Introduction--Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech

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By Melville B. Nimmer*

Before turning to the provocative issues posed in this symposium on the First Amendment and the Media, it may be well to pause by way of introduction to consider a preliminary constitutional issue. In the voluminous discussions, judicial and otherwise, of the rights of the media, one issue appears to have been virtually ignored. That the First Amendment guarantee of freedom of expression, whatever its scope, may be claimed not just for newspapers and other printed publications, but also for motion pictures, and radio and television broadcasts is clear enough. Freedom of the press amounts to freedom of "the media." But the constitutional text protects against "abridging the freedom of speech, or of the press." Why this duality? Is any freedom conferred upon "the press" by the freedom of the press clause which would not be available to it (as well as to nonmedia speakers) by the freedom of speech clause? Alternatively, may it be argued that a separate press clause implies that speech via the press is subject to some restraints that would not be applicable to other speech? If each of these inquiries is to be answered in the negative, does this mean...

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1. Since this text was written, it has come to the author's attention that Mr. Justice Potter Stewart, in a recent speech at the Yale Law School, focused upon the same issue as that posed in this introduction, reaching somewhat different conclusions. The reader is fortunate in being able to consider for himself Justice Stewart's insightful views by turning to page 631 of this issue.
5. U.S. Const. amend. I.
that "freedom of the press" is a meaningless appendage to the speech clause?

As nature abhors a vacuum, the law cannot abide a redundancy. The presumption is strong that language used in a legal instrument, be it a constitution, a statute, or a contract, has meaning, else it would not have been employed. In the real world we know that even lawyers sometimes employ unnecessary phrases. But the legal presumption against futile verbiage is itself a part of the real world, and must be taken into account. Apart from the force of the canons of construction, we are beginning to observe a tension between the rights of the press and of those who would speak although they do not command the press. It may well be, then, that the courts will ultimately reach for some independent meaning in the freedom of the press clause. It is the purpose of this introduction preliminarily to explore that issue.

History casts little light on the question here posed. The foremost historian of the First Amendment tells us that prior to and contemporaneous with its adoption "[m]ost writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press." Insofar as a few writers did distinguish the two concepts, it was based upon the now discarded theory that for purposes of defamation "speech was free so long as it was truthful, while truth was not a defense to a charge of libelous publication." Nothing in the fragmentary records of debate attending the adoption of the First Amendment suggests that the Founding Fathers had this, or, indeed, any other distinction in mind, when they chose to protect both freedom of speech and of the press against abridgment. It may be surmised that to some this duality was deemed necessary because the reference to "speech" might be construed to protect only oral expression, so that the reference to "the press" was added in order explicitly to protect written expression.

This rationale is somewhat remotely suggested by the language of Pennsylvania's first constitution, adopted in 1776. It provided: "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." But only the state constitutions of Pennsylvania

9. Id.
10. PA. CONST. art. XII (1776) (Declaration of Rights), quoted in 5 THE FEDERAL
and Vermont at the time of the adoption of the First Amendment pur-
ported to protect freedom of speech as such, while all but four of the
states at that time expressly provided constitutional protection for free-
dom of the press. 11 This fact, when combined with the prevailing rhet-
oric in the post-Revolutionary period recognizing freedom of speech,
tends to support Professor Levy's conclusion that freedom of speech
and of the press were at that time thought of as interchangeable.

But as we have seen in other constitutional contexts, the original
understanding of the Founders is not necessarily controlling. It is what
they said, and not necessarily what they meant, that in the last analysis
may be determinative. This is particularly true when constitutional
language is subjected to tensions not anticipated when the text was writ-
ten. During the past term of the Supreme Court, several cases were
decided which suggest that just such a tension is building between the
rights of speech and of the press.

The Prison Visitation Cases

There are, for example, the prison visitation cases, Pell v. Procu-
nier12 and Saxbe v. Washington Post Co., 13 which, although not
articulated as such, may be said to pose the issue of whether those who
assert claims under the freedom of the press clause are entitled to
greater rights than those who claim under the freedom of speech clause.
In both of the cases members of the press challenged prison regulations
which forbade press and other media interviews with specific individual
inmates. 14 In each instance the challenge was based upon the freedom
of the press clause. In Pell there was a companion case in which the
same regulations were challenged by a group of prisoners, relying upon
the freedom of speech clause.

