Criminal Laws: Publication of Juvenile Names
Juvenile: Publication of Names in Court Proceedings
Freedom of Access: Names in Court Proceedings
15 MRSA §2609
15 MRSA §2664

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Honorable Olympia Snowe
Senate Chambers
State House
Augusta, Maine

Re: Constitutionality of 15 M.R.S.A. §§2609 and 2664

Dear Senator Snowe:

You have asked for our opinion of whether the above-cited sections of Maine law prohibit the publication of names of juveniles involved in the juvenile court when their identity has not been obtained from court or police sources, and if so, whether there is a significant possibility that the statutes are vulnerable to constitutional attack for overbreadth and infringement of first amendment rights. You have also asked whether the State in general can prohibit publication of any information about a juvenile involved in juvenile court when the information is obtained from sources independent of the law enforcement processes, and you have submitted for our review a proposed amendment to the Maine statutes obviating any prospective constitutional problems.

Having reviewed the cited sections and the applicable case law, we are of the opinion that the statutes do prohibit publication of the name of any juvenile involved in the juvenile court system, regardless of the source of this information. From a review of U.S. Supreme Court decisions to date, however, we are unable to conclude with any degree of assurance that the application of these statutes prohibiting publication of the name of a juvenile or any other information pertaining to juvenile proceedings would be clearly unconstitutional. Finally,

although not clearly necessitated by recent Supreme Court case law, the proposed legislation, with additional clarifying language, would resolve some potential ambiguities in the present law.

Sections 2609 and 2664 provide in part:

> "Any person [other than certain public officials in the course of their official duties] . . . who divulges or publishes without the consent of the . . . Court the name of any juvenile brought or to be brought before the . . . Court . . . or who, being present at any juvenile . . . hearing before the . . . Court which is private, divulges or publishes, without consent of the . . . Court, any of the matters which occurred at said hearing may be found guilty . . . of criminal contempt . . ."

It should first be observed that the prohibition against publishing the name of a juvenile applies not to individuals who "may be brought" to the Court, as your letter suggests, but rather to juveniles brought or "to be brought." The distinction in language is important. As you properly suggest, any juvenile involved in questionable activities "may be brought" to the Court. To prohibit divulging the names of those persons would be to place on the potential publisher the impossible burden of determining whether the juvenile might ever be brought to the Court. Thus, both sections use the phrase "to be brought," which phrase connotes to us some indication that the juvenile justice system has already made a decision that the individual will in fact be brought before the appropriate court. The use of this latter phrase in the statute relieves the publisher of an impossible burden that would be thrust upon him were the former phrase used in the law.

The statutes in question provide that all juvenile hearings shall be noncriminal in nature and that they shall be private. In keeping with the private character of the proceedings, the statutes further permit the court to hold in contempt: 1) anyone, regardless of whether they were present at the hearing, who divulges or publishes the name of the juvenile, and 2) anyone who was present at the hearing who divulges or publishes what occurred at the hearing. It is therefore incorrect to say that these statutes permit the court to hold in contempt any persons, including relatives, neighbors or news reporters, who were not present at the hearing, for divulging matters that took place at the hearing. However, they do forbid any identification of the juvenile by the news media, even if the juvenile's name has been learned from independent sources.

In a series of recent opinions, the United States Supreme Court has held that a court cannot restrain the publication of information obtained from court records to which public has access or from judicial proceedings to which the public is admitted. Oklahoma Pub. Co. v. District Court, 45 U.S.L.W. 3599 (1977); Nebraska Press Ass'n. v. Stuart, 96 S.Ct. 2791 (1976); Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975). In Cohn, the Court ruled it unconstitutional to impose civil liability for invasion of privacy on a publisher for divulging the name of a rape victim obtained from the public records of the court. In Stuart, the Court overturned as violative of the first amendment a court order imposed during a public trial prohibiting the press from publishing any information relating to the proceedings which might inculpate the accused. In Oklahoma Pub. Co., the Supreme Court summarily overturned a court order prohibiting the news media from publishing the name or picture of a juvenile accused of murder, where the identity of the juvenile had been learned in open court and the photograph had been taken as the youth left the courtroom following a hearing to which the press was admitted.

Although these cases evidence a strong policy against imposing prior restraints on publication of information pertaining to judicial proceedings, they are distinguishable from the issue posed in your request and hence do not resolve the question. While these cases consistently uphold the right to publish information legitimately obtained by the press pertaining to public court documents or proceedings, the Supreme Court has carefully qualified its decisions to date to avoid the broader first amendment issues involved in closing certain judicial proceedings or sealing court records or in banning publication of any information derived from such closed proceedings, whatever the immediate source of that information may be.

