JUDICIAL RESTRAINTS ON THE PRESS

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I. THE BACKGROUND OF PRIOR RESTRAINTS

It has become an all too easy assumption of American law that freedom of the press in large part consists of there being no prior restraint on the right to publish. The concept is believed to have originated with the establishmentarian English judge, Sir William Blackstone, who, while he saw social benefit in freedom of press, was not about to permit it to go too far.

"The liberty of the press," he wrote, "is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published . . . (and) if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity." Not exactly a great testament to liberty!

Yet in 1931 in the landmark case Near v. Minnesota (283 U.S. 697) the United States Supreme Court enshrined Blackstone's proposition and made it the linchpin of a theory of the First Amendment.

Largely because our courts have not decided to what extent subsequent punishments may in themselves constitute prior restraint, Near contains both good and bad genes and its legal offspring therefore have been both healthy and unhealthy for freedom of the press.

II. THREATENING PROGENY

Not until 1971 and the Pentagon Papers case (New York Times v. United States; United States v. Washington Post, 403 U.S. 713) did the press come to the full realization that Near after all was a slender reed from which to hang a total theory of freedom of press; and in that case the Supreme Court justices reminded us that their great predecessor Chief Justice Charles Evans Hughes had qualified his no prior restraint rule in Near to exempt publications which might threaten the security of the state. Had such a threat been properly demonstrated in the Pentagon Papers case, the government would have won and the injunctions against the Times and Post would have stood. The liberal Justice William Brennan, part of the six-man majority, said as much:

"Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue."

In his oral argument before the Court, Times counsel Alexander Bickel seemed to be seeking no more than a qualified guarantee against prior restraint when he defined the constitutional issue as whether the publication of a document would have a direct link to a grave event which was immediate and visible.

Justice William O. Douglas thought this a strange argument for the Times to be making, and only he and Justice Hugo Black in the Pentagon Papers case reiterated the precept that, "Both the history and language of the First Amendment

support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." With the death of Justice Black, Justice Douglas is now alone in that view.

If the Pentagon Papers case was a setback for the government, it was no more than a Pyrrhic victory for the press; and it demonstrated for all time the fragility of Near v. Minnesota as an absolute barrier to prior restraint.

A. The Reardon Report and the Sheppard Case

It is nearly a decade since the American Bar Association's Advisory Committee on Fair Trial and Free Press issued the first draft of its Reardon Report and the unintended effects of those recommendations are still being felt. Although the Report did urge that the contempt power be exercised against any person, including a newsman, who, knowing that a criminal trial by jury is in progress or that a jury is being selected for a trial, disseminates extrajudicial statements willfully designed to affect the outcome of the trial or who violates a valid order not to reveal information disclosed at a closed judicial hearing, its main thrust was toward lawyers, police officers, and other officers of the court who are prone to become news sources.

In an information manual published subsequent to the Report, the Committee emphasized that its new rules did not intend to restrict investigations by newsmen or publications developed through journalistic enterprise. But whether

intended or not, the initial Report left the impression that most crime and court news is, by definition, prejudicial. The result has been law enforcement officers who will sometimes refuse to divulge the fact of an arrest and all too frequently a judicially imposed blackout on crime news which serves neither the best interests of the public nor the suspected violator of the law.

Less than two years before the ABA issued the final draft of its Reardon Report, the United States Supreme Court decided Sheppard v. Maxwell (384 U.S. 333, 1966). There has been much conjecture on what Justice Tom Clark intended his Sheppard opinion to mean, but evidence based on the jurist's public attempts to clarify his ruling suggests that he sought primarily to make judges masters of their own courtrooms. Clearly he did not propose the curtailment of news gathering or the judicial supervision of the editing of newspapers.

Nevertheless some judges interpreted Sheppard--as they were to interpret the Reardon Report--as a green light for use of the contempt power against offending news media and as an excuse to deny court and crime news to reporters.

