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Constitutional Law - Freedom of Speech and of the Press - Prohibition of Publication of Juveniles' Names Declared Unconstitutional

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND OF THE PRESS—PROHIBITION OF PUBLICATION OF JUVENILES' NAMES DECLARED UNCONSTITUTIONAL.

Respondents, the *Charleston Daily Mail,* and the *Charleston Daily Gazette,* dispatched reporters to the scene of a shooting at a local junior high school.[1] The reporters obtained from eye-witnesses the name of the alleged assailant, a fourteen-year-old juvenile, and both newspapers prepared articles for publication.[2] The *Daily Mail's* first publication did not include the name of the juvenile involved because a West Virginia statute prohibited such publication.[3] The *Daily Gazette,* however, published the juvenile's name and his picture.[4] Because the juvenile's name was also broadcast by at least three radio stations, the *Daily Mail* felt the name was within the public knowledge, so the name was published in a subsequent publication.[5] The respondents were indicted for knowingly publishing the name of a youth appearing before the juvenile court, in violation of a West Virginia statute prohibiting

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1. Smith v. Daily Mail Publishing Co., ___ U.S. ___, ___, 99 S. Ct. 2667, 2669 (1979).
2. *Id.*
3. *Id.* The statute prohibiting the newspaper publication of the names of juveniles provides as follows:

> Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; *nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without written order of the court;* nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

W. VA. CODE § 49-7-3 (1976) (emphasis added).
4. ___U.S. at ___, 99 S. Ct. at 2669.
5. *Id.*

such publication.[6] Respondents filed an original jurisdiction petition with the West Virginia Supreme Court for a writ of prohibition.[7] This court held that the West Virginia statute was a prior restraint and allowed the writ.[8] On appeal, the United States Supreme Court *held* that the interest of the state in protecting juveniles was not an interest of the highest order and therefore could not justify a criminal sanction for the publication of the names of juveniles appearing before the West Virginia Juvenile Court.[9] *Smith v. Daily Mail Publishing Co.*, ____ U.S. ____, 99 S. Ct. 2667 (1979).

The first amendment provides that "[c]ongress shall make no law. . . abridging the freedom of speech, or of the press."[10] The first amendment has been applied to prohibit direct or indirect restrictions upon the freedoms of speech and press. Such things as taxes,[11] judicial injunctions[12] and any other actions by government which might hinder the exercise of the first amendment freedoms before an adequate determination that such exercise is unprotected by the first amendment,[13] have been declared unconstitutional. Typically a restriction upon the first amendment rights will take the form of either a prior restraint[14] or a subsequent punishment.[15]

Prior restraints act to prohibit speech before the speech takes place.[16] The effect of a prior restraint is to freeze speech.[17] Because

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6. *Id.* The penalty for violating West Virginia Code section 49-7-3 is codified at section 49-7-20 and provides as follows:

> A person who violates an order, rule, or regulation made under the authority of this chapter, or who violates a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.

W. VA. CODE § 49-7-20 (1976).

7. ____ U.S. at ____, 99 S. Ct. at 2669.

8. State ex rel. Daily Mail Publishing Co. v. Smith, ____ W. Va. ____, 248 S.E.2d 269 (1978).

9. ____ U.S. at ____, 99 S. Ct. at 2671.

10. U.S. CONST. amend. I.

11. Grosjean v. American Press Co., 297 U.S. 233 (1936). In *Grosjean* the Court struck down a tax of two percent of the gross receipts of companies involved in publishing materials with a circulation of greater than 20,000 copies per week. The Court declared the tax unconstitutional because it was a restraint upon the press and thus abridged the first amendment rights. *Id.* at 250.

12. Near v. Minnesota, 283 U.S. 697 (1931). In *Near* the Court struck down a statute under which an injunction was procured. The injunction prohibited a newspaper from publishing articles which accused officials of failure to perform their duties properly. *Id.* at 722-23.

13. Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 (1973). In *Pittsburgh Press* the Court held that a law prohibiting newspapers from classifying their want ads according to sex for non-exempt job opportunities did not violate first amendment rights. *Id.* at 391.

