LAWYERS AND JOURNALISTS

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Chief Justice McKusick, Associate Justices of the Maine Supreme Court, Justices of the Superior and District Courts, distinguished guests:

It would not be possible to write a history of our country or of our state without adverting to the contributions of members of the legal profession and those of members of the press.

The close alliance and association of newsmen and lawyers long preceded the American Revolution. In Colonial America, the Stamp Act crisis brought them together in defiance of British Authority. The Peter Zenger case in 1734 was a conspicious example of the spirit that joined law and press.

In the fall of 1734, Governor Cosby of New York was outraged by material appearing in the Weekly Journal that came from the pens of lawyers who opposed Cosby. He got the Governor's Council to vote that the paper be burned but the Court of Quarter Sessions would not order it done. New York's aldermen also refused. Finally the Sheriff burned copies.

Then Cosby sought an indictment. Failing that he proceeded on information charging Zenger with seditious libel. A Cosby judge disbarred Zenger's lawyers. But at proceedings in August, Zenger was represented by Andrew Hamilton, a distinguished Philadelphia lawyer. Hamilton astonished the Court by asserting the right of the jury to determine if the matter published was seditious libel, and by claiming truth as a defense. Hamilton said to the jury: "The question before you is not the cause of a poor printer, nor of New York alone; it is the best cause - the cause of liberty - - - the liberty of opposing arbitrary power by speaking and writing truth."

The jury pronounced Zenger not guilty. Historian George Bancroft reported that patriots of the Revolution 40 years later hailed the verdict as "the morning star of the American Revolution."

Many lawyers in England and colonial America said Hamilton's argument was "bad law". Blackstone had said that "every libel has a tendency to break the peace, or provoke others to break it, which offense is the same whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification."

But Arthur Schlesinger, Sr. quotes an Englishman as saying: "If it is not law, it is better than law, it ought to be law, and will always be law where Justice prevails."

English law caught up with Hamilton in 1781 with the passage of the Fox Libel Act.

Arthur Schlesinger, in his Prelude to Revolution, quotes John Adams as saying the Revolution would not have been possible without the newspapers of Colonial America.

Lawyers of the period were equally influential.

Both professions continued their influence into the early years of the Republic. Alexis De Tocqueville has paid notable tribute to the bar. He said in his great work Democracy in America: "Under all free governments, of whatever sort, one finds lawyers in the leading ranks of all the parties." They were active in promoting Revolution as the efforts of John Adams, and Thomas Jefferson, and other lawyers attest, but their influence in the formative years of the Republic were constructive and not Revolutionary. Twenty lawyers were among the 39 signers of the Constitution. Their importance in this great work helped De Tocqueville reach his conclusion about the profession. He said: "What lawyers love above all things is an ordered life, and authority is the greatest guarantee of order."

Summing up his views on lawyers, de Tocqueville said: "I doubt whether democracy could rule society for long without this mixture of the legal and democratic minds, and I hardly believe that nowadays a republic can hope to survive unless the lawyers' influence over its affairs grows in proportion to the power of the people."

De Tocqueville was not as kind to the press. He said: "The hallmark of the American journalist is a direct and coarse attack, without any subtleties, on the passions of his readers; he disregards principles to seize on people, following them into their private lives and laying bare their weaknesses and their vices." De Tocqueville thought "generally the American journalists have a low social status, their education is only sketchy, and their thoughts are often vulgarly expressed." Nonetheless he thought "the power of the American press is still immense." He said: "It makes political life circulate in every corner of that vast land. Its eyes are never shut and it lays bare the secret shifts of politics, forcing public figures in turn to appear before the tribunal of opinion."

Lawyers and newspapermen, together, forged the modern doctrine of Freedom of the Press. As a layman, in the presence of judges, I dare give it a practical and lay summary as at least one newspaperman views it.

