Journal of Criminal Law and Criminology

Volume 43 | Issue 4 Article 6

1953

Pre-Trial Press Releases by Prosecutor: Stroble v. California

duel fashion. But when the burden of proof is placed on the defendant on the one hand and on the state on the other, the whole procedure seems quite unsatisfactory. Such subtleties of burden of proof certainly confuse rather than clarify the standards the jury was asked to use in reaching their verdict.[20]

The position taken by Mr. Justice Frankfurter on the problem of insanity has long been followed by the federal courts in their own procedure.[21] However, this does not necessarily mean that the Oregon procedure violates due process. There are many instances where the Supreme Court adopts one rule while leaving the states free to adopt their own rules, e.g., the right to counsel,[22] the admission of evidence illegally seized,[23] and the privilege against self incrimination.[24] And it is readily understandable why the Supreme Court is reluctant to attack state procedures for dealing with the problem under due process in the light of our limited psychiatric knowledge.[25] Nonetheless, it is rather surprising to see the Supreme Court affirming a state procedure that violates the notion that an accused will not be put to the hazard of punishment if the *state* does not remove every reasonable doubt of his guilt.

PRE-TRIAL PRESS RELEASES BY PROSECUTOR: STROBLE V. CALIFORNIA

The Supreme Court has recognized the right of the press to comment on pending litigation;[1] but this freedom is not without limits. The Court also recognizes that an accused in a criminal case may be deprived of a fair trial when newspaper accounts seriously prejudice the community.[2] The case of *Stroble v. California*[3] presents serious due process questions related to the limits beyond which neither the press nor the prosecuting attorney should be allowed to comment.

In the *Stroble* case the prosecuting attorney, before trial, released to the press the defendant's confession of the brutal sex-slaying of a five year old girl along with his opinion that Stroble was guilty and sane. The crime, with all its sordid details, was capitalized on by press, radio, and television. Through the premature releases of the prosecutor, the public was whipped into hysteria and furor as indicated by such headlines as: "Lynch Him! Howls Crowd as Stroble Goes to Court."[4]

On appeal the Supreme Court rejected defendant's principal contentions that he was deprived of due process because (1) his first confession was

20. It was even contended by appellant that the instructions were so confused and misleading, the jury believed the appellant had the burden of proof in all the elements of the case, thus denying appellant's rights of due process. Leland v. State of Oregon, 343 U.S. 790, 800 (1952) (dissenting opinion).
21. Davis v. U.S., 160 U.S. 469 (1895).
22. Betts v. Brady, 316 U.S. 455 (1942).
23. Wolf v. Colorado, 338 U.S. 25 (1949).
24. Adamson v. California, 332 U.S. 46 (1947).
25. For a rather caustic comment on the present state of psychiatric knowledge, see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 480 et seq. (1947).

1. Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); Baltimore Radio Show v. Maryland, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied* 70 Sup. Ct. 252 (1950).
2. Shepherd v. Florida, 341 U.S. 50 (1950).
3. Stroble v. California, 343 U.S. 181 (1952).
4. Los Angeles Herald Express, Nov. 18, 1949.

involuntary[5] and (2) that the inflammatory newspaper articles instigated by the district attorney deprived him of a fair trial. We are here concerned with the defendant's second contention.[6]

The fundamental problems are two: (1) what evidence is necessary to prove that newspaper accounts have deprived an accused of a fair trial; (2) does the fact that the prosecutor instituted such "trial by press" publications have any relation to the first question—that is, can the action of the prosecutor, such as here, in and of itself, or by contribution, be sufficient to deprive a defendant of a fair trial? If the answer to the second question is affirmative, one other question remains—how far ought the district attorney be allowed to go in releasing pre-trial information of a prejudicial nature?

Factors Relevant to the Determination of Whether Newspaper Accounts Have Deprived an Accused of a Fair Trial—The majority opinion considered three factors in determing that Stroble had not been deprived of a fair trial. The first was that even though the confession might have been prematurely released by the prosecutor there were subsequent confessions made during the trial itself.[7] Therefore the confession could be obtained by the press "in any event"[8] for "what transpires in the courtroom is public property."[9]

Another factor which the Court thought significant was that at no time during the first trial did Stroble seek a change of venue on the grounds of a prejudiced community caused by the newspaper articles.[10] It was not until after Stroble's conviction that he made this claim. The Supreme Court points out that Stroble's inaction is indicative of an absence of a prejudiced community.[11]

