Notre Dame Law Review

Volume 42 | Issue 6 Article 3

1-1-1967

Constitutional Problems in Restraint on the Media

John de J. Pemberton

CONSTITUTIONAL PROBLEMS IN RESTRAINT ON THE MEDIA

*John de J. Pemberton, Jr.**

I. Introduction

The problem of "trial by press" has been a recurring phenomenon in our society, but demographic and technological changes give it a different cast in recent years. We are more dependent upon the mass media for public information about controversies that find their way into litigation, and the parties to such litigation are more exposed to the viscissitudes of public reporting for the image they have in the eyes of their communities. The names of Dr. Sam Sheppard, Billy Sol Estes, Candace Mossler, Dr. Carl Coppolino, and Bobbie Baker quickly become common currency in nearly forty million homes; and the public exposure of matters that might have affected issues in the cases of Lee Harvey Oswald and Jack Ruby was unprecedented.

Because the dangers to a fair criminal trial from such publicity have been so vividly brought home to the bar, strenuous new efforts have been made to find a solution to this problem. Among these, the efforts of the ABA's Advisory Committee on Fair Trial and Free Press[1] deserve the most serious attention. In probing the constitutional dimensions of the Committee's recommendations, we are faced with an apparent conflict within the Bill of Rights.

The ancient Greek conceptualization of tragedy lay not in the triumph of wrong over right, but in the clash of rights, each unassailable in itself. Too often our discussion of the present problem has assumed that it partakes of that quality of the tragedy. Before we weep, we should analyze the issues with skepticism: Are our choices limited to the exalting of one guarantee from our charter of liberties over another? Must fair trial really yield to freedom of the press, if it is not to dominate it? The Advisory Committee believes that its carefully framed and restrained recommendations avoid that result. At the same time, however, the Committee has proposed direct sanctions against editors and journalists, albeit in carefully circumscribed situations, and avoids the conclusion of conflict by defending the constitutionality of these sanctions.[2]

II. Direct Restraints on the News Media

The recommendations set forth in part IV of the ABA Report provide for a direct restraint on the news media only in two circumstances: (1) when there has been a knowing violation of a valid judicial order not to disseminate facts during or before trial in jury cases (or before disposition without trial);[3]

* Executive Director, American Civil Liberties Union. In the preparation of this paper the author gratefully acknowledges the generous and volunteered assistance of E. Gill Agee, a second-year student at New York University Law School and participant in the Arthur Garfield Hayes Civil Liberties Program at that Law School.

1 ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft 1966) [hereinafter cited as ABA REP.].

2 ABA REP. 153.

3 ABA REP. 150.

and (2) when there has been a deliberate action during the progress of a criminal jury trial (including the period of jury selection) constituting a serious threat to a fair trial.[4] In the first category the valid judicial order, on which a contempt prosecution would be founded, must have barred dissemination of specified information referred to in the course of a judicial hearing from which the public was excluded.[5] The recommendations applicable to the second category call for punishment by the contempt power *only* if all the following circumstances exist: (a) if the maker or disseminator of a statement knows that the trial was in progress; (b) if the statement was intended to be disseminated by any means of public communication; (c) if it was made about some aspect of the case that goes beyond the public record; and (d) if the statement was "reasonably calculated" to affect the outcome of the trial and did "seriously threaten" such effect.[6] It is significant that the Committee's commentary on the requirement that the statement disseminated during trial must have been "reasonably calculated" to affect the outcome speaks in terms of the criteria of *New York Times Co. v. Sullivan*.[7] That is, the statement must either have actually been intended to affect the outcome or have been made with reckless disregard for the consequences.[8] Thus, all of the Committee's recommended uses of the contempt sanction against privately generated publicity are confined to instances in which the conduct was either wilful or wanton.

Although the Committee's recommendations are premised on the belief that in these limited circumstances "a conviction for contempt would [not] abridge freedom of speech or of the press,"[9] they clearly impose limitations on the use of speech and press by journalists and private persons. The reconciliation of such limitations is not uncommon to our tradition of constitutionally guaranteed freedoms of speech and press. For instance, we do not assume that the first amendment protects the author of a fraudulent misrepresentation from civil or criminal liability for fraud. Although both civil and criminal libel are feeling the impact of the first amendment in cases decided during the 1960's, at least civil liability for defamation survives. The censorship and control of obscenity, or at least of "pandering," has not been eliminated by the free press guarantee. Nor has the dissemination of gambling information yet been held to be protected from criminal sanctions. Thus, the Committee is able to contend that carefully limited restrictions on extrajudicial statements are not inconsistent with the constitutional guarantee of free speech and free press.

