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Panel Discussion

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Panel Discussion*

Professor Stotzky: I would like to begin by noting that my statement in introducing the topic this morning has proven true. That is, just what it means to be in favor of freedom of speech and press is a question about which reasonable people can differ. On that basis, it seems we have several different theoretical viewpoints, maybe four (perhaps I represent a fifth), about what it means to have freedom of speech and press in this country. My position is that any adequate theory of speech and press cannot be built without an analysis of the implications of the values undergirding the first amendment. These values, in turn, are reflected in the paradigms of the first amendment that I offered you this morning.** Thus, the jurisprudence of the first amendment requires one to draw upon several strands of theory in order to protect a wide range of "expressive activity."

What I would like to do is start off with a general question and ask the members of the panel to respond to it. The distinctions that the panelists make in answering the question should shed light on their first amendment theories. It should also heat up the debate.

I would like to begin the discussion with a quote from James Madison, who once stated: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or, perhaps, both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives."¹

I would like to see how we all come out on the question of exactly what it means to have a right of access to government-controlled information. Let me make two assumptions. First, I assume that all of us would agree that, to some extent, there is a right of access to government-controlled information in some circumstances. Second, let us for the moment treat the press and citizens

* The panelists were: Dean Soia Mentschikoff, Mr. Anthony Lewis, Professor Irving Younger, and Professor C. Edwin Baker. The moderator was Professor Irwin P. Stotzky. The tape recording of the discussion was transcribed verbatim; however, to facilitate reader comprehension, members of the *University of Miami Law Review* slightly edited the transcript. The changes made were strictly grammatical in nature, and the staff conscientiously attempted to retain the flavor of the discussion as it occurred.

** See Stotzky, *Foreword: The First Amendment and the Press*, 34 U. MIAMI L. REV. 785, 786-88 (1980).

1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 WRITINGS OF JAMES MADISON 103 (1910).

alike.

Answers to the question could take different forms. On one end of the spectrum is the position that there isn't much of a right to access; and even if there is, it isn't all that important. I suppose I take the extreme opposite position, just for argument's sake [laughter], that one has a right to any information the government possesses when it operates in a public fashion. I would like to open that question up first to Mr. Lewis.

Mr. Lewis: My answer is to go about it the way Dean Mentschikoff said, case by case. We do not have to answer now, in our farthest reach of the imagination, what the right of access will demand in the year 2000. Now, I don't mind judges worrying about that. They have to. I think it is the duty of judges when they establish a principle to worry about its consequences and where it will go.

I agree with a lot of things that have been said today. For example, I thought the list of six elements that Professor Younger propounded was a fine list because virtually all of it came out on the right side—in favor of access.² [Laughter.] That would be my bias, and I say that if you are arguing this in the real world, Dean Mentschikoff is absolutely right. If you expect to convince the Supreme Court that there is such a thing as a right of access, a right to acquire information, you are going to have to stand up there and say, "Gentlemen,"—or I hope soon "Ladies and gentlemen,"—"this is easy. I am only asking for this tiny little thing. You don't need to worry. This is only a little, basic, minute right to acquire information that we are talking about. The need is so overwhelming, what I call the 'accountability requirement,' the need of the public for information to deal with a subject, that it is your democratic duty to deal with and develop a way to protect this need."

Professor Stotzky: I would like to respond with one question. I think that one must begin to answer the access question first by looking at what Madison said, and second by asking whether we have a popular government in which people are supposed to be involved in the system, or whether we have a government which is supposed to make decisions for the people, not necessarily in a vacuum, but perhaps cut off from the people in a manner that doesn't allow the input that the assumptions of the democratic society (at least the ones I assume in this question) de-

2. See Younger, *In Search of Premises*, 34 U. MIAMI L. REV. 807, 814-16 (1980).

mand. It seems to me, then, that you must ask yourself *what* the society should stand for, and *why*, before you can begin to answer the access question. And I just bring that up to Mr. Baker.

Professor Baker: You asked the first question and I thought of an answer, and then you changed the question. I don't know what to do.

Professor Stotzky: You can answer the first question first. [Laughter.] Then, you can answer the second question.

Professor Baker: And the first question itself was a typical law professor's question. You said when the government operates in a "public fashion"—I assume that when it operates "publicly," you do have a right to information. The difficult question is to determine when it has a right to operate nonpublicly.

Professor Stotzky: That's all right; you can start with that if you would like to change the subject.

Professor Baker: First of all, it should be clear that, as to the right of access, I agree with Anthony Lewis that the press right and the individual right have the same foundation, and that you can analyze them similarly.

I note that on the Supreme Court, at least, the constitutional right to information or the right to know hasn't advanced very far. The main cases that are cited for the right to know—like the case mentioned by Anthony Lewis, receiving propaganda of a communist nature from abroad³—involve the notion of a willing speaker and a willing listener. The Court has a number of times intervened to stop the government from preventing that interchange. What the Court hasn't done, in any case that I can think of, is say that you have a right, as a constitutional matter rather than as a statutory matter, to receive information that somebody doesn't want to give you.

It is these types of cases, these types of claims, that recently have been coming to the Court, and which are usually decided five to four. It is usually four plus one deciding that in this case there is no right of access, but with one of the five, namely Justice Powell, who says, "Not in this case, but in some cases there is."⁴ This leads you to conclude that there are always five justices in favor of access sometimes but five against it right now. [Laughter.]

3. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); see Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793, 797 (1980).

4. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 835-36 (1974) (Powell, J., concurring in part and dissenting in part).

I also agree with Dean Mentschikoff that not everything can be made a constitutional matter. In a functioning democracy, or in any form of good, decent government (which may necessarily imply a functioning democracy), you need to have information, and people ought to know how the government is operating.

Remember back in the Vietnam War days when a Vice President would tell a student audience, "Don't you worry about that. You just don't know what I know; if you did, you would agree with me perfectly." We kept hearing that for years and it was never convincing. Some members of the Senate Foreign Relations Committee suggested that Congress should not be asked to act and should refuse to accede to any type of Administration request until the government gave Congress the information and allowed the American public to have that information, so that Congress and the public would know the basis for the Administration's proposed activities.

My inclination is certainly in favor of general openness, and I think openness will result in a much better society; but I have difficulties with putting the requirement into a constitutional framework. The country and the press need to demand that information be obtained and, usually, they will eventually be successful when there is a good need for information. But a judge errs when she decides in an individual case, "Well, okay, now I will give you this," without beginning to think about what principles would allow for the limitation of access, assuming that the judge is going to impose a limitation at some point. Judges need to think of the theoretical principle that would justify the decision in that individual case. I don't see principles that, as a matter of first amendment doctrine, are going to provide limits or guidance.

Indeed, even where the Constitution seems to provide a specific right to public information, as in the guarantee of a public trial, the Court arguably rejects the possibility of interpreting that clause to allow access. Although there is language in the Constitution saying that accounts of government expenditures must be published, we don't get information about what money is allowed or spent for the CIA, directly contrary to the public right to information specifically guaranteed in the Constitution. The Supreme Court did nothing in the suit asking for that information.⁵ I am not sure that the courts are the place to demand information.

Professor Younger: The question Professor Stotzky posed

5. See *United States v. Richardson*, 418 U.S. 166 (1974).

involved the extent to which information should be made available to people in connection with issues of self-government. There are several reasons to support freedom of speech and freedom of thought in general, self-government being just one of them. Let me add a few words on that matter to what has already been said.

A principal theme of American history, and of the kind of secular religion that we all profess, is the "consent of the governed"—the substantial participation by the governed in government, either directly or indirectly through their representatives. We know there are many tensions between the ideal and the reality. We know there are many exceptions, and we know that in many ways we still haven't quite adjusted the original conception and the popular religion to the realities of what has been called a "post-industrial society." Still, I am one who likes to believe in what I learned when I first studied American history, that the consent of the governed and the participation of the governed are very important matters. It seems obvious to me that if those are important matters, it is necessary that the governed be informed. There is no way to participate and no way to consent in any way that counts if you don't know what you are consenting to or what it is you are participating in.

We understand, however, that this is not a blank check, that there will be situations in which information ought not to be available. Each of us has touched upon various aspects of these situations. I suppose that if I were making an argument to a court in the next case down the line, I would do my best to remind the court that this is indeed the American idea, that people ought to know. The situations in which they do not have a right to know are exceptional situations. Falling back upon the rather trivial skills of the lawyer, I suppose I might try to evolve an argument whereby we presume a right to know, and only if there is good reason not to indulge in that presumption will we deny information to the governed. That is about the best I can do with it.

