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The Press and the Public Interest: An Essay on the Relationship Between Social Behavior and the Language of First Amendment Theory

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THE PRESS AND THE PUBLIC INTEREST: AN ESSAY ON THE RELATIONSHIP BETWEEN SOCIAL BEHAVIOR AND THE LANGUAGE OF FIRST AMENDMENT THEORY

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I would like to explore in this essay one aspect of the contemporary American debate over the theory of freedom of speech and press. The subject I want to address is this: whether the principle of freedom of speech and press should be viewed as protecting some personal or individual interest in speaking and writing or whether it should be seen as fostering a collective or public interest. Sometimes this issue is stated as being whether the first amendment protects a "right to speak" or a "right to hear," though in general the problem seems to be whether we should conceive of the principle as securing speech against government intervention without regard to the potential benefits that speech offers for the larger society, or rather only because of them.

These alternative statements of the purposes of the first amendment were present at the very beginnings of our modern free speech jurisprudence. Thus, we have Zechariah Chafee's early summary description of the purposes of the first amendment:

> The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.[1]

Brandeis' concurring opinion in *Whitney v. California*[2] is another survey of first amendment functions that appears to encompass the two conceptions.[3]

What is interesting about the development of first amendment theory is that these two characterizations should eventually come into deep conflict. With Chafee and Brandeis, for example, it seemed possible to point to these differing purposes without having to choose between them, or at least not all that much really turned on which one was chosen. In time, however, some people began to insist that a choice had to be made. Alexander

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1. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941).

2. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

3. "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." 274 U.S. at 375.

Meiklejohn's essay, "Free Speech and Its Relation to Self-Government,"[4] published in 1948, seems to have been the turning point.

In that essay, Meiklejohn denounced the theory that the first amendment served to protect any kind of "individual interest" in speaking and insisted that its only function was to secure the collective interest in hearing all speech relevant to the democratic process. In words that are now familiar, Meiklejohn stated that "the point of ultimate interest is not the words of the speakers, but the minds of the hearers," and, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[5]

In due course, this way of talking about free speech and press — as serving a public interest — came to dominate first amendment discourse. Over the last two decades, especially with cases involving the press, the idiom of the first amendment has taken a full turn in the direction of finding an identity between the principle of free speech and the advancement of the collective good.[6] The logic that we routinely encounter posits that we have free speech because the society is better off receiving the information and ideas that come from open expression in an uninhibited atmosphere.

Still, there has been a strong resistance movement to this way of thinking about free speech and press.[7] Professor Ronald Dworkin, for example, labels the "individual right" perspective an approach based on "principle," and the "public interest" perspective an approach based on "policy," arguing that the latter will lead to a weakening of first amendment protections:

> Suppose the question arises, for example, whether the Freedom of Information Act should be amended so that the Disease Control Center is not required to make its reports available to reporters, or whether the Atomic Energy Commission should be allowed to enjoin a magazine from publishing an article that might make atomic information more readily available to foreign powers. The public's general interest in being well informed argues against confidentiality and for publication in both cases. But the public also has an interest in infection-free hospitals and in atomic security, and these two kinds of interests must be balanced, as in a cost-benefit analysis, in order to determine where the public's overall interest lies. Suppose that in the long term (and taking side effects into account) the public would lose more overall if the information in question were published. Then it would be self-contradictory to argue that it must be published in the public's interest, and the argument for free speech, on grounds of policy, would be defeated.[8]

It is preferable, Dworkin continues, to see this as a "genuine conflict" and not a "pseudo conflict between two aspects of the public's interest that may be dissolved in some judgment of its overall interest."[9] By "genuine con-

4. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

5. *Id.* at 25.

6. *See, e.g.,* Richmond Newspapers v. Virginia, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633-34 (1975).

7. *See, e.g.,* B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 31-36 (1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 577-79 (1978); Dworkin, *Is the Press Losing the First Amendment?,* THE NEW YORK REVIEW OF BOOKS, Dec. 4, 1980, at 51-52, 57.

