



Anthony Lewis



## THE MCGILL LECTURE

It is a great honor for me to be here and to give the McGill lecture. You have heard from people who knew him better than I, though I did know him, about the special qualities of Ralph McGill. They are qualities that only occasionally distinguish our profession — courage, humanity, concern. I add that he was happily without the self-importance that I think tends to afflict journalism nowadays. He was a fighter with words. He used the amendment we are here to discuss.

I take my title from a phrase of Mr. Justice Brandeis. "If we would guide by the light of reason," he said, "we must let our minds be bold." He was speaking to his colleagues on the Supreme Court in a dissenting opinion, urging his fellow Justices not to be bound by their prejudices, not to erect those prejudices into legal walls. I think what he said, in 1932, captures the spirit of the First Amendment as it speaks to all Americans. It allows us — no, it encourages us — to let our mind be bold.

Looking at other societies often makes us see the values of our own more clearly, so I begin with a note about a South African whom I know and greatly respect, Desmond Tutu, an Anglican Bishop and General Secretary of the South African Council of Churches.

Last month Bishop Tutu paid one of his frequent visits to the United States. He met officials of our government, and he made some speeches. He said what he has often said at home and abroad: that the racial system of South Africa, which reserves all political power and basic civil right to the twenty percent of the people who are white, is an outrage. He urged the outside world to help the voiceless millions of blacks in South Africa by bringing economic pressure on its government. I doubt that many of us would regard those remarks as extreme. At least we would not if a small racial minority forbade most of us to vote or own land or, often, live in the same place as our wives or husbands. But the South African government was extremely angry at what Bishop Tutu said. The Prime Minister, P. W. Botha, said the Bishop had "exploited" his passport — which had been granted him, the prime minister said, "as a favor from the state." When Bishop Tutu returned to South Africa, Mr. Botha said, his passport would be taken away.

Now to me, and I think probably to all of us, that is a jarring story because we have a different view of the relationship between the individual and the state. In particular, we reject the notion of officially-enforced orthodoxy. That rejection, to me, is at the heart of the First Amendment. Americans may have unorthodox, even offensive opinions without fearing the retribution of authority. Justice Holmes put it in one unforgettable sentence: "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." That statement, in its way, is a measure of the difference between the American state and most others in the world. Prime Minister Botha would not accept such a principle; I doubt that many other heads of government would, East or West, North or South.

But that Holmes opinion, from 1928, was a dissent. A majority of the Supreme Court was not then prepared to accept the idea of freedom for the thought that we hate or, as Holmes said in an earlier dissent, freedom for the opinion that we believe to be fraught with death. Must I then modify my statement that one fundamental of the First Amendment is a rejection of enforced orthodoxy? No, I do not think so, for time has made that meaning of the amendment unarguably clear.

Of course the amendment is not a set of detailed or self-enforcing rules. It is given concrete meaning over time by a continuing process of law and politics. When the Supreme Court decides a constitutional issue, its view is subjected to critical examination by scholars, politicians, the public, history and the Court itself. One hardly needs to say that in this place, in this region that has witnessed what I think is undoubtedly the greatest constitutional, social and political revolution of a peaceful character in our age. In 1896 the Supreme Court, applying the sociology of that day, said there was nothing invidious about segregating black people unless they chose "to put that construction upon it." After Adolf Hitler, the Supreme Court could not fail to see that for the state to separate out one group in society, whether Jews or blacks or some other, was necessarily invidious. And so, in 1954, the Court changed its mind and held that segregation was not "the equal protection of the laws."

Now the process by which constitutional principles are constantly reapplied does not always result in acceptance of new doctrines; I need hardly say that while Senator Jesse Helms is alive and well and thinking up new ways to undo constitutional decisions. But more often than not, what the Court does is accepted as consistent with our fundamental values, and the law moves in that direction. That surely has hap-



pened, after years of struggle, on the racial issue. With all of the remaining difficulties and inadequacies of our society in that regard, virtually no one now would defend deliberate, official segregation.

