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IF THERE IS TO BE AN ABRIDGMENT OF PRETRIAL COMMUNICATION, SHOULD IT BE COUPLED WITH AN EXPANSION OF TRIAL COVERAGE BY RADIO AND TELEVISION?

*Frank G. Raichle**

If I have any of the attributes of a trial lawyer, it must be that of nerve. It does take nerve for one who is accustomed to addressing captive audiences of twelve, carefully selected as far as possible for their lack of firsthand knowledge of the matter at hand, to come before this galaxy of educators, judges, lawyers, and students to discuss a subject about which all of the listeners are at least as well informed as the speaker.

When Dean O'Meara suggested I join this distinguished group of speakers and participate in this discussion, I was somewhat reluctant to do so because all facets of the subject have been so thoroughly discussed that anything I might say would be redundant or plagiaristic — perhaps a little of both.

However, the lawyer's urge to talk shop and perhaps take advantage of the occasion to mention one or two of his own cases soon overcame my rather brief and fleeting reticence. The subject discussed in this article is: "If there is to be an abridgment of pretrial communication, should it be coupled with an expansion of trial coverage by radio and television?" My answer to this question is unreservedly, "No!"

The abridgment — curtailment, if one pleases — of prejudicial pretrial information permissible for release in a criminal case to news media by attorneys and law enforcement officers is recommended as a step forward in the attempt to assure a fair trial. It should not be followed with a step backward by giving the defendant a trial in a theater instead of a courtroom. One element of a fair trial should not be supplied only if another is to be taken away.

No one should have to bargain for that to which he is entitled. The right to a fair trial is enshrined in the United States Constitution, and the United States Supreme Court in *Estes v. Texas*[1] held that the televising of a criminal trial violated the fundamental concept of a fair trial, at least in the present state of the art of radio and television.

Since a defendant has a constitutional right to a nontelevised trial, it would seem most implausible and even impossible legally to restrict the release of prejudicial information to the news media prior to trial only on condition that the defendant waive his right to a nontelevised trial or that it be taken away from him. One might as well argue that the defendant should be protected against prejudicial pretrial publicity only if he surrenders his right to be represented by counsel, or his right to a confrontation by witnesses against him, or any of the other fundamentals of the Anglo-American concept of a fair trial.

These discussions on the rights of free press and fair trial should not be thought of as a debate between the news media and the Bar over which of the

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1 381 U.S. 532 (1965).

two rights shall override the other. The right of a free press and the right to a fair trial are both guaranteed by the Constitution.

The right of free press does not exist so publishers may more profitably sell newspapers, and the right of fair trial does not exist so lawyers may more effectively or more rewardingly defend criminal cases. The right of free press exists so a citizen may come to know, and the right of fair trial exists so he may be protected against injustice. Accordingly, in the exercise of these rights, as in the exercise of many other rights, there must be an accommodation to the rights of the other person. For example, one has a right to walk down a street in a particular direction. Anyone else has an equal right to walk on the same part of the same street at the same time in the opposite direction. That doesn't give one a right to bump into someone else nor a right to push another person off a particular part of the sidewalk. Obviously, in the exercise of one's right he must accommodate himself to the exercise of an equal right by another.

The journalists of the news media seem reluctant to admit the existence of the problem of an accommodation between a free press and a fair trial. They take a sort of "boys will be boys" attitude; and admitting that damaging information will occasionally creep into their stories, they question whether adverse pretrial publicity actually prejudices a juror against a defendant and ask for empirical evidence of the fact that it does. They seem to suggest that surveys should be made by ringing doorbells and asking housewives and others whether they would be prejudiced as jurors if they heard that a defendant in a given case would not take a lie detector test, had a criminal record, or had confessed to the crime for which he was being tried.

I had the privilege of participating in a panel discussion on the general subject of free press and fair trial in New York City with Herbert Brucker, past president of the American Society of Newspaper Editors, the recipient of many awards, and the author of a number of books on the subject of a free press. In the course of his remarks he said,

> I think this clash is inherent in the subject of fair trial and free press and I don't think we can do anything about it. . . . Show me one man who has been unjustly convicted because of what was published.[2]

He contended that we lawyers had nothing more than "just a fear that a man's right to a fair trial would be prejudiced." Mr. Brucker is wrong! We lawyers have more than fear; we have firsthand knowledge. Sometimes the representatives of the news media seem to suggest that such fears can be dispelled by a *voir dire* examination of prospective jurors. Unfortunately, some courts with increasing frequency are applying the same concept. Recently, the United States Court of Appeals for the Second Circuit[3] said that it was cynical to believe that deep prejudice in a juror could not be discovered upon a *voir dire* examination.

Since when has a defendant been protected against prejudice on the part of jurors only when it is "deep"? Since when is prejudice a matter of degree?

2 Brucker, 2 CRIM. L. BULL. 20 (1966).
3 Application of Cohn, 332 F.2d 976 (2d Cir. 1964).

Does not *any* prejudice against the defendant in effect reverse the presumption of innocence? Even if this be cynicism, I seriously question whether the *voir dire* is an effective protection against the seating of prejudiced jurors.

Two personal experiences will illustrate the questionable effectiveness of the *voir dire*. In 1938 when I was a special prosecutor in my home town, we prosecuted a high public official on bribery charges involving large sums of money. It was a widely publicized case, and one might say that since I was the prosecutor I was indeed the beneficiary of all the pretrial publicity. In any event, there was an extensive *voir dire* and finally twelve jurors and some alternates were seated. The judge congratulated them on their selection, complimented them on their open minds in the case, and in view of the importance of the case, admonished them not to form any opinion until they had heard all the evidence and the charge of the court. In addition, he told them not to discuss the case with anyone and not to permit the case to be discussed in their presence. I thought his admonitions were more than ordinarily impressive. At this point the jurors were about to leave the room for a short recess, and in passing my table one of them leaned over and asked in exactly these words, "Do we have to be here when this guy is sentenced?" Of course, the incident was reported and an alternate juror was substituted.