A case in point was the trial of Richard Speck for the murder of eight Chicago nurses. Prior to trial, Illinois Circuit Court Judge Herbert Paschen issued a 16-point order restricting news coverage of the proceedings. Included was a ban on printing anything which did not occur in open court, a ban going far beyond anything contemplated in either Sheppard or the Reardon Report. Prohibition of the purchase of

transcripts and restrictions on identifying jurors and sketching in the courtroom were among the court rules challenged in a suit brought to the Illinois Supreme Court by the Chicago Tribune. Under this kind of pressure, Judge Paschen retreated tactically and the trial was concluded without incident.

B. The Dickinson "Gag Rule" Case

The residual effects of Sheppard and the Reardon Report--documents which are clearly misconstrued by some judges, lawyers and police officers--were dramatically demonstrated in November, 1971 when two Baton Rouge reporters were cited for contempt by a United States District Court judge for publishing testimony given at an open court hearing in violation of the judge's order, the pertinent part of which follows:

> It is ordered that no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.

Ignoring the order, the two reporters covered the story and were found guilty of criminal contempt. In discussing the contempt convictions the United States Court of Appeals for the Fifth Circuit (United States v. Dickinson, 465 F. 2d 496, 1972) sidestepped the First Amendment question of prior

restraint. Instead it held that, although the District Court judge's gag order was constitutionally infirm, the two reporters probably should have respected it until they had petitioned the Court of Appeals.

No jury was yet involved in the case, the Appeals Court observed, and a carnival atmosphere had not developed. Moreover, the public's right to know what facts were being brought out at the hearings was particularly compelling since the issue under consideration was whether elected state officials had trumped up charges against an individual solely because of his race and civil rights activities. The District Court's cure, said the Appeals judges, was worse than the disease. Relying on the Pentagon Papers case the Appeals Court nevertheless concluded that judicial protocols took precedence and that the judge's unconstitutional order should have been obeyed pending a speedy review. (It took nine months for a final court ruling in the case.)

The Court of Appeals returned the case to the District Court for a determination of whether the contempt convictions should be reversed. The District Court ultimately sustained the contempt convictions, and the Court of Appeals refused to reverse (476 F. 2d 373, 1973). In October, 1973, over the objection of Justice Douglas, the United States Supreme Court refused to hear an appeal from the two reporters.

Their lawyers had argued before the high court that if the decision were allowed to stand it would arm courts with the power to authorize patently impermissible prior restraints

on the exercise of First Amendment rights through the use of the contempt power and allow them to accomplish indirectly what the Constitution directly prohibits. "If the heavy burden which must be borne by the government to support any prior restraint can be met merely by the assertion of the possibility of a conflict . . . between constitutional rights," counsel for the reporters contended, "then freedom of the press as we know it would be held hostage to the fertile imagination of judges."

C. The CBS Sketching Case

Fallout from the Louisiana ruling was not long in coming. A United States District Court judge in Florida fined CBS $500 for criminal contempt when it refused to honor verbal orders not to sketch in or out of the courtroom in its June, 1973, coverage of the trial of the "Gainesville Eight."

In its brief to the same Fifth Circuit Court of Appeals, CBS attacked the judge's orders on due process grounds. They were not official orders of the District Court since they had been issued in chambers. In addition, there had been no notice, no personal service, no opportunity to be heard, no time limit set, and apparently no right of review. The judge refused to disqualify himself as an essential witness to the oral orders and tried the case without a jury, further violations of due process, CBS charged.

CBS had shown no deliberate defiance of or utter disrespect for the court. The artist left the courtroom to do

her sketching after the judge's initial order, and left the courthouse itself to work from memory after a second order. United States v. Columbia Broadcasting System, Inc. (5th Cir. Case No. 73-2602, 73-2615), Brief of Appellant.

Following the Dickinson holding the Court of Appeals voided the no sketching ban but not the pending contempt citation.

