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A Constitutional Impasse

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FREE PRESS v. FAIR TRIAL: A CONTINUING DIALOGUE

A Constitutional Impasse?

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With admirable directness and simplicity, our Constitution guarantees both a "free press" and a "fair trial." Unhappily, circumstance sometimes requires us to translate these guarantees from their terse eloquence into perplexing practice. At that point, we discover that the exercise of a free press often makes it impossible to provide a fair trial. Unfortunately typical are the cases where an editorial or a broadcast goes into damaging detail, and even conclusion, about a particular crime when the accused has yet to be tried. Free press—and by the word "press" I include radio, television, and the movies—is given express protection in the Constitution in the first amendment. An equally firm insistence on due process of law, our ancient shorthand for fair trial procedure, is likewise found in the fifth amendment. Both of these constitutional concepts are binding on the States through the due process clause of the fourteenth amendment. What we find ourselves presented with, therefore, is a confrontation between equally important but conflicting social values. How can we secure one right without denying the other? It would be a beggarly description of freedom to say that the media have the freedom to be responsible and that, if they are not responsible, they should not be free. But words like "irresponsibility," of course, only indicate that we have reached a result. They have nothing to say about the process required to resolve problems that necessarily emerge in any clash between constitutional rights of equal dignity. Indeed, despair that such a process could ever be effected might well have led the Framers to say, in the unequivocal way that they did, that the press must be free. It was believed, I think, in 1791, as doubtless it is believed today, that agreement will never be reached on what is irresponsible and what is not. Perhaps the Framers must once again be congratulated that in the first amendment, as elsewhere in our Constitution, they forswore the false comfort that adjectives provide.

A year ago last November this subject was brought home to us with greater impact than we should like ever to witness again. After the assassination of President Kennedy, we watched the medium of television bring under its relentless surveillance the protagonists in

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the incredible drama that unfolded in Dallas. For those of us who sat in that enormous television audience, and particularly for those of us who were lawyers, a single question haunted us throughout that time: "Is it possible that the person or persons accused of this crime can receive a fair trial?"

We remember news commentators on radio and television, only hours after the assassination, saying in tones of solemn assurance, that there could be no doubt that Lee Harvey Oswald was the assassin of John F. Kennedy. The Warren Commission has since verified that statement—insofar as that is possible, when the accused is forever precluded from being called to the stand. But the media comment before trial on the guilt or innocence of the accused and its glaring inconsistency with any notion of fair trial was highlighted for us in the television coverage of those terrible days.

A group of Harvard Law School professors, among them such distinguished legal scholars as Henry Hart and Louis Jaffe, wrote an indignant letter to the *New York Times*. They said:

> It is too frequently a feature of our criminal justice that it is regarded as a public carnival. And this reflects our general obsession that everybody has a right immediately to know and see everything, that reporters and TV cameras must be omnipresent, that justice must take a second place behind the public's immediate "right to be informed" about every detail of a crime. For the fact is that justice is incompatible with the notion that police, prosecutors, attorneys, reporters, and cameramen should have an unlimited right to conduct *ex parte* public trials in the press and on television.[1]

That full media coverage of an alleged crime is incompatible with justice is authoritatively borne out by decisions of the Supreme Court. At the beginning of this century, Mr. Justice Holmes in *Patterson v. Colorado*[2] stated this proposition as follows:[3] "The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." But much has happened to the media since this was said in 1907; a "medium" such as television cannot be called an "outside influence." Television, as the case of Jack Ruby so vividly illustrates, cannot only influence but it can fundamentally alter the direction of the administration of justice. If Jack Ruby had not seen, flashed on the television screen, the President's sorrowful widow and children, would Lee Oswald have been so thoroughly removed from the

1. N. Y. Times, Dec. 3 1963, § 4 (Editorial), p. 10, col. 6.
2. 205 U.S. 454 (1907).
3. *Id.* at 462.

separate inquests of trial and history? In a medium such as television, an immediacy and intimacy is possible which is denied to the older media. But that intimacy and immediacy are qualities of a novel dynamism. We have clear proof of the effect of these volatile qualities on the legal process in the events that followed the assassination of the President. On television, the reporter, the ostensible observer, becomes an actor. The communications-media tail appears more and more to wag almost any dog.