The First Amendment has undergone a similar process of re-examination in our day: perhaps less noticed, but I think just as dramatic. And here I align myself with those who take an optimistic view of the development of the First Amendment, refusing to be gloomy because this case or that of the last few years has disappointed the press. If you look over the sweep of First Amendment cases, say from the First World War, from the time Holmes and Brandeis began dissenting, until today, I think it is impossible to resist the view that the Supreme Court has given that amendment a scope greater than could have been anticipated when that process of adjudication began sixty years ago. The result of the re-interpretation has been to breathe back into the amendment the spirit of Jefferson and Madison, the spirit of freedom for the unorthodox.

Remember that there is a curiosity about the First Amendment: that in many of its terms it really went for a very long period without any authoritative interpretation by the Supreme Court. Congress in 1798 passed the Sedition Act, which punished speech critical of the government. Jefferson and Madison thought it a violation of the First Amendment, but it expired in its own terms after just two years and was never tested in the Supreme Court. Then for a century or more Congress did not legislate on such matters, and the amendment during that time was held not to apply to state legislation.

Only when World War I came, and the beginning of the Red Scare, the fear of radicalism that has remained in this country one way or another ever since, did Congress and the states begin passing restrictive laws about dangerous speech, disloyalty and subversion. And then it took some time before Supreme Court Justices — at least this would be my optimistic view — could free themselves from the prejudices of the day, as Brandeis said, and “let their minds be bold.” As late as 1951, the Supreme Court upheld the criminal conviction of Communist Party leaders under the Smith Act for conspiring to teach or advocate the violent overthrow of the government, on evidence showing not the feeblest possibility of their attaining that end. But then the Supreme Court moved slowly and steadily toward the more expansive ideal of freedom. It sustained only one more Smith Act conviction. It set aside many state and federal efforts to punish people for radical views or unpopular artistic expression. It held unconstitutional on general libertarian principles — and here we came close to the example of Bishop Tutu — an act of Congress forbidding the issuance of passports to members of the Communist Party.

Today I do not believe that any Smith Act conviction would get past the Supreme Court, or for that matter that the Justice Department would bring such a case. Indeed, the business of prosecuting Communists for their beliefs has become so passe that last year the Senate Judiciary Committee, with a range of opinion from Senator Kennedy to Senator Thurmond, supported a proposed Federal Criminal Code that would have repealed the Smith Act. But more broadly than that, we can see that the Holmes-Brandeis view has prevailed. The First Amendment does not allow government to define what is true or safe or legitimate opinion. The victory of that principle was symbolized for me when, in 1974, Justice Powell wrote in an opinion of the Court: “Under the First Amendment, there is no such thing as a false idea.”

I have been speaking of the amendment in the way we commonly think of it today: as a protection for those who speak and write — radical soapbox orators or pamphleteers of the kind that, in World War I, Holmes wanted to protect though a majority of the public loathed their opinion. But the amendment is not limited to speaking and writing. It says: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” And it is my view that all the clauses of the amendment play a part in seeing to it that there is no enforced orthodoxy in this country. Think, for example, of the case of NAACP v. Alabama. In the 1950s Alabama sought to obtain the membership list of the NAACP. In those days public knowledge of its membership might have been very dangerous to individuals, and the association refused to produce the list. It was found in contempt. But in 1958 the Supreme Court of the United States unanimously set aside the contempt conviction. Justice Harlan’s opinion found that there was a freedom of association protected by the Constitution that allowed the NAACP not to produce the list. And we may decide for ourselves where that freedom of association lies, in which particular words of the First Amendment. But we know it must be there. How could we be thought free to assemble, speak and believe as we wish if it became dangerous to associate with like-minded people?

