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Freedom and Responsibility of the Press in a Free Country

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FREEDOM AND RESPONSIBILITY OF THE PRESS IN A FREE COUNTRY

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UNDER our Constitution, an accused in a criminal prosecution is assured of a speedy and public trial by an impartial jury.

No higher or more solemn duty rests upon a court, upon members of a jury or upon us as lawyers and officers of the court, than to keep alive and inviolate this right of an accused to a fair trial.

No lesser place or rank may be assigned to the First Amendment of the Constitution which protects the people's right to freedom of the press. Here again, history tells us that the framers of the Constitution intended ". . . to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."[1]

The question we will consider is how best can these two fundamental principles of a fair trial and liberty of the press coexist without conflict. Where do we draw the fine line between the public's right to news and the individual's right to justice? This question has been one of the most difficult for courts to adjudicate.

On the one hand, we know that freedom of the press is an indispensable condition to the proper functioning of the democratic process. I wish to emphasize that in using the term "press," I mean not only our newspapers, but all other media, including radio and television, which keep our people informed.

Our free press brings to light corruption, injustice, dishonesty, wrongs of every kind and description in all corners of the world. It is a bar to Star Chamber proceedings. It enables the people to know whether our system of justice is being administered honorably and impartially, as it must be if it is to retain respect and beget obedience. The free press may also be helpful to an accused in dispelling false, distorted or wild charges that would otherwise provoke hasty and irresponsible vigilante action. It may arouse public sympathy and help to nullify a "Scottsboro" verdict. It may provide information by which law enforcement agencies may track down and apprehend criminals. Most important, when the press is free from censorship and suppression, it tends to assure the telling of the truth—an eternal bulwark against tyranny and dictatorship. Where the press is not free, you may expect merely a mockery of a trial—such as Vogeler and Cardinal Mindszenty were subjected to in Hungary, and Oatis got in Czechoslovakia.

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* Hon. Herbert Brownell, Jr. is the Attorney General of the United States. The article printed here was a speech delivered by him before the Federal Bar Association.

1. Bridges v. California, 314 U.S. 252, 265 (1941).

For these sound reasons our courts have always gone to great lengths to protect the freedom of the press. The press has been left free to criticize the work and administration of judges; to condemn the court system and seek its reform; to report on matters pending in civil and criminal courts; to inquire whether attorneys are conducting themselves as their Canons of Ethics require.

Only one restriction has been imposed by the courts—and this has not been upon the exercise of freedom of the press—but merely against abuse of it. The press may not impair or subvert the process of impartial and orderly decision either by court or jury. It may not influence or intimidate judge or jury before they have reached their own independent judgment. It may not divest the court of control of the proceedings. So far as is possible, guilt or innocence of the accused must be determined on the basis of the facts testified to in court—not by opinion, rumor, insinuation, suspicion and hearsay outside of court which the accused has no chance to rebut or deny; or which a trial or appellate court has no chance to consider.

In England the courts are drastic in their treatment of editors and publishers who poison the stream of justice by unfair and prejudicial comment prior to or during the course of trial or prior to sentence. There, it is a contempt of court for a newspaper to publish statements about an accused person which could not be used against him at his trial.[2] Publication of an alleged confession is forbidden before it is admitted in evidence.[3] Nor may a newspaper prejudice the accused by referring to crimes other than the one with which he is charged.[4]

In one leading English case distributors and producers of cinema newsreels were punished for contempt.[5] They had labeled pictures which showed a revolver thrown at the foot of King Edward VIII's horse, as being an attempt to assassinate the King. This description was held to be prejudicial to a fair trial—because the accused was merely awaiting trial; he had not yet been found guilty of the offense charged by the newsreels.

You may also recall a case decided in 1949, which involved publications of the *Daily Mirror* relating to the arrest and prosecution of John George Haigh, England's so-called Bluebeard.

The articles described Haigh as a vampire. It was said he had been charged with various murders, that he had committed others and gave

2. Rex v. Tibbits, [1902] 1 K.B. 77 (1901).

3. Rex v. Willis, [1913] 4 West. Weekly R. 761.

4. MacLatchy, Contempt of Court by Newspapers in England and Canada, 16 Can. B. Rev. 273 (1938).

5. Rex v. Hutchison, (1936) 2 All. E.R. 1514 (K.B.).

the names of persons that he was alleged to have murdered. The editions contained photographs and headlines in the largest possible type.