Dean Mentschikoff: I think that Madison was talking about a different kind of society than the one in which we live, so he could see democracy as a much more intimate thing. It would be lovely if people could find out what was going on and were interested in what was going on. What I find, however, is that a great many people aren't particularly interested in what is going on, except when it is something that they think will affect them, or all of us, in some dramatic way. At that point, they try to find out by writing their Congressman, which is one source of information.

You write your Congressman and say, "What is going on?" and if you trust him, you will believe him; if you trust your union leader, you will believe him; if you trust your governor, you will believe him; and if you trust Tony Lewis, you will believe him. [Laughter.] I think that is really what it is all about.

On the other hand, there are certain papers that have certain slants; when they say something, I say to myself, "It could be; it could not be." The same thing happens in TV. Who do you like on TV? Do you like the local TV people? Do you like the national ones? When Cyrus Vance gets up and says something, what do you think of him? When Jimmy Carter gets up and says something, what do you think of him? The business of trying to find out what is going on is an extraordinarily complex thing. The stuff that is selected for publication, by and large, doesn't tell you what is going on.

We all know, because we are lawyers, that courts sit around and haggle when they are deciding cases. This apparently came as a blinding revelation to these two characters from the *Washington Post*.⁶ Come on. Where have they been all their lives? There's nothing new about this, and it is not limited to the Supreme Court. The fact is that people get mad at each other. Have you ever gotten mad at a friend? Have you ever said, "He is a dopey so-and-so, and I would like to slit his throat," or whatever? [Laughter.] These things are not uncommon. But throughout the whole business, these reporters acted like children: "Oh, God, can you imagine? The Court talks like that?" The Court is people. People talk to each other this way.

Now, these reporters are conveying the information, but in what way are they conveying the information? They are conveying it as if they had something sensational. They are conveying it in a gossip kind of way. You can take the same information they knew and convey it as a fascinating story of what factors entered into a decision.

You can get the same kind of information from reading cases and opinions in a certain way. A good deal of the same information emerges very clearly. If you read the majority opinion in the *Houchins* case,⁷ you learn a great deal about what six members of the Court think about what has been going on with the press and what they have been subjected to.

6. See generally B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979).

7. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

Other people may not feel that way, but the Court has been subjected to a good deal of press harassment—what I feel is harassment—in the last five or six years. I don't blame them for being annoyed. I think the Court has put up with quite a lot of nonsense, and every once in a while, I guess they can't help sending the needle out in their turn.

I think Madison, however, was dealing with a very different kind of life. Earlier today, when Anthony Lewis pointed out the tremendous differences that industrial organization and newspaper organization make, we were really hitting at a very fundamental aspect which makes a good deal of what was said earlier irrelevant in many ways.

Mr. Lewis: I would make just one further comment. We may have gone by Professor Baker's extremely important reference to the Vietnam War too fast, because in a way, an extraordinary way, what happened in this country then was something close to a town meeting or a Jeffersonian notion of an informed democracy affecting the policy of its government.

We entered the war with the public assuming, first of all, as Professor Baker said, the superior knowledge of its governors, and then assuming the rightness of their policies. The more the public learned about the war, the less it was able to go on with those assumptions, so that we had a rather remarkable test of the principle.

Professor Stotzky: I think there is a second factor that seems to run through everybody's discussion, and I am not sure exactly how it all fits into our discussion of the theoretical underpinnings of the first amendment in any broad sense. It seems to be a question of institutional arrangement both under the Constitution and within the press itself.

One of the arguments for allowing the press access to any government-controlled information is that one of the functions of the press is to act as a fourth branch of government—as a check on the other three branches. In some ways the argument can be made—I think Professor Baker comes as close as anybody to making it—that the press has become a public institution, which would change the relationship between the citizenry in our society and the press. If the press has become a government institution, what are the implications of that for some of these cases? I think this perception fits in a bit with Mr. Lewis' point that we must look at this question in regard to the interrelationship between big government and big media corporations because the question has now be-

come much more complicated than it was during the early history of our nation. I suppose that question speaks not only to the implications of the theory of freedom of speech, but also to the question of the allocation of the say. That is, which branch of government is to make the rules with regard to the press: the legislature or the courts?

Professor Baker: Well, the "public" institution notion carries a lot of different implications; it is somewhat hard to sort out exactly where you would go from there. For instance, there has been some notion that when the government operates a press, it becomes like a public forum, and they must permit nondiscriminatory access to it. But that doesn't seem to follow necessarily. We have the government operating presses, such as the Voice of America and the military papers, which sometimes take a very particular editorial perspective, and we haven't found that constitutionally impermissible.

Likewise, we find the government setting up private-like presses or communications industries. These are partly insulated from government. The Public Broadcasting Corporation and maybe some student newspapers perform such a role. They have some type of public status, but what that implies is unclear. If the press is a part of government, as a general matter it seems that the government can make a lot of different choices about organizational form; but when the private status of the press means that the other branches don't get to choose the content or the form, then the argument begins to be more like the Fourth Estate argument I was making this morning, where the press is protected and insulated from the legislature and the executive. The private press is not so much a part of government as to have legal or constitutional responsibilities, but it still enjoys a constitutional status as an institution that plays a particular role in our society. That was the Fourth Estate argument I was making.

Professor Stotzky: Not only would the press act as a check on government, but it would apparently serve the instrumental value of getting information to the people to allow them to make choices about the system. Is that your argument?

Professor Baker: Granting our need for access to information, there are a number of ways to approach the goal. One way is to give people specific rights to the information. Another way is to set up institutional arrangements that give you some expectation that there will be people trying to obtain and make available information that the public needs. It is somewhat a policy choice, which

of these you use, or, more likely, what combination of these that you use. My argument was that the Constitution protects some of the institutional arrangements for providing information. That interpretation provides the basis for special rights of the press as well as leaving room for the other type of solution, access rights to specific information, which are generally going to be established through legislation such as the freedom of information acts.

Professor Younger: I am ready to vote with Professor Baker on that. I would phrase it in a somewhat different way, though not as well, I am sure.

Yes, we live in a republic and a democracy, and that is marvelous. Still, government is the repository of power. Our government, the government of the United States of America, is an overwhelming repository of power. I believe, as did Lord Acton, that "power tends to corrupt and absolute power corrupts absolutely."⁸ James Madison and Thomas Jefferson certainly believed that, although they did not have the benefit of the phrase of Lord Acton.

There is, therefore, always an adversarial relationship between the governed and the government, even in this blessed country. One of the profound insights of the founders was that in order for the governed to function more effectively as adversaries to the government, they must have information. You cannot trust the government to give them that information, because the government, by and large, will always wish to withhold the information, which gives the government an advantage. Hence, you need a free press to act as a conduit between government and the governed, and they gave us that free press in the first amendment. That is why I vote with Professor Baker.

Mr. Lewis: I took the question in a somewhat different sense and have a strong feeling about it. So, I will take it in the sense that I have read it.

I always resist the easy talk about the press being the fourth branch of government. I think it would be extremely dangerous for the press to claim any such status. I am against it, and the reason I am is that I think, as Dean Mentschikoff suggested, that along with such status go liabilities and responsibilities. If the press is to have that kind of quasi-official role in our system, I am convinced that the public will sooner or later shoulder it with obligations, legal obligations.

8. Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), reprinted in *LIFE AND LETTERS OF MANDELL CREIGHTON* 372 (1904).

Professor Van Alstyne of Duke a few years ago wrote a funny piece⁹ (only I didn't think it was so funny, and he didn't think so either) about a mythical situation in which three people knocked at the door of a prison. One of them was a member of the press, and two others were the chairman of the "Prisoners' Rights Committee" of the Socialist Workers Party and a concerned person privately interested in prison conditions. They were all turned down and they all sued, but only one of them won—the noble member of the press, in his role as the fourth branch of government. The Supreme Court said, "You alone are entitled to go in—the superior rights of the press, the fourth branch of government," et cetera. He was very pleased, and he wrote his article. Then someone who was in the prison, an inmate, sued on the basis of what was in the article and said it was false. Lo and behold, the Supreme Court of the United States reconsidered *New York Times Co. v. Sullivan*¹⁰ and said: "You now have a kind of fiduciary role. You have been clothed with certain power, and with that you have a certain responsibility, my dear chap. We are sorry, but you now are liable for what you say since you were performing it in this quasi-official function."

