In the

Supreme Court of the United States

ROBERT K. SMITH, ETC., ET AL.,

Petitioners,

v.

DAILY MAIL PUBLISHING CO., ET AL.,

Respondents.

No. 78-482

Washington, D. C.
March 20, 1979

Pages 1 thru 38

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v.	No. 78-482
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Washington, D. C.

Tuesday, March 20, 1979

The above-entitled matter came on for argument at 10:09 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CLETUS D. HANLEY, ESQ., Special Assistant Attorney General of West Virginia, Kanawha County Courthouse, Charleston, West Virginia 25301; on behalf of the Petitioners

FLOYD ABRAMS, ESQ., Cahill, Goron & Reindel, 80 Pine Street, New York, New York 10005; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 482, Robert K. Smith v. Daily Mail Publishing Company.

Mr. Hanley, you may proceed whenever you are ready.

ORAL ARGUMENT OF CLETUS B. HANLEY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HANLEY: Mr. Chief Justice, and may it please the Court:

This is a case in which on February 9, 1978, a shooting occurred in the City of St. Albans, West Virginia. That is about twelve miles from Charleston, the capital city, and it is in a metropolitan area there in West Virginia, if you can call it that. It has about 250,000 people. A 14-year-old boy was apprehended and taken into custody.

Later on that day, a juvenile hearing was held and he was declared a delinquent under our West Virginia law. It is against the statute of West Virginia for a newspaper to print the name of a juvenile who is under arrest or pending a hearing.

The next day, on February 10th, the Charleston Gazette, a statewide newspaper in West Virginia, published the name of the juvenile on the front page, along with a picture and also in an editorial made comment that they were deliberately doing this. Then the Daily Mail, an afternoon

newspaper, published the name that afternoon. Both of these newspapers, along with the editors and reporters, were indicted by a Kanawha County grand jury later on in the month. Before trial could be had, the newspapers sought prohibitions in the Supreme Court of West Virginia and a rule was issued on both newspapers, separate rules were issued on both newspapers putting the case before our Supreme Court for argument.

The cases were then consolidated for argument, and I want to point out to the Court mainly today that these cases, the fact situations are different. In the Gazette case, they allege in their petition that it was already common knowledge when they printed this juvenile's name. In the answer of the state, it was denied that this was so. The Gazette Newspaper then demurred to the answer, so for all practical purposes they were then saying for the purpose of this case it was not common knowledge and the information was not obtained from any other source, from a hearing or from an assistant prosecuting attorney -- which I noted in the brief, it now says that it is the prosecuting attorney.

So the bare issue then is whether a newspaper may print the name of a juvenile when they sought the information and obtained it on their own.

QUESTION: The statute doesn't make any distinction between a case where it is common knowledge and one where it is not, does it?

MR. HANLEY: No, Your Honor. However --

QUESTION: It is a criminal statute, isn't it?

MR. HANLEY: Yes, sir. However, I wanted to point that out because of the past case law of this Court indicating where the information is obtained by court records, as in the Cox case, where the information is obtained at a public hearing, and in the Nebraska case, or when the information is obtained in a closed hearing, where the court allowed the press in, that would make a big distinction.

So what I am saying to the Court, this is a case now of first impression and it is not a case of fitting in with Cox or Nebraska or the Oklahoma case. If the case fits into anything, it fits in with the Virgin Island case. Of course, that is our contention. This is the reasoning in the Virgin Island case and it should be adopted by this Court.

QUESTION: General Hanley, just so I am sure I understand your point, is it your view that -- there is no claim, is there, that the newspaper violated any law in obtaining the information?

MR. HANLEY: No, Your Honor, absolutely not, no. We are not contending that they violated any law in obtaining it. All we are saying is they printed it. We are saying, what I was trying to say is that the information was not obtained in a court hearing or court record as in the Cox, Nebraska, or

Oklahoma cases.

QUESTION: So it was obtained?

MR. HANLEY: Yes, it was, by the -- let's say their own investigation and so forth.

QUESTION: The statute doesn't care how you got it?

MR. HANLEY: No, sir, the statute doesn't --

QUESTION: So why is that material if it isn't in the statute?

MR. HANLEY: Because this Court has held in the past, we say it is material.

QUESTION: Well, was it in a case that the other side was attacking the statute like this one?

MR. HANLEY: No, sir. The Court in those cases --

QUESTION: It seems to me the only thing we need in this case is that the newspaper published the name of a juvenile.

MR. HANLEY: Yes, sir.

QUESTION: What else do we need --

MR. HANLEY: You don't need anything else.

QUESTION: -- to decide on the constitutionality of the statute?