Should we conclude, then, that at least for television first amendment protection should not be extended where the administration of justice is concerned? To support such a position, it might be contended that the older and clearly recognized Constitutional right to receive a fair trial should be emphasized whenever there is tension between the demands of fair trial and the assertions of a young and all pervasive medium such as television, the nature of which could never have been contemplated by the first amendment's authors. But if intimacy and immediacy are, as I have suggested, the truly arresting qualities of television, should not those qualities be turned to advantage? Some thinkers have told us, among them the recent but rejecting winner of the Nobel Prize, Jean Paul Sartre, that this is a century characterized by alienation, by excessive atomization, and by feelings dishearteningly widespread throughout the world that individuals are powerless to alter events over which they have neither control nor knowledge.

Perhaps then we should rebuild rather than restrict the range of television as a medium. Is it not possible that television may yet provide the means for an estranged citizenry to achieve a measure of communion with government? Indeed, the quiet hope that television can be a stimulant to an informed electorate underlies phrases such as the "right to know." Factors such as these should discourage easy conclusions that free press should be in some sense subordinate to fair trial.

The task is one of reconciliation and accommodation rather than one of choice or subordination. Mr. Justice Harlan has saliently pointed this out in his dissent in *Wood v. Georgia*,[4] a case involving collision between a grand jury investigation and hostile comment in the papers inserted by a holder of political office who considered the allegations of the judge's charge to the grand jury inflammatory and prejudicial to him. Mr. Justice Harlan said:[5] ". . . when the right to speak conflicts with the right to an impartial judicial proceeding, an accommodation must be made to preserve the essence of both." The complexities of these issues, I think, are exemplified

4. 370 U.S. 375 (1962).
5. *Id.* at 396

by the fact that, although I agree wholeheartedly with Justice Harlan's observation that an "accommodation" must be reached, I cannot agree with his choice of the "accommodation" to be made for resolving the case in which he made his observation. *Wood v. Georgia* involved criticism by a sheriff of a grand jury called by county judges to investigate "alleged Negro bloc voting" in the county. I take it from the facts of the case that the sheriff was generally supported by the Negro community and that he considered the convening of a grand jury divisive and disruptive of community relations. The *Wood* case, then, did not concern a jury trial of a criminal accused. It is, thus, important to be very careful to distinguish the factual context of a case when an accommodation is sought between fair trial and free press. Immunization of the judiciary from public criticism is not a constitutionally guaranteed right. Fair trial, on the other hand, is such a right. I think in the *Wood* case allowing public criticism of judicial action is more important, whatever the momentary discomfiture to the judiciary and others involved in the grand jury proceedings.

It is at this point that our attention is properly directed to the remedies available to cope with the dilemma of clash between free press and fair trial. As has been suggested, subordination of one constitutional right to gain another, particularly when both are given apparently equivalent constitutional sanction, is not a happy solution. This is especially so since we do not reach an end to competing constitutional claims even if we were to make a choice in favor of fair trial because fair trial raises its own brood of constitutional quandaries.

Suppose a court finds that an accused has been the subject of heated controversy in the press? Should it grant a motion for a continuance? Suppose that the court decides to postpone the trial until the vagaries of public passion have been spent on other themes. The same Constitution that insists on a fair trial requires a speedy one as well. In the famous Brinks robbery case,[6] the ingenuity of counsel for the defense sought to exploit this inherent constitutional conflict. The defendants contended that if they moved for a continuance, ". . . the period of alleged prejudice . . . would outlast [any period] . . . during which a trial, properly called speedy, might be had."[7] Therefore, defendants contended they could never constitutionally be tried at all.