In the opinion of the Lord Chief Justice, these editions were described as a disgrace to English journalism. The court declared that the newspaper had pandered to sensational tastes for the purpose of increasing its circulation. It was a case of prejudicing mankind against persons before their case was heard. The newspaper, the court said, had violated every principle of justice and fair play which it had been the pride of this country to extend to the worst of criminals.[6]

No time was wasted in vindicating the common principles of justice and the public interest. The editions complained of were published on March 4, 1949. The contempt proceeding was held on March 25, 1949—less than a month after publication. In view of the gravity of the case, the owners of the paper were also brought before the court and warned that the arm of the court was long enough to impose severe punishment upon them individually in event of recurrence.

The London *Times* reported: "His Lordship then called on Mr. Bolam [editor] to stand up, and, addressing him, said: 'The writ of attachment will be issued, and you will be taken in the custody of the tipstaff [bailiff] and committed to Brixton Prison for three calendar months.' Continuing, his Lordship said that the respondent company would be fined 10,000 pounds and pay the costs of the proceedings."[7]

Unlike the English courts, our courts have shown far greater indulgence to those few irresponsible publishers and radio broadcasters who have been charged with attempting to pervert the fair administration of justice. Compare, if you will, what took place in a recent case in the Criminal Court of Baltimore City.

Local broadcasting companies were found guilty of contempt and fined for certain broadcasts about one Eugene H. James while the latter was in police custody on a murder charge. James was alleged to be the vicious killer of a young child in Baltimore. A similar outrage had been committed in Washington, D. C., only ten days before. There was, of course, widespread public indignation over these horrible crimes. After James was apprehended a radio broadcaster in Baltimore went on the air and announced, "Stand by for a sensation." He then explained that James had been caught and charged with the Baltimore murder. He went on to say that James had confessed to this dastardly crime, that he had a long criminal record, that he went out to the scene with the officers and there re-enacted the crime.

The trial court found that the broadcast "must have had an indelible

6. Rex v. Bolam, (1949) 93 Sol. J. 220.

7. See 338 U.S. 930, 932 (1950).

effect upon the public mind, and that effect was one that was bound to follow the members of the panel into the jury room." The court rejected the suggestion that the accused was protected by a right of removal to another jurisdiction, pointing out how futile this would be where one of the stations had a broadcast radius of seven hundred and fifty miles. Nor did the judge think much of the argument that the jurors could have been polled as to whether they heard of any confession over the radio. By such inquiry, the trial court said, he would "be driving just one more nail in James' coffin."

The trial court concluded that this broadcast constituted an actual obstruction of the administration of justice, and deprived James of his constitutional right to have an impartial jury trial. The Court of Appeals for Maryland reversed the conviction upon the ground that under recent Supreme Court decisions, the judgment abridged the First and Fourteenth Amendments to the Constitution. The Supreme Court denied the petition for certiorari.[8]

In another case, on the very day preceding defendant's trial for perjury, when a part of the jury had already been selected, some newspapers published what purported to be the former criminal record of the accused, and another newspaper published a derogatory cartoon about him. Judgment was affirmed although the Court of Appeals described the practice as inexcusable and declared that in England the publishers would probably have been severely penalized.[9]

In another case, a publisher of a Florida paper and associate editor were held in contempt of court for publishing two editorials and a cartoon claimed to be contemptuous of the court's handling of certain criminal cases. The cartoon showed a judge on the bench as a compliant figure tossing aside formal charges by handing a document marked "Defendant dismissed" to a sinister criminal looking figure near him. At the right of the bench, a futile individual labeled "Public Interest" vainly protested.