I don't know if it would work exactly like that. What I do know is that I am very nervous when people talk about the press being a part of the official constitutional arrangement. I don't even like the word "institution." It makes me feel funny. I like the press to be a bunch of freebooters, which is what it has always been, not institutionalized. That relates to another point that I didn't develop freely in my talk, one that makes me nervous about Professor Baker's approach.

I don't like the idea of a special status for the press because, then, somebody will have to define who the press is. When the man in his neighborhood is outraged by some local activity, some local development, and starts putting out his own pamphlet or protests and circulating them among his neighbors, somebody will determine in some legal situation whether he is part of the "established press" (to use Mr. Justice Stewart's phrase¹¹) that is entitled to special privileges under the Constitution. I think the somebody

9. See Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

10. 376 U.S. 254 (1964).

11. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 632 (1975). Justice Stewart uses the phrases "organized press," "established news media," and "established press" interchangeably.

will be the courts, and I don't think that the press will welcome the notion of a new kind of licensing which determines who is in it. I would not welcome it.

Professor Baker: There are just a couple of points that I want to make. Oftentimes, carrying out the logical implications of various principles, in trying to come up with a principled approach to constitutional law or other areas of the law, will get you in trouble because what you have to say will be misunderstood and be perverted to lead to results that you don't like. It has been suggested that the life of law is not logic. That doesn't seem to be a good reason to avoid trying to figure out what principles are acceptable and what their implications are.

You will note that nothing I said this morning would lead to the idea that the press has any particular responsibilities. There may be good reason for criticizing the press for not carrying out some of the functions for which it merits particular constitutional protection, just as we criticize legislatures. The analogy I would make is to legislatures or to Congress, a view expressed very well by Justice Linde in the article, "Due Process of Lawmaking," delivered as part of the Oliver Wendell Holmes Devise Lecture Series and published several years ago in *Nebraska Law Review*.¹² This argument is that the state's power is plenary, except for what the Constitution specifically says it cannot do. There is no requirement, for instance, that the legislatures be rational in what they do; our current constitutional doctrine seems to say to the contrary, though without much force.¹³ We have these institutions; we have the legislature to promote the general welfare. That doesn't lead automatically to the notion that when it fails to do so, it has failed to live up to its constitutional obligations, and you strike down what it has done. There can be general reasons to provide institutional protection, without any implication that the failure of the institution to perform as you desire is a basis for invalidating what it did or regulating or imposing new legal duties on it.

Mr. Lewis: This may be the time for me to say that I found Professor Baker's breakdown of the categories of press rights, if there are to be superior rights, a persuasive one in one regard; but for the purposes of this discussion let's drop the third, which I think less significant, and make it the defensive and the offensive

12. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 196 (1976). See also Linde, *Without "Due Process,"* 49 ORE. L. REV. 125 (1970).

13. *Id.*

rights. I think that is a useful analysis, and I think it explains Justice Stewart's position. I think when you come right down to it, Justice Stewart does see himself as enlisting on behalf of the defensive rights where somebody, namely the government, is coming in and attacking the press in its lair, as in the *Zurcher* case,¹⁴ or in its sources, as in the *Branzburg* case.¹⁵ But having said that that is a good analysis of Justice Stewart, I remain totally unpersuaded by its wisdom. Maybe I can explain in terms of a question to Professor Baker.

Suppose that you have the *Branzburg* situation. Let's take that. Suppose that—and this is, of course, a bit of playing law school, the hypothetical was a real case—suppose, Professor Baker, you had been interested in the war in Vietnam and had written a paper on that subject, based in part on your conversations in Vietnam with American officials to whom you had promised anonymity. One day either you were called before a grand jury and asked for those names, or, alternatively, the police came to your office at the Oregon Law School with a search warrant with which they ransacked your files, looking for the names of your sources. Do you think your rights would be less or should be less than those of someone denominated a journalist?

Professor Baker: Okay. Twofold. First, one thing I didn't do in my talk this morning, but which I tried to do somewhat in the paper,¹⁶ although possibly not with great certainty, is to define the press. The cases have viewed the press as including the broadcast media and, presumably, the film industry, the book publishing industry, and a fairly wide range of commercial communication enterprises. It is conceivable that educational researchers might be included in that group, so I could avoid your question by arguing that my research would fit. One pragmatic reason to distinguish between "offensive" and "defensive" rights is that press involvement is more clearly discernible in the case of defensive rights. When I go around asking people questions and looking at the world, I may have no idea whether I am doing it for future communication purposes or whether I am doing it just to satisfy my present curiosity. Once I have started communicating to the world, you have enough information to decide whether to view my activities as the press. Notwithstanding the possible grounds to argue I

14. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

15. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

16. Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980).

was the press in the case you describe, in my paper I came up with the contrary conclusion and suggested very tentatively that the press is the people whose professional roles are connected with enterprises engaged primarily in offering communications to the public or who individually take on this activity on a regular basis. Those people, those press roles, are protected. So, I have worked myself into your question again, and I am about to be asked the questions by the grand jury.

There are arguments of the type that Justice Douglas made in his dissent in the *Branzburg* case,¹⁷ which suggest that everybody should be privileged to resist this type of inquiry. Douglas adopted both a press theory and an individual freedom theory, and I find his argument quite powerful, that both the speech and press theories lead to protecting sources. In contrast to Douglas, I will assume that because I am a nonpress academic, no individual freedom theory protects my sources. Nevertheless, I would find it acceptable to set out certain roles and give them particular privileges. We do that in lawyer-client relationships, certain doctor-patient relationships, and psychiatrist-patient relationships, because we think that the social value of protecting those roles deserves the privilege.

If the press has constitutional status, one of the key aspects or meanings of that status, I think, would be to give it this privilege. Although I would find it unfortunate and troublesome that I would be forced to disclose my sources, I think the particular arguments for giving the privilege to the press don't apply to me. So, unless I can come up with some other argument, I would have to answer the questions.

Mr. Lewis: I think that defines the difference between us, because I think that informing the country under our system cannot be restricted in any sense of privilege to one class of persons. I think that would be fundamentally violative of our constitutional theory.

Lawyers have a denominated function, doctors have a denominated function, priests do, agreed. But under our system, many sources, many persons, and many institutions contribute to the information of the public. I would regard it as wrong to try to denominate a class of persons to whom this function was particularly entrusted, because I know from experience that professors or Ralph Nader or CIA employees or anybody may contribute to that

17. 408 U.S. at 711 (Douglas, J., dissenting).

information which enables us to control the government.

Professor Baker: Of course, I agree entirely with what you say in terms of the government trying to stop me or stop the press from communicating what we have learned. At that point the arguments for the press and the individual are the same. If the purpose of the government's inquiry is to stop me from speaking, rather than to gather valid information for the grand jury, I think it would be impermissible, just as the harrassment of the press would be impermissible, as the Court suggested in *Branzburg*.

Second, I think that the speech or communication rights of the two should be the same; both the individual and the press can print or speak about what they have learned. The pamphleteer in the neighborhood, whether or not denominated the press, certainly cannot be stopped from distributing those pamphlets or saying what the pamphleteer wants in those pamphlets. At that point, I agree with you entirely. It is only as to the privilege of not communicating to the grand jury, that I argue there is a difference.

Mr. Lewis: But that was the case, a real case, and the professor went to prison. I think the answer for me has to be that what is involved is values, not classes of persons, and that it must be up to the court in each case to weigh those values. Whether the person happens to be a denominated, an established, journalist is irrelevant.

Professor Stotzky: Take that one step further. In your argument, unless I misunderstood your position, you made a suggestion that private censorship of the press might create state action in certain circumstances. If so, how is that going to be worked out in any particular case, number one, and secondly, why doesn't the corporation have first amendment rights—or the owner of a corporation? As a matter of fact, the Supreme Court has directly said they do, but I am just wondering how that might work, in your theory.

Professor Baker: Why don't I try to answer the first question, and if you still want to hear more from me, then, I will move to the second. [Laughter.]

