From THE AMERICAN SCHOLAR, Volume 44, Number 4, Autumn 1975.

The Great Disorder of Speech

PAUL A. FREUND

IN THE YEAR 1976 WE CELEBRATE THE ANNIVERSARY of a seminal event in the history of human liberty—the introduction of printing into England by William Caxton, A.D. 1476. To the problem of the dissemination of knowledge and ideas the new device brought a promise of solution: a promise merely—recall that the Emperor Charlemagne read with difficulty and could never get the hang of writing. To the sense of community and order, at the same time, the device brought a threat of dissolution. How the promise and the threat have been assessed by those who think and those who govern is the subject of this synoptic sketch.

The two great dangers facing modern society, Paul Valéry has said, are disorder and order. When I quoted this *aperçu* in England at a symposium on civil disobedience, the presiding officer, a peer of the realm, remarked, or rather snapped, with Podsnappian disdain, "Oh, that's very French!" Perhaps so; but it is matched in the words of an American who was presumably a good lawyer and certainly a very great poet, Wallace Stevens, in his "Connoisseur of Chaos":

> A. A violent order is disorder; and
> B. A great disorder is an order. These
> Two things are one. (Pages of illustrations.)*

These verses might be an epigraph for my essay, which is meant to furnish some "pages of illustrations."

PAUL A. FREUND is Carl M. Loeb University Professor at Harvard University, where he teaches constitutional law. He is the author of *On Law and Justice*. "The Great Disorder of Speech" is the text of the fourth Jefferson Lecture in the Humanities, delivered in Washington, D.C., on April 30, 1975, under the auspices of the National Endowment for the Humanities.

* This and other poetry selections are from *The Collected Poems of Wallace Stevens*. Reprinted by permission of Alfred A. Knopf, Inc.

Liberty and community, freedom of expression and its limits, were notably addressed by the great English secular trinity of Johns: Milton, Locke, and Mill. "Give me liberty to know, to utter, and to argue freely according to conscience, above all liberties." Milton's attack on licensing of printing was passionate, but it was prudently circumscribed in two, and possibly three, respects. This exalted liberty was for the exalted in belief:

> I mean not tolerated popery, and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpate, provided first that all charitable and compassionate means be used to win and regain the weak and the misled; that also which is impious or evil absolutely either against faith or manners no law can possibly permit, that intends not to unlaw itself.

What was to be fostered in the quest for truth were "those neighboring differences, or rather indifferences," that marked the disputations among Protestant sects.

Milton's argument was circumscribed, not only doctrinally, but procedurally as well. The attack was directed against licensing, prior restraint, censorship in its most literal form. The criminal law, in its seventeenth-century mercies, remained. For those publications that, coming forth unlicensed, were "found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy that man's prevention can use." Precisely why, from the point of view of either the publisher or the victim of a criminal libel, it is more obnoxious to ban the publication than to inflict condign punishment thereafter was not made clear. This is not to be critical or condescending toward the most magisterial pronouncement on the pursuit of truth, any more than it is in derogation of Democritus that his vision did not dissect the atom in the terms of Niels Bohr. The case against prior restraint remained to be elaborated by history. A third limitation in the *Areopagitica* is problematic. The fact that Milton himself subsequently served for a year as a censor of newssheets suggests, at least, that the omission in his great tract of explicit reference to that form of publication may have been deliberate.

A generation after the *Areopagitica,* John Locke extended the scope of toleration, as befits one who objected to the doctrine of in-

nate ideas, but still with caution in the name of the social compact: ". . . those are not at all to be tolerated who deny the being of God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist."

More than a century later, when John Stuart Mill took up the theme of liberty, the religious-political complex had receded as a threat, but there was a residual apprehension of the mob, the great unwashed. "Liberty as a principle," Mill wrote, "has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one."

In his well-known reply to Mill, Sir James Stephen thrust at the chink in the armor. "Why then," asked Stephen, "may not educated men coerce the ignorant? What is there in the character of a very commonplace ignorant peasant or petty shopkeeper in these days which makes him a less fit subject for coercion on Mr. Mill's principle than the Hindoo nobles and princes who were coerced by Akbar?" As it might be put today, the descent from the tutelary state to the totalitarian is easy.

