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Commentary, The Selling of Jury Deliberations

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REPORT BY THE NATIONAL NEWS COUNCIL, 1975-1978, at 124 (1979).

8 National News Council, IN THE PUBLIC INTEREST III, at 242 (1984).

9 *Id.*

10 H. GOODWIN, GROPING FOR ETHICS IN JOURNALISM 191-93 (2d ed. 1987).

11 Telephone response from Max Frankel, executive editor of the N. Y. TIMES (Oct. 18, 1988).

12 J. S. MILL, ON LIBERTY, ch. 1 (1859).

13 Telephone interview with F. Gilman Spencer, editor of THE DAILY NEWS (Oct. 18, 1988).

14 E. LAMBETH, COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION (1986).

15 Telephone interview with Al Ellenbery, metropolitan editor of the N. Y. POST (Oct. 18, 1988).

16 *Supra* note 14, at 128.

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Suppose that a state enacted a statute prohibiting jurors in criminal cases from publishing accounts of their deliberations. Many versions of such a statute are possible. The restrictions might apply only within a specific time period (say, until a year after the verdict) and they might apply only to commercial sales. Probably the statute would have an exception permitting written or verbal accounts made in connection with an appeal or new trial. Let us assume a fairly extreme law -- a permanent prohibition against any publication except those made as a part of the judicial process. What is the conventional legal approach to assessing the kinds of free speech issues raised by such a statute? How satisfactory is this approach?

Modern constitutional analysis usually begins with an apparently inclusive identification of the relevant interests. In this instance, of course, the most important of these is the First Amendment right to publish. In a legal world where school students, imprisoned felons, and corporations all have the right to free speech, the status of being a juror surely cannot preclude the assertion of this right. More important than the status of the speaker is the interest of the public in hearing what the juror has to say. And, again, in the world of modern legal discourse, the potential significance of information about jury deliberations in criminal cases cannot be denied. Remember, the Supreme Court has already held that the public has a constitutional interest in reading price advertisements and seeing exotic dancing. Given these parameters, it is not surprising that the Court has emphatically recognized the public's need to know about trials. This knowledge is said to be necessary for forming opinions about the justice system and for assuring a fair trial process. So crucial is public access to trials that the privacy of minors who have been the victims of sex crimes may not be protected by a rule shutting out the press and the public during their testimony. Moreover, the privacy interests of potential jurors will not automatically justify closing off *voir dire* even when the jurors are being asked about deeply personal matters. Thus, the public's interest in information about trials extends not only to sensitive aspects of the trial itself but also to the jury.

With these starting points, it would certainly be difficult for any court to conclude that the public has no First Amendment interest in access to information about what happens inside the jury room. Both the conduct of the trial and the composition of the jury are to some extent mere forms that take on operational significance during the jury's deliberations. What if jurors routinely disregard the judges' instructions? What if racial discrimination affects discussions? The juror's right to publish, in short, carries with it the considerable weight of the general public's interest in information relevant to fair trials and a wise, effective justice system.

There are, however, other interests that must be identified and "balanced" against the interest in publication. Under conventional legal analysis, a sufficiently important governmental interest can justify restraints on even core political speech. Such an interest might be implicated by the statute under consideration here because the disclosure of details of jury discussions could reduce

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the candor and depth of those discussions. At least, the Court has already acknowledged this sort of possibility in the famous case involving President Nixon's confidential conversations. Since many judges, including Supreme Court Justices, hold secret conferences while deciding cases, the relationship between confidentiality and candor would seem plausible in the context of judicial proceedings as well. Moreover, the quality of deliberation might lead to income or notoriety. For example, there might be an incentive to elicit conflict or drama in the jury room and, since a hung jury might be thought to be of less potential interest, there might also be an inappropriate incentive to reach unanimity. Courts would have to carefully itemize these competing interests.

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This sort of inclusive consideration of relevant interests lends a reasonable cast to the Court's current approach to First Amendment analysis. This impression is strengthened by the second stage of analysis: an effort to balance and accommodate the various interests. The main consideration at this stage is whether the governmental interest (in the quality of jury deliberations) could be achieved in any way that trenched less severely on the interests involved in publication. Since our hypothetical statute would bar almost all publication and would do so for unlimited lengths of time, it would be vulnerable. For instance, it might be thought that long-delayed publications, which would probably not have been contemplated during the deliberations, need not be prohibited in order to achieve the state's purpose. This seems a sensible objection, and it leaves open the possibility that a more finely tailored statute might still be constitutional. This method -- the full articulation of the relevant interests and a precise, rationalistic effort at accommodation -- may sound reasonable enough, but I believe it limits judicial inquiry in important ways.

