Comment

The Hazards to the Press of Claiming a "Preferred Position"

By WILLIAM W. VAN ALSTYNE*

Three persons stand before the gate of San Quentin prison. One is an investigative reporter for the *San Francisco Chronicle.* One is the chairperson of "The Prisoners' Rights Committee" of the Socialist Workers Party. One is a concerned person privately interested in satisfying himself (herself) about the condition of San Quentin; a person who might (or might not) be moved thereafter to write something about his experience and who might (or might not) have sufficient literary skills to find an outlet for his manuscript. All are turned away on the basis of a uniform prison policy not permitting entry to any person in the absence of special business, *e.g.,* an attorney is permitted access, but access itself is limited to consultation with an individual prisoner. Each subsequently engages legal counsel to file suit to enjoin the warden of San Quentin from enforcing the prison rule. The basis of each suit is the first amendment provision that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

Three persons stand before the closed doors of the City of San Francisco Board of Education chamber. They are the same three as earlier appeared outside San Quentin. The Board is meeting in "executive session," to review the current pupil assignment policy in effect during the preceding year and to determine what modification, if any, should now be made. All three are turned away, and each soon thereafter files suit to enjoin the Board from enforcing its rule under which executive sessions may be scheduled upon majority vote of the School Board members. The basis of each suit is the fourteenth amendment due process clause which makes applicable to the states the first amendment provision already quoted.

In response to the six cases filed under these two sets of circumstances, the Supreme Court of the United States decides favorably to

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one plaintiff and adversely to the other two. The claims of the San Francisco investigative reporter succeed. The claims of the Socialist Workers Party Committee person and of the unattached individual fail. With respect to all of the cases, the Court unanimously acknowledges that there is a substantial first amendment interest. Only with respect to the reporter, however, does the Court conclude that there is a sufficient first amendment entitlement to invalidate the prison and school board policies which (1) only indirectly affect "the freedom of speech or of the press" and (2) are substantially related to valid public purposes.

On the first point, the Court began by noting that nothing on the face of the first amendment expressly establishes any right of access to particular places or to particular sources of information. What the amendment forbids is governmental restriction on the freedom of persons to speak and to publish whatever is on their minds—without regard to the good sense or accuracy of what they choose to say. Nevertheless, the Court conceded that insofar as government itself cordoned off various sources of information, the social utility of free speech was impaired and first amendment values were implicated. It noted that it had previously applied such a first amendment value in invalidating government restrictions on the receipt of mail originating in certain communist countries, and that it had adverted to the same principle in invalidating a refusal by the State Department to issue a passport to an American communist.[1] In each instance, the foreclosure of access to sources of information was considered too severe a curtailment on the individual's capacity adequately to inform himself on matters which might give meaning to his freedom of speech as the principal constitutional check on government power.

The Court also noted, however, that discrete and limited government restrictions on sources of information were not themselves forbidden by the Constitution[2] and, indeed, that some such restrictions were very well recognized. Congress was at liberty to meet in executive session consistent with its own rules, for instance, and the Court had also acknowledged a limited power of executive privilege.[3] For that matter, weekly conferences of the Supreme Court itself were wholly secret. No one is admitted to the conferences of the Court in which pending cases are discussed by the justices. Concluding that equivalent reasons (to induce candor and to avoid premature release

1. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

2. *See* Keindienst v. Mandel, 408 U.S. 753 (1972); Zemel v. Rusk, 381 U.S. 1 (1965).

3. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974) (dictum); United States v. Reynolds, 345 U.S. 1 (1952).

of sensitive material) were adequate to explain some school board discretion to meet in executive session, and that substantial reasons (of security, the avoidance of administrative hardship, and of maintaining a uniform atmosphere conducive to sound penological objectives) also explained the felt necessity of forbidding the public general access to prisons, the Court concluded that the general first amendment claims were, on balance, not sufficient to entitle the plaintiffs to relief.[4]

In respect to the investigative reporter of the *San Francisco Chronicle*, however, the decision of the Court was that, as applied to him, both restrictions were invalid. Starting with the observation that the first amendment itself appeared to recognize a distinct and separate constitutional position of the press ("Congress shall make no law . . . abridging the freedom of speech *or of the press*"), plaintiff's counsel emphasized the institutional role of the press in systematically disseminating to the public at large such news and information as it was able reliably to assemble—a disseminating function not assumed by either of the other two parties who had sought access.[5] Indeed, counsel urged, the press not only thus contributed to the fund of public information in unique ways, unlike an unattached private citizen or a functionary of a political party, the press served as an agency of the public; that is, as a means of securing the public right to know, an agency made all the more vital insofar as no other means would be available to alert the public to the manner in which the government presumed to conduct the public business.

