LAW DAY

Free Speech, Free Press, Free Society

CHRIS GOODNEY/BLOOMBERG

PHOTO ESSAY

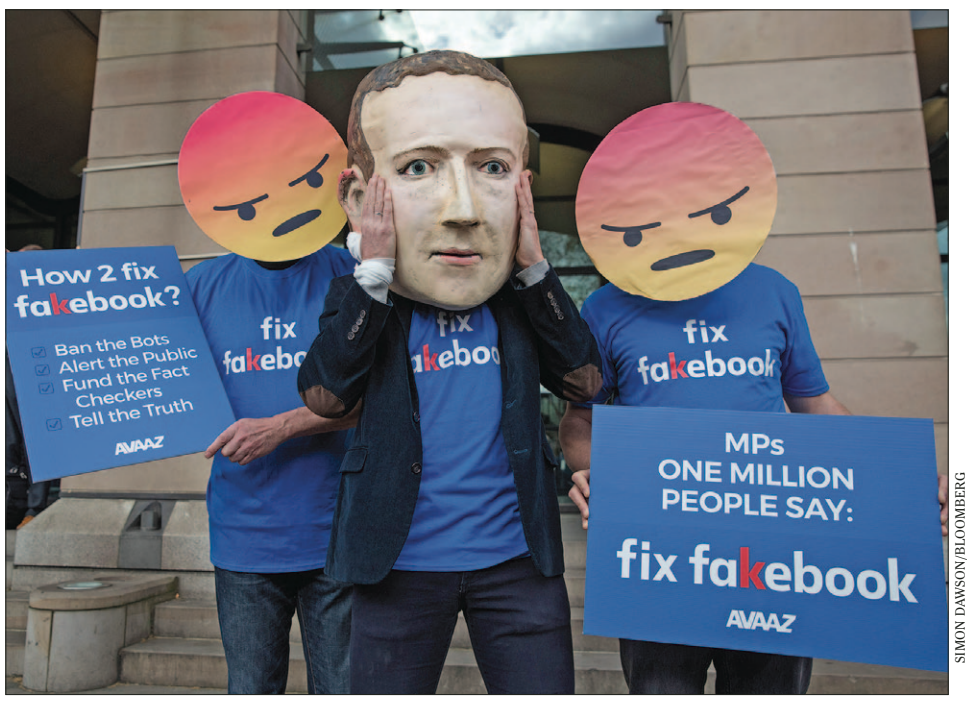
Impact of Free Speech in A Digital Age

Excerpts from the ABA's 'Law Day 2019 Planning Guide'

Freedom of speech and freedom of the press protect journalists and other people from interference by the government in the dissemination of information. But people, including the press, have a responsibility not to communicate false information.[…]

In 1997, during the early years of Internet usage among the public, the Supreme Court recognized in *Reno v. American Civil Liberties Union* that the First Amendment rights of free speech and free press applied to this new communication frontier. The Court's ruling supported the ACLU's position in the case that the Internet is a "freespeech zone."

Today, important issues, such as "fake news" and cyberbullying, heighten concern over what speech should and should not be protected under the First Amendment. Most major social media sites—such as Facebook, YouTube, Twitter, and Instagram—have content and privacy policies meant to police their sites. However, these same policies, many argue, have led to the suppression of activist speech that support causes perceived to be unpopular. And these standards are generally outside any review under the First Amendment because they are imposed by private companies and not by government. What does it mean that private, for-profit companies have so much power to control speech that is critical to a free society?



SIMON DAWSON/BLOOMBERG

The Internet, smartphones, and social media have all enabled us to share more information more quickly than ever before. In the top photo, customers looks at **smartphones** on display at a Samsung event in New York. Above, a demonstrator wears a mask depicting Facebook CEO Mark Zuckerberg, as he stands with **demonstrators** wearing angry emoji masks outside the venue of a U.K. parliamentary committee hearing in London last year. Below, some of the **Facebook and Instagram ads** linked to a Russian effort to disrupt the American political process and stir up tensions around divisive social issues, released by members of the U.S. House Intelligence committee, are photographed in Washington, D.C.

JON ELSWICK/AP

Independent Judiciary And Independent Press Are Crucial To Free Society

Janet DiFiore
Chief Judge
State of New York

"If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter."
—George Washington

This year's Law Day theme—Free Speech, Free Press, Free Society—challenges us to consider the relationship between the First Amendment and the rule of law. In only 45 words, the First Amendment of the United States Constitution protects freedom of speech, press, religion, assembly and petition. These cherished, uniquely American rights are at the heart of our democratic tradition and underscore our commitment to an open culture that values human expression and conscience.

Freedom of speech and press are the great enablers of democratic participation, providing the means by which our citizenry can debate the issues of the day, evaluate the performance of our elected representatives, cast our votes and help shape the direction of our nation's policies and laws. As the Supreme Court stated: "There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." *Landmark Communications v. Virginia*, 435 U.S. 829, 838 (1978).

Furthermore, as George Washington suggested, the First Amendment is also an important defense against secret government, authoritarianism and tyranny. Indeed, a free press serves as the watchdog of our democracy, reporting on important events and issues, identifying wrongdoing and injustice and ensuring transparency and accountability in all areas of our society.

As judges and lawyers who value the rule of law and understand the power and purpose of the First Amendment, we must be vigilant in responding to new challenges created by the rise of the Internet and social media, and by the powerful ways in which they are influencing our public discourse. The growing tendency of people to consume news and information from media outlets which confirm their existing viewpoints is politicizing our debate on public issues. In this climate, we have seen public attacks on judges by political leaders which have gone far beyond disagreement with the merits of judicial decisions to include personal invective designed to intimidate judges and undermine their legitimacy and authority in the public eye.

As members of the only non-political branch of government, judges generally are ethically prohibited from responding to criticism or discussing the merits of their decisions. Lawyers, however, face no such restriction. Indeed, as the rule of law's ultimate defenders, lawyers have a special responsibility to speak out in defense of judicial independence and push back resolutely against those who seek to politicize the judiciary and foment disrespect for judges. We cannot allow the judiciary to become a casualty of partisan politics and the culture wars.

Similarly, attacks on the media branding it the enemy of the people destabilize our republican form of government. Just as an impartial and independent judiciary capable of protecting our fundamental rights and liberties is an indispensable pillar of our tripartite system of government, so too is a free press. As Thomas Jefferson stated in 1786: "Our liberty depends on the freedom of the press, and that cannot be limited without [liberty] being lost."