Certainly since *Bridges v. California*,[10] the cases have shown great hostility to the imposition of judicial sanctions on the press. But the Committee correctly notes that all of the current Supreme Court decisions reversing such contempt convictions involved attempts by judges to protect themselves[11] or a grand

4 *Ibid.*
5 *Ibid.*
6 *Ibid.* See commentary in ABA REP. 151-52.
7 376 U.S. 254 (1964).
8 ABA REP. 152.
9 *Id.* at 153.
10 314 U.S. 252 (1941).
11 See Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946).

jury;[12] none overturned orders protecting a petit jury trying a criminal case. The Committee finds support in the dictum of Chief Justice Warren in *Wood v. Georgia*[13] that "of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation."[14] It might be added to the Committee's observation that most contempt cases involve the further debilitating circumstance of trial court judges seeking to insulate themselves from public criticism. The unseemliness of that kind of judicial behavior in *Pennekamp v. Florida*[15] led Mr. Justice Murphy to comment that a person's freedom should not rest on "the precarious base of judicial sensitiveness and caprice."[16] Insofar as the Committee recommendation is directed at protecting the fairmindedness of juries rather than the sensitivities of the judge, they might well be distinguished from the adverse holdings in these cases.

On the other hand, no decision of the United States Supreme Court having current vitality sustains an exercise of the contempt power comparable to that recommended by the Committee. Unlike fraud, libel, and obscenity, adoption of the Committee's recommendations would involve carrying a new exception out of the area assumed to be protected by the first amendment. Although the recommendation is limited to punishment of wilful or wanton violators, the uncertainty it creates will inevitably give good-faith commentators a pause as well. As Justices Goldberg and Douglas implied in their concurring opinion in *New York Times Co. v. Sullivan*,[17] somebody has to make fact determinations about the wilfulness or wantonness of conduct, and the trier of fact is never infallible.[18] *Sullivan* itself was an ample illustration of the risks a litigant may take when fact issues are submitted to a jury.

In support of its conclusion that its recommendation for the exercise of the contempt power would be held constitutional, the Committee relies in part on the "tenor"[19] of the recent case of *Sheppard v. Maxwell*.[20] I find it difficult to find comfort in the *Sheppard* case for the Committee's conclusions. Dr. Sheppard was convicted in 1954 in a case that was bathed in the most outrageous publicity imaginable. Even the publicity surrounding the 1963 assassination of President Kennedy, which so permeated the nation that responsible observers concluded that Lee Harvey Oswald could not have received a fair trial anywhere, lacked the venality of the press treatment dealt Sheppard. There are not only suggestions of official complicity in the press abuses reported in *Sheppard,* but also implications of press stimulation of the official animus and misconduct. In the face of all of this, the Court concluded that the judge might well have employed "other means [than restricting prejudicial news accounts] that are often utilized to reduce the appearance of prejudicial material and to

12 Wood v. Georgia, 370 U.S. 375 (1962).
13 *Ibid.*
14 *Id.* at 390.
15 328 U.S. 331 (1946).
16 *Id.* at 370 (concurring opinion).
17 376 U.S. 254 (1964).
18 *Id.* at 300.
19 ABA REP. 153-54.
20 Sheppard v. Maxwell, 384 U.S. 333 (1966).

protect the jury from outside influence."[21] The Court then proceeded to enumerate three pages of description of the "other means" that the judge might have employed,[22] without once alluding to the imposition of sanctions on the news media or the private sources[23] of prejudicial statements. The Court specifically concluded that the procedures it suggested "would have been sufficient to guarantee Sheppard a fair trial,"[24] and so did not consider "what sanctions might be available against a recalcitrant press . . . ."[25] It is true that the Court thus left open the question whether a court might invoke its power of contempt against a "recalcitrant press," but it is difficult to imagine a case sufficiently outrageous to require that question to be reached if *Sheppard* wasn't such a case.