What I suggested this morning is that state action is present virtually everywhere in our definition of property rights. In fact, one of the key cases in the first amendment area, *New York Times Co. v. Sullivan*,¹⁸ was between two private parties. The question was, does the first amendment mandate a property allocation one

18. 376 U.S. 254 (1964).

way or the other? In other words, does it mandate a property allocation contrary to that made by state law? The Supreme Court answered yes. I then suggested that, by analogy, the first amendment might mandate a property right allocation that favors the press employee against the press employer.

After saying that and suggesting that the notion of freedom of the press should be interpreted as freedom for press personnel, which would be a strong argument for siding with the press employees' position, I began to get troubled. There are an infinite number of different rules or different ways that the institutional arrangements among owners and employees could be set up. It is hard to imagine that anything in the constitutional document specifies the exact rules in this context. At this point, I think I would want to fall back on the notion that there is protection for this particular industry in the Constitution, but suggest that, in this industry, the government may have authority to establish those rights and relationships of decisionmaking authority as it chooses, as long as it doesn't do a variety of impermissible things. First, the government can't have a purpose to stop the working or the functioning of the press, in terms of performing its informative role or checking function of exposing government abuses.

Professor Stotzky: How do we know what its purpose is?

Professor Baker: That is a good question, and it is, as you know, a topic of constitutional law that has been generating articles by the trailerload recently. This is not the time for me to work out my views on this in detail.

I would state that, first, you immediately look at the context of the action of the government. Does it make more sense, given this historical setting and the context of this bill coming up, to explain the legislation as an attempt to provide for the functioning of the press and to protect the freedom of the press personnel in a way that doesn't violate freedom of speech of wealthholders, or was the legislation intended to get back at the press and to destroy its ability to function?

Of course, the legislature may have had good intentions and still the law may interfere somewhat with press functioning. But, of course, lots of our laws and the other decisions of the government make it more or less viable for an industry to operate. For instance, it is quite clear that the decision to have local broadcasting units, rather than regional broadcasting stations, may be a reason that we have fewer networks. If we had had a more regional form of broadcasting, we would have had more networks, and that

might have increased the diversity that the government wanted. But, as long as the government does not interfere with the integrity of the press as an independent institution or have a purpose to restrict or to get back at the press, the law should pass constitutional muster.

Mr. Lewis: I don't want this to become too much of a "dialogue" (whatever the word is), but what Professor Baker said just now, and again this morning, suggests to me something that I find an insoluble dilemma, and I would welcome comment on it from anybody. It relates to his theory of separating out the ownership from the personnel of the press and having the rights of the press attached to the latter. Professor Baker rightly called attention to the problem of media concentration, the single voice in a large part of the country, but I find therein a dilemma that I have not been able to find any way out of, and it is this.

On the one hand, we are entirely right to be extremely concerned about media concentration when a single chain, the Gannett chain, for example, owns many newspapers in many parts of the country. While it is true that the Gannett and Newhouse chains do allow considerable independence of local editorial decision, still one may assume that a certain sameness in outlook of the kind of editors and in the general premises that they bear is likely to occur, and that there may be a concentration of economic power and a tendency towards a single voice, so that it is a bad thing in terms of the Jeffersonian or Madisonian view of democracy.

On the other hand, and this is the part we haven't thought about yet, I think that in the age of big government there is a certain value in having powerful media even if they are concentrated media. I put to you the example of Watergate, where you may recall that when the *Washington Post* was leading the investigation of that affair, Attorney General Mitchell said that he was going to put the anatomy of the publisher of the *Post*, Mrs. Graham, through a wringer.¹⁹ I think it took a considerable amount of courage for Mrs. Graham and her company to keep on doing what they were doing, and my notion is that it was easier for Mrs. Graham to have that courage when her company owned the *Washington Post*, *Newsweek*, television stations, and many other vast enterprises, than if it had been a nice little local Jeffersonian paper.

Professor Baker: I agree with a lot of what Tony said, and I share his opinions in many respects. Part of the reason for the

19. C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* 105 (1974).

second part of my talk this morning was to raise issues that we need to think about in terms of freedom of the press that usually aren't discussed in this context. Without having fully thought out the answers, I could elaborate on why these issues are important. But I have had a harder time figuring out how to think about the specific example you gave.

Nixon's view was that it might be more difficult for the *Washington Post* to investigate Watergate, given its ownership of all these other enterprises. In fact, Nixon decided to create problems for the *Post* in its TV and radio station license renewal proceedings. The *Post's* conglomerate nature may have left it particularly vulnerable. Although it is a popular theory, I do not see why the integration of a large city paper into a nonmedia or even media conglomerate would make it less vulnerable to political intimidation or more willing or able to engage in exposés.

Mr. Lewis: Because I think you have made a necessary correction to my example, let me give a less popular example. I live in Boston, which has a dominant local newspaper, the *Globe*. Boston has a struggling second newspaper, the *Herald*. The *Herald* is a Hearst newspaper. I think it is desirable for Boston to have two newspapers, rather than one. I believe that is good for the city and the theory of democracy and so forth. The reason the *Herald* has been able to last as long as it has is that the Hearst empire has other valuable properties and is willing to keep the *Herald* going although it loses money, and it is trying to change the *Herald*. So, that is the kind of thing that makes me worry about the theory that bigness is automatically bad. That is all. I should have used that example.

Professor Baker: That's a good point; if the economic interests behind this conglomerate wanted to put a new newspaper into Boston and subsidize it with the wealth they made in other press activities or in some business completely separate (at least, as I was arguing this morning, if an individually wealthy person rather than a corporation did this), then there might be a constitutional right to do it—essentially, a speech right. The right to use your money to subsidize your communication activities, I think, must be protected. That is the reason why the particular rules designed to regulate the business or to control its size must be scrutinized and may get into trouble either on a press theory or on a speech theory. But I don't think that either press rights or speech rights, by themselves, will rule out all government attempts to regulate the structure of the communications industry; so it is a

question of looking at the individual cases with a theory of the speech and press clauses.

Professor Stotzky: I would like to ask one question that perhaps will switch the focus of the topic. Should the press have any greater rights to speak than any individual? I would like to address the question to Mr. Lewis if I may. Assume that the press writes an article about an individual who was convicted of a crime thirty years ago, and for some reason they think it is a matter of public interest today. They print it, and it has a great effect on the life that this individual leads today. Does the press have any right to make a constitutional claim that that particular publication ought to be protected?

Dean Mentschikoff: I take it the action is being brought for invasion of privacy.

Mr. Lewis: It is a privacy action.

Professor Stotzky: Or you can make it for defamation, whichever you prefer.

Dean Mentschikoff: You are assuming truth.

Mr. Lewis: There is a famous privacy case that is of exactly that character. It is the *Sidis* case,²⁰ a very touching one about a young man who was a boy genius. At the age of eleven he lectured to the assorted mathematicians of the world about the fourth dimension: he went to Harvard at twelve and graduated at sixteen and so forth. Then he lapsed into idleness and lived in a dingy hall bedroom in the Back Bay of Boston and devoted himself primarily to collecting used streetcar transfers. [Laughter.] All of this comes from a story in *The New Yorker*, entitled "Where Are They Now?"²¹ [Laughter.] Anyway, the reporter for *The New Yorker* went and interviewed poor Mr. Sidis, who sought absolute obscurity. He was obsessive about his obscurity, and it was pierced by an article that told the truthful, but painful, and indeed pathetic tale, as the United States Court of Appeals for the Second Circuit said in deciding against recovery for invasion of privacy.²²

On the other hand, the California courts had a similar kind of situation, the *Red Kimono* case,²³ where the lady had been the madam of a bordello eight years earlier. She had reformed and was a pillar of society in her community, and a motion picture com-

20. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).

21. Manley, *Where Are They Now*, THE NEW YORKER, Aug. 14, 1937, at 22.

22. 113 F.2d at 809-11.

23. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

pany made and released a movie about her past life. She sued and she recovered, and that is the law in California.

Well, I will give an answer to this. Forgive the law-teaching long introduction, but it does tend to make it concrete. My answer to this is totally unrepresentative of my profession, and it should be so stated. I think there should be recovery in a sufficiently agitated case.

Professor Stotzky: To follow that up, should there be recovery if I make a statement or print a statement about a public official? Should the press maintain its constitutional privilege under *New York Times v. Sullivan*?²⁴

Mr. Lewis: Are you talking about a privacy case?