It is increasingly urgent for the legal profession, the press and our schools and educators to work together to improve civic knowledge and galvanize public support for an independent and impartial judiciary and a free and independent press. A public lacking basic literacy about the roles and functions of the three branches of government and constitutional imperatives like judicial independence will be vulnerable to propaganda and find it difficult to distinguish between appropriate and inappropriate criticism of our courts. Judges are not immune from criticism, of course, but the public needs to understand that there is a critical difference between disagreeing with a decision and saying a judge was wrong on the merits and making personal attacks or intimidating statements calculated to delegitimize judicial

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Americans Oppose Hate Speech Laws

But Say Hate Speech Is Morally Unacceptable.

- **59%** Of respondents said government should allow hate speech.
- **40%** Believe government should prevent hate speech.
- **79%** Said hate speech is morally unacceptable.
- **19%** Believe it is morally acceptable.

Source: 'Law Day 2019 Planning Guide'

The Vital Relationship Between the Courts and the Press

Lawrence K. Marks
Chief Administrative Judge
New York State
Unified Court System

The Unified Court System is a large and complex government institution that impacts the lives of New Yorkers in countless ways. Despite that, relatively few New Yorkers have direct involvement with the courts or the legal process on a regular basis. Most who directly interact with the court system are those summoned for jury service, few of whom actually end up serving on a jury. A much smaller number interact with courts as participants in litigation.

Because there is such limited opportunity for the great majority of New Yorkers to directly interact with our justice system, much of what they learn about the courts comes from the media—newspapers, television, radio and, increasingly, social media. Because understanding and knowledge of the workings of the courts is critical to achieving public trust and confidence in our justice system, we rely heavily on news media to educate the public about what we do and how we operate. Thus, ensuring transparency in the operation of the courts requires cooperation between the courts and the news media.

To further that goal, the court system's Public Information Office works on a daily basis to provide information about the Unified Court System to both internal and external audiences, especially members of the press. The Office is responsible for preparing and distributing to local and statewide media outlets press releases and media advisories concerning court initiatives, programs and events, administrative appointments and other official announcements, and maintains the court system's social media accounts. The Office regularly fields questions about court cases, and often assists reporters in gaining physical access to court proceedings. It also assists the press in obtaining access to court files, caseload data and other relevant information about the courts. We fully recognize the vitally important role of the news media, and we strive to assist them in gaining access to the information they need.

Of course, the press is welcome and, indeed, have a constitutional right to attend and report on court proceedings. Notably, however, in contrast to many other jurisdictions, New York prohibits the broadcasting of witness testimony from trial courtrooms (see Civil Rights Law §52). Although several decades ago New York experimented with audio/visual coverage, including witness testimony, of most trial court proceedings subject to certain limitations, that legislation lapsed in 1997. For trial court proceedings that do not involve witness testimony, still photography and audio/video coverage are permitted at the discretion of the judge. The Court of Appeals and the four Appellate Division Departments are not subject to this prohibition because appellate proceedings do not involve testimony, and so each court live streams

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Inside

LAW DAY: Angela Turturro, Sections Editor
Monika Kozak, Design

Liberty Begins at Home: New York's Vital Role In Preserving a Free Press

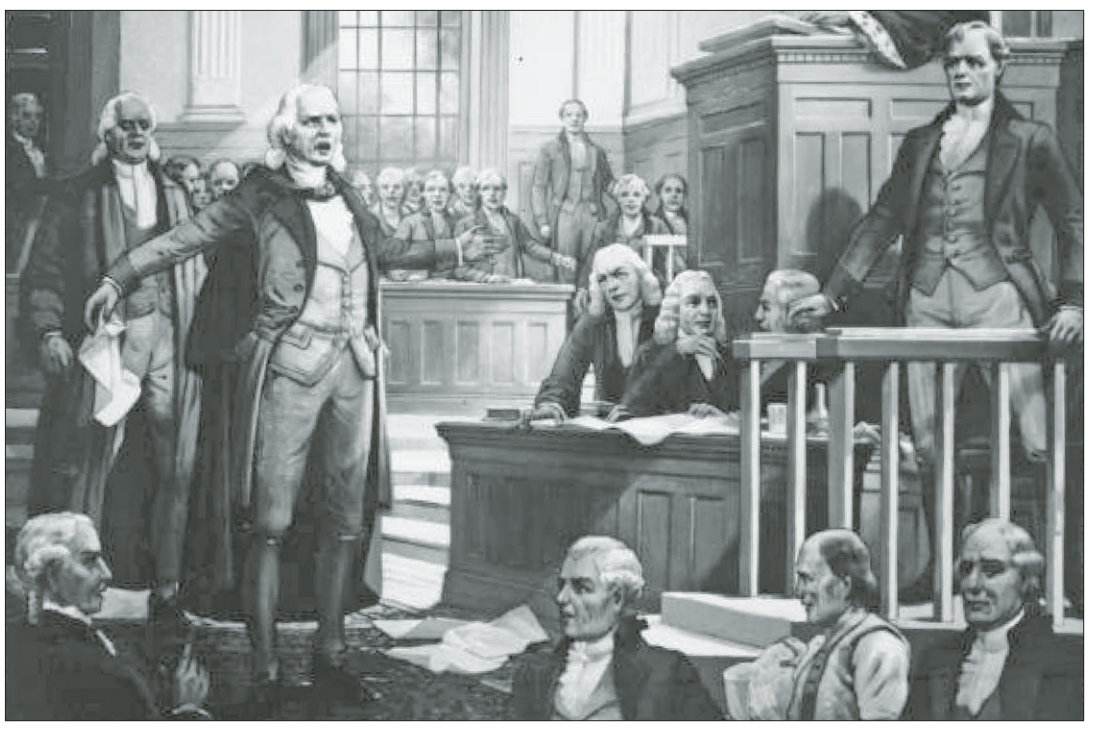
Rolando T. Acosta

Presiding Justice
Appellate Division,
First Department

New York has a rich history of safeguarding freedom of the press. As I sit in my chambers at our majestic First Department courthouse, located on the avenue named for the chief author of the First Amendment, I am reminded that James Madison called freedom of the press "one of the great bulwarks of liberty."[1] One can only imagine what our fourth president would think of the frequent pronouncements demonizing the press as the "enemy of the American people," much less the attacks on journalism and journalists that have been committed and countenanced in recent times. Reporters have been banned from the White House,[2] secretly monitored at the southern border and targeted for questioning,[3] even slaughtered by a foreign authoritarian regime with no presidential rebuke.[4] Meanwhile, there have been calls to "open up the libel laws" to make it easier for public figures to pursue and prevail in lawsuits over press coverage they dislike.[5] Indeed, in a recent concurring opinion, U.S. Supreme Court Justice Clarence Thomas proposed the elimination of the actual malice requirement in defamation cases. See generally *McKee v. Cosby*, 586 U.S. __ (2019) (Thomas, J., concurring).

