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# The Minnesota GAG LAW

## and the Fourteenth Amendment

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ON JUNE 1, 1931, the Supreme Court of the United States handed down a decision which, according to one authority, represented "the climax of a striking evolution in our Constitutional law whereby freedom of speech and press is at last effectively 'nationalized'." In this decision, rendered in the case of *Near v. Minnesota*, the court for the first time used "the guarantee of liberty in the Fourteenth Amendment . . . to completely obliterate a state law."<sup>1</sup>

The law in question, which had been enacted by the Minnesota legislature in 1925, declared certain types of publications a nuisance and provided for injunctions to prevent their circulation. Of this Minnesota measure—the first to provide for actual suppression of the public press since the passage of the Alien and Sedition Acts in 1798—Supreme Court Justice Brandeis was reported to have remarked: "It is difficult to see how one can have a free press

and the protection it affords a democratic community without the privilege this act seeks to limit."<sup>2</sup>

The origins of the Minnesota "gag law" are obscure. Some claim that it was sponsored by a legislator intent on silencing an editor who was attacking him, and that the editor died before the law could be applied to his particular publication.<sup>3</sup> The bill was initiated in the Minnesota Senate by Freling H. Stevens, a Minneapolis attorney whose firm included his brother and his two sons. He was serving his second term as state senator, and politically he was a Progressive-Republican. When the bill was introduced on March 27, 1925, as Senate File 1181, it did not cause a furor. In routine manner, it was referred to the committee on general legislation, which reported it out the following day without recommendation, and it was then placed on the general orders of business. On April 7, 1925, it came to a vote before the Senate and passed without dissent. Stevens himself did not vote on the final passage. The bill was then sent to the House, and on April 16, 1925, was passed by a vote of eighty-two to twenty-two. Governor Theodore Christianson signed it into law along with a large number of minor end-of-session bills. Thus the act which within a few years was to become a subject of national

<sup>1</sup> Robert E. Cushman and Robert F. Cushman, *Cases in Constitutional Law*, 698 (New York, 1958); Merlo J. Pusey, *Charles Evans Hughes*, 2:720 (New York, 1951).

<sup>2</sup> *American Law Review*, 58:614 (July-August, 1924); *New York Times*, January 31, 1931, sec. 1, p. 6, col. 3.

<sup>3</sup> James R. Mock, *Censorship, 1917*, 223 (Princeton, New Jersey, 1941); *New York Times*, January 12, 1930, sec. 1, p. 26, col. 4; Marion D. Shutter, ed., *History of Minneapolis*, 3:816 (Chicago, 1923); Minnesota, *Legislative Manual*, 1925, p. 682.

concern passed quietly into the Minnesota statute books. The Minneapolis newspapers, particularly the *Minneapolis Tribune*, which gave excellent coverage to the daily sessions of the legislature, did not report on its passage.<sup>4</sup>

The new law was defined in its preamble as "An act declaring a nuisance, the business . . . of regularly or customarily producing, publishing, or circulating an obscene, lewd, and lascivious newspaper, magazine, or other periodical, or a malicious, scandalous, and defamatory newspaper, magazine, or other periodical and providing for injunction and other proceedings." It provided that the county attorney or, in his absence, the attorney general or any citizen acting in behalf of the county attorney, might institute proceedings in district court for a temporary restraining order against any periodical which in the mind of the complainant violated the provisions of the act. The district court was then empowered to issue a temporary restraining order if it so desired. In any case, a summons would be served on the accused publisher, who would have the privilege of answering the charges or demurring. The case would be tried before the district court judge, who would either rule in favor of the defense or grant a permanent injunction, by which, in the language of the law, "such nuisance may be wholly abated." Failure to comply with the order of the court would involve contempt and would be punishable by a fine of a thousand dollars or a year in the county jail.<sup>5</sup>

THERE WERE in the 1920s literally hundreds of small weekly newspapers, many of which imitated and elaborated the techniques developed by Hearst and other publishers in the late 1880s and branded by Pulitzer as "yellow journalism." No grist was too offensive to the public taste to be avoided by this type of scandal mill. The reporting which filled its pages usually involved crime, sex and sexual perversion, attacks on minority religious and racial

groups, grossly exaggerated accounts of malfeasance by public officials, and scandals revolving about prominent private citizens. Some publishers went beyond the sensationalism which was intended to increase circulation and indulged in extortion and blackmail.<sup>6</sup>

The procedures followed by an extorting editor are well known. Fabricating a story out of whole cloth or greatly exaggerating a tale involving some truth, he approached his victim with advance copy and intimated that the story could be suppressed for a consideration. The victim, usually a prominent individual, could either meet the demands of the extortionist or suffer the consequences of unfavorable publicity. If he made the latter choice, he might sue for libel. In such a suit, however, the plaintiff bears the burden of proving that the published facts are untrue. Few people care to have their personal affairs aired in a courtroom. Under some circumstances, the mere occurrence of a trial can damage the reputation and earning capacity of an individual, while he is deterred by the cost of initiating legal action. Thus many people are vulnerable to an extortionist. Blackmail differs from extortion only in that the blackmailer is actually in possession of some fact his victim wishes suppressed.<sup>7</sup>

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<sup>4</sup> Minnesota, *Senate Journal*, 1925, p. 990; *House Journal*, 1925, p. 1463. Since the journals of the state legislature do not contain records of debate, it is impossible to reconstruct discussion of the bill while it was under consideration. Presumably the measure was not debated extensively.

