FIRST AMENDMENT WATCH

NAT HENTOFF

Second-class First Amendment rights

*NOT ALL SPEECH IS PRO*tected—so the majority of the Supreme Court has perennially held. For example, the dissemination of obscenity and of libel can be punished. Recently, however, an alarming new stricture on speech has been claimed—and it will probably take a Supreme Court decision, some years hence, to determine whether this theory will be allowed to further weaken the First Amendment.

The theory, based on a case now in the California courts (*Olivia Niemi* v. NBC), begins with two rapes. As noted in the last *First Amendment Watch* [*INQUIRY*, June 12, 1978], NBC's San Francisco station, KRON-TV, showed a dramatic program that included the artificial rape of a young girl by four other young women. Three days after that broadcast, Olivia Niemi, then nine, was similarly raped by four young women on a San Francisco beach. She and her lawyer contend that her assailants were imitating what they had just seen on television. Accordingly, Olivia and her mother are suing NBC for $11 million in damages on the grounds that the network was negligent in showing the film—especially at a time (eight o'clock in the evening) when youngsters are most likely to be watching.

Floyd Abrams, the nation's preeminent First Amendment lawyer, is handling the case for NBC. He says this "vicarious liability" theory is "as simplistic as it is novel, as insidious as it is unbounded." Under this theory, not only does the network's liability extend to *anyone* injured by those who commit a crime, allegedly in imitation of what they have seen on television, but damages are to be obtained from the network even though NBC had no intent to cause its viewers to actually imitate an artificial rape.

This particular film, "Born Innocent," though based on reality, was fictive. However, says Abrams, if Olivia wins on the basis of this "insidious, unbounded" theory, "there is little to prevent the courts from basing liability on imitation of reality itself: on imitation of events depicted as media coverage of the news. Are there to be jury trials with respect to imitations alleged to follow the telecasts of . . . a series of assassinations? Is a station which broadcasts an account of a crime or civil unrest to be liable if imitation occurs?" If this kind of negligence suit proliferates, self-censorship will abound in television.

Furthermore, says Abrams, this theory directly contradicts a repeated First Amendment judgment by the Supreme Court, which states that "free expression may not be restricted simply because of a *possible* reaction of even a finite audience, physically confronted by the speaker." That is, free speech cannot be curbed in fear of a "heckler's veto." (The Nazis' right to demonstrate in Skokie is a good example.) So, it is all the more unconstitutional to constrict speech in fear of what a random viewer, one among millions, *might* do as a result of having watched a particular television program.

Abrams's argument is irrelevant, says Marvin Lewis, Olivia's attorney. This case has nothing to do with censorship. The specific cause of action was the rape of Olivia—as a result of which she has "suffered a very serious injury . . . which is probably going to affect her sex life in the future." She would not have suffered that injury if NBC had not "negligently, carelessly and recklessly" programmed "Born Innocent" which in turn programmed the four girls who raped Olivia.

DAN HUBIG

NAT HENTOFF writes a regular monthly column on civil liberties issues for INQUIRY. His recent books include Does Anybody Give a Damn? *and* Jazz Is.

MARVIN LEWIS GOES ON to focus on the special vulnerability of television—among all media—in this negligence suit. Television's impact, he says, is far greater than that of print, and so its responsibility for what it purveys must also be greater. In this claim, Lewis has an unexpected ally, the Council of Communications Societies—a group of "communication professionals." In commenting on *Olivia Niemi* v. *NBC*, the council makes this astonishing proposal:

> The time may be at hand for our society to take a hard second look at the First Amendment, for "freedom of the press" meant a very different thing when the First Amendment was written than it means today when expanded to include all mass media. Specifically, we would suggest that television is a very different beast from all other media: it has the vividness and realism of pictorialization, motion, and color, but unlike motion pictures, which share these characteristics, it is available in the home where programming can be sprung upon the viewer unawares, often without benefit of prior reviews, descriptions, or discussion of content. It may well be that society will feel that the unrestrained freedom of expression granted the press, and by extension, the other media, is excessive when the medium is television.

The pronouncement, stunningly wrong-headed though it is, will surely gladden the litigious soul of Marvin Lewis. Indeed, in earlier court papers, Olivia's lawyer has presaged what he is likely to tell the jury:

> Do petitioners seriously contend that because they use the public airwaves belonging to the people that they can come into homes and cause harm to minors because they have no control over [these] homes into which broadcasts enter? How many children watch television in their bedrooms? Must their parents patrol the room of the child after he closes his door?