Or consider the religion clauses of the amendment. In the 1940s there were the cases about Jehovah’s Witnesses. One opinion by Justice Roberts involved three itinerant preachers who were proselytizing in New Haven, Connecticut, handing out leaflets and playing records that attacked the Roman Catholic faith on a street whose residents were ninety percent Catholic. They were convicted, among



other things, of inciting a breach of the peace. Justice Roberts, for a unanimous court, reversed those convictions. He wrote:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view the pleader, as we know, at times resorts to exaggeration, to vilification . . . . But the people of this nation have ordained in the light of history that, in spite of the probability of excesses and abuses, these liberties are in the long view essential to enlightened opinion and right conduct on the part of citizens of a democracy."

What is interesting here is the way the Court analogized political and religious belief and argumentation. It seemed to base its judgment on two clauses of the First Amendment, those protecting freedom of speech, and the free exercise of religion. In doing so it underlined the right of Americans to be unorthodox.

Then there were the Flag Salute cases that were so fundamental in the development of the modern Supreme Court. Children of the Jehovah's Witnesses faith refused to obey a state rule requiring pupils to salute the flag and recite the pledge of allegiance every day; to do so, they said, would violate their belief in the Biblical command not to bow down to any graven image. The children were expelled from school. In 1940, by a vote of 8 to 1, the Court upheld the constitutionality of the required salute. War was approaching, and the Court said "national unity is the basis of national security." But just three years later it changed its mind in the middle of the war. By a vote of 6 to 3, it overruled its earlier judgment, and again its opinion reflected the values of freedom in both speech and religion. Justice Jackson said:

"We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."

Justice Jackson's powerful words sum up one aspect of the First Amendment. Now I turn to another—and begin again with a comparative example from another society. This time it is with a tradition of freedom that we think of as closer to ours than South Africa's. The

country is Britain, the example a case decided in London earlier this year by the Court of Appeal.

Michael Williams was serving a fourteen-year sentence in the Hull prison in the north of England. The warden found him to be "a totally subversive and dedicated troublemaker," and therefore put him in a punishment block called a "control unit"—a new kind of unit being tried out by the Home Office, which has charge of all prisons in Britain. As penologists began to learn about the brutal tactics used in the "control unit," they expressed disquiet and it was closed. Michael Williams complained about what had been done to him, and the National Council for Civil Liberties brought suit on his behalf. Its legal adviser, Miss Harriet Harman, acting as Williams' lawyer, used the familiar process of pre-trial discovery to get documents from the Home Office on the nature of the control unit. The Home Office tried to withhold the documents, saying they were secret. (I can add that in Britain even the prison rules that all prisoners are supposed to obey are officially secret.) But the trial judge ordered many of the documents produced. Miss Harman read some in open court, and newspaper reporters in the courtroom took notes. One enterprising reporter from the Guardian, uncertain of his shorthand, went to Miss Harman and asked to see the documents. She gave him copies. For that, she was charged with contempt of court and convicted. On last February 6, the Court of Appeal affirmed the conviction. The Master of the Rolls, Lord Denning, said:

"There was no public interest in having the highly confidential documents in the present case made public. It was in the public interest that they should remain confidential. The use made of them by the journalist in the present case was highly detrimental to the good ordering of our society. They (were) used to launch a wholly unjustified attack on ministers of state and high civil servants who were only doing their best to deal with a wicked criminal."

Lord Denning's language reminds me — I am unable to resist saying this — of Lady Bracknell in Oscar Wilde's "The Importance of Being Earnest." When she learns that her daughter's suitor was found as a baby in a handbag at Victoria Station, she says to him: "To be born, or at any rate bred, in a handbag . . . seems to me to display a contempt for the ordinary decencies of family life that reminds one of the worst excesses of the French Revolution. And I presume you know what that unfortunate movement led to." But the point is not just that Lord Denning is still living in the Victorian Age. He represents a state of mind that is pervasive in official life in Britain: the idea that government will work better if the public does not know what is going on. Even in Britain there was disagreement at the outlandish reach of



that philosophy in the case of Miss Harman: holding a lawyer in contempt for giving a reporter copies of documents that had already been read in open court. A penologist, Dr. J. E. Thomas, wrote to the *The Times*:

"The way in which a punishment routine was devised for Williams ought to be a matter of urgent public concern, and it is absurd therefore to say that the documented procedures were of no public interest. . . . Lord Denning fails to understand that Williams may have been 'a wicked criminal' at one time, but he was for the time under discussion a prisoner committed to the charge of the Home Secretary; that he was entitled not to be harmed . . . ; that measures of dubious legal authority were used against him, and that that should not happen in this country."