The Court first disposed of the freedom of speech issue. Pro-
ceeding upon "the hypothesis that under some circumstances the right
of free speech includes a right to communicate a person's views to any
willing listener, including a willing representative of the press for the
purpose of publication by a willing publisher," 15 the Court nevertheless

13. Id. at 2811, 2827 (1974).
14. Visitation with prisoners was limited to the inmate's family, friends, attorneys
and clergy. See id. at 2808 n.8, 2813.
15. Id. at 2804.
denied the free speech claim. It found that the applicable countervailing interests, especially that of internal security within the corrections facilities, outweighed any speech interests asserted by the prisoners, particularly in view of the alternative modes of communications open to prisoners.16

The media representatives asserted a freedom of the press claim that markedly differed from the free speech position of the prisoners. They argued that freedom of the press includes a right of access to the sources of newsworthy information.17 The Court, borrowing from its opinion in the reporter privilege case, Branzburg v. Hayes,18 acknowledged that "news gathering is not without its First Amendment protections...for 'without some protection for seeking out the news, freedom of the press could be eviscerated.'"19 By this concession, the Court appeared to recognize a right under freedom of the press not available under freedom of speech. But the concession was quickly withdrawn by the further statement that "[t]he Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."20 Since members of the public21 were denied visitation rights, the Court denied such rights to the press. The proposition that the press may claim greater rights than the public generally, said the Court, "finds no support in the words of the Constitution or in any decision of this Court."22

This is as clear a statement as has thus far emerged from any decision of the Court that those words in the Constitution which speak of "freedom of the press" do not carry any meaning beyond that contained in the reference to "freedom of speech." Yet, the Court's reasoning in the Pell and Saxbe opinions raises doubts that are not entirely set at rest by the decisions. The Court reacknowledged that "without

16. Id. at 2806-07. These were found to include communications by mail, and via those persons who were permitted visitation rights. See note 14 supra.
17. The media plaintiffs contended "that, irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system." 94 S. Ct. at 2807.
20. 94 S. Ct. at 2810.
21. Other than a limited group previously known to the prisoner. See note 14 supra.
22. 94 S. Ct. at 2810.
some protection for seeking out the news, freedom of the press could be eviscerated." Can it be said, in the same sense, that without some protection for seeking out the news, freedom of speech could be eviscerated? Even the restrictive prison regulations challenged in both *Pell* and *Saxbe* accorded greater visitation rights to the press than to members of the public. For example, the California prison regulations involved in *Pell* permit newsmen (but not general members of the public) to enter prisons to interview inmates selected at random by the corrections officials from the prison population. They also permit newsmen to sit in on group meetings in connection with prison programs, and to interview inmate participants. In the federal system, the subject of *Saxbe*, newsmen (but not members of the public) are permitted to tour the premises, to photograph prison facilities, and to interview inmates who may be encountered in such a tour. The Court made a point of noting these greater rights for the press, but apparently found


24. Compare *Zemel v. Rusk*, 381 U.S. 1 (1965), with *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Zemel* the Court affirmed denial of a passport to Cuba where the claimant's stated purpose was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen." 381 U.S. at 4. In denying Zemel's First Amendment claim, the Court stated: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17. But Zemel did not allege a purpose to publish, only to gather information for himself. This is, then, at most, a "speech" and not a "press" claim. Only two of the Justices (Douglas and Goldberg) dissented on First Amendment grounds.

Contrast this with *Branzburg*, where the reporters asserted a right to gather information for press purposes. Although a majority of the Court denied this claim as well (insofar as it impliedly granted a privilege against disclosure of sources), four of the Justices dissented on First Amendment grounds: Mr. Justice Douglas argued, "The press has a preferred position in our constitutional scheme . . . . The function of the press is to explore and investigate events . . . ." 408 U.S. at 721-22. Mr. Justice Stewart (joined by Justices Brennan and Marshall) premised his dissent on "the critical role of an independent press in our society." *Id.* at 725. Mr. Justice Powell joined the majority in a special concurrence which suggested that under other facts he might join with the dissenters in finding a reporter's privilege. "The asserted claim to privilege should be judged [in each case] on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710 (emphasis added).

Taking *Zemel* and *Branzburg* together, it is arguable that a majority of the Justices would find no "speech" right to seek out information, but that, at least in some circumstances, there is a "press" right to seek out news. The quoted passage from *Zemel*, particularly with the gloss cast by *Branzburg*, suggests by "necessary implication" that the right to "speak and publish" [provided both functions are involved] does carry with it a "restrained" right to gather information. *Id.* at 728 n.4 (Stewart, J., dissenting) (emphasis added). But see also a "speech" right to obtain information upheld in *La- mont v. Postmaster General*, 381 U.S. 301 (1965) and *Procunier v. Martinez*, 94 S. Ct. 1800 (1974). Cf. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

25. 94 S. Ct. at 2813-14.
them of no constitutional significance.