A people who mean to enjoy the benefits of a free press, in my opinion, must create a climate in which the press can get information, can print it without prior restraint, can publish without fear of unjust punishment, can obtain paper and ink and other required material, and can distribute the printed matter through the mails and elsewhere.

This is the concept that was fashioned by the Colonial and Revolutionary experience. The fledgling press of the Colonial period battered at the doors of colonial assemblies until they opened them. On June 3, 1766, the Massachusetts General Court, on motion of James Otis, opened the proceedings to the general public, so citizens could hear the Stamp Act debates. Governor Francis Bernard's plans for quartering British troops were released by the Massachusetts Council on October 10, 1768, despite Governor Bernard's protest that "no civilized government on earth could function when its intimate deliberations were canvassed by Tavern politicians and censured by newspaper libellers."

The press and public gained access to their courts by a long struggle going back to Magna Charta June 19, 1215, with its declaration that the King's courts "shall be open to everyone." Chief Justice Warren Burger, in his historic opinion, in Richmond Newspapers v Virginia, related the long colonial struggle.

The right to print without prior restraint got its strongest support in our history of the Supreme Court more than 150 years after the adoption of the First Amendment, in the opinion of Chief Justice Charles Evans Hughes in Near v Minnesota. It was re-stated in the Pentagon opinions.

The right to print without fear of unjust punishment for publication got the most notable Supreme Court statement in Sullivan v New York Times. This opinion put alleged libellous statements about public persons on a different ground than ever before, holding matter published in good faith and without malice to be not libellous. But it has left a host of problems in its wake. The Courts of every circuit have been wrestling with a definition of a "public person", and struggling over the meaning of "malice". Libel suits by other persons have increased in number and in the amounts sought. These modern libel cases have reversed the roles of jurors and judges that existed in the 18th century. Then it was the judges who terrified the newspapermen; now it is the juries. Why is this?

There were few successful jury verdicts against the press when the local editor was a "vulgar" fellow (as de Tocqueville described him), with a shirt-tail full of type and a hand press. The "printer" was no part of the establishment. He was arrayed against the government and the forces of the wealthy and powerful.

The British government gave up trying to make cases against printers.

There is an interesting and ironic difference between libel actions today and those that took place in colonial America. Then the jurors were all on the side of the ink-stained wretches of the press, and the judges were all against the press. Now the jurors frequently find against the press; and the judges in appeals courts rescue the press on First Amendment grounds.

Now, the jurors often see the press as an instrument of great power. Its leaders are among the corporate giants of the nation. Its influence shakes governments. It is the very embodiment of power. When it appears in court in criminal or civil proceedings, it often appears in the form of well-dressed corporate lawyers of vast legal experience, training, and skill. Its officials and its lawyers are images of sartorial elegance, fashionable attire, and enviable hirsute adornment. No ink-stained wretches of the press in that crowd.

There is an instinctual aversion to great power in the hearts of Americans. They also mistrust men like those who have in the long train of human experience outfoxed, outwitted and outmaneuvered the ordinary run-of-the mill hominid clod.

The jurors are stirred by their deep subconscious rebellion against their betters, by these soft spoken, infinitely skilled, neatly well mannered, manicured gentlemen. Fellows like this started sneakily using spears when the club was the weapon of the common man, and they were the first to use the bow and arrow when the spear fell into disuse. The more skillful, the more persuasive, the more eloquent such men are, the more they arouse a visceral, primordial resentment of privilege and authority.

The press is going to have a hard job revising its image if it is to get along better with jurors. Let us hope it will not let juries intimidate it into silence in the face of wrong-doing that needs disclosure. Maybe it ought to exult less in its pursuit of the wicked, boast less of toppling the mighty, brag less about being a fourth estate, content itself with the role of the observer, and occupy itself less with the role of the grand inquisitor.

It is not enough that the newspapers often get rescued by appeals courts from the verdicts of juries. Not every little newspaper can afford great lawyers like the late Edward Williams who managed to get a million dollar libel verdict against the Washington Post reversed. (The Washington Post spent more than $1 million defending itself in the Mobil Oil case.)