The dilemma of the Brinks case reveals the fundamental difficulty in biased media-coverage concerning cases that are either being tried or about to be tried. This problem is becoming less and less responsive to solution by procedural devices. Continuance of

6. Commonwealth v. Geagan, 339 Mass. 487, 159 N.E.2d 870, *cert. denied*, 361 U.S. 895.
7. *Id.* at 880.

the case, or, in a day of nationwide television and radio, changing the venue, is wholly inadequate to protect the criminal accused. As already pointed out, these devices raise delicate constitutional problems of their own.

Is exercise of the contempt power a satisfactory way to prevent adverse and widespread publicity damaging to the rights of the accused at the time of trial and at the very moment of dissemination? After the comment adverse to the accused has been disseminated, can any remedy really help that particular accused? Some in our country have spoken in admiration of the English practice which prohibits all public comment concerning a case before and during trial. The rule is enforced with great severity and its exponents say that it results in a greater degree of fairness to the accused than our courts are generally able to provide. It is by means of the contempt power that the British practice of prohibiting comment on pending judicial proceedings is enforced.

I think it is not unfair to say that by American standards the contempt power is too freely used by some of the English judges. For example, it has been used to strike at criticism of the judiciary. Mr. Roland Goldfarb, who has collected some of the cases on the subject, tells us that the following comment was made in one of the English newspapers about the presiding justice's decision in a certain case:[8] "Lord Justice Slessor, who can hardly be altogether unbiased about legislation of this type, maintained that it was a very nice provisional order or as good a one as can be expected in this vale of tears." Now, to our American ears, this sounds harmless enough. Nevertheless, the author was fined for contempt by, of all people, Lord Justice Slessor.

From what I have said, I think it is clear that the English practice, with its liberal view of the contempt power, raises constitutional problems here that the English are not troubled with. With the English, rooted as they are in the concept of parliamentary sovereignty, government and legislature are one. But with us, the judiciary is a coordinate branch of government. As such, it must be subjected to the same criticism and inquiry to which the executive and legislative branches are constantly exposed. What must be emphasized in any discussion of the contempt power is that we are concerned with protecting the rights of the accused to fair trial and not with removing judicial conduct from public scrutiny and occasional reproach. The fact that contempt proceedings are frequently used for both purposes has, I think, led to unfortunate confusion.

8. Goldfarb, *The Impropriety of Publicity*, The New Republic, Feb. 29, 1964, p. 12.

Mr. Justice Frankfurter, in *Irvin v. Dowd*,[9] indicated that use of the contempt power would do much to prevent the present tendency to do reluctant justice by setting aside convictions long after those convicted have already been injured beyond the power of judicial recompense:

> The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.[10]

What Justice Frankfurter is saying is that for a long time courts seemed disposed to emphasize free press considerations over those of fair trial at the moment when the accused is first prejudiced. But when convictions obtained in such circumstances are re-examined in a proceeding for a writ of habeas corpus, after the accused has been found guilty and incarcerated, the courts have in some cases such as *Dowd* ordered the original conviction set aside on due process grounds because the media treatment of the case at the time of trial made a fair trial an impossibility.

This result, of course, is undesirable. If an accused is indeed being convicted by the press and the broadcasting media rather than by judicial procedures prescribed by statute and constitution, it is rather a hollow victory for such a person to have his conviction set aside after he has already spent years in prison. An example of this sort of "doing justice backwards" is found in the recent release, after ten years in prison, of Dr. Samuel Sheppard on a writ of habeas corpus by a Federal District Judge in Ohio on the ground that newspaper and broadcast suggestions of his guilt before trial rendered the fairness of the conviction so constitutionally doubtful as to warrant setting it aside.[11]

In the Sheppard case an unhappy, if inadvertent, collusion between the media and the prosecution resulted in prejudicing an entire community to the irreparable damage of the accused. Would the exercise of the contempt power by the trial court after the first newspaper story or broadcast suggesting Dr. Sheppard's guilt have prevented what ultimately happened?