8. Dworkin, *supra* note 7, at 52.

9. *Id.*

flict" Dworkin means we should "take free speech to be a matter of principle," as a guarantee that "individuals have the right to speak, not in order that others benefit, but because they would themselves suffer some unacceptable injury or insult if censored,"[10] and pit it against the "competing interests of the community as a whole."[11] Then, "[u]nless that competing interest is very great — unless publication threatens some emergency or other grave risk — the individual's right must outweigh the social interest, because that is what it means to suppose that he has this sort of right."[12]

But what exactly is the objection here? Is it that *more* speech will receive protection under a speaker's rights approach than under a public good approach? For the moment we may put aside the problem of whether the speech in question *ought* to be protected (a proposition we ought not simply to assume) and still wonder whether it really is simply a question of the scope of the first amendment that is the basis of the objection to the public interest perspective. The matter is not without complexity, and some of the things I shall say in due course bear on it, but it may be noted at the outset that it is hard to imagine real cases in which the same results could not be reached reasonably by both the speaker's rights and the public interest perspectives. In any event, we might well ask whether even if there will be some differential in the actual scope of first amendment protection for speech activity in society there are not *other* reasons why we should be wary of the public interest approach to the first amendment. It is to that question that I wish to turn our attention in this essay.

Before proceeding with the inquiry, I would like to address two preliminary matters. The first is to distinguish the issue we address here from one other that is also involved in current discussion of free speech theory and that is sometimes tangled up with the individual interest/public interest debate. In particular, we must keep in mind that the debate over the individual rights versus public interest orientation of free speech is independent of the dispute over whether the function of free speech should be conceived of as tied to the search for truth generally or, more narrowly, to the operation of the democratic political system. It is, in other words, quite possible to envision free speech as being related to the system of self-government and yet to see it as protecting the "individual right" of each citizen to participate in the process of political decisionmaking, instead of, as Meiklejohn did, as protecting the collectivity in receiving the information it needs to make good and wise decisions. The point is that the connection between the concept of free speech and the *subject matter* of the speech protected under it is separate from the question of whose interest — the individual's or the society's — is ultimately being advanced. In this sense, then, both Chafee and Meiklejohn conjoined two separable matters. Chafee, for example, defined the "individual interest" in personal terms (speech "on matters vital to them if life is to be worth living") and the "social interest" in terms of arriving at and implementing the best political decisions.

Finally, I should add a word of explanation as to why this essay can be considered relevant to this volume, dedicated as it is to Eric Stein. I have

10. *Id.* at 51-52.

11. *Id.* at 52.

12. *Id.*

two considerations to suggest in support of the essay's inclusion. The first is a belief, though I cannot at this point be sure, that the American experience in this area is parallel to that in other countries, notably those of Western Europe. As I look at decisions like the famous *Sunday Times*[13] case of the European Court of Human Rights, I see a striking resemblance to the idiom employed by American courts in their efforts to develop a free press jurisprudence.[14] That decision, like our *New York Times v. Sullivan*,[15] strikes a tone for thinking about the press that resonates with ours, focusing on the relationship between the concept of free press and a democratic system of government and the role of the press as mediator between the government and the people. My hope, therefore, is that the discussion of this essay will provide an interesting comparative case study.

My second reason is entirely personal: Eric Stein has been a patient and wise colleague. His interest in international human rights, stemming as it does from a profound sensitivity to the dilemmas confronting those ideals in contemporary life, has been inspirational. For me, therefore, anything I have to say on this subject seems related to him.

I

The thesis I wish to advance is quite simple to state. It is this: The characterization an advocate selects to explain or justify a "right" is really best understood as reflecting a general, and complex, identity desired by the advocate and a relationship between the advocate and others in the society. What is truly significant, therefore, about the shift in justification of first amendment press rights to a public interest idiom is to be found in an exploration of the identity being proffered for the press (by itself and others) and the proposed relationship with other members of the society that that identity would establish.

No group of people, of course, has a single "identity" or "relationship with others," any more than a single individual does. It is always a matter of a mixture of identities, one of degree and emphasis. But the degree and emphasis can be critical in determining the shift of behavior — as it would be if university professors came to think of themselves primarily as teachers

13. Sunday Times v. United Kingdom (Ser. A, No. 30), 2 E.H.R.R. 245 (Eur. Ct. Hum. Rts. 1979), *digested in* 1979 Y.B. EUR. CONV. HUM. RTS. 402.

14. [F]reedom of expression constitutes one of the essential foundations of a democratic society; . . . it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.

These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.

2 E.H.R.R. at 280 (1979).

15. 376 U.S. 254 (1964).

instead of as writers and scholars. Furthermore, as with any way of thinking, or identity, what we are speaking about here cannot be reduced to a few paragraphs, and I do not propose to try to do so. But we can begin to elicit some of the critical, and perhaps obvious, elements involved and so at least provide the preparations for future explorations.

