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Constitutional Law--Fair Trial and Free Press--Resolution of a Conflict

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Constitutional Law—Fair Trial and Free Press—Resolution of a Conflict

Petitioner was arrested and tried for the murder of his wife. Massive harmful publicity preceded the trial. During the trial the presence of news reporters in great numbers provided a disruptive influence. *Held,* that petitioner was denied a fair trial as guaranteed by the due process clause of the fourteenth amendment by the trial judge's failure to sufficiently protect the proceedings from "massive, pervasive, and prejudicial publicity." *Sheppard v. Maxwell,* 384 U.S. 333 (1966)[1]

The instant case illustrates a growing problem encountered in the attempt to deal fairly with an accused person in criminal trials. Mass-circulation news coverage can threaten a defendant through extensive publicity before the trial and by disruptive conduct of news media personnel during the trial. This situation brings into conflict two basic rights guaranteed by the United States Constitution—freedom of press, and due process of law accorded every criminal defendant. This comment attempts to review the court's past treatment of the problem and to outline steps in its resolution.

The principal case is the latest in a series concerning news coverage before and during a criminal trial. Although only a few decisions have dealt with disruptive reporting during a trial many have involved pretrial publicity. Some knowledge of these will be helpful in assessing the impact of the principal case.

Until recent years, the Supreme Court required a person claiming injustice in the criminal process to show essential unfairness as a demonstrable reality.[2] This doctrine required that a defendant claiming unfairness from pretrial news coverage show that his jurors, as an actuality, were affected by the publicity to the point of being biased against him.[3] Under the early cases of juror's statement of impartiality given upon examination was considered

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[1] Petitioner's writ of habeas corpus was granted by the Federal District Court, 231 F.Supp. 37 (D.C.S.D. Ohio 1964) on grounds that he was not afforded a fair trial, but the Court of Appeals reversed on the grounds that prejudice was not shown. 346 F.2d 707 (6th Cir. 1965).

[2] Adams v. McCann, 317 U.S. 269 (1942).

[3] Stroble v. California, 343 U.S. 181 (1952).

presumptive of his fairness.[4] However, the Court later recognized that such statements should not be dispositive when many of the jurors promising impartiality had expressed preconceived notions of guilt.[5]

In recognizing the increasing need for protection against outside publicity, the Supreme Court began to assess the general community atmosphere created by the news media and initiated the probability of unfairness theory.[6] In one of the cases applying this test, the Court held that massive pretrial publicity which had permeated the trial community inherently deprived the defendant of a fair trial.[7] The probability of unfairneses doctrine is at this date the basic and most liberal test applied by the Supreme Court in resolving the problem of pretrial news coverage.

The control of the conduct and impact of news reporters during a trial has been the subject of little comment by the Supreme Court, perhaps because this normally can be handled effectively by the trial judge. In one recent case the trial court effectively guarded against the adverse effects of pretrial publicity by granting a change of venue and a continuance, but was held to have allowed irreparable harm to the defendant by condoning the use of television cameras in the courtroom.[8] The presence of television was held to infer notoriety to the defendant and cause psychological distractions which effectively denied him due process.[9] Thus, from the law prior to *Sheppard,* it appears that the defendant must be protected from the overwhelming presence of news media at the trial as well as from pretrial coverage.

The principal case is a startling example of a trial judge's unwillingness or inability to control both the effects of massive pretrial publicity and the disruptive presence of news media in the courtroom. Although the publicity before defendant's trial was extensive and harmful to his cause, repeated requests for a change

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[4] Irvin v. Dowd, 366 U.S. 717, 723 (1960); Holt v. United States, 218 U.S. 245 (1910); Spies v. Illinois, 123 U.S. 131 (1887).
[5] *Id.* at 728.
[6] See Beck v. Washington, 369 U.S. 541 (1962); Rideau v. Louisiana, 373 U.S. 723 (1963).
[7] Rideau v. Louisiana, *supra* note 6.
[8] Estes v. Texas, 381 U.S. 532 (1965). For comment see 34 FORDHAM L. REV. 329 (1965).
[9] Estes v. Texas, *supra* note 8, at 550.

of venue and continuances were denied. During the trial members of the press were allowed to occupy a space inside the bar near the defense table and the jury box. Reporters were allowed to handle exhibits and generally developed a disruptive atmosphere. The abuses in this case were so clear and abundant that it is of little value in determining the minimum standards that the Supreme Court will accept as protecting an accused person's right to due process of law. The Court relied jointly on the inflammatory pretrial publicity and lack of judicial decorum at the trial.[10] Therefore it did not require a showing of identifiable prejudice,[11] but rather relied on its recent decisions[12] and reversed because probability of harm had been shown.[13]