One may wonder, however, had the prison regulations in fact granted no greater rights to the press than to members of the public, whether the Court would as easily have concluded that freedom of the press confers no rights beyond those of freedom of speech. The question is particularly pertinent since even where the press enjoyed greater de facto rights than the general public, as in Pell and Saxbe, only five justices were prepared to deny the press still greater constitutional rights and to concur in the stated equating of press and speech rights. In a case involving the reporting of news where press and public are in fact equally restricted, it is not difficult to envisage at least one member of the Pell-Saxbe majority shifting sides so as to produce a constitutionally cognizable freedom of the press that goes beyond freedom of speech.26

The Right of Access Cases

Pell and Saxbe were cases in which both freedom of the press and freedom of speech were invoked in support of the same objective. What of a case where the freedoms of press and speech may be said to be in conflict? What is to prevail?

The day after the decisions in Pell and Saxbe the Supreme Court handed down a decision which may be viewed as just such a case. In Miami Herald Publishing Co. v. Tornillo27 the validity of a Florida right of reply statute was put in issue. The Miami Herald argued that the statute, by requiring a newspaper to grant political candidates a right to equal space in order to answer such newspaper's criticism, violated the freedom of the press guarantee. The Florida circuit court upheld the Herald's position, expressly holding the statute unconstitutional under the freedom of the press clause.28 On direct appeal, the Florida Supreme Court reversed, ruling that "free speech" was enhanced rather than abridged by the right of reply statute.29 It may be said that both of the Florida courts were correct in their conclusions, but each ignored the competing right involved. The circuit court properly concluded

26. In this regard it may not be without significance that Mr. Justice Stewart, who has evidenced a profound understanding of First Amendment theory in numerous opinions upholding speech claims, and who advocated a constitutional right of the press to seek out news in his dissent in Branzburg (see 408 U.S. at 728 n.4), was the author of the Court's opinions in Pell and Saxbe.
29. 287 So. 2d 78 (Fla. 1973).
that the operation of the right of reply statute served to limit freedom of the press, while the Florida Supreme Court was equally correct in deciding that the same statute enhanced the public's freedom of speech. The largely unarticulated but crucial issue presented to the United States Supreme Court was as to which of these rights is to prevail when they are in conflict.

Chief Justice Burger, speaking for the Court, stated that "[c]ompelling editors or publishers to publish that which "reason" tells them should not be published' is what is at issue in this case." With the issue thus characterized, the Court had no difficulty in concluding that the right of reply statute was violative of the freedom of the press guarantee. Nowhere does the Tornillo opinion explicitly acknowledge a confrontation between the rights of speech and press, but implicit recognition of the speech interest may be found in the Court's reference to the "access advocates'" argument that, given the present semimonopolistic posture of the press, speech can be effective and therefore free only if enhanced by devices such as a right of reply statute. The Court in accepting the press clause argument in effect necessarily found it to be superior to any competing speech clause claims.

Still, the appellee in Tornillo did not assert that a right of access was required by the freedom of speech clause, but only that the Florida statute which provided such a right was not a violation of the freedom of press clause. Without such a statute it would have been necessary to invoke the speech clause as a sword against the shield of the press clause. That was precisely the nature of the claim in Columbia Broadcasting System, Inc. v. Democratic National Committee. In that case the complainants argued that they had a First Amendment right to purchase television advertising time in order to comment on public issues

30. 94 S. Ct. at 2839.
31. Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). In Pittsburgh Press the freedom of a newspaper to determine the content of its publication was held to be subordinate to a city ordinance which forbade sex-designated columns in help-wanted advertisements. The Court emphasized the commercial nature of the advertisements, and made the point that its decision did not "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors." Id. at 391. The same might be said of material appearing in a newspaper pursuant to a right of reply statute, yet the Court in Tornillo concluded that freedom of the press precluded injection of material not originated or consented to by the newspaper. Is it significant that in Pittsburgh Press the interest competing with freedom of the press was not freedom of speech, but rather sex equality in employment practices?
32. 94 S. Ct. at 2835-37.
without regard to whether the broadcaster had complied with the Federal Communications Commission's "fairness doctrine."