Legal fees come high these days. Few small papers could survive a long lawsuit.

There are, of course, situations other than libel that threaten journalists with peril. Many states have passed shield laws to protect newspapers and reporters from court ordered disclosure of confidential sources. Maine does not have such a law. The Maine newspapers have not tried to get one. They have felt the Maine record has not demonstrated a need for a shield law and have been content to rely on the testimonial privileges deriving from the First Amendment, as it has been construed in many circuits. The recent Supreme Court opinion in the Hohler case does not alter that confidence in my opinion, for it narrowly applied to published evidence by known sources. That became a problem because the office of the Maine Attorney General failed to have a published standard governing the subpeona of newspaper witnesses.

It will be solved, one day, in my opinion, when the Attorney General of Maine adopts standards similar to those in effect in the United States Department of Justice since October 10, 1980. These standards require that a subpeona of a newspaperman may be sought only on the order of the Attorney General after it has been determined that the matter involved is relevant and material,

that it is essential to a successful prosecution, and that it cannot be obtained from an alternative source. The press has an argument with the Attorney General and not with the courts.

The sort of reporting involved in the Steeves murder trial (an interview with an accused man) is a kind of reporting that is useful to society and to the courts. But if figures involved in crime come to know that reporters are the agents of authority (or can be compelled by authority to appear against them) they will not talk to newspapermen any more readily than they would talk to policemen. They will deserve a Miranda warning, if they are willing to talk. This belief, widely held by some of the press, I know does not much impress the bench and bar, but I believe the existing risks to newspapers will chill some reporting until the Maine Attorney General adopts self-restraints on prosecutors like those adopted by the Department of Justice.

The threat to press freedom involved in the power of government to restrict access to paper and ink is not much present in American minds now. But it was a threat that roused the resistance of Colonial America to the British Stamp Act which threatened to destroy the puny press of colonial times.

It has been a threat repeatedly in many countries. Control of newsprint supplies was used by Dictator Juan Peron to extinguish La Prensa of Buenos Aires in the fifties. It is being used by President Ortega of Nicaragua to destroy La Prensa, in Managua, the sole surviving opposition newspaper. The Nicaraguan government has cut off La Prensa's local newsprint supplies and has commandeered paper shipped in by American paper companies. Newsprint is the life blood of the printed press and its impoundment has marked the rise of dictatorships in many countries of the world.

The right to distribute is a right that the United States dealt with in its earliest days. The British government's postal service refused to handle papers like the New York Journal and the Pennsylvanian Journal. So a parallel postal service was set up by William Goddard of the Maryland Journal on February 2, 1774. The Continental Congress took it over on July 26, 1775 and named Benjamin Franklin Postmaster General. By Christmas Day, the British postal headquarters in New York cancelled all deliveries throughout the continent.

There have been crises of distribution since the formation of the Union. During the debate on the U. S. Constitution, the Federalists were blamed for interfering with Anti-Federalist mails.

During the Civil War period, abolitionist literature was destroyed by Southern postmasters. Efforts to keep pornographic or obscene matter out of the mails have involved a great deal of litigation, now much diminished. Rising second class mail rates could reach a point threatening to the distribution of printed publications. Congress, oddly enough, is dealing this session with a restriction on the dissemination through the mails of lottery advertisements, still banned under postal laws and regulations.

The passage of the First Amendment, it is plain to see, has not put an end to all debate over press freedom. It is a debate that, in the nature of things, is endless. It promises to engage the attention of lawyers and journalists in every generation. It is a freedom that newspapermen and lawyers have labored to preserve, year after year. They may differ, from time to time, over the best way to do it; but they seldom disagree in broad principle and purpose.

Other issues than freedom of the press, of course, engage the attention and arouse the concern of members of our two professions. Some citizens are so unkind as to suggest that both of our professions stand somewhere below used car dealers in public confidence and respect. That should give us some anxiety. If this is true, it probably partly reflects historic public attitudes toward power.

