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Constitutional Law--Fair Trial and Free Press--State Court Contempt Power

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equitable manner, it is Congress which has the ultimate duty to eliminate inadequacies by amending the act.

IRA H. MEYER

CONSTITUTIONAL LAW — FAIR TRIAL AND FREE PRESS — STATE COURT CONTEMPT POWER

Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966).

In 1964 the Warren Commission warned that steps had to be taken "to bring about a proper balance between the right of the public to be adequately informed of civil and criminal proceedings and the right of the individual to a fair and impartial trial."[1]

Recently, in *Phoenix Newspapers, Inc. v. Superior Court*,[2] a reporter employed by the petitioner newspaper company attended a pre-trial hearing on an application for a writ of habeas corpus. Evidence was introduced to determine whether or not the defendant should be bound over for trial on a first degree murder charge. After denying the application and finding that publication of the evidence presented would be prejudicial, the presiding judge, upon defense counsel's request, issued an order enjoining publication of anything that had transpired at the hearing. Although anyone violating that order was to be held in contempt of court, the petitioner nevertheless published a report of the hearing. Prior to a hearing on the contempt charge before the superior court, the petitioner filed a writ of prohibition[3] in the Arizona Supreme Court to stay the hearing.

The majority opinion held that at such a pre-trial hearing, the lower court could not, in advance of publication, limit the petitioner's right to print the news and inform the public of the matters

[1] The Warren Commission came to this conclusion after recognizing that news media coverage of President Kennedy's assassination could be so pervasive that a defendant's opportunity for a fair trial by a jury free of prejudice would be seriously jeopardized because of the premature disclosure of evidence against him. U.S. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 242 (1964).

[2] 418 P.2d 594 (Ariz. 1966).

[3] The writ of prohibition tests the jurisdiction of a lower court. It is used "to prevent an inferior court from acting without or in excess of jurisdiction [or where] . . . there is no plain, speedy and adequate remedy available [to a party]." *Id.* at 595.

which had occurred in open court in the course of a judicial hearing. The contempt order of the lower court was accordingly held to be violative of the Arizona Constitution.[4] Similar to the protections of the first and sixth amendments of the federal constitution, the Arizona Constitution provides that every person has the right to speak, write, or publish on all subjects[5] and requires a speedy public trial in all criminal cases.[6] To avoid interpretational differences with the federal constitution, the court, in construing only the state provisions, reasoned that a "public trial" was a public right. Being a member of the public, the petitioner attended the pre-trial hearing as a matter of right. Similarly, his constitutional right of free speech included the right to publish what had transpired.[7] As a result, the Arizona Supreme Court held that the lower court had no jurisdiction to cite the petitioner for contempt since he was within his constitutional rights in observing what had transpired in open court and in publishing the information that was presented.[8]

Vice Chief Justice Bernstein limited his concurring opinion to what he termed the *direct* restriction of the press.[9] He asserted that what transpires in the courtroom is a matter of public concern.[10] Therefore, the courts have neither the right nor the authority to suppress disclosures of the proceedings before them. It is when an accused is before a tribunal of law that the value of a free press contributes to and assures the integrity of the criminal process. To allow the court to restrict publications of these proceedings would undermine the purposes of a free press.[11] Thus, the concurring

[4] *Id.* at 596. It is interesting to note that the court held the order violative of the petitioner's substantive rights of free speech and press under article 2, section 6 of the Arizona Constitution rather than on the procedural grounds that the contemptuous conduct necessarily took place beyond the geographical area of the courtroom. See Nye v. United States, 313 U.S. 33 (1940) in which the summary contempt power was limited to the geographical area in or near the courtroom.

[5] ARIZ. CONST. art. 2, § 6. The court limited its decision to this section even though the same rights are protected by the first amendment of the federal constitution. For the difference in the interpretation of the relevant portions of the Arizona Constitution and the federal constitution, see text accompanying notes 15-18 *infra.*

[6] ARIZ. CONST. art. 2, § 24. Note that § 24 is similar to the sixth amendment of the federal constitution.