Since both the speech and press clauses of the First Amendment only protect against governmental abridgment, *i.e.*, "state action," an issue not posed in *Tornillo* was presented in *Democratic National Committee*. In *Tornillo* the right of reply statute both constituted state action with respect to the newspaper's defense under the press clause and at the same time obviated any need for the plaintiff to establish state action as a basis of claim under the speech clause. The complainants' reliance in *Democratic National Committee* upon the speech clause as the source of a right of access apart from the commands of any statute required a showing that the broadcaster's refusal to accord such access constituted state action. A majority of the Court in denying the public such right of access to television nevertheless assumed that the network's refusal of access constituted state action. This decision then may be said to be predicated, like *Tornillo*, upon a determination that the rights of the media, under the press clause, outweigh the speech clause rights of those who do not control the media.

In reaching its decision, the Court in *Democratic National Committee* recognized that it was "[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed." What was not acknowledged was that it was the press clause which was being weighed

34. In another case in which the right of access was denied by the Court during the past term, *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714 (1974), state action was present in that the defendant city was the operator of a rapid transit system. The city was upheld in its refusal to carry in its cars advertising of a political nature. The Court noted that "a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public," but because in the present case "state action exists . . . the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious or invidious." *Id.* at 2717. The Court concluded that defendant's policies and practices could not be so characterized.

35. The complaintants relied upon a construction of the Federal Communications Act in addition to an independent First Amendment right of access. *Id.* at 98.

36. Only Chief Justice Burger and Justices Stewart and Rehnquist found an absence of state action. *Id.* at 114-21. Of course, absent a right of reply statute it would be more difficult to find that a newspaper's activities constitute state action than to find that a broadcaster's activities may be so characterized. See *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714 (1974); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Amal. Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 678 (1970); cf. *Barron, Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1669 (1967).

37. 412 U.S. at 102.
against the speech clause. In essence, however, the Court's decision may be seen as drawing just such a balance, and finding in favor of "the press."*

The Defamation Cases

Nowhere has the Supreme Court's failure to discern or articulate a distinction between the freedoms of speech and the press been more evident than in the libel cases. In its latest venture into this field, *Gertz v. Robert Welch, Inc.*, the Court both limited and extended the application of *New York Times v. Sullivan*. *Times* had enunciated a standard whereby defamatory statements against public officials were protected by the First Amendment provided such statements were neither knowingly false nor made with reckless disregard of their truth. That rule was subsequently extended to defamatory statements made against public figures as well as public officials. In *Rosenbloom v. Metromedia, Inc.*, a plurality opinion extended the doctrine still further by invoking First Amendment immunity for defamatory statements relating to matters "of public or general interest."

The majority opinion in *Gertz* retreated from the farthest reaches of *Rosenbloom* by restricting application of the *Times* doctrine to statements against public officials or figures. But while limiting the First Amendment impact upon the law of defamation in this respect, in another respect it greatly increased that impact. The Court in *Gertz* for the first time formulated, as a constitutional matter, rules governing recoverable damages even for defamatory utterances against private individuals. These constitute sweeping changes in the law of defama-

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38. "In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many." *Id.* at 125.

39. The *Democratic National Committee* opinion does suggest that a statute might constitutionally provide for a right of access to broadcasting (see *id.* at 131), but this option may have been removed by the subsequent decision in *Tornillo*, unless broadcasting is to be distinguished from newspapers in this respect.


43. 403 U.S. 29 (1971).

44. *Id.* at 43-44.

45. *But see id.* at 62 (Harlan, J., dissenting) and *id.* at 78 (Marshall, J., dissenting).

46. The rules set out by the Court may be summarized as follows: No longer may there be any recovery without fault in defamation actions; the plaintiff must at least of-
tion, and much can be said both for and against the Court's new rules. Such is not the intent of this commentary. What should be here pointed out is the ambiguity in the sweep of the Gertz damage rules resulting from the Court's failure to acknowledge that speech and press represent two separable interests.