D. How Public Are Trials and Pretrial Hearings?

Under the misperceived mandate of Sheppard and Reardon, renewed efforts are being made to close to the public all or portions of trials and preliminary hearings. The issue is unsettled in law.

Since only the prosecution's side is heard in a preliminary hearing and the public may overlook the distinction between a hearing and a trial, it is feared that testimony at pretrial hearings may be considered a manifestation of guilt rather than a finding of probable cause to hold a suspect or a review of admissibility of evidence. At the same time, however, it appears that preliminary hearings are often routinized procedures in which magistrates bow to the wishes of prosecutors and sometimes become susceptible to chicanery in one form or another. And at least 80 per cent of preliminary hearings never proceed to trial.

More generally the principle of public justice, publicly administered, stands as a strong positive argument for unimpeded public, and thereby news media, access to

preliminary hearings.

Preliminary hearings are not necessarily open as a matter of law in state jurisdictions. For example, in Abzill v. Fisher (442 P. 2d 916, 1968) the Supreme Court of Nevada held that a statute providing for the exclusion of the public from the courtroom during preliminary examination was a proper exercise of legislative power and did not even minimally violate the First Amendment. A newspaper reporter had challenged the statute in a murder case.

The court argued that the constitutionally protected right conferred on the press did not embrace the right of access to sources of information not available to the general public. Estes v. Texas (381 U.S. 532), the 1965 United States Supreme Court ruling barring broadcast journalism from the courtroom, at least for the immediate future, was cited as precedent.

The Estes ban has recently spread to courthouse corridors and to the courthouse itself and its environs. In 1967 the Fifth Circuit Court of Appeals upheld the contempt conviction of a news photographer who, in violation of a standing order of a court, took television pictures of a defendant and his attorney in the hallway outside a courtroom after the defendant's arraignment. The news photographer was fined $25 because, said the court, "A defendant in a criminal proceeding should not be forced to run a gantlet of reporters and photographers each time he enters or leaves the court-toom. . ." Seymour v. United States (372 F. 2d 629).

As we shall note, the question of the openness of preliminary hearings has been decided differently by other state courts.

Until 1967 there was considerable uncertainty as to whether publication of preliminary hearings would be permitted by federal courts. Open preliminary hearings, however, were guaranteed in provisions of the Criminal Justice Act of 1967 (C. 80 3).

The question of a public trial is on slightly firmer constitutional ground. In a few cases courts have ruled that a defendant may waive a public trial. Kirstowsky v. Superior Court, 300 P. 2d 163 (Calif. 1956); United States v. Sorrentino, 175 F. 2d 721 (3d Cir. 1949); United States v. Kobli, 172 F. 2d 919 (3d Cir. 1949). The right to a public trial is the defendant's right and not the right of the media. United States v. Kleinman, 107 F. Supp. 407 (D.C.D.C. 1952); United Press Ass'n v. Valente, 123 N.E. 2d 769 (N.Y. 1954). But, said the United States Supreme Court in 1964, a defendant has no absolute right to a private trial. Singer v. United States, 380 U.S. 24.

A federal court in Nevada held in 1972 that a trial court could restrain a newspaper from disclosing the names of jurors during the course of a murder trial. Schuster v. Bowen, 347 F. Supp. 319.

In recent years there have been numerous instances of courtrooms being cleared, of reporters being forcibly evicted from courtrooms, of newsmen being ominously discouraged from

seeking contact with defense attorneys, witnesses, defendants and their cohorts and grand jurors. Reporters also have been denied access to prison inmates, although federal courts in California and the District of Columbia have ruled that regulations banning interviews between prisoners and reporters are unconstitutional.

E. Restraints on Acquiring Information

Usually it is the content of communication that inspires judicial restraints on the press, but in recent years more attention has been given to the way information is acquired. As indicated earlier, litigation and the injunctions surrounding the Pentagon Papers were prior restraints on the New York Times and Washington Post. Court injunctions also prevented publication of the Pentagon Papers material by the Boston Globe and the St. Louis Post-Dispatch. Beacon Press had difficulty bringing out a book that included excerpts from the same documents. Gravel v. United States, 408 U.S. 606 (1972).