In the face of these events, it is appropriate to reflect on the important role played by New York law and courts in preserving freedom of the press under our federalist system. Article I, §8 of the New York State Constitution, which guarantees the right of "[e]very citizen" to "freely speak, write and publish his or her sentiments on all subjects,"[6] provides protections that are broader than those afforded by the First Amendment. See *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 529 n.3 (1988); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991); *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557-58 (1986). New York's "Shield Law," Civil Rights Law §79-h, further bolsters journalistic autonomy by giving journalists an absolute privilege against disclosure of their confidential sources and a strong qualified privilege against disclosure of non-confidential materials collected during news-gathering activities.[7] As the Court of Appeals has observed, "New York public policy as embodied in the Constitution and our current statutory scheme provides a mantle of protection for those who gather and report the news—and their confidential sources—that has been recognized as the strongest in the nation." *Matter of Holmes v. Winter*, 22 N.Y.3d 300, 310 (2013). These foundational principles of New York law are of increasing importance in an environment that threatens to erode free-press protections at the federal level

New Yorkers were early supporters of freedom of the press. In 1735, printer John Peter Zenger was prosecuted for seditious libel for publishing negative articles about the Governor and refusing to disclose his source. Although truth was not a defense under the governing English law, Zenger's counsel argued that the jury should consider the truth of the published statements, but the court instructed the jury that it was only to decide whether Zenger had published the » Page 10



John Peter Zenger, printer of the New York Weekly Journal, was charged with seditious libel for publishing criticism of colonial governor William Cosby, violating English law that prohibited publishing criticism of the government that would lead to public dissatisfaction. Zenger's lawyers, Andrew Hamilton and William Smith, argued that the truth of the articles was a defense to the libel charge, and convinced the jury that Zenger should be acquitted. This trial, which is part of the groundwork of freedom of the press, took place at what is now the Federal Hall National Memorial in New York.

LIBRARY OF CONGRESS

Courtroom sketch depicting the trial of '**Crown v. John Peter Zenger**,' at left.

Old City Hall, where the trial took place, with the courtroom on the second floor, above.

A page from Zenger's **New-York Weekly Journal**, Jan. 7, 1733.

Numb. X.

THE
New-York Weekly JOURNAL,

Containing the freshest Advices, Foreign, and Domestick.

MUNDAY January 7, 1733.

TO THE ENGLISHMAN,

——With native Freedom brave,
The meanest Briton scorns the haughtiest Slave.
THE CAMPAIGN.

SInce you have taken upon your self the noble Appellation of the Englishmen; I am perswaded you will not be displeased if, out of the tender Regard I have to the Honour of my Country, I venture to give you my thoughts upon the Duty of an English Man, and endeavour at the same Time to awaken in you, and all my Country Men, the brave Ambition of Wisdom of God is Superiour to the Inventions of Men.

Considering these inestimable Blessings, which we enjoy in a greater Measure, than any other Nation now in being, what should be the Duty of every English Man, and of you in Particular, but to maintain his happiness and his Birthright to the Utmost? To stand by the free Constitution of his Country with his Influence, with his Pen and with his Sword? In a Word, with his whole Might and Main? An English Man may speak his Opinion *without Doors* as well as *within Doors*:

Our Free Press: A Historical Perspective

Elizabeth A. Garry

Presiding Justice
Appellate Division,
Third Department

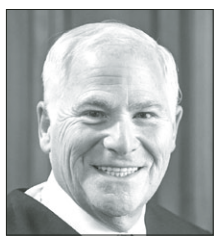
Although our entitlement to certain fundamental freedoms may be self-evident, the rights protecting those freedoms were born out of struggle—first the revolutionary struggle that won our independence, and now the ongoing struggle to interpret and apply our law in a rapidly changing world. As we consider the meaning and future of free speech and free press in our free society, this year's Law Day theme provides an opportunity to look back upon the history of those freedoms and the laws that guarantee them. The law regarding free press has been in flux at various times before, during and since its adoption as one of our founding principles, and its capacity to evolve and accommodate change is a source of strength for our enduring constitutional democracy.

In 1804, newspaper publisher Harry Croswell was indicted on charges of criminal libel and sedition for publishing claims that President Thomas Jefferson had paid another publisher, James Callender, to print negative stories about Jefferson's political adversaries. Croswell's attorney attempted to introduce evidence regarding the truth of the statements, but the jury was instructed to determine only whether Croswell had, in fact, made the publication—and that they were NOT to consider the truth of the underlying assertions, or Croswell's intent in making the publication. Given these instructions, the jury was thus constrained to find Croswell guilty (see *People v. Croswell*, 3 Johns Cas 337, 342 (Sup. Ct. 1804); see also Paul McGrath's in-depth treatment of the matter, published by The Historical Society of the Courts of New York State: "*People v. Croswell: Alexander Hamilton and the Transformation of the Common Law of Libel*," 7 Judicial Notice 5, 11 (2011).

Alexander Hamilton was one of the attorneys representing Croswell, and he traveled to Albany in 1804 to seek a new trial. The highly anticipated court appearance was attended not only by curious members of the public, but also many members of the New York State Senate and Assembly, who were at the time considering a bill that would allow truth as a defense against charges of libel. See McGrath at 15; Ron Chernow, Alexander Hamilton 669 (2005). Hamilton's six-hour-long argument contended, among other things, that evidence regarding the truth of the published statements should be admissible as evidence of the publisher's intent. See *People v. Croswell*, 3 Johns Cas at 360-61.

The vote was divided 2-2, and Croswell's motion for a new trial was denied. However, later that year, the Legislature did pass a bill regarding charges of libel. William W. Van Ness, who had served as Croswell's attorney at trial and on the appeal, was also a member of the Assembly, and he introduced the bill. The proposed bill incorporated the principles espoused by Hamilton during his argument in the *Croswell* case; among other things, the proposal empowered juries to determine the law and the facts, and provided that a defendant could introduce evidence of truthfulness in his defense, so long as the publication was made "with good motives and justifiable ends." *People v. Croswell*, 3 Johns Cas 337, 412 (Sup. Ct. 1804) quoting sess. 28 c. 90 (1805); see McGrath at 17. Thereafter, Croswell was ultimately awarded a new trial, and the prosecution declined to retry him. See McGrath » Page 10

Freedom of Information Is Integral for a Free Press



Alan Scheinkman

Presiding Justice
Appellate Division,
Second Department

The First Amendment to the United States Constitution provides that "Congress shall make no law … abridging the freedom of speech, or of the press." The Free Speech Clause, of course, protects the freedom of each individual in our society "to express [oneself] in accordance with the dictates of [one's] own conscience." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985); see, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J. concurring)). The Free Press Clause, while directly protecting the news gathering and publication freedoms of journalists, is ultimately for the benefit of all of us—the public at large. See *Time v. Hill*, 385 U.S. 374, 389 (1967). The principal right guaranteed under this clause is, at bottom, the right of the public to information. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) ("'The protection of the public requires not merely discussion, but information'"), quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("The predominant purpose of the grant of [the Free Press Clause] was to preserve an untrammeled press as a vital source of public information"); see also *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people").