<sup>5</sup> Minnesota, *Laws*, 1925, p. 358.

<sup>6</sup> Lamar T. Beman, *Censorship of Speech and Press*, 198-205 (New York, 1930); Ernest W. Mandeville, "Gutter Literature," in *New Republic*, 45:350 (February 17, 1926); N. W. Ayer and Son, *American Newspaper Annual and Directory*, 1920-29. Ayer does not list all newspapers, since some were so ephemeral that they appeared and went out of business before their existence could be recorded.

<sup>7</sup> These crimes are usually difficult to prove in court. Professor George Vold of the department of sociology in the University of Minnesota, who has served on crime commissions and is an instructor in criminology, aided the writer in preparing this description.

Public officials frequently have been singled out for attack by the sensational press. The nature of their position makes them especially vulnerable to unfavorable publicity, and though an official may be innocent of any malfeasance, a continuous barrage of charges inevitably casts some doubt on his honesty. A fine but definite line exists between attempts by the legitimate press to expose corruption and the sensational charges of the scandal sheet. Rarely indeed has a conviction arisen out of accusations made by journals of the latter type, while on occasion they have been linked with criminal organizations or interests.

Of the scandal sheets established in the 1920s, many expired within a few weeks. Those surviving often moved from address to address, appearing at irregular intervals under varying editorships. The lives of such editors were often as shifting and unstable as their papers. In following the career of one such individual it was discovered that, over a period of nine years, the city directory listed him only five times, in each instance at a different address. A man might edit several papers in rapid succession, only to turn up a short time later on the staff of an erstwhile competitor.<sup>8</sup>

One such elusive personality was Howard A. Guilford, who in 1913 founded a paper in St. Paul called the *Reporter*. Little is known of his earlier life. He was born in 1888, probably in Massachusetts, since he refers to his family there and was buried in that state. In a privately published book of memoirs he alludes to a reading knowl-

edge of "Mr. Blackstone," indicating some acquaintance with the law, but Guilford sheds no further light on his life before arriving in Minnesota at the age of twenty-five.<sup>9</sup>

Unfortunately, no copy of the St. Paul *Reporter* is preserved, but according to Guilford the paper accused the St. Paul chief of police, Martin J. Flanagan, of negligence in failing to pursue known criminals. Soon after its appearance on January 17, 1913, Guilford was arrested on a counterfeiting charge, but was subsequently released. This marked the beginning of a lengthy police record, which extended from 1913 to 1927. In 1914 he was arrested on a charge of carrying a concealed weapon, and acquitted; he was convicted of libel in 1918, and fined a hundred dollars; he was tried for extortion in 1920, and acquitted. In his book Guilford mentions three other occasions when a county attorney sought an indictment on charges of libel or extortion, but in each case the grand jury failed to indict him.<sup>10</sup>

Meanwhile, the *Reporter* appeared sporadically in 1913 and 1914. Beginning in 1915, the paper was published in Minneapolis under the name of the *Twin City Reporter* and it became a regular weekly. For a short time in 1915 Guilford attempted to issue it daily, but this attempt was unsuccessful, and he soon returned to a weekly schedule.

Each issue of the *Twin City Reporter* followed a set pattern; sex, attacks on public officials and prominent private citizens, and vicious baiting of minority groups were its major subjects. Three- or four-inch headlines, revealing a new sex scandal, screamed from every opening page. Some samples are: "Smooth Minneapolis Doctor with Woman in Saint Paul Hotel," or "White Slaver Plying Trade: Well Known Local Man Is Ruining Women and Living off Their Earnings." The lead lines and reporting conformed to the same style. The second feature story each week singled out a public official for "exposure" on charges

<sup>8</sup> See J. M. Near in *Minneapolis City Directory, 1927-36*. The *Saturday Press*, published in Minneapolis, listed four different addresses from 1933 to 1936.

<sup>9</sup> Howard A. Guilford, *A Tale of Two Cities: Memoirs of Sixteen Years Behind a Pencil*, 6-8, 13, 50 (Robbinsdale, 1929); *Minneapolis Tribune*, September 9, 1934, sec. 1, p. 4, col. 1.

<sup>10</sup> *Minneapolis Tribune*, September 27, 1927, sec. 1, p. 2, col. 5; Guilford, *Tale of Two Cities*, 7-15, 82-91.

which might include graft, failure to prosecute known criminals, or being in league with them.<sup>11</sup> Crimes most frequently cited were prostitution and gambling. Minority groups were attacked indiscriminately. The Salvation Army was accused of misappropriating the funds it collected and of preying on the poor it professed to serve. The Roman Catholic church was an almost weekly victim. Its adherents were referred to as "papists" or "Romish," and its clergy were accused of sexual irregularities. National or racial minorities were invariably referred to in common or derogatory terms — Chinese were "chinks," Italians, "dagoes," Negroes, "dinges," and so forth.