MR. HANLEY: I am saying, Your Honor, that you don't need anything --

QUESTION: We don't need any more facts, do we?

MR. HANLEY: No, sir.

QUESTION: So what we need now is law.

MR. HANLEY: Yes, sir.

QUESTION: Which you are getting read to get to?

MR. HANLEY: Hopefully.

QUESTION: Well, that is when I quit.

MR. HANLEY: We are asking this Court to adopt the reasoning in the Virgin Islands case where they have balanced the right of a juvenile as against the First Amendment rights of a newspaper and have upheld the rights of a juvenile. When we speak of freedom of the press, I wonder what are we saying, what are we speaking of?

I say it is the right of an editor that owns the newspaper or the owner of a newspaper to print almost anything he wants to, and the only recourse that anyone has is if it is a private person is by a libel suit, and since the Sullivan case of New York Times v. Sullivan, it is pretty hard. This Court as a checking balance as against the legislative branch of the government, as against the executive branch of government, but how far is this Court going to go to protect the rights of a newspaper in the First Amendment.

We say that it is going too far to say that the country must be in dire need or war or something of that kind, and we saying that this Cox case and these later cases in this Court indicate that they don't intend to go that far.

QUESTION: Mr. Hanley, let me -- help me out a

little bit. What are the state interests that are being served?

MR. HANLEY: The state interests that are being served are to protect juveniles.

QUESTION: Then my next question is why are radio and television excluded from the coverage of your statute?

MR. HANLEY: Your Honor, it is excluded because that is regulated by the Federal Government. The FCC regulates them, and I can point to an analogy of that. In our state, if a person files and runs for office and an advertisement is placed in a newspaper, it is against the law not to say who paid for the ad, but it doesn't say anything about radio or television. However, the FCC controls that and will not let them place an ad without telling who paid for it.

QUESTION: Well, is this a matter of regulation as much as it is just the imposition of the criminal statute? To put it another way, do you think there is a prior restraint involved here?

MR. HANLEY: Your Honor, we are saying that if there is a prior restraint, the rights of the juvenile should be balanced ahead of such restraint and the rights of the juvenile should be protected.

QUESTION: You are conceding that there might be a prior restraint then?

MR. HANLEY: Yes, sir, I am.

QUESTION: Well, the statute is a threat, is it not?

MR. HANLEY: Well, if you compare it, for instance, with the Landmark case --

QUESTION: Well, any statute is a threat --

MR. HANLEY: I would say it would be a prior restraint.

QUESTION: Well, a libel statute is a threat, but that doesn't prevent anyone from publishing something libelous. He is liable then if he does.

MR. HANLEY: That's true, Your Honor.

QUESTION: I know that your opposition takes the position that it is a prior restraint, maybe I should ask him.

MR. HANLEY: Well, I have been confused, frankly, in reading the cases on prior restraint. For instance, the Landmark case says that is not a prior restraint. That is my reading of it, and I want to mention that case.

QUESTION: Doesn't Landmark help or hinder you?

MR. HANLEY: Of course, the opposition is going to say it hinders me. But what I am saying is that case is attempting to protect the judiciary and this Court said that the judiciary does not need protecting and that the people are entitled to know what the judiciary is doing. What I am saying is juveniles -- it is a separate thing all over this country. Most states have some method and some statutes to protect juveniles and to rehabilitate them and not to treat

them as criminals.

QUESTION: Well, I am not in opposition to you particularly, but the other side of that coin is that the public has a right to know who is committing crimes around.

MR. HANLEY: Well, of course, the newspaper is not clearly prohibited. They can print all about the incident they want to, they just can't print the name. And I might say that the flagrancy and deliberateness and arrogance that was demonstrated in this editorial shows how far the newspaper will go if somebody doesn't do something to balance it out. I am not --

QUESTION: Well, how amending the Constitution, that would do something.

MR. HANLEY: Your Honor, I think it is a question of interpretation and I think this Court has not decided that question because this Court also thought that maybe it would be going too far to just say that prior restraint is forbidden absolutely.

QUESTION: In a constitutional sense, does the public have a right to know anything as individuals, that, say, newspapers, television station doesn't choose to print or that their neighbors don't choose to tell them?

MR. HANLEY: Of course, when the newspaper doesn't choose to print it, they won't do it. I don't know about that part of it, Your Honor. It is just a question of if

you want to protect the juveniles and most of the thinking throughout the country is that we do.

QUESTION: Is it against the law in your state for a police officer or judge to tell the press who committed the crime?

MR. HANLEY: Your Honor, the statute provides -- I was going to get to that -- the statute provides that the judge may order, may allow by order, may allow the newspaper to print it. In other words, it is his --

QUESTION: Well, that isn't quite what I asked you. Say he does -- is it against the law for a police officer or a judge to tell the press who committed the crime?