Providing the public with information is not an end in itself, but rather is a prerequisite to the ability of the people to intelligently participate in self-government. When the Free Press Clause was adopted, "'[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' … [S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.*, 297 U.S. at 249-50, quoting 2 Cooley's Constitutional Limitations (8th Ed.) p. 886.

To put the matter more succinctly, while freedom of speech may be viewed as protecting expression that emanates from the mind of a particular person, freedom of the press may be viewed as protecting the flow of information that may enter the public consciousness. While the uninhibited thought and expression that is facilitated by freedom of speech is essential to human liberty, an informed electorate, facilitated by freedom of the press to inform, educate and enlighten, is essential to democracy.

At this moment in our history, freedom of speech, while seemingly perpetually threatened in various ways, is in fairly good shape, at least in the sense that social media and internet communication in general have made it very easy, perhaps too easy, for each of us to say virtually anything about everything, potentially anonymously and to the entire world, virtually without constraint and, indeed without reflection. Yet, at the very time we are bombarded with a torrent of words and images through both traditional media and through new forms of social communication, our entitlement to be apprised of determinable facts, or, to put it differently, our right to *accurate* information, is not faring so well. We are flooded with a steady stream of communications which purport to provide information—indeed, exponentially more information than ever before—but that stream is heavily polluted with distortions, propaganda, and "fake news," which severely compromise the ability of the populace to make critical judgments about the policies and conduct of its leaders. We have seen foreign nations, and others, undertake to use the modern tools of technology to deliberately spread false information on a widescale, precisely in order to divide us, undermine our confidence in our leaders, and cause us to doubt ourselves and our democratic ideals. We have developed a tendency for each of us to retreat into the cocoon of whatever media outlet provides news that fits our preexisting world views. We seek to avoid learning things new and different; we take comfort in having our existing store of knowledge, however strongly or weakly constituted, reinforced. It was once said that each of us is entitled to our own opinions but not to our own facts. Now we live in a world in which we often claim entitlement to our own facts, regardless of their provenance or probability.

Of course, the law should not—and cannot—ensure the accuracy of all publicly disseminated information, but it can, and must, protect members of the press and others whose proper role it is to keep the us, the electorate, informed, to cut through the clutter and the flack, and help us separate fact from fiction. The U.S. Supreme Court has, for example, recognized that the Free Press Clause prohibits prior restraint of publication (see *Near v. Minnesota*, 283 U.S. 697 (1931)), even where the material to be published allegedly implicates national security concerns. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case). The Free Press Clause also restrains the government's power to subject the distribution of information to taxation or licensing requirements. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). In addition, the Supreme Court has held that the First Amendment prohibits state courts from awarding damages for defamation to public officials in the absence of a showing » Page 10

NATIONAL ARCHIVES

The New York Times.

NEW YORK, TUESDAY, MARCH 29, 1960.

"*The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard.*"

—*New York Times editorial*
Saturday, March 19, 1960

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offences." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is *our* America as well as theirs. . . .

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

Stella Adler, Raymond Pace Alexander, Shelly Appleton, Harry Van Arsdale, Harry Belafonte, Julie Belafonte, Dr. Algernon Black, Marc Blitztein, William Bowe, William Branch, Marlon Brando, Ms. Ralph Bunche, Diahann Carroll, Joseph Cohen, Richard Coe, Nat King Cole, Cheryl Crawford, Dorothy Dandridge, Ossie Davis, Sammy Davis, Jr., Ruby Dee, Harry Dolly, Scotty Eckford, Dr. Philip Elliott, Dr. Harry Emerson, Anthony Franciosa, Mathew Guinan, Lorraine Hansbury, Rev. Donald Harrington, Nat Hentoff, James Hicks, Mary Hinkson, Van Heflin, Langston Hughes, Morris Iushewitz, Mahalia Jackson, Paul Jennings, Eartha Kitt, Rabbi Edward Klein, Hope Lange, John Lewis, Viveca Lindfors, David Livingston, William Michaelson, Carl Murphy, Dan Murray, John Murray, A. J. Muste, Frederick O'Neal, Peter Ohlin, Albert P. Palmer, Clarence Pickett, Shad Polier, Sidney Poitier, Michael Pollatzer, A. Philip Randolph, John Raitt, Elmer Rice, Cleveland Robinson, Jackie Robinson, Mrs. Eleanor Roosevelt, Bayard Rustin, Robert Ryan, Frank Silvera, Louis Simon, Hope Stevens, David Sullivan, Johns Sun, George Tabori, Rev. Gardner C. Taylor, Norman Thomas, Kenneth Tynan, Charles White, Shelley Winters, Max Youngstein

'Heed Their Rising Voices' was an advertisement published in the New York Times and paid for by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South to attract support for King against an Alabama perjury charge. The advertisement, which was critical of actions taken against civil rights protesters in Montgomery, became the basis of a civil libel suit when the Montgomery police commissioner sued The Times. In 'New York Times Co. v. Sullivan', decided March 9, 1964, the Supreme Court established the "actual malice" standard—public officials cannot sue for libel unless they prove that a statement was made with "actual malice," that is, knowing or reckless disregard for the truth.

At left, **advertisement published in the New York Times** on March 29, 1960.

MANUEL BALCE CENETA/AP

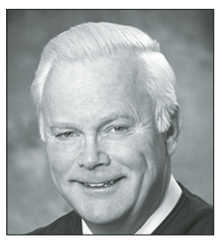
UW DIGITAL COLLECTIONS

In 'Tinker v. Des Moines Independent Community School District,' a landmark decision addressing the First Amendment rights of U.S. public school students, the Supreme Court ruled that the school board was wrong to suspend students protesting the Vietnam War by wearing black armbands to school. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," wrote Justice Abraham Fortas, who delivered the opinion of the court.

Top left, students **Mary Beth Tinker** and her brother, **John** display two black armbands in 1968.

Student protesters marching down Langdon Street at the University of Wisconsin-Madison during the Vietnam War era in January 1965.

