

CAROL BURNETT FUND FOR RESPONSIBLE JOURNALISM

presents

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speaking on

IT'S THE PLAINTIFF'S FIRST AMENDMENT, TOO

Tuesday

April 26, 1988

Noon

Hemenway Theatre

Sponsored by the UHM Journalism Department as the seventh in the series of annual Carol Burnett Fund Lectures on Ethics and Responsibility in Journalism

arrogance in the news media, and incivility and disrespect, and we do get some things wrong that sound ethics would require us to correct. I admit to a continuing impatience with what Time magazine's retiring press critic, Thomas Griffith, calls "the haste, shoddiness, cynicism and hype of too much journalism." And I agree with Griffith that the bias some readers think they detect on the press's part is not a taking of political sides, but something more worrisome: seeing politicians up close, many journalists have "no faith in any of them and are carriers, as well as recorders, of the prevailing disenchantment."

Disenchantment with democracy can mean the death of liberty. So I am slow to share such cynicism and discouragement. Like most of my peers in the news business, I am as convinced as I was as a cub reporter that our free press, in this free country, is one of democracy's noblest institutions, and that if we can maintain its freedom under the First Amendment, the press bears a companion responsibility to exercise that freedom fairly, so that when we come to our ultimate bed check in America we will find Liebling's suspect slat to be one of the sturdy supports that has kept the bounce in the bed of our democracy. I just hope we can quit fighting for the covers before we break the bonds that brought us Americans together in the first place. Free expression is a very fragile gift. We owe it our patience and restraint so as to give it breathing space.

What we're talking about in this case is not money and never has been. It's something far more important. We're talking punishment of a publication, an irresponsible, publication, for exercising the First Amendment right to blab nonsense about a public figure who had been transported to celebrity through the engines of publicity but now chose to be emotionally distressed about a piece of publicity she found offensive, and who found a Supreme Court unwilling to dismiss her unimportant lawsuit. That inflicted, I think, an important injury to the First Amendment. I wish she had thought some more about the damage she might do, and had canceled this lawsuit in favor of public denunciations of the National Enquirer's irresponsibility through the channels of publicity that were open to her. My point is: It's her First Amendment too, and all of us need to leave it some breathing space.

I expressly do not apologize for making this argument in my role as an editor and publisher. To those who would counter by saying mine is a self-serving argument, constructed to gain immunity for potential damages I might inflict, I say only this: I have lived 41 years as a public figure in the news business, engaged for most of that time in intensely controversial editorial arguments, and thus I have been the target of the most vituperative misrepresentation and vilification you can imagine. I have never thought of punishing any of these people who have tried to damage me, nor will I ever. Instead, I have published their defamations of me. This is America. This is a land where every citizen should be free to have his say even if it bruises me with hurts and enrages me with lies. I could have been a plaintiff a hundred times over. But it's my First Amendment, too, and I do not want to injure your freedom and mine to take potshots freely at one another.

Americans are already paying a price for litigation lightly undertaken. I worry that much of the press is already drifting toward a softness and timidity in reporting public affairs. Playing it safe against the possibility of lawsuits can only lead to insipidity in reporting and commenting on the news.

And we've never seen a time when we've had a greater need for a hard edge on the news. Not a softening of it. When we learn the real Great Communicator in Washington was Larry Speakes, we haven't been covering the presidency adequately to inform the electorate. When we find out what Oliver North and John Poindexter were up to in the White House basement, we realize our coverage has fallen short of adequately informing even the President. So, yes, there is

his mother in an outhouse, especially when the page was labeled "parody--not to be taken seriously?" Well, the jury took it seriously. It awarded Falwell damages for something called "intentional infliction of emotional distress." The Supreme Court drily noted that "the law does not regard the intent to inflict emotional distress as one which should receive much solicitude," and unanimously reversed the verdict.

My question is: why would Falwell, and similar plaintiffs, become so upset that they would launch cases of this sort which, if not thrown out by the nation's highest court, could cause grave encroachment on everyone's First Amendment freedoms? I repeat, is it too much to ask that potential plaintiffs, even those who feel they've suffered substantial injury, restrain themselves from doing a potentially disastrous injury to a larger American freedom.

I recognize that this lecture at the University of Hawaii on press ethics was born of Carol Burnett's unhappy experience with the supermarket tabloid National Enquirer. I wish she hadn't brought that suit. Not that the gossip sheet was blameless. It reported a boisterous Miss Burnett had a loud disagreement with Henry Kissinger in a Washington restaurant, traipsed around the place offering everyone a bite of her dessert, and really raised eyebrows when she accidentally knocked over a glass of wine on a diner and giggled instead of apologizing. That was the size of it. How grievously could this junk have injured a gifted comedienne who had gained great international fame through years of outstanding performance and resultant notice in the public prints and on the screens for her cockamamie roles? Ten million dollars worth, she charged in her libel suit, alleging infliction of emotional suffering. A Los Angeles jury awarded her \$1.6 million. The Los Angeles trial judge called that amount "clearly excessive and not supported by substantial evidence." Yet so unhappy was he at the National Enquirer's pandering to unworthy instincts that he approved the award of half that amount to her, \$800,000. The Supreme Court rejected the National Enquirer's claim that the judgment violated the First Amendment. A California court of appeal did cut the \$800,000 to \$200,000 on pain of having the case tried all over. And before the new trial was held, Miss Burnett settled the case for an undisclosed amount of money to be paid to her by the National Enquirer. There it all ended and there it stands today. To Miss Burnett's credit she always intended to give away whatever money she won, not to keep it. (You should also know that the fee offered for this lecture of mine is being donated back in full to the University of Hawaii so that it may be used to underwrite even further explorations into journalistic ethics.)