Each of these philosophers saw liberty of expression as an instrumental value, an aid to the apprehension of something identified as the true or the good; accordingly the limits of expression were to be drawn in light of its serviceability. What warrant then could be found for freedom of expression in the philosophy of a skeptic, or in a skeptical age? For an answer we would do well to turn to the thought of Mr. Justice Holmes, for whom "truth" was "the power of the thought to get itself accepted in the competition of the market." Freedom of expression was not instrumental in a quest; it created its own object, its Holy Grail. The principle of freedom of speech from repression was not, however, subject to the same relaxed skepticism. In Holmes's existentialism the activity of speech was of a different order from its particular content, and so the issue of freedom versus restraint was salvaged from the class of issues to be left to the competition of the market. The process, unlike any of its content, was intrinsically good; and Holmes was able to escape from his own skepticism by a hierarchy of categories akin to Bertrand Russell's theory of types.

Skepticism in a jurist is matched by humility in a theologian. Holmes, the believing unbeliever, and Reinhold Niebuhr, the unbelieving believer, reached a point of convergence. Dr. Niebuhr was speaking of moral truths and their inevitable historical corruptions and misappropriations and fragmentary formulations.

> This alone [he submitted] would justify the ultimate freedom of a democratic society, in which not even the moral presuppositions upon which the society rests are withdrawn from constant scrutiny and reexamination. Only through such freedom can the premature arrest of new vitalities in history be prevented. . . . A society which exempts ultimate principles from criticism will find difficulty in dealing with the historical forces which have appropriated these truths as their special possession.

Once a principle is established, a jurist has a special obligation to delineate its limits. Not for him the exhilaration of dangling in the void from a lofty premise; he must find his footing on the hard rung of a middle axiom. Justice Holmes found the limiting principle in the test of clear and present danger, which he appropriated from the criminal law, where it served to mark the line at which innocuous preparation for a crime passed over into a punishable attempt. Speech, then, would be privileged if, and only if, it did not create a clear and present danger of a result that society could properly forbid. The celebrated example is falsely crying "Fire!" in a crowded theater—an example, it has always seemed to me, that is singularly unhelpful. For the cry of "Fire!" is a peculiar kind of speech, not the sort that gives rise to the troublesome problems in this field. The cry is not the ordinary communication of information, or argument, or exhortation, or entertainment. It is in the nature of a preset signal to action, which could have been conveyed by lanterns in a belfry. More to the point would have been a discussion of what may be said on the stage, not in the pit.

There are difficulties with the clear-and-present-danger test apart from the illustration. For one thing, it does not analyze the causal link between the speech and the danger: although the speech may be moderate and rational, the audience may be hostile and emotional. A clear and present danger of violence is created, but in which direction should the strong arm of the law be pointed? Another difficulty is that no account is taken of the

relative seriousness of the danger (it might be simply a trespass on barren land) compared with the importance of the speech. Moreover, the test of certainty and imminence is subject to loose construction by an apprehensive jury, and even to manipulation by judges, as when the Smith Act, directed against the teaching of communism, was sustained by use of a sliding scale, weighing the gravity of the danger discounted by its improbability, thus countenancing speculation in historical futures, the most dangerous form of gambling with the liberty of speech. And finally, the clear-and-present-danger test, although it has its uses in the area of seditious speech where it arose, is not a broad-spectrum sovereign remedy for such other complaints as defamation, obscenity, and invasions of privacy, where the complex of interests at stake requires closer diagnosis and more refined treatment.