What, then, is being proposed in this regard, when representatives of the press defend the rights and powers of the press in terms of serving the "collective" or "public interest"? In a sense, the answer is fairly apparent. The press is defining itself as the supplier of "what the public wants," which in most instances will be defined as the information and ideas the people will use to exercise their roles as citizens, consumers, investors, entertainment-goers and the like. But there is usually something more, for something must be added to explain why the press should be free to attend to the public's needs. The press is saying it is "responsible," that it can be trusted to handle the power it wields; that it will be honest, straightforward, balanced, fair and decent.

These virtues may seem too general and universal to be of any help in understanding what is happening to the press within today's legal world, but the selection of justifications for power and status is actually quite broad and the choices made within that range are revealing. Consider alternatives: The press might very well claim its rights on the basis, not that it is generally good, but that it is simply a survivor of the marketplace like any other business; that journalists possess the knowledge, expertise and professional training that make them uniquely capable of performing this social function; or, to take other historically common justifications of power, that the press is the contemporary bearer of an aristocratic heritage, or perhaps even possessed of a divine mandate. Most important, the press is no longer asserting that what it does is nobody's business but its own. Its very arguments in self-defense concede its potential for inflicting individual and social harm, as well as the legitimacy and importance of self-restraint in the exercise of its powers.

Now, a question of some importance is this: Just why should the press have turned to this particular method of self-justification? Here, again, I think the answer is built into the structure of the American press, and in particular into the convergence of two very well-known phenomena: namely, the increased capacity of the media to reach larger and larger audiences and the simultaneous decline in the number of people who control the existing outlets.

The most significant development in the press in the twentieth century, besides its increased capacity to reach so many people, has been its growing concentration. The steadily dwindling number of newspapers in the cities across the country, a trend which has now resulted in there being only a handful of cities in which there is any genuine competition, has been noted and bemoaned by many, but little has been done to reverse the process. Nonetheless, the "power" of the press has become a focus of rather constant attention and, like any locus of unchecked power within the society, has made the press a constant target for criticism and cries for reform. Concentration of control within the press raises the most profound issue for its continued freedom from public control: Can we continue to live with a

concept of liberty for the press when the circumstances under which that liberty was originally conceived have changed drastically?

To observe the enhancement of the power of the press and its growing concentration is of course to tread a well-worn path. The reality of the phenomenon pointed to is indubitable; whether a remedy is required, and what that remedy might look like, are matters open to reasonable difference of opinion. These, however, are not my immediate concern. All I wish to do here is to suggest that we try to trace a linkage between this highly significant *issue* of the legitimacy of the press's power and social position and the language it regularly uses in defending its constitutional claims.

It is the enormously enhanced position of social power wielded by current members of the mass media that mandates a self-presentation in the language of the "public interest." When the potential for social harm is so augmented, when inevitably there will be doubts about whether the original conditions justifying an expanded range of liberties have been irrevocably altered by succeeding events, it behooves those who sit in the positions of control to adopt a posture that minimizes the risks of harm with promises of good behavior.

Ironically, the very institution that the press has turned to for support of its liberties has itself suffered from similar problems of legitimacy. The court system — and, of course, especially the Supreme Court — is the one political institution in our federal structure that lacks an uncomplicated democratic pedigree, and this uncertainty about its status in relation to the other two branches has, as everyone knows, been the cause of seemingly endless challenges to its actions and equally endless attempts to account for its role in American politics. I am not interested here in either recounting these debates or in trying to add to them. What is important for my purposes is the fact that they exist and that they establish an atmosphere in which the exercise of judicial power is of uncertain legitimacy.

Just as we do with the press, therefore, we find the Supreme Court commonly characterizing its function as that of protecting the people and their democratic sovereignty against the government, in spite of the reality that democratic processes are being regularly upset in the enforcement of constitutional liberties. There is, then, a convergence of interest between both the press and the courts in turning to a collective, or public interest account of their jointly exercised powers. The most striking example of this convergence in the modern case law is *New York Times Co. v. Sullivan*,[16] where the fragility of both the press and the Court were being tested by Alabama's use of libel actions against desegregation speech. There is evident in the case a feeling of mutual vulnerability and joint dependency. In any event, that coincidence of interest produced our modern idiom of freedom of speech and press — the idiom of Meiklejohn and the "public interest" orientation of the first amendment.