MR. HANLEY: No, sir, absolutely not.

QUESTION: But you say that no matter how the press learns it, the statute would apply?

MR. HANLEY: No, I don't, Your Honor, because the --

QUESTION: Well, absent an order permitting the publication.

MR. HANLEY: No, I don't, Your Honor, because from the prior cases of this Court --

QUESTION: Yes, but all you are saying is that the statute would be invalid if it was applied, but the statute on its face seems to cover the --

MR. HANLEY: Yes, that's true. That is absolutely true, and this Court has not struck a statute as such down as

yet in that regard. It has --

QUESTION: Do you rely, or to what extent if you do rely, on the fact that step by step criminal conduct of juveniles has been treated by the court in terms of procedure and prosecution to be more and more like the prosecution of adult crime except for a jury and a few other factors?

MR. HANLEY: Your Honor, I would answer that by saying this: I think that the court is giving a juvenile double protection, they are giving them the same rights as an adult and also the rights of a juvenile, not just giving him the rights of an adult and taking away the rights of juvenile, but now they receive both rights, the right to be treated as a juvenile and also have the same rights as an adult, as to an attorney, have an attorney and given their rights and so forth.

In this particular case, this juvenile has not been tried yet for this alleged crime. It is my understanding that he has a good defense to this alleged act of murder. He has not had a chance to have his day in court as yet.

QUESTION: Well, is that the newspaper's fault?

MR. HANLEY: No, it is not the newspaper's fault.

QUESTION: Well, why are we interested in that point?

MR. HANLEY: Well, I just wanted to point it out, that he hasn't --

QUESTION: Do you want us to draw the inference that the newspapers are holding this case up?

MR. HANLEY: Well, it didn't help it any, Your Honor.

QUESTION: I thought you wanted to drop a little on the newspapers, didn't you?

MR. HANLEY: Yes, sir.

QUESTION: I don't see how we can.

MR. HANLEY: No, you can't, but --

QUESTION: Well, why don't we argue the law in this case instead of all of these extraneous matters? In all deference, you say this is the first case of this kind.

MR. HANLEY: Yes, sir.

QUESTION: It involves the First Amendment which is important.

MR. HANLEY: Yes, sir.

QUESTION: So why don't we get to the law. That is all this is.

MR. HANLEY: Your Honor, as far as the law is concerned, I think the reasoning in the Virgin Islands case fits this case on all fours, and the Court in that case indicated that the balance, the right to preserve --

QUESTION: Did that case say that the radio and television and everybody else could print it but the news --

MR. HANLEY: No, sir, but, Your Honor --

QUESTION: Well, isn't that one of the points that is before us?

MR. HANLEY: No, that is not before you. I say that is not before you. The Fourteenth Amendment is not in this case because it wasn't decided in the court below. That was brought up for the first time up here.

QUESTION: You don't agree that we can uphold a court on any grounds?

MR. HANLEY: Well, I would suggest that possibly --

QUESTION: Of course, if we affirm on the First Amendment, we don't have to get to the Fourteenth, is that right?

MR. HANLEY: Yes, sir.

QUESTION: But if we don't affirm on the First, can't we get to the Fourteenth?

MR. HANLEY: I would suggest and argue that I don't think the Court should get to the Fourteenth.

QUESTION: I said could.

MR. HANLEY: Absolutely, Your Honor.

QUESTION: Thank you.

QUESTION: General Hanley, on that point, you say that the explanation of the exclusion for radio and TV is that they are regulated by the Federal Communications Commission.

MR. HANLEY: Yes, sir.

QUESTION: Is there a federal regulation that prohibits them from publishing the names of juveniles?

MR. HANLEY: Your Honor, yes, there is. There is a federal statute that prohibits publishing a juvenile's name, just like the statute in West Virginia.

QUESTION: So in practical effect you say they really are, all the media are treated the same if you look at the entite statutory --

MR. HANLEY: As far as the federal statute is concerned, yes, sir. I don't want to misrepresent. There is a federal statute, that is, I assume that means that if there is a federal law violated by a juvenile, they cannot print his name, the press nor the media, nor any of the media.

QUESTION: What about a state law?

MR. HANLEY: That is a federal law, Your Honor.

QUESTION: I misunderstood you. If a juvenile violates a state law, can they publish it on the radio?

MR. HANLEY: As far as the state statute, yes, but not --

QUESTION: No, sir, as far as the federal statute.

MR. HANLEY: I don't think there is a regulation against it.

