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The Free Press and a Fair Trial

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THE FREE PRESS AND A FAIR TRIAL

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It is no haphazard coincidence that the doctrines of freedom of the press and of the right of an individual to an impartial trial are joined together in those first ten amendments to the Constitution, known collectively as the Bill of Rights. Nor is it an accident that in neither the first nor the fourth amendment did the drafters trouble to define freedom of the press, the form of a jury trial or the nature of the impartiality which the jurors are to possess.

Freedom of the press and trial by jury were put cheek-by-jowl because to the men of that time each was considered a means to a single end, the protection of the citizens from arbitrary acts of the authorities of the State. And to those men it seemed unnecessary to define the terms and concepts which, to them, held no mystery. As the Supreme Court observed nearly seventy years ago, "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors . . . ."[1]

In the deep reaches of the common law those principles were not bred of abstract moral predilictions which, as Justice Holmes has said, "must not be allowed to influence our minds in settling legal distinctions,"[2] but rooted in harsh experience. Generations of experience had shown convincingly that without both of these guarantees—trial by jury and freedom of the press—no man was safe once caught in the sovereign's toils. The principles, then, were not philosophical but eminently practical.

Yet so short are men's memories that we are now in a time when these two fundamental guarantees have come to be viewed by many people, including many supposedly versed in the law, as not only unrelated but even antagonistic and mutually irreconcilable.

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[1] Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[2] HOLMES, THE COMMON LAW 118 (Belknap Press ed. 1963).

Thus the Warren Commission, reporting on the assassination of President Kennedy, raised the question whether the attendant publicity of those dreadful days would have made it impossible for the accused assassin to have a "fair" trial, whether it did not in fact make it difficult for the accused assassin of the assassin to have such a fair trial. The same question has been raised by a number of State Bar Associations and frequently discussed in the councils of the American Bar Association.

The critical part of the question, to be sure, is not directed solely at the press. A proposed amendment to Canon 5 would make it "improper and professionally reprehensible" for a lawyer to express pre-trial opinions on the evidence against an accused, and the Morse bill[3] now pending in Congress would make it a punishable contempt of court for any one in federal jurisdiction, including the accused himself, to "publish information not properly filed with the court."

But whether the apparent target is the press or the Bar, the assumption behind all such proposals is that any and all pre-trial publicity is by nature a bad thing and ought to be proscribed in order to preserve that "impartial trial" of the fourth amendment.

Since this debate—the Bar on one side and the press on the other—has become so acrimonious, it might be well to pause a moment for a look at the origin of both these principles of the Bill of Rights; else there is a danger that in the forensics of the advocates we will lose sight of what lawyers call the crux of the case.

Doing so, it becomes apparent that freedom of the press is not a "privilege" granted to editors, like the *droit du seigneur* or the benefit of clergy, though critics of the press may speak of it in those terms and some editors act as if it were. Nor are the defenses erected to preserve both free speech and free publishing intended as an absolute license to speak, or to print, anything without accountability.

Blackstone, that teacher of yesteryear who today is more honored than read, stated the matter clearly, and it is apparent that what he states is not a one-sided doctrine but a two-pronged concept. He remarks in his *Commentaries:*

> The liberty of the press is indeed essential to the nature of the free state; but this consists in laying no *previous* restraints upon

[3] S. 290, 89th Cong., 1st Sess. (1965).

> publications, and not in freedom from censure from criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[4]

Note, first of all, that the freedom belongs to "every freeman," not just to publishers of great newspapers; any man is entitled, if he will, to hawk handbills crying impeachment of a Chief Justice. Clearly, what belongs as a right to every man is a privilege of none, and anything that abridges the right for any man—even a muddle-headed editor—abridges the right for all men.

Note also that included herein is the right to be mischievous and improper insofar as what is said. The allegation, or even the provable fact, that a certain man writes something that will be mischievous in its effects, be it on a great matter of State or on a county trial for poaching, is no ground for preventing the writer from setting before the public his sentiments about the conduct of Presidents or a county prosecutor.

But note especially that as Blackstone states the principle there is no freedom from accountability for what is written or said. If a man writes what injures another he has, in this view, committed a tort, as surely as if he had stabbed him with a pike-staff. If what a man writes is destructive to the ends of society, then society may afterwards bring him to task.

Such was the concept of freedom of the press to those who drafted the first amendment; they felt no need to define their terms for their minds had been suckled on Blackstone. A man was as free to write as to walk down a public highway; but if in either case he trampled a neighbor or disturbed the peace he should answer for it.