Internet Is an Essential Conduit To Exercising Our Right to Assemble



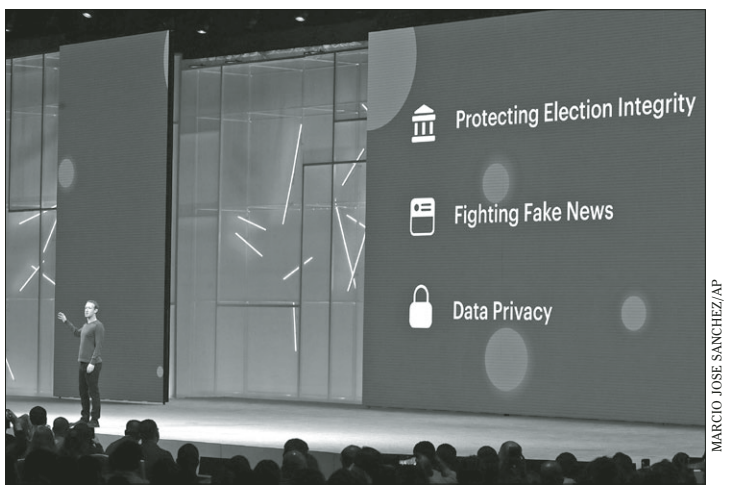
Gerald J. Whalen
Presiding Justice
Appellate Division, Fourth Department

Among the essential rights guaranteed by the First Amendment, "the right of the people peaceably to assemble" seems to garner little distinct discussion, although it is recognized as being inextricably bound with and "equally fundamental" as those of free speech and free press. *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). Indeed, at least one scholar describes this right as having become "a historical footnote in American political theory and law." See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565, 566 (2010). Nonetheless, the right to peaceably assemble for the purpose of advancing beliefs and ideas or "to petition the Government for a redress of grievances" (U.S. Const. amend. I) constitutes an "attribute of national citizenship" (*United States v. Cruikshank*, 92 U.S. 542, 547 (1875)).

The importance of the right to peaceably assemble can be found in the traditional characteristics ascribed to its exercise: Often the right is invoked by those who "dissent from the majority and consensus standards endorsed by government" and who seek public, advocacy-oriented visibility (see Inazu, 84 Tul. L. Rev. at 570). The exercise itself tends to be more expressive than simple association, which can be private, and may manifest in parades, demonstrations, and other creative forms of engagement (id.; *cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958)).The historical significance of this right, early manifestations of which include eighteenth century political societies and their initially scandalous expressions of open criticism of the federal government, is the "understanding of popular sovereignty and representation in which the role of the citizen was not limited to periodic voting, but instead entailed active and constant engagement in political life" (Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 NC L. Rev. 1525, 1537-40 (2004); see Inazu, 84 Tul. L. Rev. at 577-81).

Today, assembly is not only a conduit for the expression of political dissent against the government, but an important tool for recognizing and amplifying otherwise marginalized voices in our society. More and more often our nation's citizens meet in cyberspace to opine and discuss and decry and, yes, 'like' positions on issues, not only of politics, but of our societal values as well. This digitalization of the town square bridges physical distances and introduces people, thoughts, and experiences to which we would not otherwise be exposed, and can facilitate understanding and empathy due to the context this communication provides. The Internet permits private interaction, certainly, but it also permits people, regardless of physical distance or other traditional impairments to collective action, to unite to discuss and advocate their shared ideals to the government or the public in general.

Moreover, although the Internet may not be a public forum in and of itself (see generally *United States v. American Library Assn*, 539 U.S. 194, 205-07 (2003) (plurality opinion); Elizabeth Henslee, *A Funny Thing Happened on the Way to the Public Forum*, 43 Cap. U. L. Rev. 777, 826-30 (2015)), social media is often the catalyst for the traditional, real-world exercise of the right of assembly in its most "pristine and classic form": a peaceable gathering to protest grievances inflicted by government (*Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); Inazu, 84 Tul. L. Rev. at 566). In other words, it has become an essential conduit to the exercise of this right. Far from an idle information stream, activists—seasoned or newly fervent alike—utilize social media to raise awareness, to organize, and to mobi- » Page 10



MARCIO JOSE SANCHEZ/AP

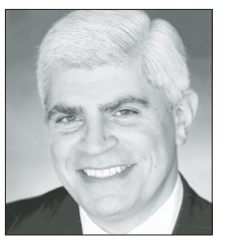
LIBRARY OF CONGRESS

Results of the 2017 Gallup/Knight Foundation Survey on Trust, Media and Democracy indicate that most Americans find it harder to be well-informed and to distinguish accurate from fake news, and increasingly perceive the media as biased.

Facebook CEO **Mark Zuckerberg,** top left, makes the keynote address at F8, Facebook's developer conference in San Jose, Calif., last year.

Above and at left, an illustration by Frederick Burr Opper titled **'The fin de siècle newspaper proprietor'** published in 1894, and a close-up, shows a newspaper owner sitting in a chair in his office next to an open safe where "Profits" are spilling out onto the floor; outside this scene are many newspaper reporters for the "Daily Splurge" rushing to the office to toss their stories onto the printing press, such stories as "A Week as a Tramp!! Wild and Exciting Experiences of a Daily Splurge Reporter", "Life in Sing Sing—a Splurge Reporter in Disguise", "Divorce Court Details", "How beggars are treated on 5th Ave. by Fanny Fake", and "High Spiced Sensation." A notice hanging on the wall of the office states "The Motto of the Daily Splurge—Morality and a High Sense of Duty".

We Must Protect 'One of the Greatest Bulwarks of Liberty'



Michael Miller
President
New York State Bar Association

The overarching theme of this year's Law Day, *Free Speech, Free Press, Free Society,* is freedom of expression, the bedrock upon which our constitutional democracy is built. The unprecedented assault upon this precious freedom by our current President and his supporters is dangerous and alarming, as it undermines the American public's confidence in the institutions of government—Congress, the Executive Branch and the Judiciary, as well as the press. The vitality and future of our constitutional democracy is threatened when the public loses confidence in its most basic institutions and ideals.

The first 10 amendments to the U.S. Constitution were adopted in 1792, three years after adoption of the Constitution itself, and are commonly referred to as the Bill of Rights. The first of those amendments provides the essential support for the most fundamental of all rights, the right of free expression of ideas.

Freedom of expression is the tyrants' greatest enemy. Throughout history, when authoritarian leaders have been unhappy with perceived criticism from the news media and others, they have often referred to those critics as the "enemies of the people." Thereafter, frequently, blood has flowed, and people have died.

Whenever President Trump is unhappy with a judicial decision, he derides the judiciary. He refers to a judge duly approved by Congress as a "so-called judge." When he is unhappy with news media coverage, he attacks the press as an institution. He labels any unflattering or critical story "fake news" and frequently declares that the press is "the enemy of the people."

Hitler's Propaganda Minister Joseph Goebbels frequently referred to Jews as "a sworn enemy of the German people" who posed a risk to the führer's vision for the country. Goebbels wrote that "if someone wears the Jewish star, he is an enemy of the people." This profoundly dangerous rhetoric and strategy of constant attack on adversaries used by Hitler and others in Nazi Germany led to some of the darkest days in modern history—World War II and the Nazis' systematic extermination of six million Jews, and millions more Roma, disabled persons, gay men and others.