The Court's decision in Cohn, supra, for instance, stressed the fact that the information was obtained from indictments which were available for public inspection and it did not leave out the possibility that the media might be civilly liable for invasion of privacy for publishing or broadcasting information derived from or relating to private judicial proceedings. In a footnote, the majority opinion clearly warned against a broad reading of the case:

> We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings. 420 U.S. at 496, n. 26.

Again, in Nebraska Press Ass'n. v. Stuart, the Court emphasized that the information sought to be published originated in a public hearing and that at the time of the hearing the trial court did not know that closure was an alternative open to it. 96 S.Ct. at 2807. Justice Brennan in a concurring opinion noted that the question of closed proceedings was not presented to the Court, 96 S.Ct. at 2814, n.11; and Justice Stevens, in his concurring opinion, expressed doubt as to whether the same first amendment protections might apply when the information published was obtained by other means. 96 S.Ct. at 2830.

The per curiam opinion in Oklahoma Pub. Co., relying on Cohn, likewise emphasized that members of the press were in fact permitted to be present at the hearing where they learned the juvenile's identity, that they had not "acquired the information unlawfully or even without the State's implicit approval," and that the information sought to be published had been "placed in the public domain" by the same court which then sought to restrain its publication. 45 U.S.L.W. at 3599.

Because Maine statutes require juvenile proceedings to be private and juvenile records to be sealed, 15 M.R.S.A. §§2606,2666, 2609, 2664, presuming compliance with these statutes by the courts, we conclude that information concerning a juvenile involved in the Maine juvenile court system is not public in the same sense that the information under consideration in Cohn, Stuart and Oklahoma Pub. Co. was "in the public domain." Nor can we predict with any certainty that the United States Supreme Court would grant the same first amendment protections to information derived solely from friends or neighbors of a juvenile as it has to information made public initially by the judicial system itself. Rather, the fact that juvenile proceedings and records are by statute closed to the public view puts them on a par with grand jury proceedings or transcripts, the secrecy of which has long been respected and enforced in our courts. See Pittsburg Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958). The factors supporting secrecy in grand jury proceedings, that is, protecting potential defendants and encouraging free disclosure of information, are also operative in the juvenile system and may be considered compelling enough to outweigh the first amendment interests of the press.

The Supreme Court has never held that the press has a first amendment right to gather information in any manner it wishes. Rather, the Court has clearly stated that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Branzburg v. Hayes, 408 U.S. 665 at 684 (1972); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974). "The right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 16-17 (1963). The Court has expressed its apparent approval of gag orders running to attorneys, witnesses, court officers and other participants in judicial proceedings, Sheppard v. Maxwell, 384 U.S. 333 at 358-362 (1966); and on the same day that it issued the opinion in Nebrasks Press Ass'n. v. Stuart, the Court let stand orders holding in contempt a news reporter who refused to reveal the identity of sources who may have violated such a gag order and another reporter who refused to reveal the source of information derived from a sealed grand jury transcript. Farr v. Pitchess, No. 75-444, cert. denied, 44 U.S.L.W. 3756 (1976); Rosato v. Superior Court, 124 Cal. Rptr. 427, cert. denied, 44 U.S.L.W. 3756 (1976). The enforcement of legitimate gag orders and protection of the secrecy of certain proceedings and records therefore sometimes require controls on the press which, though less direct, may be just as severe as gag orders restraining publication in the first instance.

In summary, Supreme Court law on the issue posed in your letter is not definitive. Although recent cases appear to give broad first amendment protection to publication of information by the press, the cases do not reach the constitutional issues involved in publishing information pertaining to closed judicial proceedings. In view of the Supreme Court decisions refusing to afford blanket protection to the press in its manner of gathering information, and in view of the presumptive constitutionality of our statutes, we cannot say that 15 M.R.S.A. §§ 2609 and 2664 are unconstitutional, even as applied to information gathered from sources independent of the judicial process.

With respect to the legislation proposed in your letter, such legislation would narrow the scope of the present law, affording clearer notice to the press as to what information may be published. However, for clarification, we would suggest rewording as follows which would avoid the constitutional issue raised by the wording of the current statute:

> Nothing contained in this section shall prohibit divulging or publishing the name of a juvenile brought or to be brought before the juvenile court when none of the information thus divulged or published has been obtained unlawfully or from or through the proceedings, personnel or records of the court or of a law enforcement agency.

This amendment would allow publication only when the information is obtained through lawful means, not in violation of any gag order, and from sources independent of the judicial processes.

I hope this information is helpful.

Sincerely,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General