Mr. Justice Powell, at the beginning of the Court's opinion in Gertz, spoke of the need to accommodate "the law of defamation" on the one hand, and "the freedoms of speech and press" on the other.47 From this is might appear that no distinction was intended as between speech and press in the application of the doctrine which was to follow. Later, however, the court stated that "[t]he principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."48 Since for constitutional purposes a broadcaster is no less a part of "the press" than is a newspaper, the above statement of "the principal issue" seems to relate exclusively to freedom of the press. Further, the opinion stated "that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."49

That the term "publisher" was not here used in the broad sense of anyone who causes a "publication" within the meaning of the law of defamation60 is evident from the sentence which immediately followed: "Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."51 Later the Court apparently spoke interchangeably of the needs of "the press"62 and of "the communications media."53 In enunciating the new damage limitations, the Court

47. 94 S. Ct. at 3000.
48. Id. at 3003 (emphasis added).
49. Id. at 3007 (emphasis added).
50. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." RESTATEMENT (FIRST) OF TORTS § 577 (1938).
51. 94 S. Ct. at 3007 (emphasis added).
52. Id. at 3009.
53. Id. at 3010.
stated: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," adding that it thus "shields the press and broadcast media from the rigors of strict liability for defamation." At one point Justice Powell restated the balance referred to at the beginning of the opinion, but this time characterized it as "the balance between the needs of the press and the individual's claim to compensation for wrongful injury."

It seems fair, then, to conclude that the Gertz opinion formulates doctrine applicable only to defamatory statements made by newspapers and broadcasters, i.e., "the media." If the Court's opinion is thus to be read literally, it leaves untouched a significant area of defamation involving written and spoken statements not uttered via the media. Yet, one is left with the uneasy feeling that the Court's application of the new doctrine to what may be regarded as the freedom of the press arena, and its unarticulated exclusion of other "speech," may have been inadvertent, and that, further, the inadvertence was due precisely to the failure of the Court to recognize that the freedoms of speech and press are not necessarily coextensive. This failure to distinguish between the two concepts may be even more evident in Mr. Justice White's dissent in Gertz. He there characterized the majority opinion as applicable to

54. Id. (emphasis added).
55. Id. at 3011 (emphasis added).
56. Id. at 3009 (emphasis added).
"each and every defamation action," and "to all defamation actions," thus seeming to ignore the majority's repeated and apparently limiting references to defamations by newspapers and broadcasters.

The point here made is not that the majority and Justice White were necessarily in disagreement as to the scope of the majority opinion. It is rather that neither appears to have been aware that there is a contradiction between the Court's stated scope of its opinion and the description of that scope in the White dissent. The majority assumed without explanation that only "the press" was implicated in its holding, while Justice White, equally without discussion, asserted that all defamatory "speech" was involved.

Other areas of actual or potential tension between speech and press could be noted. Enough has been said, perhaps, to point up the need to articulate unstated and perhaps unconscious premises as to the relationship between these two forms of expression. When such premises are made explicit it may be that the Court will decide to treat freedom of speech and freedom of the press as coextensive and as merely alternative descriptions of a unitary concept. But this need not be the conclusion to be drawn. It may be that for some purposes freedom of the press should confer greater rights than does freedom of speech, and for other purposes lesser rights.

"The Press": Defining the Physical Scope

A first step in making this determination must be a clarification as to what physical acts are referred to under the concept of freedom of the press, and how, if at all, these differ from the acts encompassed under freedom of speech. These First Amendment principles are not self-defining, so that it is open to the Court to supply definitions. If "speech" is held to refer to all forms of expression, it would include speech by newspapers and other segments of "the press," and freedom of the press would be a meaningless redundancy. At the other polar

58. 94 S. Ct. at 3022.
59. Id. at 3031.
60. It has been suggested that the issue of a reporter's privilege remains live notwithstanding the denial of the privilege in Branzburg v. Hayes, 408 U.S. 665 (1972). See note 24 supra. This raises the question of defining "those categories of newsmen who [are] qualified for the privilege." 408 U.S. at 704. This, in turn, requires a definition of "the press." See text accompanying notes 68-71 infra.
61. On the propriety and desirability of the Court engaging in such definitional balancing, see Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935 (1968) [hereinafter cited as Right to Speak].
extreme “speech” could be held to be limited to spoken, and perhaps symbolic, expression, leaving the protection of written expression to the freedom of the press clause. Such a construction might find some support in early First Amendment history.

But such a definition of “the press” would be odd because it is both too narrow and too broad. It is too narrow in that it would exclude from “the press” those components of the media which deal in spoken rather than written expression. Television and motion pictures consist in large part, and radio in its entirety, in spoken rather than visual expression. If any substantive distinction is to be made between the rights of speech and press, in most contexts it would make little sense to vary the rights to be accorded various components of the media depending upon whether they deal in the spoken or the written word. This conclusion is implicit in the Supreme Court’s acknowledgment that broadcasters in particular, and “the media” in general are entitled to claim freedom of “the press.”