During a period referred to as the "Reign of Terror" after the French Revolution, a law was enacted that established a special tribunal to punish the "enemies of the people." Countless thousands were declared enemies of the people for crimes that included "spreading false rumors" and were summarily guillotined.

Lenin is quoted as saying that he found "instructive" the French policies against "enemies of the people." Lenin and Stalin employed the term to all who disagreed with their policies or ideology, from political opposition leaders to members of the press to those who wrote critical articles to clergy who opposed state-mandated atheism. Being called an enemy of the people could result in immediate imprisonment, banishment to a Russian Gulag, or worse.

During the harshest days of the cultural revolu- » Page 10

MICHAEL MILLER *is a solo practitioner in Manhattan.*

DiFiore

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authority and influence future decisions.

I am encouraged by the fact that Hank Greenberg, New York State Bar Association President-Elect, shares my concerns, and we have committed to bring the Bench and Bar together to collaborate on strategies and programs to advance public education on the rule of law. Living as we do in the Internet age of snapshots and soundbites, communicating the practical importance of complex implicit norms like "checks and balances" will not be an easy task, but we truly believe that no element of our society is better positioned to lead on these issues and work productively with schools and the media than the Bar and Bench. Together, we can and must develop concrete, implementable strategies to remind the American public of how and why our rights and freedoms are dependent on an independent judiciary and a free and independent press.

We need simple and direct messages like the one I read recently where a three-legged stool was used to describe the unique design and stability of our system of government, including what would happen to the structure if one or both of the executive and legislative branches decided to kick out the third leg. We also need to sensitize the media on how its coverage can influence public perceptions. For example, when reporting on high-profile appellate rulings and trials, the media's tendency to routinely identify the judges' political party affiliations or to label them as "Obama" or "Bush" judges further politicizes the adjudicative function in the public eye and diminishes confidence in the impartiality and independence of judges.

On this Law Day devoted to freedom of speech and press, we find the rule of law under pressure in many ways, from the rapidly changing means by which we consume information and express our views in the age of the Internet to the decline in civic knowledge among our citizenry to the noxious efforts to politicize the judiciary and undermine public confidence in the impartiality of judges. Our legal profession is challenged to consider what we should be doing to promote an informed electorate that understands the value of judicial independence and the rule of law. As lawyers who swore an oath to uphold the Constitution, it is up to us, individually and collectively, to speak out against corrosive attacks on the judiciary. And, just as important, it is up to us to assume a broader leadership role in working with the media and our schools to make sure that every American understands that we cannot have a free society without an impartial and independent judiciary or a free and independent press.

Acosta

« Continued from page 8

statements. Despite this instruction, Zenger was acquitted. *Crown v. John Peter Zenger,* Historical Society of the New York Courts; see also *Beach v. Shanley,* 62 N.Y.2d 241, 255 (1984) (Wachtler, J. concurring). Thereafter, "New York became a hospitable environment for journalists and other purveyors of the written word." *Holmes,* 22 N.Y.3d at 307. In 1803, Harry Croswell was convicted of libel for publishing an article critical of President Thomas Jefferson and others. *People v. Croswell*, 3 Johns. Cas. 337 (1804); see also *People v. Santiago*, 185 Misc.2d 138, 147-50 (Monroe County Ct 2000). On appeal to the New York Supreme Court of Judicature, Alexander Hamilton was "in the room where it happen[ed],"[8] representing Croswell. Hamilton argued that the defendant should have been allowed to offer evidence of the truth of the publication in his defense. That argument was rejected by a divided Court and the conviction stood.[9] One year later, however, New York enacted legislation providing that truth is a defense to libel "where published with good motive and for justifiable ends."[10] This same language was included in article I, §8 of New York's Constitution when it was adopted in 1821.[11]

The inclusion of article I, §8 in the New York Constitution was of particular significance when one considers that it wasn't until 1925, in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), that the U.S. Supreme Court endorsed the concept that the First Amendment, through the doctrine of incorporation by way of the Fourteenth Amendment, could apply to the states.

Following *Gitlow*, the First Amendment establishes the floor for free speech and press protections in New York, but not the ceiling. Notably, "the drafters [of article I, §8] chose not to model our provision after the First Amendment, deciding instead to adopt more expansive language." *Holmes*, 22 N.Y.3d at 307. As Chief Judge Kaye eloquently noted:

> This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas (*Matter of Beach v. Shanley*, 62 N.Y.2d 241, 255-256 [Wachtler, J., concurring]). That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that 'every citizen may freely speak, write and publish … sentiments on all subjects.' (NY Const, art I, §8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.
>
> *Immuno AG*, 77 N.Y.2d at 249.

The Court of Appeals reaffirmed the preeminence of New York's free speech protections in *Matter of Holmes v. Winter*, 22 N.Y.3d 300 (2013). In that case, Colorado police who investigated the mass shooting in an Aurora, Colo. movie theater were suspected of having leaked information about the case to a New York reporter, in violation of a pre-trial publicity order. The defendant in Colorado subpoenaed the reporter under a Colorado law providing for out-of-state witnesses to appear in criminal proceedings. The New York trial court ruled that the reporter was required to appear in Colorado. On appeal, the majority of a First Department panel affirmed, holding that the reporter could raise any claim of privilege in the Colorado proceeding. 110 A.D.3d 134 (2013). Justice Saxe and I dissented, reasoning that the reporter should not be compelled to appear in the Colorado proceeding, because the sole purpose of compelling her testimony was to seek disclosure of her confidential sources, in clear violation of the absolute protection against such disclosure embodied in the Shield Law. Id. at 139. The Court of Appeals agreed with our dissent: "[P]rotection of the anonymity of confidential sources is a core—if not *the* central—concern underlying New York's journalist privilege, with roots that can be traced back to the inception of the press in New York." 22 N.Y.3d at 316. The Court further noted that requiring a reporter to wait until she was on the witness stand to assert her claim of privilege "can itself be viewed as a significant incursion into the press autonomy recognized in article I, §8 and the Shield Law." Id. at 319.

Finally, a key component of a free press emanating from federal jurisprudence is the "actual malice" standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Sullivan* held that in order to prevail on a defamation claim, government officials and other public figures must prove that the statement in question was "knowingly false" or made with "reckless disregard" for its accuracy. Id. at 279-81. As referenced above, Justice Thomas recently issued a lengthy concurrence to a denial of certiorari in which he argued that the Court "in an appropriate case" should reconsider *Sullivan* and its progeny. *McKee v. Cosby*, 586 U.S. __ (2019) (Thomas, J. concurring). After analyzing the status of libel laws in the 18th and 19th centuries, Justice Thomas observed that there was "little historical evidence suggesting that the … actual-malice rule flows from the original understanding of the First or Fourteenth Amendment." Id. He concluded by noting that "[t]he States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm." Id.