[7] 418 P.2d at 596.

[8] *Id.* at 596-97.

[9] *Id.* at 597-601. Vice Chief Justice Bernstein did not specifically define the term "direct," but the context of his opinion reveals his area of concern.

[10] *Id.* at 599. Note that the basis of this proposition is a policy consideration whereas the majority opinion regards the "public trial" provision of the Arizona Constitution to be a public right. This proposition was also recognized in Craig v. Harney, 331 U.S. 367 (1947).

[11] 418 P.2d at 601. Vice Chief Justice Bernstein stated: "I hold to the assertion

opinion in *Phoenix* would require that publication of matters occurring in an open court proceeding, whether pre-trial or trial, be immune from *direct* restriction. Unlike the majority opinion, Vice Chief Justice Bernstein implied that he would have no objection to alternative restrictions which may have an indirect effect upon the press.[12]

Though the essence of the Arizona court's holding establishes immunity, as a result of the state provisions of free speech[13] and public trial,[14] for publication of open court matters, the due process clause of the fourteenth amendment makes the first and sixth amendments of the constitution applicable to the states.[15] The public trial provision of the state constitution was interpreted to be a public right, and thus the petitioner had a right to attend the pretrial hearing and a right to publish what had transpired.[16] The right of the public to be free from secret or oppressive proceedings is thereby protected, notwithstanding any right of an accused to a fair trial. In *Estes v. Texas*,[17] however, the Supreme Court reversed the conviction for swindling because prejudicial publicity had deprived the defendant of a fair trial. Relying on the notion that a trial which is public does not necessarily indicate that it is fair, the Court held that the accused's right to a fair trial outweighed the news media's right to bring electronic equipment into the courtroom.[18]

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that full disclosure . . . contributes to the efficiency and integrity of the criminal process and believe that the moment we permit other than such full disclosure we are heading toward the complete and inpenetrable secrecy reminiscent of the days of the Star Chamber." *Ibid.*

[12] The concurring opinion did not indicate that it would be objectionable to restrain others such as police, counsel, and the like from aiding the press in its efforts to obtain "scoops" or "exclusive stories by indirect means outside of the courtroom or "behind" the scenes. This seems to be premised on the notion that much information which otherwise would not appear in a court transcript would not appear in newspaper print if such information were not available from these persons.

[13] ARIZ. CONST. art. 2, § 6.

[14] ARIZ. CONST. art. 2, § 24.

[15] Estes v. Texas, 381 U.S. 532 (1965) (recent application of the sixth amendment); Schneider v. Town of Irvington, 308 U.S. 147 (1939) (first amendment).

[16] For the court's discussion of this reasoning, see text accompanying notes 5-7 *supra.*

[17] 381 U.S. 532, 538 (1965).

[18] *Ibid.* The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. Mr. Chief Justice Warren stated:

> [T]he guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry. A public trial is a necessary component of an accused's right to a fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt. *Id.* at 583.

The protections afforded by a fair trial in *Estes* were said to outweigh the reportorial freedom of the press due to the fact that "prejudice" occurred in the courtroom during the pre-trial hearing.[19] In the *Phoenix* case, on the other hand, the allegedly contemptuous events occurred outside the courtroom, and the alleged "prejudice" had not taken place before the trial court acted.[20] The basic difference between the two cases is that in *Estes* the news media actually interrupted the court proceedings with bulky electronic equipment, whereas in *Phoenix* the reporter was merely present in court taking notes. Thus, the "public trial" argument provides one constitutional basis for considering the underlying policy issue of whether a public trial is to protect the public interest in being informed about the proceedings of its court system[21] or to protect the individual's interest in obtaining a fair trial.[22] To understand fully the significance of the issue, each freedom must be carefully examined.

