

The Conflict Between the First and the Sixth Amendments

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"For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

-U.S. Supreme Court Justice Hugo Black, from his majority opinion in
Bridges v. California, 1941.

Hypothetical:

A celebrity's spouse is found dead of a drug overdose and possible physical abuse. Their racy lifestyle apparently worried their friends and was fodder for tabloids. Upon learning of the spouse's death, the celebrity holes up in a friend's estate and refuses to talk to anyone. Reporters from television and print, along with a ragtag cult of itinerant celebrity followers, camp out on the grounds of the estate. A flea market springs up. There are nightly musical performances and poetry readings. The camp is sporadically rife with speculation about the meaning of cryptic statements that the celebrity is delivering through a spokesperson. Rumor-filled web pages and betting pools are showcased on nightly newscasts.

The celebrity is named a suspect in the death of the spouse. A nationally known victim rights lawyer makes her way to the compound,

and holds court everyday before the "manor corps" as the semi-permanently encamped cult is now referred to in the press. A warrant is issued for the celebrity's arrest. A group of fans barricade themselves around the mansion. A SWAT team storms the mansion and arrests the celebrity. Several camp followers are injured in the melee. Twenty seven people are arrested for interfering with police.

The public's appetite is now frenzied. It is a bonanza for the press. At the arraignment a week later, after being whipped into a lather by several self-appointed, sidewalk-preaching "activists," the celebrity-cult throng swells into a critical mass, and storms the county courthouse. Sheriff's deputies and police from three cities can barely prevent them from overrunning the building.

Is justice possible? What should the judge do?

Introduction

This purpose of this essay is to explore the monumental clash between the first and sixth amendments. The first amendment guarantees a free press to society. The sixth amendment guarantees a fair trial to criminal defendants. We will look at the philosophical ideals behind these amendments, the fundamentally different institutions that each amendment has spawned, and how those institutions are inherently at cross purposes. We will look at specific clashes and what the courts have chiseled legally, out of the raw stone formed in the confluence of these two important and morally distinct tectonic plates of law.

In the first section, we will look at the individual integrity of the first and sixth amendments; in the second section we will look at the inherent conflict between them, and the rules, structures, and compromises that

have resulted. Finally, we will look at the relationship between television and the courts.

Sanctity of the First Amendment

The first amendment states, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The first amendment exists so that our society may maintain its intellectual health and become enriched by a vigorous, competitive marketplace of ideas. In a society dedicated to an ongoing pursuit of truth, freedom of expression is seen as a sacred right. The unencumbered exchange of ideas is an important underpinning of our productive, progressive, and self-examining national culture.

Nature of a Free Press

A free press is a curious, aggressive, resilient, freewheeling, occasionally blasphemous force of nature. It thrives in a rough and tumble, competitive environment; in fact, such an environment is necessary for its survival. Conflict and tension are important conditions for its health. A free press is premised on the notion that all ideas should be able to breathe freely in an open intellectual marketplace, and be subjected to the glaring scrutiny and vigorous debate that the press provides. Bad ideas should not be squelched, because as they are examined, they will be overpowered by good ideas over time. It is under these conditions that important social issues get discussed and reconciled.

There may be surges of passion and sensation in such an expressive society; voracious, morbid consumption of shamelessly pimped product can happen in any open marketplace. It is expected that a vigorous press can handle occasional surges of passion and sensation, that the public will

sort out the truth over time, that to try to restrain the press would be to choke its very essence from it.

There is no pretense held by defenders of the freedom of the press that passions won't occasionally rule. It is part of the game, a necessary cost of freedom. But there are institutions that seek to insulate themselves from such surges of emotion. Probably the most important such institution is the court system; arguably the most important element of the constitution that carves out space for the courts is the sixth amendment.

Sanctity of the Sixth Amendment

The sixth amendment states, in part: "The accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." This amendment exists to protect defendants from popular passion and governmental caprice. Trials must be public so that the machinations and motives of an all-powerful government are open to scrutiny; fairness must be enforced by the impaneling of an unprejudiced jury of one's peers.

Nature of the Courts

As an institution burdened with the fair administration of justice, the courts have an awesome task. They must be independent, solemn, and proprietary, and they must be extraordinarily careful. This is in marked contrast to the popular, freewheeling, rough and tumble, take-all-comers environment that a free press encourages.

