North Dakota Law Review

Volume 41 | Number 1 Article 2

1964

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FREE PRESS V. FAIR TRIAL: THE JUDGE'S VIEW*

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One of the fundamentals of our concept of justice is a fair and impartial trial before an unbiased judge and an unprejudiced jury. To that end we have established an elaborate system intended to assure that persons who make up the jury panel are selected at random and are, in general, representative of the population of the area. For that purpose, when the petit jury before which a particular case will be tried is drawn from the panel, we allow examination of each prospective juror concerning possible conflicting interest in the matter he will hear, or possible bias in favor of or prejudice against any litigant or his counsel or concerning the subject matter of the litigation. In addition, we give each side the right arbitrarily to exclude from the jury a limited number of persons (usually six in a civil case and fifteen to twenty in a criminal case). To achieve fairness we also grant a civil litigant or criminal defendant the right to assistance of counsel (in some criminal cases at the expense of the state), to confront and cross-examine witnesses against him, to require that testimony be given under oath and that irrelevant or incompetent evidence be excluded, to produce his own witnesses and to compel their attendance by court order. We protect the individual accused of crime by presuming him to be innocent of the charge and requiring the state to prove his guilt beyond a reasonable doubt. Under our law there are only a few instances in which evidence of prior criminal convictions may be introduced and a confession may not be considered until it has been determined that it was voluntarily given. We also accord an accused, unless he deliberately waives his rights, a prompt and public trial. We protect the defendant in civil litigation by imposing on the plaintiff the burden of proof and instructing the jury that unless plaintiff's evidence outweighs that of defendant, the burden has not been met, and they must return a verdict for defendant. All of these safeguards have been established and are maintained to secure trial by reason. Almost all of them are constitutionally protected rights.

Equally fundamental to our concept of constitutional government is "The maintenance of the opportunity for free . . . discussion to the end that government may be responsive to the will of the people

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*Remarks delivered before the Forum on the Mass Media, held at the University of North Dakota on October 31, 1964.

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and that changes may be obtained by lawful means. . . ."[1] The First Amendment protects that right, and the guarantees of that amendment were adopted because, as Mr. Justice Brandeis so succinctly put it, "Those who won our independence believed . . . in the power of reason as applied through public discussion. . . ."[2]

Reason is thus engrained in both free press and fair trial, but nowhere does the Constitution tell us what to do in the event that fair trial requirements conflict with free press protection. Yet conflict does exist and must be resolved. To state that obvious proposition is also to acknowledge that both cannot be absolute rights. My thesis is that neither right is absolute, that the interests on both sides must be balanced, and that the conclusion of any balancing based on reason must be that, to the extent necessary to protect the individual's right to fair trial, specific limitations of the free press right are constitutionally permissible.

As recently as March 9, 1964, the Supreme Court has recognized that freedom of expression is not an absolute right, for on that day, despite the contrary views of Justices Goldberg, Douglas and Black, the Court said in the *New York Times* case[3] that there is a qualified, rather than an absolute privilege with respect to libel of public officials. Earlier it had in *Beauharnais v. Illinois*,[4] upheld a criminal libel statute as applied to a publication which was defamatory of a racial group and liable to cause violence, and in *Speiser v. Randall*,[5] stated that "considerations of the greatest urgency can justify restrictions on speech, and . . . the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances." *Bridges v. California*,[6] *Pennekamp v. Florida*,[7] *Craig v. Harney*,[8] and more recently *Wood v. Georgia*[9] have all considered the use of the contempt power to deal with a claimed obstruction of justice. While each has struck down the exercise of the power in the particular case, all have applied the clear and present danger test, and Mr. Justice Brennan's opinion in the *New York Times* case makes clear that a majority of the present Court accept that application. Though refusing in the four cases referred to to sanction use of the contempt power with respect to criticism of judges, the Court has emphasized that the cases did not "represent a situation where an individual is on trial"[10] and noted that "trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper"[11] and that "of course the

