

Fall 1970

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Recommended Citation

Elie Abel, *A Journalist Looks at the Legal Profession*, 5 Val. U. L. Rev. 71 (1970).
Available at: <http://scholar.valpo.edu/vulr/vol5/iss1/4>

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COMMENTS

A JOURNALIST LOOKS AT THE LEGAL PROFESSION†

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Some of you must be wondering why I, a layman, should be here on Law Day to speak before so large an assembly of law students, lawyers and judges. I have not read law. Not being a litigious man, I have never initiated legal action in the courts. Happily, I have never been convicted of any offense graver than that of exceeding the speed limit. While I have spent a fair amount of time in the courts as a reporter, I claim no expertise in the matter.

What brings me here, quite simply, is an invitation from the Student Bar Association, conceivably a misguided invitation. They called me one day last winter and asked if I would come out for this occasion. I was not unwilling, but I thought I had better warn them that some of the things I proposed to say might not sit well with some lawyers. Come ahead, they said. So here we are.

THE REVOLUTION OF RISING EXPECTATIONS

The fact that I was invited to be with you tonight suggests that we live in extraordinary times. Social change hardly ever moves at a smooth, even pace. There have been times, sometimes whole decades or centuries, in which nothing appeared to be happening. Men were born, grew up, went to work, married, raised their families and at last grew old and died, reasonably content for the most part with their lack of spectacular accomplishment. I need not belabor the point that our time is different, that a great many men, far from being content with their lot, keep pressing for faster, farther-reaching change. Many are black Americans, whose material condition, I would guess, has changed more rapidly for the better over the past twenty-five years than in any comparable period of American history. The statistics are dramatic, but I won't bore you with them. Certainly their rights as free-born Americans have been widening steadily since the Supreme Court in 1954 handed down that celebrated ruling on school desegregation.¹ There are

† This comment was originally presented by the author at Law Day exercises at Valparaiso University School of Law, Valparaiso, Indiana, May 3, 1970.

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1. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Mexican-Americans in the Southwest, Puerto Ricans in the slums of our great Northeastern cities and American Indians who, taking their cue from the reawakened black community, make their voices heard as never before in the streets, in the press and in the courts. Suddenly we are made aware of discontent, poverty, bitterness and violence in our midst. Many of us don't like it.

What we see happening today has, in other countries at other times, been called the revolution of rising expectations. It is a phenomenon familiar to historians. The fact is, so they tell us, that aggrieved people hardly ever rise up to demand a radical change in their condition when things are at their worst. It is only when the tide of change is flowing that the poor and forgotten dare to hope for more and faster change.

We saw it in Russia. The revolution succeeded in 1917, years after the Czars had started to relax their oppressive rule. We saw it in Hungary in 1956. The worst rigors of Stalinist rule, Hungarian style, had been relaxed after Stalin's death in 1953. Yet the revolt in the streets of Budapest did not erupt until October 23, 1956. Matyas Rakosi had been overthrown three months earlier. The political prisoners were gradually being released and abuses of the past were being acknowledged. Living conditions, by western standards still poor, were distinctly improved over what they had been five years before.

What we may be seeing, then, is a time when the poorest Americans are for the first time beginning to share modestly in a national prosperity which has passed them by for so many years, and, in consequence, to ask for more—for a bigger share—now.

The ordinary white citizen is made to feel distinctly uncomfortable by all these demands: more freedom, more and better houses, more and better jobs, higher wages, full equality before the law and in daily life. He has never seen anything like it before, and even if he cannot dismiss the demands as totally unjustified, he is likely to contend that the method of protest is wrong. "Why don't they work through the system?" he asks. "Why not register and vote and join old political parties (or form new ones) as our own forefathers did? Why take to the streets?"

I wonder how un-American it is for people to demand redress for their grievances by marching in the streets. Have we all forgotten the American Revolution? It is perfectly true that America was not accustomed to that kind of thing in the silent fifties. But have we already forgotten the Bonus Marchers, the sit-down strikes in the automobile and the steel industries or, farther back in history, the Draft Riots of 1863? Like it or not, these happenings are the warp and woof of modern American history.