Independence

The rights of a criminal defendant can be unpopular to champion. Or, as in the hypothetical, the defendant may enjoy an irrational wellspring of

popular support. Public passions in sensational criminal cases can be morbidly exaggerated. An institution like the court system, dedicated to the lawful resolution of complaints, must be capable of resisting the surge of popular passions. Of course this ideal is not always met. It can be difficult when the public is especially outraged or sensationally curious. But that is the reason the courts exist: to provide an emotionally insulated space where reason rules above passion, where even odious-seeming or celebrated defendants can be given a fair hearing. An unregulated surge of public passion can ruin that prospect.

Solemnity

Courts have traditionally been hallowed, conservative places. In Islamic countries today, courts are officiated by religious clerics. In medieval Europe, it was the same. Western culture has evolved away from religion as the source of law, but the law still comes in grave-sounding language and in book form. There are still robed, solemn stewards of the law, to whom we show reverence and from whom we expect temperate ("sober as a judge") demeanor. These are our modern day holy men, keepers of the sacred texts. Court is a secular temple. If we think of judges as a secular class of monk, we can appreciate their impulse to be proprietary, to keep their hallowed space unsullied from outside corruption.

Sensitivity

Courts are extremely sensitive. They can not tolerate the rough and tumble environment that the press can tolerate. They can't settle for a general trend toward being right most of the time. The judgments of courts must be correct an overwhelming amount of the time. The stakes are truly

monumental. Civil society is largely premised on the fair resolution of conflict. While it may sometimes seem that an inordinate amount of fuss is made over the rights of the defendant, a towering responsibility looms: an innocent person getting convicted is the worst miscarriage imaginable. There is no greater outrage. If courts err on the side of caution in the effort to avoid this tragedy, it is acceptable. Frequent false convictions will cause a massive credibility loss for government, and lead to cultural deterioration and civil war faster than almost anything else. Such are the stakes of the administration of justice.

The Inherent Clash

What does a society look like with both an institution dedicated to the free spirited exchange of ideas, and one dedicated to the solemn, reasoned administration of justice? How do these institutions coexist? What has happened as they've rubbed against each other over the years? In this section, we will look at several notable instances of the first and sixth amendments in conflict, the decisions that settled those conflicts, and the resultant devices available to courts to assure a fair trial.

The general dynamic of the relationship between the press and the courts is that the courts have been conservative and resistant to the advances of the press, but in spite of this have been penetrated more and more over the years by an aggressive press. The press have sported increasingly sophisticated devices with which to record the proceedings, and today enjoy considerable reportage privileges, with caveats. The penetration is the victory of the press; the caveats are the privileges and prerogatives retained by the courts.

Courts have resorted to many devices over the years to protect the sanctity of the administration of justice from the glare and meddling of the

press. While some of those devices have been recognized by higher courts as legitimate tools of the court, some have been struck down as too restrictive to first amendment rights. And conversely, some trial courts have been found to have been remiss in their efforts to shield the rights of the defendant from the glare of the press.

The Circus

Several sensational criminal trials, where the press became a primary player in the proceedings of court, have stood out over the years, and have provoked questioning about the proper role of the press in the courtroom. Four will be highlighted here: the trials of Bruno Hauptmann, Billy Sol Estes, Sam Sheppard, and O.J. Simpson.

In 1935, Bruno Hauptmann was tried in New Jersey for the kidnap and murder of the twenty-month-old son of famous aviator Charles Lindbergh. Because of Lindbergh's fame, the trial was a major event, and the press went wild. Cameras were dominant in the courtroom, literally in the face of the participants. The trial stands out as an early circus, and while there were no legal challenges to the verdict or tactics of the court, there was subsequent shame and soul-searching on the part of the press and determination in the legal community not to let it happen again. The American Bar Association appointed a special committee to study the trial. The commission was headed by former Minnesota Supreme Court Justice Oscar Hallam, who said in his report, "There never was a case that lent itself to greater temptation to lurid or excessive publicity, never a case more provocative of trial out of court, never a case beset with greater menace of disorderly procedure" (Barber 8)

In *Estes v. Texas*, the conviction of Texas wheeler-dealer Billy Sol Estes was overturned by the U.S. Supreme Court in 1965 because it was

determined that the presence of a plethora of television cameras in pretrial hearings had ruined the possibility of a fair trial. The Estes decision was largely interpreted as a ban on television cameras in courtrooms, which did not thaw for another ten years.

