Washington and Lee Law Review

Volume 7 | Issue 1 Article 5

Spring 3-1-1950

Propriety of Law Review Comment on Pending Cases

NOTE

PROPRIETY OF LAW REVIEW COMMENT ON PENDING CASES

A problem which has been of perennial concern to editors of law reviews throughout the nation is the determination of a proper policy in regard to publication of comment on a decision by an intermediate appellate court while there is still a possibility that the case may be appealed to a higher court.[1] This problem, upon closer analysis, evolves into two separate questions: first, the legality of such comments, and, second, the propriety of a law review publishing the comment even if it is recognized as a legally acceptable procedure.

Concerning the legality of a comment by a law review on a decision which is still subject to review by a higher court, there is a total absence of direct authority. This is probably due to the fact that law review editors have sought to maintain friendly relations with the courts and have refrained from any practices which might be considered illegal.[2] The Stanford Law Review, for example, recently withheld publication of a case comment in deference to a request from the California Supreme Court, although this action was in direct opposition to that law review's stated aim "to comment on cases before they reach a court of last resort."[3]

Because of this lack of authority any investigation of the legal aspects of the question must be made by drawing an analogy to the law relating to the publication of information concerning pending cases by newspapers, magazines, pamphlets, letters, and radio stations.

The power of a court to punish persons who publish matter tending

---

[1]The First National Conference of Law Review Editors, after considering a report of the study made by its Committee on the Problem of Commenting on Pending cases, adopted the following resolution: "BE IT RESOLVED, that it is the sentiment of the First National Conference of Law Review Editors that such comment is within the proper bounds of academic freedom when it is written by a disinterested party in a fair manner as a result of thorough and impartial research." See Report on First National Conference of Law Review Editors (1949) 44 Ill. L. Rev. 676, 683. The question was also discussed by the Southern Law Review Conference in its March, 1949 meeting at the University of Mississippi. Transcript of Proceedings, Third Annual Southern Law Review Conference 23-27 (1949).

[2]However, this policy has not deterred most reviews from publishing comments on appellate cases. A perusal of the last complete volumes of seven leading reviews published by schools in as many different states shows that all seven carried one or more comments on decisions of intermediate courts, both state and federal.

[3]President's Page (1949) 1 Stanford Law Review x.

to influence a decision by the court was early recognized as an inherent contempt power by an American court[4] which adopted the view expressed by Lord Hardwicke in the *St. James Evening Post* case[5] that "There cannot be anything of greater consequence than to keep the streams of justice clear and pure."[6] This principle that a court could summarily punish contempt by publication was generally accepted[7] until 1830 when the notorious impeachment proceedings against Judge Peck for misuse of his contempt powers made it the subject of heated debates.[8] Although Judge Peck was acquitted, Congress immediately set to work to pass a law which would manifest its disapproval of this broad extension by the courts of their contempt powers. This Act limited the powers of the courts to punish for contempt to cases of "misbehaviour of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice...."[9] Construing this act in *Ex parte Robinson*[10] the United States Supreme Court declared that "it limits the power of these [Circuit and District] courts" so that the power of "punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."[11]

---

[4]Respublica v. Oswald, 1 Dallas 319 (Pa. 1788).

[5]Roach v. Garvan, 2 Atkyns 469, 26 Eng. Rep. 683 (1742). Defendants had published newspaper comments in regard to a cause awaiting decision by the court. The comments were clearly libelous and the court, in making them the basis for a conviction, declared that, in addition to the usual forms of contempt, "there may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard." 2 Atkyns 469, 471, 26 Eng. Rep. 683, 685 (1742).

[6]2 Atkyns 469, 471, 26 Eng. Rep. 683, 685 (1742).

[7]Ex parte Kearney, 7 Wheat. 38 (U. S. 1822); United States v. Duane, Fed. Cas. 14,997 (C. C. A. Pa. 1801); People ex rel. Lewis v. Few, et ux., 2 Johns. 290 (N. Y. 1807); People v. Freer, 1 Gaines 485 (N. Y. 1803).

[8]The decision of Judge Peck, a federal district judge, in a highly controversial land grant case was published in a newspaper. A few days later Lawless, an attorney for one of the unsuccessful litigants, pointed out in a newspaper advertisement errors made by Judge Peck in rendering this decision. The judge had Lawless brought before him and, without the aid of a jury, declared him guilty of contempt. Lawless protested such procedure, but rather than appeal his conviction, used his political influence to have impeachment charges filed against Judge Peck. See: Stansbury, Trial of James Peck, passim; Thomas, Problems of Contempt of Court (1934) 25-27; Nelles and King, Contempt by Publication (1928) 28 Col. L. Rev. 401, 423-430; Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers (1924) 37 Harv. L. Rev. 1010, 1024-1027.