In seeing this convergence of interests between the press and the Court, we are also in a better position to understand the more modern divergence between these same two institutions. It is of course a known fact of life that the transition from the Warren Court to the Burger Court has meant a soft-

16. 376 U.S. 254 (1964).

ening of the promised protections arising out of the *Sullivan* pact between the press and the Court. But as has been repeatedly pointed out, the press has won as well as lost in the Burger court, although the clamor from the press over its losses has frequently proclaimed nothing short of a total judicial abandonment of the first amendment. At times, in fact, the reaction of the press has been so extreme and exaggerated that even the moderate and liberal members of the Court (notably Justice Brennan) have felt compelled to depart from the protocol of judicial nonparticipation in public debate in order to chastise the press for indulging in a kind of juvenile overreaction to its defeats.[17]

I do not wish to defend these overreactions of the press, but I do think they have at their core a legitimate concern, though it is not really the practical consequences of actual decisions that have gone against them. The real problem many members of the press have with the Burger Court, I suspect, has less to do with the results and more to do with the *characterization* of the press by the Court. Though we frequently overlook it, the courts — and, here again, especially the Supreme Court — perform a dual function: They resolve actual disputes and make law, but they also articulate a vision or set of visions about how to think about the world in which we live. In this latter function the courts are opinion-makers, speakers in the marketplace, in a very literal sense. One can debate just how great an influence the Court has on shaping the attitudes of the American people — I for one would estimate it, relative to other speakers, as being fairly high — but there seems to me little room for denying its having any role altogether. This means that even when the Court reaches a "favorable" result it can simultaneously undermine its value for the press by the way it speaks about the press.

This is precisely what happened in one of the most favorable press decisions, *Miami Herald v. Tornillo*.[18] Split into two parts, the argument of the *Miami Herald* opinion reads like the meanderings of a divided personality. In the first the press is described as excessively concentrated and monopolistic, as being fundamentally altered from the press that the Framers thought was in need of special protections, and so on.[19] In the second part, the decision gives the impression that the "rights" of journalists and editors are sacrosanct territory in our society, worthy of our trust while the government is not.[20] Always ambiguous, however, the opinion, even at the end, may be read as saying that the press is bad but unfortunately there's nothing we can do about it — a reinforcement of the troublesome theme developed in the first part of the opinion.[21]

17. *See Address by William J. Brennan, Jr.*, 32 RUTGERS L. REV. 173 (1979).

18. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

19. 418 U.S. at 247-54.

20. 418 U.S. at 254-58.

21. 418 U.S. at 258 ("It has yet to be demonstrated how governmental regulation of . . . [the editorial] process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.")

II

But what is the explanation for the concerns so frequently voiced about the shift to thinking about press rights (and more generally, about free speech rights) in terms of the advancement of the public interest? Here I think we must try to understand what happens to an institution that embraces an identity of being a servant of the public interest.

Of course, not every group of individuals or institution will necessarily react in the same way to the same self-characterization; differences can be expected to manifest themselves depending upon the functions performed by the group or institution, its former identity and the characteristics of the people involved. Generalizations about probable consequences are, therefore, not in order. But we may still ask what is to be feared in vesting the institution of the press with the self-image of being the agent, or representative, of the "public"?

The problem is the risk that the press will come to think of itself as possessed of a kind of indefinite but powerful mandate to ferret out and rectify wrongs in the society and in doing so will end up either performing what have until now been primarily official functions, but without the restraints we have so carefully built into the official processes, or actually exceeding the boundaries of legitimate official action. Perhaps there are already indications that this has occurred.

When, a few years ago, the television show, "Sixty Minutes" produced a program to examine the propriety of some of its journalistic techniques in uncovering fraudulent, deceitful and illegal behavior in society, it displayed an unfortunately commonly encountered attitude among journalists. Whether it is proper to engage in illegal activity in order to discover how easy it is to do so, to employ false identities to gain access to privately run business operations as a means of uncovering fraudulent and improper practices, to use the technique known as the "ambush interview" in which people are suddenly confronted, while the cameras are rolling, with the accusations of wrongdoing — these were the types of techniques practiced and (with one exception) defended by the producers of the show. What was interesting, and in some degree disturbing, about the self-critique was not the practices themselves but the general attitude that lay behind the defense of their use. It was clear that "Sixty Minutes" regarded itself as essentially a kind of law enforcement agency, vested with the mission of detecting and disclosing improper behavior in the society. Yet, despite having undertaken this self-appointed task, the "Sixty Minutes" people did not seem to see, let alone properly assess, the relevance of many parallel limits that we routinely impose on the official system of civil and criminal law enforcement. Quite obviously, both the presumption of innocence and the privilege against self-incrimination, to take but two examples, are elemental bulwarks of our system of criminal justice. They stand guard against what we have come to think of as inherent biases in our thinking that detrimentally skew our approach to ascertaining the guilt or innocence of those charged with wrongdoing. Yet neither were raised as potentially relevant guideposts to thinking about the parallel issues in a system of journalistic criminal justice.

