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Televising Judicial Proceedings - A Denial of Due Process?

ilization does not effect sexual drive or ability, sex offenders subjected to sterilization would be able to indulge in criminal acts without fear of pregnancy or of need for contraceptives. Thus, female mental defectives, so inclined, could engage freely in prostitution without the fear of bearing children.[45] Similarly, a rapist's ability to have intercourse is not affected by sterilization and consequently, such an operation would produce only the limited benefit of precluding offspring without lessening his capacity to commit illicit acts.

The legal aspects of sterilization laws must also be re-examined. The Supreme Court in *Griswold v. Connecticut*,[46] struck down a state statute which barred the distribution of information on birth control devices and prohibited the use of such devices. The Court, speaking through Mr. Justice Douglas, found a constitutional right of marital privacy with which the state may not interfere. It can be argued that an individual's right to procreate is no less important than his right of marital privacy. In fact, the former seems an inextricable component of the latter, and thus, the state should be unable to deprive its citizens of their ability to procreate.

Compulsory sterilization laws are historical mistakes. While normally the law takes some time to utilize new scientific achievements, in this area the courts have continuously applied eugenic theories which have not been fully proven. The United States Supreme Court would probably not hesitate today to strike down sterilization laws on the grounds that they contravene the protection of the individual afforded by the Constitution and reflect a concept repugnant to the social conscience of America.

[45] See Landman, *Sterilization—Legislation and Decisions*, 23 ILL. L. REV. 465, 469 (1922).

[46] 379 U.S. 926 (1965).

TELEVISING JUDICIAL PROCEEDINGS—A DENIAL OF DUE PROCESS?

The emergence of television as a major medium of reporting judicial proceedings has raised the issue of whether the televising of pretrial activities and the presence of television equipment in the courtroom constitutes an obstruction of justice. On June 7, 1965, the United States Supreme Court held that the televising of the criminal proceedings against Billie Sol Estes was a denial of "a fair trial in a fair tribunal." While the decision in *Estes v. Texas*[1] has settled some disputes, it has highlighted the necessity of resolving questions still unanswered. A conflict between the orderly administration of justice and the historical right to a public trial provides the substance of the problems to be solved.

[1] 381 U.S. 532 (1965).

Knowledge of the excesses of the English Court of the Star Chamber, and the French monarchy's abuse of the *lettre de cachet* impelled our society to provide safeguards against the employment of our courts as instruments of persecution; the public trial is one such safeguard. In the United States the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776,[2] and most of the states adopted similar constitutional provisions following the ratification of the sixth amendment to the federal constitution in 1791.[3] Since the United States Supreme Court has indicated that defendants in a state court are entitled to a public trial, the guarantee of the sixth amendment exists on the state as well as on the national level.[4] However, the question arises as to how "public" the trial must be. Surely the quality of justice provided is not proportional to the magnitude of the trial forum or the scope of its television coverage. The purpose of the *public* trial is not that every member of the community should be permitted to view the proceedings, but, that the trial must be open, rather than closed, and that persons other than "officials" may view it.[5] "We must take cognizance of the fact that the constitutional right of the accused to a public trial is a privilege intended for his benefit."[6] If we subordinate the accused's interest in the public trial to that of the public, we will weaken the power of the trial judge to promulgate rules "to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice."[7]

It is within the discretion of the court to exclude persons not directly connected with the trial to prevent a miscarriage of justice.[8] The right of the trial judge to exercise this power is unquestioned when the courtroom is overcrowded, or if there is the likelihood of a recital of scandalous or indecent matters which would have a demoralizing effect upon the spectators.[9] As long as the judge exercises the power within these guidelines the right to a public trial is not impaired. The trial judge's power to exclude the press from the courtroom has been the focus of much dispute.[10] With the advent of television as an important aspect of communication, this controversial issue has been further complicated. Significantly, it has been pointed out that today "there remains no doubt that the protection of freedom of speech and press is extended to the medium of television."[11]

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[2] PA. CONST. art. 1, § 9.

[3] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

[4] *In re* Oliver, 333 U.S. 257 (1947).