In the *Twin City Reporter* of December 22, 1916, the name of the editor was changed from Guilford to Jay M. Near. Early in 1920, Near's name was replaced by that of John D. ("Jack") Bevans. He continued as editor until Edward J. Morgan took charge in August, 1921, and the latter's name remained on the masthead through November 25, 1927. The same general style that had marked the paper since its founding continued throughout the entire thirteen years of the publication's existence.<sup>12</sup>

In 1917, the *Twin City Reporter* lost its mailing privileges. Under the federal Espionage Act of 1917 the postmaster general of the United States was authorized to rescind second-class mailing privileges of any publication which contained material inimical to the war effort. By criticising the president and the war effort, and violently opposing the European food aid program, the *Reporter* probably incurred the displeasure of the postmaster general. The paper took no notice of the loss in its own pages.<sup>13</sup>

Little is known of the activities of Near and Guilford in the early 1920s. Guilford filed for mayor of Minneapolis in 1918 and was defeated. At about this time his wife instituted a suit for divorce. Ironically, the man who had for several years entertained the public with scandals involving infidelity

and adultery, lost his own wife on these very charges. Near, who was born in Fort Atkinson, Iowa, in 1874, was married, and had a daughter living in California. When he first went to Minneapolis and what he did there prior to his connection with the *Twin City Reporter* is not known. According to Guilford, Near became the innocent victim of his erstwhile partner, Bevans, who was blackmailing people without Near's knowledge. When Near learned of this, he left the newspaper, and his name did not again appear before the public until 1927.<sup>14</sup>

IN THAT YEAR, Near and Guilford combined forces to bring out a new weekly called the *Saturday Press*. Guilford thus described its launching: "In August of 1927, J. M. Near, my former partner and later editor of the *Twin City Reporter*, returned to Minneapolis from the Pacific Coast. He looked me up and suggested that we enter the weekly newspaper game together. I gave the matter some thought . . . and finally told Near that I would join him with one understanding — that never

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<sup>11</sup> Guilford, *Tale of Two Cities*, 31–33; *Twin City Reporter*, August 17, 1914, October 8, 1915. The only known file of this paper, covering the years 1914 to 1927, is owned by the Minnesota Historical Society.

<sup>12</sup> See issues of the *Twin City Reporter* for 1915, 1916, and 1917. The most virulent anti-Catholicism seems to be contemporary with the appearance of Jay M. Near on its editorial staff. He later published at least two pamphlets enlarging upon scandals involving Catholic clergy.

<sup>13</sup> Mock, *Censorship, 1917*, 145. The loss of second-class mailing privileges — a preferentially low rate — practically precludes the use of the mails to any publication. Since the act did not require the postmaster general to file formal charges, his precise reasons for rescinding the privileges of the *Twin City Reporter* are unknown. Ultimately a newspaper restricted under the Espionage Act brought suit against the United States. The Supreme Court upheld this section of the act, ruling that control of the mails was clearly within the power of Congress. See *Milwaukee Publishing Company v. Burleson*, 255 *United States Supreme Court Reports* 407 (1921).

<sup>14</sup> Guilford, *Tale of Two Cities*, 57, 63, 70; *Minneapolis Tribune*, April 19, 1936, sec. 2, p. 3, col. 1.

a word of a sex nature would appear in the columns of our paper.”<sup>15</sup>

The first issue of the *Saturday Press* appeared on September 24, 1927. The announcement on its first page stated that “The names of the publishers of this journal of ultra-intellectual epics are not unknown to readers of the Twin Cities and the Northwest. Unfortunately we are both former editors of a local scandal sheet, a distinction which we regret. We at least have the satisfaction of knowing that no blackmail ever dirtied our hands although we are aware that the taint of blackmail sullies our reputations.”<sup>16</sup> The statement went on to declare that the paper would expose crime and corruption in high places and wage war on the *Twin City Reporter*. The *Saturday Press*, it announced, was about to embark on a crusade to clean up the city. That Minneapolis stood in need of reform was common knowledge; throughout the 1920s it had a reputation as one of the nation’s chronically corrupt cities.<sup>17</sup>

In the same issue of the *Press*, Near claimed that he and his partner were marked for extinction if they dared to produce their paper: “Word has been passed to Mr. Guilford and myself within the last week that if we persisted in our exposé of conditions as they are in this city we would be ‘bumped off’. Just a minute, boys, before you start something you can’t finish. . . . We are going through, and if anything happens to either of us the stage is set so that within twenty-four hours old Sir John Law will begin stuffing Stillwater

Penitentiary full of certain gentlemen.”<sup>18</sup> Three days later, on September 27, Guilford was shot. In the company of his sister-in-law, he left his home in the Minneapolis suburb of Robbinsdale by automobile. He was followed by another vehicle, whose occupants forced his car off the road and fired into it a volley of shots. Guilford sustained bullet wounds in his abdomen and thigh, and was hospitalized for several weeks.<sup>19</sup>

Contrary to the predictions in the *Saturday Press*, no prison terms resulted from the Guilford shooting. Two men, Harry Jaffa and Paul Cottlieb, were apprehended by the police and identified by Guilford as his assailants, but he refused to press charges against them and they were subsequently released. Near, left to carry on alone, declared in the issue of October 1, “If the ochre hearted rodents who fired those shots into the defenseless body of my buddy thought for a moment that they were ending the fight against gang rule in the city they were mistaken.”

The first public official to be attacked by the *Saturday Press* was Frank W. Brunskill, the Minneapolis chief of police, who, according to the issue of October 8, promptly “took upon his brawny shoulders the burden of suppressing this publication on news stands and other news agencies operating in the city.” The following week Near continued to harass Brunskill, proclaiming in his lead article that “the Chief in banning this paper from news stands definitely aligns himself with gangland and violates the law he is sworn to uphold.”<sup>20</sup>

Soon the vituperations against Brunskill extended to Mayor George E. Leach of Minneapolis and County Attorney Floyd B. Olson of Hennepin County. On November 5 Near queried, “Why is it that the Chief of Police has not been asked to resign by the Mayor, or his indictment sought by the County Attorney?” Two weeks later, on November 19, the feature story in the *Saturday Press* announced that “Mayor Leach suspends patrolman for tagging

<sup>15</sup> Guilford, *Tale of Two Cities*, 129.