Although traditional prior restraint was not involved, several other cases have emerged wherein information is defined as property, and the press is held liable under various public and private property rights statutes.

In a case involving the late columnist Drew Pearson, a Federal District Court relied on the ancient doctrine of trover and conversion (converting someone else's property to one's own use) and applied it to the office papers of the late

Senator Thomas Dodd. Dodd v. Pearson, 279 F. Supp. 101 (D.C.D.C. 1968). This ruling was eventually overturned, but it has been frequently cited in subsequent cases.

Several sections of Chapter 18 of the U.S. Code which are designed to protect government property were cited in the aborted trial of Daniel Ellsberg and Anthony Russo.

State laws aimed at prosecuting those who would "receive stolen goods" have also been used against the press. This was demonstrated in the legal battle between the Los Angeles Free Press, an alternative newspaper, and the California state attorney general's office when a list of undercover narcotics agents' names were published by the paper. Just how the newspaper acquired the information was at issue and resulted in a lower court conviction that was affirmed on appeal. Kunkin v. People, 24 Cal. App. 2d 447, 100 Cal. Rptr. 445 (1972).

However, the Kunkin decision was shortlived. In 1973 the California Supreme Court overturned the lower court ruling, deciding that it was not clear that the newspaper reporter and staff had been aware that the property was, in fact, stolen. People v. Kunkin, 107 Cal. Rptr. 184 (1973).

The possibility of the concept of information as property becoming a strong restraint on the press is more potential than real at this writing; however, the foregoing precedents could make this a lively area of communication law in the future.

F. Additional Problems

Additional problems that Near v. Minnesota seems incapable of preventing ought to be mentioned, although they represent prior restraint only by indirection.

Some judges have taken it upon themselves to decide the size and composition of press pools. The misuse of subpoenas continues to constitute a scandalous interference with the free flow of news. News media in Florida, joined by national press groups, will argue before the United States Supreme Court that a 1913 Florida law giving political candidates a right to reply to editorial attacks is an unconstitutional prior restraint on freedom of the press. The law has been upheld by the Supreme Court of Florida (Tornillo v. Miami Herald Publishing Company, 42 LW 2073; S.Ct. docket No. 73-797, 1973).

State legislatures in Massachusetts and Maine attempted in 1973 to pass laws requiring newspapers to accept paid political advertisements and to present only signed editorials. Alabama actually passed an "ethics law" compelling legislative reporters to file statements of "economic interest" before their accreditation would be granted to cover state government at any level. The law was held unconstitutional in a split vote of a three-judge federal panel in Lewis v. Baxley, 42 LW 2347 (Jan. 8, 1974).

III. FOR THE PRESS A BRIGHTER SIDE

In a series of cases beginning in 1941, the United States Supreme Court brought out-of-court publications relating to judicial proceedings under the protection of the First Amendment. The Court restricted use of the contempt power to misbehavior committed in the courtroom itself unless there was a clear and present danger to the orderly administration of justice.

Justice Black's language in the first of those cases reflects a most positive application of classical libertarian press theory and the best intentions of Near v. Minnesota:

> For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. Bridges v. California, 314 U.S. 252 (1941). See also Pennekamp v. Florida, 328 U.S. 331 (1946); and Craig v. Harney, 331 U.S. 367 (1947).

Thirty years later the Circuit Court of Cook County, Illinois, issued an injunction against pamphleteers in a Chicago suburb. Citing Near v. Minnesota, Chief Justice Warren Burger in lifting the injunction wrote for the United States Supreme Court that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). This spirit may yet prevail in American law.

A. The Judicial Process IS a Public Process

In a landmark 1948 case (In re Oliver, 333 U.S. 257) Justice Black declared:

> Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state or municipal court during the history of this country. (Courts martial may be regarded as an exception.) Nor have we found any record of even one such secret criminal trial in England since abolition of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute.