The final element considered by the Court was the time factor. The importance of this factor is amplified by the view of many psychologists that news reports immediately before or at the beginning of a trial are most effective because of lack of counter-propaganda and specific knowledge.[12] The Court held that since the inflammatory articles appeared approximately six weeks before defendant's trial the public passion must have cooled.[13] The question of whether there was sufficient time for passion to cool and prejudice to subside seems to have been much closer in this case than the majority pointed out. Mr. Justice Frankfurter, in his strong dissent, refers to the California Supreme Court as saying that at the time of

5. The *Stroble* case also sheds new light on the question of the voluntariness of confessions. The California Supreme Court assumed that Stroble's first confession was involuntary as it was coercive under the rule of Ashcraft v. Tennessee, 327 U.S. 274 (1946); but the court affirmed the conviction because of defendant's subsequent confessions made in court. The United States Supreme Court, which follows the rule that a conviction must be reversed if it contains any part of an involuntary confession, independently determined that Stroble's original confession was not coerced. Stroble v. California, 343 U.S. 181, 189-191 (1952).

6. The area of "trial by press" has been well covered. See note 1 *supra;* and also, Notes, *Controlling Press and Radio Influence of Trials,* 63 HARV. L. REV. 840 (1950), *When The Press Collides With Justice,* 34 J. AM. JUD. SOC'Y 46 (1951).

7. Stroble v. California, 343 U.S. 181, 193 (1952).

8. *Ibid.*

9. Craig v. Harney, 331 U.S. 367, 374 (1947).

10. Stroble v. California, 343 U.S. 181, 194 (1952).

11. *Ibid.*

12. MURPHY AND NEWCOMB, EXPERIMENTAL SOCIAL PSYCHOLOGY, 961 (Rev. Ed. 1937).

13. Stroble v. California, 343 U.S. 181, 195 (1952).

defendant's trial there was much exploitation of the widespread public excitement over sex-crimes in general and defendant's crime in particular.[14]

The above elements were considered by the majority in determining at what point, if at all, actual prejudice and bias is created by newspaper accounts. But there may be other factors that should be considered. For example, the emotional tone of the reports,[15] the extent of newspaper circulation,[16] the manner in which the press treated the stories, and the nature of the crime itself may all play important roles in determining whether there has been an unfair "trial by press." Even if all these factors are considered, in the absence of concrete proof of actual bias, the decision must be a matter of degree.

Action by the Prosecutor in Releasing Pre-Trial Information—In addition to the argument that Stroble was deprived of due process because the newspapers had aroused public passion, the defense also introduced a strong corollary argument.[17] This second argument was that it was the conviction-minded prosecutor who instigated the "crusade" against Stroble by issuing prejudicial statements of defendant's confession, guilt, and sanity. As to this contention the Court said that while it could deprecate such action by the prosecutor it could do no more.[18] The majority opinion indicates, then, that even if the prosecutor commences "trial by press" proceedings against an accused, he stands without recourse in the absence of proof of prejudice. The Court thus gives the public prosecutor a relatively free hand to arouse public passion to that point just short of the undefined "degree of prejudice" the Court considers; the mere fact that it was the prosecutor who instigates such action will not, by itself, deprive one of a fair trial.[19]

Mr. Justice Frankfurter, however, believes that such measures by a prosecutor or court officer should be condemned and prevented. In *Shepherd v. Florida*[20] he said:

> It is hard to imagine a more prejudicial influence then a press release by an officer of the court charged with defendants' custody stating that they had confessed. . . .[21]

In the *Stroble* case Mr. Justice Frankfurter further expanded this theory into the belief that any inflammatory pre-trial releases by a prosecutor automatically deprives the accused of a fair trial. The most important reason for this belief is that to allow such action by the prosecutor is tantamount to permitting the state itself, through the prosecutor who wields its power, to become a conscious participant in "trial by press."[22] A corollary to this argument is premised, by Justice Franfurter, on the phrase coined by Holmes and Hughes, J.J., that jurors are "extremely

14. *Id.* at 201.
15. Brief for Appellants, p. 13, Stroble v. California, 343 U.S. 181 (1952).
16. *Ibid.*
17. *Ibid.*
18. Stroble v. California, 343 U.S. 181, 193 (1952).
19. Shepherd v. Florida, 341 U.S. 50 (1950) (sheriff released to the press a confession by defendants but the alleged confession was never produced in court; Supreme Court reversed the conviction). It may be inferred from the Shepherd case that one thing a prosecutor may not do is to release a confession never admissible or introduced in court. However, this inference cannot be taken too strongly since the Shepherd case involved elements of mob violence and racial discrimination.
20. Shepherd v. Florida, 341 U.S. 50 (1950).
21. *Id.* at 52.
22. Stroble v. California, 343 U.S. 181, 201 (1952).

likely to be impregnated by the environing atmosphere."[23] Therefore every precaution must be observed to keep extraneous influences out of the court room.[24] The final corollary to the argument is based on the concept that since the primary role of the prosecutor is to see that justice be done,[25] there is no "fair play" where the prosecutor instigates "trial by press" proceedings and courts condone such action.[26]

Possible Solutions—The question as to what is necessary to prove that newspaper accounts have deprived an accused of a fair trial is difficult to answer. The *Stroble* case demonstrates that the ultimate decision must be one of degree. However, the opinion makes clear that the prosecutor may provoke public passion and prejudice through press releases so long as the community does not reach that "undefined degree of prejudice."