Professor Stotzky: No, a defamation case.

Mr. Lewis: Would I overrule *Times v. Sullivan*? No, I think *Times v. Sullivan* was probably, to me, the most satisfying, greatest first amendment case of my lifetime.

Professor Stotzky: So, then, you would protect statements made by the press about public officials under *Times*?

Dean Mentschikoff: This wasn't done maliciously, I take it.

Professor Stotzky: Just assume that a false statement was made about a public official.

Mr. Lewis: That is *Times v. Sullivan*.

Professor Stotzky: All right, say it is a true statement, but it harms his reputation.

Mr. Lewis: A true statement? No. There is no defamation recovery for a true statement.²⁵ Conceivably there could be some aspect of a public official's life that is protectable, but I doubt it in this country. If a public official is drunk or beats her husband or that kind of thing [Laughter.]—Professor Baker has set a very demanding example to follow.²⁶ [Applause.] I wanted him to know that I was listening. In this country I think practically anything that a public official (at least, perhaps, an elected official) does may bear on her or his capacity as a public official. So I am dubious, but if you are talking about Mr. Sidis, that is a different question for me.

Professor Baker: I take it you weren't suggesting that the answer was different whether you were talking about the press or about a private individual, either in the question or in the legal

24. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

25. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 116 (4th ed. 1971).

26. See Baker, *supra* note 16, at 822 n.**.

conclusion.

Mr. Lewis: I hope that was not the question because my belief—this comes to your third category of what you call “speech”—I forget exactly how you put it.

Professor Baker: Some people have interpreted some cases as saying the press has special rights against defamation actions.

Mr. Lewis: If that is the question, my answer, consistent with my other answers, is no, there is no difference. Although not many people have noticed it, that is exactly what *New York Times Co. v. Sullivan* decided. Not only did it involve four black ministers as well as the *New York Times*, but a specific section of the opinion considered separately the facts as applied to the four ministers and entered judgment for the ministers²⁷—very unusual in a Supreme Court opinion.

Professor Stotzky: I would like to open up the floor to some questions, but I have one more. [Laughter.] Assume that a newspaper reporter gets his hands on the plans for the neutron bomb and decides he wants to publish those plans. Suppose that word of the reporter's intentions gets out and, of course, a court issues an injunction against him. I suppose we all know that “prior restraints” are dirty words in constitutional law. The question that I would like to ask is whether there any instances you can envision in which prior restraints ought to exist and, if so, whether that somehow differs from subsequent restraints under the Constitution? Is there really a difference in kind, theoretically?

Dean Mentschikoff: I think there is a big difference in kind. My God, you know if they were ever going to post the dates of the sailing of ships out of New York Harbor in the Second World War with the submarines lying outside, I would prior restrain them so fast it would make your head spin. [Laughter.]

Professor Younger: I don't see how there can be any reasonable disagreement with that position [laughter], but the question is a vexing one. When that case comes along, of course, you restrain it. You don't permit the troop ships to be sunk, and if it is a matter of putting atomic weapons in the hands of irresponsible people, you make sure that it doesn't happen. But that is because, as we have been instructed, the Constitution is not a suicide pact, and your head has to be screwed on the right way. [Laughter.] We must remember that nothing is infinite in its reach.

Mr. Lewis: Are we voting yes or no on this? I am also

27. 376 U.S. at 286.

reasonable.

Professor Stotzky: Is anyone unreasonable?

Mr. Lewis: Something has to be added which I think is very, very important, in this area when you get away from the extremes of the obvious case where all reasonable people will agree. The hard part is when there is an interplay of courts and Congress, which in my opinion is what the Pentagon Papers case²⁸ was about, although not many people noticed it. It was an area on the borderline. As it turns out, it wasn't very near the borderline because nothing happened, nobody even remembers what was in the Pentagon Papers, and the country didn't fall—it wasn't anywhere close to falling. But as it appeared to the judges at that time, it was near that line; and what made the difference, I think, on the Supreme Court was that it was in an area where Congress had not legislated, which can be very important. Congress has legislated in some areas, notably the nuclear bomb area, where it has laid down a scheme of prior restraints for atomic information; in those areas, I think the courts are going to be readier to enjoin.

Professor Baker: I don't want to attack reasonableness and take an extreme position. Rather, I would make a couple of comments.

First, it is not clear to me what the difference is between enjoining somebody and saying that if you fail to follow the injunction, we will punish you, and making what you are about to do illegal and threatening to punish you if you fail to follow the law. Maybe, one could enjoin something but not prohibit it directly, or could prohibit it directly but not enjoin it—but why? In regards to the sailing dates of the ships with the submarines right outside the harbor, we might conclude that publication could be prohibited and punished, but why should the question whether the prohibition is by prior restraints or by general rule affect the first amendment analysis? Still, Mr. Lewis's point about Congress's lack of action deserves attention.

The second point is that it is very, very easy to think that we have the case of the neutron bomb that you described, when we don't. It seems that a lot of the country thought we did with the *Progressive* publication about nuclear weapons,²⁹ where now most people are concluding that it wasn't quite that issue at all. So we should be very careful on that order.

28. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

29. *See United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

Finally, I'm left with a quite troublesome problem. I think back to the time when we made our surprise invasions of various countries on the borders of Vietnam—Cambodia, I think, or Laos. If newspapers had publicized the information that we were about to make this surprise attack it seems reasonable to conclude (or the government attorneys shouldn't have had any problem arguing) that this publication would cause the loss of a lot of lives. It also seems that the mood of the country at that time may have been so strong that if the attack had been publicized two, three, or four days beforehand, the strength of the reaction in the country could have changed government policy. Those lives, or the particular lives we were worried about when we wanted the prior restraint, wouldn't have been lives lost at all, because the war would have gone in an entirely different direction after this public outcry. So when information is relevant for decisionmaking, even if a reasonable person would conclude that keeping the information secret may be necessary to save lives, it is not clear how the case should come out. Given those caveats, I think we should go back and think about what type of expression we are protecting and why we are protecting it, and see if we can distinguish those cases on the basis of our general theory of the first amendment.

Dean Mentschikoff: Of course, you hear those cases in camera. You don't hear those in public. They are like custody cases—or like custody cases used to be.

Professor Baker: You mean you enjoin publication and also enjoin the publication of information about the court's decision to enjoin the publication? It is like Blackmun's decision as a Circuit Justice in *Nebraska Press*³⁰ where he enjoined the press from publishing the facts of his opinion, which, of course, was a published opinion.

Mr. Lewis: Well, the *Progressive* case was heard almost entirely in camera.

I have a comment on the question raised by Professor Baker about whether there is a difference between prior restraints and subsequent punishment. I think there is. I don't think it is just a simple thing. Perhaps the formalistic way the Supreme Court has gone about it is wrong, but I think there are real differences. At least two occur to me. One is that prior restraints are heard by

30. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1334 (Blackmun, Circuit Justice, 1975) (not staying order that may suppress reporting of some of the facts stated in Justice Blackmun's opinion).

judges and subsequent punishments are decided by juries.

The second is a political point, which is that it is easier for governments to act against powerful establishments, private persons, and institutions by civil restraining actions rather than by criminal cases. That was clear to me in a British example, the Crossman diary case,³¹ where the late Richard Crossman had kept a diary while he was a member of the British Cabinet. After his death, it was published in serial installments in the *London Sunday Times*.³² After the second or third installment, the government brought an action to enjoin any further installments and to enjoin publication of the planned book. The action was brought against the executors of his estate, his widow, Michael Foot (who was then a member of the Labor Cabinet), the publisher, and one or two other people. The government brought this action for an injunction, though no such action had ever been brought before, and there was no statute allowing it. It was a novel theory and it failed.

They brought that action rather than bring a criminal case under a widely known and used statute, the Official Secrets Act, which might well, indeed, very probably did, apply. Why did they do so? In my opinion, because they did not want to put Mrs. Ann Crossman in the docket. It would have been perfectly outrageous, and the public wouldn't have stood for it. Similarly, I think it was much easier to sue the *New York Times* in the Pentagon Papers case,³³ than to make Mr. Arthur Sulzberger the defendant in a criminal case. It is easier to bring a prior restraint, and therefore it should be guarded against more closely.