For that kind of treatment it is more promising to look at history (law being history with the history left out). But before making that move, a word more needs to be said about the philosophers. They give us a mood, a rationale for a principle that must be taken, however, as defeasible. There is something perhaps too exclusively intellectual about their valuation of expression, too neglectful—to use an old-fashioned phrase—of the affective side of expression, for both the audience and the author. For an appreciation of this side we do best to turn to the poets in their discursive moments. "We want the creative faculty to imagine that which we know; we want the generous impulse to act that which we imagine; we want the poetry of life." Shelley spoke for the recipient, and modestly, too, for it can be maintained that we do not really "know" a thing—whether it be the inside of a coal mine or the Bill of Rights—until we know it feelingly, kinesthetically. For the experience of the artist himself I call again on Wallace Stevens, in his "Reply to Papini":

> . . . The poet
> Increases the aspects of experience,
> As in an enchantment, analyzed and fixed
> And final. This is the centre. The poet is
> The angry day-son clanging at its make:
> The satisfaction underneath the sense,
> The conception sparkling in still obstinate thought.

Whatever the philosophic bases for freedom of expression—whether as an indispensable means to the discovery and spread of truth or as a fulfillment of the human vocation to seek to persuade, to inform, to entertain, and to astonish one another—the freedom is, as I have said, defeasible in smaller or larger measure. To regard it as never requiring accommodation with the interests of integrity, security, personal reputation, and human dignity would be to take part of the values of life—however grand a part—in place of the whole, in the realm of public policy to commit the offense of political synecdoche.

If, in making the necessary accommodations, we turn for guidance to history, it is not with a view to establishing a hierarchy of values. To do that would be to confuse history with the historian, the historian who draws out of his narrative hat the values he has smuggled into his normative sleeve. To view history as a sort of retrospective politics, Santayana warned, is like looking over a crowd to find one's friends. A similar warning was sounded by Lord Acton: "Whatever a man's notions of these later centuries are, such in the main the man himself will be. Under the name of History, they cover the articles of his philosophic, his religious and his political creed. . . . Modern history touches us so nearly, it is so deep a question of life and death, that we are bound to find our way through it, and to owe our insight to ourselves."

We look to history for those prudential cautions and occasionally prudent arrangements that may achieve a satisfying accommodation of values: in politics as in the realm of ideas, a not-too-coerced order, a not-too-chaotic disorder. For speech and press, if we look to the experience of England prior to the American Revolution, we encounter three forms of coercion in the name of order: censorship, taxation, and criminal prosecutions.

Censorship, despite Milton's attack (which in fact went almost unnoticed), was irresistibly attractive to Puritan as well as royal regimes. Although the demise of the Star Chamber in 1641 removed one set of enforcers, the surveillance was carried on alike under Romanist, Anglican, and Puritan rule by the Printers' and Stationers' Company and their agents, the monotony broken only by a bewildering succession of turnabouts in the illicit and the licit. The scheme was codified in the Licensing Act of 1662, which

prohibited the printing, sale, or importation of "heretical, seditious, schismatical, or offensive books," or what "may tend . . . to the scandal of religion, or the church, or the government. . . ." Built into this forbidding authority was a basic conflict of interest, for by another section of the law the Stationers' Company was recognized to have a monopoly of publishing as granted by the crown, which extended to works domestic and foreign, modern and classical. It was indeed a political-ecclesiastical-commercial complex with a vengeance.

Enacted for seven years, the statute was extended for two-year periods and would require renewal in 1695. As every schoolboy knows, Parliament allowed the act to lapse in that year. To be sure, a committee of the Commons was engaged in drafting a more acceptable licensing law, but before their work was done the session expired. And so the great principle of freedom of the press was established, if not in a fit of absent-mindedness, then in a spasm of inanition.

Every schoolboy knows, too, Macaulay's mordant commentary on the episode. The Commons presented to the Lords a statement of eighteen points in opposition to renewal, closely matching a paper prepared for the purpose by John Locke. "But," Macaulay complains, "all their objections will be found to relate to matters of detail. On the great question of principle, on the question whether the liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said." The statement of the Commons did indeed address itself to the administrative abuses under the act: the bribery of licensors, the needless cost and delay, the slipshod quality of monopolistic printing, the domiciliary searches for unlicensed presses and books, the unconfined discretion given to the licensors under the loose terms of the act. By way of extenuation for the tone of these objections by the Commons, it is sometimes suggested that they were drawn up to influence practical men of affairs in Parliament, and in any event your Englishman is embarrassed and confused in the presence of large declarations of universal principles.