1. Stromberg v. California, 283 U.S. 359, 369 (1931).
2. Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion).
3. New York Times v. Sullivan, 84 Sup. Ct. 710 (1964).
4. 343 U.S. 250 (1952).
5. 357 U.S. 513, 521 (1958).
6. 314 U.S. 252 (1941).
7. 328 U.S. 331 (1946).
8. 331 U.S. 367 (1947).
9. 370 U.S. 375 (1962).
10. Wood v. Georgia, 370 U.S., at 389 (1962).
11. Bridges v. California, 314 U.S., at 271 (1941).

limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation."[12] It has also taken pains to make clear that it was dealing with the common law contempt power, which it characterized "as of the most general and undefined nature,"[13] not with "the full reach of the power of the state to protect the administration of justice by its courts"[14] and commented that the judgment did not come to the Supreme Court "encased in the armor wrought by prior legislative deliberation"[15] and that "the legislature . . . has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance."[16] Not all of the quoted statements were essential to the decision reached in the particular case; they do not, therefore, have binding force in future cases.

Viewed in the context of the Court's free speech decisions, however, one may hazard the conclusion that a statute containing a legislative specification of the particular kinds of expression prohibited and the circumstances under which and the length of time for which the prohibitions are to operate and legislative findings, preferably, but not necessarily, based on scientific data, that the prohibited expressions constitute serious and imminent dangers to the right to a fair trial, would be held constitutional.

A question does exist concerning whether such a statute can limit publication of matter revealed on preliminary hearing or which is offered but excluded during trial. There are several Supreme Court cases indicating that what transpires in a courtroom during preliminary hearing or during trial may be published.[17] Those cases do not, however, consider the problem in relation to a statute listing specific material and delaying rather than prohibiting its publication.

Whether such a statute should be enacted depends upon whether there is any other means of dealing effectively with the fair trial problem and whether the detriment to free discussion resulting from such a statute offsets its benefits to fair trial.

With increasing frequency convictions are being reversed on due process grounds, because of prejudicial publicity.[18] The reversal of a judgment or conviction when essential unfairness has been

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12. Wood v. Georgia, *supra* note 10, at 390.
13. Bridges v. California, *supra* note 11, at 260.
14. Craig v. Harney, 331 U.S., at 373 (1947).
15. Bridges v. California, *supra* note 11, at 261, reiterated in Wood v. Georgia, *supra* note 10, at 386.
16. Bridges v. California, *supra* note 11, at 260, 261.
17. Craig v. Harney, *supra* note 14, at 374; Stroble v. California, 343 U.S. 181, 193 (1952). A number of states have statutes under which preliminary hearing may be closed, Geis, *Preliminary Hearing and The Press*, 8 U.C.L.A.L. Rev. 397 (1961).
18. In Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); and more recently Sheppard v. Maxwell, 231 F. Supp. 37 (1964) state convictions were set aside as in violation of the due process clause; Marshall v. United States, 360 U.S. 310 (1959) is a reversal of a federal conviction.

demonstrated does correct for the prejudice underlying the judgment or conviction, but for a number of reasons reversal is not an adequate corrective. Cardinal among those reasons is that all of the expenses of the abortive trial and of the appeal necessary to upset it must be borne by the litigant or the accused, and in cases likely to attract substantial publicity, such expenses are apt to be in the tens of thousands of dollars. Important also to an accused who is unable to obtain bail but is acquitted on the second trial is that he has been unnecessarily deprived of his liberty for the period of time necessary to conduct his first trial and carry out his appeal. Finally, if both those points be overlooked, and it be assumed that sufficient additional funds to pay the cost of the second trial will be available, the litigant or accused may still have been prejudiced by the intervening death or disappearance of a material witness.[19] What is true of reversal is, of course, applicable, though in lesser degree, to an order by the trial court terminating the trial or setting aside a verdict because of prejudicial publicity.

