RECENT DEVELOPMENT

POSTTRIAL JUROR INTERVIEWS BY THE PRESS: THE FIFTH CIRCUIT'S APPROACH

In a series of cases culminating with *Haeberle v. Texas International Airlines*,[1] the Fifth Circuit Court of Appeals has defined the scope of the press' first amendment[2] right to posttrial juror interviews. This definition involves a delicate balance between the sixth amendment guarantee of a fair trial[3] and the first amendment protection of a free press.[4] Judges may restrict the time and place of juror interviews[5] but cannot forbid such contact altogether.[6]

In 1982, in *In re Express-News Corp.*,[7] the Fifth Circuit struck down a local court rule[8] that prohibited postverdict juror interviews except upon

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1. 739 F.2d 1019 (5th Cir. 1984).

2. The first amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

3. The sixth amendment states in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . by an impartial jury. . . and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

U.S. CONST. amend VI.

4. Federal courts have consistently held that the first amendment does not guarantee the press access to information beyond that available to the public. Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (upheld government's refusal to validate passports of tourists desiring to visit Cuba). The Fifth Circuit, in *In re* Express-News Corp., 695 F.2d 807 (5th Cir. 1982), approved of the line of cases that gives the press a right of access equal to that of the general public. *Id.* at 809-10.

Tension between the first and sixth amendments has arisen in a variety of contexts. For example, a number of federal districts have local court rules which prohibit the taking of photographs in, or in the immediate vicinity of, the courtroom. *See, e.g.*, N.D. TEX. R. 14.3; D. WYO. R. 19; *cf.* FED. R. CRIM. P. 53 (prohibits taking of photographs during judicial proceedings).

The validity of these rules generally has turned on the facts. *Compare* Estes v. Texas, 381 U.S. 532, 550-52 (1965) (5-4 decision) (televised recording of criminal proceedings violated defendant's right to due process when defendant was well known and had national notoriety) *with* Dorfman v. Meiszner, 430 F.2d 558, 562 (7th Cir. 1970) (district court rule prohibiting photography anywhere in courthouse or federal building and on surrounding plaza and sidewalks violated news media's first amendment rights).

5. *See infra* notes 18-25 and accompanying text.

6. *See infra* notes 7-17 and accompanying text.

7. 695 F.2d 807 (5th Cir. 1982).

8. The rule provided as follows:

> No attorney or any party to an action *or any other person* shall himself or through any investigator or other person acting for him interview, examine or question any juror, rela-

a showing of "good cause."[9] The court held that the rule, insofar as it impinged on the press' right to gather news,[10] was overly broad.[11] Judge Rubin, writing for the court, distinguished the line of authority forbidding litigants and their attorneys from questioning jurors. Litigants typically sought juror interviews to obtain evidence of misconduct,[12] while

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tive, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action except on leave of court granted upon good cause shown.

W.D. TEX. R. 500-2 (emphasis added). The rule was rescinded in 1983. TEXAS RULES OF COURT 736 (1984).

In 1976, the news media launched a similar challenge to the constitutional validity of rule 500-2, which was then rule 20. The Fifth Circuit denied the petitioners' application for a writ of mandamus. *In re* Iris Reed, No. 76-3009 (5th Cir. 1976) (mem.), *noted in* Brief for Respondent and the United States at 5 n.1, *In re* Express-News Corp., 695 F.2d 807 (5th Cir. 1982).

Six other districts have court rules that prohibit questioning of jurors by nonparties. *See* D. CONN. R. 12(f); E.D. LA. R. 14.5; M.D. LA. R. 16(A)(5); W.D. LA. R. 16; D.N.J.R. 19(B); N.D. OKLA. R. 8. The Louisiana districts lie within the fifth circuit.

9. Prior to *Express-News*, a number of district courts had held that judges cannot insulate discharged jurors from the news media. *See* United States v. Franklin, 546 F. Supp. 1133, 1145 (N.D. Ind. 1982); Ohio *ex rel.* Beacon Journal v. McMonagle, 8 Media L. Rep. (BNA) 1927, 1927 (Ohio Ct. App. 1982); Barnes v. Schwartz, 6 Media L. Rep. (BNA) 1648, 1650 (S.D. Fla. 1980) (order).