Responding sympathetically to this analysis, the Court unanimously held in favor of the reporter's claim, declaring in the course of its opinion:

> In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.
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> In dealing with the free press guarantee, it is important to note that the interest it protects is not possessed by the media themselves. . . . The Press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.

4. *Cf.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

5. *Cf.* Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 652 (1975); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975). *But see* Lange, *The Speech and Press Clauses*, 23 U.C.L.A.L. REV. 77, 100-07 (1975).

Shortly after the conclusion of these cases in the Supreme Court, the investigative reporter of the *San Francisco Chronicle* spent a number of hours visiting within San Quentin and sitting in during executive sessions of the San Francisco Board of Education, subsequently filing lengthy stories, which, with minor editing, were promptly and fully published in the *Chronicle*.

Within one month of the *Chronicle's* series on San Quentin, two law suits were filed against the *Chronicle* and a bill was introduced in Congress, all in response to the content of "The San Quentin Story." The fist of the law suits was brought by the warden of San Quentin in federal district court to compel the *Chronicle* promptly to publish a reply the warden had prepared in response to the *Chronicle* series —a reply he had already submitted to the *Chronicle* but which the *Chronicle* had refused to run. Claiming that the published series was substantially inaccurate and misleading in its description of conditions within San Quentin, the warden pressed the point vigorously that the public was entitled to know the whole truth and that, as fiduciary of the public interest, the *Chronicle* was duty bound to present both sides of a given controversy to provide a necessary diversity of information and opinion without which the public could be misled. Conceding that ordinarily the first amendment could not be used to compel a person or a voluntary association to lend its own forum or publication to the dissemination of dissent, the warden pressed upon the district court the very distinctions which the *Chronicle* had itself so successfully used in its special pleading for extraordinary first amendment access rights. The press, he observed, was granted that special access on the strength of an interest "not possessed by the media themselves," but "to bring fulfillment to the public's right to know." In basing its claims on that ground, the press was now estopped from acting in a manner frankly inconsistent with that position, *i.e.*, by asserting that the press was as free as anyone else to determine the content of its published pages. Those pages belonged to the public, and so long as the materials submitted for publication were neither repetitious of what may already have been published there nor irrelevant to a subject which the *Chronicle* had been able to examine wholly on account of its special claim as a public agency, it was without authority to deny or to censor the publication of a reply which would have at least as much likelihood of ascertaining the truth about conditions at San Quentin as the *Chronicle's* own report.

The federal district court was well aware of the case of *Miami Herald Publishing Co. v. Tornillo*[6]—but was persuaded that that case

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6. 418 U.S. 241 (1974).

was readily distinguishable. In the *Miami Herald* case, a "right of reply" statute had been held invalid as applied to a newspaper editorial *not* based on information which the newspaper had acquired solely by force of special access as an agent or representative of the public interest. Rather, the editorial in the *Miami Herald* had been prepared solely on the basis of information as readily available to anyone else as it had been available to the newspaper.

As the story in the *Chronicle* was based on special access claims made possible only because the *Chonicle* relied upon the public interest (and related itself to that interest simply as an agent), the federal district court concluded that the controlling decision was not the *Miami Herald* case but rather the case of Red Lion Broadcasting Co. v. FCC.[7] There, in sustaining substantive regulations by the FCC requiring each broadcaster to serve "the public interest, convenience, and necessity" by providing for a full right of reply by any identifiable person disparaged in the course of a broadcast, the Supreme Court had unanimously concluded:

> Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues . . . .[8]

In the *Red Lion* case, the Supreme Court had noted that broadcasters could be subjected to special duties which could not constitutionally be imposed upon others because the broadcaster enjoyed a special privilege not similarly shared by others, that is, exclusive use of a given wavelength in a given market. In *Warden of San Quentin v. San Francisco Chronicle*, the newspaper was identically subjected to an identical restraint based on identical reasoning, *i.e.*, exclusive access to a given source of information not available to others. The *Chronicle* appealed the decision of the federal district court—but the decision was affirmed in a brief per curiam opinion reciting simply that the district court opinion was clearly correct.