14. *Id.* at 390. A prior restraint is one which suppresses a publication before it is determined that the speech is unprotected by the first amendment. *Id.* For a more extensive discussion of prior restraints, *see* Litwack, *The Doctrine of Prior Restraints*, 12 HARV. C.R. — C.L.L. REV. 519 (1977), where prior restraints are defined as "formal prohibition[s] on speech, imposed in advance of utterance or publication." *Id.* at 520.

15. Landmark Com., Inc. v. Virginia, 435 U.S. 829, 841 (1978).

16. *See supra* note 14 for a definition of prior restraint.

17. Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 559 (1976).

of this freezing effect, the United States Supreme Court has declared all prior restraints to be presumptively invalid.[18] The presumed invalidity of a prior restraint does not make the first amendment absolute. Instead the government's asserted interest is subjected to a balancing test whereby the first amendment right being infringed is balanced against the asserted governmental interest.[19] The Court has determined that the only interest sufficient to pass this balancing test is a compelling state interest.[20] If the government can demonstrate that the prior restraint is protecting a compelling state interest, that prior restraint will be upheld.[21]

Unlike the effect of a prior restraint, the effect of a subsequent punishment is not to "freeze" speech, but to "chill" it.[22] A subsequent punishment restricts speech by imposing a penalty after the speech has taken place.[23] The subsequent punishment does not require the speaker to remain silent by immediately imposing itself upon the speaker, but the subsequent punishment is imposed only after a judicial determination and a conviction for violation of some governmental regulation. Further, that conviction is subject to all of the procedures and protections granted persons in the court system before a penalty may be imposed.[24] Because a conviction offers a number of opportunities for acquittal and release before the punishment is final, the effect of a subsequent punishment is only to "chill" speech.[25] Therefore, unlike a prior restraint which "freezes" speech[26] and is thus presumed to be invalid, there is no such presumption when the restriction upon first amendment rights is a subsequent punishment. It follows from this that the test to uphold a subsequent punishment should be different from the test to uphold a prior restraint.

The Court will uphold a subsequent punishment if the government asserts an interest sufficent to justify the chilling effect of the subsequent punishment on the freedoms of the first amendment.[27] Furthermore, the government requires that the

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18. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
19. Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1961).
20. Thomas v. Collins, 323 U.S. 516, 531-32 (1944). In *Thomas*, a union representative was found guilty of contempt of court for refusing to obey an injunction which prohibited him from speaking at a union recruiting function. The Supreme Court found that controlling and regulating labor unions was not a compelling state interest. *Id.*
21. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).
22. 427 U.S. at 559.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Landmark Com., Inc. v. Virginia, 435 U.S. 829, 838 (1978).

subsequent punishment be necessary to further the asserted state interest, and, in fact, it must do so.[28] Subsequent punishments and prior restraints will be upheld if the facts of the case show that they meet these tests. Generally subsequent punishments and prior restraints are upheld in areas such as obscenity,[29] threats to the national welfare,[30] and cases of defamation[31] because the Court has declared these forms of speech to be unprotected by the first amendment.[32]

In addition to the speech which has been declared unprotected, the Court has also allowed other methods of incidentally burdening the press.[33] This "burdening" can take the form of denying the press access to certain areas.[34]

The Court stated in *Pell v. Procunier*,[35] that the press has no constitutional right of access to places where members of the public are not generally allowed,[36] and the government has no affirmative duty to make those areas available to the press.[37] Thus, if the area is closed to the general public it may be closed to the press,[38] and information which can be had only through direct access to those areas becomes unavailable to the press, except by other, less direct means.[39] For example, the press has been allowed to obtain supposedly unobtainable information received from their "sources" and publish it, as it did in *New York Times Co. v. United States*.[40]

Besides being able to publish information which the press obtains from its "sources," the press may choose to wait until the information enters an area to which the general public has access

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28. *Id.* at 841.

29. 283 U.S. at 716; Miller v. California, 413 U.S. 15, 36-37 (1973); *cf.* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

30. 283 U.S. at 716; Schenck v. United States, 294 U.S. 47, 52 (1919); *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969). In *Brandenburg* the Court stated that mere advocacy of an overthrow is not enough to sustain a restraint on first amendment rights. The advocacy must be likely to incite or produce imminent lawless action. *Id.* at 447.