No, violence is not a stranger in these United States. The historians will tell us, if we are willing to listen, that the years between 1830 and 1850 were perhaps the most violent in the history of our cities—more violent by far than the 1960's. In that period, just twenty years, Baltimore saw 12 major riots; Philadelphia—11; New York—8; Boston and Cincinnati—4.

Think of the Molly Maguires, the Kentucky Night Riders, the Ku Klux Klan, the lynchings not only of black men in the south but of Chinese and even Italians in some rough-and-ready frontier region less than a century ago.

Don't believe for a minute that violence is something alien, a product of the television age. I am sorry to say that it won't go away even if all the television stations across the land were to suppress all pictures of turbulence in the streets. Not one of our underlying problems would disappear if all those television lenses were capped simultaneously either voluntarily or by federal edict. The problems would still be there, festering in darkness. And they would surely erupt. The people, in whose name alone the press and the television claim the right to disseminate information, would be left in ignorance, wholly unprepared for the eruption ahead, knowing nothing of its nature or its causes.

THE ROLE OF THE PRESS AND THE FIRST AMENDMENT

This brings me, as might be expected, to the role of the free press in this American society and, alongside it, the role of the bar as another defender of American freedoms.

It is fashionable nowadays for men in high public office to speak of themselves as strict constructionists. While I have not until now thought of myself as a strict father or a strict moralist or indeed a strict anything, I have no fundamental quarrel with those who wish to construe the Constitution strictly. I have only one caveat: let them remember that the Bill of Rights is part of that Constitution we so strictly construe.

Consider the first amendment, which reads in pertinent part: "Congress shall make no law abridging . . . the freedom of speech, or of the press"²

The Supreme Court, long before it became the Warren Court, laid down the doctrine that freedom of speech and freedom of the press are the very cornerstone of free government by free men.³ The first amendment clearly proscribes certain action by the federal executive and

2. U.S. CONST. amend. I.

3. *See, e.g., DeJonge v. Oregon*, 299 U.S. 353 (1937); *Schenck v. United States*, 249 U.S. 47 (1919).

judiciary as well as the Congress, including specifically the issuance of subpoenas in connection with federal investigations and proceedings.⁴ Nor is it open to serious question—I am told by my lawyer friends—that the first amendment protects not only the dissemination of news,⁵ but all activities incidental thereto, including specifically the gathering of news.⁶

In the light of these settled principles, the appropriate inquiry is not whether the right of a newsman to gather news is of sufficient importance to overcome the general duty of all persons to give compulsory testimony. Not at all. The question, more properly, should be phrased in reverse: whether the need for compulsory testimony is so compelling in our scheme of legal values as to outweigh the first amendment right of a newsman to gather news.

Let us not dismiss too casually this need to strike a balance: wholesale subpoenas of the kind the Justice Department's management has in mind, as a practical matter, would destroy or seriously impair the ability of the news media to fulfill the unique role assigned to it in our system of government.

You have all heard the suggestion, I know, that in these troubled times perhaps we ought to reconsider the first amendment. I, for one, was shocked at a recent gathering to hear a reasonably prominent scholar suggest that perhaps this nation can no longer afford such privileged treatment for the news media.

Standing before you as a self-proclaimed strict constructionist, let me draw your attention to the fact that as far back as the first Continental Congress, the special role and function of the free press as a kind of ombudsman for free Americans was clearly understood and proclaimed. In short, this whole development has not been accidental nor in any degree an afterthought. In *Near v. Minnesota*⁷ Chief Justice Charles Evans Hughes had occasion to review the genesis of the first amendment.

The decision contains the following quotation from a letter sent by

4. *Watkins v. United States*, 354 U.S. 178 (1957).

5. *Talley v. California*, 362 U.S. 60 (1960); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

6. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965), invalidating the Postal Service and Federal Employees Salary Act, Publ. L. No. 87-793, § 305, 76 Stat. 840, which required that foreign mail deemed "communist political propaganda" be held at the post office until requested by the addressee. *See also Thomas v. Collins*, 323 U.S. 516 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

7. 283 U.S. 697 (1931).

the Continental Congress on October 26, 1774, to the inhabitants of Quebec:

The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.⁸

Chief Justice Hughes went on to quote with evident approval the words of James Madison, whom he characterized as the leading spirit in the framing of the first amendment. Madison, in describing the reasons why our state constitutions include guarantees of freedom of the press, said this:

In every state, probably in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxurious growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation.⁹

I will not burden you with further quotes from the founding fathers. I think the point has been made that the first amendment

8. 1 JOURNAL OF THE CONTINENTAL CONGRESS 104, 108 (1904), as quoted in 283 U.S. at 717.