The latter proposition is undesirable. The concept of fair play demands that the defendant have a fair and impartial trial: that the judge and jury shall be unbiased, that the prosecutor shall protect the innocent as well as convict the guilty, that guilt should be proved through the processes of law without the aid of extraneous passion.

The problem lies in finding the most efficient means of preventing the prosecutor from releasing unwarranted, passion-arousing information to the press.

One approach has been suggested by the American Bar Association in a special committee report.[27] In regard to newspaper discussion of pending litigation the report said:

> Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial and otherwise prejudice the due administration of justice. Generally they are to be condemned.[28]

More specifically the report prescribed limits beyond which the prosecutor ought not to go in releasing information to the press:

> A statement . . . asking the public to suspend judgment upon the accused until the charges . . . can be fully investigated, would seem to be the *limit* beyond which counsel ought not to go.[29]

As a disciplinary measure to prevent miscarriages of justice the Bar Association further recommended that a breach of these rules should be punished by disbarment.[30]

Such would be an ideal solution; however there are no discovered cases of disbarment proceedings based on these rules.[31] Further, the difficulties of

23. Frank v. Mangum, 237 U.S. 309, 349 (1914).
24. Stroble v. California, 343 U.S. 181, 201 (1952).
25. The position of the prosecutor in a criminal case is defined in Berger v. United States, 295 U.S. 78, 88 (1935) as ". . . the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice be done . . . while he may strike hard blows, he is not at liberty to strike foul ones. . . ."
26. Mr. Justic Frankfurter found most repugnant the state court's affirmative acceptance of the prosecutor-instigated "trial by press" tactics as part of the traditional concept of the American way of the conduct of a trial. Stroble v. California, 343 U.S. 181, 201 (1952).
27. *Report of the Special Committee on Cooperation Between the Press, Radio and Bar, as to Publicity Interfering With Fair Trial of Judicial and Quasi-Judicial Proceedings.* 62 A.B.A. REP. 851 (1937).
28. *Id.* at 859.
29. *Id.* at 859-860 (italics supplied).
30. *Id.* at 859.
31. See 5 AM. JUR. Attorneys at Law, §§257-285.

imposing effective professional discipline encountered in cases where the conduct is more generally condemned than that in the *Stroble* case, affords little basis for hope that the problem will be effectively handled through threats of disbarment or similar disciplinary measures.[32]

Another possible solution would be for the courts to use the contempt power to punish officers of the court (including police officers, prosecutors, and private counsel) for official misconduct.[33] However, this power has not been effectively used in the past and, considering the practical pressures of administrating criminal law, it is doubtful that the power will be effectively used in the future.

A third possible solution would be to institute contempt proceedings against the press.[34] The Supreme Court has determined that there must be a clear and present danger before courts can apply the constructive contempt power in curbing abuses of freedom of press.[35] It is doubtful that the facts of the *Stroble* case would present a situation serious enough to prove a clear and present danger. Although Mr. Justice Frankfurter has indicated that a clear and present danger may be more readily found where there is a jury involved rather than a judge alone,[36] his views have not yet prevailed upon the Court in this area.

Another possible solution would be to obtain the voluntary cooperation of the press, radio, and television. Even if H. L. Mencken is not altogether correct in saying that "journalistic codes of ethics are all moonshine"[37] it nevertheless remains true that such voluntary cooperation would be very difficult to obtain. Many newspapers have thrived and apparently are continuing to thrive on sensationalism. If cooperation entails cutting circulation, there is little doubt that circulation will not be forfeited.

Finally, it has been suggested that, in order to obtain cooperation between the press and police officers, prosecutors or other high police officials might give pre-trial or pre-indictment information to the press on the strength of the press' promise not to release it until the appropriate time.[38] In this manner it is hoped that the press would not seek extra information of its own which might prove prejudicial to both the defendant and the prosecution. If there is to be such cooperation, the greater burden for it must rest on the prosecutors and police officials, who are often, as the *Stroble* case indicates, reluctant to cooperate to this extent.