[9]36 Stat. 1163 (1831).

[10]19 Wall. 505 (U. S. 1873).

[11]19 Wall. 505, 511 (U. S. 1873).

In *Toledo Newspaper Co. v. United States*,[12] however, the Supreme Court upheld a district court's conviction of a newspaper for contempt. The acts on which the conviction were based were the publication of editorials and cartoons which were obviously intended to influence the court's decision in a pending case. In asserting its power to declare these publications contemptuous, the Court made the surprising discovery that the Act of 1831 "conferred no power not already granted and imposed no limitations not already existing."[13] Thus, the statute was stripped of its vitality and became a dead letter which was finally removed from the statute books in June, 1948.[14]

With the Act of 1831 relegated to oblivion, the Court established a new rule in *Nye v. United States*[15] by adopting the "clear and present danger" test as set forth in *Schenck v. United States*.[16] Applying this test to the case of allegedly contemptuous newspaper editorials commenting on a pending case, the Court refused to uphold the conviction, on the ground that "To regard it [the editorial] . . . as in itself of substantial influence upon the course of justice would be to impute a lack of firmness, wisdom, or honor, which we cannot accept as a major premise."[17] Even in a case where there were direct threats and attempts to influence the decision of a trial judge,[18] the Court failed to find a "clear and present danger," and declared that "The danger must not be remote or even probable; it must immediately imperil."[19]

Since the freedom of speech guaranteed in the First Amendment is now considered a part of the "liberty" which is protected against state action by the Fourteenth Amendment,[20] this test set up by the United

[12]247 U. S. 402, 38 S. Ct. 560, 62 L. ed. 1186 (1918).

[13]247 U. S. 402, 418, 38 S. Ct. 560, 564, 62 L. ed. 1186, 1193 (1918). This discovery was the result of a questionable analogy. After declaring that it was "essential to recall the situation existing at the time of the Act of 1831 to elucidate its provisions," the Supreme Court disregarded the impeachment proceedings against Judge Peck which had been the impelling force behind Congress' action. Instead, the Court based its decision on the reasoning in the then recent case of Marshall v. Gordon, 243 U. S. 521, 37 S. Ct. 448, 61 L. ed. 881 (1917), which dealt with the legislature's power to punish summarily for contempt. Finding that Congress had an implied power to punish contempt so as to prevent a recurrence of an act which interfered with its normal function, the Court declared that such a power must necessarily be impliedly given to the judiciary, even under the Act.

[14]Act June 25, 1948, c. 646 § 39, 62 Stat. 992.

[15]313 U. S. 33, 61 S. Ct. 810, 85 L. ed. 1172 (1941).

[16]249 U. S. 47, 39 S. Ct. 247, 63 L. ed. 470 (1919).

[17]Bridges v. California, 314 U. S. 252, 273, 62 S. Ct. 190, 199, 86 L. ed. 192, 209, 159 A. L. R. 1346, 1362 (1941).

[18]Craig v. Harney, 331 U. S. 367, 67 S. Ct. 1249, 91 L. ed. 1546 (1947).

[19]331 U. S. 367, 376, 67 S. Ct. 1249, 1255, 91 L. ed. 1546, 1552 (1947).

[20]Gitlow v. People of State of New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925).

States Supreme Court must also be binding on the state courts. A typical example of the manner in which the problem is handled by state courts is found in the recent case of *Baltimore Radio Show, Inc., v. State*[21] where defendant had been convicted for violation of the rules of the Supreme Bench of Baltimore, which made punishable as contempt the issuance by any person having official connection with a criminal case of any matter bearing upon the issue to be tried or publication of any matter obtained as a result of a violation of this rule. In holding this rule to be invalid, Maryland's Court of Appeals found no fault with the "high motives of the Maryland Bench and Bar in attempting to keep the stream of justice undefiled by sensationalism,"[22] but simply held that the rule was too broad under the "clear and present danger" doctrine prescribed by the United States Supreme Court.

