PRÉCIS

A STUDY OF THE STATUS OF JUDICIAL CANON 35 AND ITS IMPACT ON TELEVISION IN THE LEGAL PROCESS

by Arthur Franklin Holston, Jr.

I. The Subject of the Study:

Edward R. Murrow, prominent leader of the government's office of information and former television personality, recently stated,

> There should never be any regulation prohibiting the free export of news or information, but both in television and the movies the people who produce the material might well have regard, not only for the income, but the impact. Freedom of expression cannot be limited without being destroyed. Those involved in mediums of communication have a single allegiance: to the truth.[1]

The problem of the impact of television, the fight for freedom of expression, intertwined with a fundamental need for self-censorship, is the involved web that almost suffocates television as the medium contemplates its role in the legal process.

To further complicate the picture, the American Bar Association has its Canon 35, which stated, in 1937,

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public, and should not be permitted.

The Canon is now 35 years old and its only pertinent revision was made in 1952 when the phrases "or televising" and "distract the witness in giving his testimony" were added. The original Canon was enacted after the excesses of the tabloid press during the Hall-Mills and Peaches Browning trials of the not-always glorious 1920's. Every attempt in recent years to get Canon 35 repealed has failed.[2]

The Honorable John R. Dethmers, Chief Justice of the Supreme Court of Michigan, spoke in opposition to the use of television in the courtroom when he stated,

> In every Canon 35 discussion the Constitutional rights of freedom of the press and of speech are stressed by those who say courts should be opened to news and TV cameras. It is well to remember that these were included in the Bill of Rights not primarily to secure business advantage for a special group as distinguished from other members of the public-namely, for those desiring to engage in the business of publishing or broadcasting the news. On the contrary, these rights were included for the specific purpose of guaranteeing to the people the right to be informed, particularly concerning the operation of government.
>
> So considered, the rights of freedom of press and speech are closely related to another Constitutional right - the right to a public trial. But here again this is a right designed not only to prevent persons from being subjected to the injustices of Star Chamber proceedings but also to keep the people informed about what the courts are doing in cases which may affect the rights of the public.
>
> Obviously trials should be public. But it does not follow that a trial should be held in the

largest auditorium in town so that a bigger crowd could attend. A trial does not have to be televised to millions in order to be "public".[3]

Speaking for the use of television in the courtroom and in answer to Justice Dethmers, William R. McAndrew, Executive Vice President of NBC news, said,

> The implication in arguments against permitting cameras to cover court proceedings is that television news is irresponsible, concerned only with reporting spectacles and sensations. Nothing is further from the truth. News broadcasters have demonstrated repeatedly an uncommon sense of responsibility and a highly developed sense of taste. To deny them access to public events to which other news media are admitted is to impugn their integrity and assign them second class status.
>
> Television respects privacy. It believes that certain matters bearing on national security or personal rights should be aired only behind closed doors. But it objects to being barred at the door when others, particularly its competitors, are allowed to enter. As long as any part of the public may attend a particular proceeding, the broadcaster considers his presence of equal propriety.
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> In fact, he regards it as a duty. It is part of his obligation to keep the public as fully informed as possible on as many vital matters as possible.[4]

II The Purpose of the Study:

The purpose of this study is to investigate the role of television in the legal process. To facilitate the study, answers will be sought to the following questions:

(1) What has been the role of television in the legal process in the past; what decisions have been made by legal authorities; what efforts have been made by television authorities to enter the courtroom?

(2) Why have efforts to repeal Canon 35 failed? What role will the courts let television play in covering

their trials; conversely, what effort is being made by the Industry to work with legal authorities?

(3) What do the facts in #1 mean, what are the implications for television in the legal process? Does television have the potential to operate efficiently in the courtroom, while preserving courtroom decorum, in order to be accepted on an equal basis with its competitor- the newspaperman? Will the careless role of less concerned television stations in working with the legal process impair progress towards a mutual meeting of the minds?