If today we have problems from "freedom of the press" they derive not from holding to the first part of the doctrine but from softening the second part. We do still have libel laws but they are neither clear nor forceful; in the recent *New York Times* case[5] the Supreme Court all but abolished them as they apply to public officials. In most jurisdictions the concept of an answerable tort from the printed word has, for all practical purposes, been lost entirely.

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[4] 4 BLACKSTONE, COMMENTARIES *151-52.

[5] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

It will be heresy for an editor to say so, but a part of the present problem about pre-trial publicity arises from this disappearance of accountability. There is a valid complaint when newspapers in pre-trial stories refer to the accused as the "burglar" or the "rapist" before there is a conviction in court. Actually few newspapers do this any longer; but all would abandon it quickly if the few which do were brought to account by successful damage suits.

Nonetheless, in both law and logic the abuse of the thing must not be confused with the thing abused. The Blackstone doctrine found its way into our Constitution because experience taught that the best safeguard against the tyranny of policemen, prosecutors and judges was the right of outsiders—in practice, newspapers—to put their actions under the glare of publicity at every stage. It was the ability of people to know what was going on that diminished, if it has not extinguished, the languishment of the un-tried in prison, either through the casualness or the callousness of officials. Insofar as it bears on the question of justice in the courtroom, the freedom of the press to publicize events before, during and after a trial was conceived as a handmaiden of those other guarantees, such as the right of habeas corpus.

In short, we have freedom of the press for no other reason than that men saw it as an instrument of justice—not as a privilege or a matter of form, but as a means to an end of substance.

We have trial by jury for the same reason, and for none other. As every lawyer surely knows, the present conception of a trial as a presentation of evidence to a jury totally unfamiliar with the case is of relatively recent origin. The forerunners of the modern jury were the jurata of Norman times, men called in to help the King's minister decide a case precisely because they were familiar with the matters at issue; what today we might call "expert" advisers. The system has something to commend it in logic but it proved susceptible to manipulation, particularly in criminal cases; officers of the King's court rarely chose jurata unfriendly to the King's side of the case. The substitute, slowly evolved, was the jury of freemen chosen by lot.

Note here, however, that they were always freemen of the same county; indeed, they are today in most jurisdictions. They were locally chosen because local jurors would have some knowledge of local affairs, perhaps of the background gossip of the case, and

might even be help in reaching a just decision by virtue of their knowledge of the people involved. Only in extreme cases was a criminal trial put in the hands of total strangers in a distant court.

Moreover, the judges were—and in England still are—active participants in the trial, not mere umpires between contending counsel; they helped the jury weigh the evidence as well as the law. In sum, there is no antiquity in the modern idea that a jury should be composed of people who come to court with minds blank as to the case at hand, left to struggle as best they may without guidance and dependent solely on the skill of advocates for the justice of their verdict.

This modern idea that a jury should come into the courtroom in total ignorance was an effort to remove prejudice from the juror's mind; or, more accurately, to guard against prejudgment. Whether this is sound in theory may be left to philosophers, although I can't forebear noting that the tendency to turn to blue-ribbon juries suggests that it is not wholly honored even in the abstract. What is relevant to the present discussion is simply the reminder that the form of a jury trial has been an evolving process. The form—*i.e.,* the use of the number 12, or the ignorance of the jurors—is not the heart of the matter; what abides is the effort to make the judicial process as just as human frailty will allow.

This is true of all legal procedures, though once being inducted into their mysteries lawyers may easily forget it. The law has its procedures not for their own sake but only as instruments to substantive principles. They thus stand on a par with such instruments as freedom of the press—to be upheld where they are tested by time, to be altered if they no longer serve in the real world in which men live.

What has happened in the present controversy, I believe, is that some members of the Bar have lost the substance in the form. That is, they see pre-trial publicity as endangering the ignorance of the jury when it is empanelled. If a juror has read about the case, has read perhaps that the accused has a record of convictions, has heard the prosecutor say the evidence against the accused is "overwhelming," and so on, then the juror may come prejudgment in mind. So they conclude that the form—in this instance, an empty-minded jury—must be preserved at all costs.

The error here is three-fold. It misreads the law's history. It

divorces the law from reality. And it ignores the injury to the substance in the preservation of a form.