QUESTION: So it is only --

MR. HANLEY: But they can regulate it. I don't think that it would be proper for the state to regulate the

TV and radio. I don't think -- there is no case that I could find where that has been determined. But there certainly is a federal statute preventing juveniles, so it indicates -- the federal government thinks they can protect a juvenile.

QUESTION: Would you cite that federal statute for us?

QUESTION: It is on page 35 of respondent's brief, in the footnote.

QUESTION: In operative effect, Mr. Hanley, the statute gives the judge the opportunity to -- gives the judge the power to decide whether there shall be or shall not be publication. Isn't that true?

MR. HANLEY: Yes, Your Honor, and I think in past years they have done that right along as sort of routine, but I don't know --

QUESTION: Then what happens to the underlying proposition that the juvenile must be protected even from public knowledge when the judge can waive it -- the judge could waive it theoretically in every case, couldn't he?

MR. HANLEY: Yes, he could, Your Honor.

QUESTION: That would mean that a particular judge could wipe out the statute if he wanted to.

MR. HANLEY: Yes, but under most juvenile laws the judge was considered the parens patre of the child and assuming that -- we assume that the judge would do a better job

than some newspaper or some stranger. He would be acquainted with these things, with these matters.

QUESTION: Do you happen to know when the West Virginia statute was passed?

MR. HANLEY: Not off-hand, Your Honor. I think it has been on the books about thirty years. It has been at least that long. I think one of the -- I read one of the amicus briefs and it indicated that it was a forty-year statute.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Abrams.

ORAL ARGUMENT OF FLOYD ABRAMS, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ABRAMS: Mr. Chief Justice, and may it please the Court:

I would like to respond very briefly to one or two questions which were asked of General Hanley before proceeding to my argument. The statute was adopted in 1915 in West Virginia. It is 64 years old. So far as we know, this is the first prosecution under it against any newspaper.

QUESTION: So its limitation to the press is fully explainable just by the --

MR. ABRAMS: Yes, sir, it was adopted at a time when the --

QUESTION: At a time when there was no television and very little radio.

MR. ABRAMS: And at a time when the First Amendment did not apply to the states as well. The statutory language as of 1915 was very similar to what it is today, it said nor shall the name of any child in connection with any proceeding under this Act be published in any newspaper without a written order of the court.

I should like to proceed first to the question of whether this statute is indeed a prior restraint. As I understand General Hanley, he has conceded or all but conceded that it is, but I think it is a matter which is for the Court to decide, of course. It is not a prior restraint because it is a threat. All criminal statutes directed at the press are threats. The Landmark statute was a threat and it was not a prior restraint.

It is a prior restraint in our view because the essence of it and the essence of the crime alleged here is that you must seek written permission of the judge before you can print the name of the child. That in our view is what makes it a prior restraint.

QUESTION: Would it be a different situation if exception were not provided in the statute?

MR. ABRAMS: Yes, it would, Mr. Justice Blackmun. It would not be a prior restraint statute in our view then;

it would be a straight subsequent punishment, a criminal statute to be judged as you judge against First Amendment interests and First Amendment claims, criminal statutes which affect or directly implicate the rights of the press.

QUESTION: So an even more rigorous prohibition would not be a prior restraint?

MR. ABRAMS: That is also the case in terms of licensing statutes. If instead of a licensing statute, Mr. Justice Rehnquist, you had a flat ban on any kind of publication, I dare say it would likely be unconstitutional but it wouldn't be a prior restraint. And the fact that the essence of this crime as alleged and as the essence of this misdemeanor which can lead to six-month jail sentences here is not obtaining the permission of the court and printing without that permission in our view makes this a prior restraint, and a far more classic sence than most of the prior restraint cases which this Court has had in recent years, far more than the Pentagon Papers or the Nebraska Press Association case, far more than Near itself.

QUESTION: And yet if the paper here had simply chosen to abide the statute and not seek permission and, say, were prohibited, as the editorial indicated they were, from publishing, it would have the same effect as the criminal statute and not be a prior restraint.

MR. ABRAMS: On the particular facts of this case,

I think the paper would have been able to defend and indeed if a criminal case proceeds would be able to defend on the grounds that permission wasn't needed. But the essence as I understand it -- one of the things that is wrong with prior restraints, as I understand it, is that it establishes a censorial authority with a relationship to the censored entity which is one of the things that this Court has indicated it doesn't like, that it is particularly loath to accept in prior restraint statutes.

Now, I appreciate the fact that it is on its face anomylous to say that because there is this provision in the statute which says that you can go to a court and get permission, that that makes it a prior restraint, but in our view that is always what licensing statutes have. It is precisely that provision which brings into account the essential prior restraint relationship of the censor to the party who is doing the censoring, that you have to go and ask permission.