Notice, first, how the legal primacy of the constitutional interest in free speech encourages a soft-headed suspension of disbelief on empirical and historical issues. Why believe that the public has any significant need for direct accounts of jury deliberations? Conventional constitutional analysis answers this question by naming some obviously important public issue (for example, the justice system) and then assuming that almost any information potentially relevant to that issue, no matter what its character or source, is needed by the public.[1] This is nearly superstitious in its simplicity. It may be that, even without the revelations of jurors, the public has plenty of information available to evaluate both specific trials and the justice system generally. Possible alternative sources include direct experience in juries and in other small groups, scientific studies, and information produced at trial or on appeal. Before assuming that such sources are inadequate, it would be important to find out the extent to which jurors' accounts have been unavailable in the past and whether public decision making was in any way retarded as a result. In some amorphous way, the public can be thought to "need" to know almost anything. But without refinement and substantiation, this tells us little about the consequences of policies that restrict the availability of information. Notice also how the emphasis on rights and on instrumental efficacy distracts attention from the issue of civic responsibility. It may be that our hypothetical statute would prevent some publications that were not specifically contemplated during jury deliberations. However, it does not follow that the statute is broader than necessary to accomplish the state's purposes. Restraints, even if overbroad when viewed from a concretely functional perspective, can be relevant to shaping self-image and role. If jurors' understand that there is a possibility of *any* subsequent publication, the spirit in which they approach their responsibilities may be affected.

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We often recognize that a sense of public role and duty is inculcated by imposing special restraints on the use of information by those with public obligations. Lawyers can be disbarred for revealing the confidences of their clients. Grand jurors are routinely sworn to secrecy. Even litigants can be punished for publishing information obtained through the process of pre-trial discovery. To evaluate such restraints only in terms of immediate consequences would be to ignore the impor-

tance of a consciousness of public status and responsibility.

Much of the ritual surrounding juries has the effect of communicating the harsh fact that jurors do not act as individuals or as private citizens. They are sternly lectured by judges who sit high and are clothed in black robes; they are separated from their families and jobs; they are housed in motel rooms and transported in buses with darkened windows. Until recently, such treatment, along with general civic education, may have been enough to create a sense of special function so that jurors did not often or noticeably discuss their official experiences. It may be that this sense of purpose and self-restraint is breaking down. A legislature might come to the conclusion that statutory prohibitions are necessary to make explicit a lesson that once had been understood implicitly: that during their deliberations jurors should see themselves, not as political observers or as policy analysts or as social psychologists or as artists, but as public trustees performing a specific public task.

Such a conclusion, incorporated in a statute imposing broad duties of confidentiality on jurors, might or might not ultimately turn out to be wise. It would entail uncertain consequences for public debate, but it would embody an important notion of civic duty and role. Unfortunately, conventional free speech analysis would only skim over both the difficulty and seriousness of the issues posed. Experience is probably the only way to find out how dangerous or useful such statutes would be, and experience is what modern constitutional law curtails.

NOTE

1 Those who think that this must be a tendentious characterization of the Court's approach are referred to *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981) (need for nearby nude dancing); *First National Bank v. Bellotti*, 435 U.S. 755 (1978) (need for opinions of corporations); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (need for price advertisements); *New York Times Co. v. Sullivan*, 376 U.S. 254(1964) (need for defamatory information).

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Actors sell acting, bakers sell bread, chefs sell cuisine, and so on through the alphabet. America is a land of an endless parade of sellers transacting with buyers who, in turn, themselves become sellers. Our legal justice system is no exception: police, lawyers, judges, jailers trade their services for remuneration. It is not only capitalists who need apply; anyone is free to sell.

Some, though, would have it otherwise. In the aftermath of the Howard Beach trial, a mini-controversy has arisen concerning the propriety of jurors receiving payment in exchange for exclusive reports of jury deliberations. The practice develops in a way that generates a more salable story. One may suspect that lurking behind such criticism is a general conviction that dispensation of justice and the profit motive do not mix.

How likely is it that the integrity of jury proceedings will be threatened from this direction? I have no way of knowing -- nor, I suspect, does anyone else. However, one can hazard a guess based on generally reliable human propensities. When I do that, I find it more likely that jury deliberations will be marginally *improved* by prospects of barter than that they will be perverted. The juror who dozes through the trial and subsequent deliberations will find himself not only sleeping away the opportunity to render a fair verdict but also possessing a smaller stock of precise recollections to offer an acquisitive press. So it is reasonable to suspect that financially-minded jurors may be especially dutiful in paying attention to trial proceedings and to the arguments that transpire in the jurors' room. Indeed, they may be induced to take a more active and incisive role in those deliberations: wouldn't *you* want to be a hero of *your* own story? On balance, then, there seems at the very least to be no overwhelming probability of trial proceedings being worsened by the introduction of a cash nexus.

That, though, is speculation. I should not want to rest the case for jurors' liberty to profit from their role on a

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