The Supreme Court reversed this conviction, saying through Mr. Justice Reed: ". . . Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."[10] In his concurring opinion in this case, Mr. Justice Frankfurter said:

". . . A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are

8. Baltimore Radio Show, Inc. v. State, 193 Md. 713, 67 A. 2d 497 (1949), cert. denied, 338 U.S. 912 (1950).

9. United States v. Weber, 197 F. 2d 237, 238-239 (2d Cir. 1952).

10. Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press."[11]

From these decisions it is plain that freedom of the press is not freedom from responsibility for its exercise. Most of the publishers and broadcasters in this country have been mindful of their great responsibility to the people. Many have urged reforms and taken steps to curb practices which tend to interfere with a fair trial. It is interesting to note that in 1893 the *Evening Post* in New York never gave any space to murders and other crimes. At that time the *Sun, Times* and *Tribune* experimented with furnishing police and trial news in a more restrained manner. They even tried out prominent young literary men in the field, but it still remained a ghastly column.

About a year ago, the President of the New York County Lawyers Association offered a twelve-point Code of Ethics on "Fair Trial and Free Press." This Code enumerated specific practices to be avoided both by newspapers and officers of the court for securing a fair trial. As the New York *Times* recently pointed out, voluntary adoption of this proposed Code would supply a set of standards to guide the press in its comments on trials without infringing on its freedom.

However, the chief responsibility for securing fair and impartial trials cannot be shifted to the press. It must of necessity rest upon the members of the bar and other officers of the court.

More than twenty years ago a writer on the subject said: "Except for the slush and gush of the sob artists, there is very little offense chargeable against the press in which it is not led or abetted by lawyers, judges and other public officers."[12]

Merely a few examples will suffice to illustrate the point.

In 1949, a 17-year-old girl was reported to have been criminally attacked in Lake County, Florida. The defendants were tried, convicted and sentenced to death. The Supreme Court of Florida affirmed. The decision was reversed by the Supreme Court. In a concurring opinion, Mr. Justice Jackson urged reversal upon the ground that the defendants were "prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and public opinion which it generated."[13]

In this case the newspaper published as a fact, upon information received from the sheriff, that the defendants had confessed. Both wit-

11. Id. at 355.

12. 15 J. Am. Jud. Soc'y 139 (1932); See also, Phillips v. McCoy, Conduct of Judges and Lawyers 154 (1952).

13. Shepherd v. Florida, 341 U.S. 50, 51 (1951).

nesses and jurors agreed that they were aware of this alleged confession. Yet, strangely enough, the confession was never offered at the trial.

Mr. Justice Jackson's keen analysis of the irreparable harm done to the defendants in this case by the wrongful act of a law enforcement official merits constant reminder. He said:

"If the prosecutor in the courtroom had told the jury that the accused had confessed but did not offer to prove the confession, the court would undoubtedly have declared a mistrial and cited the attorney for contempt. If a confession had been offered in court, the defendant would have had the right to be confronted by the persons who claimed to have witnessed it, to cross-examine them, and to contradict their testimony. If the court had allowed an involuntary confession to be placed before the jury, we would not hesitate to consider it a denial of due process of law and reverse. When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions, and can at least preserve his objections on the record.

"But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable, 'confessions' are put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury."[14]

In another case,[15] the state district attorney, immediately after defendant's arrest for murder, released to the press defendant's admissions of the unsavory details even before the defendant completed his statement. The district attorney also announced his belief that defendant was guilty and sane. Conviction was upheld but the majority of the Supreme Court deprecated, and the dissenting opinion severely criticized the action of the district attorney. In his dissent, Mr. Justice Frankfurter said:

". . . To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, . . . a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice."[16]

Over the years there have been instances where overzealous federal prosecuting attorneys have publicized derogatory information of a defendant which was neither competent nor admissible evidence.

In one case the local newspapers published a statement by one of the prosecuting attorneys that the defendant was reported dead and

14. Id. at 51-52.
15. Stroble v. California, 343 U.S. 181 (1952).
16. Id. at 201.

had declared that he would take his own life rather than face prosecution.[17] Jurors, of course, saw the newspaper accounts.

In another case the prosecuting attorney held a press conference with newspapers during the trial and gave out information which indicated that the defendant was a member of a much larger ring of smugglers, and had attempted to bribe an important witness for the government. A copy of the newspaper was later found in the jury room. The trial judge's explicit instructions that the contents of the newspaper article were to be disregarded saved the judgment from reversal by the Court of Appeals.[18] Judge Frank filed a dissent, stating that he could not dismiss trial by newspaper "as an unavoidable curse of metropolitan living (like, . . . crowded subways)."[19] Nor was he impressed by the trial court's direction to the members of the jury to disregard what they had read. He said: ". . . it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant."[20]

The primary responsibility of a United States Attorney is not that he shall win his case, but that justice is done. His should always be a twofold aim—that the guilty shall be "brought to book" and that the innocent shall go free.