QUESTION: You would concede -- you would, I suppose, assert, would you not, that even in the absence of this provision for judicial authority to publish, that the statute would be equally unconstitutional --

MR. ABRAMS: Oh, absolutely, Mr. Justice Stewart.

QUESTION: -- under the First and Fourteenth Amendments. So what difference would it make what we label it?

MR. ABRAMS: It only make a difference in terms of

how you choose to analyze it and it seems to me that this statute is so clearly unconstitutional for a variety of reasons that, whether or not it is a prior restraint or a subsequent punishment statute, it would be just as unconstitutional.

QUESTION: But you can read some of our cases indicating that a prior restraint is the most onerous of all prohibitions against publication, and I take it in your answer to my Brother Stewart and my own question that that isn't necessarily the case.

MR. ABRAMS: Mr. Justice Rehnquist --

QUESTION: It is most draconic.

MR. ABRAMS: -- prior restraints by their nature are the most draconic restraints upon speech. That doesn't mean that a subsequent punishment statute in a particular case doesn't fall on speech with even greater brutality. Professor Chaffee once wrote that if there were capital punishment for the advocacy of socialism, that that would have a pretty chilling effect. I would have no doubt that that would have more of a chilling effect on advocacy of socialism than this prior restraint statute would.

All I am saying is that you do have an established body of law about how to view prior restraints, it is our view that this is a prior restraint statute, and that that body of law ought to be the overview with which you look at

the statute.

QUESTION: But prior restraint statutes aren't the most severe repressions of publication.

MR. ABRAMS: Prior restraint statutes, as this Court has indicated time and again, are to be viewed with the particular harshness by this Court to see if there is an exception which allows the statute to stand, that this Court has indicated, as I understand all its prior restraint rulings, that prior restraints are presumtively unconstitutional, unlike other statutes that prior restraints bear a heavy burden, unlike certain other statutes.

Justice Stewart, I don't have to persuade you that I think it is a prior restraint, but if it is, it seems to me that your cases lead you to analyze the legal questions in a somewhat different way.

QUESTION: Why wouldn't a flat ban be even worse?

MR. ABRAMS: A flat ban may be even worse, just as a flat ban on publication of all literature by the King of England would have been worse than sending people to the censorial authority to get permission to print. Nonetheless, we have a body of law which says that prior restraints, because of the effects that they have, are particularly presumptively unconstitutional.

QUESTION: Mr. Abrams, I notice that you put -- or at least you appear to put a good deal of weight on the fact

that between 1960 and 1975, as we all know, there has been an enormous increase in juvenile crime and serious violent crime. Now, suppose the statistics were the other way, suppose it showed that juvenile crime was going down, would it make any difference to your constitutional point?

MR. ABRAMS: No, it would not, Mr. Chief Justice. I simply indicated that to indicate to you why the press might want to print that for information of the Court, but that is not at the heart of our argument.

QUESTION: It is really irrelevant, isn't it --

MR. ABRAMS: It is --

QUESTION: -- whether crime is going up or going down?

MR. ABRAMS: It is irrelevant as to the legal position of --

QUESTION: It is a constitutional question.

MR. ABRAMS: Yes, sir. Yes, sir, it is.

QUESTION: It is simply saying --

MR. ABRAMS: I suggested to you, since I thought you --

QUESTION: It explains your interest, not --

MR. ABRAMS: -- and that is the only reason that it is there.

Entirely aside from the question, if it is a question of whether this is a prior restraint and must meet those

harsh standards, it is our view that this statute cannot meet any First Amendment test. This Court has indicated, it seems to us with ever greater clarity in recent years, the proposition, particularly the last term by the Chief Justice in the Houchins v. KQED case, that the government may not restrain communications of whatever information the media acquires and which they elect to reveal. That proposition reflected in opinions such as Tornilla and a variety of others by this Court is in our view flatly unconsistent with the statute which bars and makes criminal precisely the publication of what the press has learned and chooses to print. It is a core First Amendment interest, in our view, which cannot give way even to societal interests at least as great as those which are asserted here.

The fact of the matter is that under this statute, as General Hanley has conceded, it doesn't make any difference how the press learns the information, it doesn't make any difference that in this case, for example, on what I take to be the admitted facts of this case, that this was a killing in a public school, in which there were seven eye-witnesses and that entirely aside from the question of who gave the information to the press -- and on this record I think it is admitted that the information came from police authorities -- that this community was filled with eye-witnesses that knew what happened there. And General Hanley rightly and candidly

concedes to you that that makes no difference, that the statute still applies.

