Censorship and Journalists' Privilege

The Case of Near *versus* Minnesota -- A Half Century Later

Fred W. Friendly

ON THE following pages is an edited version of a timely talk that Fred W. Friendly gave at the Minnesota Historical Society's recent annual meeting and history conference in Minneapolis. The speaker discussed a famous Minnesota court case and related it not only to other cases but to free-press and fair-trial issues of today.

Friendly, former president of CBS news, is now advisor on communications to the Ford Foundation and Edward R. Murrow professor of broadcast journalism at the Columbia University graduate school of journalism in New York. He substituted on short notice for Fawn M. Brodie, who had to withdraw suddenly as noon luncheon speaker at the MHS meeting because of the serious illness of her husband.

In 1974, in connection with his work at the Ford Foundation, Friendly initiated the Conferences on the Media and the Law. Cosponsored by major news organizations, this innovative series of conferences brings together journalists, judges, lawyers, and law enforcement officials in a special format designed to produce greater understanding of both the journalistic and judicial decision-making processes by underscoring conflicting constitutional concerns. At Columbia, Friendly teaches a course on journalism and the First Amendment. — Ed.

ALTHOUGH journalists tend to give all credit to the Founding Fathers for freedom of the press, it was the creative work of this century's judiciary — Charles Evans Hughes, Oliver Wendell Holmes, Louis D. Brandeis, among others — that nationalized the First Amendment. For it was only forty-eight years ago, in its decision in Near *v.* Minnesota, that the United States Supreme Court reinforced the prohibition against prior restraints and decided that the due process clause of the Fourteenth Amendment protects newspapers from the heavy hand of state action.[1]

In 1925 the Minnesota legislature passed a public nuisance bill that permitted the state to close down "an obscene, lewd and lascivious newspaper, magazine, or other periodical, or a malicious, scandalous, and defamatory newspaper, magazine, or other periodical."[2]

Two years later a small Minneapolis scandal sheet, the *Saturday Press*, was silenced by a restraining order sought by County Attorney Floyd B. Olson of Hennepin County. The publishers, Jay M. Near and Howard A. Guilford, self-admitted scandalmongers and occasional blackmailers, had charged that Jewish gangsters were controlling gambling and bootlegging in Minneapolis: "Practically every vendor of vile hooch every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW. It is Jew, Jew, Jew, as long as one cares to comb over the records." Prosecutor Olson (later to be governor) was among the politicians accused of being a pawn of the Jewish conspiracy.[3]

The county judge ruled: "Said defendants Howard A. Guilford and J M. Near and divers and sundry other persons whose names are to the plaintiff unknown, be in the meantime restrained, and they are hereby forbidden to produce, edit, publish, circulate, have in their possession, sell or give away any publication known by any other name whatsoever containing malicious, scandalous, and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise."[4]

His order was upheld five months later when Chief Justice Samuel B. Wilson declared for the majority of the Minnesota Supreme Court: "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." By way of comparison Justice Wilson noted that the constitutional guarantee of free-

[1] The citation for this landmark case is 283 *United States* 697 (1931). For an earlier article on the case, see John E. Hartmann, "The Minnesota Gag Law and the Fourteenth Amendment," in *Minnesota History*, 37:161–173 (December, 1960).

[2] Minnesota, *Laws*, 1925, p. 358.

[3] *Saturday Press*, November 19, 1927, as quoted with 283 *United States* 697.

[4] Quoted in appellant's brief filed with 283 *United States* 697, p. 15–16.

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dom of assembly does not protect illegal assemblies, such as riots, nor does it deny the state power to prevent them.[5]

The case might have ended there had not Colonel Robert R. McCormick, publisher of the *Chicago Tribune*, committed $25,000 and his own law firm to appeal the Minnesota high court's judgment.[6]

When Near v. Minnesota was argued in the United States Supreme Court, Justice Brandeis, himself a Jew, asked the most probing questions. "It is difficult to see," Brandeis observed, "how one is to have a free press without the privilege this Minnesota Act seeks to limit. These editors seek to expose coordination between criminals and public officials profiting from gambling. You are dealing here with scandal that ought to be a matter of prime interest to every citizen."

"Assuming it to be true," argued James E. Markham, St. Paul attorney, for the state of Minnesota.

"No," Justice Brandeis snapped back. "A newspaper cannot always wait until it gets the judgment of a court. These men set out on a campaign to rid the city of certain evils."

"So they *say*," Markham interrupted.

"Yes, of course, so they say," answered Brandeis. "They acted with courage. They invited suit for criminal libel if what they said was not true." The justice concluded: "Now if that campaign was not privileged, if that is not one of the things for which the press exists, then for what does it exist?"[7]

Those present when the Near case was argued sensed it would be a close call. Justice Pierce Butler, himself from Minnesota, read lengthy anti-Semitic quotations from the *Saturday Press* and argued that the gag order was not a prior restraint as that concept had evolved in the English legal system. He saw nothing in the Constitution to prevent the banning of lewd or malicious defamation.