In United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978), the Ninth Circuit Court of Appeals invalidated a district court order that forbade discharged jurors from discussing a case with the news media. *Id.* at 1361. The appellate court held that the threat of jury harassment posed no "clear and present danger." The court reasoned that because the trial had ended, interrogation of the jurors did not affect the defendants' ability to obtain a fair trial. *Id.*

10. In *Branzburg v. Hayes*, the United States Supreme Court extended first amendment protection to newsgatherers. 408 U.S. 665, 681 (1972) (dictum).

11. 695 F.2d at 810, 811. The court of appeals' analysis resembles the judicial doctrine of "overbreadth." The overbreadth approach considers the effect of the law on parties not then before the court. If the law would be unconstitutional as applied to these litigants, it is facially invalid. The Supreme Court used the following language to define the doctrine in NAACP v. Alabama, 377 U.S. 288 (1964): "[A] governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 307. Similarly, the court of appeals in *Express-News* stated: "A court may not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special treatment by carrying the burden of showing good cause." 695 F.2d at 810.

Two aspects of the overbreadth technique distinguish it from the *Express-News* analysis. First, the Fifth Circuit analyzed the constitutional validity of rule 500-2 solely in terms of its applicability to the challengers then before the court, whereas the "overbreadth cases" would have considered the effect of the rule on other potential interviewers. Second, the Fifth Circuit left rule 500-2 intact. *See, e.g.*, United States v. Davila, 704 F.2d 749, 753-55 (5th Cir. 1983) (upheld denial of defendant's motion to interview jurors on basis of rule 500-2). In contrast, courts employing an overbreadth approach would have invalidated rule 500-2 in its entirety. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1186-87 (10th ed. 1980) (discusses the distinctive features of the overbreadth technique).

12. *See, e.g.*, United States v. Riley, 544 F.2d 237 (5th Cir. 1976) (discussed *infra* note 27), *cert.*

Express-News' proposed interviews, which were intended solely for informational purposes, did not threaten the finality of the verdict.[13]

In *Express-News*, the court engaged in strict scrutiny, requiring a "compelling state interest" and a rule "narrowly tailored to prevent a threat to the administration of justice."[14] Although the court suggested that the sixth amendment right to a fair trial is a compelling state interest,[15] it held that the rule failed the second prong of the test because it was over-inclusive.[16] The rule restricted the news media even when the jurors would otherwise be "willing and anxious to speak."[17]

The court, however, left open the possibility that it would uphold a

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denied, 430 U.S. 932 (1977). *Riley* is in accord with decisions from other circuits. *See, e.g.*, United States v. Franks, 511 F.2d 25, 38 (6th Cir.), *cert. denied*, 422 U.S. 1042, 1048 (1975).

Organized bar groups generally permit postverdict interviews for the purpose of impeaching a verdict. For example, the Model Code of Professional Responsibility approves of juror interviews:

> After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29 (1981); *accord* American College of Trial Lawyers, CODE OF TRIAL CONDUCT § 19(c) (1972) (counsel has right to interview discharged jurors when permitted by law); ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1967) (attorney may interview discharged jurors to impeach verdict); *cf.* North Carolina Comm. on Professional Ethics and Grievances, Op. 337 (1983) (lawyer may interview jurors for purpose of improving his trial techniques).

Judges, however, typically adopt a strict position. *See, e.g.*, Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948); United States v. Balistrieri, 577 F. Supp. 1532, 1549, 1550-51 (E.D. Wis. 1984). In *Rakes*, Judge Prettyman stated:

> If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice.

169 F.2d at 745-46.

13. 695 F.2d at 810. Arguably, publication of jurors' allegations of misconduct in the deliberations may disturb the finality of judgments. As a practical matter, however, courts are unlikely to admit reported interviews into evidence. *See* State v. Larson, 281 N.W.2d 481, 484 (Minn.), *cert. denied*, 444 U.S. 973 (1979); *see also* United States v. Jaffe, 98 F. Supp. 191, 194 (D.D.C. 1951) (newspaper articles generally inadmissible).

14. 695 F.2d at 810.

15. *Id.* at 809-10.

16. *Id.* at 810.