Federal courts have consistently held that public trials provide an effective restraint against possible abuses of judicial power, encourage witnesses to appear, and educate the public as to judicial remedies. United States v. Kobli, 172 F. 2d 919 (3d Cir. 1949).

There are additional arguments for public monitoring of the judicial process. A Washington Post challenge of a Bureau of Prisons policy flatly prohibiting interviews with prisoners was upheld by the U. S. District Court for the District of Columbia; but the judgment was stayed by the United States Supreme Court pending an appeal to the Court of Appeals. The original judgment was subsequently affirmed by District Court Judge Gerhard Gesell who observed:

> The stay entered by the Supreme Court of the United States has resulted in a continuing serious suppression of paramount constitutional rights which requires immediate attention. A free press cannot be fostered in an atmosphere that delays publication on matters of current public concern. The Courts have a responsibility to lift pre-publication restraints, not to encourage them, and must adjust their deliberative process accordingly. Washington Post Company v. Kleindienst, 357 F. Supp. 770, 784 (1972).

In an antitrust case in which a defendant's motion for an order to suppress a bill of particulars in the interests of a fair trial was turned down, a Federal District Court said, "The First Amendment commands that freedom of the press shall not be infringed, and this court is loathe to intrude on that guarantee. A free press cannot be shackled by speculations as to inflammatory publicity. For even if media coverage should give rise to unwarranted criticism, though, 'it may be designed to harass those whose conduct has been honest and courageous . . . this seems a fair price to pay for a truly open society'." (The inside quotations are from the Reardon Report). United States v. General Motors Corp., 352 F. Supp. 1071, 1074 (1973)

Barring the public from an entire pretrial suppression hearing having to do with the legality of the seizure of illicit drugs from a bag carried by a defendant at an airport terminal was, in the opinion of a Federal Court of Appeals, an error of constitutional magnitude depriving the defendant of his right to a public trial. United States v. Clark, 475 F. 2d 240 (C.A. N.Y. 1972).

Although state court opinions are mixed, their general thrust is to regard the 6th Amendment's right to a public trial as a right designed to further both the interests of the individual whose trial it is and the interests of society at large. On the latter point, state courts have stressed that public trials assure that the public at large has oversight of the mechanisms of justice; that the public will have increased

confidence in judicial institutions; that the defendant is protected from unfair on unnecessary prosecutions; that participants in the judicial process will take their responsibilities seriously; that unknown witnesses will come forward; and that the testimony of witnesses will be improved.

In 1955, rejecting an order which would have excluded all members of the public from a courtroom during a trial, the Court of Appeals of Ohio underlined the role of the press:

> The trial of a criminal case is a public matter; an action filed in the name of the State. The rights of representatives of the press can, however, rise no higher and by the same token, can be no less than the rights of any other member of the public. So long as the means adopted in observing trial events stay within the rules of the court and do not distract from or disturb the solemnity of proceedings which is so necessary in the conduct of a public trial in the administration of justice, the right of an employee of a newspaper is the same as any other person. It might be suggested that since a great majority of the public, either because of lack of time or space limitations of the courtroom, or lack of direct interest, are prevented or unable to attend judicial proceedings whereby knowledge of such proceedings can be gained only through the work of news-gathering and disseminating agencies, and therefore, when judicious limitation of those attending a public trial is necessary, such fact should be considered in favor of allowing members of the press to attend. E. W. Scripps Co. v. Fulton, 125 N.E. 2d 896 (Ohio 1955).

In 1972 an Arkansas judge cited a Texarkana newspaper editor for contempt because his paper, the Gazette, had reported a rape verdict reached by a jury in open court. The Arkansas Supreme Court reversed, noting that "Every court that has had an occasion to rule upon freedom of the press to publish court proceedings, has held that whatever transpires in the courtroom is public property and those who see

and hear it may report it without judicial censorship . . . No court . . . has the power to prohibit the news media from publishing that which transpires in open court." Wood v. Goodson, 485 S.W. 2d 213, 216 (Ark. 1972).

