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LEGAL PITFALLS IN THE RIGHT TO KNOW

JAMES C. GOODALE*

Until recent years, the self-executing nature of the first amendment was its most attractive feature, from the press' point of view. Under the rule forbidding prior restraint except in extraordinary national security situations, the press was free to publish what it wished, subject to subsequent determinations of liability for slander, libel, contempt of court, or violation of privacy rights.¹ While scholars debated whether prior restraint and subsequent punishment were in fact different,² the press knew there was a difference: a prior restraint, even if lifted on appeal, robbed a story of its timeliness and made it unpublishable; while a story later found libelous or in contempt of court made its way into print.

Under this rule against prior restraint, courts played no role in the prepublication process. Editors alone decided what to print or not to print. As far as I can determine, until the New York Times' publication of the Pentagon Papers in 1971, only a handful of prior restraints against the press had been issued, and those few were largely disobeyed.³

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1. In the *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971). Justice Brennan summarized the rule against prior restraint:

Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States*, 249 U.S. 47, 52 (1919), during which time "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and locations of troops." *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

Justices Stewart and White, in a critical concurring opinion in the *Pentagon Papers* case, stated that they would require proof in national security cases that a publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people" before a permanent injunction will be permitted. *Id.* at 730 (Stewart, J., concurring).

2. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951); Rembar, *Paper Victory*, ATLANTIC MONTHLY, November 1971, at 61.

3. See *Near v. Minnesota*, 283 U.S. 697 (1931); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Dailey v. Superior Court, 112 Cal. 94, 44 P. 458 (1896); *In re Shortridge*, 99 Cal. 526, 34 P. 227 (1893); Johnson

All of the foregoing may have changed, however. Courts may now view the rule as merely a rebuttable presumption against prior restraint.⁴ This presumption has been easily rebutted in suits for temporary restraining orders against libel⁵ and violations of privacy⁶ and fair trial rights.⁷ I hope that, in *Nebraska Press Association v. Stuart*,⁸ undecided at this writing, the Supreme Court will reaffirm the well-established rule that there can be *no* prior restraints against the press without proof of immediate and irreparable damage to national security.⁹ If that happens (and there is no certainty at this writing that

v. Simpson, 433 S.W.2d 644 (Ky. 1968); *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950); *Ithaca Journal News, Inc. v. City Court*, 58 Misc. 2d 73, 294 N.Y.S.2d 558 (Sup. Ct. Tompkins County 1968); *State v. Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (1937); *Ex parte McCormick*, 129 Tex. Crim. 457, 88 S.W.2d 104 (1935); *Ex parte Foster*, 44 Tex. Crim. 423, 71 S.W. 593 (1903); *State v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971).

4. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) ("Prior restraints are not unconstitutional per se"); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); *Cooper v. Rockford Newspapers, Inc.*, 34 Ill. App. 3d 645, 339 N.E.2d 477 (1975).

5. *See American Broadcasting Co. v. Smith Cabinet Mfg. Co.*, — Ind. App. —, 312 N.E.2d 85 (1974).

6. *See Quinn v. Johnson*, Docket No. 2231 N (Sup. Ct. N.Y. County, April 5, 1976).

7. *See, e.g., Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975); *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975); *United States v. Schiavo*, 504 F.2d 1 (3d Cir. 1974) (en banc), *cert. denied*, 419 U.S. 1096 (1975); *United States v. Columbia Broadcasting Sys., Inc.*, 497 F.2d 107 (5th Cir. 1974); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *Sun Co. v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973); *State ex rel. Miami Herald Publishing Co. v. Rose*, 271 So. 2d 483 (Fla. Ct. App. 1972); *Oliver v. Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (dictum). *See also Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972); *People v. Green*, Nos. L28145F-L28150 (San Fran. Mun. Ct., May 19, 1974); *State v. Payne*, No. 74-7F (Cir. Ct. Manatee County, Fla., April 4, 1974).

8. *State ex rel. Nebraska Press Ass'n v. Stuart*, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd*, 44 U.S.L.W. 5149 (U.S. June 30, 1976) (The Supreme Court decision was handed down several months after this address was delivered).

9. Thus, in *Near v. Minnesota*, 283 U.S. 697, 715-16 (1931), the Supreme Court concluded:

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized

it will), the press can again rely on the first amendment to protect all publications and broadcasts, with legal penalties being imposed only after publication. Perhaps then, the first amendment can again be self-executing, and the government will not interfere in the publication process. No prior approvals for publication will be required or sought. The courts will deal with the actual consequences of publication, but not with the imaginary consequences of unpublished matter.