Dr. Thomas was really expressing, in his particular criticism of that contempt judgment, a generality that underlies the entire American Constitution. That is, that the public is the ultimate sovereign, holding government institutions accountable for what they do. In the words of Dr. Thomas's letter, what the government does is a matter of "urgent public concern." And the First Amendment plays a crucial part in this process by assuring that the public has the information necessary for it to perform its function.

Now here we leave the realm of opinions and beliefs — of "fighting faiths," as Holmes put it — and come to facts. That is, the right to publish, or to acquire, facts or alleged facts about official life.

The first great case about this aspect of the First Amendment was one that I suppose was the National Enquirer case of its day, only even perhaps a little seedier. That was the case of *Near v. Minnesota* decided by the Supreme Court in 1931. Mr. Near was the sort of civil libertarian hero who very often appears: a not altogether admirable and charming gentleman. He published a nasty weekly paper called *The Saturday Press*, and I say nasty because it specialized in crude anti-Semitism. It carried stories saying that officials of Minneapolis were corrupt and were in league with Jewish gangsters. The newspaper was suppressed, enjoined from further publication, under a Minnesota law allowing that to happen. Fred Friendly, in his book "*Minnesota Rag*," points out a wonderful aspect of the case. When it was argued in the Supreme Court, counsel for the State of Minnesota seemed to pitch his argument to Justice Brandeis, the then one Jewish member of the Court. But Justice Brandeis was a man of Olympian detachment, and he was not moved by the nasty words in the newspaper. Wasn't it, he asked that lawyer, the very purpose of the guarantee of press freedom in the First Amendment to see to it that officials could not stop the publication of articles about official misconduct?

That was the view taken by the majority when the Court decided the case. Chief Justice Hughes's opinion said the First Amendment's main historical purpose had been to prevent previous restraints upon publication. Under the amendment, he said, no one could be forced to prove that his publication was harmless or even true before being allowed to print it. The vote of the justices was 5 to 4. By that slim majority, they established the extremely important rule that the First Amendment frowns on prior restraints, as we call them now. It was that rule, reaffirmed by the Supreme Court, that in 1971 allowed *The New York Times* to go on printing documents from the secret history of the Vietnam War known as the Pentagon Papers.

In the *Near* case Chief Justice Hughes said that anyone who published what later turned out to be false and damaging could be called to account by the victim in a libel suit. Thirty years later that weapon against free speech and press was limited by the Supreme Court. In the case of *New York Times v. Sullivan* it said for the first time that the First Amendment restrained libel suits. It held that an official could not recover libel damages unless he showed that a false publication about him was published with knowledge that it was false or in reckless disregard of its truth or falsehood. In other words, a newspaper or anyone else criticizing a public official could not be made to pay damages for a merely inadvertent or negligent mistake. Why not? Because, Justice Brennan said for the Court, some mistakes are inevitable and people would be afraid to criticize if they were held to absolute standards. An absolute rule would chill "the citizen-critic of government," Justice Brennan said, and "it is as much his duty to criticize as it is the official's duty to administer."

As brought to life in *Near* and *Sullivan*, the First Amendment frees us all to write and speak vigorously, even brutally, about what our officials do. Within very broad limits — broader, I think than in any other society on earth — we cannot be stopped from saying what we wish or be penalized afterwards for an honest mistake.