But to regard “the press” as relating to all written expression would also constitute an unduly broad definition. It is true that the Supreme Court has said that “[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,” and, further, that it includes “the right of the lonely pamphleteer

63. See text accompanying note 10 supra.
64. A defamatory statement if written is libel, and if spoken is slander (RESTATEMENT (FIRST) OF TORTS § 568 (1938)), with varying consequences flowing from this distinction. There is, however, a split of authority on whether radio and television broadcasts constitute libel or slander. Compare Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934), Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947) (note particularly the opinion of Fuld, J., concurring, discussing the varying views in detail, id. at 300-05, 73 N.E.2d at 32-34), and Shor v. Billingsley, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. 1956), with CAL. Civ. Code § 46 (West 1954). Retraction statutes (for whatever vitality they may retain post-Gertz) may apply to both written and spoken defamation by the media. See, e.g., id. § 48a (applicable to both newspapers and radio).

In another context, the doctrine which asserts “a heavy presumption” against the constitutionality of prior restraints (see, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971)) may be seen as the favoring of “press” over “speech” since generally it is only the former which may be the subject of prior restraint.

who uses carbon paper or a mimeograph as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.\textsuperscript{67} Flexible as this concept may be in terms of sophistication of equipment and production cost, it would seem that something more is called for than the mere act of applying words to paper, even if followed by a transfer of the paper to a given individual. As the above quoted passage suggests, at the very least in order to qualify as a part of "the press" there must be a "publication." That is, there must be an act of publishing in the copyright sense, \textit{i.e.}, copies of the work must be made available to members of the public.\textsuperscript{68}

One who duplicates a document and then passes it on to an agent of a foreign government is in a sense engaged in an act of "speech" (whether or not protected by "freedom of speech"),\textsuperscript{69} but it would be strange indeed to regard the actor as performing a function of "the press." If the actor turns the same document over to the representative of a newspaper, which proceeds to publish it, we may well then regard the entire process as within the sphere of "press" activities. This distinction does not in itself tell us whether either the former or the latter act should be regarded as constitutionally protected, although I will argue below that at least in some circumstances the latter act should be protected when the former is not.\textsuperscript{70} The point here to be made is that we both forego the possibility of analytical distinctions and do violence to the plain meaning of language if we indiscriminately regard any dissemination of printed material as an activity of "the press." Whether the distinction is to turn on the copyright definition of publication or on some other standard,\textsuperscript{71} it is clear that accepted usage already distinguishes between visual materials which comprise a part of press activities and those which are speech but not press.

\textsuperscript{68}See M. Nimmer, \textit{Nimmer on Copyright} \S 49 (1974).
\textsuperscript{70}See note 81 & accompanying text \textit{infra}.
\textsuperscript{71}In his dissent in \textit{Saxbe}, Justice Powell pointed out that the Federal Bureau of Prisons employs a workable definition of "the press" for prison visitation purposes as including "'[a] newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station.'" 94 S. Ct. at 2826. For a collection of 17 state statutes which provide for a "newsman's" privilege, see Branzburg v. Hayes, 408 U.S. 665, 689 n.27 (1972). Later in the \textit{Branzburg} opinion, however, the Court discusses the difficulty of defining "those categories of newsmen who qualified for the privilege." \textit{Id.} at 704.
The Functions of Speech and Press

Having concluded that it is possible to distinguish between press and speech activities, the question remains as to whether the "freedom" of the press should differ substantively from that accorded to speech. This introduction is intended only as the beginning of that inquiry. No more will be attempted here than to suggest certain guidelines and directions that may be helpful in delineating the constitutional relationship between press and speech.

An understanding of the press-speech relationship must begin with a brief review of the reasons why freedom of speech is important, in order to determine whether those reasons are equally applicable to freedom of the press. Mr. Justice Brandeis, in his concurring opinion in Whitney v. California,72 summed up the three major justifications for freedom of speech. First, free speech is a necessary concomitant of a democratic society. We cannot intelligently make decisions required of a self-governing people unless we are permitted to hear all possible views bearing upon such decisions. This is sometimes called the democratic dialogue function. Second, quite apart from its utility in the democratic process, freedom of expression is an end in itself. Self-expression is a part of self-fulfillment, or as Justice Brandeis suggested, liberty is "the secret of happiness."73 Third, freedom of speech is a necessary safety valve. Those who are not permitted to express themselves in words are more likely to seek expression in violent deeds. There may be other justifications for freedom of speech but these are sufficient for our purposes.74

Are these purposes equally applicable to freedom of the press? Speech on a one-to-one basis between friends, neighbors and fellow workers may sometimes prove more significant than the media in the shaping of public opinion. This is occasionally the case in a political context, and somewhat more frequently in other contexts, as with respect to critical reviews of books and films. The succès d'estime is a phenomenon sufficiently familiar to have been given a name. Still, these are the exception. The democratic dialogue rationale is eminently applicable to the press. The informing and opinion-shaping function of the press is unquestioned. Most would agree that generally speech via the press is much more significant as a contribution to the democratic dialogue than is speech through nonmedia channels.