Within the same week as the warden's suit against the *Chronicle*, a second suit was brought against the newspaper, arising from the same story. This action was for libel, brought by a trusty of the prison, alleging that the description of his conduct at San Quentin as trusty was false and damaging. In preparing to defend against this action, the *Chronicle* very carefully reviewed those parts of its published story adverting to the trusty, and discovered two things: (1) The investigative reporter had used reasonable care in relying upon his sources

7. 395 U.S. 367 (1969).
8. *Id.* at 392.

and certainly did not knowingly use any false statements, although for reasons not reasonably discoverable by the reporter, a few of the statements about the trusty were in fact false; (2) The principal source for this part of the story was provided by seemingly reliable, firsthand statements of two different prisoners plus another trusty of San Quentin, all of whom the reporter had interviewed under a commitment of confidentiality in the course of his on-site newsgathering within San Quentin.

Based on its review, the *Chronicle* answered the complaint in the libel action by admitting the possibility of some factual error but by citing the Supreme Court decisions in *New York Times v. Sullivan*[9] and *Gertz v. Robert Welch, Inc.*[10] as a first amendment defense. Thus, the *Chronicle* argued that even assuming the plaintiff were a "private" rather than a "public" figure,[11] still the first amendment barred an action for libel unless false (and presumptively damaging) statements about an identifiable person were made negligently.[12] The first amendment would surely not permit strict liability.

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9. 376 U.S. 254 (1964).

10. 418 U.S. 323 (1974).

11. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). *But see* Time, Inc. v. Firestone, 96 S. Ct. 958 (1976); Rosenblatt v. Baer, 383 U.S. 75 (1966).

12. An understanding of the California statutory scheme is helpful in evaluating the argument that the first amendment will not allow the imposition of liability without fault. In California, libel is defined as "a false and *unprivileged* publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." CAL. CIV. CODE § 45 (West 1954) (emphasis added). This section has been interpreted to allow the recovery of compensatory damages even where the absence of malice is proved. *See* Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911).

Under California law, the *Chronicle* might also raise the stautory defense that its publication of the article was privileged under section 47(3) of the Civil Code. and thus not actionable in the absence of malice. That section provides that a communication "without malice, to a person interested therein . . . by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent," is privileged. CAL. CIV. CODE § 47(3) (West 1954). This provision has been applied primarily to individual relationships such as communications between members of a church relating to church matters. *See* Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948). *See also* Moore v. Greene, 431 F.2d 584 (9th Cir. 1970) (letter from former attorney to newly chosen attorney relating to mutual client); Shoemaker v. Friedberg, 80 Cal. App. 2d 911, 183 P.2d 318 (1947) (medical communications between a patient and his physician); Longsworth v. Curson, 56 Cal. App. 489, 206 P. 779 (1922) (communications between employees and their employer regarding a co-employee). It has also been applied in dicta, however, to a magazine article about a policy of a Laguna Beach school board which allegedly libeled the board president. *See* Harris v. Curtis Publishing Co., 49 Cal. App. 2d 340, 121 P.2d 761 (1942). In finding that publication of the article was a communication between interested parties the court noted "that

Legal counsel representing the plaintiff trusty argued that neither *New York Times* nor *Gertz* was applicable to this case. The reason was that in neither case did the offending publication purport to represent the public's right to know as an agent or fiduciary of the public. In neither case had the press held itself out as possessing special entitlements to news sources unavailable to others but available exceptionally to itself. The plaintiff's position was that insofar as the public was invited to rely upon the *Chronicle* more than upon the utterances of others, a higher standard of care should be imposed upon the newspaper as a public fiduciary. Similarly, he argued, a fiduciary is subject to a greater measure of accountability in fulfilling its duty to the public right to know. Thus, the plaintiff was entitled to have the court subpoena the reporter and to demand of him the names of those whose statements he had relied upon, in order that the public could judge for itself the integrity and reliability of the information which the newspaper had presumed to publish!

