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Walter J. Mattison

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RESTRAINTS ON FREEDOM OF THE PRESS

WALTER J. MATTISON*

THE term "trial by newspapers" is probably as old as newspapers themselves, but it is only during the past decade that that term has come into general use in the United States.

Judging from the number of cases that have reached the highest courts of the land, it is very evident that many of the publishers today are firmly convinced that a trial by newspapers is an inalienable right possessed by such newspapers, and in each action we find an attempted justification on the grounds that the Federal Constitution guarantees the freedom of the press. Nothing could be further from the facts. The first amendment to the Constitution of the United States provides that "Congress shall make no law . . . . abridging the freedom of speech or of the press. . . . ." This amendment is confined to laws passed by Congress. There is nothing in this amendment nor the Constitution itself that prohibits the various states from passing laws restricting the right of newspapers to publish anything unless such laws become repugnant to the Fourteenth Amendment of the Constitution of the United States. Outside of this very limited restriction, the states can legislate on the subject in any way each individual state sees fit unless absolutely restricted or limited by the constitution of the state affected.

We gather from this, in the first place, that the Federal Constitution does not guarantee the freedom of the press. Further, the constitutional provision restraining Congress from making laws abridging the freedom of the press must likewise be construed in the light of other constitutional provisions. Freedom of the press is a relative term, somewhat analogous to that of liberty. While we secure certain rights as to liberty under the constitution, such liberty is subject to other restraints contained in the constitution, designed to safeguard the rights and liberties of others. Congress therefore has the right to pass laws which effectually restrain the freedom of the press where public necessity requires such restraint.

*Assistant City Attorney, Milwaukee; Instructor Newspaper Law, Marquette College of Journalism.

It has been said by some authorities that the freedom of the press clause in the constitution merely prohibits a prepublication censorship of news; that a newspaper can publish what it pleases, being liable to respond civilly or criminally after publication.

Even this, however, is not an exact statement of the law. The first amendment does not prevent prepublication censorship, as witness the effect of the war time acts where power given congress and the president by the constitution was paramount to the fundamental guaranties of liberty, including that of freedom of the press. Under the war powers the Federal Congress and the president had the right to protect the country against attacks from within designed to aid the enemy, and the exercise of such powers were upheld by the highest court of the land.[1]

Another instance where prepublication restraint has been justified is under the rather doubtful theory of "the right to privacy," which has been rejected in many of the states of this country, but which has likewise been regarded as a property right in other states. In the states recognizing the theory that a person has a right to live his life as he pleases, whether it be a life of complete privacy or of privacy as to certain acts and publicity as to other acts, it is evident that an injunction will lie to restrain any threatened invasion of such right to privacy by newspapers. This restraint, however, is based upon the constitutional guaranty which prevents invasion of property rights.

These limited restraints together with another class wherein publication amounts to a contempt of court, constitute, we believe, nearly all of the prepublication restraints. The great mass of the law pertaining to newspapers operates with the idea of punishment after publication. These laws are very effective restraints, and, broadly speaking, can be classified under enactments passed pursuant to broad police powers possessed by the federal and state government to protect public safety and welfare, under those powers exercised solely by the federal government in limiting the use of the mails, and under the broad inherent power of courts of record to punish for contempt of court.

Nearly every state has adopted constitutional provisions somewhat similar to those included in the First Amendment to the Constitution of the United States; but even under such constitutional restrictions states have much broader powers to legislate on the subject than has the federal government—this in view of the fact that the federal constitution is a delegation of powers, whereas the state constitution merely acts as a limitation. It has been truthfully stated that as far as state restraints are concerned the various legislatures have the right to pass laws restraining the publication of almost anything, within reason of course, as long as such enactments do not amount to a prepublication censorship.

Thus we have a Connecticut law, which was sustained, prohibiting the sale of any paper devoted wholly or principally to the publication of criminal news or pictures and stories of deeds of bloodshed, lust or crime (*State* v. *McKee,* 73 Conn. 18, 46 Atl. 409, page 413) and a

[1] *Schenck* v. *U.S.,* 249 U.S., page 48, 63 L. ed. 470, page 472; *United States of America ex rel Milwaukee Social Democratic Publishing Company* v. *Burleson,* 255 U.S. 408, 65 L. ed. p. 707.

Minnesota statute, which was likewise sustained, rendering it unlawful to publish in a newspaper the details of a public execution beyond the statement of the fact that such convict was on the day in question duly executed according to law.

All governments, both state and federal, have a right to punish and prohibit publication of seditious utterances and under the police powers have the right to prohibit any newspaper publication of articles that are obscene and also articles which blaspheme, these prohibitions being made necessary, of course, from the standpoint of public security as well as public safety.

In spite of the First Amendment, the Federal Congress has administered what amounts to a very effectual restraint under its power to control traffic between states and under its rights to regulate the mail. Under its power to regulate traffic between states it has legislated to prevent interstate shipments of obscene matters and publications detrimental to morals or to the public welfare.

