

JRW Essay on First Amendment
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The jury as a major device in our system of justice is a flawed instrument.

Its flaws flow from the source from which it is drawn. It cannot rise far above the level of the people whose views it faithfully reflects. Like the people generally, it is moved by its conscious consideration of evidence and by subconscious impulses that arise from age-old characteristics derived from the primordial experience and residing in that reptilian part of the brain about which no man knoweth much.

Resident in this region, and proceeding from thousands of years of human experience, is an instinctual attitude toward power. Power is hated. It is feared. It is resisted. Whenever it is encountered, it inspires an effort to resist it, to curb it, to alter it, to repulse it.

This impulse was a chief ally of the puny press of the pre-Revolutionary period in America. Colonial administrators were unable to bend the colonial juries to their will. Authority was seldom able to get a jury to convict for disregard of the law and rarely able to get it to convict the impoverished colonial printers courageous enough to assault the establishment. By the time of the Revolution, the British government had largely given up on colonial juries.

Recent events in American courts show the age-old instinct has shifted to the other side. The jury, now, clearly perceives the press as a place where power resides. It has seen governments

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resign after widespread publicity given to executive misbehaviour. It has seen the press prevail in the exercise of its right to publish material hostile to government. Such events do not wholly or always derive from the power of the press. The misfortunes of government officials are mostly self-inflicted wounds, but the blood from wounds that are self-inflicted and that coming from the lash of the press is indistinguishable. So the jury associates the press with power. And the exercise of power inspires its customary response.

The feeble spark of the juror's intellect is often extinguished by the vast quantities of fuel that lawyers, witnesses, and judges heap upon it. The more flourishing flame of the instinct burns briskly on despite rhetorical deluges of counsel and witness. The subconscious offers up its influence and testimony against power.

There were few successful libel suits against the press when the local editor was a vulgar fellow with a shirt-tail full of type and a hand press. No juror could mistake these ink-stained wretches of the press as pillars of great power, or identify them with the establishment. How different it is now. "The press" is a great powerful entity of the establishment. Its leaders are counted among the corporate powers of the nation. Its influence makes the agents of government tremble. It is the very embodiment of power — economic, political, and social.

When "the Press" appears in court, as an accused entity in criminal courts, or a litigant in a civil proceeding, it appears in the form of well dressed corporate lawyers of vast legal

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experience, training, and skill. The officials of the press parade through the witness box, images of sartorial elegance, fashionable attire, objects of perfect grooming and enviable hirsute adornment.

Now the instinctual aversion to power is joined by other impulses from the subconscious. The average juror is not thus accoutered or thus endowed. In the long train of human experience it is men such as these who have outfoxed, outwitted, and outmaneuvered the ordinary run-of-the mill hominid clod. From the deep recesses of the subconscious comes a warning, an admonition, a signal to beware of these soft-spoken, infinitely skilled, neatly manicured gentlemen. Such men have been mistrusted for thousands of years by the multitudes of their fellow men. It is fellows like this who started sneakily using spears when the club was the prevailing weapon, and who began to employ the bow and arrow when the spear fell into disuse. They were watched narrowly, mistrustfully, and skeptically from the mouth of every prehistoric cave when they went by. The more skillful they are, the more persuasive they are, the more convincing they are, in intellectual terms, the more they set loose those instinctual warnings and misgivings.

The dislike of the multitude for those who held power and privilege in colonial America saved poor printers once; now it threatens a press that has become as powerful as colonial governors — or more powerful.

This new situation of the press must be faced by publishers and editors. The press cannot stop printing information that is

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resented and disliked. It must not be intimidated into silence in the face of wrong-doing. Without doing either it probably can change its life style in ways that will not so speedily summon forth the instinctual revulsion against the exercise of power. Perhaps it ought to exult less in the pursuit of wickedness, boast less of toppling the mighty, appraise more conservatively its role as the fourth estate of government, accept more publicly the role of the observer, don less frequently the robes of the grand inquisitor. The reality of the press as a part of the American power structure cannot be removed. The press can proceed with greater caution in cases that clearly involve high risks of winding up in the civil courts. It can take more pains to make its exposures objective and impersonal. It can pursue the victims of exposure with more pious regret and less exultation. It can do less to arouse the age-old antipathy in the subconscious of the jury against the powerful, the vindictive, the vengeful, and the ruthless.

Even then, the jury will remain a flawed instrument — as flawed as democracy itself, not good, but better than any known alternative.