9. 4 REPORT ON THE VIRGINIA RESOLUTIONS, MADISON'S WORKS 544, as quoted in 283 U.S. at 718.

is no afterthought, and that critical though we may be of certain press practices in our own time, there is grave danger for all of us in tampering with the Bill of Rights.

Let us also remember that the press, while it may at times appear to be asking special favors, asks them in the name of the people it informs. I would remind you of the statement by Mr. Justice Brennan in *Time, Inc. v. Hill*: "Those guarantees are not for the benefit of the press so much as for the benefit of all of us."¹⁰

We all recognize that in some circumstances first amendment rights must necessarily give way to other rights where the preservation of our society or its orderly functioning is at stake. But the courts have made clear time and time again that such rights give way only in the most limited, extraordinary circumstances. Ordinarily, as I need not explain to this distinguished audience of jurists, where first amendment rights conflict with rights, powers and privileges of the government in general or with other non-first amendment rights, the rights protected by the first amendment prevail.

Let me quote *Bridges v. California*,¹¹ again a case that goes back years before the Warren Court:

[T]he First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow."¹²

And further in the same opinion:

[T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.¹³

The heart of the argument against compelling journalists to testify as to their sources or other confidential matters is that the very act of presuming to turn a newsman's notes or tapes of film into raw material for any prosecution inevitably has the effect of "drying up" sources of information. This is hardly a new principle. The Supreme Court has

10. 385 U.S. 374, 389 (1969).

11. 314 U.S. 252 (1941).

12. *Id.* at 263.

13. *Id.* at 265.

repeatedly emphasized in a variety of contexts the value of anonymity in the collection or dissemination of information.¹⁴ Conversely, the Supreme Court has also recognized that identification of the source of information or ideas has served to stifle first amendment freedoms out of fear of retaliation or punishment.¹⁵ You may well ask how it is that the free flow of news has not dried up long before now. The answer, or part of it at least, is quite simple. Until recently government prosecutors, government officials and others in a position to compel testimony have for the most part recognized at least de facto the privilege asserted by newsmen. In those instances where an interrogator has sought to breach the "privilege," the newsman, almost uniformly, has accepted fine or imprisonment rather than disclose his sources or other confidential information.

THE RESPONSE OF THE BAR

What has changed, then, is that in the present climate much of our populace is worried and fearful about the public scene. Federal prosecutors (taking their cue from Attorney General Mitchell) have set out to invade the hitherto forbidden territory of sources of news and made the general public aware of a problem that, for so many years, was a matter of primary concern only to legal scholars and newsmen themselves.

My criticism of the present day bar is that it has not raised its voice in protest against this invasion. I stand with Mayor Lindsay of New York, who just the other day speaking before the Association of the Bar of the City of New York noted:

The Justice Department has issued and then retracted a startling series of subpoenas asking for the notes and tapes of newsmen. Where are the declarations of opposition? Where are the leaders in politics, the Bar and academic life speaking out against these new threats to our constitutional freedoms?¹⁶

The Dean-designate of the Yale Law School in a recent issue of the *New Republic* spelled out the compelling necessity for a newsman's privilege in terms that I commend to all of you. He pointed out that various courts have respected the confidentiality of disclosures made to

14. See *Talley v. California*, 362 U.S. 60 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

15. *Talley v. California*, 362 U.S. 60 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

16. Address by Mayor Lindsay, New York City Bar Association Meeting, April, 1970.

priests, attorneys, social workers, teachers and guidance counselors. Turning to the news fraternity, the Dean-designate made this point:

Most disclosures are made to an attorney because the client wants the best possible advice and because he realizes that he will be the loser if he withholds the raw materials on which such advice should be predicated. The patient tells all to his physician because he wants to be diagnosed and treated properly. Information is given to social workers, teachers and guidance counselors because there is a problem which calls for help. Persons who made such communications probably know very little about the degree to which their confidences may be disclosed in the future. But if they did, the immediate interest in getting good advice would probably prevail, the communication would be made and the professional relationships would remain viable.