Another case that invites similar reflection is *Rideau v. Louisiana*,[12] which was reviewed by the Supreme Court in 1963. That case involved the televising of an "interview" between a sheriff and a criminal accused prior to trial. In the *Rideau* case, the parish had a population of 150,000. On one of three broadcasts

9. 366 U.S. 723 (1963).
10. *Id.* at 730.
11. Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964).
12. 373 U.S. 723 (1963).

of the film an estimated 53,000 people were in the viewing audience. Yet a motion to change the venue was denied; furthermore, no contempt citations were issued. Two years later, after the prisoner had been convicted and sentenced to death, the United States Supreme Court set aside the conviction because it had been obtained in circumstances inconsistent with due process. The Court properly *held*, per Mr. Justice Stewart:

> . . . [T]his spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so persuasively exposed to such a spectacle could be but a hollow formality.[13]

But one cannot help wondering why the trial judge did not issue any contempt citations against those responsible for thus prejudicing the cause of the accused. Moreover, perhaps the Supreme Court should have reproached the lower court for not bringing to account those who were responsible for so completely frustrating an accused's right to fair trial.

Why, indeed, then hasn't the contempt power been more widely used by the trial courts to strike at media publications that directly injure the right of the criminal accused? According to some, the reason is found in the United States Supreme Court's holding in the famous case of *Bridges v. California*.[14] In that case, it was held that punishment by contempt for comment on judicial proceedings is not permissible unless the offending publication presents a "clear and present danger" of obstructing justice. In the judgment of Mr. Anthony Lewis, the requirement of such a showing is so stern as to render contempt proceedings of no use to deter damaging media comment on criminal cases "no matter how severely the defendant's right to a fair trial may be hurt."[15]

If Mr. Lewis' criticism is valid and the contempt power is shorn of all vitality by the *Bridges* rule, then perhaps in the stimulus of the events of last fall, a reconsideration of the *Bridges* rule is in order. It may be that the present line of decisions inhibit a feasible accommodation between fair trial and free press.

It appears that we have turned down the available remedies one by one. To what remedy, it might be asked in some measure of desperation, should we turn? Justice Bernard S. Meyer, in the pages of this *Review*,[16] has suggested a statute. I think the proposed statute has the merit of proscribing only publications that would

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13. *Id.* at 726.
14. 314 U.S. 252 (1941).
15. Lewis, *The Case Of 'Trial By Press,'* N. Y. Times, Oct. 18, 1964, § 6 (Magazine), p. 98.
16. Meyer, *Free Press v. Fair Trial: The Judge's View*, 41 N.D.L. REV. 14 (1964).

be damaging to the rights of the criminal accused. I would not, however, restrict application of the statute to trial by jury alone. It was said anciently by an English judge that "The Devil himself knoweth not the mind of man." We cannot know for sure what serves to influence or sway the judgment of human beings. Judges, I think, no less than jurors, are capable of being swayed by media coverage adverse to the cause of the accused whose cause they must try. As was observed in *Baltimore Radio Show v. State*,[17] "Judges are not so 'angelic' as to render them immune to human influences calculated to affect the rest of mankind." The great utility of the statute proposed by Justice Meyer is that it would reach newspapermen, broadcasters, and the lawyers and prosecutors who supply them with information. This, of course, would be a most stimulating deterrent to the publication of information prejudicial to the fair trial of the criminal accused.

The danger, of course, of putting too much reliance on a statute is that no statute, however superbly drafted, can remove the fundamental dilemma raised in any clash of competing constitutional values. A statute can codify the problem. It can indicate a legislative preference in a particular situation as to which constitutional right should be emphasized. But the question still remains whether the emphasis required by statute is constitutionally permissible.

I suggest that we reflect on Mr. Justice Frankfurter's dissent in *Bridges* when he spoke in defense of the use of the contempt power not to prevent criticism of the judiciary but to protect impartial adjudication. He said:

> . . . [T]he Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty.[18]

17. 193 Md. 300, 67 A.2d 497, 508 (1949).
18. Bridges v. California, 314 U.S. 252, 284 (1941).