This of course is not to say that precisely the same rules that govern

official behavior ought to govern unofficial activities such as journalists engage in, nor, certainly, that the press ought not to be engaged at all in ferreting out wrongful conduct. The point is simply that there are serious risks of injustice and improper behavior *whenever anyone* — official or unofficial — envisions for themselves a mandate to expose and rectify the wrongdoing within the society. And, a self-conscious acknowledgement of the limits of one's capacity to do good, matched with a comparable recognition of one's capacity to inflict serious harm, is a minimal condition of undertaking such an enterprise. Yet that is precisely the problem for the press: Institutionally disinclined to see itself as a semi- or quasi-official organization, for to do so seems a partial acknowledgement of the relevance of the limitations imposed on official behavior, it is nonetheless inclined to cast itself as the true representative and protector of the people's interests.

III

The concern, however, is not limited to problems with the behavior of the press alone. It also extends to the potential behavior of the public, and in tracing this concern we can learn something especially interesting about first amendment thinking generally and perhaps even something useful for dealing with that perennial quest of fashioning a viable theory of the first amendment.

The problem with the public interest perspective is that it seems to place control over speech freedom in the hands of the public itself. One of the things that makes a public interest reference attractive in free speech rhetoric is, doubtlessly, that it is largely an abstraction — it assumes a body of people so large that consultation with them over the attribution is usually impracticable. But not always. Sometimes "the public," speaking as a democratic majority, can make its will known quite clearly and firmly, and when it does, anyone who has claimed the status of the public's agent will be duty bound to accept its will.

This would seem to be a reasonable fear behind any turn to a justification of press rights based on the idea of serving the public will. But the fear should be clarified: The problem is not simply in what a "fair" evaluation of the competing public "interests" (both in the benefits of the speech itself and in the avoidance of the costs of that same speech) will yield in terms of the scope of protection for speech activities but in obtaining any "fair" evaluation in the first place. In short, the real concern underlying the objections to the public interest idiom is that it seems to vest in the public a real choice — as the ultimate party in interest — over what level of protection for speech we will have, and the public is not to be trusted with exercising that choice wisely. In the face of this reality, the preferable course to some has been to turn to a position in which free speech is defended as a matter of "right" or "principle," that is, as something beyond the realm of discussion.

In fact, the deeper one probes into the strategic thinking in the first amendment area, the more one discovers — and, depending on one's viewpoint, to one's discomfort — that a good deal of first amendment "reasoning" can be understood as directed at making reconsideration of any first amendment issue virtually unthinkable. Perhaps the most striking example of this methodology is Justice Black's well-known insistence that the lan-

guage of the first amendment ("no law") foreclosed any independent examination of the first amendment protections the Court was extending. Along with the repeated invocation of "the Framers' intent" and the seemingly settled "history" of the free speech and press clause, the "no law" technique represents a familiar fortress strategy for presenting the first amendment.

I do not wish here to explore at length the merits and demerits of these ways of thinking and talking about the first amendment, but only to clarify the key concerns behind the objections to the public interest idiom. It should be observed, however, that this desire to protect something you value by making its abandonment or modification unthinkable is one of the primary motivations behind the suppression of speech in the first place. It does seem anomalous, to say the least, for the process that condemns that practice to employ it itself. The real difficulty, however, is more than making sure you practice what you preach, but in identifying and understanding what the ultimate purposes of the first amendment really are. It would seem that among those ultimate purposes ought to be that of developing the capacity of mind to avoid such patterns of deception, both of others and of oneself.

