FREEDOM of the PRESS

Ten Minnesota Cases

Marshall H. Tanick

EDITOR'S PAGE

MINNESOTA is the birthplace of major rulings interpreting the United States Constitution. Many of these legal decisions involve the "preferred freedoms" of speech and press under the First Amendment. The cases in Minnesota cover diverse subjects, ranging from injunctions to ink and from libel to lewdness. Commemorating the bicentennial of the Constitution, this article reviews ten leading legal cases that have helped shape freedom of the press.

The "Minnesota Rag"

The seminal Minnesota free-press case is the 1931 decision of the U.S. Supreme Court in *Near v. Minnesota*, aptly hailed by Fred W. Friendly in *Minnesota Rag* (1981) as one of the most important legal decisions "in the continuing struggle between the powers of government and the powers of the press to publish the news."

The *Near* case concerned a public-nuisance law enacted in 1925 by the Minnesota legislature, which authorized county attorneys to seek court orders to close down any publication deemed to be "malicious, scandalous, or defamatory." It was aimed at a handful of so-called scandal sheets or "rags," developed primarily in the Twin Cities and Duluth in the Roaring Twenties. The *Saturday Press*, a feisty, virulent publication in Minneapolis, had aroused the wrath of Hennepin County Attorney Floyd B. Olson, who secured an order from a Hennepin County judge enjoining the rabble-rousing publication as a "public nuisance," and the Minnesota Supreme Court upheld the ruling. The case was then appealed to the U.S. Supreme Court.

The Supreme Court approached the *Near* case with extreme care, recognizing that it raised "questions of grave importance transcending the local interests involved in the particular action." The decision, by a bare 5-4 margin, struck down the Minnesota law despite a vigorous dissent led by Justice Pierce Butler, the first Minnesotan to sit on the high court. In so doing, the court firmly embedded the doctrine against prior restraint of the press; for the first time, it directly stated

Marshall Tanick, a partner in a Minneapolis law firm, is a member of the Minnesota News Council and the Constitutional Bicentennial Committees of the Hennepin County Bar Association and the Minnesota State Bar Association. He also teaches a course in media law at Hamline University School of Law.

that the First Amendment guarantee of freedom of press against congressional infringement is protected through the due-process clause of the Fourteenth Amendment "from invasion by state action."

The "Power To Destroy"

A recent freedom-of-the-press case from Minnesota reflects another fundamental legal principle: "The power to tax involves the power to destroy." That recognition, uttered 150 years ago by Supreme Court Chief Justice John Marshall, was at the heart of the court's 1983 ruling in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*. The case concerned a special "use tax" on paper and ink that was imposed by the legislature upon the state's dozen largest newspapers in lieu of a sales tax. The *Minneapolis Star & Tribune*, the state's largest newspaper, bore the brunt, paying about two-thirds of the total revenue raised by the law.

The Minnesota Supreme Court upheld the tax in 1981. But the U.S. Supreme Court, in a decision by Justice Sandra Day O'Connor, ruled that the tax violated freedom of the press. The analysis turned on the intention of the framers of the Constitution to restrict the "powerful weapon" of taxation against newspapers. Use of a tax "threat" against the press, the court declared, "can operate effectively as a censor" by inhibiting critical reporting. The tax also was constitutionally invalid because it appeared to be "a penalty for a few of the largest newspapers." Lawyers and jurists continue to cite this case for the principle that legislation that "singles out the press for special treatment" is constitutionally suspect.

A "Fair" Decision

One of Minnesota's favorite locales, the state fairgrounds, generated a memorable First Amendment clash in 1981 in *Heffron v. International Society for Krishna Consciousness, Inc.* In 1977 the Hare Krishna organization challenged a regulation promulgated by the Minnesota Agricultural Society (the public entity that runs the fair) restricting all sales and distributions of merchandise, "including printed or written material," to fixed locations assigned and regulated by the fair's operators. The Krishnas claimed that the regulation infringed their First Amendment freedoms of religion, speech, and press by abridging the distribution and sale of literature as well as curbing their solicitation of cash donations.

