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The Jailing of the First Amendment

In a rare departure from custom, The Chronicle herewith reprints a contemporary's comments on an issue of moment and public concern—an editorial published in the Los Angeles Times of Wednesday that deals with a disturbing series of court attacks upon freedom of the press.

William Farr went to jail Monday. He was imprisoned by order of Superior Judge Charles H. Older of Los Angeles, who convicted the newspaper reporter of contempt of court for refusing to identify the source of a news story about the Charles Manson murder trial.

Farr's imprisonment has less connection with his refusal to betray the confidence of his news source than with two other elements: first, an ugly streak of authoritarianism that is pervading some of the courts and, second, the false free press-fair trial issue that masks an attack on First Amendment protections of press and speech.

The Sixth Amendment, which guarantees a fair and public trial, and the First Amendment are not antithetical. They are allies in freedom, but the First Amendment is the basis of all our liberties. Without a free press and free speech—which mean freedom of thought and, more important, the right to express thought—the administration of justice becomes shrouded in secrecy, which breeds the germs of injustice. The sunlight of disclosure is the best and only disinfectant. All history, and events in present-day totalitarian regimes, bear witness to this truth.

Americans, with our strong tradition of liberty dating from the birth of this nation, can be counted on to repel frontal assaults on freedom. Oblique attacks, advanced in the name of freedom itself, are more difficult to recognize and harder to resist.

The current assaults on press and speech come dressed in noble robes. Restrictions on information about court proceedings have been imposed in the name of a cherished right—a fair trial. Thus, three years ago, the American Bar Assn. suggested compromising the First Amendment in the name of justice. The ABA recommended stringent controls on the release of information in criminal trials, not only by prosecution and defense attorneys and judicial employes but by law enforcement officers as well. In doing so, the ABA gave assurance that its proposals were not aimed at newsmen, but that assurance—since proved false—made the proposal no less repugnant.

The impulse toward censorship by those in authority is always strong. The courts have recognized this by repeatedly rejecting restrictions attempted by other government agencies, but some judges—not all by any means—have now decided that censorship is the basis of a fair trial. They welcomed the ABA proposals that shielded some stages of judicial proceedings from public scrutiny. The flow of restrictive orders increased, and judges often went far beyond the ABA recommendations:

—A Monterey County judge not only restricted the release of information to the media but removed the press and public from the courtroom while the censorship order was argued. Furthermore, he forbade public complaints about the order. A New York justice barred the public from a criminal trial.

—The secret proceedings ordered in a court in Ventura County were so bizarre that an appellate court commented: "In the present case, it is startling to see the evils of secret proceedings so proliferating in seven short weeks that the court could reach the astonishing result of committing a citizen to jail in secret proceedings, could contemplate inquisitorial proceedings against the newspaper reporter for reporting this commitment, and could adopt the position that the district attorney, the chief law enforcement officer in the county, was prohibited on pain of contempt from advising the public that someone had been sent secretly to jail . . ."

—A Superior Court judge in Los Angeles County attempted last August to enforce direct censorship. He ordered the media (an order that was appealed) not to print or broadcast anything relating to a murder case except proceedings in court, over which, of course, he exercises direct control.

—A Superior Court judge in Los Angeles prohibited any comment on a pending case by the county, its sheriff and district attorney, the city of Los Angeles, its chief of police and Board of Police Commissioners. His assertion of power was so broad that a writer on legal affairs stated, "Thus a single judge in a single community felt it appropriate to . . . assume the role of the Legislature, the Supreme Court, the executive head of local government, the promulgator of rules of professional conduct and, most importantly, a censor of speech."

—Another judge, in a flight of imagination, named the district attorney, the sheriff, the chief of police and the police commissioners of Los Angeles as "Ministers of Justice," and declared, as such, that their "speech is peculiarly subject to judicial control."

—A Baton Rouge, La., judge ordered newspapers not to publish news about the trial of a civil rights case.

—An Arkansas judge ordered a newspaper not to publish the news on the verdict of a rape trial.

Such decisions are not aberrations by the few judges; a pattern is emerging—a pattern that reflects a no-more-extreme view of judicial power than the State Court of Appeal did in the Farr case. That three-member court waived aside a California law that protects the confidentiality of news sources and said it regarded such laws as "an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers." This was a naked claim to power that mocked the Constitution it invoked.

We have reached this juncture step by step:

First, the assertion, supported by the ABA, that the courts have the right to gag attorneys.

Second, the extension of this power to law enforcement officers and to elected executives of government.

Then, an attempt at direct censorship of the media by telling them what they can and cannot print or broadcast.

And, finally, the assertion that the courts are not a coordinate branch of government, but supreme and answerable only to themselves.

All this on the mere presumption, barren of evidence, that pretrial news is always and without question prejudicial to a fair trial.

Judge Harold R. Medina, U.S. senior circuit judge for the 2nd Circuit, foresaw these consequences several years ago. A report prepared under his supervision for the Bar of the City of New York said, "The prospect . . . of judges of various criminal courts of high and low degree sitting as petty tyrants, handing down sentences of fine and imprisonment for contempt of court against lawyers, policemen, reporters and editors is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what a price . . . With respect to the police and the press in the entire pretrial period, we think it unwise and detrimental to the public interest to give such contempt powers to the courts and the judges."

Judicial censorship that smothers the public's right to know how law enforcement agencies and the courts are functioning will not assure fair trials, but will guarantee the opposite. Censorship will lead to secret investigations, secret arrests and secret trials.

Today, as a portent of things to come, William Farr is in jail. His cellmate is the First Amendment. Judge Charles H. Older of the Superior Court of Los Angeles put them both there.