Both of us must be concerned if this attitude diminishes the historic role of both professions in the leadership of the nation.

The Constitutional Convention of 1787 was signed by 39 delegates. Twenty of the 39 signers were lawyers. The number of lawyers reflected the enormous importance of the law. There were two planters, six politicians, four merchants, one banker, one business man, two generals, one statesman, and two physicians. The self described "statesman", I hasten to say, was Benjamin Franklin. Some of you may remind me that Ben was not the last printer to identify himself as a statesman. But that is not what worries me.

What worries me is that there are 151 members in the Maine House of Representatives and only four are lawyers. There are 35 members of the Senate and only one is a lawyer. In the House there are 34 members with no other profession but that of legislator, there are 24 business people, 18 educators, 13 retired persons, 10 government employees.

I believe the proportionate legal mix of the Constitutional Convention was better for the country. It was 20 out of 39 or more than 50 percent lawyers, while the Maine Legislature has only 2.7 percent lawyers.

I have less confidence in poll takers estimate of lawyers than I do in de Toqueville's estimate of them. He says: "The people in a democracy do not distrust lawyers, knowing that it is to their interest to serve the democratic cause, and they listen to them without getting angry, for they do not imagine them to have any arriere pensee. In actual fact lawyers do not want to overthrow democracy's chosen government, but they do constantly try to guide it along lines to which it is not inclined by methods foreign to it. By birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes; so he is the natural liaison officer between aristocracy and people, and the link that joins them."

Beyond this general interest in having lawyers in democratic legislatures, there is a particular interest. They improve the draftsmanship of legislative measures. Their skill and experience make it possible to determine by study what the lawmakers had in mind in any particular bill. To extract legislative history from some Maine measures is next to impossible. So I wish more lawyers were in the Legislature.

There are fewer than ever before, I suppose, because they are so much better paid in private practice.

But I hope a sense of public duty will bring them to the Legislature as it brought them to the Continental Congress and to the Constitutional Convention.

There are two other aspects of the environment of the law I would like to address briefly. One is location of the Supreme Court. The Legislature has approved placing the Supreme Court building in Augusta but money has not been appropriated for it. Only one other state does not have a Supreme Court building in its capitol. Chief Justice McKusick has taken the leadership in this matter. I hope before the Legislature gives away all its money, it may get around to remedying an historic, and inexplicable oversight of the first Maine Legislature.

There is another eccentricity in Maine's legal environment: it is also the only state in the Union in which the Legislature selects the Attorney General. Other states choose an Attorney General by election of the people or by appointment of the governor. They do so for good reason.

The Maine system produces an official state lawyer without a client and a state government without a lawyer. The office is a loose cannon. The Attorney General is an independent free agent who can go abroad to intervene in any legal controversy that excites his interest or partisanship.

He may write on any subject under the imprimatur of the State and speak with the voice of Maine whether or not anyone in the state agrees with him.

Any thoughtful observer of this century knows that the courts and the press nowadays are both confronted with many difficult problems. Many of these problems reach them as the result of the failure of other agencies and institutions. We are both at the end of the line. The criminal courts deal with situations that the political system has failed to handle. Events reach the press after the fact.

The inability of democratic political processes to cope with many social and economic issues shoves the failures of the political system onto the courts already crowded with their historic burdens. Problems that once were dealt with by elections, legislatures, and bureaucrats, families and churches reach a system of justice not originally devised to deal effectively with moral and social problems.

Maine lawyers, judges and journalists face the new challenges that confront their colleagues in the rest of the country. We like to think they are somewhat better prepared to deal with them.

We like to believe that both professions profit by a long history of cordial relations and mutual endeavor in the public interest. They will need the strengths that derive from a common professional purpose in order to cope with future problems more difficult than any that our society has faced in the past.

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