Justice Butler took on his brother Brandeis. "The doctrine that measures such as the one before us [the Minnesota public nuisance bill] are invalid because they operate as previous restraints to infringe freedom of the press," he said, "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 purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion."[8]

Chief Justice Charles Evans Hughes, the swing vote in the 1931 decision that overturned the Minnesota law, wrote the majority opinion: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications is significant of the deep-seated conviction that such restraints would violate constitutional right." To require a publisher to prove in a court of law truth without malice before publication "is the essence of censorship."[9]

The four conservative justices, Pierce Butler, Willis Van Devanter, George Sutherland, and James C. McReynolds, took vigorous issue with the majority. In his dissent, Butler wrote: "The decision of the court in this case declares Minnesota and every other state powerless to restrain by injunction the business of publishing and circulating malicious, scandalous and defamatory periodicals. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes 'liberty' in the due process clause of the 14th Amendment to put upon the states a Federal restriction that is without precedent."[10]

The majority opinion was careful to state that the First Amendment is not absolute. Chief Justice Hughes wrote:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitement to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force.[11]

IN THE forty-eight years since the Near case, the court has held the line against prior restraints of news and opinion. In the 1971 Pentagon Papers case, a six-to-three majority of the Supreme Court refused to enjoin the *New York Times* and other newspapers from publishing classified material not demonstrably essential to the nation's security.[12] In other landmark cases since then, Near v. Minnesota has been the central rivet in the First Amendment.

A paragraph of Hughes's majority opinion in the Near case is perhaps more relevant now than on that hot June

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[5] Olson v. Guilford, 174 *Minnesota Supreme Court Reports* 457–463 (1928).

[6] Weymouth Kirkland, Chicago attorney, to Robert R. McCormick, June 20, 1930, letter in *Chicago Tribune* archives.

[7] The Brandeis-Markham exchange was published by the *Chicago Tribune*, January 31, 1931, in an article headlined "Brandeis Hints Minnesota's Gag Law Is Invalid."

[8] 283 *United States* 737–738.

[9] 283 *United States* 718–720.

[10] 283 *United States* 723.

[11] 283 *United States* 716.

[12] *New York Times* Company v. United States, 403 *United States* 713.

day in 1931 when he read it aloud in the old Supreme Court chamber in the United States Capitol:

> The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by criminal alliances and official neglect, emphasize the primary need of a vigilant and courageous press, especially in the great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make the less necessary the immunity of the press from previous restraint in dealing with official misconduct.[13]

Now in 1978 we are engaged in another great First Amendment debate. Does the freedom of the press identified by Hughes in 1931 include a constitutionally protected right to gather news? Or does Near *v.* Minnesota and its progeny simply mean that government (including judges) can impose no prior restraints?

This constitutional debate that has been heating up for the last decade climaxed last fall in a sordid New Jersey murder trial. The press-court argument can be divided into two strands. The first, the right to publish virtually anything unless damage to the nation's security can be proved, was established by the Near decision and reinforced time and time again, most notably by the Pentagon Papers case. Every time the federal or state government has tried to impose prior censorship the courts have turned them down. In Nebraska Press Association *v.* Stuart, 427 *United States* 539 (1976), which involved the fair trial-free press issue, the Supreme Court ruled unanimously that newspapers and broadcasters could not be restrained from reporting what had occurred in an open pretrial hearing. In Landmark Communications, Inc. *v.* Virginia, 431 *United States* 964 (1978), the Supreme Court voided a Virginia statute that made it a crime to report facts concerning a judge under investigation, thereby declaring again that it is almost — not quite — as difficult to punish a newspaper for printing something as it is to prevent it from doing so.

So the legacy of Near *v.* Minnesota is quite clear on the subject of prior restraints — no prior restraints means *NO* prior restraints. And except in a very few areas, government will have a very difficult time when it attempts to make publication a crime.

What is not clear at all is whether the press clause in the First Amendment bestows on journalists alone any special privileges in the service of their mission as identified by Chief Justice Hughes: to root out "malfeasance and corruption."

The first major test of this privilege began in February, 1970, when Earl Caldwell, a resourceful Black reporter for the *New York Times* who had managed to gain access to the inner councils of the Black Panther party in the San Francisco Bay area in California. Caldwell was subpoenaed by a federal grand jury "to testify" and "to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activites of that organization."