Freedom of the press is essential to enlighten a free people and restrain those who wield power.[23] It has proven to be a "catalyst in awakening public interest in governmental affairs, exposing corruption among public officers,"[24] and guarding "against the miscarriage of justice by subjecting . . . the judicial processes to extensive public scrutiny and criticism."[25] To allow such worthy functions to remain unimpeded, the Supreme Court has virtually immunized freedom of the press from the restraints of the contempt power by not allowing any restriction of this freedom in the absence of a "clear and present danger."[26]

The guarantee of a public trial enables members of the media, as members of the public, to be present at trial but does not afford them the right to monopolize the courtroom with media equipment. They may enter as members of the public, and after they leave the courtroom they may report through their respective media what transpired in open court.

[19] *Id.* at 535-38. The "prejudice" in the courtroom was the presence of the television media and its necessary electronic equipment.

[20] For the Arizona court's reasoning, in terms of freedom of the press, see text accompanying notes 4-8 *supra.*

[21] Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594, 596 (Ariz. 1966). The majority opinion argued that "Courts are public institutions. The manner in which justice is administered does not have any private aspects. To permit a hearing held in open court to be kept secret . . . would take from the public its right to be informed of a proceeding to which it is an interested party." *Ibid.*

[22] See Estes v. Texas, 381 U.S. 532, 540 (1965).

[23] Bridges v. California, 314 U.S. 252, 284 (1941) (dissenting opinion). Note that freedom of the press was held to include the freedom to publish and to circulate. *Ibid.*

[24] Estes v. Texas, 381 U.S. 532, 539 (1965).

[25] Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

[26] Bridges v. California, 314 U.S. 252 (1941). To determine whether or not this

On the other hand, the constitutional protection of a fair and impartial trial involves equally valuable policy considerations. The Supreme Court has, in principle, ruled that an accused must receive a fair trial by an impartial jury which is relatively free of the preconceived biases that can result from prejudicial and inflammatory news media coverage.[27] This principle is based upon the concept that the "primary concern of all must be the proper administration of justice [and] the life or liberty of any individual of this land should not be put in jeopardy because of the actions of any news media."[28] This concern is a direct result of the constitutional requirement that both the federal[29] and state courts[30] must afford trial by a jury which not only is impartially selected[31] but also possesses an impartial mental attitude.[32] To give the phrase "impartial jury" its full constitutional meaning, it must be a workable concept.

The danger of prejudicial publicity infringing upon the practical application of this concept was recently recognized in *Sheppard v. Maxwell*,[33] which warned that the "balance . . . [must] never [be] weighed against the accused."[34] This pronouncement in the *Sheppard* case is in harmony with *Estes*,[35] which emphasized that the preservation of a fair trial is the "most fundamental of all freedoms."[36]

Assuming, therefore, that a fair trial by an impartial jury "must

danger exists, the Court must look to the gravity of the evil and discount its improbability before it can find any limitation as being necessary to avoid the danger. Dennis v. United States, 341 U.S. 494 (1951). Under Bridges v. California, *supra*, this test, specifically applicable to the contempt power of the court, requires an "immediate" and "imminent" degree of danger. Another case, Pennekamp v. Florida, 328 U.S. 331 (1946), required that this danger be shown by a "solidity of evidence." *Id.* at 347. As a result of Gitlow v. New York, 268 U.S. 652 (1925), the contempt power of the states, due to the first amendment, is as restricted as that of the federal courts.

27 Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Janko v. United States, 366 U.S. 716 (1961) (per curiam); Marshall v. United States, 360 U.S. 310 (1959) (per curiam).

28 Estes v. Texas, *supra* note 27, at 540.

29 Holt v. United States, 218 U.S. 245 (1910).

30 Irvin v. Dowd, 366 U.S. 717 (1961).

31 Shepherd v. Florida, 341 U.S. 50 (1951).

32 Irvin v. Dowd, 366 U.S. 717 (1961).

33 384 U.S. 333 (1966).

34 *Id.* at 362.

