would have invoked the First Amendment and refused to identify her source. But it couldn't have been much of a source because the story was wrong; the DNA test had not even been run yet.<sup>19</sup>

That leads me to the question of televising trials. Having, over the years, been involved in numerous arguments about access for radio and television (the camera and the microphone are to us what the pencil is to the print reporter), I must theoretically hold that television should be admitted to all courtrooms. But, in my declining years, I am no longer a believer in absolutes. Clearly, the camera encourages lawyers and witnesses to grandstand. It promotes an industry of exploitation of media "celebrityhood." It can, in case of a mistrial, complicate the task of selecting a second jury. So, I will not argue too vehemently with any judge who decides to limit television access to his or her courtroom.

We have not recently had the kind of dramatic press freedom confrontation that makes the public appreciate the importance of this privilege. It was not very helpful to the cause that an editor in St. Paul, Minnesota, violated a reporter's promise to safeguard the identity of a confidential source, with the result that the source sued for breach of contract.<sup>20</sup>

The most interesting press freedom case recently has been the gag order imposed on *Business Week* by Federal Judge John Feikens in Cincinnati preventing the magazine from publishing court documents under seal which it had managed to obtain.<sup>21</sup> This was clearly an egregious example of prior restraint, although not on the level of the Pentagon papers.<sup>22</sup>

I am nostalgic for the Pentagon Papers case, which had everything I would want to see in a First Amendment case. Here was the Nixon Administration seeking to enjoin the publication of Vietnam history on the ground that it would irreparably harm the national security of the United States.<sup>23</sup> Yet the government was totally unable

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17. William Carlsen, *Defense Won't Be Allowed to See Leak Files*, S.F. CHRON., Aug. 10, 1995, at A8.

18. *Id.*

19. *Id.*

20. *Ruzicka v. Conde Nast Publications, Inc.*, 999 F.2d 1319 (8th Cir. 1993).

21. *Proctor & Gamble v. Bankers Trust Co.*, 900 F. Supp. 186 (S.D. Ohio 1995), *vacated*, 1196 U.S. App. LEXIS 3817 (6th Cir. Ohio March 5, 1996). *See also* Linda Himelstein, *The Story Behind the Bankers Trust Story*, Bus. Wk., Oct. 2, 1995, at 58.

22. *New York Times v. United States*, 403 U.S. 713 (1971).

23. *Id.*

to demonstrate harm to the satisfaction of a Federal judge.<sup>24</sup> That case, argued by the *New York Times* and *Washington Post* after they had submitted to prior restraint, is what you call striking a real blow for freedom of the press.<sup>25</sup> It served the public and exploded an official lie. It showed that, on the whole, the public interest suffers more from excessive secrecy than from excessive disclosure. Chalk up one for the First Amendment.

But, given the contemporary situation, how does a press, whose motive and dedication to the public weal are suspect, go about restoring public support for our "privilege?" How do we overcome the public attitude that evidenced itself when the press protested against censorship in the Gulf war and opinion polls indicated the public favored more censorship?

The case of the Unabomber and the publication of his creed in the *Washington Post* may suggest one approach we may have to adopt.<sup>26</sup> The Unabomber, demanding publication of his 32,000-word paper as the price for desisting from further murders, gave a new meaning to "publish or perish."<sup>27</sup> And the *Post*, submitting to the demand, gave a new meaning to "publish and be damned."<sup>28</sup> For there were a great many who damned the *Post* and the *New York Times* for submitting to "blackmail," thus possibly inviting copy-catting.

I support the decision of the papers. As a matter of restoring a link with the public, the press must do something to overcome the prevailing impression of arrogance and insensitivity to the concerns of ordinary people. I thought the *Times* publisher, Arthur Sulzberger, had it right when he said that this issue "centers on the role of a newspaper as part of a community."<sup>29</sup> In a community, faced with the choice between principle and life, you may have to choose life.

Let's face it. They don't like us newspeople out there any more. They think we manipulate and exploit them for fun and profit. They are no longer willing to forgive us our press passes. I am not so utopian as to hope that the media mega-corporations will forswear profit and rededicate themselves to the public interest. But whatever we can do to convince the public that their interest means something to us will serve the First Amendment.

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24. *Id.*

25. *Id.*

26. *Industrial Society and Its Future*, WASH. POST, Sept. 19, 1995, at A1.

27. Daniel Schorr, *Publishing the Unabomber: Responsible or Reckless? Printing Was a Tough But Conscionable Choice*, WASH. POST, Sept. 24, 1995, at C3.

28. *Id.*

29. William Serrin, *The Papers Submitted to Blackmail by a Killer*, WASH. POST, Sept. 24, 1995, at C3.

One possible new direction has been outlined by my friend, Ellen Hume, in a study for the Annenberg Washington Program of Northwestern University on the impact of technology on journalism. She finds that "the apparently endless flow of scandals and feeding frenzies has damaged rather than enhanced journalism's credibility."<sup>30</sup> The objective now, she says, must be to use new technologies to create "a trustworthy product."<sup>31</sup> Addressing a "public" rather than an "audience."

The smart new journalism will be both interactive and proactive, opening the door for citizen engagement. In the new news marketplace, Ellen sees an end to the obsession with scoops and deadlines.

I may be too old to grasp what lies ahead in a new interactive journalism geared to a new technological age. I can only surmise that anything that helps to restore public confidence in the disseminators of information will help to restore public support for the constitutional guarantee of the freedom of the press. The men who crafted that guarantee to shield the writers of political polemics from retaliation by Congress could not have dreamed what a vast industry their brief amendment would end up shielding. But it is still, perhaps more than ever, worth fighting to protect.

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30. Richard Harwood, *Extinct Stained Wretches?*, WASH. POST, Nov. 2, 1995, at A31.

31. *Id.*