What we have here, Lewis is saying, is a Cyclops of enormously persuasive power which has the ability to incite rape and all manner of mayhem—whatever the intent of its Dr. Frankenstein. Therefore, it must be caged. And, as a deterrent to all the other Frankensteins at other networks and the individual stations, there must be a whopping judgment to at least partially recompense Olivia for her trauma.

The First Amendment answer to this notion that television is "a very different beast from all other media" has been presented in an American Library Association amicus brief in this case:

> In today's world, the "medium may be the message," but there is no authority recognizing the medium as the measure of First Amendment rights. The right of free speech is protected from infringement whether that right is exercised by newspapers . . . by motion pictures . . . or by television . . . Moreover, the degree of protection afforded the various media of communication must be the same.

BUT DOESN'T TELEVISION have manifestly greater impact? So did the printing press when it was invented. "To vary the degree of freedom of speech inversely with the impact of the medium used," the ALA continues, "would produce the anomalous result that the man 'who talks to himself' would be afforded the broadest protection under the First Amendment." On the contrary, the purpose of the First Amendment is most invigoratingly served if full protection is the right of all who use it—certainly "including the medium with the greatest audience and impact."

This clash of views between the Council of Communications Societies and the American Library Association may well be at the core of how *Olivia Niemi* v. *NBC* is decided—at least on the trial court level. While Floyd Abrams argues the First Amendment issues, his opponent—while also focusing on the injury done to Olivia—is likely to try undercutting Abrams by emphasizing that television *already* has fewer free-speech protections than other media and so cannot be compared constitutionally with, let us say, print. Or, to use Marvin Lewis's own words from an earlier brief:

> Any suggestion that the First Amendment exempts negligent telecasts from liability simply ignores the fact that the First Amendment protections accorded broadcasters are not coextensive with those granted other types of media defendants.

After all, Lewis says in gleeful anticipation, "If Federal courts are amenable to allowing *direct governmental interference* with broadcasting policies, surely the principles announced in such cases should support the kind of indirect 'interference' at issue in this case." That indirect "interference," of course, consists of using an arm of the state—the court system—to bring this negligence action against NBC on the basis of the content of a particular program.

Consider what has already been done by the courts and Congress to broadcasters' First Amendment rights—the equal time rule in political campaigns and the pernicious Fairness Doctrine, to name the two most prominent examples. A broadcaster must now devote a reasonable amount of time to public issues of controversy, and he must give reasonable opportunity for opposing viewpoints to be heard. Who decides what is "reasonable"? The state, that's who.

By contrast, the First Amendment absolutely prohibits such intrusions by the state into the editorial operations of newspapers. Most print journalists have ignored this lower-caste status of their television colleagues (on the "*I'm* all right, Jack" principle). An exception, J. Edward Murray, a past president of the American Society of Newspaper Editors, has pointed out how inhibiting a fairness doctrine applied to print media would be:

> Newspapers investigate and expose policemen who are on the "take" in the dope rackets. If an equivalent weight or time must be given to policemen who are not on the "take," the whole campaign becomes so unwieldy and pointless as to be useless. Must the good cops get equivalent space with the bad cops?

Television, Lewis is saying, is a Cyclops of enormous power which can incite rape and mayhem—whatever the intent of its Dr. Frankenstein.

And Bill Monroe of *NBC* says, with much feeling,

> The FCC, while speaking for boldness, turns around and punishes those who practice it. It is thoroughly understood in the industry that the most likely outcome of bold journalism is trouble with the FCC: a penalty, amounting to harassment, in the form of an official request for justification—in 10 or 20 days after a program has been aired—that the program is in compliance with the Fairness Doctrine. Any newsman who has seen the effort a broadcast executive and his staff must make to prepare an answer to such an official request can only assume that his boss, as a human being, would have a desire to minimize such official challenges in the future.

How does it happen that broadcasting, the defendant in the *Niemi* case, comes into the dock already stripped of some basic First Amendment rights? The time-honored answer is that there are only a limited number of broadcast

channels—while anyone presumably can start a newspaper—and so these scarce channels must be regulated in order to prevent a licensee from monopolizing all viewpoints presented on that section of air. However, there is hardly a city in the country that does not have more competing television channels than newspapers. With regard to "scarcity," the glum fact is that in 97 percent of American cities, there is *no* competition among newspaper owners. Yet, television and radio, except for CBS, have not fought to claim their full

Television, with its free-speech rights already attenuated by law and FCC actions, could be reduced to total inanity if Niemi wins her suit.