But it seems to us that to put that kind of onus on the press, to say that therewwill be no punishment of the police, to say that the statute doesn't even apply to the police, to say that there will be no punishment of anyone else and no other efforts made of a meaningful sort, not even an effort made if this state interest is so great to ban magazines, let alone newspapers, let alone radio and television, to ban individuals from repeating these things.

QUESTION: Well, this radio and television, this section the General is relying on applies to federal juvenile--

MR. ABRAMS: Yes, the statute says --

QUESTION: That is all it applies to. It doesn't apply to state --

MR. ABRAMS: The libel law, of course, is one example where --

QUESTION: But I am talking about this one that says you can't publish anything.

MR. ABRAMS: That's right, that statute has no application whatsoever to --

QUESTION: That applies to a federal juvenile here and not in a state area.

MR. ABRAMS: That is correct, Mr. Justice Marshall. It has nothing to do with a state prosecution.

QUESTION: How does it vary, if at all, on your case that the tendency over the last dozen years, more or less, has been to assimilate procedure for juvenile prosecutions, if they are to be called that, juvenile procedures to the full panoply of criminal procedures?

MR. ABRAMS: If anything, Mr. Chief Justice, it suggests that there is perhaps less need for this kind of special unique protection of juveniles. Now, that is not an argument that we have made in our brief to you, but to the extent that it is relevant at all, that this Court has in recent years with the exception of jury trial extended a wide variety of rights to juveniles on the theory that they are entitled to the same treatment constitutionally as adults, it doesn't seem to us that it can cut against us in any event.

QUESTION: Would that be a consideration primarily for the legislature rather than for judges?

MR. ABRAMS: I think that consideration is for legislatures. But when you balance against a First Amendment interest as we view it as pristine as this, the right of the juvenile involved here, what is said to be the right of the juvenile involved here, we don't think that that comes out very close as a matter of law. We cite to you, for example, your own decision in Davis v. Alaska in which this Court came to consider the rights of the juvenile to confidentiality of his juvenile criminal record as against the Sixth Amendment

rights of confrontation of a party accused of a crime. In that case, Alaska had put a juvenile on the stand, so far as the case reads, without the consent, without any waiver by the juvenile, put him on the stand, and this Court held that testimony must be permitted as to his prior juvenile record. And even though temporary embarrassment might result to the juvenile and his family, the Court said the Sixth Amendment right of the defendant in that case triumphed, had to prevail over the right of the juvenile.

Well, we would think that by any kind of equitable treatment of First Amendment rights, at least the same ruling ought to apply here. In the Nebraska case, the ruling of the Court was that the Court would not choose btween First and Sixth Amendment rights, would not put one above the other. If that is so, we think that at the very least the First Amendment is entitled to as much regard in this context as the Sixth Amendment was given in the Alaska case.

There are two additional factors which I would like to mention. Why is it the statute simply cannot work? Assuming that the First Amendment law were less clear than we think it is, one would in any event look to the question of what the statute is going to do, what will it accomplish. Assuming the court were even to engage in a kind of ad hoc balancing test, which we would strongly disapprove, the statute simply cannot accomplish the end of leading to

rehabilitation for juveniles or the like. How could it when it is so under-inclusive not only to exclude radio and television, to include magazines, to include everything in the world, including private conversations except newspaper publication.

QUESTION: But doesn't a newspaper more have a particular significance, say, ten years after the event, the state can close the juvenile record but some reporter can go into a newspaper morgue ten years later and say so and so, age 25, was proceeded against as a juvenile ten years ago, the proceedings against him were dismissed, and because the story was reported in the newspaper, that would be the only source of information he would have?

MR. ABRAMS: That is possible, Mr. Justice Rehnquist. I think it fair to say that even to the extent that that is considered a distinguishing factor of newspapers, although not I think of magazines, for example, which also have indexes, West Virginia can't control what out-of-state newspapers publish about materials such as this. I take it they can't, and I read the Nebraska case to indicate that they cannot, therefore they couldn't even affect all the newspapers, even if they wanted to deal with newspapers as a discrete class.

As I suggested already, this case is illustrative, the facts of this case, it seems to me, are illustrative of why this statute can't work. We don't rely, as Justice

Marshall indicated earlier, on the facts of this case. The statute, in our view, is facially unconstitutionally. But this killing occurred in a community of 14,000 people. It occurred in a junior high school, the only junior high school in town. It occurred in front of at least seven eye-witnesses. Everybody in that community knows about this and everybody knew about it. To think that a statute can pass constitutional muster where the interest that it is promoting is that of protecting the right of the juvenile for what, against the publicity or rehabilitation later on, when everybody in his community knows exactly what happened to him, seems to --

QUESTION: Suppose, Mr. Abrams, there weren't seven eye-witnesses, indeed no eye-witnesses and that he was apprehended on some circumstantial evidence. Would it make any difference to your constitutional issue?