17. *Id.*

less restrictive court rule,[18] particularly one that prevented discussion of other jurors' votes.[19] A year later, in *United States v. Harrelson*,[20] the Fifth Circuit approved a court order that prohibited "repeated requests for interviews" with reluctant subjects[21] and inquiry into the votes of other jurors.[22] The court found the order narrowly drawn to protect against harassment of former jurors and to preserve the confidentiality of jury deliberations.[23] Limiting *Express-News* to the general proposition that the press is entitled to some access to the jury,[24] the court emphasized that trial judges have the discretion to limit such access pursuant to their supervisory authority over the jury.[25]

Recently, in *Haeberle v. Texas International Airlines*,[26] the Fifth Circuit again addressed *Express-News* in upholding a judicial prohibition against juror interviews by litigants.[27] In *Haeberle* the trial court entered

18. *Id.*

19. *Id.* at 811 ("We express no view concerning the validity of a rule narrowly tailored to prevent the disclosure of the ballots of individual jurors or some other paramount value.").

20. 713 F.2d 1114 (5th Cir. 1983).

21. *Id.* at 1117-18.

22. *Id.* at 1118.

23. *Id.* While the court order approved in *Harrelson* is more narrowly drawn than rule 500-2, it is not the least restrictive alternative. For example, to promote juror privacy, a court could advise jurors who felt harassed to seek a protective order. *See* Brief of Appellants-Petitioners at 21, United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983); *cf.* Commonwealth v. Fidler, 377 Mass. 192, 201 n.9, 385 N.E.2d 513, 519 n.9 (1979) (quoting OFFICE OF JURY COMMISSIONER FOR MIDDLESEX COUNTY, THE TRIAL JUROR'S HANDBOOK 20-21 (1978)) (notes that jurors are routinely advised not to reveal the names of fellow jurors or course of deliberations). Similarly, a judge may require that all interviews with jurors take place under his supervision. *See* United States v. Cauble, 532 F. Supp. 804, 808 (E.D. Tex. 1982). In *Cauble*, the court noted that "a district judge has the power, and sometimes the duty, to order that all posttrial investigation of jurors shall be under his supervision." *Cf.* Commonwealth v. Fidler, 377 Mass. 192, 202-03, 385 N.E.2d 513, 519-20 (1979) (trial judge can supervise questioning of jurors by litigants and their counsel). The *Harrelson* court did not examine less restrictive alternatives.

24. 713 F.2d at 1116, 1118.

25. *Id.* at 1118.

26. 739 F.2d 1019 (5th Cir. 1984).

27. The Fifth Circuit had previously considered an analogous question in United States v. Riley, 544 F.2d 237 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977). In *Riley*, the defendant requested the court's permission to interview the jurors, intending to elicit evidence of jury misconduct. *Id.* at 241. The trial court denied the motion. *Id.* The Fifth Circuit affirmed, holding that an attorney may interview jurors only if she makes a preliminary showing of prejudicial intrusion into the deliberative process. *Id.* at 242; *see also* O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1310 (5th Cir. 1977) (counsel's affidavits insufficient to show "illegal or prejudicial intrusion into the jury process").

Twenty-five federal districts have local court rules that prohibit litigants and counsel from interviewing discharging jurors without leave of court. *See* M.D. ALA. R. 4; N.D. ALA. R. 10; S.D. ALA. R. 12; D. ARIZ. R. 12(b); D. CONN. R. 12(f); D.D.C.R. 1-28(c); D. KAN. R. 23A; E.D. LA. R. 14.5; M.D. LA. R. 16(A)(5); W.D. LA. R. 16; D. MD. R. 25A; N.D. MISS. R. G-3(2); S.D. MISS. R. 16(B);

judgment against three limited partnerships in accordance with the jury's responses to special interrogatories.[28] Their attorney then sought leave to interview the jurors to learn the reasons for their findings.[29] The trial judge denied this request.[30]

On appeal, the attorney challenged the denial on first amendment grounds.[31] Judge Rubin, writing for the court, rejected the claim.[32] He distinguished *Express-News*, noting that it turned on the public's "paramount" right to obtain information.[33] The attorney in *Haeberle* sought the information exclusively for her own benefit.[34] The court conceded that her interests were of some constitutional dimension, but held that they were secondary to the state's interest in preserving jurors' privacy and promoting the administration of justice.[35]

Haeberle represents a sound balance between the first and sixth amendments. This balance affords reporters a constitutional right to gather information absent harassment or inquiry into the specific votes of other jurors.