Professor Baker: There is perhaps a footnote to be added. The occasion for writing John Milton's *Areopagitica*,³⁴ of course, was a proposal to require the licensing of books. Milton, perhaps, more than the participants in today's program, was concerned not so much with the speaker, but with the content of the speech. He was perfectly agreeable to have any kind of subsequent penalty that you wish, but his point was that you did not restrain it prior to the speech because the public would be deprived of the content of what was to be distributed, which was an important value to

31. *Attorney-General v. Jonathan Cape Ltd.*, [1976] 1 Q.B. 752 (1975).

32. *Sunday Times* (London), Jan. 26, 1975, at 15; *id.*, Feb. 2, 1975, at 15; *id.*, Feb. 9, 1975, at 15; *id.*, Feb. 16, 1975, at 15; *id.*, Feb. 23, 1975, at 33.

33. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

34. J. MILTON, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, To the Parliament of England*, in *COMPLETE POEMS AND MAJOR PROSE* (Hughes ed. 1957).

him.

Professor Stotzky: Unless there are other comments, I wish to open up the discussion to questions from the floor. Does anyone have any questions? Mr. Bane.

Audience Member: I have a question for Mr. Lewis. If I understood you correctly this morning, you stated that the Supreme Court of the United States is justified in holding its deliberations behind a closed door because the results of those deliberations were in the form of an opinion and judgment, and the reasons for that were made public in their published opinions. I would like to ask how far you would carry that theory. Would you agree that the judge in the *Gannett* case³⁵ would be acting properly in excluding the press and the public from a pretrial hearing if he had undertaken that he would enter an order following the pretrial hearing and give his reasons therefor? Would you agree that institutions that are subject to Sunshine Laws,³⁶ such as the town council, public utility commissions, and school boards, could also meet in executive session, provided that the results of their deliberations were published with the reasons therefor?

Mr. Lewis: Let me begin at the end and say that whether or not to pass a Sunshine Law is not for me a constitutional question. I was trying to puzzle out in a very primitive way the beginnings of some notion of a constitutional theory of accountability. As to that, I think the difficulty with the *Gannett* case is simply that the theory of the *Gannett* case would remove from public scrutiny the overwhelming portion of the criminal justice process in this country. If it were applied across the board, most of the criminal justice process in this country would never be seen by the public, and I would regard that as an entirely impermissible result.

I think *Gannett* was wrongly decided on the first amendment. I happen to find the analysis of the text of the sixth amendment by Justice Stewart for the majority to be persuasive. I think the amendment was designed for the protection of the defendant, the accused, rather than giving a right to the public.

Now, I am not sure whether I have missed some of your question

Audience Member: I also mentioned institutions that are subject to the Sunshine Laws, and I asked whether, by analogy to

35. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

36. See, e.g., FLA. STAT. § 286.011 (1979), which provides that all state, county, or municipal board or agency meetings at which official acts are taken are considered public meetings and open to the public at all times.

the reasoning justifying Supreme Court deliberations in secrecy, secret meetings of school boards and town councils would also be constitutionally justifiable in your view, provided that they published the results of their deliberations.

Mr. Lewis: I think that is different from my position in another respect. I am looking at it as a matter of accountability, and on the whole, a local school board is accountable rather quickly. It seems to me that a school board has either been elected—probably been elected—or appointed in a way where accountability is seen in the process, even if it does hold executive sessions. I would find it extremely difficult to see in the first amendment a constitutional requirement that would eliminate occasional executive sessions in the school board, although I would not favor them. I think it is different when an entire process, as in the *Gannett* case, would be effectively shielded from any meaningful public scrutiny.

Audience Member: Thank you.

Professor Stotzky: Are there any other questions?

Audience Member: If we were to analogize the *Gannett* case to, perhaps, the *Sheppard* case³⁷ and say that at some point some kind of restriction must be placed on the press to prevent an unfair trial and prejudice, who should determine what level of prejudice triggers the restriction? If the cases say that once the press has access it cannot be prevented from printing, and if the view is that access cannot be denied, then at what point will the press be prevented from printing something that will, in fact, prevent a fair trial?

Professor Younger: I suppose if the line has to be drawn somewhere, the appropriate surveyor is the judge. I can't imagine that anybody else participating in the process is going to be the one to say, "All right. At this point, close the doors," or whatever it may be. The question, however, is really whether that situation should be allowed to arise at all, or whether the way to handle it is to close the doors informally a little bit earlier.

Some of us were talking about what you do if you are a defense counsel in the trenches and you represent someone about whom there is a lot of public interest and some scare headlines are appearing in the paper. What do you do? If that viewpoint is uncongenial to you, suppose you are the judge; after all, to some ex-

37. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). When the trial court allowed newsmen to overrun the small court room, creating confusion and frequently disrupting the trial, the Court found that this "massive," "pervasive," and "prejudicial publicity" prevented the defendant from receiving a fair trial. *Id.* at 333.

tent you take your responsibility seriously, and you want to see to it that the trial is more or less fair, et cetera. Of course, the prosecutor shares some of the responsibilities of both defense counsel and the court. As I was struggling to say in my remarks this morning, I sometimes wonder whether the whole thing isn't a kind of false issue in the sense that, to a very considerable extent, the appellate courts are deceiving themselves and not looking with sufficient care at the realities underlying the words that they so readily spin out.³⁸

I no longer defend criminal cases, but I was once in considerable practice at defending them. I never even dreamt of asking that the courtroom be closed, although I did have some cases which had some publicity. If I were defending a *Sheppard*-type case, I suspect that I would ask the judge not to close the doors. Indeed, if he suggested to me he was going to close the doors, I would say, "You are doing it over my objection." Of course, then the sixth amendment comes into play and he can't close the trial.

It seems to me that an astute defense counsel will turn publicity to advantage. I want a jury, and the first thing I am going to tell the jury is:

This is a case that is going to be absolutely drenched in the most outrageous publicity you can imagine.

Are you going to be fooled by it? Of course not.

Are you going to decide the case from what the newspapers tell you? Of course not.

And you are going to decide the case on the evidence presented here.

They will be leaning over backwards to do it. In short, you turn it to an advantage.

Let me mention that in my own "ballpark," the Southern District of New York, a great many cases have been tried which potentially were the source of tremendous amounts of adverse publicity. I can't recall a single instance from 1960, when I became an Assistant United States Attorney, through today in which a judge in the Southern District of New York has been asked to close the doors in a criminal case, putting aside the Pentagon Papers case or something of that kind. The practice has developed—and it has worked very well indeed—of the prosecutor simply asking the press to hold off and keep it quiet:

38. See Younger, *supra* note 2, at 812-13.

Hey, fellows, you have some professional standards. Be responsible about it. We will tell you everything you want to know and make the files available to you after the verdict. But so long as the trial is going on, will you please handle yourselves in a manner appropriate to professional people?

That has worked very well. Long trials have taken place in the Southern District with virtually not a word in the newspapers. Everything was reported afterwards. The doors were open, and the reporters were there taking it all down.

Think of how many cases Clarence Darrow defended in which the publicity was pervasive. He never asked to close the doors. He didn't want the doors closed. He turned the publicity to an advantage when addressing the jury in the *Scopes* case.³⁹ It seems to me that is the way to handle publicity, rather than invite these intractable constitutional problems.

Professor Stotzky: After the *Gannett* case, as a matter of fact, some judges had an interesting strategy. They would allow the public in during a trial but not the press, which, I suppose, raises other interesting questions.

Mr. Lewis: I want to say that I agreed with what Professor Younger said this morning and has reiterated in part now, that the danger of prejudicing juries has been much exaggerated in this country. Perhaps the reason we have gone so far is that very extreme cases were decided by the Supreme Court. The first case was *Irvin v. Dowd*,⁴⁰ in which seven of the twelve jurors on voir dire said they had read all about the case and thought the defendant was guilty before they heard the evidence. That was an extreme case. Another extreme case was *Sheppard*,⁴¹ where there was a Roman carnival going on right in the courtroom.

Most of the cases are not so extraordinary. As the Watergate coverup trials and many other cases reflect, it is quite possible for juries to resist this. So, I am with Professor Younger very hesitant about bringing on these great constitutional dilemmas.

Professor Younger: At the risk of being denounced as un-American or something worse, let me tell you that this idea of sequestering the jury just infuriates me. What kind of society have we come to be when we send the defendant home at night, but imprison the jurors? [Laughter.] This is, after all, exactly what we

39. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). See generally M. VON HESSE, *INHERIT THE WIND* (1943).