(4) Evaluation.

III. The limitations of the Study:

Aside from historical considerations and comparative situations, the study will essentially be limited to one channel for the dissemination of news- television. Receivers will be limited to parties immediately concerned with the problem (American Bar Association, National Association of Broadcasters, practicing judges, etc.). The time covered will essentially be limited to the thirty-five years Canon 35 has been in effect. Reference to previous studies in allied areas will be negligible for a recent survey has indicated very little has been written in thesis studies within the relatively short time that television has been in existence. Geographic restrictions will limit the study to applications in the United States.

IV. Justification of the Study:

A. Intrinsic merit:

There is intrinsic merit in the study of a problem that can present a mutual exchange of concepts between members of two professions (the legal and television) for this exchange might aid in an ultimate understanding whereby the two may work closely together or, at least, in closer harmony.

B. Distinctiveness:

Since research has indicated that studies in this area are limited or non-existent, the publishing of this study should provide a valuable tool for any person or persons interested in the role of television in the legal process.

V. Materials and Sources Available for Study:

Articles in periodicals, personal communications and reports of legal proceedings (briefs or case histories) involving court decisions are available in addition to addresses and articles in newspapers.

VI. The Organization of the Study:

The organization of the study may follow the steps of description, analysis, interpretation and evaluation as outlined in section II.

Specifically, a series of test situations are contemplated in which Canon 35 is tested or adhered to. Each case will present a situation and the evaluation will be drawn after it has been closely studied.

From time to time the question of open court for the newspaper and partially, or completely, closed court

for television will be studied.

Finally, through lengthy correspondence and research the history of Canon 35 will be examined.

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[1]Baltimore News-Post, July 12, 1961, p. 16A.

[2]Stan Opotowsky, TV, the Big Picture, p. 18.

[3]William R. McAndrew & John R. Dethmers, "Should Television be Permitted to Cover Courtroom Proceedings" TV Guide, May 13-19, 1961, pp. 26-29.

[4]Ibid.

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INTRODUCTION

The History of Canon 35 thru 1954

Essentially this study is aimed at evaluating the impact that Canon 35 has had on the television industry. The debate between television and the American Bar Association has been a relatively recent one but the history of the Canon suggests turmoil between the working 'press' and the ABA since its founding in September of 1937. To gain a keener understanding of the conflict, the history of the Canon is here cited:

As indicated in the precis, Canon 35 was adopted during a period of emotional disturbance resulting from the improper conduct of the Hauptmann and other cases and the reporting of the trials in the nineteen-thirties. The nature and facts of the crime, the conduct of the trial, the actions of the spectators, the antics of the participating lawyers and the activities of the Governor and the Court of Pardons after the verdict led to shameful publicity. At that time the bar and the press were firm in their belief that something should be done to prevent a recurrence of such an episode.

First, the American Bar Association named a special committee to investigate, then report and make recommendations. The committee did make a report but

because of the political turn the case took the report was not issued.[1]

In January, 1936, the ABA decided to ask the cooperation of the media in attacking the problem. A "Special Committee on Cooperation Between the Press, Radio and Bar Against Interfering with Fair Trial in Judicial and Quasi-Judicial Proceedings" was created. Six outstanding lawyers were named to the committee; then a request was made to the American Newspaper Publishers Association and the American Society of Newspaper Editors to appoint committees to work with the bar group. This was done; but it is interesting to note that no invitation was extended to the broadcasters.[2]

For approximately two years the three committees worked together "in an effort to agree upon standards of publicity of judicial proceedings and methods of obtaining an observance of them acceptable to the three interests involved." A cooperative effort between local bar associations was recommended as one way to achieve their objective.

In 1936 a report of progress was made at the meeting of the ABA and the special committee was authorized to continue its work.