But what if the facts of official life are completely hidden? What if some institution of government declares its business off limits to what Justice Brennan called in the *Sullivan* case "the citizen-critics of government?" That is an important question, I think the most important contemporary question in this field, and one that the Supreme Court has only started to resolve.

What I call the principle of accountability, the public keeping watch on its official servants, depends on knowledge of the facts. A deeply conservative Supreme Court justice saw that critical point years ago. Justice Sutherland wrote the opinion for a unanimous court when, in 1935, it struck down a tax that Huey Long and his legislature



had put on Louisiana newspapers critical of his regime. Justice Sutherland said, "Informed public opinion is the most potent of all restraints upon misgovernment."

But it is a long way from that generality to actually deciding, in a lawsuit, that someone has a constitutional right to access to an official fact or institution from which he has been barred. It took the Supreme Court forty-five years to travel that road. Last July it held for the first time, as Justice Stevens put it, "that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment."

In recent years there has been a debate, in law and in journalism, about the position of the press under the First Amendment. Some, both judges and editors, have argued for what amounts to a preferred position for journalists. Justice Stewart, in a speech at Yale, said, "the organized press" — newspapers, magazines, broadcasting — was given a special place in the First Amendment. The framers of the Constitution, he said, intended the press to have more complete protection than others because they wanted "a fourth institution outside the government as an additional check on the three official branches." That view naturally has a certain appeal to journalists. It certifies our importance in the American scheme of things.

On such a theory, the press has claimed a constitutional right not to testify in official proceedings. There was a right to gather news, the argument went; if reporters were forced to tell a grand jury later about their sources, the sources would dry up; ergo, the First Amendment gave reporters a privilege not to testify. The argument did not succeed in the Supreme Court, and I differ from most of my professional colleagues in believing that it should not have succeeded. For one thing, I think it would be wrong and unwise for journalists to claim a status more exalted than others who contribute to the policy debates of our society. And there are others. If a professor who is an expert on Vietnam writes about it while the war is on, relying on confidential official sources, and he is then called before a grand jury and asked to name those sources, should he go to prison for refusing to answer while I go free because I am a journalist? I do not think so — and that case actually happened. Someone who writes for a newspaper or appears on television should not, in my opinion, have a greater claim to freedom of speech or publication than a pamphleteer or a writer of books or Ralph Nader.

And there are other interests that are of value in our constitutional sense. I give you a case from South Africa as an example. A magazine called *To The Point*, later discovered to have been secretly financed by government funds, published an article saying highly informed

sources had told the writer of the article that a black minister called Manes Buthelezi was in favor of violence and communism. Mr. Buthelezi sued and sought the name of the sources in order to prove his libel case. The editor stood on the proposition that he was entitled not to disclose those sources. Counsel for Mr. Buthelezi was of the view, and I believe he was right, that there were no sources, that in fact the article had been planted by the security police. Under those circumstances, was the journalist's claim of a privilege not to testify the only value at stake? I find it impossible to say so. Counsel for Mr. Buthelezi did not choose to press his point to the extent of demanding the imprisonment of the editor for contempt. He merely accepted a judgment in his favor in the libel suit.

There is a further reason for skepticism about a preferred legal position for the press in my view. It would tend to make the press part of the official structure of the state, which I think it should never be. When people speak of the press as the fourth branch of government, I shudder. Institutions that are assimilated to branches of government tend to acquire not only dignity but responsibility, which is to say chains. A columnist for *The Times of London*, Bernard Levin, put in his uniquely ascerbic way why that is a bad idea. "The press," he said, "has no duty to be responsible at all, and it will be an ill day for freedom if it should ever acquire one. . . . We are and must remain vagabonds and outlaws, for only by so remaining shall we be able to keep the faith by which we live, which is the pursuit of knowledge that others would like unpursued and the making of comments that others would prefer unmade."