31. 283 U.S. at 715.

32. 413 U.S. at 23 (obscenity is unprotected by the first amendment); 283 U.S. at 715 (libel); 249 U.S. at 52 (speech which constitutes a threat to the national defense).

33. Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

34. Pell v. Procunier, 417 U.S. 817, 835 (1974) (reporters denied access to prisons to interview).

35. 417 U.S. at 817.

36. *Id.* at 834.

37. *Id.*

38. *Id.*

39. Branzburg v. Hayes, 408 U.S. 665 (1972). In *Branzburg* the Court held that a newsman could be required to testify about his news sources before a grand jury. The Court reasoned that a newspaper's sources were not likely to dry up as a result of this ruling because many of the informants depended upon exposure by the press to get their ideas across. From the discussion it is apparent that the Court feels that the press can find ways to obtain information which is generally unobtainable by the public. *Id.* at 695.

40. 403 U.S. 713 (1971). In *New York Times* the Court vacated an injunction which enjoined the *New York Times* from publishing the "History of U.S. Decision-Making Process on Viet Nam Policy," (Pentagon Papers), which were classified government documents. *Id.*

and then obtain the information.[41] Once the information is obtained its publication can be restrained only if it falls under one of the categories of speech which have been declared unprotected by the first amendment.[42]

The press has generally been afforded access to the court system, because of the important role the press has in subjecting the court officers, police, and the judicial process itself, to "extensive public scrutiny and criticism."[43] It is believed that this scrutiny and criticism will protect against a possible miscarriage of justice.[44] For this reason the United States Supreme Court is reluctant to deny the press access to the court system.[45] However, although the press is generally granted access to the courts, the press may be prohibited from publishing information which may adversely affect the functioning of the court system or the procurement of justice for the defendant.[46] Thus, the courts may close their doors and deny the press access in certain situations.[47]

One such situation in which the press has traditionally been excluded is the juvenile court system.[48] This system was first adopted in Illinois in 1899, and has spread throughout the United States.[49] It was established because reformers felt the harsh treatment given children prior to the adoption of the present juvenile court system did not meet the needs of either the child or society, thus a new system specifically designed for juveniles was required.[50] Under this new system the court would not determine guilt or innocence, but would look at the child from the viewpoint of what was best for him.[51] The juvenile court was to act *in loco parentis*[52] or under the *parens patriae* doctrine.[53] Originally, the system was for treatment and rehabilitation of the juvenile

41. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). A statute prohibited the publication of the names of rape victims. The press obtained the name of such a victim from a public record and proceeded to publish the name of the victim. The Court held that because the information was on the public record, the publication could not be punished. *Id.* at 495.

42. *See supra* note 32 for the categories of speech declared unprotected by the first amendment.

43. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

44. *Id.*

45. *Id.*

46. *Id.* In *Sheppard* the Court held that the defendant was denied a fair trial because the trial court did not impose enough restrictions upon the press. *Id.*

47. *Id. See also* Gannett Co., Inc. v. DePasquale, ___ U.S. ___, 99 S. Ct. 2898 (1979). In *Gannett* the Court stated that the public did not have a constitutional right to attend a pre-trial proceeding where closure is necessary to protect the rights of the defendants to a fair trial. *Id.* at ___, 99 S. Ct. at 2913.

48. ___ U.S. at ___, 99 S. Ct. at 2672.

49. In re Gault, 387 U.S. 1, 14 (1967).

50. *Id.* at 15.

51. *Id.*

52. *Id.* Howard v. United States, 2 F.2d 170 (E.D. Ky. 1942), stated that "a person acting in loco parentis is one 'assuming the parental character or discharging parental duties.'" *Id.* at 174.