MR. ABRAMS: The constitutional issue, no, and that is why I indicated that as in the Nebraska case, this is simply illustrative of the functioning of the statute. The constitutional argument remains precisely the same, whether or not anybody knows about it in any particular case. It seems to us that this statute which punishes speech, which is in our view a prior restraint as well on speech and on the press, cannot pass muster. But one of the reasons it can't is the reason that the Court indicated in the Nebraska Press Association case, in which the Court said that a whole

community cannot be restrained from discussing a subject intimately affecting lie within it.

There is a final point. There are other means and West Virginia has sought out some of them to accomplish this end. Legislation against discrimination in employment, against people with juvenile records, is on the books in West Virginia, and it was at the time of this alleged crime; legislation which at that time, 1977, destroy arrest records was in effect in West Virginia at that time. There are a wide variety of other means, and of course the most obvious one that comes to mind is the one which General Hanley has indicated that West Virginia does not have, and that is prosecution against public officials who release information of this sort.

QUESTION: Of course, the destruction of arrest records legislation isn't going to be very useful if a person can go to the newspaper morgue and find out the fact of arrest from that.

MR. ABRAMS: That is true, Mr. Justice Rehnquist, but the destruction of arrest records, which has its own panoply of constitutional problems which I am not reaching here, is one way, taken in conjunction with other ways, that the state can attempt to assure that a juvenile will be protected from the effects of whatever crime he is accused of. It is not a totally successful way, any more than anything

else could be in the situation where anybody could know what happened and anybody can know in any case whether a juvenile did something or what he didn't do.

It is relevant I think, as it was in Landmark, that the approach taken by West Virginia here is one of a very small minority of states. As our brief points out, West Virginia is one of only six states which purports to impose criminal punishments on the press for its publication of information of this sort.

Just last month, after our briefs were submitted to this Court, the American Bar Association adopted the recommendations of the Juvenile Justice Standards Project of the Institute for Judicial Administration and of the ABA itself.

QUESTION: That didn't constitute a constitutional amendment, I take it?

MR. ABRAMS: No, sir. And the conclusion that they reached --

QUESTION: We don't know yet, do we?

MR. ABRAMS: That's right -- was that there were alternative ways to do this and what they recommended was essentially greater control over files held in the juvenile court system.

I don't suggest for a moment that control over files would have kept this information from coming out. As it happens, the facts of this case were such that everybody knew

what happened anyway, but the position of the ABA is also the position, as our brief indicates, of a wide range of other entities.

QUESTION: We had a case out here not long ago in Vienna where there was a family killing and there was no doubt as to who was apprehended for juvenile proceeding, but the press was very unhappy and presumably other people may have been unhappy that they were simply unable to find out about what transpired at the closed juvenile hearing. Would your argument extend that far?

MR. ABRAMS: No, we make no argument today with respect to any right of press access to closed juvenile hearings. That raises entirely different issues and that is neither how this information was obtained nor is it an argument that we are making in this case at all. We have not taken the position in this case that the press is entitled to access to closed juvenile proceedings.

QUESTION: Mr. Abrams, going back to the ABA recommendation, is it your view that a statute making it a crime for a court aide of some kind, a clerk or somebody like that to reveal information like this to be constitutional?

MR. ABRAMS: It is my view that it would be constitutional for a statute to impose criminal penalties on those within the judicial system itself, yes, sir.

QUESTION: And that would apply to, say, also

prohibition against the police for revealing information?

MR. ABRAMS: Yes, sir.

QUESTION: That issue was not presented in the Landmark case, was it?

MR. ABRAMS: That was not presented.

QUESTION: Suppose this picture that is in the appendix had been published without the name, would that be a violation of the statute? Would it be the functional equivalent of identifying the juvenile defendant?

MR. ABRAMS: I suppose -- I think that, while it would obviously carry a lot of the same effects, it would not be the "name." I would think the statute would not apply. I would think you would have to read the criminal statute narrowly so as to avoid other constitutional problems, and I would think that if the picture were published without a name that that would not constitute a violation of the statute.