First Amendment rights. Perhaps broadcasting has become habituated to its second-class citizenship—even unto relative passivity when, during the Nixon years, the FCC ordered stations to censor rock lyrics that might be interpreted as "glorifying" drug-taking and other unseemly mores of the young.

The most determined paladin of broadcasting's First Amendment rights has come not from the industry but from the high court. A vigorous dissenter to all decisions chilling broadcast speech, William O. Douglas insisted that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." TV and radio are also "the press." And that is why, said Douglas, "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or benevolent ends."

In one of his last speeches before leaving the bench, Douglas noted sadly that the Court had repeatedly held "by overwhelming majorities" that the First Amendment rights of broadcasting could be reduced. And so, said Douglas, "we approach the 1980s with a large chunk of the 'press' under government control."

*AN INDEX OF HOW DIFFI*cult it will be to liberate that large chunk of the press is the fate of Senator William Proxmire's First Amendment Clarification Act (S. 22). In the spirit of William O. Douglas, the bill calls for the abolition of the Fairness Doctrine and the equal time rule. By June 1978, when the Senate Communications Subcommittee held a hearing on the measure, Proxmire had been able to recruit only two cosponsors. And one of them, Lee Metcalf, has died—leaving only Spark Matsunaga of Hawaii.

Proxmire is a long-distance runner, and he intends to keep introducing the First Amendment Clarification Act until there is a constituency for it—but that may take decades. Television, in the meantime, with its free-speech rights already attenuated by law and FCC actions, could be reduced to total inanity if Olivia Niemi wins her "vicarious liability" suit in San Francisco. Even should NBC ultimately prevail before the Supreme Court—for television has not yet lost *all* its First Amendment protections—it would take years to exhaust all appellate procedures. As Floyd Abrams says, this "could not help but chill" other media as well as television.

So long as there's a shot at winning, and so long as negligence lawyers operate on contingency fees, a lower court triumph by Olivia could well trigger hordes of suits against newspapers, book publishers, movie companies, and libraries. And if, as wildly improbable as it seems, the Supreme Court should uphold a judgment for Olivia, this *First Amendment Watch* will be mainly limited to a monthly body count.

We can only hope that this tale of dread may eventually awaken more of the citizenry to the indivisibility of First Amendment freedoms. As a result of our having allowed television's First Amendment protections to become weaker than those of the print media and movies, the defendant in *Niemi* is more vulnerable than, say, the *Los Angeles Times* would be. But a decision against the defendant in this case would break new antilibertarian ground. And if the defendant, television, ultimately loses in the high court, its special vulnerabilities will soon infect all other media. Once it has been demonstrated that an action for this kind of random "negligence" can strip one medium of its freedom of speech, claimants will rise to smite all the others. ❏

POLITICS

VICTOR MARCHETTI

Twilight of the spooks

A DIRTY CLANDESTINE WAR is now being waged in the political back alleys of the nation's capital. It is a vicious free-for-all involving several former top-level CIA professionals and their allies, some still in the agency. Established reputations and promising careers are at stake. The success, or lack thereof, as well as the wisdom of the operational philosophies favored by the various contending cliques are being questioned. Even the patriotism and sanity of the major adversaries are being exposed to doubt. All the combatants are determined to justify their covert careers and operational methods. And they intend to avenge the attacks of their rivals.

In such a war, there can be no victors—only bloodied survivors. It is, in a sense, the CIA's *Götterdämmerung*. It is the twilight of the spooks.

Usually, the agency's intratribal battles are silently resolved within the hallowed halls of headquarters at Langley, Virginia. Only rarely does word of the clandestine throat-cutting extend beyond the Potomac River, much less to the American public. But in this instance, because of the scope and significance of the warfare, rumors have begun to surface in the national news media. The leading antagonists are therefore compelled to go public to save themselves. An ironic twist, considering how these men of excessive secrecy deplore whistleblowers and leakers.

Former CIA Director Bill Colby has published a book entitled—are you ready for this?—*Honorable Men: My Life*

VICTOR MARCHETTI is a former CIA officer and an advocate of reform in the intelligence business. His book, The CIA and the Cult of Intelligence, *written with John Marks, is the only book ever to have been censored by the U.S. government prior to publication.*