[5] Douglas, *The Public Trial and the Free Press,* 33 ROCKY MT. L. REV. 1, 5 (1960).

[6] See Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486, 495 (W.D. Pa. 1957). "While criminal trials are public proceedings it is doubtful whether the public has anything akin to a right of attendance at such trials. The sixth amendment grants to the accused the privilege of a public trial, but there is no comparable constitutional grant to the public making their attendance mandatory upon the court or the parties." Yesawich, *Television and Broadcasting Trials,* 37 CORNELL L.Q. 701, 704-05 (1952).

[7] People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954).

[8] United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949).

[9] *Id.* at 922.

[10] *Compare* Craig v. Harney, 331 U.S. 367, 374 (1946) *and* Lyles v. State, 330 P.2d 734, 740 (Okla. 1959) *with* Pennekamp v. Florida, 328 U.S. 331 (1946) *and In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465, 476 (Colo. 1956).

[11] Doubles, *A Camera in the Courtroom,* 22 WASH. & LEE L. REV. 1, 2 (1965).

The influence which television may have upon the trial and the juror can begin before the courtroom doors are open. The United States Supreme Court dealt with this problem of pretrial publicity in *Rideau v. Louisiana*.[12] In its opinion, the Court discussed an interview, filmed in the jail prior to trial, in which the accused confessed to having committed armed robbery, kidnapping and murder. It appears implicit in the decision that the Court considered this is to be pretrial publicity carried to its extreme and which could result only in a prejudiced trial.

The dangers presented by the televising of criminal proceedings are not limited to the period before trial, but are equally apparent with respect to the coverage of the trial itself. "Television can work . . . profound changes in the behavior of the people it focuses on."[13] Both witnesses and judges are likely to be influenced by the presence of television equipment in the courtroom. Constant awareness of television cameras may result in the impairment of a witness' testimony.[14] Even a judge may be distracted from his duty simply because the temptation to play to the electorate becomes too great.[15] If the trial judge were to become nothing more than an actor, the bench could be nothing more than a stage.

The Court in *Estes* confronted the problems of both trial and pretrial television coverage. In this case, extensive pretrial publicity had given the proceedings national notoriety and had resulted in the petitioner's obtaining a change of venue. On the day of trial, the petitioner moved to prevent the televising and radio broadcasting of the proceedings. A two-day hearing on this motion was carried live by both radio and television, and the final result of these deliberations was a denial of the motion.

Thereafter, to minimize the disruptive effect of television at the trial, a booth was constructed in the rear of the courtroom within which all photographers were to remain with their equipment during the proceedings. Because of continual objection, only the opening and closing arguments of the state, the return of the jury's verdict, and its receipt by the trial judge were televised live with sound. Later, videotaped portions of the proceedings were telecast on regularly-scheduled news programs.

At the conclusion of his trial, the petitioner was found guilty, and on appeal his conviction was affirmed. On writ of certiorari, the United States Supreme Court, in a five-to-four decision, reversed the conviction and held that the petitioner had been deprived of due process of law by the televising and broadcasting of the pretrial proceedings and of the trial itself. The Court, through Mr. Justice Clark, stated that the exercise of freedom of the press must necessarily be subject to the maintenance of absolute fairness in the judicial process. The irrelevancies which are injected into the proceedings by the use of television must be protected against because they detract from the maintenance of this fairness.

There is, however, a basic argument to be made in favor of television in the courtroom. With television playing an increasingly important role in the field of public information, interest has arisen as to the

[12] 373 U.S. 723 (1963).
[13] Estes v. Texas, 381 U.S. 532, 569 (1965) (concurring opinion).
[14] See United States v. Kleinman, 107 F. Supp. 407, 408 (D.D.C. 1952).
[15] See Douglas, *supra* note 5, at 10.

educational advantages to be gained from the televised trial. Perhaps this viewpoint has emerged because "there is no field of government about which the people know so little as they do about their courts."[16] And, moreover, it may be equally true that "there is no field of government about which they should know as much, as their courts." It has been said that with "opportunity to know and see how an accused is afforded due process of law" the general public "will come to have a greater respect for the principles of democracy."[17]

Nonetheless, in considering the role of television as a medium of education, the basic purpose of the trial must not be overlooked. It has been observed that "a trial is not held for public information or education. It is held for the solemn purpose of endeavoring to ascertain the truth. . . ."[18] If it were conceded, *arguendo,* that the educational benefits of televised trials constituted a valid basis for permitting television in the courtroom, we would have to consider Mr. Justice Harlan's statement in Estes:

> The public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant . . . than by innate curiosity to learn about the workings of the judicial process itself.[19]

The basic controversy remains: should television be permitted in the courtroom?

