A Free and Fair Press

and Other Comments on the Media

Lee Loevinger

ONE OF THE most stimulating sessions at the Minnesota Historical Society's annual meeting on October 20, 1973, was "The Media and the Candidate," during which panelist Lee Loevinger made some forceful and timely statements that serve as "The Editor's Page" for this issue of Minnesota History. *Geri Joseph, contributing editor for the* Minneapolis Tribune, *moderated the panel, which also included Albert A. Eisele, Washington correspondent for the* St. Paul Pioneer Press *and* Dispatch; *P. Kenneth Peterson, former mayor of Minneapolis, former Minnesota Public Service commissioner, and now a member of the Minnesota Corrections Authority; and John Evans, formerly of KSTP television and now president of the Urban Coalition of Minneapolis.*

Mr. Loevinger is a native of St. Paul who now conducts private law practice in Washington, D.C. His distinguished career has included five years as a member of the Federal Communications Commission, some twenty-seven months as assistant attorney general in charge of the antitrust division during the John F. Kennedy administration, and almost a year as associate justice of the Minnesota Supreme Court. Mr. Loevinger also has written widely on law, economics, antitrust matters, communications, and science. His comments on a free press and a fair press and on "advocacy journalism" that follow were responses to questions from the audience; the other remarks are from a revised version of his prepared talk on the panel.

ON A FREE AND FAIR PRESS

LET ME give you a quasi-legal answer to what I think is a very important, if not *the* most important, question that has been asked at this session, and that is, "How do you ensure fairness in media reports?" The answer, blunt as it may be, is that you *don't*.

What does free speech mean? Freedom of speech does not mean that people can say things that you like. It does not mean that they can say things that you agree with. It does not mean that they can say things that you think are fair. Freedom of speech means people can say whatever they want to say whether you think it is fair or not. You cannot have a *free* press and a guaranteed *fair* press.

Now, our theory is that in the long run, if we have enough freedom and enough diversity, we will get a fair measure of fairness, and it usually works. But if you have got to make a choice, you have got to come down on the side of freedom. As soon as you say, "How are we going to ensure fairness?" your very question implies that there is going to be an authoritative definition of fairness. I do not care whether it is a press council, or the government, or the FCC, or somebody else, somewhere there has got to be a final authority. As my old colleague, Justice Frank T. Gallagher of the Minnesota Supreme Court, used to say, "The court is supreme — not because it is always right but because it has the last word."

If you say "fairness," somebody has got to have the last word. And if you say somebody other than the press is going to have the last word, there is no alternative, eventually, but government, and there is no longer a free press, and you can forget the First Amendment. Fairness? Yes, within a degree, I think we have a right to demand it. *You* have got to demand it of the press. The government cannot demand it, or you do not have a free press, and you have got to make up your mind whether you are going to opt for freedom or fairness.

AT THIS JUNCTURE, moderator Geri Joseph mentioned

a limitation to free speech, the "clear and present danger" doctrine of Justice Oliver Wendell Holmes, who used the example that one cannot yell "fire!" in a crowded theater when there is no fire. Then Mr. Loevinger continued with the following:

There *are* some limits to free speech. But unless the limits are very strictly defined, very clearly defined, and the government is very rigidly confined within those limits, you do not have freedom. When you start talking about broad, general standards like fairness you might as well abandon the idea of freedom, because I can assure you that what is fair to one side is not fair to the other. Both McGovern and Nixon claimed that the press was against them. And the same story is frequently attacked by both sides as leaning too far in the other direction. Every newspaperman knows this. You give any authoritative body the right to define fairness and you have written the First Amendment out of the Constitution.

ON ADVOCACY JOURNALISM

I SOMETIMES shock people by telling them lawsuits are *never* decided on the facts. They are decided on the *evidence*, which is quite different. The evidence is what people recollect as the facts, and there is always a certain fallibility in human recollection and telling of the facts. So it is with history; so it is with current news. There is simply no escape.

Any newspaperman will tell you that the amount of material that pours in to the city desk or the telegraph desk in one night is far more than can be published, and a selection always has to be made. Now, the selection depends upon the editorial judgment of the reporters and the editors. The best way that we can ensure a fair and accurate report is to demand it and to insist that we have reporters and editors who say that accuracy and fairness are their model. This statement may seem a bit banal, but let me assure you that it is not. There is now in journalism a very great debate going on between those who say that it is the job of the press to report the facts as objectively as possible and those who say, since complete objectivity is never possible, let us abandon all pretense and write what we think people ought to know, i.e., viz., and to wit, *advocacy journalism.*

This is the mod wave, the wave of the young, the wave of those who currently hold themselves out as the future. Now I think it is nonsense; I think it is vicious; I think it is subversive of the press; and I think that if you can insist on rejecting the concept of advocacy journalism and tell journalists, "We know that you cannot be completely accurate and completely fair, but, damn it all, you can try as hard as you can" — just as a judge can never be sure that he is always right or that his decisions are always just, but if he says, "I do not care about whether I am right or just . . . I am just going to decide for what seems to me to be the side that I like because it ought to win" — this would be roughly equivalent to what is being championed in the field of journalism today under the rubric of advocacy journalism. And I say that we can insist that the notion of accuracy and fairness should be a guiding ideal for journalists, and this is the best we can do for journalists or anybody else.

