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A DEFENSE ATTORNEY'S VIEW

By PERCY FOREMAN†

THE DISTINGUISHED PANEL of which I am honored to be a member consists chiefly of lawyers of every shape and description — lawyers who are judges, a lawyer who is a Chancellor of one of America's great Bar Associations, a lawyer who is a teacher, a lawyer who is a District Attorney, and, to our surprise, a lawyer who is a journalist. I am just a lawyer who is a lawyer — and I have been that for longer than I care to, or most of you, can remember. For more than forty years I've been in the pit looking up at judges, over at juries, out at newsmen, and, occasionally, down on my client, who at least at the beginning of the trial was usually in the pit even deeper than I.

Although I am pleased to participate in a Symposium on "A Free Press and a Fair Trial," I might note that most of my professional life has been concerned with a "Fair Trial and a Free Client." As a defense lawyer my interest naturally is not in the abstract concept of a "fair trial." I have no illusions of cold, emotionless "justice" mechanically turning out impeccable, even-hand verdicts which are both fair and correct. What I know and what I thrive on is that dramatic process where advocates, such as I, are able to fight as hard as possible to keep the accused from being found guilty by twelve very human jurors. In this trial by forensic combat, we advocates use, as best we can, our mastery of the facts, our understanding of jurors and judges, our knowledge of the law, and our own courage and determination.

It is a bit awesome to have the whole State of Texas, or the entire Commonwealth of Pennsylvania, committed to the conviction of your client, but fortunately, our legal system has developed some very potent tools to aid the defense attorney in this seemingly unequal conflict. We have fundamental constitutional protections, such as the accused's privilege against self-incrimination and his right to confront his accusers, set rules of evidence which are designed to eliminate unreliable testimony, and most significantly, the presumption of innocence. Moreover, the accused and his advocate are entitled to an impartial jury — one which makes its determination of the facts *after* hearing the evidence produced and the arguments presented *in court* — and not one which has made up its mind before the trial has

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begun. The defense attorney's responsibility is to convince the jury of the accused's innocence, or more accurately, to strive to keep the jury from being convinced of his guilt. This I assure you is very often difficult. To impose the further burden of attempting to "deconvince" a jury or juror who "knows" the accused is guilty, is hardly fair to the advocate and certainly not fair to the defendant.

How does the press affect the defense attorney's task? First, I want to stress that my relations with the press have been, are, and I hope will continue to be, extremely cordial. As I noted, I have no illusion of a trial being some sort of abstract exercise in justice; it is not a legal equivalent to a laboratory experiment. A criminal trial is a dramatic, human, and public institution. I can remember that as a boy the court house impressed me as the chief theatre and school house of the town. The essential object of the trial is, of course, to determine the guilt or innocence of the accused, but the public trial is also a source of drama and instruction for the community. A realization by the court, the prosecution and the defense that this is so should not prevent them from doing their jobs, but rather should stimulate them to exercise their responsibility all the more carefully. I do not believe that publicity is presumptively prejudicial or at best a necessary evil. Justice should have and has traditionally had a public character, and those of us who are from day to day concerned with its operation should not only be aware of this but should learn how to understand and to live with this fact.

As you might discern from my remarks, I am not too concerned with publicity during a trial. Competent judges and competent counsel can prevent things from getting out of hand. Dignity and decorum are not necessarily enhanced by lack of publicity, nor destroyed by considerable publicity. We all know that some of the most frightening abuses have taken place in secret hearings, and indeed the constitutional provision for a public trial would seem to indicate that our forefathers presumed that publicity would help, not hurt, in the quest for justice.

I therefore cannot see any reason for a blanket prohibition of the use of television in the court or hearing room. It is true that through selective editing there could be misrepresentation of what goes on at the trial, but it is equally true that a reporter's printed story could be subjected to the same objection. Moreover, a remark which might be interpreted one way on a printed page may be understood in a considerably different way when the remark is heard from a speaker who is at the same time seen by the public. The voice, mannerisms

and demeanor of the speaker may convey a much more accurate impression than his mere printed words.

It could be argued that the use of television could adversely affect witnesses, and even judges and attorneys. But the fact is that no important public trial is free from public influence upon those who participate in it — whether they be a witness, judge, juror, or one of an audience of assorted newspapermen, court house buffs, interested lawyers, or curious citizens. Indeed, the self-consciousness or desire on the part of those participating to make a good show is already present in any major public trial, whether it be conducted with or without television.

Of course, there can be publicity that is excessive or poorly handled during the course of a trial. If this occurs it is usually because of error on the part of the judge, and convictions which might result from such “circus trials” will, of course, be set aside. This is not a problem, however, of control of the press but rather of control of the court.