I would point out in conclusion that what this case pits against each other is, on the one hand, First Amendment interests which we think are long recognized by this Court as being at the apex of First Amendment protections, and the ban on prior restraints as we view it, the freedom of the press to print news within its possession, the protection of truthful speech about public events, against another societal interest, non-constitutional in nature, and there is no suggestion here in this case, nor as I understand it in any ruling of this

Court that the right to confidentiality imposed by a statute of this sort is of constitutional magnitude; it's speculative there is nothing in this record or so far as we know in the literature to suggest that a statute of this sort of even needed to lead to the societal result which is sought here; incapable of fulfillment by the statute because of its under-inclusiveness and because in any event the information as in this case is often widely known, and --

QUESTION: Mr. Abrams, could I go back once more to the ABA problem.

MR. ABRAMS: Yes.

QUESTION: I take it the statute could not prohibit a victim or the family of a victim from telling the press who the young man under suspicion was?

MR. ABRAMS: I don't believe that would be constitutional.

QUESTION: Isn't it always going to be true that the information would be obtainable probably and potentially available?

MR. ABRAMS: It would always be potentially available, yes.

I have nothing else, Your Honors. Thank you very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Hanley?

ORAL ARGUMENT OF CLETUS B. HANLEY, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. HANLEY: Yes, sir. I would just like to make a few points, point out a few things.

If Your Honors please, regardless of whether this is considered a prior restraint or not, I am not conceding that it is or it isn't. All I am saying is that I am asking this Court to follow the view and the reasoning in the Virgin Islands case. In that case they said it was a prior restraint but they said that the rights of the juvenile outweighed the First Amendment.

Counsel has brought up again the fact that this was common knowledge, and I am requesting the Court to consider only the petition and pleadings in the Gazette Case because this case was consolidated. There are two sets of facts. The Daily Mail obtained more facts, I suppose, because they came to -- they printed later. But in the Gazette case, the petition says that -- their petition says that they obtained the knowledge from a policeman and I imagine that is so, but we don't concede for a minute that this was common knowledge.

This place where the shooting occurred is about 13 miles from Charleston. That is one big metropolitan area.

QUESTION: General, even if it was common knowledge, the statute would cover it, I take it?

MR. HANLEY: Well, if it was common knowledge out

there, it wouldn't be common knowledge in the community which is Charleston and that is where the boy is going to be tried.

QUESTION: Wherever it was common knowledge, if it was common knowledge, in Charleston or anywhere else, the statute would forbid the publication?

MR. HANLEY: Yes, but we do not concede --

QUESTION: And to that extent the statute at a very minimum would be overpowered, I take it?

MR. HANLEY: Pardon, Your Honor?

QUESTION: Would you say that a statute may validly forbid the publication of a juvenile's name where the name is common knowledge in the community?

MR. HANLEY: I don't -- I think it could, yes, but we don't concede that it was common knowledge at all, and there is no evidence taken here. That is my point, there has been no evidence taken in this case and yet counsel for the other side says it is common knowledge and they got the information here and got the information there. We don't concede that, and if the Court reads the pleadings --

QUESTION: I understand.

MR. HANLEY: In the Cox case, this Court said we reaffirm that the guarantees -- that is First Amendment guarantees -- are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. Well,

we concede that, but we are saying that this is a barrier, this is the -- under the holding of the Virgin Islands case, it is important that this Court could destroy the whole juvenile system throughout the country if it doesn't protect the juvenile in this instance.

QUESTION: All throughout the country, I thought there were only five or six states that had this statute?

MR. HANLEY: Well --

QUESTION: How can you say that that will affect the whole country?

MR. HANLEY: Because for this reason, Your Honor. I am not talking about a similar-type statute. I am talking about juvenile programs.

QUESTION: The only thing we have before us is this statute, am I right?

MR. HANLEY: Yes, sir. The federal Act goes to all media. I just --

QUESTION: It applies to federal cases.

MR. HANLEY: Only, yes, sir, federal cases only.

QUESTION: And what relation does that have to this case?

MR. HANLEY: In this regard, Your Honor, it is an analogy. If the federal government can do it, why couldn't state governments do it. That is the only reason it applies.

QUESTION: Well, I don't know if the federal

government can do it or not, and I won't be able to know until a case involving it comes here.

MR. HANLEY: Well --

QUESTION: But this one is here.

MR. HANLEY: Yes, sir, and we are arguing that as an analogy at least we urge the Court to consider the Virgin Islands ruling and holding in that case.

QUESTION: General Hanley, just as a matter of curiosity, what has ever happened to this young man?

MR. HANLEY: He is still pending trial.

QUESTION: Is he incarcerated? He is free, I take it?

MR. HANLEY: I think he is out on bond, Your Honor, I believe.

QUESTION: Is he going to school?

MR. HANLEY: I don't know. I have no idea.

I want to say one more thing, that at the close of the year this newspaper published the story of the year and published the story of this boy's troubles again and called it the story of the year and printed his name again and while this case was pending. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. This case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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