A year later a California Court of Appeals stayed a San Bernardino Superior Court judge's order prohibiting for six months newspaper publication of the names of nine inmate witnesses in a prison murder case. "The conclusion is inescapable," said the Court of Appeals, "that a prior restraint on publication in the name of a fair trial should rarely be employed against the communication media." Sun Company of San Bernardino v. Superior Court, 105 Cal. Rptr. 873, 29 C.A. 3d 815 (1973).

The opinion is also important because it reminds its readers that neither the Judicial Conference of the United States in its Kaufman Report (Committee on the Operation of the Jury System, Report of the Committee on the "Free Press-Fair Trial" Issue of the Judicial Conference of the United States), 1969, 45 F.R.D. 391; 1971 51, F. R.D. 135, nor the New York City Bar's Medina Report (Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York), Columbia University Press, 1967, recommended any restraints on publication by the press. The California Court of Appeals was concerned with the proliferation of gag orders issued in pending criminal actions by that state's trial

courts.

Such a court order against the press had been denied summarily by both the Court of Appeals and the California Supreme Court in the trial of Sirhan Sirhan, and the United States Supreme Court denied certiorari. Younger v. Superior Court, 393 U.S. 1001 (1968).

Reviving the spirit of the 1941 Bridges case, the California high court observed that "where contempt sanctions have been sought to be imposed upon the press, or upon one not immediately subject to judicial supervision, the high courts have severely limited the judicial power by annulling contempt convictions."

In a later case involving the contempt conviction of a district attorney for violating a protective order designed to curb potentially prejudicial pretrial publicity, the California Court of Appeals said in passing that although the facts of the shotgun slaying of a four-year-old girl provoked an immediate public outcry and fairly extensive news coverage of a potentially prejudicial nature, a protection order imposing direct restraint against the news media was impermissible. Younger v. Smith, 106 Cal. Rptr. 225 (Cal. App. 1973).

In the New York trial of alleged underworld figure Carmine Persico, the courtroom was cleared after Persico waived his right to a public trial because of "prejudicial publicity." Trial court Justice George Postel ordered the record of the trial sealed until after the jury had returned a verdict. He declined to sequester the jury, suggesting that

it would be cheaper for the taxpayers to sequester the offending newsmen.

Postel's decision was upheld by the Appellate Division of the Supreme Court and five reporters appealed to New York's highest tribunal, the Court of Appeals. That court through Chief Judge Stanley Fuld, who is also chairman of the New York Fair Trial-Free Press Conference, held for a unanimous court that it was wrong for the trial judge to bar the press and the public from the trial. Postel's order, said the court, was an unwarranted effort to punish and censor the press and could not be condoned. Oliver v. Postel, 282 N.E. 2d 306 (1972).

B. Preliminary Hearings at the State Court Level

The Supreme Court of Arizona in 1966 held unconstitutional an order of a Phoenix judge prohibiting the reporting of a habeas corpus hearing prior to a murder trial. The court reasoned that a trial court could not, in advance of publication, limit the right of a newspaper to print the news and inform the public of that which had taken place in open court in the course of a judicial hearing. Phoenix Newspapers, Inc. v. Superior Court, 418 P. 2d 596 (1966).

The same court in 1971 held that a defendant in a multiple homicide case was not entitled to have reporters and the public excluded from a preliminary hearing. Such a restraint, said the court, "strikes at the very foundation of freedom of the press by subjecting it to censorship by the

judiciary . . . a defendant has no right to a secret trial and an accused by request may not foreclose the right of the people from freely discussing and printing proceedings held in open court." Had matters inadmissible in evidence at the trial been discussed, the court intimated that it might have acted differently; but the accused person would have to demonstrate that having an open preliminary hearing would pose a clear and present danger to the administration of justice. And "the substantive evil must be extremely serious and the degree of imminence extremely high." Phoenix Newspapers, Inc. v. Jennings, 490 P. 2d 563 (1971).