40. 366 U.S. 717 (1961).

41. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). See note 37 *supra*.

do.

Now, I am never going to be on a jury, but if I ever were on a jury, and the judge said to me that for six weeks I was going to be locked up with strangers and deprived of the companionship of my family, that I could have only one cocktail at night, that my newspaper would be vented, and that some deputy marshal must fiddle with the television set before I am allowed to watch it, then I would rise in my dignity and say, "Your Honor, you can do that if you want, but I guarantee there will be no verdict in this case," and then let him handle it! [Laughter.] I would say to him, "If you tell me not to read the papers, I won't read them; if you tell me not to watch television, I will not touch it; but I am going home every night and you are not going to lock me up." Some day some juror is going to say that, and then let's see what happens. [Laughter.]

Professor Stotzky: The juror might spend some time in jail.

Professor Baker: I agree with and find interesting many of the comments, but I think one other thing worth noting is that there is no need to find any conflict between the constitutional rights of fair trial and freedom of the press. Both are restrictions or demands placed upon the government. There is no basis to think that the government in meeting its constitutional obligations has the right to interfere with any individual's constitutional rights. The government is posed with the problem of providing a fair trial without at the same time violating first amendment commands. If it cannot do this, the government always has the solution of letting the defendant go.

Professor Stotzky: Are there any other questions?

Audience Member: Mr. Lewis, I believe you stated in your address that the press is not entitled to any protection outside the free press clause. Would you agree that the press could possibly look elsewhere for special protections, say, by virtue of the free speech clause itself, due to its function as a conduit for the dissemination of ideas?

Mr. Lewis: No, the answer to that is no. You have read me awry. I don't think I said precisely what you stated as my reason for thinking so. I simply take the speech and press clauses together as analogous clauses to protect communication, whether written or spoken, by anybody. I think whatever rights inure in those clauses inure to everybody because I don't think the word "press," for the historical reasons I gave, meant the media. I think it meant the product of the printing press. Anyway, my answer to your substantive question is that I do not think the press in our modern sense

of newspapers, magazines, and broadcasters has any rights other than those that other people have in any part of the Constitution.

This was, indeed, Justice Stevens' point in the *Houchins* case,⁴² that everybody has the same rights to inform himself about a public institution such as a prison, if there is no other way to make it accountable to the public, which he took to be the case. He asked himself the question, "Why, then, am I ready to affirm an injunction that allowed this press institution, a television station in San Francisco, KQED, to go in?" He said the answer to that is a familiar rule of law. They were the people who asked. You don't have to admit other people who haven't asked. They showed the enterprise, and perhaps they are performing that function, so they are entitled to go in. When somebody comes along who represents the Prison Reform League, we will deal with his case.

And I think it is true that, as a practical matter, it is usually going to be the press that is out there performing this function; but I wouldn't analyze its rights as separate.

Professor Stotzky: If I might just pick up on that—if the assumption is that both the public and the press have access to some institution, would anybody make the argument that the press ought to have more effective access because of the different function it might be serving? Would that fit into anybody's theory here? Nobody would agree with it? Yes, Mr. Maschel.

Audience Member: Justice Burger, I believe, in the second *Pentagon Papers* case,⁴³ asked whether it wasn't inconsistent for the press under the guise of the right of access to get the name of the government's informers, but then to refuse to disclose the names of its informers in judicial proceedings like, for instance, the *Farber* case.⁴⁴ I would like to ask Professor Baker whether he agrees with that, and if not, why.

Professor Baker: Well, first of all, I didn't argue for a constitutional right of access on the part of the press, and so I didn't argue that the press had a first amendment right to get the names of the government's informants. What I would claim is that they have a right to publish any information that they do get. That right, I would take it, is the same as an individual's right to communicate any information an individual has. The speech rights or the communication rights of the individual and the press should be

42. *Houchins v. KQED, Inc.*, 438 U.S. 1, 39 (1978) (Stevens, J., dissenting).

43. *New York Times Co. v. United States*, 403 U.S. 713, 751 n.2 (1971) (Burger, C.J., dissenting).

44. *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978).

the same.

To go back to a concurrence rather than a dissent, Justice Brennan in *Nebraska Press*,⁴⁵ if I remember correctly, suggested that the press should be able to publish information about the trial no matter how it gets the information. Now, that doesn't mean that the reporters couldn't be punished for breaking and entering or doing whatever they did to get the information. In fact, protection for breaking and entering sounds like the offensive rights that I argue aren't protected; but once they get the information, they are allowed to publicize it. I didn't argue that either of the two branches should be able to force the other to disclose this type of information.

The protection you give to different institutions is going to vary, depending on the reasons you are giving it and on what protection they need to carry out their functions. For instance, it seems perfectly proper to have constitutional provisions mandating that the government publicize expenditures and make that information available, even if those constitutional provisions are unfortunately not followed. And, of course, by legislation, we can decide to make various things necessarily available; but I didn't argue in either case that one party had a constitutional right to the information about the other's sources.

Audience Member: Perhaps this goes to Professor Stotzky's last question. What about the situation at the *Bakke*⁴⁶ Supreme Court argument where the press, I take it, was given a certain position where they could sit and listen to the whole argument. Yet the public was only allowed to sit in for something like three minutes at a time; they were made to rotate. What kind of argument can you make to say that the press should have adequate access, but that the public shouldn't? Perhaps, Mr. Lewis.

Mr. Lewis: It strikes me as a sound, wise, constitutional—[Laughter.]

Dean Mentschikoff: I agree with you; it was an outrage.

Mr. Lewis: Well, I suppose we are dealing in a practical world, and I don't know that I can come up with a constitutional justification for that any more than for your not being allowed into the President's press conferences in person. That is the representative function of the press that Justice Powell talked about in

45. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 572 (1976) (Brennan, J., concurring).

46. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (oral argument reported at 46 U.S.L.W. 3249 (U.S. Oct. 18, 1977)).

*Saxbe v. Washington Post Co.*⁴⁷ In reality, in the kind of society we have, there has to be some allocative system, and I guess that is it.

Professor Stotzky: Do you mean to say that the press and the public should be treated as equals, except in some situations?

Dean Mentschikoff: Sometimes the press is more equal. [Laughter.]

Audience Member: Given the sometimes more equal nature of the press, I find it somewhat interesting that the press doesn't scrutinize itself that much. You won't see in one paper, "Well, the other paper printed this, and we feel they were distorting it for this reason."

Professor Younger: Well, that is a comment on the obligation, if there be an obligation, of the press to be as harsh upon itself as it is upon all the rest of us. I suppose it would be most graceful for a member of the profession of journalism to respond to that, but while he prepares his gracious words, I will say that as one whose appetite for dirt and gossip is as unlimited as the next man's [Laughter.], I have the impression that while more might be done—I don't want to say that the press is above criticism—of course not—but there are publications which do review the press. There are people who continue the great tradition A.J. Liebling established years ago of reviewing the press as if it were baseball.⁴⁸ There are people like I.F. Stone, essentially individual entrepreneurs who engage in examination of the press; and there is, of course, the common sense of the average person, which I like to think recognizes that whatever you are told in the newspaper must be taken with a grain of salt.

All yours, Tony. I warmed them up.

Mr. Lewis: I think that the point made by the questioner is a fair point. The press has been in the past rather pompous about itself and unwilling to discuss its own doings very frankly, and I agree with Professor Younger that that is changing. Some newspapers—the *Washington Post* and the *Boston Globe* are the two in my reading experience—have formally appointed somebody on the staff to be what they call an ombudsman, who receives readers'

47. 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

48. A.J. Liebling (1904-1963), a journalist and reporter, is best known for his critical and humorous inside look at the press in a series of articles appearing in *The New Yorker*. These articles were later collected in *THE WAYWARD PRESSMAN* (1947) and *MINK AND RED HERRING* (1949), both describing his life as a newspaperman and his impressions of the press.

complaints and writes articles about them when he thinks it is justified. It works to an extent.

Journalism reviews have started, which are highly professional and often would fulfill your dearest desire for not only hard-hitting criticism, but gossip and stridency and whatever else you would like. The *Columbia Journalism Review* is, I think, very tough on the magazines and papers and broadcasters it discusses. I think that is all to the good.