Caldwell resisted the subpoena on the grounds that the government had not shown that he knew of any crimes and that the FBI, the United States attorney, and the Nixon administration were merely using their power in "a fishing expedition" to find out what he might know and to drive a wedge between a reporter and radical leaders of the Black community. Caldwell won most of his case in a federal district court and then in the Ninth Circuit Court of Appeals, but he was eventually doomed when the Supreme Court joined his case with two others in which reporters [Paul M. Branzburg and Paul Pappas] who may have witnessed a crime claimed the right to refuse to testify before a grand jury.[14]

The vote in the Supreme Court was five to four. Justice Byron White wrote for the majority: "A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. *We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.*"[15]

Disagreeing bitterly with the majority, Justice Potter Stewart, writing for Justices William Brennan, Jr., and Thurgood Marshall, said: "The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution."[16]

Justice William O. Douglas' view was his normal absolutist one — that the First Amendment prohibits all interference with the press, including even laws against defamation. Justice Lewis Powell — concurring with the majority — was enigmatic. Some constitutional authorities considered his view so close to the minority's that it left the door open for a second look at some future time at the newsman privilege issue.[17]

There have been other so-called newsmen privilege

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[13] 283 *United States* 719–720.

[14] The Caldwell case is Branzburg *v.* Hayes, 408 *United States* 665 (1972).

[15] 408 *United States* 689–690. Italics are the author's.

[16] 408 *United States* 725.

[17] 408 *United States* 711–725, 709–710.

cases — William Farr and the Fresno Four in California, Peter Bridge and Selwyn Rabb in New Jersey, Jay Shelledy in Idaho, among others — and all that has stimulated a healthy debate within the ranks of American journalism as to whether or not there should be legislation creating shield laws. Justice White himself joined this debate with this passage from his opinion in the 1972 Branzburg/Caldwell case: "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable."

And White specifically suggested: "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and the press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."[18]

ALTHOUGH the Congress of the United States has never passed a shield law, twenty-six states have. One of the strongest of these shield laws is that of New Jersey, where the issue was lately joined in a bitter and convoluted confrontation that makes the Caldwell case look simple. Here are the basic facts: Three years ago, Myron A. Farber, an investigative reporter for the *New York Times*, wrote a series of extraordinary articles indicating that a physician in Oradell, New Jersey, injected lethal doses of curare into several patients at Riverdell Hospital. Eventually, "Dr. X," one Mario E. Jascalevich, was indicted on three counts of murder. His trial began some twelve years after the alleged murders.[19]

It became the trial of Myron Farber as much as that of Dr. Jascalevich. The Farber case opened when the defense lawyer, in a tactical move to secure his client a fair trail or possibly a mistrial, insisted that reporter Farber appear as a witness and furnish his notes and sources. Farber and the *Times* refused on the grounds that journalists would cease to be effective investigators if they could not promise to protect the identity of their sources. Legally, they based their refusal on the absolute New Jersey reporter's shield law that had been enacted in response to Justice White's majority opinion in the Branzburg/Caldwell/Pappas case. The trial judge, then the chief of the Superior Court, and eventually the New Jersey Supreme Court ruled that the shield law was unconstitutional if enforced in this case, because it interferes with a defendant's Sixth Amendment right, also guaranteed by New Jersey's constitution, "to have compulsory process for obtaining witnesses in his favor."

Farber and the *Times* refused to yield their notes and sources and were held in civil and criminal contempt. The *Times* was fined $100,000, plus $5,000 for each day it defied the subpoena. Farber was fined a total of $2,000 and sentenced to jail for as long as he refused to give up the notes, plus six months. Eventually, the *Times* paid $285,000, and Farber served forty days in jail.

Farber and his many supporters claim that the court has erred in not granting him a fair hearing on his good faith assumption that he was protected by the New Jersey shield law. The case was appealed to the United States Supreme Court on procedural due process grounds — and on the additional ground that the High Court should establish a reporter's First Amendment right to protect confidential notes and sources; that is, to establish a constitutional right to gather as well as to print news. But the court chose not to take the case.

Few observers doubt Farber's integrity, and I trust him when he swears his files contain nothing that would have substantively affected the outcome of the murder trial. But there is an argument that his prime role as the investigative reporter actually triggered the indictment and subsequent trial. Does that amount to a waiver of any reporter's privilege? Or is there a difference between revealing sources to a closed grand jury investigation and doing so in an open courtroom where a person is charged with a criminal act?

Some journalists are critical of Farber's contract to write a book on the Jascalevich case for $75,000, feeling that this somehow gives the author a vested interest in a murder conviction. Farber denies this — and is not the author of a book entitled to the same protections as those journalists who write for newspapers?

If the Supreme Court had agreed to consider the issues raised by Farber, the *Times*, and the New Jersey court, doubtless it would have delivered a landmark judgment, as Near v. Minnesota was in its time. There might have been a rematch of the Justice White versus Justice Stewart debate of 1972.

Perhaps the court will use instead one of several similar "reporter confidentiality" cases now in lower courts to make a future ruling on the news gathering issue and the competing claims of the First and Sixth amendments. In the meantime, Farber was released from the Hackensack, New Jersey, jail after a jury acquitted Dr. Jascalevich.