<sup>16</sup> *Saturday Press*, September 24, 1927. Texts of nine issues of the *Saturday Press* which appeared prior to its suppression are among the papers and briefs filed in connection with *Near v. Minnesota*, 283 *United States* 697 (1931). A few issues of the paper, dating from the early 1930s, are in the collection of the Minnesota Historical Society.

<sup>17</sup> George H. Mayer, *The Political Career of Floyd B. Olson*, 14 (Minneapolis, 1951).

<sup>18</sup> *Saturday Press*, September 24, 1927.

<sup>19</sup> *Minneapolis Tribune*, September 27, 1927.

<sup>20</sup> *Saturday Press*, October 15, 1927.

Mayor's car," and asked, "Is Leach immune from the law Bill Jones is forced to obey?"

Following the line of their previous publications, Near and Guilford soon found a minority group to attack—on this occasion, the Jews. Writing on November 12, Near asserted, "There have been too many men in this city who have been taking orders from JEW GANGSTERS, therefore we have Jew gangsters practically ruling Minneapolis. It is Jew thugs who have 'pulled' practically every robbery in this city."

Guilford, while still in the hospital, wrote an article criticising once again the county attorney. Published on November 19, it accused Olson of failing to prosecute criminals and added this warning: "Now go ahead and run for Governor again, Floyd, and you'll find that what you took to be a chip on my shoulder is really a tomahawk."

Olson, responded three days later by bringing action in Hennepin County District Court under the gag law of 1925. Declaring that the *Saturday Press* was a nuisance as there defined, he filed a complaint and asked relief in a temporary restraining order, which the court granted. The attorneys for Near and Guilford demurred. It was hardly possible for them to answer the complaint, since the *Saturday Press* was clearly scandalous and defamatory. By demurring, however, they contended that the Minnesota statute was unconstitutional, and this contention formed the basis for their defense. When the hearing was held before Judge Mathias Baldwin on December 19, the demurrer was overruled. In a memorandum, the judge asserted that, since freedom of the press is so sacred a liberty, the case should be certified immediately to the Minnesota Supreme Court. While the decision of this tribunal was awaited, Near and Guilford were restrained from publishing.<sup>21</sup>

In their appeal, the publishers based their case on three main premises. They argued that liberty of the press, as guaranteed in Article 1, Section 3 of the Minne-

sota State Constitution, was being violated; contended that the hearing had denied them the right to a trial by jury; and held that the 1925 statute was an arbitrary and unreasonable invasion of liberty, as set forth in the due process clause of the Fourteenth Amendment.

On May 25, 1928, when the court handed down its decision, one justice abstained, while Chief Justice Samuel B. Wilson joined three associate justices in ruling against Near and Guilford.<sup>22</sup> They decided that by the definition of the law of 1925, a newspaper business conducted in violation of the act was classified as a public nuisance, and that a court of equity had the power to enjoin and thereby abate public nuisances. It held further that the law was a legitimate exercise of the state police power. The chief justice said, "There can be no doubt that the police powers include all regulation designed to promote the public convenience, happiness, welfare, and prosperity . . . and extend to all matters of health, safety, and morals. . . . It is the prerogative of the Legislature to determine not only what the public interest requires but also the measures to protect that interest." He went on to say that the court must be very cautious in reviewing legislative acts, and in all cases of doubt, the benefit of that doubt should be with the legislature.

The chief justice next turned his attention to libel. Libel law alone, he pointed out, was not sufficient to protect racial and other minority groups that were being defamed or attacked. Who, the judge asked, is going to bring suit when no particular individual is the target of such attacks? Clearly, the abatement of such attacks was the aim of the legislature in enacting the law. Considering the problem presented by the language of the Minnesota Constitu-

<sup>21</sup> The proceedings of the district court may be found among the briefs filed in connection with 283 *United States* 697.

<sup>22</sup> *Olson v. Guilford*, 174 *Minnesota Supreme Court Reports* 457-463 (1928).

tion, Justice Wilson said, "In Minnesota no agency can hush the sincere and honest voice of the press; but our Constitution was never intended to protect malice, scandal, and defamation, when untrue or published without justifiable ends." He further pointed out that while the state Constitution guarantees freedom of assembly, it does not thereby countenance illegal assemblies, such as riots, nor does it deny the state power to prevent them.

The remaining contentions of Near and Guilford were quickly dealt with. The due process clause of the Fourteenth Amendment was never intended to limit the subjects on which the police powers of the state might be exerted lawfully. Since this was an equitable proceeding, no jury was required.

The case was remanded back to the district court, where Judge Baldwin then issued a permanent injunction, by the terms of which the partners were perpetually prohibited from publishing any paper called the *Saturday Press*, or that paper under any other name.<sup>23</sup> Near and Guilford were out of business.

WITH THE ISSUING of the permanent injunction, publishers outside the state became aware for the first time of the Minnesota law. They quickly came to the conclusion that a law of this nature was a genuine threat to the freedom of the press. Large metropolitan newspapers of the highest repute felt it their duty to investigate and expose irregularities in public office. Statutes similar to the Minnesota law, if enacted in their communities, could be used as effective muzzles on any newspaper which offended public officials. A storm of protest soon arose.

<sup>23</sup> See briefs filed with 283 *United States* 697.