Against this background, Professor Emerson's article assumes added significance. At a moment when, from my admittedly press-oriented perspective, the right to communicate is under heavy attack, Emerson focuses on the right to know. Of course, it is inappropriate, if not rude, to criticize an author for not addressing a subject of particular interest to the listener. At this time in the history of the first amendment, however, I would have preferred Professor Emerson to elaborate on his excellent essay on prior restraints, published over twenty years ago. It is one of the best on the subject.¹⁰

I hope that my response to Professor Emerson is more than chauvinistic, and does not reflect merely an Olympian view from the vantage point of a powerful press that easily obtains access, an access perhaps not available to the less powerful. I believe my objection amounts to more than that, however. As Emerson concedes, the right to know is a qualified right, whereas the right to communicate is substantially absolute. My fear is that if the courts begin to enforce the right to know, the qualifications applicable to the right to know may be applied to the right to communicate, thus curtailing existing first amendment rights.

Obviously, the first amendment protects everyone, not merely the press, although the press may have special first amendment rights not available to others.¹¹ Yet for equally obvious reasons, it is easiest for me to test Professor Emerson's right-to-know concept in the context of the press. The press communicates via four interrelated functions—

only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops.

10. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW AND CONTEMP. PROB. 648 (1955).

11. See Stewart, "Or of the Press," 26 HAST. L.J. 631 (1975).

gathering, writing, editing, and publishing information. As mentioned above, the press believed until recent years that the right to publish was qualified only by the government's right to restrain publication of information that would immediately and irreparably damage national security, such as the publication of atomic bomb secrets and consequent delivery of them to the Nazis in 1944.¹²

If the courts recognize the right to know, however, they will begin to perform the function of gathering information. They will also act as editors, since only the courts can apply the qualifications inherent in the right to know. Editing will require judgments about what information to release to the public and what to withhold. The right to communicate will thus be affected, since one cannot communicate what has been withheld. Analytically, therefore, in effecting the right to know, a court must necessarily become involved in the communication process. Perhaps the following example will better illustrate the risks I perceive in this involvement:

Suppose the right to know entitles a communications organization to obtain a governmental report on thalidomide, the drug that caused birth deformities.¹³ Suit is brought against the government, but the government persuades the court that it is not required to deliver a full copy of the report. The court, therefore, approves the deletion of references to certain drug companies, drug officials, and individuals, reasoning that the deleted information would violate some people's right of privacy and would libel others. The government also persuades the court to make deletions on grounds of taste and relevancy. The court then delivers to the communication organization a report that lacks substantial material relating to the thalidomide controversy.

In delivering such a report, the court has performed many of the communications functions: gathering, writing, editing, and communicating information. The information about thalidomide was collected by court order, edited by court action, and then communicated by court action.¹⁴

12. See note 1 *supra*.

13. See Evans, *The Half-Free Press*, in *THE GRANADA GUILDHALL LECTURES* (1974).

14. The procedure described is also applicable to actions brought under the Freedom of Information Act, 5 U.S.C. § 552 (1970), *as amended*, 5 U.S.C. § 552 (Supp. IV, 1974). In large part, Emerson's theory is a constitutionalization of this Act. In other words, a plaintiff would have, as a matter of constitutional law, the same rights, subject to the same exceptions, granted to plaintiffs presently under the Freedom of Information Act. For an illustrative case under that Act, see, *e.g.*, *Department of Air Force v. Rose*,

Suppose further that a second communications organization obtains the full thalidomide report without the deletions, and the same court is asked to enjoin publication of the portions deleted from the first report. Under the Supreme Court's decision in *Near v. Minnesota*, the first amendment does not permit courts to enjoin alleged libel. I would submit that the right of privacy is sufficiently analogous so that violations of that right also cannot be enjoined.¹⁵

Yet the court in the above example has already determined that there is no first amendment right to know about the libelous matters and the information violating privacy rights which were deleted from the first report. How can the court later decide that the first amendment protects the publication of such information?

The answer seems to be that the court can act as a kind of censor when the court is vindicating the public's right to know, but cannot do so when the press rather than the court is advocating the right to know. It seems rather anomalous that the first amendment can be cited to justify the censorship of information in one case and to prohibit the censorship of the very same information in a second case.

The problem with the right to know as sketched by Emerson, therefore, is that as a qualified right, it inevitably involves determinations

96 S. Ct. 1592 (1976). In *Rose*, a law review editor sought "sanitized" (names deleted) case summaries of the Air Force Academy's Honor and Ethics Code adjudications for preparation of an article. The Court held that Exemption 6 (personnel files, disclosure of which would be "unwarranted invasion of personal privacy") required *in camera* inspection to redact names and any other identifying information in the case summaries before releasing them to plaintiffs. See also *Administrator, Fed. Aviation Agency v. Robertson*, 422 U.S. 255 (1975); *Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Washington Research Project, Inc. v. Department of HEW*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Many of the risks inherent in the right to know are also present in this Act. There is one significant difference, however: the Act is a product of legislation and therefore does not depend on first amendment theory.