In my judgment, no apologies are necessary: Macaulay's schoolboy has been misled; a recital of the evils and abuses of enforcement was just what was called for in an attack on the licens-

ing system. For so long as some forms of control are to remain (through the criminal or civil law), the problem is to identify those features of licensing which make it peculiarly obnoxious. John Locke himself, when he tried to generalize on this differentiation, was singularly unconvincing. He wrote: "I know not why a man should not have liberty to print whatever he would speak; and to be answerable for the one, just as he is for the other, if he transgresses the law in either. But gagging a man, for fear he should talk heresy or sedition, has no other ground than such as will make gyves necessary, for fear a man should use violence if his hands were free, and must at last end in the imprisonment of all whom you will suspect will be guilty of treason or misdemeanour." This would be persuasive if the prior restraint were directed against an author or publisher to suppress still uncomposed works, but it loses its force when applied to existing writing lying open to the judgment of the censor. When, almost a century later, Dr. Johnson looked back wistfully at the era of Tory censorship, he was equally unpersuasive from the other side. "[I]t is yet allowed," he pointed out, "that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious; but this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may afterwards be censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief."

Both metaphors are parodies of the essential problem of prior restraint—Locke's universally shackled men and Johnson's universally unbolted doors. For the real problem is the process of selection, for shackling or bolting. A process in which the selectors have a personal stake, by virtue of a competitive position, or a need to justify their occupation or to avoid fines for approving an illicit publication; a process where administrative discretion, or indiscretion, is unreviewable; in which no jury stands between the government and its quarry; and in which the standards to be enforced ("offensive" publications) are at best a general warrant to the enforcers—this is a process calculated to promote the bland and stifle the blunt, to result in Herodian enforcement at the cost of the vitality of the press, to strike the balance depicted in *Measure for*

Measure: "There's scarce truth enough alive to make societies secure, but security enough to make fellowships accursed. Much upon this riddle runs the wisdom of the world."

The end of the licensing system brought a proliferation of newssheets, the smaller ones being the most obnoxious to the governing authorities. In the oscillating struggle between government and its critics, Parliament found a new weapon, a stamp tax on newssheets, which by its terms bore most harshly on the smaller publications. The power to tax does indeed involve the power to destroy, if it is done in a discriminatory way, so that the inner political check on the imposition of a generalized burden does not operate.

But the most menacing weapon was the prosecution for seditious libel, the crime of bringing the government or its organs into hatred, ridicule, or contempt. It was menacing not only because of the savagery of the penalties, ranging from the pillory to dismemberment, but because of the peculiar mode of trial. Juries were not allowed to bring in a general verdict of guilty or not guilty after receiving instructions on the law; the king's judges alone undertook to determine whether the published matter was seditious; the jury's verdict simply reflected their finding on whether the accused was in fact responsible for the publication. Moreover, truth was no defense, for in preserving the realm against disaffection, a good opinion of government was necessary; a truthful attack on high officers of state was all the more likely to produce alienation and weaken the bonds of loyalty. This impeccable logic was not abandoned in England until 1843, when truth was established as a defense, though meantime the role of the jury was enlarged by Fox's Libel Act in 1792, as a concession to popular feeling during the hysteria bred by the French Revolution.

On this side of the Atlantic, before the rights of Englishmen finally became the rights of man, the English struggle was recapitulated. While licensing was not transplanted, stamp taxes on the press, and general warrants to search for seditious writings, germinated, in John Adams's celebrated words, the "child Independence." No prior restraint, but criminal liability after publication, the Blackstonian formula, was the accepted framework of debate. The libertarian impulse was directed by lawyers

and publicists against the special abuses of the law of seditious libel (the "honeyed Mansfieldism of Blackstone," in Jefferson's phrase), against the constricted role of the jury and the failure to recognize truth as a defense. These were the fighting issues in the law of the press in preconstitutional America.