It decided that a public figure should expect to endure unflattering inspection and take a lot of unfriendly heat in return for reaching for official power, or for enjoying the benefits of publicity that helps create celebrity for an American who takes his or her person onto the public stage. To be legally libeled, such a public figure must not only prove dissemination of a falsehood, but must show the disseminator maliciously proceeded in the knowledge that the account was false or with reckless disregard for whether it was false or not.

The Supreme Court obviously was sending more than a legalistic signal to all Americans, including potential libel plaintiffs. It was saying, look, we want an open and unfrightened society in America, one where people can speak their minds even if it gives some offense to others, and public figures especially should be tough enough to take a few lumps, because they volunteered for the spotlight and should expect to be viewed in sometimes cruel relief. You entered the kitchen, the Court seemed to be saying, so expect to take some heat that may not always be entirely fair. The implication was that temperamental people who haven't suffered all that much ought to be restrained about punishing their critics at the expense of eroding the First Amendment's important guarantee of free expression for everyone. Some falsehoods are "inevitable in free debate," the Supreme Court has said; it's necessary to give free speech some breathing space." And it ought not to be treated as lightly as it has been treated during the last decade by a succession of sensitive souls who have rushed to sue when they haven't been seriously damaged. Precedent shows they will usually get a friendly hearing from a jury; juries don't tend to be very solicitous of the press these days, and the importance of the jurors' own freedoms under the First Amendment doesn't get emphasized to them by fee-eager contingency lawyers for plaintiffs who profess to be woefully injured. Is it too much to hope that everybody will take a look beyond pique and profit to the larger damage the society will suffer if we go on trying heedlessly to undercut the First Amendment's freedom to express ourselves plainly about each other, even if it occasionally hurts? Can we start to restrain ourselves in the interest of the larger good?

The Rev. Jerry Falwell's suit against Hustler magazine is only the latest example of a suit that should not have been brought. Once again, the U.S. Supreme Court had to salvage our freedom from resultant abridgement. Who could have taken seriously that tasteless magazine's satirical cartoon of the preacher's supposed drunken rendezvous with

You may think, for instance, that Dan Rather ambushed George Bush in their televised shouting match about the Iran-Contra affair. Or you may believe as I do that Bush ambushed Rather in a deliberate set-up designed to show that Bush was not a wimp. (How Rather got to be the bait for that ambush is another part of it.) Anyway, everybody went away upset.

In another area, Howard Baker undoubtedly spoke for millions when he said the Sam Donaldsons of this world ought to quit shouting at the President. Less affectionate observers of Ronald Reagan see him deliberately using the clatter of those helicopter engines to create the impression that he is being rudely shouted at, as well as to evade a serious treatment of his views on the nation's affairs.

Some see the political parties being supplanted by a presumptuous press eager to usurp the public agenda from the people's elected representatives. Others see an abdication of responsibility by the political parties, leaving a vacuum that the press is paying a price to fill. It's taking the heat in a kitchen the politicians have vacated.

Is the press really running in a pack and conspiring to dictate the issue du jour? Or should we credit those other critics who believe the press ignores the serious issues and put gossip about personalities first?

Some see a malevolent press out to wreck American institutions and destroy a decent measure of privacy for individuals; the press generally sees itself as an embattled and unappreciated servant of the public trying to hold misleaders to account and to slice through their baloney.

There's truth in many of these contentions, of course. And an even larger question is: do we want an orderly and obedient press in place of a rowdy and robust one? Would that better serve democracy?

Let us pause here, then, to ask what the First Amendment to the American constitution was designed to do, and whether Garry Trudeau's worry about the use of lawsuits against irreverent journalistic practice is justified.

The press clause in the constitution says, of course, that you can make no law abridging freedom of the press. Not some law. No law. Of course you can be sued for damaging other people libelously in your exercise of this freedom. But the Supreme Court further interpreted in the 1960s what it takes to libel a public figure.

IT'S THE PLAINTIFF'S FIRST AMENDMENT TOO

When Garry Trudeau, the creator of Doonesbury, addressed the American Newspaper Publishers Association here in Honolulu yesterday, he expressed concern at the number of libel suits being brought or threatened against satirical cartoonists and other American social critics.

He quoted a comment by Gene Roberts of the Philadelphia Inquirer when Roberts was told that some editorial cartoonists hold politicians up to ridicule. "That isn't libel," Roberts said. "That's a job description."

Trudeau recalled that Frank Sinatra's lawyers once threatened to sue him because they claimed a Doonesbury strip about Sinatra's appearance at the Golden Nugget misrepresented facts. "Of course I misrepresented the facts," Trudeau told the publishers. "I made them up."

So if the lawyers could have sued him on that basis, he said, "it would have been a very short trial."

The point is, satire is not supposed to be factual. It's supposed to make fun of the pompous, puncture the inflated, ridicule the pretentious, trip up the posturer and generally magnify failings to the point of the absurd, making its point more often by derisive foolishness than by plodding solemnity.

This satirical treatment of the self-important is an element in the healthy American habit of "always challenging ourselves to do better," Trudeau concluded.

The thought is worth reflection. Do we want to shut down rowdy and robust irreverence about public figures? Is fearful kowtowing to the powerful in character for this nation? That's the flip side, of course, of the ethical argument that the press ought to show greater respect for the privacy, the dignity and the sensibilities of public figures. And that is bound up, in turn, with the larger suggestion by A.J. Liebling, the late press critic of New Yorker magazine, that the press generally "is the weak slat under the bed of democracy."

You can cite ample evidence to support Liebling, depending on the tilt of your critical faculties or the tint of your political coloration.