New York has a long tradition of striking that balance in support of a free press, but not all states share that tradition. So, it is possible that, if *Sullivan* were overturned by the U.S. Supreme Court, "the New York legislature [and] the New York courts … would quickly act to protect the press because that's what we do in New York."[12] Our sister states may not be so quick to act, or may not act at all. Therefore, in light of the growing threats to journalistic freedom in the United States and abroad, the vital importance of continuing New York's tradition of protecting freedom of the press is as clear today as it has ever been.

1. *Madison Speech in the House of Representatives, 1789,* Library of Congress.
2. Peter Baker, *Trump Bars CNN's Jim Acosta From the White House,* NY Times (Feb. 17, 2018).
3. Julia Ainsley, *U.S. Officials Made List of Reporters, Lawyers, Activists to Question at Border,* NBCNEWS.com (March 6, 2019).
4. Peter Baker and Eric Schmitt, *Trump Defies Congressional Deadline on Khashoggi Report,* NY Times, (Feb. 8, 2019).
5. Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws,* NY Times (Jan. 10, 2018).
6. The full text of article I, §8 reads: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."
7. The Shield Law was amended in 1990 (Civil Rights Law §79-h[c]) to codify the Court of Appeals' holding in *O'Neill*, 71 N.Y.2d 521, which recognized that article I, §8 provides reporters with a "qualified privilege" against compelled disclosure of "nonconfidential news" (see *Matter of Holmes v. Winter*, 22 N.Y.3d 300, 308 (2013).
8. Lin-Manuel Miranda, *The Room Where It Happens*, Hamilton the Musical, Act 2 (2015).
9. "The Court was deadlocked because the 'fifth' judge, Ambrose Spencer, had deferred his judicial appointment to the New York Supreme Court of Judicature during its pendency of this case so that he could continue to represent the People. In these circumstances, the prosecutor was entitled to move for judgment on the verdict, but the motion was not made." *People v. Croswell,* Historical Society of the New York Courts.
10. N.Y. Sess. Laws ch. 90, §2 (1805); *People v. Croswell,* Historical Society of the New York Courts. The burden now rests with the plaintiff in a defamation case to prove falsity. See generally *Immuno AG*, 77 N.Y.2d 235.
11. See full text of article I, §8, supra.
12. Tony Mauro, *Justice Clarence Thomas Stirs Up a First Amendment Squabble Over Libel Law,* NYLJ (March 29, 2019) (quoting First Amendment litigator Katherine Bolger).

Marks

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and archives appellate arguments on their respective webpages for public viewing. Additionally, in New York City and many courts outside of the City, photography and audio/video recording by accredited members of the media are allowed in common, non-courtroom areas of the courthouse, as long as such coverage does not undermine the safety and security of the public, the litigants or court staff.

In addition to the work of our Public Information Office, we seek to promote transparency through events such as the Chief Judge's annual State of Our Judiciary address. The State of Our Judiciary is our primary opportunity to provide the public with an accounting of the —what we are working on, what we have accomplished and where we need to improve. In addition, the annual report on the Chief Judge's Excellence Initiative and the Annual Report of the Chief Administrator of the Courts further detail programs, initiatives and services we offer to provide the highest quality of justice. We owe the public a fair and accurate reporting of what we do, and these publications better ensure that goal is achieved.

Complementing its reporting on the operations of the courts, the news media have an important role in promoting improvement and reform of the justice system. The press can be an invaluable vehicle for court leaders to speak directly to the public, explaining new ideas and programs and innovations we are implementing, or considering implementing, to improve the delivery of justice.

Of course, the court system can also take inspiration from the press. The press has been instrumental in identifying problems in the justice system, motivating the courts to develop new approaches and methods to adjudicate cases. Examples include: reporting on the ravages of the opioid epidemic, which spurred establishment of specialized courts to help address this crisis; highlighting that New York was one of only two states in the nation that set the age of criminal responsibility at 16, which resulted in the Unified Court System taking a lead role in promoting legislation to remedy this problematic anomaly; coverage of the plight of veterans in the justice system, which led to creation of veterans' courts that provide greater sensitivity to veterans' problems and provide services and programs; and, attention to the inequities of our bail system, which has led to the courts' greater use of alternatives to monetary bail, better ensuring that those who stand accused of a crime are not detained pretrial due to a lack of economic means.

These are just a few examples of how the press has helped to prod the Unified Court System to strive for excellence and provide a higher quality of justice. With the utmost regard to our obligation of transparency to the public, we recognize that an active and aggressive press helps to ensure a better system of justice. Fully cognizant of that, the Unified Court System is committed to assisting the press in all ways possible—even when it is critical of our operations—and to achieving the highest level of transparency.

Scheinkman

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of actual malice. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Though the relative freedom to defame may, at times, result in unfair and uncompensated hurt and injury to cherished and valued reputations, so much so that this principle is now subject to significant criticism by at least one holder of high office, the Supreme Court has accorded broad protection to the press in fulfilling its vital role, because "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Our constitutionally expressed freedoms are just pretty words on a page without the judiciary to enforce them. To that end, we need to take great care in order to foster, not stifle, public access to governmental information. While there may be principled reasons to withhold certain, narrow kinds of information from the public, either temporarily or permanently, in the main, we are all better served by encouraging the free flow of information in order to enhance and elevate the public discourse, to shed light in the darkness that sometimes surrounds us, and help us discern truth from falsity. In addition to safeguarding the vital role played by the press, the judiciary should ensure that its own functions, and those of the other branches of government, are, to the greatest extent feasible, open and transparent, to maximize citizens' knowledge of, and confidence in, the institutions of their government. For example, the U.S. Supreme Court held in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) that the public and the press have a First Amendment right of access to criminal trials. This holding was premised on the proposition that "'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,'" and mandating public access to criminal trials would ensure that such discussion "is an informed one." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604, 605 (1982), quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966). While it may be unrealistic to expect that members of the public have the time to engage in regular courtwatching, they have the right to do so and have the right to have the media sit in and report on the proceedings for them. Chief Judge Janet DiFiore's Excellence Initiative has, as its ultimate objective, the goal of informing the public as to the work of the courts and where it has been improved and where improvement is needed. This self-reporting is essential to public confidence, trust, and accountability.