Consider, for example, the case of British law, so often cited as an example we should follow. British law does put stringent restrictions on pre-trial statements by both prosecution and defense and pre-trial comments or reporting by newspapers. Yet the citation looks at the form, not the substance. For one thing, in criminal cases the British court system still honors the requirement in our fourth amendment for a "speedy" trial; it is a rare thing indeed for an accused to languish long untried. Equally importantly, every step in the British criminal process is open to the public and the press—arraignments and preliminary hearings as well as the trial proper. The form may seem to be one of restriction; the substance, which is full information for the public from beginning to end of the judicial process, is jealously preserved.

The reality in this country, as any country lawyer can bear witness, is somewhat different. The law's delays, in criminal as in civil matters, are interminable. It is not at all unusual for an accused to have no public hearing in his case until the actual trial, which may be months—even years—after arrest. In a system that so functions in actual practice, a ban upon all news, upon all comment, upon all statements even by the accused, would ring down a total curtain of silence under which many unfortunate men would be buried.

I, for one man, would shudder at the prospect of being charged with some crime, especially one of moral turpitude, and being condemned to suffer silence until some distant day when even an acquital would not be recompense. And what I shudder at for myself I would not wish upon any man. The history of the law means nothing if it does not mean that each man should be treated as we would be done by.

It may not be so in theory, but in the real world there are policemen out to break all records in the number of arrests they can make in a given period. There are prosecutors with the same failing. There are officers who in a tense situation yield to the temptation to arrest anyone for the sake of pacifying a public aroused by a murder or a rape. There have been spite arrests. There are, indeed, a hundred ways in which justice can be and sometimes is debauched by those whose job it is to serve it. Sometimes

the damage is to the defendant. Sometimes it is to the community, which, let us not forget, is also an interested party in any criminal case.

For all these situations, where the substance of justice is involved and is sometimes lost in the forms, there is no better instrument than that every stage of the procedure, from commission of the crime to the verdict of the jury, should be subject to public scrutiny. In the obverse, the thing can be stated more bluntly. Deny the right to such public scrutiny and in the real world there remains no other instrument by which justice can be judged.

But what, then, of the form that the jury should be ignorant. The abstraction itself is dubious, for pre-knowledge is not necessarily the same thing as prejudice; in every other walk of life—within the family, within business, within other groups—men are often helped to more just decisions by some prior knowledge of the dispute at hand. No matter. In the real world it is nonsense for the Warren Commission or anyone else to imply that it would be possible to have a President assassinated in such silence that none should know the circumstance until he heard it in court. The same is true of many lesser crimes in smaller communities than the whole nation; what is of interest to the community, the community will talk about. The only difference is whether they read about it in their newspapers, where there is at least some chance of accuracy, or listen to gossip where anything can pass for truth unchallenged.

None of this is intended to deny that pre-trial publicity can have its ill effects. As there are misguided or venal editors, so are there lawyers, police and judges. No defense is offered here of the policeman or prosecutor who announces that he has caught "the guilty one," or labels the evidence as "conclusive" or otherwise so loads his statements that he does the accused an injury that later vindication cannot assuage. No defense either of the editor who pillories an accused or slanders those in authority for the sake of sheer sensation or for the gratification of spite.

But for these things we are not without remedies, if we will but seek them. As editors can be brought to account, so may policemen, lawyers and even judges. The American Bar Association, for one simple deed, could enforce its existing Canons. It could bring to account counsel who speak mischievously; it could lend its weight

to recoverable actions against officials who do torts with their tongues.

What the law should not do is to try to remedy one evil with a greater one. Those who insisted that our Constitution was not complete until freedom of the press and the guarantee of trial by jury had been put side by side were not engaged in novel experiment. They were not enshrining abstract theory. They were recording the lessons of experience. The substance of what they sought was as impartial a system of justice as could be devised, in the hope—but not necessarily the certainty—that this would yield a just decision between society and those accused of transgressions against society.

Here the lesson experience, a thousand years of experience, was that the judicial process must be open to inspection from its beginning to its end, to the purpose that all should lie under the public gaze so that if error could not be obviated it could at least not be hidden. One instrument for this was the open court with the accused and the accusers openly confronted. Another instrument was the open press, so that nothing could be hidden from first accusation to final judgment. The lesson of the common law was that the two were not irreconcilable, they were mutually dependent.

And so they still are. Freedom of the press and the open trial are both means to the end that citizens may judge the system which judges them; they are the twin handmaidens that lead blind justice. To dim one of them might not put all in darkness, but there would surely be thereafter less light along the way.