The First Amendment to the Constitution ("Congress shall make no law . . . abridging the freedom of speech or of the press") was drawn in seemingly absolute terms; but what exactly was the meaning of the freedom of the press? The only proper answer must be, as it is to similar questions, "What do you mean by 'meaning?' "

The Sedition Act of 1798 was the great testing ground. Passed amid the excitement of the Federalists over Jacobinism abroad and at home, in France and among the Jeffersonian Republicans, the act betrayed its partisan thrust on its face. It was to expire on March 3, 1801, which by a providential coincidence was the date on which John Adams's term as president was due to end. The act made it an offense to publish "any false, scandalous and malicious utterances against the government, Congress, or the President, with intent to defame them, bring them into contempt or disrepute, or excite against them the hatred of the people." Whether the omission of the vice president (Thomas Jefferson) from the list of officers to be safeguarded from abuse was a mere inadvertence on the part of the Federalists can only be conjectured. The necessity for the law was put with emotional force by a principal sponsor of the bill, who quoted an example of the sedition abroad in the land, taken from an attack on John Adams in a New York Republican organ: ". . . The mask should be torn off from this meaner species of aristocracy than history has condescended to record; where a person without patriotism, without philosophy, without a taste for the fine arts . . . is jostled into the Chief Magistracy. . . ." That rising crescendo of abuse could not possibly be tolerated. The act was administered in a similar humor; Robert Frost had not yet written that the way of understanding is partly mirth. One Republican worthy was heavily fined for saying at a tavern, after President Adams had passed through the town to the salute of a cannon, that he wished the cannonball had passed through Adams's posterior. Matthew Lyon, congressman from

Vermont, was convicted and sentenced to jail for his abusive comments on foreign policy in his newspaper, fetchingly called "The Scourge of Aristocracy and Repository of Important Political Truth." While in prison he was reelected to Congress—a precedent emulated in the twentieth century in my own Commonwealth of Massachusetts.

But was the Sedition Act constitutional? It contained the safeguards for which the libertarians had fought as colonists: the defense of truth and the full role of the jury. The answer to the question, I have suggested, turns on the further question, What do you mean when you ask what the First Amendment means? John Marshall, campaigning for Congress in Virginia in 1798, criticized the Sedition Act on grounds of policy, but maintained that it was constitutionally valid. And he was right if you give the First Amendment its denotative meaning. The particular historic devices that were obnoxious to the sons of liberty were avoided. In this sense the First Amendment was fulfilled. In another sense, if a connotative meaning is given, the answer may well be different. If juries were in fact an illusory safeguard, if the defense of truth was likewise illusory in dealing with political diatribe, then the meaning of the guarantee ought to outreach the particulars that gave it birth, in order that the freedom envisaged at its core can be vindicated.

Whether the inadequacies of the safeguards in the Sedition Act should have been foreseen, as they were by Madison with remarkable prescience in the Virginia Resolutions, or whether the First Amendment received a new and more extensive "meaning" in light of the actual experience under the act, the ultimate judgment should be the same under a connotative sense of meaning. To digress: When a judicial nominee is cross-examined by a senator on whether he believes that the meaning of the Constitution changes, the question is an invitation to a discussion of linguistic, quite as much as constitutional, philosophy, although the nominee would doubtless be thought rude and evasive in suggesting this—just as a schoolboy who, when asked what caused the Civil War, gives the only sensible answer, "Why do you want to know?" would no doubt be sent to the headmaster for disciplinary action.

It is worth recalling that even the Jeffersonians, positive as they

were in their condemnation of the Sedition Act on constitutional grounds, did not regard the liberty of the press as absolute. Jefferson himself time and again made it plain that defamation of public officials, like defamation of ordinary citizens, could be redressed through civil actions for damages in the courts of the states. Jefferson, writing to Abigail Adams in 1804 (imagine a president of the United States engaging in serious controversy with the wife of his predecessor on constitutional issues—what a charming Golden Age!), said of the Sedition Act:

> Nor does the opinion of unconstitutionality, and consequent nullity of that law, remove all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue, all truth and falsehood, in the U.S. The power to do that is fully possessed by the several State Legislatures. . . . They have accordingly, all of them, made provisions for punishing slander, which those who have time and inclination, resort to for the vindication of their characters. In general, the States laws appear to have made the presses responsible for slander as far as is consistent with its useful freedom.