Another personal experience indicating the lack of protection furnished by the *voir dire* involves the case of *People v. Pauley*.[4] Pauley was the Deputy Commissioner of Police in Buffalo and was on trial with other members of the department for bribery. As his counsel I was aware that anyone who had had unpleasant experiences with members of the police department might carry some prejudicial feelings toward him. There was a lady juror who said that she had no acquaintances among the members of the police department, had never had any contact with the department, had never heard of any of the defendants, knew little or nothing about the case, had formed no prejudice, and knew of no reason why she could not be a fair and impartial juror. She was seated. In due course the jury convicted the defendants. A posttrial investigation disclosed that she had been married to a police officer, had had him arrested on one occasion for brutality, and had later divorced him. It further developed that she had borrowed from the Police Credit Union and had been dunned for payment. It was also discovered that she had known that one of the defendants had arrested her brother a few years before. Needless to say, the conviction was reversed.

Believing that the *voir dire* is a very ineffective screening mechanism and that many jurors, either consciously or unconsciously, occasionally lie on *voir dire*, I am in hearty accord with that portion of the general commentary of the ABA Advisory Committee on Fair Trial and Free Press stating that "the evidence indicates that jurors often fail to be truthful on matters of possible prejudice."[5]

With deference to judges, occasionally the fault lies with the court. If a judge manifests irritation towards those veniremen who frankly state that they

4 281 App. Div. 223, 119 N.Y.S.2d 152 (1953).

5 ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 58 (Tent. Draft 1966).

have an opinion, he appears critical of those who do not claim an open mind, other jurors waiting to be called are naturally intimidated and reluctant to speak frankly. It seems anomalous to me that with the courts tending more and more to tell us that we should rely upon the questioning of jurors to weed out the prejudiced that the same courts are increasingly circumscribing the *voir dire*.

In my judgment, based on more years of experience than I like to admit, many veniremen, once they get to court, want to be selected. I find it alarming to think of the effect of a televised *voir dire*. Remember how many delegates to the national political conventions have asked to have their delegations polled when they knew that the spotlight of television was upon them? Who would say that the spotlight of television upon a prospective juror would not in some measure, consciously or unconsciously, affect his answers to the questions put to him, especially if the television also revealed judicial impatience with the time-consuming process of selecting a jury?

Thus, the proposal that curtailment of the release of adverse and prejudicial pretrial communication to the press should be coupled with expanded trial coverage by radio and television raises all the considerations inherent in the question of whether the telecasting and broadcasting of a trial in and of itself violates the Anglo-American concept of a fair trial. Since the Supreme Court in the *Estes* case decided that trial coverage by television did violate the right to a fair trial, there is no need to mention all the considerations that demonstrate the unfairness of the telecasting and broadcasting of a trial. For the present the legal question is concluded.

In discussing the proposal on a policy level rather than on a constitutional level, it is important to note that in the *Estes* case the opinions of Justices Clark, Harlan, Warren, Whittaker, and White mention some, but not all, of the relevant considerations to be considered in this connection. The "parade of horribles" contained in those opinions is somewhat incomplete. The amicus curiae brief for the American Bar Association likewise notes many of the factors that contribute to the unfairness of televising and broadcasting trials, but it does not mention all of them.

In addition to the considerations mentioned in the opinions in the case, the briefs of the parties, and the ABA's amicus curiae brief it does not beggar one's powers of imagination to envision the activities of the televisors and broadcasters if they are given the sway that they seek. It should be remembered that televisors and broadcasters must have sponsors — persons, firms, or corporations who pay for time and an opportunity to advertise their wares. This involves the necessity of commercials harmonized with a selection of incidents of the trial most calculated to draw listeners and viewers. Clamor will result for the calling of important witnesses during what the telecasters and broadcasters consider prime time and the natural desire on their part that the nuances of a trial coincide with the fluctuation of the attendance of listeners and viewers.

It does not seem too extreme to expect that telecasters and broadcasters will desire pauses in the course of the trial to permit the intrusion of commercials, just as pauses in the play of a televised football game wholly un-

related to the play of the game now permit commercial announcements. I ask, and not facetiously, will a judge be importuned to pause and consider his ruling at a given juncture of a case before giving it so a commercial can serve the two-fold purpose of advertising the sponsor's product and heightening the suspense of the moment? Will counsel be moved to call witnesses at a time best calculated to reach the most viewers or listeners? Will cases, consciously or unconsciously, be tried to the radio listeners or the television viewers instead of to the jury?

Related to the telecasting will be the inevitable narrating that accompanies the telecasting of events such as a national convention. Will the narrators be giving thumbnail sketches of the participants, the judge, the lawyers, the defendant, and the jurors? Will witnesses, parties, and attorneys be interviewed at the end of the day or at other recess times for their reactions to various incidents of the trial? Will jurors who have become celebrities overnight be able to overcome the distractions incident to their newfound prominence and dramatized importance? In short, shall a defendant's ordeal in a stadium be substituted for his traditional day in court?

A trial should be conducted for the ascertainment of truth and not for the purpose of entertainment. Every trial is an exacting test of the fidelity to conscience and the intelligence of jurors. The test should not be made more difficult by the distracting impact of radio and television coverage of the trial.

Society can do nothing worse than to convict an innocent man. The news media can do nothing more venal than to contribute to such a happening. Let us all remember that if the time comes when the courts cannot guarantee the constitutional right of a fair trial, the time will also have come when the courts cannot guarantee the freedom of the press.