In recognizing reversals as palliatives, the Court suggested several remedial steps that could be taken to protect a defendant from the adverse effects of news coverage. In the area of pretrial publicity, much information may eminate from the police, prosecution, witnesses, or even the defense. The Court suggested that the trial court might safely control the news media's source of supply by prohibiting any lawyer, party, witness, or court official from making an extra judicial statements relating to evidence, the identity of witnesses, opinions of guilt or innocence, or anything relating to the merits of the case.[14] To control the conduct of news reporting during the trial, the Supreme Court suggested implementation of rules governing the use of the courtroom and limitation of the number of newsmen allowed in the courtroom if their presence tends to be disruptive.[15]

The suggested means for dealing with the harmful effects of news reporting focuses attention on the apparent conflict between the right of the accused to due process[16] and freedom of press.[17] Although both of these fundamental rights must be protected, the Supreme Court has held that the functions of the news media "must necessarily be subject to the maintenance of absolute fairness in the

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[10] Sheppard v. Maxwell, 384 U.S. 333 (1966).
[11] *Id.* at 614.
[12] Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965).
[13] Sheppard v. Maxwell, 384 U.S. 333 (1966).
[14] *Id.* at 619.
[15] *Id.* at 618.
[16] U.S. CONST. amend. XIV.
[17] U.S. CONST. amend. I.

judicial process."[18] In handling pretrial publicity, the courts have little power to deal directly with the news media. In applying the contempt power, they must show a clear and present danger to the judicial process.[19] The Supreme Court cases involving newspaper interference with the judicial process have strictly applied the clear and present danger test and have uniformly reversed contempt convictions, although in none of the cases was there a jury to be intimidated or influenced.[20]

In view of this attitude toward using the contempt power to control outside publications, the trial courts will apparently have to resort to other means to insure due process of law.

There are several existing legal tools which may be used to overcome the effects of pretrial publicity. Changes of venue are often suggested as a remedy for this problem and in some cases would probably be sufficient.[21] If the defendant is a well-known figure, however, or if news coverage had become very extensive, such change would doubtless accomplish little. The use of a continuance might also serve as a solution although it has been questioned whether an accused should be forced to give up his right to a speedy trial in order to secure his right to trial by an impartial jury.[22] Harmful effects of pretrial publicity might be detected by voir dire examination of jurors and such effects might be minimized or overcome by the trial court's instructions. Practice has suggested that neither voir dire nor court instructions are really very effective tools in this area.[23]

Other methods of controlling pretrial publicity suggested in the principal case—limited news releases by police, lawyers, or court officials—may provide a solution both effective and harmonious with the freedom granted to the press. Although news reporters are highly critical of such proposed controls[24] and legal writers have

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

[19] Schenck v. United States, 249 U.S. 47 (1919).

[20] Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

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

[22] Trescher, *A Bar Association View, in Symposium—A Free Press and a Fair Trial,* 11 VILL. L. REV. 677, 709 (1966).

[23] *Id.* at 711.

[24] Graham, *A Newspaperman's View, in Symposium—A Free Press and a Fair Trial,* 11 VILL. L. REV. 677, 680 (1966).

called for temperance in their application,[25] the need for some control is apparent.

Although the defendant's rights may be protected by the suggested methods, the eventual solution lies in a working agreement between the news media and the judiciary. An initial acceptance of the necessity for such controls and voluntary restraint by both the press and the Bar should effect an harmonious solution to the conflict.

Jack William DeBolt

Evidence—Medical Malpractice—Expert Testimony of Defendant Physician When Called as Adverse Witness

P, brought a medical malpractice suit alleging that her colon was torn by the negligent use of a bardex tube during X-ray procedures in *Ds'* office. At the trial *Ds* were called as adverse witnesses. The court refused to permit *P* to adversely examine *Ds* on matters involving their judgment, knowledge and opinions as experts. The trial court, directed a verdict for *Ds*. *Held*, affirmed. In a medical malpractice action *P* will not be permitted to call a defendant physician as an adverse witness and extract expert testimony from him to prove a charge of malpractice. *Hoffman v. Naslund*, 144 N.W.2d 580 (Minn. 1966).

It is well settled that a defendant physician can be called as an adverse witness and be examined as to pertinent facts in the case.[1] However, the issue is not settled as to whether such defendant can be required as an adverse witness to give his expert opinion on the matters in question. Although the courts are about equally divided on this question, the trend is toward requiring defendant physicians to give testimony involving their expert knowledge and opinion when called as adverse witnesses.[2]

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[25] *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 185 (1966).
[26] U.S. CONST. amend. VI.
[27] Geise v. United States, 265 F.2d 659 (9th Cir. 1958).

[1] McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 203 N.E.2d 469 (1964); Hunder v. Rindlaub, 61 N.D. 389, 237 N.W. 915 (1931).

[2] Annot., 88 A.L.R.2d 1186 (1963).