The same idea is contained in Jefferson's Second Inaugural, and late in life, writing to a French correspondent on an ideal constitution for a state, he included among the basic principles "Freedom of the Press, subject only to liability for personal injuries." The most articulate of the Jeffersonian theorists on freedom of the press, Titus Wortman of New York, furnished an explanation of this position: "Civil prosecutions, at the suit of injured individuals, are a sufficient restraint upon the licentiousness of the Press. As in such prosecutions it is left to the jury to ascertain the damages sustained, while they afford a real compensation for the injury, they are much less likely to be rendered a dangerous weapon in the hands of a prevailing [political] party, or an aspiring administration." Just how far the risk of verdicts for damages against the press may be consistent, in Jefferson's words, with its useful function has remained to be considered in our own time.

The twentieth century has brought some striking parallels to the seventeenth and eighteenth. Censorship in the classical form of systematic licensing of the press has been repudiated, but so-called prior restraint has taken new forms that require comparison with

the old. The government's attempt to enjoin publication of the Pentagon Papers was free of the special vices of the licensing system: there was no grant of a commercial monopoly to the judges; there was opportunity for appellate review; there was no requirement of systematic submission of publications in advance. And yet the central threat of overkill remained, given the absence of any controlling statutory standards for an injunctive order, the want of a right to jury trial, and the procedural rule that publication in disobedience of a preliminary order during the course of the litigation is punishable as a contempt of court regardless of the possible reversal of the injunction on appeal.

Taxes on the press—"taxes on Knowledge," as they were called—were curiously revived in Louisiana in the 1930s under the aegis of Governor Huey Long. A tax on newspaper revenues from advertising, whose rate varied upward with the circulation of the paper, bore on its face an animus toward the metropolitan press, which was regarded as the special enemy of the state administration. The Supreme Court, not closing its eyes to what all others could see, invoked the history of stamp taxes to strike down the law. "To allow ourselves to fetter [the press] is to fetter ourselves," in Justice Sutherland's words—with an assist, there is reason to believe, from Justice Cardozo.

For seditious libel, however labeled, a new standard in the criminal law has been devised, replacing the clear-and-present-danger test and its deficiencies—the standard of incitement, which adds to the requirement of imminent danger of violence some requisite with respect to the quality of the utterance itself in its context. To be more repressive would be excessive caution—overkill in another form. Half our fears of disorder will be mocked by history, as half the scientific truths taught today will be proved false in fifty years. The trouble is that in neither case do we know which half. We go on teaching science rather than forsaking it, and in the realm of utterance, risk for risk, measure for measure, we stake our fortunes in a marginal case on the side of freedom.

The question raised glancingly by Jefferson but left unanalyzed—how far civil suits for defamation may be compatible with maintaining the useful function of the press as a critic—has become an urgent issue. Most of our states had resolved it by al-

lowing the press an immunity for the expression of opinion, however damaging and distorted, while imposing strict liability for untrue defamatory statements of fact. Under this accommodation, editorial comment and artistic criticism flourished. When, for example, Dorothy Parker wrote that Tallulah Bankhead ran the gamut of emotions from A to B, or that when Leslie Howard played Hamlet last night, Hamlet lost, no one would seriously have considered a libel action. But false statements of fact, even though made innocently, carried a threat of liability, especially so because the amount of damages awarded could be staggering. When a jury in Alabama awarded half a million dollars to a local police commissioner in an action against the *New York Times* for relatively minor inaccuracies in a civil rights advertisement that did not even name him or his office, the legal accommodation of rights had clearly gone awry. Two factors called for attention: the degree of culpability required to make the press liable, and the measure of monetary damages.