53. 387 U.S. at 16. The doctrine of *parens patriae* grants the legislature power to provide protection for persons and their property. McIntosh v. Dill, 86 Okla. 1, 205 P.917 (1922).

offender,[54] thus, the system used a civil system approach[55] for which it was inappropriate to apply the criminal procedures of the adult court.[56]

Today, although the juvenile court system still maintains a civil system approach, and still applies the *parens patriae* rationale, juveniles are entitled to some of the constitutional rights afforded to adults accused of crimes, such as notice of the charges,[57] the right to an attorney,[58] the right to avoid self-incrimination[59] and the right to cross-examine witnesses.[60]

Although not a constitutional right, juveniles have been afforded anonymity when brought before the courts.[61] It is believed that this anonymity facilitates the rehabilitation of the juvenile because the public does not label him as a delinquent, and the usual stigma which attaches when a person is labeled a delinquent is avoided.[62] The states have an interest in seeing that the juvenile is not labeled and remains anonymous, because the purpose of the juvenile court system is to rehabilitate juveniles,[63] and that rehabilitation is more likely to occur if the juvenile remains anonymous.[64]

In *Davis v. Alaska*[65] the United States Supreme Court addressed the issue of whether the state's interest in maintaining the juvenile's anonymity outweighed the right of an accused to confront and cross-examine the witness against him.[66] The Court determined that it did not. In reaching its determination the Court balanced the state's interest in preserving the juvenile's anonymity against the defendant's constitutional right to cross-examine the witness and determined that the state's interest in juvenile anonymity could not require a vital constitutional right to yield.[67]

The *Smith* case also involves a constitutional right and the

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54. 387 U.S. at 15.
55. *Id.* at 17.
56. *Id.* at 14.
57. *Id.* at 33.
58. *Id.* at 36.
59. *Id.* at 55.
60. *Id.* at 57.
61. ___ U.S. at ___, 99 S. Ct. at 2672.
62. 387 U.S. at 24. *In re Gault* stated that "[t]he juvenile offender is now classed as a 'delinquent'. . . . It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults." *Id.* at 23-24. For other suggestions for dealing with the problem of juvenile anonymity, *see* Geis, *Publication of the Names of Juveniles*, 23 MONT. L. REV. 141 (1962); Note, *The Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Right of Access*, 39 U. PITT. L. REV. 121 (1977).
63. 387 U.S. at 16; Davis v. Alaska, 415 U.S. 308, 319 (1974).
64. *See supra* note 62 for discussion of the juvenile anonymity rationale.
65. 415 U.S. 308.
66. *Id.* at 320.
67. *Id.*

asserted state interest of maintaining a juvenile's anonymity.[68] In *Smith* the state of West Virginia asserted that its criminal statute[69] was justified by the state's interest in preserving the juvenile's anonymity.[70] The Court concluded that it was not.[71] In reaching its decision the Court first stated that both a prior restraint and a subsequent punishment required the highest state interest to sustain their validity.[72] The Court added that it did not have to address the issue of whether the West Virginia statute acted as a prior restraint,[73] because the statute did not satisfy the lesser constitutional standards set forth in *Landmark Communications, Inc. v. Virginia,*[74] for subsequent punishments.[75]

To determine that the state's interest in preserving juvenile anonymity was not an interest sufficient to justify a subsequent punishment, the Court applied the rationale and balancing test of *Davis*.[76] The Court concluded that the first amendment right of freedom of the press was as important as the sixth amendment right to cross-examine witnesses, therefore the first amendment rights, like the sixth amendment rights in *Davis,* would prevail over the state's interest in protecting juveniles.[77]

The Court also determined that the state interest asserted in *Smith* was not furthered by the application of a punishment because the restriction applied to newspapers only. Under the statute, television and radio stations could broadcast the name of the juvenile and not be subject to any punishment. In the *Smith* case three radio stations had broadcast the name of the juvenile, and none of those stations were indicted. Thus the Court determined that the statute did not serve its intended purpose.[78]

Finally, the Court stated that there was no evidence that it was necessary to impose a criminal penalty to protect the juvenile.[79] The Court based this on the fact that only a few states find it necessary to provide a criminal punishment to protect the juvenile's anonymity.[80]