In 1966, Congress contributed to the cause of transparency by enacting the Freedom of Information Act (5 U.S.C. 552), which requires federal agencies to make information available to the public. This statute calls for broad disclosure, and the statutory exemptions from disclosure are construed narrowly. See *Milner v. Department of Navy*, 562 U.S. 562, 571 (2011). The New York Legislature followed suit in 1977 by enacting the Freedom of Information Law (Public Officers Law §§84 et seq.), which imposes upon state and local agencies disclosure requirements similar to those of the federal statute. Under the New York statute, "all agency records are presumptively available for public inspection and copying," and "the burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption." *Hanig v. State Dept. of Motor Vehicles*, 79 N.Y.2.d 106, 109 (1992). The New York statute includes a legislative declaration stating, among other things, that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions … . The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article." Public Officers Law §84.

Our ability to govern ourselves is increasingly dependent upon a free and engaged media that provides, tests, and synthesizes information. This right to information, and the ability of the press to perform these essential functions, must be protected and nurtured if democracy is to survive.

Miller

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tion in China, Mao declared, "The social forces and groups which resist the socialist revolution and are hostile to or sabotage socialist construction are all enemies of the people."

It is frightening that our President regularly uses language from the tyrants' lexicon. Lawful investigations are described as "witch hunts." Immigrants are called vermin. African-American individuals and others are referred to as dogs. He proposes regulation—i.e., censorship—of Facebook and Twitter. He even rails against political satire that targets him and has called on the Federal Communications Commission to investigate NBC because he doesn't like skits on *Saturday Night Live* in which he and his administration are lampooned.

Americans have not seen such an assault on the truth and free expression since the McCarthy era in the 1950s. In today's digital age, an avalanche of baseless claims and insults are tweeted by the President and repeated over and over in the social media echo-chamber. Through social media campaigns, there have been serious attacks on the essential institutions of our government, and real damage has been done to the public's confidence in these institutions.

I am by no means suggesting that we cannot or should not take issue with any media coverage. But it is unfair and deeply dangerous to question without a modicum of evidence the integrity of the news media simply for criticizing or challenging political leaders.

Democracy is fragile. President Ronald Reagan warned: "Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same."

During the Revolutionary War, nearly 250 years ago, Thomas Paine wrote, "The times have found us." The times also found Abraham Lincoln to preserve our nation, and the times found Franklin Delano Roosevelt to save the free world from tyranny. Now, the times have found us to honor our oath to the Constitution and protect America, its values and its vital institutions.

We dare not sit idly by on the sidelines as witnesses to the erosion of public confidence in the fundamental institutions of democracy and freedom. The oath that each of us took to protect and defend the Constitution of the United States gives us a special obligation.

Without a free press, there is no free society. We must protect the freedom of the press, what George Mason referred to in 1776 as "one of the greatest bulwarks of liberty." The ideals enunciated in our Constitution and Bill of Rights have made America great. Our duty is to keep it so.

Garry

« Continued from page 8

at 17-18. These principles were also later incorporated into the New York State Constitution at Article 1, Section 8.

This bit of history not only reveals a significant moment that took place in our state courts, but also demonstrates, in context, the evolution of our nation's attitudes and our movement toward greater protections afforded to speech and press. It bears noting that Hamilton's argument in defending Croswell was NOT a full-throated endorsement of truth as an absolute defense in a libel prosecution. Hamilton sought only to allow the jury to consider the truth or falsity of the published statements "as a means to determine the intent" of the publication. *People v. Croswell*, 3 Johns Cas at 357; see also McGrath at 15. Although he defended a free press, Hamilton reportedly rebuked "the novel, the visionary, the pestilential doctrine of an unchecked press." *People v. Croswell*, 3 Johns Cas at 353 (Sup. Ct. 1804). We therefore recall that the common law concept of a "free press" was very different from that which we now embrace as a critical cornerstone of our free society. Around the time of Croswell's trial, press freedom referred to publication free from licensure by the government, or prior restraint, but clearly did not include a broad freedom from official intervention—or even criminal prosecution—after the fact. See McGrath at 9; David Jenkins, "The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence," 45 Am. J. Legal Hist. 154, 161 (2001), quoting Blackstone's Commentaries on the Laws of England.

In revisiting this history, we are reminded that even our most fundamental principles and closely-held freedoms have evolved over time. 160 years after *Croswell*, the Supreme Court would decide the landmark free speech case, *New York Times Co. v. Sullivan*. That decision was rendered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254, 270 (1964).

As the law has developed, we can see the thread of Hamilton's argument in *Croswell* weaving through First Amendment jurisprudence. He contended that evidence of the truth should be admissible with respect to intent and that both truth and intent should be determined by the jury. In *New York Times Co. v. Sullivan*, the Supreme Court would ultimately place intent at the center of a civil libel cause of action and shield news organizations from liability for statements about public officials—even if the statements are inadvertently inaccurate—as long as they did not act with actual malice. In a landmark case on criminal libel, the Supreme Court would note that "the 'good motives' restriction incorporated in many state constitutions and statutes to reflect Alexander Hamilton's unsuccessfully urged formula in *People v. Croswell* liberalized the common-law rule denying any defense for truth." *Garrison v. State of La.*, 379 U.S. 64, 72 (1964) (internal citations omitted).

Looking forward, now as in the past, our nation's continuing progress and resilience clearly depend upon leaders in all three branches of government playing their critical parts, with good faith and necessary sacrifice of self-interest, to preserve our constitutional norms. It further relies upon the zealous advocacy of attorneys and diligent service of judges who uphold our law. Most importantly, our freedom and our good government depend upon an engaged—and well-informed—public, whom we in government have pledged to serve.

Whalen

« Continued from page 9

lize in person locally, nationally, and globally. What begins as an online thought becomes hundreds of thousands assembling to petition shared grievances against the government—such as the Women's March on Washington and its simultaneous satellite marches throughout the nation. This grass roots method of political and social engagement is far from new. We have simply replaced a bullhorn with a hashtag and a physical flyer with a digital post.

This is not to say that online assembly does not have its dangers. The practical reality of the Internet is that it can divide, rather than unite, when users interact in only self-created echo chambers that parrot their existent views back to them. The constant flow of new information, colored by a poster's own perception or outright disinformation, can undermine attempts at reasoned deliberation and allow debate to devolve into meaningless adherence to a party line. This potential for people to divide into factions, however, is neither new nor a result of technology. The Founders in fact anticipated both this result and the problems arising from this division. "A zeal for different opinions … ; an attachment to different leaders … ; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good." James Madison, Federalist No. 10. The fix, of course, is not to inhibit the dissenting or differing viewpoints that create factions within our society, inasmuch as this erosion of liberty would "be worse than the disease." Id. Instead, an essential element of our republican government is the need to ensure that the voice of the majority does not silence the rights of the minority. James Madison, Federalist No. 51. Through the exercise of the right to assembly, now supported by our increased ability to connect and understand, the voices of the marginalized and disenfranchised are amplified, and our nation is stronger for it.