Nor are any of the other available correctives more satisfactory. The place of trial can be changed, but such a change has little meaning in view of the breadth of modern press, radio and television coverage and its ability to move with the trial. Further, such a change makes more difficult and expensive the attendance of witnesses and the conduct of the trial, and with respect to a person accused, is an exception to his right to be tried in the locality where the crime was committed. In some states it is possible, instead of changing the place of trial, to bring in jurors from other counties,[20] but this offers no protection against infection of the out-of-county jurors by publicity during the trial, and causes inconvenience and possible resentment on the part of jurors imported from other parts of the state. Trial can also be delayed until the effects of the adverse publicity have worn off, but there is no scientific method of determining how long such a delay should be. The court must, therefore, make an "educated guess." The guess will tend to be too short since court dockets must be kept reasonably current, but if it is too long that will be small consolation to a person criminally accused, to whom the Constitution guarantees the right to a *speedy* trial.

Locking up the jury is sometimes put forward as a solution. Obviously the procedure does not meet the problem of pre-trial publicity and even with respect to publicity during trial it is virtually

19. Though by statute (*e.g.* N.Y. CIV. PRAC. § 4517) and at common law, Fleury v. Edwards, 14 N.Y.S.2d 334 (1964), testimony taken on the prior trial is admissible, it is subject on the second trial to any proper objection even though not made at the first trial.

20. Authorized by the statutes of Arkansas, Kentucky, New Jersey, North Carolina, Virginia and West Virginia, and discussed in Note, *Community Hostility and the Right to An Impartial Jury*, 60 COL. L. REV. 349, 365 ff. (1960).

impossible to seal the jurors off completely. When the procedure is followed the jury must be locked up from the inception of a case, for the court has no way of knowing in advance when prejudicial matter will be published. Yet the inconvenience of being separated from family and home during an entire trial or even any substantial part of a trial of some length will not be lightly accepted by the jurors, who may, in consequence, feel some resentment against the person requesting the lock-up procedure.

Waiver of the right to trial by jury is also suggested at times, on the theory that judges are less likely than jurors to succumb to the pressure of prejudice. Under present law there is in most states no absolute right to waive jury trial; in civil cases the consent of the opposing side is required; in criminal cases the trial judge has discretion for good cause to reject the waiver. Moreover, in light of the importance attached to trial by jury in our system of justice, even an absolute right to waive jury trial would be abdication to, rather than solution of, the problem of prejudicial pre-trial publicity.

It is, of course, possible to question prospective jurors concerning pre-trial publicity, but to do so compounds the prejudice by bringing it once again and more specifically to the jurors' attention, and presupposes the ability of the average juror to control his subconscious as well as his conscious reactions. Further, it leaves the litigant or accused largely dependent upon the answer the juror, already conditioned by the adverse publicity, chooses to give to the inquiry whether he can, notwithstanding the publicity, render an impartial verdict according to the evidence.[21] Finally, if a juror is seated notwithstanding his admission that it will take some evidence to overcome the impression he has formed,[22] the effect is to reverse the presumption of innocence in a criminal case or the burden of proof rules applicable in a civil case.

Jurors are regularly instructed not to read about, listen to comments about, or discuss a case while it is on trial. While the last two parts of the admonition are probably adhered to, it is doubtful that the first part is.[23] Indeed, it is extremely difficult for a juror in a metropolitan area to avoid reading at least such matter as appears in the headlines visible to him in subways or on newsstands as he travels between home and court. Jurors may also be instructed not to consider in their deliberations matter which has come to their attention improperly, but such instructions are

21. See, *e.g.*, N.Y. CODE CRIM. PROC. § 376(2) under which, however, the court must be satisfied that the juror does not entertain such a present opinion or impression as would influence his verdict.
22. See, *e.g.*, Holt v. United States, 218 U.S. 245 (1910); Low v. State, 156 Tex. Crim. 34, 238 S.W.2d 769 (1951).
23. Thus in United States v. Leviton, 193 F.2d 848, 857 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952) (memorandum of Frankfurter, J.), a copy of the offending article was found in the jury room.

subject to the same vagaries that are involved with juror examination.[24] Such an instruction, it has been said, is equivalent to telling a little boy to go stand in the corner and not to think about a white elephant. Certainly, it will be all the more difficult for jurors to follow such an instruction because the material placed before them by the improper publicity has not been subjected to the protective procedures of confrontation, cross-examination and rebuttal.