Under its power to regulate the mail Congress has passed a series of very effective restraints. The so-called lottery statute is probably the best known of all postal laws and regulations. Section 473 of the Postal Laws and Regulations provides that "no newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier."

Just what constitutes a lottery or a gift enterprise within the meaning of this regulation has been a very fruitful source of litigation and will continue to be so in the future. The federal government has held that to publish the successful numbers of a drawing for the prize-winning automobile at automobile shows, dances or other instances where such prizes are given by lot and dependent upon chance, constitutes a lottery, and that the publication of these numbers constitutes an offense against the postal regulation in question and in addition to the punishment prescribed by the statute hold that such publication is sufficient to close the mails to the offending newspaper.

The courts and the textbooks have variously defined what constitutes a lottery or a gift enterprise as follows:

> "A lottery is a species of gaming . . . . and is a scheme for distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize." 25 Cyc. 1633.
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> "A scheme for distribution of prizes by chance."
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> "A scheme by which a result is reached by some action or means taken, and in which result man's choice or will has not part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished." *People* v. *Elliott,* 74 Mich. 264, 267; 41 N.W. 916.
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> "'Lottery' embraces the element of procuring through lot or chance, by the investment of a sum of money or something of

value, some greater amount or thing of greater value." *U.S.* v. *Wallis,* 58 Fed. 942, 943.

"If the result of the distribution is to be determined solely by skill or judgment, the scheme is not a lottery; but by the better rule if the influence of skill is apt to be thwarted by chance it will be immaterial that the conditions of distribution permit the exercise of judgment to some extent." Lotteries, 25 Cyc. p. 1635.

"Offers of prizes to purchasers of goods, the prizes to be distributed by chance among the purchasers, constitute lotteries, whether the goods purchased or the chance to obtain a prize is the consideration that moves the purchasers to enter into the transaction. And of similar nature is the distribution of prizes by chance among purchasers of concert tickets." 25 Cyc. pp. 1637-8.

Gift enterprise defined.

"The transfer of rights of independent value in money or property, together with the right, in the consideration of the payment of value, to a chance for a prize, may be called a gift enterprise." Thomas Non-Mailable Matter 85.

The case of *Post Publishing Company* v. *Murray,* 230 Fed. Rep. 773, is of interest in view of the fact that the prize offered by that newspaper was considered by the court as not being a violation of the federal statute. The Boston *Post* advertized that its photographers would take the pictures of woman shoppers and publish the pictures with the heads cut off and that five dollars would be paid to each lady photographed who identified her photo. The court held in this case that the facts did not bring it within the statutes as the particular kind of a chance involved did not require a parting with anything of value by members of the public for the prize offered and it did not amount to a lottery, as lottery involves a scheme for raising money by selling chances to share in a distribution of prizes or a scheme for the distribution of prizes by chance among persons purchasing tickets, and a gift enterprize contemplates a scheme in which presents are given as an inducement to members of the public to part with their money. This case did not go to the federal Supreme Court nor did an unreported Iowa case go to the Supreme Court. In the Iowa case the court arrived at a contrary decision in considering facts somewhat analogous to those above stated. The court in the Iowa case held that the time spent by the individual working on the solution of the problem and walking or riding to the newspaper office constituted a thing of value, namely, his time and labor, and that such being the fact, the postal regulation was violated and the scheme branded as a lottery and a gift enterprise.

Other restraints which have been passed by Congress in spite of the constitutional amendment guaranteeing freedom of the press, some of which can be classified as direct and others as indirect restraints,

are those which prohibit the mails to newspapers unless every six months such newspapers using the mails publish sworn statements giving minute details of ownership and indebtedness of the paper, together with information as to its net paid circulation, and a law which requires all news items, whether in the editorial columns or the news colums, to be marked "advertisement" if any consideration whatever moves from the person benefited to the newspaper. The purpose of these enactments is obvious. It is an attempt on the part of Congress to make public all interests behind the newspaper so that the reading public might ascertain for itself what influences, money or otherwise, are back of the policy of the paper. In the litigation which has already been fought through the courts, an attempt was made to show that all of these postal regulations amount to prepublication censorship but the courts decided otherwise.

Next in importance to the restraints imposed by Congress on the freedom of the press through its postal regulations is undoubtedly that great inherent power possessed by the courts to punish for contempt. No other power exercised by the court has been subjected to such severe criticism. This is due largely to the fact that there is a growing tendency on the part of newspapers to try out in the public press criminal actions as well as public questions pending before courts. The power to punish for contempt is inherent in the courts. It dates back to the common law, and it has always been held that such power is vital in order to enable courts to perform their entire duties to the public and to protect the right of litigants. The power to punish for contempt is likewise possessed by courts and by state legislatures. Neither Congress nor the legislature under the separation of power doctrine could deprive courts of this inherent right and the courts through the promiscuous use of the injunction, cannot deprive the various legislative branches of the right to punish for contempt.