72. 274 U.S. 357, 372 (1927).
73. Id. at 375.
74. For a more expanded treatment of these justifications, see Right to Speak, supra note 61.
The self-fulfillment function of speech finds little counterpart in relation to the press.\textsuperscript{75} To be sure, the individual contributor to the press may experience self-fulfillment by the publication of his work. But for the press \textit{qua} press, apart from the individual pamphleteer, it is unlikely that this is a significant factor. Even less relevant to the press is the safety valve aspect of speech.

In evaluating the significance of the differences between the speech and press functions, it is helpful to consider separately those situations in which the forces of speech and press pull in the same direction, and those in which they are antithetical. The prison visitation and defamation cases and, indeed, most First Amendment issues, fall in the former category. The access cases are an example of the latter. In \textit{Pell} and \textit{Saxbe} both the prisoners’ speech claim and the media’s press claim sought the same result, \textit{i.e.}, prisoner interviews by the media. Moreover, the speech claim was not asserted independently of the press claim; both the prisoners and the media wanted the prisoners’ speech to be disseminated via the press. In such circumstances the substantial democratic dialogue function of the press is combined with the prisoners’ self-fulfillment and safety valve functions, as well as their own contribution to the democratic dialogue. The combined weight of the speech-press interests is considerable.

Against this the Court weighed the interests in prison administration, and found in particular that “security considerations”\textsuperscript{76} outweighed the First Amendment interests. In concluding that the press should have no greater visitation rights than do members of the public, the Court ignored the separate and substantial democratic dialogue function of the press not present when prisoner speech is addressed simply to members of the public.\textsuperscript{77} It also ignored the fact that security precautions against visitation abuses are much more feasible if only the press, and not the public generally, is permitted to designate given prisoners for interview. This is not to suggest that on balance the speech-press interest necessarily outweighs the prison administration interest. The point is, rather, that the Court cannot properly weigh these respective

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\item \textsuperscript{75} But see Branzburg \textit{v.} Hayes, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting) (“the press enhance[s] personal self-fulfillment by providing the people with the widest possible range of fact and opinion”).
\item \textsuperscript{76} 94 S. Ct. at 2806, 2808.
\item \textsuperscript{77} In his dissent in \textit{Saxbe}, Mr. Justice Powell stated: “For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. . . . The press is the necessary representative of the public’s interest in this context . . . .” 94 S. Ct. at 2821-22.
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interests without examining separately the respective claims of speech and press. Either interest alone might not outweigh the prison administration interest, while the combined speech-press interests might. It is, then, submitted that the Court was wrong in blithely concluding in Saxbe that "it is unnecessary to engage in any delicate balancing [because] the sole limitation imposed on newsgathering . . . is no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate." 78

In the defamation cases the speech and press interests again pull in the same direction, i.e., immunizing defamatory expression against the counter-interest in reputation. 79 But here, unlike the prisoner visitation cases, the speech and press interests are not necessarily combined. If Mr. Justice White's characterization of the scope of the majority opinion in Gertz is correct, then the Court has articulated a First Amendment rule of immunity for defamatory expression regardless of whether such expression is channeled through the media. The majority opinion itself, however, appears to be limited to media expression. One could construct an argument, based upon an evaluation of the speech and press interests outlined above, as to why the Gertz doctrine should be limited to media expression.

Defamatory statements appearing in the media generally consist of expressions by persons not themselves connected with the media, quoted in the media as "news." In such circumstances the speech values of self-fulfillment and, to some extent, democratic dialogue and safety valve which pertain to the speech of the person quoted are combined with the considerable democratic dialogue press interest. Together these may be said to outweigh the counter-interest in reputation. The balance might shift in favor of reputation if the democratic dialogue press interest is removed, as would be the case in nonmedia defamatory speech. The point, once again, is not that these respective balances are necessarily correct; it is only that the Court cannot properly assess the balance in each situation without distinguishing between the separable press and speech interests.