A Florida Court of Appeals ruled a year later that a pretrial order prohibiting news media from publishing any information about a murder case except testimony presented in open court--including hearings in chambers--operated as a prior restraint on constitutionally privileged communication and was therefore invalid. Miami Herald Publishing Co. v. Rose, 271 So. 2d 483 (1972).

C. The Sperry Case

A key ruling which should be read with the Dickinson case is State ex rel. Superior Ct. of Snohomish Co. v. Sperry, 483 P. 2d 608 (Wash. 1971). In both cases a trial court entered an order limiting the reporting of proceedings open to the public. In each case there was a violation of the court's order and the respective trial judges found the reporters in contempt of court. In Dickinson, after the

court's order was ruled invalid, the case was remanded to the trial judge to reconsider the judgment of contempt. In Sperry, the trial court's decision was simply reversed and no right of appeal was considered; indeed, the Supreme Court of Washington emphasized the difficulty of obtaining review.

The issue in both cases was whether a newspaper may constitutionally be proscribed in advance from reporting to the public those events which occur during an open and public court proceeding. In Sperry, a hearing to consider the admissibility of evidence was held in the absence of the jury. The Washington Supreme Court asserted that the violation of an order patently in excess of the jurisdiction of the issuing court, that is, void on its face, cannot produce a valid judgment of contempt.

"To sustain this judgment of contempt," said Justice McGovern for the court, "would be to say that the mere possibility of prejudicial matter reaching a juror outside the courtroom is more important in the eyes of the law than is a constitutionally guaranteed freedom of expression. This we cannot say."

In a concurring opinion Justice Rosellini thought it would be an anomaly if the law, while decreeing that a reporter may report with impunity falsehoods about a public official or public figure (New York Times v. Sullivan, 376 U.S. 254, 1964) decreed at the same time that he could not print the truth about judicial proceedings:

> A rule allowing a court to suppress publication of the facts about those matters which occur before it, even though the rule were to be used only for supposedly "legitimate" purposes and never to conceal improper acts of the court itself, would hardly be calculated to inspire in the public that respect for the judicial system which "law and order" require. The very notion of such power in the court is utterly incompatible with the principle of equal justice, openly administered, which is fundamental to the health of a democratic society.

D. News Photography

A United States Court of Appeals in Illinois upheld a District Court order prohibiting photography and broadcasting inside as well as in areas adjacent to the courtroom, on the floor on which courtroom was located, and in the area surrounding the elevators on the first floor. But it would not uphold that part of the order which applied to a combined courthouse and federal office building including a large glass-enclosed public lobby and an open plaza used for demonstrations in the area surrounding the building. In a declaratory judgment in behalf of the Chicago Journalism Review and the American Newspaper Guild, the Court of Appeals held the court rule overbroad and beyond the scope permitted by the First Amendment. Dorfman v. Meiszner, 430 F. 2d 558 (7th Cir. 1970).

A television cameraman covering a night burglary used a floodlight to photograph apprehended suspects as they left a building. Police officers confiscated his camera, conditioning its return on whether the film contained information detrimental to the prosecution and whether the suspects were

juveniles. Although the film and camera were returned intact a day later, a Federal District Court said in a declaratory judgment that the seizing of the camera was an unlawful prior restraint, providing no opportunity for a hearing. News reporters have a right, the court added, to be in public places and on public property to gather information photographically or otherwise. The use of light for night photography should be restricted only when it interferes with or endangers the police in their work. Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634 (D.C. Minn. 1972).