<sup>24</sup> See Robert R. McCormick, *The Freedom of the Press*, 42-45 (New York, 1936); *What American Editors Said About the Ten Million Dollar Libel Suit* (Chicago, 1923). The latter work, published by the Chicago Tribune Company, summarizes press comment on the trial and provides a bibliography.



FLOYD B. Olson in the 1920s

The first major newspaper to support Near was the *Chicago Tribune*. Whether he invited its intervention, or the paper acted on its own initiative, is not certain. It is known, however, that the *Tribune's* attorneys soon entered the case, and in conjunction with the lawyers already representing Near and Guilford, prepared an appeal from the permanent injunction to the Minnesota Supreme Court. The Chicago paper's publisher, Colonel Robert R. McCormick, was known as a champion of freedom of the press. In 1920 the *Tribune* had been sued for libel by the city of Chicago, which asked damages totaling ten million dollars because the paper published a series of articles charging that the municipality was bankrupt, insolvent, and so corruptly administered that its streets were not properly cleaned and its laws not efficiently enforced.<sup>24</sup> Chicago contended that the articles were untrue and libelous, and that their appearance had damaged the

city's credit. The trial was a long one and was carried on appeal to the Illinois Supreme Court, where it was finally decided in favor of the *Tribune*.

Speaking about the case later, McCormick said, "Consequently we embarked upon the most extensive study of municipal law and the law of freedom of the press that has ever been undertaken. The results of our studies were embodied in the argument in the State of Illinois and led to the opinion, first of the Circuit Court of Cook County, then of the Supreme Court [of Illinois] that a city may not sue a newspaper for libel. . . . While the information was fresh in our minds our attention was drawn to a case where acting under a statute of that state [*Minnesota*], the District [*County*] Attorney had filed an information, pernicious instrument for political persecution, against a newspaper alleging that it was a scandalous newspaper. A Chancellor of that state, after a very short hearing had enjoined further publication of the paper and the Supreme Court affirmed that decision. Therefore we took immediate steps to carry the case to the Supreme Court of the United States with the financial assistance and moral support of the American Newspaper Publishers Association."<sup>25</sup>

While the second appeal to the Minnesota Supreme Court was pending, the nation's press became articulate on the subject of the *Saturday Press* case. The *Cleveland Plain Dealer* decided that "The case is one of vast importance. It far overshadows the specific wrong committed against an obscure and unimportant weekly publication in Minnesota. It concerns the fundamental rights of free speech and free press."<sup>26</sup>

McCormick himself turned to his editorial columns to attack the Minnesota law. Classing Minnesota with the notorious "Monkey States," he contended that "Minnesota joins hands with Tennessee and, of the two states, Minnesota may justly claim to be more ridiculous. After all, it is less

than one hundred years since intelligent men discarded the traditional biological notions found in the Bible. It is nearly three hundred years since John Milton stated the argument for free speech and free press and Milton was by no means the first champion of enlightenment in this field."<sup>27</sup> The more circumspect *New York Times* branded the Minnesota statute "A Vicious Law," and asserted that "A Soviet Commissar, one of the police bureaucrats who ruled Russia before the Revolution, or an oriental despot, could have no greater power than this. For not only are property rights destroyed, but the source of public information is blocked or cut off."<sup>28</sup> Not quite certain how it stood on the Minnesota law, but recognizing a need for housecleaning, the *Christian Science Monitor* observed, "The [Minnesota Supreme] Court's decision should impress on them [*publishers*] the need to work within their societies and with their publications for higher professional standards. Such efforts might obviate the necessity for new laws elsewhere."<sup>29</sup>

During the waning days of April, 1929, the American Newspaper Publishers Association met, and McCormick, as chairman of its committee on free press, had this to report: "The [*Minnesota*] Statute is tyrannical, despotic, un-American, and oppressive. . . . Whenever a grafting minority

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<sup>25</sup> Robert R. McCormick, *The Case for the Freedom of the Press*, 17-19 (1933). McCormick's facts are somewhat in error here. He first entered the Near case when it was appealed to the Minnesota Supreme Court for the second time, a year before the American Newspaper Publishers Association joined his effort. See Philip Kinsley, *Liberty and the Press: A History of the Chicago Tribune's Fight to Preserve a Free Press for the American People*, 4 (Chicago, 1944).

<sup>26</sup> Quoted in Beman, *Censorship of Speech and Press*, 326.

<sup>27</sup> *Chicago Tribune*, March 28, 1929, sec. 1, p. 14, col. 2. McCormick here refers to the Scopes trial of 1925 in Tennessee.

<sup>28</sup> *New York Times*, April 26, 1929, sec. 1, p. 24, col. 3.

<sup>29</sup> *Christian Science Monitor*, August 8, 1929, sec. 1, p. 14, col. 1.



desires to remain in power or to prevent exposure of wrong doing it has a ready weapon at hand with which to cover up iniquity and suppress attempts to expose it." On the basis of McCormick's report, the association adopted the following resolution: "Now therefore be it resolved by the American Newspaper Publisher's Association that said statute is one of the gravest assaults upon the liberties of the people that has been attempted since the adoption of The Constitution, and is inherently dangerous to the Republican form of Government; and be it further resolved that the members of The Association co-operate in all respects to secure repeal of said statute and of any statute similarly directed against the right of free utterance."<sup>30</sup>

MEANWHILE, the Minnesota legislature was in session. That body was well aware of the unfavorable national publicity that the state was receiving, and it was inevitable that it should devote some discussion to the "nuisance law," as it was coming to be known. Representative Ralph R. Davis of Breckenridge introduced into the House a repeal bill which was referred to the committee on general legislation. After deliberation, the committee submitted a majority report recommending indefinite postponement and a minority report favorable to passage. The author of the repeal attempt moved on the floor that the minority report be accepted. This motion was defeated by a vote of eighty-seven to thirty. The legislature was not yet ready to reconsider its actions; Minnesotans in general did not seem overly concerned; and the *Minneapolis Tribune*, reporting the failure of the repeal measure, did so without comment.<sup>31</sup>

Finally, on December 20, 1929, the Min-

<sup>30</sup> American Newspaper Publishers Association, *Proceedings*, 1929, p. 73.