Certainly a court could not exercise its contempt power if one of the less drastic means enumerated in *Sheppard* would assure a fair trial. In *Aptheker v. Secretary of State*[26] the Court weighed a contention that both the first and the fifth amendments were violated in the McCarran Act's flat ban on issuing passports to members of an organization required to register under the act. The Secretary of State strenuously urged the legitimacy of Congress' concern over the uses hostile to internal security that could be made of such passports.[27] In striking down the statute, Mr. Justice Goldberg recognized the validity of Congress' concern but emphasized that it should have used "less drastic means" in achieving its goal.[28] The availability of "less drastic" means is highly relevant in analyzing the Committee's recommendations. The guarantees of speech and press serve central functions in the processes of self-government; and if exceptions such as those for fraud, libel, and obscenity have survived the adoption of the first amendment, it is significant that they have tended to contract rather than to expand. The general commentary of the Committee devotes several pages to observations about the value that a free press has had for the system of administering justice[29] and cites numerous instances of important contributions made by the press.[30] Of course, the Committee does not believe that the sanctions it proposes would inhibit the press in the performance of this valuable role. But all exceptions have boundaries, and all boundaries tend to have some penumbras. A first amendment without such exceptions is much less likely to inhibit the dissemination of beneficial information and criticism than otherwise.

The Committee proposes, as did the Supreme Court in *Sheppard,* many measures designed to control the incidence of prejudicial publicity. The Committee acknowledges that its recommendation for use of the contempt power is not a central one;[31] it views the contempt power applicable to the private

21 *Id.* at 358.
22 *Id.* at 359-62.
23 I exclude witnesses from "private sources" in making that broad generalization. Witnesses, as distinguished from extrajudicial private parties, do have an official function that may make them subject to the jurisdiction of a court in a pending proceedings.
24 Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).
25 *Ibid.*
26 378 U.S. 500 (1964).
27 *Id.* at 508-09.
28 *Id.* at 512.
29 ABA REP. 47-51.
30 *Ibid.*
31 *Id.* at 151.

generation of extrajudicial statements in part IV as only a "desirable, and a valuable supplement to the other steps recommended."[32] But, despite the *Sheppard* opinion's reference to some of these other means as ones "often utilized,"[33] it is obvious that we have no experience with their systematic employment to minimize the hazard of prejudicial publicity. At the very least, the democratic bias in favor of first amendment freedoms ought to require the acquisition of that experience before the new exception is carved out. Moreover, it may not be mere wishful thinking on the part of one deeply committed to that bias to believe that the attempt to make do with still less drastic means may be constitutionally required.

The Committee's reliance on the fact that the leading Supreme Court decisions do not involve jury trials is a double-edged sword. The alternative means that the Committee recommends to protect the jury were not applicable to these nonjury situations. The court struck down restraints on the press in these cases even though "less drastic" means were not available to protect the judges who were the objects of the apparent tendency to influence.

Perhaps the most serious threat to the integrity of the judicial process considered in these major Supreme Court precedents was posed by the extrajudicial statements in *Craig v. Harney*.[34] In that case a newspaper had reported, with serious inaccuracies, the trial of a civil case involving the forfeiture of a serviceman's lease for nonpayment of rent while absent in the service.[35] The jury balked three times at complying with the judge's instructions to return a verdict for the landlord; and after the instructed verdict was finally returned, a motion was made on the tenant's behalf for a new trial.[36] While the motion was pending, the newspaper reported the activities of local citizens who organized to petition the judge to grant the new trial. Prior to a ruling on the motion, the paper, noting the judge's lack of legal training, editorially commented on his "high-handed" conduct of the earlier trial and demanded that the pending motion be granted. The layman judge was an elected official who faced the prospect of reelection in that district.[37] No "less drastic means," such as orders governing the conduct of prosecutors, law enforcement officers, witnesses, or court officials, could have protected the judge from the pressure this publicity was generating to influence his decision. Moreover, it was contended — not without force, I think — that since the case involved only private litigation, the range of permissible comment should have been narrower than in a criminal trial, which necessarily generates greater public concern.[38] In the face of all these circumstances, the Supreme Court majority found that the newspaper's conduct failed to rise to the level of an imminent or serious threat to a judge of reasonable fortitude.[39] A still higher degree of imminence and seriousness might well be required to take the case across the line of "clear and present

32 *Ibid.*
33 Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).
34 331 U.S. 367 (1947).
35 *Id.* at 369.
36 *Id.* at 369-70.
37 *Id.* at 375-77.
38 *Id.* at 378.
39 See *id.* at 376.

danger," when there are other less drastic means of protecting the judicial process than merely relying upon one man's point of view in the imposition of a direct restraint by contempt.