The 1954 trial of Ohio physician Sam Sheppard for the murder of his wife was preceded by a firestorm of local press calling for his arrest and conviction. The police were seen as passively taking orders from the local press. The trial was a major media event; like Hauptmann, cameras were major players in the show. Sheppard was found guilty and sent to prison. Twelve years later, in *Sheppard v. Maxwell*, the U.S. Supreme Court overturned Sheppard's conviction and released him, finding that the trial court did not do near enough to ensure a fair trial.

Even among members of the press, it is near total consensus that the O.J. Simpson trial was a circus. Judge Lance Ito, presiding in that case, has taken most of the heat for letting the situation get out of control. There were no challenges resulting from the Simpson trial, but new sentiment was generated for restoring dignity to the courtroom, including from some quarters the call once again to ban television cameras from courtrooms.

In *Estes* and *Sheppard*, the Supreme court overturned convictions because it found that circus-like publicity ruined the defendant's chance of a getting a fair trial. While the verdicts in the Hauptmann and Simpson cases did not get challenged, there has been broad consensus that in each of those cases the press was allowed to get out of control. But fault has typically been found with the judges of those trials, who were found to have made inadequate use of various discretionary devices at their disposal to shield the proceedings from the press.

Prior restraint: Courts Overstepping Their Power

While the judges in Hauptmann, Sheppard, Estes, and Simpson have been criticized for not doing enough to protect the defendants' rights to a fair trial, in some cases the attempts by trial judges to control the proceedings have been reversed for overbreadth. Usually this judicial ardor has been an attempt to gag the press, which the Supreme Court has generally frowned upon.

A broad precedent was set by the Supreme Court in deciding *Near v. Minnesota* (1931). *Near* published "The Saturday Press," a racist, muckraking Minneapolis newspaper. The state of Minnesota passed a law allowing courts to enjoin a "malicious, scandalous, or defamatory newspaper, magazine, or other periodical." (Bunker 66) *Near* was shut down, and sued. The Supreme Court found the prior restraint of *Near* impermissible. *Near v. Minnesota* is considered a landmark case, because it greatly restricted a state's power to impose prior restraint on the press.

In *Nebraska Press Association v. Stuart* (1976), the U.S. Supreme Court reversed a lower court's use of prior restraint against a newspaper. The Court found that a newspaper's first amendment rights to print a confession by a murder defendant outweighed the defendant's sixth amendment rights. The Court held that trial courts have other means to protect defendants' rights, like sequestration and limiting release of information. From this precedent, it has been widely interpreted that prior restraint on the press can only be justified by a gravely compelling interest of the state, such as national security.

It is taken for granted in America that the press will print what it can, and that the courts generally are not permitted to restrain it. Securing an impartial jury for a defendant is simply not a compelling reason for the court to gag the press. It is assumed that the press will be curious and vigorous, and that beyond formalities like printing "alleged" or

"suspected," next to a defendant's name, the press will have no sympathy for a defendant. It is up to the courts to protect defendants. The courts have retained several prerogatives for doing so.

Recognized Tools and Discretion of the Courts

Change of venue and continuance are considered primary tools of the court for lifting trials out of places and times of prejudice in criminal trials where there is a lot of local buzz. In *Rideau v. Louisiana* (1963), a defendant requested a change of venue, claiming that the broadcast of a confession had prejudiced the trial. The Louisiana trial court denied his request. The U.S. Supreme Court found the denial of change of venue to be impermissible in terms of the sixth amendment. Continuance is a similar tool at a judge's disposal; it is used to move a trial away from the immediate hype surrounding a criminal trial to a later time when things may have calmed down. Judges are expected to permit change of venue and continuance when to do so would increase the chance of fairness for the defendant.

In addition to change of venue and continuance, judges have certain other discretionary tools for shielding the proceedings from the press. In all states, judges typically have discretion to exclude the press from pretrial proceedings and meetings held in chambers. In ??? the press unsuccessfully sued a judge for shutting them out of a pretrial proceeding. Precedent was set when the U.S. Supreme Court found in favor of the judge, declaring that excluding the press from a pretrial matter was the judge's prerogative. Judges also have the power to enjoin counsel, officers of the court, and parties to the case from making statements to the press.

A defendant's right to a fair trial is largely dependent on uncorrupted jury and witnesses. Specific tools of "voir dire," anonymity, and

sequestering are available toward this end. Thorough screening, or voir dire ("truth speaking") process is available to counsel to determine competence and prejudice of both jury and witnesses. Anonymity of jury is strictly enforced in most states, as is anonymity for certain witnesses in sensitive cases. The protection of the identity of jurors and some witnesses is an area where prior restraint is allowed. A member of the press can be found in contempt of court for printing the names or showing photographs of jurors and certain witnesses. Sequestering of jury and witnesses is an option in most courts, where the court determines that their exposure to the media or to the public will seriously compromise their impartiality.