The court's refusal to endorse a blanket prohibition against juror interviews reconciles conflicting practical considerations to preserve the integrity of the system. The availability of juror interviews ensures accountability to the public.[36] Prohibiting juror interviews would dimin-

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E.D. MO. R. 16(D); D.N.J.R. 19(B); S.D. OHIO R. 5.5; N.D. OKLA. R. 8; D.R.I.R. 22a(g)(3); W.D. TENN. R. 19; E.D. TEX. R. 10(b)-(c); N.D. TEX. R. 8.2(d); W.D. WASH. R. CRIM. P. 47(b); N.D. W. VA. R. 1-15; S.D. W. VA. R. 1-18; D. WYO. R. 18(c).

The court rule for the Western District of Tennessee is typical:

> No attorney, party or representative of either may interrogate a juror after the verdict has been returned without prior approval of the Court. Approval of the Court shall be sought only by an application made by counsel orally in open Court, or upon written motion which states the grounds and the purpose of the interrogation.
>
> If a post-verdict interrogation of one or more members of the jury should be approved, the scope of the interrogation and other appropriate limitations upon the interrogation will be determined by the judge prior to the interrogation.

W D. TENN. R. 19.

28. 739 F.2d at 1020.

29. *Id.*

30. *Id.*

31. *Id.* at 1021.

32. *Id.* at 1022; *see also* Sixberry v. Buster, 88 F.R.D. 561, 562 (E.D. Pa. 1980) (denied attorney's request to interview jurors based on desire to improve litigation skills). The bar has reached conflicting views concerning the ethical propriety of *Haeberle*-type interviews. *See* authorities cited *supra* note 12.

33. 739 F.2d at 1022.

34. *Id.*

35. *Id.*

36. Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889, 893 (1983).

ish public confidence in jury verdicts.

Uncontrolled inquiry, however, would also undermine the integrity of jury verdicts. Few persons would have confidence in a system that produces dubious results; however, exposure of every aspect of jury deliberations would produce precisely that appearance, whether justified or not, for factual findings are typically the products of compromise.[37] Discussion among jurors should take place in the jury room, not in the newspapers.[38]

Qualified protection of the deliberative process also promotes freedom of thought.[39] The notion of a thorough and relentless exchange of ideas lies at the heart of the jury system.[40] The exposure of jurors' words and votes would strike the system at its roots. Equally important is the need to protect jurors from harassment.[41] As state-appointed participants in the judicial process, jurors are entitled to some privacy.[42]

The *Express-News-Harrelson-Haeberle* balance accommodates these concerns while according the press some constitutional protection. A balancing test provides few bright lines, however, for the importance of various interests will differ in every case. The Fifth Circuit wisely has left such decisions with the superintendents of judicial proceedings—the trial judges.

R.E.B.

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37. *See* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 HARV. L. REV. 1187, 1195-97 (1979).

38. *See* Note, *supra* note 36, at 891.

39. A Senate subcommittee's treatment of jurors after the trial of presidential assailant John Hinckley stands in stark contrast to the judiciary's traditional concern for the confidentiality of jury deliberations. The Subcommittee on Criminal Law invited five of the jurors to testify about their experience. Some of the senators openly denounced Hinckley's acquittal and inquired into the role of certain jurors not then present. *See The Insanity Defense: Hearings on S.* 18, *S.* 1106, *S.* 1558, *S.* 1995, *S.* 2572, *S.* S. 2658, *and S.* 2669 *Before the Subcomm. on Criminal Law of the Senate Comm on the Judiciary,* 97th Cong., 2d Sess. 155-70 (1982).

40. *See* Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir.), *cert. denied,* 335 U.S. 826 (1948).

41. *See* United States v. Harrelson, 713 F.2d 1114, 1118 (5th Cir. 1983).

42. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1967). Opinion 319 states: "The task of being a good juror is not an easy one, and lawyers should not in their efforts to represent clients do anything that will tend to make it more difficult to obtain qualified juror [sic]." *See also* United States v. Balistrieri, 577 F. Supp. 1532, 1550 (E.D. Wis. 1984) (lawyer interviews have a "chilling effect on potential jurors").