The publicity which gives me the most concern is the publicity given to details and facts of the crime *before* the trial. Confessions, statements, comments, suppositions — all of which a competent counsel could easily keep out of any trial — may be plastered all over the papers or on television, convincing the public generally (including potential jurors) of the “clear cut guilt” of a man who has not yet had his day in court. None of the accepted means of eliminating prejudiced jurors who have been exposed to such information really can be said to work.

To ask a man, “Have you read about this case?” when the very question implies that if he has you are going to brand him as incapable of being “fair”, will most assuredly cause him to deny any familiarity with the case. Common experience justifies the defense attorney’s doubt about the accuracy of the answers to such an inquiry. However, such doubt is minimal compared to the doubt we should have about the perfect honesty of answers to questions which require a potential juror to state that he can be fair, when he has admitted to reading or having heard such publicity.

Such doubts plague the defense lawyer. They terrify him! For example, in a child abuse case, try to convince a juror — who has read that the defendant is a convicted rapist, who has read that a minister (who is not a witness) saw the accused in the act, who has read the anguished statement of the “victim’s” mother, who has read stern editorials about getting such “mad dogs” off the streets — that he must limit his impressions of the facts in what might seem

to him to be a trial bound by pettifogging rules. After such an emotional onslaught, just try to convince Mr. "Reasonable Juror" that the defendant was merely exercising a constitutional right in not taking the stand and that he is still entitled to a presumption of innocence.

Obviously the damage has been done, and you just hope you can pick up the pieces. But can we prevent the damage from being done? I am not sure that we can.

The English injunctive system is not suitable to either our constitutional or judicial tradition. The Supreme Court consistently has been very sensitive to any attempts through the use of injunctions to muzzle the press. Moreover, there is probably not the faith in the lower judiciary in the United States that exists in England. We have, for the most part, an elected judiciary, or politically appointed judges for limited terms, and a much wider variety of standards for the members of our bench than exist in England. Thus, it would seem most unlikely that we would ever adopt the English practice.

Also, I seriously doubt whether we can rely on the enforcement of ethical standards by the bar or bench to dry up the sources of such prejudicial information, or upon the enforcement of professional journalistic ethics to prevent its publication. The dispute between the press and the legal profession seems similar to the current battle over automobile safety: The automobile manufacturers say that they manufacture safe cars, but that there are no safe drivers; safety experts wonder if the cars are safe for those to whom the manufacturer knows they are to be sold. Criticizing drivers does not make safer cars, nor does criticizing cars make better drivers. Obviously, some third party has to make rules for both. Perhaps Judge Smith's proposals¹ are a step in the right direction.

However, any attempt to dry up the sources of information will be met with strong resistance by the press. It is, and will continue to be, the press's job to dig and dig hard for information. Of course, the court and the Bar Association could control the kind of information that a lawyer could divulge, and it is possible that legislative or judicial controls could be imposed on law enforcement officials. It is difficult, however, to see how witnesses, their relatives and others can be kept from discussing the case with the news media and thus have their views published. In fact, one effect of rules regulating law enforcement officials and lawyers might be that the only information available to the public is the least reliable; a state of affairs I am sure that we all wish to preclude.

1. See Smith, *A Judicial View*, 11 VILL. L. REV. 721 (1966).

As I have stated, it is unlikely that in the name of journalistic ethics, the press will not print such information as it has available and will not exploit sensational crime as one of the staples of any lively daily press. This is especially so if there is no common standard to bind all of the news media. Although a number of newspapers voluntarily have agreed to avoid emphasizing the details of any crime news or to indulge in any sensational reporting, the bulk of the news media will follow whatever is the most competitively successful path.

Another possibility might be to make those who create an atmosphere in which a fair trial cannot take place liable to those — the defendant, the state, the witnesses — who are inconvenienced or damaged by the delays which may be caused by such publication.

As you will have gathered, I am not too optimistic about ever “solving” the problem of such conflicts as presently exist between the principles of a “free press” and a “fair trial.” In the final analysis, the relative competence of a lawyer in dissipating adverse prejudicial publicity, and the fairness with which a judge administers a trial, may be the only effective protections that are feasible. As I believe I have pointed out, this may be a very difficult task for both the lawyer and the judge, but it is one which they have had to perform and which they have generally accomplished with competence. As soon as an attorney finds himself presented with such a situation, he should begin to consider how best to protect his client against adverse publicity. Under the recent Supreme Court cases,² it would appear that more lawyers will be getting into the act at a sufficiently early stage of the case so that many of the abuses of the past can be eliminated by more adequate and prompt legal representation.

2. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).