In a series of decisions, the Supreme Court has dealt with both issues. On the side of damages, injury to reputation may not be presumed, it must be proved; and punitive damages are permitted only in cases of willful or reckless falsehood. On the score of culpability, a publisher is liable to a public official or a public figure only for that kind of knowing or reckless misstatement. A troublesome problem has been whether the press should have the same immunity when the victim of the false statement is an ordinary citizen but the defamation occurred in the context of a discussion or report of a matter of public concern. At first I leaned to the view that the area of public concern should confer the same latitude on the press, in the interest of untrammeled reporting. But I have since come to the view adopted by the Court—that where the victim is not a public officer or public figure, the balance should move in the victim's favor, permitting him to recover if he can show merely negligence, not necessarily recklessness, on the part of the publisher. In an event of public concern, the person defamed may be an involuntary participant, as in the case of one whose home has been broken into. Even where the person defamed has entered the arena voluntarily, as in the case of a lawyer representing a client or a professor speaking on a public question,

he has not made his character a relevant issue, and a publicist ought to assume the burden of due care if he chooses to impugn that character. Otherwise private citizens may be deterred from entering the arena of public debate. That arena is not occupied solely by the press, and it would be ironic if, in preventing a chilling effect on the press, the law were to chill the entry into the arena by ordinary citizens.

Thus far I have said nothing of the legal controls on obscenity. Actually this concern did not arise until the eighteenth century in England—save as obscenity might be imbedded, as it often was, in politically seditious or theologically heretical writing. But with the rise of a politically powerful middle class, of evangelical Protestantism, and a concomitant fear of the literacy of the lower class, obscenity became a concern of the state, as it did in America in the nineteenth century. No area of law is less satisfactory than this one. The basic difficulty is that there is no consensus on what harm is caused to whom by what means; with these fundamentals in doubt, it would be surprising if there were in fact a satisfactory approach. Whether obscenity harms society by producing dangerous behavior on the part of the consumer or serves to discharge aggressive impulses benignly, whether it is harmful to the consumer himself by producing a state of narcissistic infantile regression, and if so whether this is a proper business of law, are questions unresolved.

It must be said, however, that our Supreme Court has taken a series of positions in the last generation that greatly moderate the reach of obscenity laws. The work in question must be viewed as a whole, not in isolated passages. A serious literary, scientific, or historical purpose will serve to legitimate a work. Standards suitable for juveniles cannot be made the criteria for works distributed to adults. Booksellers cannot be penalized for carrying a work whose contents are not known to them. Material in the home is beyond the reach of the law of obscenity (greatly undermining the rationale of harm to the consumer). And a book or film—the example is the film version of *Lady Chatterley's Lover*—cannot be banned because its ideas are immoral or because it makes immorality attractive.

These are significant accomplishments. Yet the nagging ques-

tion remains whether even the residue ought to be subjected to the sanctions of the law if there is a willing purchaser and no offensive public display. My judgment is that the law will come to confine itself to public displays (on the analogy of public nuisances), to distribution to juveniles (as an adjunct to parental control), and to zoning restrictions for theaters and bookstores specializing in this form of popular culture. For the rest, it may be adjudged a sin against language or an offense against art—crimes against which the writ of the law runneth not.

Five hundred years after Caxton, generation by generation, struggle by struggle, we in America—writers and speakers, politicians and artists—have achieved, at least for a historical moment, a degree of freedom from official control that would, I daresay, amply gratify Milton, Locke, Mill, and Thomas Jefferson. Meanwhile a different set of problems has emerged, centering on the adequacy and responsibility of the media of communication themselves, problems of new entry into the field and access to the existing media.

Of making many books there may be no end, but of the shrinkage of the daily press there can be no doubt. As technology made possible the proliferation of newspapers—aided, to be sure, by the elimination of licensing—so it is to technology that we look for the removal of economic obstacles. What we read in cold print is now increasingly the product of cold type, and it may be that the savings in cost of equipment and labor will encourage more entries into the field of daily journalism, despite the heavy competition of radio and television. Already there has been a patent flowering of more specialized journals, and the underground press is emerging into the daylight of readership. In all this, the laws of economics are more relevant than the civil law. The law can, of course, combat restrictive competitive practices, as it did a generation ago when the government invoked the antitrust laws to force the Associated Press to liberalize its requirements for membership.

The search for diversity has turned to broadening the spectrum of views available to the consumers of opinion by providing greater access to existing media. The prototype, of course, is found in the electronic media, by dint of the so-called fairness doctrine and the right of reply to personal attacks. The fairness doctrine is a

corollary of the legal obligation of television and radio stations to broadcast on controversial public issues; in fulfilling that duty, they must give fair coverage, not necessarily in the same program, to opposing points of view.