The reporter refused to provide the names of his confidential informants, claiming that to do so would necessarily undermine his own credibility with all other prospective sources of information.[13] The court held that under these circumstances, where the reporter alone was in possession of the information without which plaintiff would be unable to prove one way or the other the ultimate reliability of such sources, but where the reporter refused to disclose his sources, plaintiff's allegation that such sources were not reasonably reliable would be taken as true. Accordingly, the court submitted the case to the jury with instructions that the jury should find in favor of the plaintiff such damages as reasonably reflected the extent of psychic and reputational damage as in fact the plaintiff had sustained from publication of false

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the overwhelming majority of the citizens of this country are interested in [educational systems] and in questions which affect the education and proper training of our youth. . . . Without further discussion, we hold that this publication was a communication between interested persons within the meaning of the statute." *Id.* at 350, 121 P.2d at 766-67. The *Chronicle's* argument of privilege based on the mutual interest of the readers and the newspaper would be strengthened by the paper's earlier successful claim that it was a responsible agent for the public and hence should be privileged in its communications with the public. It should be noted, however, that the court could refuse to follow the interpretation of section 47(3) given by the court in *Harris* because the plaintiff in that case would have been a "public official" under the standard announced in *New York Times.* Because the statute provided the defendant the same protection it would have received under present constitutional interpretation, *Harris* would be inapplicable to a newspaper communication allegedly libeling a "private" as opposed to a "public" plaintiff.

13. *Cf.* Branzburg v. Hayes, 408 U.S. 665 (1972). The California evidence laws would prevent the court from holding the reporter in contempt for refusing to obey the subpoena. That section would not, however, immunize the newspaper from liability. CAL. EVID. CODE § 1070 (West Supp. 1976).

statements carelessly repeated by the *San Francisco Chronicle*. The jury returned a judgment for $50,000.

Within a month of these two legal actions, a bill was introduced in Congress to bring all newspapers with a general circulation in excess of 20,000 daily copies within the scope of the Federal Communications Act. The bill required each qualifying paper to be licensed according to the standard already applicable to all radio and television broadcasters, and subjected those newspapers to the same "fairness," "right to reply," "equal (candidates') time," and "diversity" requirements applicable to all other licensees. The basis of the proposed bill was that, insofar as the print press had placed *itself* in a "preferred position" under the first amendment, with special access rights and special "public agency" rights which no one else was entitled to share, in a manner fully equivalent to radio and television licensees, the newspapers should be subject to special ficuciary obligations inapplicable to persons not as favored as the press.

The fable of cases is only that—just a fable. It remains but a fable partly because the newspaper *lost*, rather than won, the San Quentin case. The Supreme Court declined to accept the newspapers' argument that they have more first amendment rights than others, and above quoted statements from the Court in the *Chronicle*'s suit for access appear in the dissenting opinions rather than in the majority opinions in that case.[14] The fourth estate almost surely regarded those cases as a setback. I have attempted to suggest another view of the matter. The temptation of the press toward special pleading under the first amendment is very strong.[15] Its "success" may well call back the victory of King

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14. Saxbe v. Washington Post, 417 U.S. 843, 863 (1974) (Douglas, Brennan & Marshall, JJ., dissenting); Pell v. Procunier, 417 U.S. 817, 837 (1974) (Douglas, Brennan & Marshall, JJ., dissenting).

15. Such a caution to the press does not mean that it therefore has *no* basis for seeking to protect the anonymity of sources or for seeking access to newsworthy sources. KQED v. Houchins, No. 75-3643 (9th Cir., Nov. 1, 1976). As previously noted, first amendment resistance to compelled disclosure has a substantial basis, whether claimed by working journalists, lone pamphleteers, members of disfavored political parties, or others. *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960). In brief, one may readily disagree with the outcome even of *Branzburg*, where the reporter's claim of privilege to refuse to appear in response to a grand jury subpoena was rejected, simply on the basis of general first amendment theory. Branzburg v. Hayes, 408 U.S. 665 (1972). Similarly, the court has held that access claims also have a sound first amendment basis. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965). It may be entirely reasonable to object that the blanket restriction sustained in *Saxbe* was indefensibly excessive. Yet there is a pleasing irony even in some of these cases. *Within twenty-four hours* of turning away the special claims of the press in the *Saxbe* case, the very same Supreme Court unanimously held that the press was wholly immune to the access claims of others. *See* Miami Herald Pub-

Pyrrhus of Epirus over the Romans at Asculum, in 279 B.C.: "One more such victory . . . and we are lost."