<sup>31</sup> Minnesota, *House Journal*, 1929, p. 735; *Minneapolis Tribune*, March 27, 1929, sec. 1, p. 9, col. 5.

<sup>32</sup> 179 *Minnesota* 41 (1929).

nesota Supreme Court ruled on the second appeal. The case was now being carried in Near's name only, Guilford having withdrawn from the litigation. The contentions of the attorneys were basically those used in the first case. One new argument only was added. It contended that, in being prevented from earning his daily living, Near had been deprived of his property without due process of law, as defined in the Fourteenth Amendment. This argument sought to capitalize on the court's presumed concern with property and the individual's economic rights.

Speaking for the same majority as in the first case, Chief Justice Wilson handed down a terse and pointed opinion. An evil existed, the court asserted, which was inimical to the public and which the legislature intended to remedy. No claim had been advanced that the *Saturday Press* was not precisely what it was charged with being — namely, a business which regularly and customarily devoted itself to malicious, scandalous, and defamatory matter. In regard to the original arguments, the chief justice stood on the reasoning presented in his first decision. He then quickly disposed of the property argument presented by counsel for Near, saying, "We see no reason however for defendants to construe the judgment as restricting them from operating a newspaper in harmony with the public welfare to which we all must yield. The case has been tried. The allegations of this complaint have been found to be true. Though this is an equity action defendants have in no way indicated any desire to conduct their business in the usual and legitimate manner."<sup>32</sup>

MINNESOTA had spoken with finality. The only course of action remaining for Near was an appeal to the United States Supreme Court. Accordingly, with McCormick no doubt bearing most of the cost, arrangements were made for arguing the case in Washington before the nation's highest court.

The Minnesota decision once more stimulated a national outcry. An editorial entitled "A Dangerous Reprisal," in the *New York Times* of December 24, 1929, reads as follows: "For the passage of such a law and its sympathetic reception by the courts, the blame must be left on the doorstep of the sensational press. To such jackals of journalism, no morsel is inedible. Decent newspapers everywhere sympathize with the public resentment which takes form in laws such as that passed in Minnesota . . . [but] if the Minnesota law were commonly enacted, newspapers would be at the mercy of the courts, sometimes with personal spite to gratify or political purposes to achieve; the cure is worse than the malady." The *Literary Digest* was more succinct. In its issue of February 1, 1930, it declared "War on the Minnesota Gag Law," contending that "freedom of the press in Minnesota is reduced to about the freedom of a straight jacket."

While the case was pending before the United States Supreme Court, the Minnesota legislature met for its 1931 session. In the three years elapsing after the first action in Hennepin County District Court, Floyd Olson had been elevated from the office of county attorney to that of governor. As chief executive he once more faced the issue of the gag law. In his inaugural message he called for its repeal, declaring, "The cases in which the law was used were proper exercises of the operation of the law, but I believe that the possibilities for abuse make it an unwise law. The freedom of speech and the press should remain inviolate, and any law which constitutes an entering wedge into that inviolability is unsafe."<sup>38</sup>

Once more Representative Davis introduced a repeal measure in the House. Referred this time to the committee on printing and publishing, the bill was reported favorably, and on February 4, 1931, it passed the House by a majority of sixty-eight to fifty-eight. It was, however, killed by a determined minority in the Senate. There the committee on general legislation

reported the bill without recommendation, and accordingly the measure was placed on general orders. Three days before the end of the session, a motion was made to bring the bill to a vote by placing it on a special order of business. Although this motion received a majority vote of thirty-eight to twenty-three, it failed to draw the two-thirds necessary for suspension of the rules. Thus the second attempt to repeal the gag law died.<sup>34</sup>

The fate of the case before the Supreme Court was by no means certain. Since 1833, judicial precedent had held that the Bill of Rights did not apply to the states, but served only to limit the federal government.<sup>35</sup> According to this doctrine, the states were limited only by such rights and freedoms as were set forth in their own constitutions, to be interpreted by state courts.

The framers of the Fourteenth Amendment had intended to apply the protections of the Bill of Rights to individuals, and to guard those rights against state interference. The amendment declared that no state was to abridge the privileges and immunities of any citizen, nor deprive him of life, liberty, or property without due process of law, nor to deny to any person the equal protection of the laws. While the intent of the framers was to erect a barrier between the citizen and the state government, the courts had not interpreted the Fourteenth Amendment in this manner. Through a series of decisions from 1870 to 1920, the United States Supreme Court had used the wording of the Fourteenth Amendment to protect business from arbitrary and unreasonable state interference, but had done little to protect the liberties of the individual citizen.

In 1925, the Supreme Court had admitted, for the first time, that the word "liberty" in the Fourteenth Amendment

<sup>33</sup> Floyd B. Olson, *Inaugural Message to the Legislature of Minnesota*, 11 (St. Paul, 1931).