It thus appears that the only completely effectual solution of the problem is to prevent the prejudice from occurring initially,[25] by delaying publication until the danger is past. Are there detriments to free discussion resulting from a statute so providing?

The argument most vociferously advanced is that such a statute would be but the first step on the road to censorship in its vilest forms, that the camel must not be permitted to get his nose under the tent. The argument is, of course, based on fear rather than reason and against it must be balanced the fear that an individual will lose his liberty or his life or a substantial portion of his property without just cause. *Reason's* answer is the Supreme Court, for while that "Court sits it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing"[26] the obstruction of justice. Fear of the camel need not transform us into ostriches!

Denial to the people of their right to know what goes on in crime, law enforcement and government circles is another argument often advanced. No one will deny that publicity concerning such matters is an important check on corruption and incompetency of public officials and on the control of crime generally.[27] But publicity and discussion of these matters will not be prevented by a statute concerned only with specific items (*e.g.* — the confession of a person accused or his prior criminal record, man-in-the-street polls or editorial comment concerning guilt) and which proscribes publication only for the period essential to protect the right to fair trial. That such delay in publication of particular items does not thwart the

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24. For Mr. Justice Jackson the assumption that prejudicial publicity could thus be overcome was "unmitigated fiction," Krulewitch v. United States, 336 U.S. 440, 453 (1949).

25. As Judge Markell eloquently put it in his dissenting opinion in Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497, 512 (1949), *Cert. denied* 338 U.S. 912 (1950), existing correctives "at best only circumvent some consequences of an achieved obstruction of justice." The right to sue for libel is not a solution, for it can reach only defamatory publications and may be defended on the ground of truth or privilege, Patterson v. Colorado, 205 U.S. 454 (1907). Only Pennsylvania has provided a statutory action [PA. STAT. ANN. title 17, § 2045 (1930)] in favor of a person "aggrieved by publication concerning his trial, which would improperly tend to bias the minds" of the triers of fact. Though the statute has been on the books since 1836, no action has been brought under it, probably because the plaintiff in such an action, prejudiced in the original action, may be hard put by the very result thus produced to show injury. See Note, 27 TEMP. L.Q. 490 (1953-54).

26. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

27. Gillmor, *'Trial By Newspaper'; The Constitutional Conflict Between Free Press and Fair Trial in English and American Law* (unpublished dissertation) p. 359 ff. details a number of instances in which incompetency or corruption was exposed.

public interest is evidenced by the fact that responsible New York papers did, at the request of the United States Attorney, exclude specified details from their reports of the Appalachin conspiracy trial and from a later narcotics trial[28] and that many papers in kidnap cases voluntarily limit publication before the victim has been located.

News stories reporting the arrest of an individual on a particular charge may quite community anxiety resulting from the crime, and broadsiding the description of a fugitive from justice will aid in the fugitive's capture. However, legislation need not prevent either. Newspapers also sometimes dig up leads or evidence helpful to the prosecution or to prove the innocence of a person accused; publicity may be of value in turning up witnesses. The statute would not affect newspaper investigations, though it might delay publication of some of the evidence turned up. It would not prevent publicity concerning the occurrence, though it would probably tone down some of the more sensational reporting. Sensationalism is not necessary, however, to bring the occurrence to a prospective witness' attention; indeed, by creating an atmosphere of prejudice or emotion, such reporting is just as likely to deter witnesses from coming forth as it is to bring them forth.

Crime news reporting, it is sometimes urged, is a crime deterrent. The conclusion is, however, unsupported by any scientific data; in fact it seems distinctly possible that the contrary could be demonstrated. The argument is, in any event, irrelevant, for the proposed statute would not prohibit such reporting. It would simply delay particular items for a limited time. Whatever deterrent effect publicity presently has will, therefore, continue notwithstanding the proposed statute.