A further proposal is for an American equivalent of the British Press Council. One, the National News Council, has been established at the suggestion of a study by the Twentieth Century Fund; but some of the leading news organizations, including the *New York Times*, have refused to cooperate with it on the ground that it is a step toward the institutionalization of the press and the foisting on it of quasi-official responsibilities.

Audience Member: This morning, Professor Younger, you implied that you would be in favor of closing certain hearings or trials when all the parties involved agreed that they should be closed. One thing that bothers me about this is in the case of a criminal trial. Suppose the defendant is informed that the judge has discretion in sentencing him, and that the judge wants the trial closed and the prosecuting attorney wants the trial closed. Suppose the public defender representing the defendant lives in this community with the judge and the prosecuting attorney and must deal with them on a day-to-day basis. So in that case does the defendant really have a choice—a free choice—of whether he wants that trial open or closed? In that situation, are there any checks to ensure that when the defendant doesn't want the trial closed, he can keep it open?

Professor Younger: Well, the only check I can suggest is the professional obligation of the defense counsel to do what he thinks is in his client's best interest, no matter how hard the judge looks at him and no matter how displeased the judge will be with him the next time they meet on the golf course. No lawyer worth the name of lawyer would dream of giving up what he believes to be in the client's best interest to considerations of the kind that you are identifying.

I don't mean for one moment to suggest that it doesn't happen, but it ought not to happen; and if you are a lawyer of the kind I think you want to be, you will not permit it to happen. It is a lesson every young courtroom lawyer must learn early in his days in court. There will come a time when you will have to stand up

and simply say what you think you have to say, risking the displeasure of the judge. In the trial end of this business, there is a statement to this effect—I have run across it all around the country, so it is not limited to my hometown—"You are not really a trial lawyer until the day comes when you are held in contempt." That marks your baptism. [Laughter.]

Audience Member: Mr. Lewis, is the release of information from the Supreme Court three or four days prior to the official decision, with no apparent public interest or great urgency, a little unethical; and if so, how should it be handled?

Mr. Lewis: I am afraid the answer to that question may be a generational one; at least, I have so observed. I wouldn't do it myself. But, maybe it isn't generational, because some younger colleagues of mine take the same view. On the other hand, others in the journalism profession think that is a "fuddy-duddy" outlook, old-fashioned and excessively identified with the interests of the institution that we are covering.

I never thought that scoops about the Supreme Court were particularly valuable. Reporting three days earlier what is going to happen anyway in three days didn't seem to me to contribute a great deal to the learning of mankind. It is very different from a scoop that discloses something that makes a real difference to the public debate, such as the disclosure of the Bay of Pigs or the Cambodian invasion or the disclosure of something that was going to be secret altogether like Watergate. Those are different. I think scoops that merely anticipate what is going to be public in a little while are without value; and all I can say is that my view is not the only view, and there is a kind of aggressive, competitive feeling that it is just good to be there first.

Audience Member: Professor Baker, given your offensive and defensive rights and the rule against government appropriation of legitimate work product of the press, how would you give substantive content to that "legitimate work product" to protect the offensive and defensive interface, where access to important information, relevant to informed public choice, was officially denied by the government, but the press had nonetheless acquired it?

Professor Baker: I am not entirely clear about your hypothetical, but any information that the press obtained without itself breaking the law (or even by breaking laws that restrict voluntary communications) would be part of its legitimate work product. As for information that they broke the law to obtain, by breaking into a building or something like that, I have suggested they should still

be able to publish it; but if the press itself is accused or suspected of being involved in a crime, then I think that the government has the power to investigate it. At this point, the press may have a fifth amendment privilege, but it probably wouldn't have a constitutional basis to resist a subpoena or a search warrant.

In some ways the press is similar to lawyers, though the examples will not be perfectly parallel because their functions differ. I assume the press should not be allowed to keep information secret when they are engaged in crime. Likewise, lawyers may be required to give information that they have about a crime that is about to occur. It becomes very interesting whether or not the rationale for the press privilege and the rationale for the attorney privilege lead to the same conclusion. I tentatively argue that, here, denial of the privilege would interfere with the proper functioning of the press but not of attorneys and, therefore, only the press wouldn't have to give information of crimes that are about to occur.

I think you are right to point out the legitimate work product notion as an interesting and difficult one; but generally speaking, absent the press engaging in a crime, I would include the information that it gathers as part of its work product and as the type of thing that would be protected by privilege. Is that responsive? I am not sure.

Audience Member: Yes.

Professor Stotzky: We will address one more question, and that should end the discussion. Professor Gaubatz.

Audience Member: I am just a little bit curious. You make the analogy of the press to attorneys and to doctors and what-have-you when releasing information; and yet you call it the fourth estate, and also analogize it to the other three estates in government. I was wondering whether you would think that the other branches—the other estates of government—might benefit from the same lack of disclosure that you would leave the press.

Mr. Lewis: One of the reasons that I do not share the view just stated, that there should be an absolute or automatic testimonial privilege attaching to members of the organized press, in Justice Stewart's phrase,⁴⁹ is that I do not think along those lines. Indeed, I think, as I said this morning, that other values have to be weighed, and one of those is law enforcement.

For an example that nobody has mentioned but to me is very

49. See Stewart, *supra* note 11, at 631.

strong, suppose that the *Branzburg* case⁵⁰ had been decided the other way, and a very strong, qualified, but far-reaching privilege had been given to members of the press, however they might be defined, to decline to disclose information despite rather compelling claims of law enforcement. I wonder what effect that might have had on the case of *United States v. Nixon*.⁵¹ I liked that better the way it came out. I have always thought it was a marvelous little bit of history that in writing the opinion of the Court in *Branzburg v. Hayes* (an opinion which came down on June 29, 1972, though it obviously was written earlier; June 29, 1972, in case anyone has forgotten, was twelve days after the break-in at the Watergate), Justice White said that a reason for denying the privilege to journalists was the ancient rule that the law is entitled to every man's evidence.⁵² In a footnote, White wrote that Chief Justice Marshall, sitting on circuit, had opined that even the President of the United States would have to reply to a subpoena.⁵³

Professor Baker: I think the question is powerful. Let me note at least some of the problems.

Wasn't *United States v. Nixon* a case where the party who was being asked to answer questions or provide materials was suspected of engaging in wrongdoing, the type of thing that isn't a legitimate work product? I think it was. [Laughter.] I think that if you gave Nixon the same type of privilege that I was suggesting for the press, it wouldn't have helped him. That response, however, doesn't go far enough.

There is a lot of legitimate work product of the executive branch of government or of the legislative branch that I think can be kept secret. I believe that access usually isn't constitutionally mandated. But I think most information ought to be and, particularly if mandated by legislation or by a specific constitutional provision, often must be made public. A privilege for the press means, in part, that its activities, unlike those of the legislative or executive branches, could not be subject to open meeting laws or mandatory disclosure. You can't make the press be so open.

In figuring out what we mean by the integrity of an institution and its ability to carry out its functions, we have to work within the context of what type of institution it is. A lot of the specific

50. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

51. 418 U.S. 683 (1974).

52. 408 U.S. at 688.

53. *Id.* at 689 n.26 (quoting Chief Justice Marshall in *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d)).

procedures or processes of government are laid out in the Constitution. In fact, the organization of government is largely what the Constitution is about. The powers that the different branches have to pursue their objectives are different. I assume that the power of the press comes primarily from the word. The primary power of the legislature is to legislate, although that is not its only means to accomplish what it wants. So my analysis would be that the arguments for the privilege apply according to how the privilege would affect that branch's ability legitimately to make those decisions and carry out those activities that justify its structural position in our government.

Are there grounds for thinking that the Constitution has established the proper degree of openness or privilege, or is this an area where Congress should decide whether openness or privilege best promotes our welfare and freedom? In almost all cases, my inclination as to the executive vis-a-vis the legislative branch is to conclude that the legislature would have that power. But that is certainly not the position of the executive branch, which would claim, in some cases where it hasn't been involved in wrongdoing, that it may have some inherent rights of special executive privilege. Usually, those arguments are unconvincing. Nevertheless, I think you have to analyze the constitutional role of each branch to determine whether and when it has a constitutional or legal right to secrecy.

Professor Stotzky: Thank you very much for coming today.
[Applause.]