<sup>34</sup> Minnesota, *House Journal*, 1931, p. 74, 153, 216; *Senate Journal*, 1931, p. 50, 894, 1157.

<sup>35</sup> *Barron v. Baltimore*, 7 *Peters* 233 (1833).

might be used to guarantee to the individual the fundamental rights contained in the federal Bill of Rights and to overrule state legislation which interfered with those rights. Although in this instance the Court had upheld a New York law which seemingly abridged freedom of speech, the way was opened to apply the Fourteenth Amendment to state legislation infringing upon such freedom.<sup>36</sup> Two years later the Court interpreted the word "liberty" in the Fourteenth Amendment as protecting an individual. In this case the Court did not overrule the state law, but it did hold that the law, as applied to the appellant, deprived him of his liberty in violation of the Fourteenth Amendment.<sup>37</sup> Two weeks before handing down the *Near* decision, in the case of *Stromberg v. California*, the Court invalidated a state law as unconstitutional, holding that the statute deprived an individual of the right of freedom of speech without due process of law.<sup>38</sup>

On June 1, 1931, in a five to four decision, with Chief Justice Hughes and Justices Brandeis, Holmes, Roberts, and Stone comprising the majority, the Court invalidated the Minnesota statute and decided in favor of *Near*.<sup>39</sup> Speaking for the majority, the chief justice said, "This statute for the suppression as a public nuisance of a newspaper or periodical is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action." The opinion pointed out that such liberty is not an absolute right, and a state may punish its abuse, but here the Court must cut through the mere details of procedure and must have concern for the substance and not the form; the statute must be tested by its operation and effect.

In meeting the question of whether a

<sup>36</sup> *Citlow v. New York*, 268 *United States* 652 (1925).

<sup>37</sup> *Fiske v. Kansas*, 274 *United States* 380 (1927).

<sup>38</sup> *Stromberg v. California*, 283 *United States* 359 (1931).

<sup>39</sup> 283 *United States* 697.

statute authorizing proceedings in restraint of publication is consistent with the historic ideas of liberty of the press, the chief justice quoted at length from Blackstone and raised the issue of previous restraint. According to Hughes, a man is responsible for the utterances he makes. Whether in words or in print, he can be called for his errors and tried for libel or slander. It is not the intention of liberty of speech or press to provide immunity from such proceedings. Prior restraint, however, is effective censorship, and from colonial times on, it has been the intention of Americans to prevent such censorship from being effected. The Court could not, he concluded, countenance such previous restraint.

Hughes then turned to the problem raised by the *Saturday Press*. "The administration of government has become more complex," he noted. "The opportunities for malfeasance and corruption have multiplied, crime has grown to serious proportions and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect emphasizes the need of a vigilant and courageous press, especially in the great cities. The fact that liberty of the press can be abused by miscreant purveyors of scandal does not make less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy."

The four conservative judges, Butler, VanDevanter, Sutherland, and McReynolds, did not concur in this opinion. In a dissent written by Justice Butler, who was himself from Minnesota, they took vigorous issue with it. Butler concluded that "The decision of the Court in this case declares Minnesota and every other state powerless to restrain by legislative action the business of publishing and circulating . . . malicious and defamatory periodicals. It gives freedom of the press a meaning and scope not heretofore recognized and construes

liberty in the due process clause of the Fourteenth Amendment to put upon the states a federal restriction that is without precedent."

Butler based most of his dissent upon the facts of the particular case rather than upon the legal issue. He pointed out again that Near was doing precisely what the law was intended to prevent, and that Near was, by his own admission, tainted with blackmail. He quoted at length from the malicious articles appearing in the *Saturday Press*. He argued that the federal court should not reverse the judgment of the Minnesota Supreme Court on the mere basis that in some other case the law might be misapplied.

To sum up, Butler concluded, "The doctrine that measures, such as the one before us, are invalid because they operate as previous restraint to infringe the freedom of the press, exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have the purpose and sufficient capacity to construct and put into effect a scheme or program for oppression, blackmail, or extortion." His main argument, that the decision would render the states powerless, is an extreme statement.

Hughes pointed out that the states and private citizens have recourse to all laws governing libel, and every publisher is responsible under these laws. Hughes, in essence, said that the Minnesota statute allowed the shutting down of a publication for what it might say. That, he felt, is censorship and is not constitutional.<sup>40</sup>

SHORTLY AFTER the Supreme Court decision, Near resumed publication of the *Saturday Press*. The few extant issues printed after June, 1931, indicate that Near had lost his old editorial fire. The tone of the paper is strangely subdued. Near's attacks on public officials are less virulent, and the chief object of his wrath is the Com-

munist party. The signing of his editorials as "The Old Man" is perhaps a more subtle indication of the change.