Thus, it appears, statutory limitation that forfeits none of the benefits of free discussion can be devised. Moreover, substantial benefits to the press can result from such legislation. The phrase "obstruction of the administration of justice" which describes the offense sought to be punished in contempt proceedings has an uncomfortable umbrella-like quality for the press. Legislation would catalogue the specific kinds of publications and the length of time during which publication is proscribed. Contempt proceedings are summary in nature, often tried before the judge who issued the citation, always tried without a jury, and in some jurisdictions without limitation as to punishment.[29] Legislation could, as federal[30]

28. One such instance is reported in Wessel, *Procedural Safeguards for the Mass Conspiracy Trial*, 48 A.B.A.J. 628, 630 (1962) and a second in a letter from United States Attorney Morgenthau printed on the editorial page of the New York Herald Tribune of July 24, 1962. But note that when New York County District Attorney Frank Hogan in 1954 announced a policy of declining to disclose the contents of statements made by prospective defendants in criminal investigations, he was roundly criticized by the press, see N.Y.L.J. April 22, 1954, p. 4.

29. And, it might be noted, at least at common law, without a right of appeal. Not until the Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, did our British brethren give a limited right of appeal to the House of Lords.

30. 18 U.S.C. 401, formerly 28 U.S.C. 385 (1940 ed.).

and New York[31] statutes have since 1831 or earlier, take from the courts the power to punish publication as contempt and establish a new misdemeanor. Such legislation could fix the limits of the punishment that could be imposed for violation, require procedure by information or indictment, and give the right to trial by jury before a judge having no connection with the publication.[32] That portion of the statute taking away a court's power to punish contempt-by-publication may be attacked as an unconstitutional invasion by the legislature of the power of the courts. The federal and New York statutes have, however, withstood the test of time notwithstanding this separation-of-powers argument and while there are cases in some states invalidating analogous statutes on this basis, most of them antedate the Supreme Court's decision in the *Nye*[33] case. Though study of the constitution of a particular state would be required before a clear answer could be given, the proposed legislation would, I believe, withstand separation-of-powers attack in most states.

Space does not permit me to spell out fully the details of such a statute. The central thoughts are that it would specify what material was proscribed and for how long, and that its proscriptions would apply to the bar and to law enforcement personnel as well as to the press.

The period of time that the statute would delay publication would begin with the commission of a crime or the commencement of a civil suit and continue until trial by jury is waived, or in a jury case, until the particular material is admitted in evidence, or, if it is never admitted, until the verdict is rendered. Thus, it would proscribe publication only for the period essential to protect the right to fair trial. Note also that it would not apply to a non-jury trial. Not that a judge, especially if he is elected to office or serving a short term, may not be influenced by newspaper publicity, but that most of the specific items hereafter referred to must come to his attention in any event when he rules on the admissibility of evidence, and that the Supreme Court has made clear that in its view such a statute is not necessary with respect to judges.[34]

The specific items covered by the statute would be divided into two categories, the first covering matter the publication of which it can be said as a matter of law presents a serious and imminent

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31. N.Y. JUDICIARY LAW § 750(A)(6).

32. United States v. Barnett, 84 Sup. Ct. 984 (1964) makes clear that there is no constitutional right to jury trial in contempt cases. While provision of a jury in contempt cases has been held unconstitutional as in violation of the seperation of powers doctrine [Nelles & King, *Contempt by Publication*, 28 COL. L. REV. 401, 525 ff. (1928)], this rule should not apply to the proposed statute which creates a substantive crime.

33. Nye v. United States, 313 U.S. 33 (1941).

34. In the Bridges, Pennekamp and Craig cases, *supra*, notes 6, 7 and 8.

danger of substantial prejudice, the second covering matter the publication of which would not constitute an offense unless a jury found as a fact that in the circumstances of the case concerning which publication was made the material published created such a danger of substantial prejudice.