Drawing an analogy with these cases, it would seem that the legality of a law review comment on a case which was subject to further appeal may safely be assumed. Indeed, there are sound reasons why the law review comment should be less subject to censure by the courts than would be the comments of other publications. First is the fact that a law review published by a recognized law school would be more likely to offer its comments from the viewpoint of a bona fide neutral than would a newspaper which might be a puppet of private interest and might have as its primary purpose the increasing of subscriptions rather than seeing justice administered.

While it is true that, in a few instances, law reviews have published comments by persons having an active interest in a case, this would seem to be the rare exception rather than the rule. The recent case of *Kingsland v. Dorsey*[23] sets a precedent for handling these cases individually rather than by a blanket rule prohibiting all anticipatory comments. In the *Kingsland* case the United States Supreme Court upheld an order of the Commissioner of Patents disbarring an attorney who had presented to the Patent Office as testimony of a "reluctant witness," a trade journal article which his client had had written and published for the very purpose of influencing that office. The Court had already found that the presentation of this article amounted to a fraud on the Patent Office and was sufficient ground for setting aside a twelve-year-old judgment which had relied on the article in sustaining the patent.[24]

[21]67 A. (2d) 497 (Md. 1949).
[22]67 A. (2d) 497, 511 (Md. 1949).
[23]70 S. Ct. 123, 94 L. ed. 107 (1949).
[24]Hazel-Atlas Glass Company v. Hartford-Empire Company, 322 U. S. 238, 64 S. Ct. 997, 88 L. ed. 1250 (1944).

Although Justices Jackson and Frankfurter dissented in the *Kingsland* case,[25] their objection was made on the basis of the facts in that particular case and not to the power of the Court to take such action against an offender whose guilt was certain. Thus, there would be an unquestioned power in the courts to punish the editors of the law review along with the author of the comment, if the editors had published his work with knowledge of the facts. Here, however, the illegality would be in the purpose and not in the means used to carry out that purpose.

A second reason for distinguishing the law review from other publications in considering the right to comment on pending cases lies in the type of case discussed. The newspaper comment is usually in regard to a case in the trial stage where the controlling issue is often a question of fact which is much more likely to be influenced by emotion and, therefore, by outside pressure than is a question of law which is usually the subject of a law review comment. In contrast, the law review comment is on a case which has already been decided by an intermediate appellate court, and the discussion is analytical rather than emotional in nature.

Finally the law review situation is distinguishable in the type of readers approached. The newspaper is circulated among the general public which has often demonstrated a tendency to believe the printed word without question. But the law review has a limited circulation among a profession whose members earn their livelihood by questioning the statements of others and, presumably, would not be in danger of becoming pawns in the hand of an unscrupulous editor.

Accepting as fact the *legality* of law review discussion on pending decisions, there remains the perplexing question as to the *propriety* of publishing such comments. It would probably be safe to assume that a law review would follow the example set by Stanford[26] and refrain from comment on a case if requested to do so by the court before which the case was pending. In the usual situation, however, the courts have not been so explicit in the statements of their attitudes toward the matter, and so the editors of law reviews have been forced to resolve the question on the basis of their own opinions, which are uncertain because of the conflict of interests involved. The general practice in law review writing, on the one hand, requires that a case should be made the subject of comment as soon as possible after the decision has been published. Opposed to this is the policy of the law reviews to main-

[25]70 S. Ct. 123, 124, 94 L. ed. 107, 109 (1949).
[26]See note 3, supra.

tain amicable relations with the courts and to hold themselves above reproach in matters of ethics.

In an attempt to ascertain the feelings of the judiciary on this problem and to present facts which might aid law review publishers in their consideration of it, the editors of the Washington and Lee Law Review requested an unofficial opinion from the judges of the highest court of each state. The question submitted was: "In your opinion, is it permissible for law reviews, published under the auspices of recognized American Law Schools, to print comments on a lower court decision while further appeal of the case is still possible, provided the comment is in the form of an academic discussion of a general legal problem, and not written with a purpose of influencing the result of any specific litigation?"

Statistically, the survey showed a remarkably even split of opinion, with fifteen courts answering in the affirmative and fourteen giving a negative reply.[27] A wide divergence of opinion as to the importance of the problem was indicated by the answers which ranged in temper from a simple yes or no to strong and even vehement arguments for or against publication of such comments.

A review of these arguments should prove enlightening and helpful to all concerned. This is especially true since several courts replied that they had never seriously considered the problem and would like to hear arguments from both sides before taking a definite stand on the matter.