Guilford launched a new publication, the *Pink Sheet*, late in 1931 or early in 1932. It was, according to the motto on its masthead, "Published weekly in the interest of fair play for the under dog." Within a year it was apparently out of business and its editor was back with the *Saturday Press*. His career came to an abrupt end on September 6, 1934, when he was shot to death near his Minneapolis home by unknown and unapprehended gunmen. He was driving his automobile and had slowed down to make a turn. Another vehicle drew abreast and a shotgun was fired at close range at Guilford's head. He died instantly, and his car, out of control, continued across the street and smashed into a tree. The murder vehicle moved on without anyone noticing its license number.<sup>41</sup>

McCormick, true to his friends, lashed out at Minnesota authorities and Governor Olson. Reviewing the circumstances of the case, he pointed out that, shortly before his death, Guilford had announced he would begin a series of radio talks which would reveal "the whole story of Floyd Olson's connection with the Twin Cities underworld." Commenting pointedly that Minneapolis police had made no arrests as a result of the killing, McCormick implied that Olson was encouraging and assisting gangland in the elimination of any who dared to expose it. He concluded, "We can only believe that murder was used by public authorities and the underworld to coerce the freedom of the press after unconstitutional law had failed."<sup>42</sup>

Olson, who was dying of cancer in a hospital at the time of McCormick's attack,

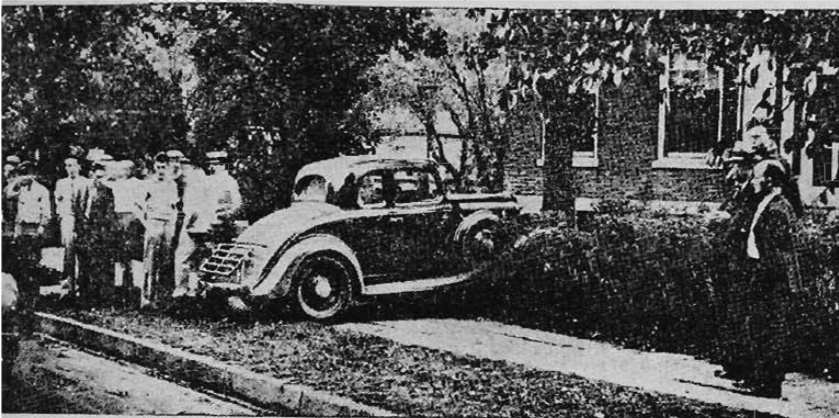
<sup>40</sup> 283 *United States* 697-737.

<sup>41</sup> *Minneapolis Tribune*, September 7, 1934. The only known example of the *Pink Sheet* is the issue of June 17, 1932, in the Minnesota Historical Society's collection.

<sup>42</sup> McCormick, *Freedom of the Press*, 99, 108.

<sup>43</sup> Mayer, *Floyd B. Olson*, 224.

## WHERE GUILFORD DIED AT GUNMEN'S HANDS



GUILFORD's death was featured on the front page of the *Minneapolis Tribune* for September 7, 1934. The likeness was taken in 1918, when he ran for mayor of Minneapolis.

retorted by jeering at him as a self-styled champion of the free press and noting that "dozens of papers have been suppressed because of economic views expressed without one word from Bertie. It is only when a scandal sheet has difficulty that Bertie comes to the rescue. That is because he is the owner of the world's leading scandal sheet."<sup>43</sup>

Near, whose name was enshrined in the historic Supreme Court decision, died peacefully on April 18, 1936.<sup>44</sup> The last

<sup>43</sup> *Minneapolis Tribune*, April 19, 1936, sec. 2, p. 3, col. 1.

<sup>44</sup> Chief Justice Hughes' attitude toward the Near case is analyzed by Merlo J. Pusey in an article in Allison Dunham and Philip B. Kurland, eds., *Mr. Justice*, 167 (Chicago, 1956). For Hughes, "there was no question that freedom from such arbitrary restraints" as the Minnesota statute had laid on newspapers "was included in the liberty protected by the due process clause of the Fourteenth Amendment," writes Mr. Pusey. "Nor was he shaken by the evidence indicating that the paper that had been suppressed was a miserable little scandal sheet. He spoke for a great principle, and that principle may now be regarded as firmly established in American law."

THE PHOTOGRAPH of Olson on page 167, taken while he was county attorney, is from the collection of the Minnesota Historical Society.

## FORMER EDITOR IS SHOT DOWN ON DRIVE HOME

Blast From Shotgun in Car Alongside Kills Him Near Home on Ridgewood Ave.

Fatal Charge Fired When He Slows Up to Make Turn Into Pillsbury Ave.

Gunmen Thursday night shot and killed Howard Guilford, former editor of the *Saturday Press* and the *Pink Sheet*.

The shooting took place at 8:30 p. m. at the intersection of Pillsbury and Ridgewood avenues, as Guilford was driving to his home, only a few blocks away, in an apartment at 601 Ridgewood avenue.

Apparently he had been driving out La Salle avenue, for he had swung right into Groveland for a short log, and then had turned left on Pillsbury, preparatory to making the turn at Ridgewood.

**Car's Radio Going.**  
On the seat beside him was a bag of cakes and cookies that he was taking home for dinner. Back of the seat was a collection of fishing tackle. On the dashboard his radio was going, broadcasting the last few innings of the Minneapolis-Milwaukee baseball game.

As Guilford approached the intersection he slowed his car to a crawl, preparing to make the right turn. As he did so another car pulled abreast.



Howard Guilford.

issue of the *Saturday Press* located by the writer was published after his death under the editorship of F. E. Wion on June 27, 1936. The exact dates of the demise of the *Twin City Reporter* and the *Saturday Press* are unknown, for they did not again appear in the regular news.

Near and Guilford inadvertently stimulated an important interpretation of American constitutional law. As the *Cleveland Plain Dealer* pointed out, few were concerned with the suppression of an obscure weekly in Minnesota, but many were concerned with the graver issues involved.<sup>45</sup> With the Stromberg and Near cases, the Supreme Court embarked upon a Constitutional interpretation that broadens the application of the Bill of Rights and guarantees the individual's liberties against interference at any level of government.



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