The Minnesota Supreme Court ruled the regulation invalid, but the U.S. Supreme Court disagreed. Recognizing "important constitutional issues," it upheld the regulation by a 5-4 margin, viewing it as a reasonable, nondiscriminatory "time, place, and manner" restriction in furtherance of "the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fair grounds."

Interestingly, in all three of these landmark rulings, the U.S. Supreme Court overruled the decision of the Minnesota Supreme Court, twice overturning rulings upholding the state statutes and once upholding the validity of a regulation deemed unconstitutional by Minnesota's high court.

Not all of the important legal decisions involving First Amendment issues from Minnesota emanate from the U.S. Supreme Court. The state court system as well as the lower federal trial and appellate courts also have adjudicated memorable cases in Minnesota.

The Access Cases: A "Balancing Test"

One of the most significant and controversial state court rulings, *Gannett Broadcasting, Inc. v. Schumacher*, known generally as the Galaxy case, was decided in 1986 by the Minnesota Supreme Court. The case raised the issue of whether court records concerning insurance-approved settlements received by relatives of persons killed in the 1985 Galaxy airline crash could be sealed and restricted from scrutiny by the press and others.

The Minnesota Supreme Court rejected media challenges and unanimously upheld the confidentiality restrictions. The decision, written by Chief Justice Douglas Amdahl, rejected any "First Amendment right of access" to the sealed materials and, instead, applied a "balancing test" to determine the competing rights of the litigants, media, and surviving kin. The "privacy interests" of heirs of the decedents and other factors outweighed the interests of the press to review and report the settlement terms.

The court expressly limited its ruling in the Galaxy

case to the narrow circumstance of court-approved settlements of civil claims that are governed by specific statutes. In criminal cases, access to official records and proceedings is much less circumscribed, as reflected in a 1977 decision of the Minnesota Supreme Court in *Northwest Publications, Inc. v. Anderson*. This case involved "gag orders" issued by two trial courts that temporarily sealed files in a couple of highly celebrated murder cases, the Shirleen Howard murder in Winona and the Elisabeth Congdon and Velma Pietila murders in Duluth, in order to minimize prejudicial publicity that could taint the juries. The state supreme court, however, equated this action with prior restraint and reversed the orders, noting that "restrictive orders of this nature are in general improper" under the First Amendment.

Subsequent cases in Minnesota have borne out the enormously high standard of proof required to suppress public information about pending criminal cases and have encouraged use of less restrictive alternatives such as change of venue, expanding pretrial questioning of prospective jurors, and sequestration of jurors.

A Libel Trilogy

Two decades ago the U.S. Supreme Court wrought a major change by ruling in *New York Times Co. v. Sullivan* that libel law is subject to constitutional protections. The doctrine that evolved from the *Times* case established that elected officials and "public figures" could not prevail in a defamation case unless they could clearly and convincingly prove that the derogatory statements were made or published with "actual malice," meaning with knowledge of falsity or reckless disregard of the truth. The earliest state libel case raising these constitutional considerations was a 1967 decision of the Minnesota Supreme Court entitled *Rose v. Koch*.

The case involved Arnold Rose, a well-known author, University of Minnesota professor, and ex-legislator, who had been called a Communist collaborator or sympathizer in a right-wing pamphlet. Rose brought suit for libel and prevailed in a trial in Hennepin County. The case reached the state supreme court three years after the historic *Times* decision.

Recognizing that the *Times* ruling "established a new law of libel of constitutional dimension," the court reversed the verdict for Rose on grounds that the trial judge had erroneously limited the *Times* privilege for criticism of public officials to the period when Rose was a legislator or legislative candidate. Instead, the "actual malice" rule should be applied to Rose at all times that he was a "public figure." The supreme court also ruled evidence should not be allowed on extraneous issues such as the publisher's personal animosity toward Rose, the nature of the language used in the article, and the extent of publication.