35 Estes v. Texas, 381 U.S. 532 (1965).

36 *Id.* at 540. Mr. Clifton Daniels, Executive Editor of the Sunday New York Times, in referring to the right to a fair trial, said: "We are, after all, citizens before we are lawyers and newspapermen. We have a common interest in preserving the rights of our fellow-citizens, not to mention our own rights." Daniels, *Fair Trial and Freedom of the Press*, 71 CASE & COMMENT 3, 8 (1966).

be maintained at all costs,"[37] what measures can the trial court take to insulate an accused from incriminating or prejudicial publicity?[38] In *Sheppard* the Supreme Court limited the scope of its holding by setting forth the procedures which were available, but not exercised, to insulate the accused from the prejudicial influence of the press.[39] It was said that the trial court could have controlled or prohibited the release of leads or extra-judicial statements by the prosecutor, police, counsel, witnesses, and jurors.[40] Or, if the trial court had no jurisdiction over certain individuals, agencies, or investigative bodies under city or county authority, the court could have *requested* appropriate officials to promulgate regulations prohibiting the dissemination of information about a case, or it could have *warned* the news media about the impropriety of publishing material *not* introduced in open court.[41]

To whatever extent these procedural devices insulate an accused from prejudicial publicity, they are effective only during the trial and can exert no direct[42] influence or coercion upon what the press

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[37] Estes v. Texas, 381 U.S. 532, 538 (1966).

[38] The Supreme Court in Marshall v. United States, 360 U.S. 310, 312 (1959) (per curiam) held that a determination of prejudicial publicity must turn on the particular facts of the case. The following kinds of information are examples of what have been held to be prejudicial: (1) confessions and admissions, Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); and (2) prior conduct and criminal records, Marshall v. United States, 360 U.S. 310 (1959) (per curiam).

Many legal writers have deemed other types of information to be prejudicial, if published before or during trial. *E.g.*, Braithwaite, *Fair Trial — Free Press*, 38 A.B.A. RESEARCH MEMO. SERIES 1 (1966), in which the following are said to be information of a prejudicial nature: (1) opinions as to the merits of a case; (2) investigative procedures — finger prints, evidence, balistics, and the like; (3) circumstances of the arrest; (4) inadmissible evidence; (5) matter excluded from evidence during trial; (6) out-of-court statements of witnesses; (7) comments upon evidence or credibility of witnesses; and (8) personal opinions about the accused's guilt. *Id.* at 12-13.

[39] Sheppard v. Maxwell, 384 U.S. 333, 358 (1966). The Court limited its decision to the indirect procedures. The trial court could have limited the number of newsmen to be allowed in the courtroom. During the trial, the court could have permitted a change of venue, continuance, sequestration of the jury, or a new trial. However, the Supreme Court refused to pass on what sanctions might be available directly against a recalcitrant press. *Id.* at 358-63.

[40] *Id.* at 359, 361. Such a restriction would have minimal effectiveness in states which have statutes providing that news media are not required to disclose the source of their information. *E.g.*, OHIO REV. CODE § 2739.12. The court issuing such a prohibition would have a difficult problem in discovering which individual is responsible for a "leak" or release of guarded information.

[41] Sheppard v. Maxwell, 384 U.S. 333 (1966).

[42] The term "direct" is used to illustrate the similarity of the concurring opinion in the *Phoenix* case with the viewpoint adopted in Sheppard v. Maxwell, 384 U.S. 333 (1966). For a discussion of the *Phoenix* concurring opinion, see text accompanying notes 9-12 *supra.*

may do or publish outside of the courtroom.[43] However, in *Phoenix*[44] the trial court attempted to prevent prejudicial publicity through the use of its contempt power — a means which has proven to be very effective in England.[45] The concurring opinion in *Phoenix*[46] illustrates that the American system, unlike the British, has a restrictive postconviction, rather than a restrictive pre-trial, procedure. The emphasis of the former is to correct, while that of the latter is to prevent, an injustice that can result from massive publicity of a criminal trial.[47] Thus, the major distinction between the American and British systems is primarily a question of "when."[48]