Assuming that these remedies fail, as is most often the case, and the inflammatory material becomes newsprint, what remedies are open to the accused? Apart from a new trial, the defendant has two remedies; both are inadequate. First, the defendant may commence a civil suit against the prosecutor. There are several difficulties here: (1) there is no common law

32. See note 43 A.L.R. 54 (1924); see note 94 L. Ed. 130 (1949); see also note 31 *supra*.

33. See, Griffin v. United States, 295 Fed. 437 (3d Cir. 1924); *Ex Parte* Davis, 112 Fed. 139 (C.C.D.Fla. 1901).

34. See note 1 *supra*.

35. *Ibid.*

36. In the opinion of Mr. Justice Frankfurter the Supreme Court has not yet decided on the limit of protection afforded publications which have "injuriously affected" trial by jury in criminal cases. He believes that since the *Bridges, Pennekamp,* and *Craig* cases, cited note 1 *supra,* did not involve juries, they are not controlling. Baltimore Radio Show v. Maryland, 70 Sup. Ct. 252, 256 (1950).

37. Quoted in 63 HARV. L. REV. 840, 843 (1950).

38. This suggestion was made by Mr. Lane, editor of the Chicago Daily News, in a speech at Northwestern University School of Law for the Seventh Annual Short Course for Prosecuting Attorneys August 6, 1952.

action for the creation of an unfair trial;[39] (2) in general, prosecutors and quasi-judicial officers enjoy immunity from civil liability.[40]

The other remedy for the accused is to seek a change of venue by claiming a prejudiced community.[41] However, if the accused's original venue was prejudiced by newspaper, radio, and television, it is quite possible, especially in a celebrated case, that these mass media of communication will also prejudice the surrounding areas.[42]

Since it appears that the suggested methods of preventing the prosecutor from making press releases have failed, and that once the releases have been published it is difficult to determine when the press has brought the public to that "undefined degree of prejudice" sufficient to deprive one of a fair trial, then perhaps the only effective way to guarantee an accused his right to a fair and impartial trial is to declare any inflammatory releases a denial of due process. This is the approach taken by Mr. Justice Frankfurter in his dissent.

A similar development appears to have taken place in the recent cases of the court relating to coerced confessions.[43] These cases focus less on the question of whether the particular defendant was actually coerced into confessing and more on the question of whether the prosecution and police were guilty of conduct which, by and large, tends toward coercion and prejudice.

Pre-trial inflammatory information released by the prosecutor is not a part of the established processes of law by which guilt is proven. If such actions are to be condemned and prevented then perhaps Mr. Justice Frankfurter's answer, denial of due process, is the only feasible solution.

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39. See PROSSER, TORTS 777-859 (1941). It should be pointed out, however, that there may be a statutory tort action for deprivation of a fair trial.

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state . . . ,subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ." 17 Stat. 13 (1871), 8 U.S.C. §43 (1946).

It is admitted that a right to a fair trial is protected by the due process clause of the Fourteenth Amendment. Chambers v. Florida, 309 U.S. 227, 238 (1939); Moore v. Dempsey, 261 U.S. 86, 91 (1922). Therefore, although there are no discovered cases on the point, the statutory remedy is apparently available. However, to be successful in such an action one must first overcome the difficulty of proving that the community had reached that "undefined degree of prejudice."

40. Downey v. Allen, 36 Cal. App.2d 269, 97 P.2d 515 (1940); Andersen v. Bishop, 304 Mass. 396, 23 N.E.2d 1003 (1939). It is possible, however, to obtain a money judgment because the general immunity from civil liability is limited to proceedings in court and not to proceedings which, while official and public, are not in their nature judicial. Chappell v. Duney, 16 N.Y.S.2d 477, 173 Misc. 438 (1940). But even if a judgment is obtained a defendant can get little satisfaction if he has been executed.

41. Under one view the defendant must affirmatively show that there is such a feeling of prejudice prevailing as will be reasonably certain to prevent a fair and impartial trial. Buck v. Reigard, 39 Ohio O.P.S. 429, 85 N.E.2d 302 (1949); Downs v. State, 111 Md. 241, 73 Atl. 893 (1909). Under a second view the defendant must raise only a reasonable apprehension that he cannot obtain a fair trial. People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914).

42. For example, in the *Stroble* case the average daily newspaper circulation was over 1,200,000. The effect and coverage of radio and television could only be speculated upon. Brief for Appellants, p. 16, Stroble v. California, 343 U.S. 181 (1952).

43. Upshaw v. United States, 335 U.S. 410 (1948); Ashcraft v. Tennessee, 327 U.S. 274 (1946); McNabb v. United States, 318 U.S. 332 (1943); See also ALLEN, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1, 25-30 (1950).