Smith extends the rationale that once the information has

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68. ___ U.S. at ___, 99 S. Ct. at 2671.
69. *See supra* note 3 for the text of this statute.
70. ___ U.S. at ___, 99 S. Ct. at 2671.
71. *Id.* at ___, 99 S. Ct. at 2672.
72. *Id.* at ___, 99 S. Ct. at 2670.
73. *Id.*
74. 435 U.S. at 843.
75. ___ U.S. at ___, 99 S. Ct. at 2670. *See supra* note 27 and text for the *Landmark* test.
76. *Id.* at ___, 99 S. Ct. at 2671.
77. *Id.*
78. *Id.*
79. *Id.* at ___, 99 S. Ct. at 2672.
80. *Id.*

escaped the protection of the government and moved into the public domain its publication may not be restrained unless there is a need to further an interest of the highest order,[81] or the publication involves material which the United States Supreme Court has determined to be unprotected speech.[82] The Court clearly holds that the state interest asserted in *Smith,* juvenile anonymity, does not meet the requirements set for even a subsequent punishment.[83] If the Court applies its previous holdings in *Landmark*[84] and *Cox*[85] it will not uphold a prior restraint or a subsequent punishment for the publication of a juvenile's name if that information is obtained from a third party or when it is obtained in an area where the public is generally allowed. Because the Court has determined that juvenile anonymity is not a sufficient interest to support a criminal penalty, a concurring opinion feels that the states are left with no effective method of protecting their asserted interest in juvenile anonymity.[86] As the Court points out, however, the majority of the states do not enforce their juvenile anonymity interests with criminal punishment.[87] The pertinent sections of the United States Code[88] and the North Dakota Century Code[89] both fall within this category.

The federal code expressly prohibits publication of a juvenile's name[90] but it does not provide a criminal penalty in the event the name is published, as did the West Virginia statute.[91] The federal code does provide a contempt of court section.[92] Under a strict construction of the *Smith* holding that a criminal sanction can not be imposed for the publication of a juvenile's name,[93] an application of this contempt provision[94] as a civil contempt[95] would probably be upheld. Thus, the federal code is enforceable without a criminal sanction.

The North Dakota statute, unlike the federal and West Virginia statutes, does not expressly prohibit publication of any

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81. *Id.* at ____, 99 S. Ct. at 2671.
82. *See supra* note 32 for the categories of speech declared unprotected by the first amendment.
83. ____ U.S. at ____, 99 S. Ct. at 2671.
84. 435 U.S. 829.
85. 420 U.S. 469.
86. ____ U. S. at ____, 99 S. Ct. at 2673.
87. *Id.* at ____, 99 S. Ct. at 2672.
88. 18 U.S.C. § 5038(d) (2) (1979).
89. N.D. CENT. CODE § § 27-20-51 (Supp. 1979) & 27-20-52 (1974).
90. 18 U.S.C. § 5038(d) (2) (1979).
91. ____ U.S. at ____, 99 S. Ct. at 2668-69. *See supra* note 3 for the text of the statute.
92. 18 U.S.C. § 401 (1979).
93. ____ U.S. at ____, 99 S. Ct. at 2672.
94. 18 U.S.C. § 401 (1979).
95. McCrone v. United States, 307 U.S. 61 (1939). Civil contempt arises when the punishment is remedial, when it only serves the purpose of the complaint, and when it is intended to act as a deterrent to offenses against individuals and not the public. *Id.* at 64.

kind.[96] It instead provides protection for the juvenile by prohibiting access to the juvenile's files.[97] The North Dakota statutes also provide contempt of court proceedings for anyone who interferes with the juvenile court's function.[98] This statute could be interpreted to require a compliance by the news media with the state's interest in preserving a juvenile's anonymity and thus publication of identifying information by the news media could be civilly restrained. Also the contempt of court section allows the juvenile court to punish those persons who abuse their right of access to juvenile records. Following the rationale of *Smith*, which prohibits only criminal sanctions for publication,[99] the North Dakota statutes would probably be upheld.

ROSELLEN M. SAND

96. N.D. CENT. CODE § § 27-20-51 (Supp. 1979) & 27-20-52 (1974).
97. *Id.*
98. N.D. CENT. CODE § 27-20-55 (1974).
99. ____ U.S. at ____, 99 S. Ct. at 2672.