In the anxiety of newspapers to discuss questions of great public importance, public statements have been made, are being made and in the future will be made, which prejudice the rights of parties in pending litigation. This was discussed by Mr. Justice Holmes in the case of *Patterson* v. *Colorado,* 205 U. S. 454, 51 L. ed. 879, wherein he said:

> A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument

in open court, and not by any outside influence; whether of private talk or public print.

It must be self-evident from Justice Holmes' discussion that the intent of the writer or newspaper is immaterial, and that the truth or falsity of the statements is likewise immaterial. If the facts as set up in the newspaper are brought to public attention, they are deemed to be "calculated" to influence the decision and therefore tend to interfere with the due administration of justice in pending actions. This, of course, is based on sound logic. In adopting the procedure of the court it was the intention of the people that litigation is to be determined by regularly constituted bodies, on testimony to be presented under circumstances, where the right to cross-examine witnesses is given litigants, and where the court itself would supervise the orderly presentation of such testimony. This procedure is based on the experience of all civilized countries extending over a period of hundreds of years, and while it may have its faults nothing has ever been presented to justify any departure from this orderly method of trying litigated questions. To permit outside influence, even under the guise of freedom of the press, to distort the facts, or comment, favorably or unfavorably, upon them would defeat the very purpose for which courts are established.

There are two different rules affecting punishments for contempt in this country. The first is the common law rule wherein it is held that to charge the court with unfairness or corruption amounts to a contempt even after the termination of the case in question. The other rule, which is the rule in Wisconsin and which constitutes the weight of authority in state courts, is that criticism after the case is ended is not contempt of court however malicious such contempt may be. The federal courts adopted the latter theory and that is the rule in the federal courts as shown by the decision in *Patterson* v. *Colorado,* 205, U. S. 454, 51 L. ed. 879, wherein the court said:

> When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the courts of justice by premature statement, argument or intimidation hardly can be denied.

In all jurisdictions there are two fundamental rules of law. First: Newspapers may during the pendency of the case publish a fair and truthful account of the proceedings; and second, in all jurisdictions the newspaper must refrain from publishing other matter, whether news or comment, which is calculated to prejudice the rights of either side, discredit the court or influence its decision.

Contempts are punishable without a trial by jury. Newspaper contempts are known as constructive contempts in that they take place

outside of the court room and are not committed as a rule in the judge's presence. They are also called indirect contempts. In the case of so-called newspaper contempts the defendant is usually brought in on a rule to show cause and informed of the allegations. A day is set for a hearing and he is given a reasonable opportunity to prepare his defense. The case is heard and he is acquitted or sentenced, depending upon whether he is found guilty or not of the contempt. These proceedings are not considered by the courts as criminal cases and for that reason the case is heard without a jury. *Cooley on Constitutional Limitation,* 4 Ed. 394. There could be no jury issue as a rule because there is never any serious question as to the performance of the act, and the only question involved is whether the newspaper comment constitutes contempt of court or not.

In an appeal from the judgment of the court the appellate court hears the action either on a writ of error, certiorari or habeas corpus proceeding, and the only question before the appellate court is whether the article was in fact contemptuous and did the court proceed legally.

A reading of the various cases indicates that while the punishment of newspaper men for contempt is not infrequent, the punishments imposed are usually very moderate. In a number of cases the court, after imposing a fine, has indicated that a motion would be received before the end of the term for a reduction in the fine upon the presentation of evidence showing complete retraction by a publication by the offending newspaper.

Contempt of court is a very important so-called restraint and while courts have hesitated to cite newspapers for contempt of court, due to the fact that these proceedings might be subject to considerable criticism and misunderstanding, nevertheless in proper actions courts have acted firmly to protect the court as an institution and the rights of litigants rightfully before the court.

Another line of action which might be classified as one of the indirect restraints on publication is the relief afforded citizens against defamatory statements published in newspapers under the so-called libel laws. The question of libel constitutes a great subdivision of the law itself and any attempt to even briefly discuss the rights of newspapers in libel actions would extend this article beyond all reasonable bounds, and the subject therefore is merely mentioned as one of the restraints.

The purpose of this article is to call attention to the fact that the freedom of the press is not an absolute right and that the term is merely a relative term. We in this country do possess a freedom of the press that is not the case in any other country in the world. While the freedom of the press clause was not included in the original draft of the Constitution, it was made the subject of the first constitutional

amendment and its guaranty is primarily against prepublication censorship such as prevailed in England and the American Colonies up to the time of the American Revolution. Practically all of the states have been very zealous in safeguarding the right of freedom of speech and freedom of the press and no state has gone to the extent of prohibiting any publication except under circumstances where the public welfare, the public safety and public morals are directly involved. It is an established doctrine in this country that the greatest amount of freedom to the individual citizens of this county can only be furthered by a free and untrammeled press, but in no jurisdiction have newspapers been given the right under the guise of freedom of the press to invade the constitutional guaranties that are given to the general public under our form of government.