ON HISTORY AND CURRENT EVENTS

IT IS SIGNIFICANT that this public affairs conference is being held under the auspices of the Minnesota Historical Society. In recent years historical societies, including Minnesota's, have directed their interest more and more toward contemporary documents. This challenges our traditional impressions that history and current events are separate subjects and requires us to ask what each is.

Current events cannot be simply the routine of ordinary living, not even that of presidents and kings. Current events, in any significant sense, must mean events that involve large numbers of people; that is, matters which affect the mass population directly or indirectly. If this is a correct view, then we can say that history is simply an extended version of current events.

No doubt you have all heard the story of the man who is astonished to learn that all of his life he had been speaking prose without knowing it. I hope it is no surprise to anyone today to learn that all of us are participants in history. History is a continuously ongoing process that is simply an extension of contemporary events. This view helps illuminate the relationship of the mass media to politics. The media are to politics what historians are to history.

At one time the view was widely held that historians merely discovered and recorded history in an automatic and neutral process. A more recent and realistic analysis is that human events are ambiguous and that all reports of human events involve some interpretation. Thus we have come to the view that historians both report and create history.

Similarly, we may observe that the media both report and influence current events, particularly politics. However, this realistic recognition of the fact that those who report also assert influence has recently spawned an exaggerated view of the power of the media. There are those who now attribute not merely influence but controlling power to the mass media, especially to television. We are told that the media are responsible for many, if not most, of our ills and sins, and that the media could, if they would, cure most social problems.

It is my opinion and thesis that the power of the media is not nearly as great as current demonology or popular opinion says. Mankind has always had a ten-

dency to attribute its own folly and perversity to external forces. Throughout most of human history and prehistory events were attributed to malevolent or benign spirits.

WHAT EFFECT DO THE MEDIA HAVE ON CURRENT EVENTS?

THE QUESTION is clearly difficult to answer. We may ask a similar question as to what effect do other social institutions have, such as schools, churches, families, and homes. As partial answers I offer the following principles. First, there are no definitive, unambiguous, demonstrable answers to such questions. Second, the media are not monolithic and do not have entirely uniform effect. The impact of the media varies with the medium, the event, the population, and other circumstances. For example, the media clearly have a differing role in relation to elections and moon shots. Similarly, the impact of the media is certainly different in presidential elections and in elections for county boards — or such quaint elective offices as clerk of court.

Third, there are, nevertheless, some common aspects or elements among the members of a social category such as the mass media. The most obvious characteristic of the mass media is that they are media — that is, that they mediate between the mass and the individual. It is said that the world is growing smaller. This may be true from the viewpoint of transportation, but it is not true from the viewpoint of the individual. As world population has increased, the mass of society has expanded, and the range of individual observation has gotten relatively smaller. In an earlier, smaller society an individual could observe much, perhaps most, of the current history in which he was enveloped, of the events that affected him. In a mass society no one can observe much of what affects him. This aspect of contemporary society affects everyone. The president can observe and control only a small part of the government. An agency head can know and influence only a part of the action of his own agency. The citizen can know only a tiny bit of what his government does and can influence only a very limited part of government.

In this situation the media operate as the data-gathering bureaucracy for the public. The media have all the virtues and vices of all bureaucracies. They operate largely automatically, moderately efficiently, and without undue dependence on any individual. They exaggerate their own importance and influence. They proclaim that their function is the purpose of their existence. They believe that their institutional survival is the most important social objective.

Let me reduce these generalities to specifics. Studies have been made to determine the influence on elections. These have consisted of comparisons of expenditures by candidates for major offices, such as governor, senator, and congressman, on broadcast advertising and correlation of these with election success. Such studies show a random relationship between expenditures and election. The candidate who spent the most lost as often as he won in an across-the-board study. In 1960 the press favored Nixon, and he lost. In 1972 the press favored Nixon, and he won. Whatever else may be the case, the press does not control our elections.

ON TELEVISION

THERE IS a contemporary fascination with television, with an attribution to it of all kinds of social sins and potential blessings. Television seems to have taken the place of religion in contemporary public dialogue. People no longer argue emotionally about religion in public, but the media, the classrooms, and the streets are filled with emotional disputes about television. The reasons for this are complex, but I can suggest a few. Broadcasting, particularly television, is the first truly mass medium. Newspapers have never been a mass medium in the same sense because the mass is, at best, semiliterate in the sense of not really enjoying the process of reading. Television conveys the message without any effort on the part of the listener. Television passes time pleasantly and even entertains occasionally. The alternative to television, it is not generally recognized, is simply idleness — temporal vacuity. Because of these facts, the capacity of the media, and of television in particular, to inform the public is limited. The capacity of television to inform is limited partly by the nature of the medium, but mainly by the nature and disposition of the audience.