The physical constraints on the number and location of channels which led in the first place to the necessity of licensing by the government have sufficed to justify imposing upon licensees the moderate duty of openness embodied in the fairness and right-of-reply regulations. Dissemination of contrasting views is germane to the licensing function, as the equitable distribution of energy would be a condition germane to the licensing of hydroelectric sites; and of all controls it is most congruent with the spirit of the First Amendment. Whether technical advances making possible a multiplication of channels will call for a relaxation of these rules is an open question, but it can be said that a proliferation of outlets in the ultra-high-frequency range does not seem adequate, as a practical matter, to cure the shortage continuing on the conventional frequencies that are the staple of viewing and listening.

What bearing, if any, does this governmental oversight have on the printed news media, where the limitation on outlets is owing to the laws of economics rather than the laws of nature? The question was tested in a modest way in 1974, when the Supreme Court considered a Florida law affording a right of reply to public officials and candidates whose character had been attacked in the local press. The law, which was not a model of draftsmanship, was held repugnant to the freedom of the press. While the outcome was disappointing to those who saw in the electronic field a model for the press in a time of scarcity, the differences are significant. The distinctive impact of television, in particular, and its potential for powerful partisanship make some mild form of balance appropriate. Journals of news and opinion have more counterparts in the printed media: the daily press is supplemented and to some extent offset by weekly magazines, neighborhood newssheets, trade and religious periodicals, and more. And although a right of reply to an attack on one's character is a very limited inroad on editorial autonomy—particularly given the very circumscribed right of public officers and public figures to recover damages for defamation—the principle of resisting the government's entering

wedge is probably a salutary one in the context of journals of opinion, where factual and judgmental attacks on the editorial page may be hard to distinguish.

This is not to say that a univocal press in a given locality is a consummation to be wished. It is only to say that regeneration should come from within—prodded, I should add, by self-interest. If newspapers develop an interesting op-ed page, include a diversity of columnists (Chief Justice Hughes called them the daily calumnists), publish excerpts from other editorial pages and a generous sampling of letters as a mirror of public opinion, those papers may become more popular, the readers more engaged, the circulation higher. For this the responsibility rests ultimately on the community itself.

I have spoken mainly of the great disorder of words, for without it individuals are less than persons and civilization stagnates and atrophies. But civilization is a tension between atrophy and anarchy.

> A. A violent order is disorder; and
> B. A great disorder is an order.

But the poem ends:

> . . . Now, A
> And B are not like statuary, posed
> For a vista in the Louvre. They are things chalked
> On the sidewalk so that the pensive man may see.
>
> The pensive man . . . He sees that eagle float
> For which the intricate Alps are a single nest.

The eagle is an endangered species. We have largely lost, as a nation, the unforced unity of its vision, and we have scarcely begun to turn the great disorder of words into an anthem for mankind. When a physical chemist cannot understand a chemical physicist, when a linguistic philosopher can do nothing with political philosophy except dissolve it, and a psychohistorian is baffled by a Cliometrician, when the fables and myths of one people are viewed as the superstitions of another, one can only put the question, "Two cultures?" and give the answer that Lord Keynes made to

the charge of a bankers' conspiracy, "I only wish there were!"

The task is not one for coercion but for the culture. We need a more universal kind of *McGuffey's Readers,* and in higher education we need not so much a prescription of Great Books, Dr. Eliot's Five-Foot Shelf (the Bible and other Harvard Classics), or the *Britannica's* selection, as a set of Great Themes. There is, to be sure, the *Britannica's* concordance, the Syntopicon of Great Ideas, one hundred and two to be exact; but you would not be surprised if I should have substituted for its first Great Idea—Angels—a theme like Accountability, and not on alphabetical grounds alone.

Disparity of knowledge is inevitable, and diversity of opinion is essential, and both are elements of a lively, healthy society respectful of the intricate Alps of human existence, so long as there is not lost a sense of ultimate unity of purpose, of the organic community of humankind. The great disorder of words may yet give us both the prudential scrutiny of the owl and the floating vision of the eagle.