Television: The Current Laboratory

After *Estes v. Texas*, most states shunned efforts by television to penetrate courtrooms. Colorado was the lone exception to this television blackout. But in the seventies, broad experimentation began with courts and television, and in *Chandler v. Florida* (1981), the Supreme Court essentially validated the experiment. In *Chandler*, two men were convicted of burglary while television covered the trial. The two men appealed, claiming that solely by being there, television had ruined their trial. The U.S. Supreme Court disagreed, saying that cameras did not inherently cause prejudice, which legitimized broad experimentation with television in the courts across the country.

Today, each state has its own rules governing television in courts and. (See Appendix Exhibit A). Some states allow television coverage of only appellate cases. Four states (Alabama, Arkansas, Oklahoma, and Minnesota) give the defendant the right to veto the presence of cameras; twelve states don't allow cameras in criminal trials at all. Most states give

broad discretion to the presiding judge about whether to allow cameras, and whether certain witnesses should be excluded from coverage. All states restrict or prohibit the photographing of jurors. All states have restrictions on how many cameras can be in a courtroom at one time. Press agencies are expected to "pool" (share) these limited cameras.

Federal courts still prohibit cameras, except the Second and Ninth Circuit Courts of Appeals. Cameras are anathema to the Supreme Court and probably won't be breaking in any time soon; Justice David Souter, one of the Court's more liberal members, has said that if cameras are allowed in, they will have "to roll over my dead body." (Kirby)

The Verdict

A society that promises to guarantee two such diverse liberties as a free press and a fair trial is bound to experience discord when the two liberties collide. We have demonstrated that the first and sixth amendments have fundamentally different philosophical underpinnings, and shown the tension between them. But it is a necessary tension, as the two ideals strive, in their respective arenas, for fulfillment. In many respects, they have accommodated each other. It is a microcosm of our society: a grand, imperfect, occasionally blasphemous, and ultimately fascinating experiment.

Idaho - broad discretion in presiding judge
Iowa - need victim/witness consent in sexual abuse cases
Kentucky - broad discretion in presiding judge
Massachusetts - coverage of certain proceedings prohibited
Michigan - judge may prohibit coverage of certain witnesses
Montana - broad discretion in presiding judge
Nevada - broad discretion in presiding judge
New Hampshire - broad discretion in presiding judge
New Mexico - judge may prohibit coverage of certain witnesses
North Carolina - coverage of certain cases/witnesses prohibited
North Dakota - broad discretion in presiding judge
Rhode Island - coverage of certain proceedings prohibited/broad discretion in presiding judge
South Carolina - broad discretion in presiding judge
Tennessee - broad discretion in presiding judge/coverage of minors is restricted
Washington - broad discretion in presiding judge
West Virginia - broad discretion in presiding judge
Wisconsin - broad discretion in presiding judge
Wyoming - broad discretion in presiding judge

TIER II: States with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony.

Hawaii - coverage of certain cases and witnesses prohibited
Kansas - many types of witnesses may object
Missouri - many types of witnesses may object
New Jersey - coverage of sexual penetration cases prohibited
Ohio - victim/witness has right to object to coverage
Oregon - witnesses discretion to object to coverage of certain cases
Texas - no rules for criminal trial coverage, but such coverage allowed increasingly on a case by case basis
Virginia - coverage of sex offense cases prohibited

TIER III: States that allow appellate coverage only, or that have such restricting trial coverage rules essentially preventing coverage.

Alabama - consent of all parties/attorneys required

Arkansas - coverage ceases with objection by party/attorney
Delaware - appellate coverage only
Illinois - appellate coverage only
Indiana - appellate coverage only
Louisiana - appellate coverage only
Maine - appellate coverage/civil trial/arraignments, sentencings and other non-
testimonial proceedings in criminal matters
Maryland - appellate coverage/civil trial only
Minnesota - appellate coverage/trial - consent of all parties required
Mississippi - appellate coverage only via the Internet
Nebraska - appellate coverage/audio trial coverage only
New York - appellate coverage only
Oklahoma - consent of criminal defendant required
Pennsylvania - any witness who objects won't be covered, civil trials only
without a jury
South Dakota - Supreme Court coverage only
Utah - appellate coverage/trial coverage - still photography only
Vermont - broad discretion in presiding judge

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