Considering first the answers from fifteen state courts which had no objection to a law review comment on a pending case, it should be noted that eight of them gave no reason to support their stand on the matter. Whether this lack of expression was due to inadequate time for considering the problem, or to a feeling that the answer was so obvious as to need no statement of reasons must be left an open question. The reasons offered by the remaining seven were based primarily on the idea that the comment would have no influence on the court's decision

[27]States answering in the affirmative were: Arizona, Connecticut, Florida, Kentucky, Maine, Michigan, Minnesota, Mississippi, New York, Pennsylvania, South Carolina, Texas, Utah, Vermont, and one other state which requested that its name be withheld. States answering in the negative were: Georgia, Kansas, Maryland, Nevada, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, Wisconsin, Wyoming, and one other state which requested that its name be withheld. Though no reply was received from the California court, it should probably be classed with this group in view of its action in regard to the Stanford Law Review. See note 3, supra. Illinois, Massachusetts, and Washington replied to the letter of inquiry but did not give a definite answer to the question. Sixteen courts made no response.

or that no harm would be done even if the comment did play a part in the decision. This argument was clearly set forth by Chief Justice George W. Maxey of the Supreme Court of Pennsylvania:

> "The judge reads everything he can find which is applicable to the subject, but if he is a worthy judge his conclusion is his own, not someone else's.
>
> "... Are we to suppose that a judge is so weakminded that he would be influenced to a *wrong* decision by something he might have read in a law review on the case? If on the other hand a Law Review article should influence him to a correct decision, so much the better...."

South Carolina's Chief Justice D. Gordon Baker suggests that such a comment would be an advantage since, "The average court—well-meaning and honest—needs all of the enlightenment it can get...."

Another reason advanced by courts favoring these comments was that there is little likelihood of the comment being read by the judges of the court reviewing the case. This is true, first, because in many cases the comment, although written while the appeal is pending, is not actually distributed to subscribers until after there has been a final determination of the case. Secondly, the press of business makes it impossible for the judges of many courts to become regular readers of the law reviews.

A unique approach to the controversy was suggested by the Arizona Supreme Court. Chief Jutsice Arthur T. LaPrade argued that the decisions of an intermediate court became public property when they are published, and therefore "there is no reason in propriety or legal ethics why they should not be commented upon and discussed."

Turning to those courts giving a negative answer to the inquiry, the arguments are found to indicate a deeper and more personal conviction on the subject. Of the fourteen courts which object to comment on a pending case not one failed to give some reason for its objection. Although these reasons were expressed with varying degrees of feeling, the underlying motives generally seemed to be the fear that the law review comment would prevent the court before whom the case was pending from maintaining its desired status of absolute neutrality. The philosophy of this argument as stated by Chief Justice Hall S. Lusk of the Supreme Court of Oregon is that "courts should, to the greatest extent possible, be governed in their decisions by the record in the case, the oral arguments of counsel, and the briefs, and should be subjected to the least possible amount of influence from the outside."

Other courts pointed out that the comment might discuss issues

which had not been tried in the trial court or were not being tried on appeal, and would thus become a sort of brief amicus curiae, but one which the parties themselves would not be in a position to give attention to or to answer. Chief Justice Edward W. Hudgins of Virginia's Supreme Court of Appeals points out that "members of an appellate court desire all the information and light that can be furnished on issues involved, but not an argument which the opposing party has not had opportunity to meet." "Publication of such article," he continues, "violates our conception of fair play."

At least two courts, while asserting their firm belief that courts with proper judicial integrity were immune to outside influences, were, nevertheless, opposed to law review comment on pending decisions on the ground that "those unfamiliar with the court might easily believe that a decision which happens to follow theories advanced by a law review were brought about by the influence of such review."[28] Chief Justice Charles Lee Horsey of the Supreme Court of Nevada suggests that "it is better to be, like Caesar's wife, above suspicion."

Another argument, which, although advanced by only two courts here, was considered worthy of note by some of those courts replying in the affirmative, is the possibility that the privilege of comment might be abused. Chief Judge Ogle Marbury of Maryland, after rejecting as "nonsensical" the assumption that judges are a superior race of men immune to ordinary influences, declared that "we may assume that the editors of law reviews are also a race of superior men, and would not consciously do anything to influence the other superior men sitting on the judge's bench, but this assumption is no more correct than the other."