At the very least, we should begin with a distinction in our thinking about the public interest perspective on the first amendment. The problem with it may be thought to rest, not in the general idea that the first amendment should be thought about in terms of its advancement of the social good, but in the unfortunately narrow range of considerations we presently associate with the social good. A "cost-benefit" analysis for the first amendment is undesirable, in other words, because of its stunted conception of what the first amendment is all about. When Dworkin objects to the public interest perspective through his examples of the Disease Control Center and the Atomic Energy Commission, he defines the free speech interest of the public as that of "being well informed." This is of a piece with most contemporary talk about the advantages of the first amendment: It brings us the information we need to make decisions as citizens and truth-seekers and the like. This is a pragmatic style of thinking of a most limited kind, and, importantly, it seems to neglect consideration of a more fundamental symbolic and aspirational role for the first amendment. The solution, however, is not to retreat from the task of understanding and articulating just how society is better off with a first amendment such as our intuitions tell us we ought to have, to a kind of uncommunicative stance of "principle," but rather to engage in that task of enlarging our conception of the relevant considerations.

The public interest perspective, therefore, is dangerous because our theory of the first amendment is itself too narrow and undeveloped.

IV

I have argued that the best way to understand the prevailing "theory" about the first amendment serving a "public interest," and the concerns that many people seem to have with that theory, is to see it as a kind of shorthand expression of a set of identities for the various participants involved in free speech litigation (the courts, the public and the speakers, which of course includes the press) and of the various relationships between these

parties. Pursuing that line of inquiry, I have suggested that we see it as the language of those whose exercise of power (be it informational or judicial) is precarious — that is to say, of questionable legitimacy — and as embodying a kind of promise to behave in certain ways in exercising that power (responsible, objective and the like). And I have indicated what I think is at the root of our fears about individuals and institutions that assert the authority to act on behalf of someone assumed to possess ultimate sovereignty, especially when the principle is most often a dissembling abstraction.

The interest of what we find in such an inquiry is accentuated by a comparison with other roads not taken; that is to say, of other means of representing oneself as holding power legitimately. It is noteworthy, I think, that the press has thus far chosen not to rest its case on any claim of special *expertise* in acquiring and disseminating the "news." There is perhaps some suggestion of expertise in the modern development of the concept of "editorial autonomy," which has appeared in a few cases like *Miami Herald*.[22] But it has not been more explicit than that.

This omission is of a piece with a more general ambivalence within the American press about its identity. The press in this country appears to be somewhat uncomfortable with any sense of itself as an institution made up of "professionals." The ambiguous status of journalism and communications departments within our universities bespeaks a more widespread division within the press about its status.[23] In large measure, the issue seems to be where the press stands: as an outsider, reporting on and criticizing events within, or as an insider, subject to the same standards and expectations that govern those who are themselves participants in the events covered by the press. More than most groups (compare lawyers, for example) the press is in conflict over its relationship to the world on which it regularly reports.

Here, I think, lies another part of the attraction to the dissenting rhetoric of "speakers rights." For it is the identity offered by that "theoretical" account of free speech protections that seemingly best matches the underlying need of many journalists to think of themselves as totally independent people, unconstrained by the expectations regularly imposed on those who inhabit the realms of officialdom and the professional class. It is the image of the wily, Odyssean reporter, employing clever techniques and staunchly maintaining his or her independence, that is so much at odds with the "public interest," "right to hear" idiom of contemporary first amendment discourse.

What this also demonstrates, in part, is that the identities connected with our first amendment idiom are really always going to be subject to evaluation in terms of their advancement of the "public interest." It is not

22. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

23. *See, e.g., Journalism Educators Debate Strategies, Technology and Ties to the Media,* N.Y. Times, Jan. 23, 1984, at 11, col. 1 (city ed.); Salmans, *TV's Newscasters Give Low Marks to Newcomers,* N.Y. Times, Apr. 15, 1984, § 2, at 1, col. 1.

the case that one identity "serves" the public interest and the other does not; though the behavior under either identity will differ in significant respects, each will be judged ultimately by the measure of its general value for the society.

What is of special interest in the change in first amendment idiom towards the "public interest," "right to hear" language is the progressive shift within the American press towards a professional identity. We can expect, I think, to see a continuous movement within the press towards taking on the characteristics of the other professions, including a more developed system of ethical self-evaluation. The recent demise of the National News Council[24] only highlights the absence of — and need for — an institutional organization within the press vested with the task of systematically addressing the complex issues that an increasingly powerful and professional press will inevitably have to face.

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24. *See National News Council Will Dissolve,* N.Y. Times, Mar. 23, 1984, at 11, col. 1 (city ed.).