E. Press Passes

A final case demonstrates the quality of protection many courts have given in recent years to First Amendment values as they are reflected in news media activities. Here an "underground" newspaper was denied access to police department records available to "established" newspapers. Access to police records was claimed to be dependent upon possession of a press pass issued only to members of what the police chief termed "legitimate" newspapers. But the department had no written policy defining what would constitute or qualify one to be a member of the "established" press; and no local ordinances or regulations covered the issuance of press passes. In fact, not all "legitimate" reporters had bothered to pick them up.

A suit was brought under the federal Civil Rights Act of 1871 and the Iowa Public Records Act by Challenge, a

newspaper which, although incorporated, had total assets of less than $10 and no physical facilities of its own.

It was apparent, said a United States District Court, that the police were engaged in a classic example of post-facto rationalization of a preconceived determination to deny the newspaper's application with no objective comparison of its rights with those of other members of the press. Information was being funneled to the public only through those media considered responsible because they "cooperated" in presenting what the police department believed to be appropriate--and this constituted a denial of equal protection and due process of law. The court concluded with a notable statement:

> The history of this nation and particularly of the development of the institutions of our complex federal system of government has been repeatedly jarred and reshaped by the continuing investigation, reporting and advocacy of independent journalists unaffiliated with major institutions and often with no resource except their wit, persistence, and the crudest mechanisms for placing words on paper. Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (D.C. Iowa, 1971).

IV. CONCLUSIONS

It is clear from this review of recent cases that the weight of judicial authority is on the side of the healthier progeny of Near v. Minnesota, and of the more liberal interpretations of the purposes of the First Amendment.

There are, however, bad vibrations in the legal atmosphere. Some courts have found in Sheppard, Estes and the Reardon Report strictures against the news media which seem

never to have been intended. Others appear willing to assume that as long as there are no official restrictions imposed in advance of publication, then there is no prior restraint and all obligations to the First Amendment are honored. This is the more fragile side of Near v. Minnesota.

Unresolved in our legal system is the question of whether subsequent punishments with the same effect as impermissible prior restraints are to be regarded as prior restraints. The Dickinson case presents this dilemma. There the contempt convictions came after publication but constituted prior restraint indirectly in that they could affect the substance of future reporting. In the first instance, however, the doctrine of prior restraint deals with limitations of form rather than of substance. Professor Thomas Emerson of Yale University, an eminent First Amendment scholar, puts the question this way:

> The issue is not whether the government may impose a particular restriction of substance in an area of public expression, such as forbidding obscenity in newspapers, but whether it may do so by a particular method, such as advance screening of newspaper copy. In other words, restrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint. The major considerations underlying the doctrine of prior restraint, therefore, are matters of administration, techniques of enforcement, methods of operation, and their effect upon the basic objectives of the First Amendment. Emerson, "The Doctrine of Prior Restraint," 20 Law and Contemporary Problems 648 (1955).

Emerson's influence is found in Associate Justice Finley's comprehensive concurring opinion in the Sperry case

in which he argues forcefully that, although prior restraint and pre-publication censorship are forbidden under the state of Washington's constitution (and under the doctrine of Near v. Minnesota), "post-publication accountability, responsibility, and liability of the news media is constitutionally supportable. Actions by members of the news media amounting to potential contamination of a criminal defendant's right to a fair and impartial trial cannot be proscribed in advance. But, such actions where provably harmful to fair trial constitutional rights may subject the news media to post-publication accountability."

Future constitutional struggles, then, will revolve around the definition of post-publication accountability and the degree to which such accountability, when it is imposed upon the press, has the very same effect as an actual prior restraint. In the struggle the press must understand and be prepared to use its constitutional defenses. And it might take heart from the sentiments of the Kentucky Supreme Court which, in ruling that a trial court could not condition the presence of reporters upon a promise of the press not to publish the names of juvenile witnesses, declared:

> . . . The principle that justice can not survive behind walls of silence is so deeply inbedded in our Anglo-American judicial system as to give our people in today's modern society a deep distrust of secret trials. Johnson v. Simpson, 433 S.W. 2d 644 (1968).

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