A practical objection which should be considered by the law review editor before publishing a comment on a pending decision was suggested by Presiding Judge St. Clair Smith of the Supreme Court of South Dakota. Judge Smith personally found nothing improper in such comment but the emphatic dissent of the other judges of the court led him "to doubt whether the good to be accomplished by such comments will justify the storm of criticism such comments may engender." It should be noted, however, that the prevailing practice of publishing these comments[29] has not, thus far, given rise to any storms of noticeable degree.

A very pertinent question asked by several of the courts opposing comments on pending cases was: "Why is it necessary to comment on

[28]Letter of Chief Justice W. H. Duckworth of the Supreme Court of Georgia.
[29]See note 2, supra.

a case before it has been finally decided?" From the point of view of the law review editor, at least two answers to this question are readily available.

First, there would seem to be no practical way for a law review editor to know whether a case decided by an intermediate court was going to be appealed to a higher court. Even after a decision by the highest court in the state there would be, in many cases, a possibility of a rehearing or an appeal to the Supreme Court of the United States, and here again the law review editor would have no way of knowing whether these rights to appeal would be exercised. While it might be suggested that the law review could wait until the statutory time for appeal had expired, this would not be a practical solution for there would still be the possibility that the appeal had been filed within the required time and was waiting its turn on a crowded docket.[30]

Secondly, one of the fundamental functions of a law review—i.e., to publish timely discussions of current legal problems—would be impaired if the law review is forced to wait until a final decision has been given on a problem before commenting upon it. After a precedent has been set by the highest court having power to consider a question, a law review comment on the problem may lose interest to practicing attorneys. Mr. George E. Farrand, of the Los Angeles bar, states the position of the practicing attorney when he points out that he "takes, reads, and studies exactly a dozen law reviews" so that he may advise clients "on what the law is to be, not necessarily on what it was."[31] Mr. Farrand's argument continues: "Clients of our office market annually a quarter billion dollars worth of products, but much or little, we want to know what the trends are, what the lower courts are deciding, and what our brethren at the bar, on the faculties, and in the law schools think about it."

The most common objection to such comments was, as previously stated, that they would prevent the court from maintaining its desired status of absolute neutrality. At first glance this seems to be a forceful argument, but a closer analysis will reveal its weakness. Under the old common law system where a law suit was, in many instances, a battle of wits between the attorneys, there would obviously be an element of unfairness to the participants in allowing outsiders to take part

[30]Mr. George E. Farrand in an editorial in The Los Angeles Daily Journal for September 26, 1949 points out that in California, for example, "a case involving matters of public policy and constitutional interpretation may be pending as much as five years."

[31]Editorial in The Los Angeles Daily Mirror, September 26, 1949.

in a case. But if the courts are established for the benefit of the citizens and not as a combat arena for lawyers, and if their function is accepted to be to administer justice and not merely to referee a debating match, there should be no objection to a court's receiving aid from any source whatever so long as the final result is a correct one. If a law review comment brings to the attention of the appellate court a point which had been overlooked by the attorneys, then that comment has performed a creditable service and is worthy of praise rather than censure. And if some members of the general public should suspect that the decision of a court was not solely the result of the unassisted thinking of the judges, their objection should have little weight for the court was doing no more or less than properly performing its function of finding the law and then applying it. To find fault with this process would be to revert to the long abandoned theory that the law is a "brooding omnipresence in the sky" which flows by divine guidance through the select group of men sitting on the bench.

There remains, then, only one serious problem which should be considered by a law review editor before publishing a comment on a pending case: Is the good to be accomplished by such publication sufficient to overcome the ill feelings which it may arouse? This question will probably receive a negative answer from some sources, but the value of law review publications is receiving increasing recognition from the legal profession,[32] and it is to be hoped that a more liberal attitude on the part of the courts will soon allow law reviews to enjoy a freedom of the press similar to that of other publications.

WILLIAM J. LEDBETTER

[32]In an address made to the Southeastern Regional Conference of Law Teachers of the Association of American Law Schools in September, 1948, Professor George John Miller, of the University of Florida, points out that "by giving the bar something direct, something they can get their teeth into, something to save them time, and by giving the judges some background that a busy court has no opportunity to acquire, even though they obviously have the brain power, if they could only find the time, we can reduce radically the width of that gap between the practitioner and the teacher. And it seems to me that if we accomplish that, the Law Review justifies itself as an essential part of a law school." Proceedings of Southeastern Regional Conference of Law Teachers of the Association of American Law Schools (1948) 3 Miami Law Quarterly 73, 185.