Another libel case, *Johnson v. Dirkswager*, in 1982, involved a confrontation between a public employee and the state regarding the dissemination of the reasons for firing the employee. The case began when the Commissioner of Public Welfare fired a state hospital worker for alleged "sexual improprieties" with patients. The employee ultimately was vindicated of the charges and then brought suit against the commissioner and the *Star & Tribune*, asserting that the commissioner's remarks reported by the newspaper defamed the worker. The state supreme court ruled against the claimant on grounds that "top-level cabinet-type officials" in Minnesota have an absolute privilege to declare the reasons for firing a public employee, even if those reasons are derogatory and turn out to be unproven. The importance of having an informed citizenry was deemed to outweigh the harmful effects upon the subjects of that disparaging information.

The constitutional principles underlying libel claims were reinterpreted by the state supreme court in 1985 in the case of *Jadwin v. Minneapolis Star & Tribune Co.* The case concerned an allegedly defamatory newspaper article which characterized a man who created a tax-free bond fund and related companies as inept and of dubious honesty. The court declared that the subject of the article was a "private" individual and thus needed only show that the newspaper "acted negligently in publishing the defamatory matter" to recover actual monetary losses suffered, rather than prove "actual malice" under the *Rose* case. The court felt that this relaxed standard of culpability "best reconciles the competing societal interests in the protection of private reputation and the media's right and obligation to freely investigate and report the news."

Corporations suing for libel, however, still have to prove "actual malice." This higher standard sought "to encourage the media to probe the business world to the depth which is necessary to permit the kind of business reporting vital to an informed public."

Two Lessons For The Schools

Two significant First Amendment rulings of recent vintage arise from educational institutions. The lessons they teach are instructive in the role of a free press in society. A humor issue that was not so amusing led to a major constitutional decision in *Stanley v. Magrath*. In 1979 the *Minnesota Daily* newspaper at the university in Minneapolis published a humor issue which included satiric articles on organized religion, bawdy bathroom humor (sprinkled with a few four-letter words), and racial slurs. The issue was characterized blasphemous and lewd by many Minnesotans and triggered a storm of protest throughout the state. As a result, the university's board of regents eliminated the required student funding for the newspaper.

The *Daily* organization and its student editors challenged the university's funding restriction in federal court, claiming the cutback constituted an unlawful punishment for its previous publications and created a "chilling effect" on future publications. The trial judge disagreed and upheld the university's action. On appeal, however, the Eighth Circuit Court of Appeals in 1983 unanimously sided with the *Daily* and invalidated the funding limitation. It ruled that the university's dislike for the contents of the *Daily*'s humor issue was an "improper motivation" for tinkering with the newspaper's funding and violated the First Amendment. The case came to an amicable and constructive resolution when the university reimbursed the *Daily* its costs of $185,000, and the two jointly established a fund for public education about press freedoms and journalistic ethics.

The reasoning that led to the *Daily*'s victory stemmed from a 1982 decision by the same Eighth Circuit Court of Appeals in *Pratt v. Ind. School Dist. No. 831*. The court ruled that the Forest Lake school district violated the First Amendment by censoring a film, "The Lottery." School officials had deemed the film, based on a well-known allegory, to be ideologically and religiously offensive. The appeals court regarded the removal of the film from the curriculum as unconstitutional censorship by some parents and school administrators. The court recognized that the movie was controversial but went on to state a ringing endorsement of an important constitutional precept: "[T]here is more at stake here than the sensibilities of those viewing the films. What is at stake is the right to receive information and to be exposed to controversial ideas—a fundamental First Amendment right. If these films can be banned by those opposed to their ideological theme, then a precedent is set for the removal of any such work."

Most Minnesotans, no matter what their ideological orientation, would wholeheartedly concur. That principle is the cornerstone of the freedoms Minnesotans celebrate during this 200th anniversary of the nation's Constitution.