In the case of a journalist's privilege the informant does not risk his health or liberty or fortune or soul by withholding information. He is likely to be moved by baser motives—spite or financial reward—or, on occasion by a laudable desire to serve the public welfare if it can be done without too much jeopardy. His communication, more than the others, is probably the result of a circular calculation and more likely to be effected by the risk of exposure. In this instance compelling the disclosure of a confidential source in one highly publicized case really is likely to restrict the flow of information to the news media and by doing so, it may well interfere with the freedom of press guaranteed by the First Amendment.¹⁷

I don't know how true it is, as President Kingman Brewster of Yale submitted the other day, that in our time the Black Panthers cannot get a fair trial anywhere in these United States. It is a question each of you must answer for himself. But if there is in it even a grain of truth, so much as a scintilla, then it seems to me we have lost something of enormous value in American society. The time is long past due for lawyers to be asking this question of themselves and trying to answer it honestly.

This brings me to the eighth amendment. Once again, as I call myself a strict constructionist, let me quote what it says: "Excessive

17. Goldstein, *Newsmen and Their Confidential Sources*, NEW REPUBLIC, March 21, 1970, at 14.

bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁸

I grant you the amendment, just those naked words, does not specify what constitutes excessive bail. Clearly, the word excessive has in this case a qualitative rather than a quantitative application. In the current Black Panther case being heard in New York, bail was set at \$100,000 for each of the Panthers accused of conspiracy to bomb certain public places. Perhaps you will not consider that excessive bail. On the other hand, at almost the same time, in a case of actual bombing in South Carolina, witnessed by a number of persons, bail was set at \$25,000. Where are the lawyers raising serious questions about the equities in this situation? Clearly, if \$25,000 is adequate bail for a bombing in South Carolina, \$100,000 is excessive for a conspiracy case in New York. We keep hearing in these cases from Mr. William Kunstler and Mr. Gerald Lefcourt and Mr. Charles Garry and other lawyers who have made a specialty of defending radical cases. But I submit that the rest of the Bar, the respectable Bar, so to speak, is not being heard from. I leave it to you to answer the question, why?

It is not my purpose to indict or condemn the legal profession. It is merely to raise questions that attorneys, I don't doubt, have been asking themselves.

We have recently gone through an interesting political charade involving two Supreme Court nominations in succession, both rejected by the United States Senate. Both were described by the President himself as strict constructionists. I have not raised any objection to that designation. In fact, I approve of a conservative on the Court who would fiercely defend the Constitution, recognizing that the people have a constitutional right to know what is going on and who would insist that, yes, even Black Panthers have a constitutional right to reasonable bail. And I am confident that the South is capable of producing such a man. In fact I am perfectly willing to nominate one right here and now—Senator Sam Ervin of North Carolina. The fact that Senator Ervin is a Democrat of the Southern persuasion ought not to seem a grave disqualification from the President's point of view. But I am led to the reluctant conclusion that the President and Mr. Agnew would rather have an issue, however spurious, than a distinguished justice from the South sitting on the Court. They have not, in fact, tried to nominate any of an appreciable number of Southern lawyers or jurists, like Senator Ervin, whose nominations—I think we can safely assume—would

18. U.S. CONST. amend. VIII.

sail through the Senate to quick confirmation.¹⁹

May I add that as a layman I have been enormously impressed by the number of young lawyers coming out of our law schools who insist as a condition of employment with our leading law firms that they shall be free to defend the poor. This seems to me in the highest traditions of American justice and I for one am proud of these young people. I suspect that all of us in the so-called learned professions might take a leaf from their book whether we are doctors or lawyers, journalists or architects or, heaven help us, politicians.

If we do not answer the call of conscience, as these young law school graduates are doing, we will deserve no better than we get.

19. Since Dean Abel's speech, Justice Harry Blackmun has been nominated and confirmed as Associate Justice. Justice Blackmun is from Minnesota.