As the Supreme Court has said, ". . . while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[21]

From this brief recital of leading decisions, it is evident that members of the bar and officials of the court have an important task ahead of them. If the people are to continue to retain confidence in the integrity of the bar and of the judiciary and in the proper administration of justice, every effort must be exerted to providing procedures by which an accused may obtain a fair trial.

The quest for a workable balance between a fair trial and free press fully merits the attention of the bench, the bar and the publishers.

The Bar Association of the City of New York has already adopted a resolution by overwhelming vote which approved a report recommending amendment of the Canons of Professional Ethics. The Bar Association stated that lawyers in criminal proceedings should refrain from originating statements on the following matters: the criminal record of the accused; any alleged confession or admission of fact bearing upon

17. Reining v. United States, 167 F. 2d 362 (5th Cir. 1948).

18. United States v. Leviton, 193 F. 2d 848 (2d Cir. 1951), cert. denied, 343 U.S. 946 (1952).

19. Id. at 865.

20. Id. at 865.

21. Berger v. United States, 295 U.S. 78, 88 (1935).

the guilt of the accused; any statement or opinion as to the guilt of the accused; any statement that a witness will testify to certain facts; any comment upon evidence already introduced or relating to the credibility of any witness; any statement of matter which has been excluded from evidence. Many recommendations were also made to govern the trial in civil proceedings.

It is encouraging to note that the New York State Bar and the American Bar Association are also giving serious consideration to this vital matter. Canon 20 of the Association's Canons of Professional Ethics generally condemns newspaper publications by a lawyer as to pending or anticipated litigation as will interfere with a fair trial or otherwise prejudice the administration of justice. Canon 20 is presently being reexamined by the American Bar Association in an effort to determine whether it needs to be strengthened. In my opinion, this is a problem for careful study by every Bar Association in this country.

The Department of Justice also has a comprehensive study on the subject under way. It will be looking to the action finally taken by the various Bar Associations. It will appreciate any and all suggestions from the press for a sound and just solution to this problem.

Many of us have often deplored and condemned the "police state" and "People's Courts" in Communist-controlled countries as a farce on justice. "In the mass trials of communist China thousands of accused are disposed of by the roar of the 'People's Courts'—'Kill—Kill—Kill'."[22] Shades of Athens! How well these communist trials recall to mind the trial of Socrates as described by Plato. Then it was the Athenian mob to whom the accusers made impassioned pleas in the arena of legal battle. Evidence to their liking was greeted with applause; catcalls expressed their disapproval. It was the same mob that rendered the verdict.[23]

If the words "fair trial" are to remain as a meaningful symbol of our free people and government, trial by newspaper must not be permitted to take the place of trial by jury in this country.

Our legal traditions are a precious heritage. We must not lose or abandon them during the storm of public passion that attends a widely publicized trial. Our courts are the mighty, ultimate fortress of our great freedom. We must not compromise their effectiveness or impair their influence upon the people. Our integrity and high standards as members of the bar are our best stock in trade. We must not sell them short for an unworthy purpose or abet trespass on the basic rights of an accused.

22. Overstreet, The Great Enterprise 271.

23. See Ludwig, Journalism and Justice in Criminal Law, 28 St. Johns L. Rev. 197 (1954).

In cooperation with the press, the bar should be able to develop rules, which, while fully protecting the right of the accused to a fair trial, also recognize the need for a free press to guard that sacred right.

The press will not shirk its responsibility to the people, if lawyers and officials of both state and federal courts discharge their own duty in achieving the aims of true and equal justice for all. I concur in the hope once expressed by a famous English judge when he said: ". . . 'Pray let us so resolve cases here, that they may stand with the reason of mankind when they are debated abroad.' "[24]

24. Cardozo, Law and Literature and other Essays and Addresses 18 (1931) (quoting Lord Nottingham).