There is one very disturbing development in the Farber case which must concern those who understand that freedom in the newsroom and order and fairness in the courtroom are indivisible. Some in the media have permitted themselves to wave a First Amendment flag as if there was nothing else in the Constitution's Bill of Rights. Recently Allan H. Neuharth, president and chief executive of the Gannett newspaper chain, warned

[18] 408 *United States* 706.

[19] Farber's series of articles began in the *New York Times* on January 8, 1976.

against "an imperial judiciary" and intoned, "Myron Farber is a prisoner of the politics of our time."[20]

Some judges, on the other hand, are permitting their rhetoric about Farber, the *Times*, and the press in general to deteriorate into sweeping denunciations, rooted in the outmoded misconception that investigative reporting is designed to sell newspapers. One federal judge intemperately denounced a *New York Times* attorney at a dinner table, while another, in open court, accused Myron Farber of "standing on an altar of greed."[21] I would warn such judges that questioning the legal positions of journalists is one thing but that attacking motives not only lacks prudence, it is dangerous.

A similar warning against "prickly insistence on principle" comes from federal Judge Jack B. Weinstein, who cautioned: "There are, of course, instances where a conflict will arise that appears to be irresolvable by compromise and good sense. Generally, since the courts have more power, they should attempt wherever possible to use forbearance and to attempt to so conduct the litigation as to avoid embarrassment to the press as well as prejudice to defendants. The prosecution usually needs little help. As a general rule, too, I believe that most defense and prosecuting counsel will be sensible in preventing showdowns at noon on the courthouse steps."[22]

I would warn my colleagues in the media that attacks on the court make little sense for a profession which, from Near, to Times *v.* Sullivan, to the Pentagon Papers, has won most of the protections it has sought. The press has been telling its critics — from Faubus to George Wallace to Nixon and Agnew — that, like it or not, Supreme Court judgments are the law of the land. There have been a few recent disturbing losses, such as Zurcher *v.* Stanford Daily. But this is no time to start yelling, "Kill the umpire."[23]

I would close my remarks by borrowing from an eminent and high-ranking member of the federal judiciary. His words were ad-libbed in affectionate frustration with some journalists at a media/law seminar sponsored in 1975 by the *Washington Post* and the Ford Foundation. They are so much in the spirit of Near *v.* Minnesota and my message to you here today that I should like to conclude with these words from my unidentified judge:

> Where, ladies and gentlemen, do you think these great constitutional rights that you were so vehemently asserting, and in which you were so conspicuously wallowing yesterday, where do you think they came from? The stork didn't bring them. These came from the judges of this country, from these villains here sitting at the table. That's where they came from. They came because at some time or place, when some other agency of government was trying to push the press around or indeed may be trying to do you in, it was the courts of this country that protected you. And that's where all these constitutional rights came from. . It's not that it was done for you, or that it was done for ourselves. It happened because it's our understanding that that's what the Constitution provides and protects. But, let me point out that the Constitution of the United States is not a self-executing document. If you look at the literal language in the First Amendment it says, "Congress shall pass no law abridging the freedom of the press." That's all it says on this subject, absolutely all. It doesn't say a word about what a state can or can't do. It doesn't say a word about a reporter's privilege before a grand jury. The very fact that these protections are available is attributable to the creative work of the judiciary over the last 190 years.
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> If you say it's self-evident, that this was always clear, let me tell you that it wasn't always so clear. If you went back to the original understanding of our ancestors, back in the early years of the nineteenth century, you would find that their understanding of this clause and the Constitution in their judgment allowed them to enact something called the Alien and Sedition law. And if those laws were still on the books Richard Nixon would still be president of the United States, Spiro Agnew would still be vice-president of the United States, and all of you people would probably be in prison.

There was a respectful and pregnant pause, and then a reporter whose name is a household work broke the silence: "Yes, your honor, but what have you done for us lately?"[24]

I think the courts and the media should begin to comprehend that these needless confrontations that often end in public brawls serve the goals of neither fair trial nor free press. If this tortuous testing of the limits of partisan advantages is pushed to its illogical extreme, we shall have the nervous breakdown of the First Amendment.

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[20] Neuharth spoke at a New Jersey Press Association meeting at Great Gorge, New Jersey, October 13, 1978.

[21] Transcript of hearing, Frederick Lacey J., August 11, 1978, United States District Court for the District of New Jersey.

[22] Judge Weinstein to Stephen M. Nagler, executive director, American Civil Liberties Union of New Jersey, October 17, 1978.

[23] Zurcher *v.* Stanford Daily is 436 *United States* 547 (1978).

[24] Howard Simons and Joseph A. Califano, Jr., eds., *The Media and the Law*, 185 (New York, Praeger Special Studies, 1976).