III. Indirect Restraints on Information Sources

Some concern should also be given to the constitutional status of the "other means" recommended by the Committee. If the express guarantees of the first ten amendments create "penumbras" of related protections,[40] the first amendment may establish a right in the press to sources of information as well as to freedom to disseminate. The reason for the hostility that the press has shown to the Committee's recommendations is the feeling that the press is less free when its sources of information have been dried up.

One can certainly imagine cases involving official silence that have, or ought to have, constitutional implications. If not in the name of the first amendment's right of free press, then perhaps in the name of the sixth amendment's right to a public trial, some limitations on the sources of information about the criminal process would surely become invalid. However, the Committee's proposed standards certainly rest upon a better footing. I doubt that any constitutional argument has ever proposed that every fact coming to official knowledge must necessarily be made public. The movement of troops and matériel in wartime are kept secret without question, and a secrecy is customarily practiced in some aspects of international diplomacy. The conferences of judges on pending litigation are zealously protected from publicity. Statutory limitations on the divulgence of matters reported in income tax returns would not lightly be challenged.

I believe that some hint of the acceptable scope of restraints on sources of information can be found in the historic purposes of the framers of the Constitution. Of course, to make an argument from the historic purposes of a constitutional provision is doubly dangerous. Lawyers and judges are often poor historians; and the historic intention, even if accurately found, may have no rational applicability to present-day interpretation. However, Mr. Justice Brennan, in his concurring opinion in *School Dist. of Abington Township v. Schempp*,[41] suggested what I think is a proper use of historic purpose. Not what the framers intended the application to be, but the "consequences which the Framers deeply feared"[42] are relevant to present-day interpretation. Thus, the key question is not whether the sixth amendment was intended to permit restraint on the press, or its sources, but what evil was that amendment aimed at avoiding.

I suggest that the framers of the sixth amendment feared an exertion of the sovereign's power to delay or influence the outcome of a trial, for the trial was meant to protect the individual citizen from the direct deprivation of his life, liberty, or property by the sovereign. They feared the king's telling the judge or jury what to do. If that is the core of the sixth amendment's interest, it is

40 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
41 374 U.S. 203, 230 (1963).
42 *Id.* at 236.

relevant that the objects of the sanctions proposed in parts I, II, and III of the Committee's recommendations are public officials, not private commentators. When the district attorney, the chief of police, or an ordinary policeman employs the press to affect the impartiality of the tribunal that will determine a citizen's liberty, it is the state that is acting, just as much as when the king told his judges how he wanted a case decided. The failure to inhibit these officials in their public statements, if the statements do in fact affect impartiality, is a failure on the part of the state to provide "a speedy and public trial, by an impartial jury" as the sixth amendment commands. No such command reaches privately generated publicity in the same manner. Furthermore, the impact of sanctions directly applicable to the private maker of publicity may discourage that kind of reporting which is essential to having a truly "public" trial.

IV. Conclusion

Thus, I suggest that the Committee's recommendations are constitutional insofar as they serve the historic purpose of the sixth amendment by protecting against state interference with the impartiality of judicial tribunals; insofar as the recommendations curtail the right of the private press to comment on litigation, they are constitutionally suspect. The judicial process needs the criticism of informed public opinion, and this criticism should not be lightly suppressed. This is not to say that the penumbra of rights created by the first and the sixth amendments will never overlap. Nor is it to say that the interests of the press in being unrestrained and of litigants in fair trials are without points of conflict. But it is possible that the first amendment may admit of no new exception for the interests of a fair trial, such as the use of the contempt power proposed in part IV of the ABA Report. Certainly no exception should be presumed until the need for it has been convincingly shown.