Such a distinction between corrective and preventive measures need not compel the conclusion that preventive measures are not available to American trial courts. In *Phoenix* Vice Chief Justice Bernstein found merit in measures advocated in *Sheppard*[49] which may have an indirect effect upon the press.[50] Similarly, the Supreme Court in *Sheppard* held that a trial court could control or prohibit the release of information or extra-judicial statements to the press.[51] It may be concluded that such a limitation of information available to the press is within the area of restraints which satisfy the Supreme Court and the Constitution.[52]

Limitation upon the release of information or extra-judicial statements is believed to be a feasible way to guarantee a fair and impartial trial without an infringment upon the freedom of the press. A sample statute which may enable courts to effectively in-

[43] For a discussion of the Supreme Court's view toward direct action against the press, see note 39 *supra.*

[44] Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966).

[45] Unlike the American view toward limitation of the press, set forth in text accompanying notes 25-26 *supra*, the English concept allows a liberal use of the contempt power as a preventive measure to stop the press before it can endanger an accused. Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594, 598 (Ariz. 1966) (concurring opinion). In "Hunt v. Clark . . . Lord Justice Compton said, 'The question is not whether technically a contempt has been committed, but whether it is of such a nature as to justify and require the court to interfere.' " *Id.* at 598. See Note, *A Free Press and a Fair Trial: England v. The United States*, 13 W. RES. L. REV. 147 (1961).

[46] 418 P.2d at 597.

[47] *Id.* at 599.

[48] This distinction is not one of principle but is rather one of operation. See Note, *Fair Trial v. Free Press: The Need for Compromise*, 34 U. CINC. L. REV. 503, 522-23 (1965).

[49] 384 U.S. 333 (1966).

[50] 418 P.2d at 597 (concurring opinion).

[51] 384 U.S. at 358.

[52] For a discussion of this inference, see text accompanying notes 11-12 *supra.* For the limitations upon such a measure, see note 40 *supra.*

sulate an accused from prejudice resulting from information not disseminated in the judicial forum is set forth below:

AN ACT TO PROTECT AN ACCUSED'S
RIGHT TO A FAIR AND IMPARTIAL TRIAL

§ 1 Police, prosecutors, parties, attorneys, witnesses, jurors, judges, and all others engaged or otherwise involved in the investigation, prosecution, or trial of a criminal matter are prohibited from releasing information, or making statements as to the guilt or innocence of any individual accused of crime or making statements of, or comments upon facts or evidence which point toward the guilt or innocence of any accused individual.

§ 2 Any person who endeavors to solicit such prohibited statements from any person subject to section 1 of this act or who conspires, aids, or otherwise encourages such person to make such statements shall be deemed to have violated this act. Any form of publication of such statements will be prima facie evidence of such violation.

§ 3 It is the duty of the investigatory body, prosecutors, counsel, police, the court, or anyone under such authority of any of these, to notify or otherwise inform all others subject to this statute of their involvement and coverage thereunder.

§ 4 This statute becomes applicable as follows:

A. Section 1 of this act becomes applicable
   (1) to the police, prosecutors, and other investigatory bodies upon notification of a possible or probable criminal act or incident and
   (2) to all others within that section upon actual or constructive notice of their involvement in any stage of the criminal process from investigation to conviction or acquittal.

B. Section 2 becomes applicable upon any part of section 1 becoming applicable, but only to the extent section 1 is applicable.

§ 5 Nothing in this act shall prohibit the making of any statements to investigatory bodies, the prosecutor, a party's attorney, and the court at any stage of the criminal process. A judge of a court of original jurisdiction may in his discretion authorize public statements that would otherwise be banned or prohibited by this act.

§ 6 The penalty for violation of this act shall be a fine of not more than ten thousand dollars ($10,000) or imprisonment for a term not to exceed six (6) months for each offense.

The statute would not be a direct restriction upon the freedom of the press. It would prohibit designated individuals from releasing, without the trial court's consent, information not produced in open court. It would also prohibit all others from encouraging the defined individuals to violate the statute. Similarly, the statute would not affect the contempt power or require the Supreme Court