It is a little hard to think of the dignitaries of today's American press — the pundits, the anchor men, the Washington figures — as vagabonds. But they ought to live by the spirit of Bernard Levin's words. By cultural choice, most American journalists today are responsible human beings. We try to be sure of our facts, but that is very different from responsibility in the constitutional sense, which means that one has a formal obligation to other institutions. Journalists must resist the lure of the establishment. We must remain outsiders. Only then can this country have what a judge in the Pentagon Papers case, the late Murray Gurfein, rightly said it needs: "A cantankerous press, an obstinate press, a ubiquitous press."

I have wandered down a journalistic byway. Now back to the case decided last July, *Richmond Newspapers v. Virginia*. It was the successor to the *Gannett* case, decided exactly one year earlier. In July, 1979, a majority of the Supreme Court told us that there was nothing in the Sixth Amendment, which refers to open trials, that let that right run to the public. It was for the benefit, the Court said, only of the ac-



cused. The Court brushed aside in a paragraph a First Amendment claim to open trials. A year later, in the *Richmond* case the Court found that very public right to open trials in the First Amendment. Without wanting to sound cynical about the Supreme Court, and I am not, I believe myself that one reason for the change was press and public criticism. The opinions in the *Gannett* case were so unper-  
suasive that the process of historical reconsideration that I mentioned earlier was telescoped. It was not just the outcry from the Gannett Company, The New York Times and the Los Angeles Times; it was the fact that a lot of judges began to close pre-trial hearings in criminal cases in a very rigorous way — more often than the Supreme Court had anticipated. In any event, very rapidly the Court took a different view and found that right of access to the courtroom in the First Amendment.

A notable aspect of the *Richmond* case is that the newspapers claimed a right of access to a courtroom from which their reporters had been cleared, but they did not make the claim for the press alone. At the argument of the case in the Supreme Court, Justice Stewart asked the lawyer for the newspapers whether his clients were not the press: implying, as I took it, that under his theory they as the press would be entitled to a preferred constitutional position. The lawyer replied, "I am not making a point of their status. I would be distressed if they were treated differently from others." Chief Justice Burger asked whether there would be any difference if the case involved a law professor who wanted to go to the trial and study the process of criminal justice to tell his students about it. "None, Mr. Chief Justice," the lawyer answered, "nor if he just wanted to inform himself as a citizen."

And that was the way the case was decided. The decision did not create an absolute right in the public or the press to enter closed government institutions or obtain secret government information. All it meant was that the press or the public could not be excluded arbitrarily — we know from a courtroom, we do not know to what other institutions the proposition may apply. Much will depend on the nature of the institution involved. This was a courtroom, which by long tradition is open to the public. If someone wanted to visit the file room of the CIA, I suspect the result would be different. But the Supreme Court has begun to apply the First Amendment to a new problem, or really an old one in new guise: How can the public get the information it needs to control the government? What is new is the scale. Government in this country has vastly expanded in its functions and its power over our lives. The public and the press, acting as the public's representative, need correspondingly more knowledge to cope

with the threat of official abuse. The First Amendment in a new way is our instrument of ultimate public sovereignty.

Dean Rusk, our former Secretary of State, said earlier this evening that there should not be any automatic concept of the right to know, and that public officials need a degree of privacy to make their decisions. I happen to agree with him to a considerable extent. But when I look at other societies where the values of secrecy and privacy have been exalted — and in particular at Britain, whose governmental process over the last thirty years has not exactly produced triumphant success — I have to say that on the whole I am prepared to risk the unruliness of the First Amendment. I agree with Mr. Rusk that these issues cannot finally be resolved in some absolute way by law or in the courts. The late Alexander Bickel made the same point after arguing the Pentagon Papers case for The New York Times, using almost the same phrase as Mr. Rusk: "Let the tensions continue."

The thought with which I would leave you is that no part of our Constitution, least of all the First Amendment, is a mere legalism. It is, as has been said, a mood as much as a command. Our judges call us back to the spirit of the First Amendment from time to time, but we should not need the judges to know that in this country we may, we must, let our minds be bold.