The negative position has been taken by the American Bar Association:

> The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.[20]

On the other hand it has been contended that "television cameras are quiet and unobtrusive,"[21] and "that television and press photography can be employed without the least disturbance of the proceedings. . . ."[22] Improvements in the methods of mass communication have now made it possible to film or tape an occurrence almost without detection. This eliminates the problem of interruption in the courtroom procedure and distraction of trial participants.[23] However, we should not forget that the basic purpose of a public trial necessarily subordinates the interests of the public to the more fundamental rights of the accused to a fair trial. "Free-

[16] Lyles v. State, *supra* note 10, at 742.
[17] *Id.* at 747.
[18] Doubles, *supra* note 11, at 9.
[19] Estes v. Texas, *supra* note 13, at 594 (concurring opinion).

[20] Canon 35, American Bar Association Canons of Professional Ethics. Similarly, the Federal Rules of Criminal Procedure provide that "the taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court." FED. R. CRIM. P. 53.
[21] S. REP. No. 725, 82d Cong., 1st Sess. 100 (1951).
[22] Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings,* 110 U. PA. L. REV. 1, 8-9 (1961).
[23] However, the problem of *undetected* broadcasting devices still remains. See *In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, *supra* note 10. If the participants in a trial are aware that they may be subjected to unrealized scrutiny, their reactions might be the same as if broadcasting devices were prominently in use.

dom of expression can hardly carry implications that nullify the guarantees of impartial trials. . . . The need is great that courts be . . . allowed to do their duty."[24]

The process of justice surely does not exhibit a perfect stability as it presently exists. It would appear unwise, therefore, to inject an additional variable into the multifarious problems already extant. That the education of the public is a valid, indeed a laudable, ideal, does not, of itself, excuse an intrusion into the normal courtroom procedure. Justice can not be made an experiment — that the televising of a trial *may not* be deleterious is obviously not a sufficient justification for the utilization of this technique.

A great segment of respected opinion rejects the entree of the television camera onto the trial scene. Moreover, the psychological effects of television coverage upon the defendant, the judge, the jury and the general public *could* vitiate the meaning of a fair and open trial. The mere possibility of this danger militates against television in the courtroom at this time. The same reasoning would reject any innovation which might tend to jeopardize the life or liberty of even a single accused.

[24] Bridges v. California, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting).

THE RIGHT OF PRIVACY

The right of privacy has been defined as the individual's right to be free from unwarranted intrusions and publicity. It is, in essence, "the right of the individual to be let alone."[1] Although the right of privacy appears to be a recently emerging doctrine, its basis can be traced to the laws of ancient Greece and Rome, and to the Anglo-Saxon common law,[2] whereat protection was granted only from physical interference with life and property. In its development, a trend has evolved which

[1] Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

[2] HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK 1-7 (1954); Pound, *Interests in Personality*, 28 HARV. L. REV. 343, 357 (1915). For example, subsequent to the passage of the New York statute, the Supreme Court of Georgia condemned the *Roberson* decision as repugnant to the ordinary concepts of justice, and espoused a concept that there was a distinct non-statutory right of privacy which is capable of judicial recognition. Despite the lack of common-law precedent or commentary as a determinative factor, support was found for the decision in the natural law and in the state and federal constitutional guarantees that no person shall be deprived of liberty. However, the use of constitutional guarantees as a foundation for the right has been criticized as being logically weak. The Constitution and Bill of Rights, although recognizing in the abstract the existence of the right of privacy, do not allocate to each individual his specific personal rights against such an invasion. These provisions furnish only the safeguards and bulwarks against governmental power.