There is, moreover, an additional concomitant of media expression which may at times justify extending First Amendment protection to

78. Id. at 2814.
79. For an analysis of the speech and reputation interests which collide in a defamation action, see Right to Speak, supra note 61.
it though not to the same communication expressed through nonmedia channels. This relates to the public nature of media communication. Justice Brandeis told us: "If there be time . . . to avert the evil . . . the remedy to be applied is . . . not enforced silence." Objectionable public statements via the media generally may be countered with "more speech." This is not usually the case with respect to nonmedia speech, wherein the fact of the communication itself may not be known until it is too late to counter it by corrective speech or other action. The application of this principle to the law of defamation is obvious, and it is clear that the injury to reputation may be no less devastating where there is a nonmedia defamatory communication.

Similarly, disclosure of governmental "secrets" to a foreign agent will not be known by the government, and hence corrective action by the government will not be possible. Disclosure to and publication by a newspaper will sometimes permit of such corrective action (this is in addition to the fact that the democratic dialogue interest of the public is served by newspaper disclosure and not by foreign agent disclosure). This is surely not to suggest that disclosure of governmental secrets to newspapers is necessarily protected by the First Amendment. Rather, it is to argue that in some circumstances the First Amendment line should be drawn differently depending upon whether there is a press disclosure or a nonmedia speech disclosure.

Finally, we may consider those instances in which speech and press interests are in conflict. The access cases are a paradigm example. Unlike prison visitation and defamation, here the pull of press and of (nonmedia) speech is not in the same direction. The press does not wish to communicate the same expression as that urged by members of the nonmedia public. The Supreme Court in Tornillo and in Democratic National Committee opted in favor of "press," and in effect,
but not explicitly, against "speech." One wonders whether the Court would have reached this same result had the nature of the opposing forces been more squarely faced. The impact on the democratic dialogue function is essentially the same regardless of whether a given matter appearing in a newspaper originated from its editorial staff or from outsiders who gain access to the press by reason of a right of reply statute or some similar device. But that dialogue is in fact furthered if proponents of more than one side of an issue are allowed to address the same media audience. Moreover, the self-fulfillment and safety valve functions are more readily applicable to the outsiders who seek access than to those within the confines of the editorial room. Thus, in these circumstances the claims of "speech" may actually outweigh those of "press."

There are, of course, counterarguments to be made. Serious questions of governmental control of the media and of the watering down of media messages that may result from state-enforced access requirements are not without substance. But the issue cannot be resolved merely by noting, as did the Court in Tornillo, that a right of reply statute "constitutes the [state] exercise of editorial control and judgment." This is but one half of the equation. The Court in Tornillo ignored the strong conflicting claims of "speech." Perhaps on

82. See the thoughtful concurring opinion of Mr. Justice Douglas in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 148 (1973). For a most effective presentation of the case against access both in the broadcasting and newspaper contexts, see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media, 52 N.C.L. REV. 1 (1974). This writer, however, is not convinced that state-imposed access rules applicable to broadcasters or newspapers would necessarily result in state control of media content. That has not been the experience in the application of those access rules known as parade ordinances. See Walker v. City of Birmingham, 388 U.S. 307 (1967). Media access is, of course, much more complex, but given speech rights to be weighed against press rights, it is not clear that the press has the more persuasive case.

Professor Lange describes as "the access doctrine's most obvious cost: the possibility that the state may exercise its power to deny enforcement in some particular case. In conceptual terms the power to enforce also necessarily imports the power to withhold enforcement. Thus an obvious but nonetheless necessary cost of the access doctrine is that the state must acquire new powers not only to require particular publications but also to suppress them." Lange, The Role of the Access Doctrine in the Regulation of the Mass Media, 52 N.C.L. REV. 1, 73 (1974). It is not clear to me how state denial of a right of access to a given work constitutes state "suppression" of that work unless the only means of publication in a given medium is via a state-imposed access route. Absent such an access monopoly, a given work which has been denied a state right of access retains substantially as much or as little opportunity for voluntary media publication as would have been the case without state access machinery.

83. 94 S. Ct. at 2840.
balance the press should still prevail, but those who doubt the efficacy of such a result are hardly persuaded by an approach that apparently fails to recognize that any balancing of speech and press rights is required.

In sum, the last term of the Supreme Court provided vivid illustrations of the variety of circumstances in which the First Amendment freedoms of speech and of the press may represent different interests, be they harmonious or discordant. Whatever the eventual results of any rebalancing of First Amendment rights in light of such a differentiation, freedom of the press as a right recognizably distinct from that of freedom of speech is an idea whose time is past due.