Much ink has been spilled in criticism of the press. It seems clear to me, however, that the critics will be handed a weapon forged by the press itself every time it seeks to extend press entitlements as the surrogate of the public right to know. Rather, let the free press draw strength from the specific and equal mention it receives in the first amendment ("equal" to the same mention made of free speech) to insure that it shares fully in the equal protection of that freedom of expression granted to each person who holds it, and who asserts it as his *own* right without pretense that he is the designated guardian of the people's right to know.[16]

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lishing Co. v. Tornillo, 418 U.S. 241 (1974). In the choice between claiming special privilege as an agency of the public right to know and claiming a freedom to print or not to print what it pleases with no special duties of accountability to "the public" (if, indeed, that is to be the choice), I think the choice for journalists is an easy one. The free press continues to do reasonably well. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971).

16. In response to the rhetorical question whether the "free press" clause to the first amendment is thus merely a "redundancy," I think that the most practical answer is to compare the fate of the Red Lion Broadcasting Company with that of the Miami Herald Publishing Company. But for the press clause, enabling the press to receive the *same* protection as the lone pamphleteer or the lone haranguer, the Miami Herald might well have suffered the same smothering fate that applies to each and to every radio or television licensee, no matter how competitive the market in which it operates, no matter how trivial its own market share or communicative influence, and no matter how diverse, independent, and numerous all other sources of news, philosophy, opinions, facts, and communicated junk within the same community.

The innovation of movable type and the communications revolution following Guttenberg's press in 1428 brought massive and *unequal* regulation of the printing press in England, styled on arguments at least as impressive at the time as anything one witnesses with respect to the cool medium. First, the audience of mass printed material beggared the comparatively minute influence of oral speech, making the press vastly more influential and the appropriate subject of special control not applicable to oral speech.

Second, the physical advantage of printing press reproduction and dissemination of copies was reinforced (even as it is today) by the impersonalism of the medium. This impersonalism led the ordinary reader to place greater credibility in what he "read" vis-à-vis what he merely "heard" (likewise indicating the propriety of special rules, *e.g.*, libel per se but not slander per se; seditious libel, but not seditious slander).

Finally, the impenetrable anonymity of printed matter, as contrasted with the listener's immediate confrontation with the person of the speaker, provided an advantage to the press. Readers could not as readily discount the unreliability of a report of a personal, firsthand appraisal of the story teller.

Given the FCC fate of radio and television, it is doubtless a fortunate accident of history that the press had already become sufficiently well known by 1791 to enable the drafters of the first amendment to anticipate *Red Lion*-style distinctions, and so to draft against them, leaving nothing to doubt. One might like to think that they would have done likewise with respect to electronic means of communication, granting

It may be more accurate, after all, to suggest that freedom of the press in the United States is not so much evidenced by the scrupulous and responsible columns of the *New York Times* or the *Washington Post,* but by the scandalous profitmongering of the sensational pulp press and by the yellow journalism of editors who calculate their facts and their style with a design to deceive. That they often go bankrupt means only that even H.L. Mencken was not infallible when he said that nobody ever went broke underestimating the taste of the American public. That they sometimes prosper may mean only that neither was Mencken wholly mistaken. That they are not constrained by standards not applicable to the lone pamphleteer or to the lone haranguer, however, is itself some of the best evidence that the first amendment is alive and well. To trade away that protection for some few bits of privilege, purchased at the price of fastening fiduciary burdens upon every newspaper in the country, is to strike a bargain as good as that made by the Indians for the sale of Manhattan Island.

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it equal first amendment protection as well, subject merely to equal restraints (of antitrust, state action theory, etc.) as other business combination modes of speech organization. In comparable areas, the Supreme Court has *not* arrested the application of Bill of Rights standards by such mechanically-styled distinctions as it did in *Red Lion. See, e.g.,* Katz v. United States, 277 U.S. 438 (1928). Despite the easy unanimity of the *Red Lion* decision, there is, of course, another view. Justice Douglas was of the opinion that no distinction should exist between newspapers and the electronic media. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Douglas, J., concurring).