In the first category would fall publication of the fact that a confession had been made, or of the prior criminal record of an accused or litigant, of an offer of settlement in a civil case, statements relating to the character or credibility of a witness or party, expressions of opinion concerning the guilt of an accused. In the second category would fall interviews with the family of the victim of a crime, statements that a witness will testify to particular facts, publication of the names and addresses of the jurors sitting in the case,[35] or of matter which appeals to racial, political, economic or other bias. The question whether publications of the second kind pose substantial and imminent danger to fair trial is one of degree in which the stage of the case at which publication occurs, the context in which published, whether the proceeding is civil or criminal in nature, and what specific subject it involves, are all important elements. Note, however, that the jury would not be required to find actual prejudice,[36] but rather that a clear and present danger of substantial prejudice from the publication existed.

One further provision should be contained in the statute. Journalists often point out that the source of much of what is reported is the lawyer or prosecutor handling the case, who in passing on information about pending litigation is acting in violation of Canon 20 of the *Canons of Professional Ethics*. In all the more than fifty years that Canon has been on the books, there has not been one reported proceeding against an offending lawyer, prosecutor or judge.[37] To augment the Canon, the statute should prohibit not only an attorney or prosecutor but also any employee of an attorney or prosecutor or the police department or the courts from furnishing information the publication of which would be prohibited under the statute.

Neither fair trial nor free discussion is the exclusive province of either the journalism or the legal profession; both are citizens' rights or in a broader sense rights of society. Reporting which

35. United States v. Borelli, 336 F.2d 376 (2d Cir. 1964).

36. Rideau v. Louisiana, 373 U.S. 723 (1963), make clear that a showing of actual prejudice is not required. Beck v. Washington, 369 U.S. 541 (1962), is not to the contrary as its analysis of the *Irvin* case shows.

37. BLAUSTEIN & PORTER, THE AMERICAN LAWYER 271 (1954). A recent opinion of the Committee on Ethics of the Colorado Bar Association seeks to implement the canon by spelling out specific kinds of statements that violate the canon. The canon is in effect as a statute or court rule or by adoption of the state bar association in Puerto Rico and all of the fifty states except Alabama, California and Oregon, though in Massachusetts, New York and Texas it has been modified, BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 822 (Supp. 1956 & 1959).

creates an atmosphere of essential unfairness has resulted in reversal of jury verdicts. In the recognition that reversal and consequent retrial is an unfair burden on both the state and the individuals involved, responsible newspapers have acceded to requests that particular material not be published until admitted in evidence or until conclusion of the trial. The proposed statute would make that principle applicable to all newspapermen, all law enforcement personnel and all members of the legal profession. It would apply only to jury trials, limit publication only of specified material and impose that limitation only for the time necessary to protect the right to a fair trial. For more than seventy years[38] a dialogue between the professions of journalism and the law has continued. Both sides purport to speak in the name of society, but more often than not seem more interested in fixing blame than in arriving at an acceptable solution. Joint efforts made in 1925, 1937[39] and 1953[40] to draft a voluntary code all came to naught. In the last few years, guides have been jointly prepared in Louisiana, Massachusetts, and Oregon, and the tragic event of last November has spurred efforts elsewhere to define standards. But it is worthy of note that when Dr. Frank Stanton of Columbia Broadcasting System in his recent Annenberg School lecture proposed establishment of new standards, the other two principal networks promptly demurred. Until it has been more clearly demonstrated that the press and the bar are willing to accept responsibility for, and have the means of, policing their respective professions, one must conclude that only a statute such as proposed can achieve the balance between journalism and justice, between freedom of discussion and the right to a fair and impartial trial, that the interests of society demand.

38. The earliest article found was published in 1892: Forrest, *Trial by Newspapers*, 14 CRIM. LAW MAGAZINE 550.
39. Report of Joint Committee of the American Bar Association, the American Newspaper Publishers Association and the American Society of Newspaper Editors, 62 A.B.A. REP. 851 (1937).
40. The code drafted by a New York County Lawyers Association Committee in that year is set forth at the end of OTTERBOURG, FAIR TRIAL AND FREE PRESS, 39 A.B.A.J. 978 (1953).