Examples of Freedom of Information cases where the court acted in effect as an editor are: *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (disclosure of the parts of the auditor's manual of the Department of Defense which prescribed allowable costs for defense contractors, but non-disclosure of parts revealing auditors' techniques for ascertaining contractors' costs and profits); and *Wellford v. Hardin*, 315 F. Supp. 768 (D.D.C. 1970) (Division of Pesticides Regulation ordered to disclose master list of files, but not information as to citations, seizures, or recall of products).

15. *But cf.* *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969); *Doc v. Roe*, 42 App. Div. 2d 559, 345 N.Y.S.2d 560, *aff'd*, 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1973), *cert. dismissed*, 420 U.S. 307 (1975); *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (Philadelphia County C.P. 1940).

of what the public does *not* have a right to know. To put it another way, the problem with the right to know is that it invariably involves prior restraint. Since the right is not self-executing, a court must decide what the public is permitted to know or not to know. Thus, once a court decides that a qualification applies, and that there is no right to know, it imposes a prior restraint, at least generically.

As indicated above, a distinction can be made to permit prior restraints when access is sought and to forbid them when communication is desired. But is that distinction sufficiently robust to survive in the rough and tumble of litigation? Or are we asking too much when we require courts to assume virtually all of the functions of a communications entity in access situations, but to avoid them entirely when only communication is involved? More importantly, is it reasonable to expect a court that has restrained one communications organization from printing information violating a person's right of privacy later to permit a second organization to print the same information, merely because access is involved in the first example but not in the second?

I think it far more likely that once courts start to perform the communication function, they will continue to do so, and the end result will be less communication rather than more. The history of the *Red Lion* case¹⁶ and the fairness doctrine partially demonstrates my concern. I

16. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court validated the personal attack rule of the fairness doctrine, on the theory that physical facilities were scarce. See F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* (1976). In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court in effect held the fairness doctrine inapplicable to newspapers. Emerson attempts to reconcile these two cases, as have others, on the theory that only "economic inequalities," rather than shortages of physical facilities, exist in the newspaper business. Although today there are more television and radio stations than newspapers, Emerson's point is that almost anyone can buy, rent, or use a printing press, while not everyone can telecast or broadcast until cable television is available to all.

I disagree with Emerson's view that the fairness doctrine can be rationalized on technical and not economic grounds. Anyone can install a cable system, like a printing press, but it is very expensive to do so. Estimates for "wiring the nation" range from 250 billion dollars to 1.2 trillion dollars. Branscomb, *The Cable Fable: Will It Come True?*, 25 J. COMMUNICATION, Winter 1975, at 44, 48. It is common knowledge that cable television would be far more widespread in New York City if cables did not have to be laid all over the city under city streets. In short, the scarcity of cable television is not due to "technological conditions," as Emerson states, but is caused by economic disparities, the same reason Emerson offers to justify his distinction of *Tornillo* from *Red Lion*. It seems dangerous to construct a first amendment theory on a technological premise. Predicting how such a technological premise will actually affect communica-

do not think *Red Lion* was correctly decided. But accepting for the moment that a relevant scarcity of facilities existed at the time the case was decided, I believe the scarcity argument is no longer relevant. Yet the courts are still deciding cases based on the fairness doctrine.¹⁷

Professor Emerson recognizes the fragility of the foundations of the fairness doctrine, and concedes that the doctrine should be put to rest when cable television is finally available to all, since it obviously inhibits communication. While Professor Emerson discusses the end of the right to know on television, however, he does not mention its end on radio, despite the growth of citizens' band radio and the multiplicity of radio outlets in large urban markets. Even if the scarcity argument once made sense, which I doubt, it seems now to be totally superseded by the ease of buying time on the many big-city radio stations and the opportunities for access to citizens' band radio. Yet the fairness doctrine is still applied in large cities. The government, once it gets in the business of deciding what can and cannot be spoken, written, telecast, or published, is very difficult to remove.

Conclusion

Historically, the public's "right to know" has been implemented by individuals exercising their right to communicate. The courts' function with respect to the right to communicate has been to permit its full exercise, reserving judgment as to the value of a communication until after it is made.

I question the desirability of allowing courts to judge communications before they are made, at least as a matter of first amendment theory. Such prejudgments are likely to erode the distinction between prior restraint and subsequent punishment, a distinction I believe important to maintain.

The courts, although independent, are nonetheless a branch of government.¹⁸ Whether a branch of government should be heavily involved in performing first amendment functions seems doubtful. I would accord the courts little, if any, jurisdiction over the information

tion is difficult; and inevitable technological changes soon make technological theories irrelevant.

17. *In re Complaint of Representative Patsy Mink Environmental Policy Center and O.D. Hagedorn against Radio Station WHAR*, 37 P & F RADIO REG. 2D 744 (1976).

18. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

gathering and editing processes, limiting their jurisdiction to dealing with the consequences of communication. I believe such limitations will best protect the right to communicate, which Emerson himself recognizes as a paramount value under the first amendment. Otherwise, I fear the right to communicate may be eroded if the courts perform too many of the functions that have historically been performed without court help.