Another progress report was issued in 1937 and, after considering the report, the House of Delegates au-

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[1] Judicial Canon 35 Conduct of Court Proceedings, (Chicago: American Bar Association, 1958), p. 25.

[2] Ibid. p. 26.

thorized the Bar Committee to continue so as to reach a final agreement. Several days after their action, the House, entirely without reference to the work of the special committee, proposed the adoption of a new canon, Canon 35, which was carried without discussion.

Canon 35 was drastic to the point of being punitive, exactly the opposite of what the special committee was seeking. The adoption of Canon 35 not only brought out a deep-seated conflict within the Association but also an equally deep-seated resentment by some members of the ABA against the media.[1]

Despite this action, the special committee continued its work; however, in 1938, at the Association meeting, the conflict between the Committee on Cooperation and the Committee on Professional Ethics was resolved in favor of the latter. The real blow to the special committee came when it was suggested that it was cutting across the work of the Committee on Professional Ethics and Grievances followed up by the suggestion the House continue the special committee only on condition that it should not express an opinion upon any question of professional or judicial ethics.[2]

At the same meeting, the special committee indicated that the prohibitions of Canon 35 were impracticable and that the adoption of the Canon had made it very difficult for the bar committee to work with the

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[1] Ibid. p. 27. [2] Ibid.

newspaper committees since the latter had felt the bar had cut them off.[1]

As a result, the newspaper associations disbanded their committees and in 1941 the ABA disbanded its special committee.

It wasn't until 1954 that the American Bar Association chose to invite the media to designate representatives to serve on a joint Bar-Media Committee. The invitation was accepted; yet when it was propsed that Canon 35 be amended the Bar-Media Committee was not even consulted. After the proposed revision had been completed and submitted the committee was informed of its contents.

Although revisions in Canon 35 have been discussed annually at meetings of the American Bar Association, the Canon still reads as it was written, in revised form, on September 15, 1952. In the concluding chapter of this thesis the issue of Canon 35 will be brought up-to-date.

The Debate Over Judicial Canon 35

Before beginning a study of the impact of Canon 35, a more detailed explanation of the arguments for and against the Canon is in order.

A consensus of opinion opposing change in the Canon would bring out the following points: (1) In every

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[1] Ibid.

lawsuit, criminal or civil, the principal figure is the judge. Since he, alone, must deal with the emotions of all who enter his courtroom he should be free of all extraneous influences which tend, or may tend, to create favor or prejudice. (2) Newspapers and radio and television stations are engaged in highly competitive commercial undertakings with the ultimate goal, profits; therefore the economics of the situation will require the media to limit their coverage of courtroom proceedings to cases which are least illustrative of the real process of American justice. (3) Courtroom facilities are presently overtaxed without the use of television facilities and accompanying personnel. (4) There is the question as to whether the defendant is being given a fair trial if there are distracting influences in the courtroom. (5) Judges are subject toperiodic re-election in many cases. Television could play a powerful role in their re-election. (6) The introduction of television to the courtroom could mean the annoying addition of extra lighting or perhaps the distracting voice of the commentator and, finally. (7) Any women sitting on the jury would be very conscious of the television camera.

The Industry arguments against Canon 35 include: (I) The basic obligation of any television station is to educate the public and what better service could it perform than to present the law at work, and in its own surroundings? (2) The average person, on taking the stand, becomes so absorbed in the business before him that

he is no longer overly conscious of the particulars of his surroundings. (3) Many Americans have a great fear of their courts, regarding them as places of complexity, contention and discord, to be avoided at all reasonable cost. This could be quickly refuted with proper television coverage. (4) It is the obligation, once again of the broadcaster to bring to the public cases in which it would have the greatest interests. (5) Television is an informational medium which can capture the essence of news, its immediacy and the actual verity of its sound and appearance. (6) There is no conceivable reason to believe that there is any less integrity among broadcasters than among lawyers, or doctors, or those engaged in other media.

CHAPTER I

THE GRAMMER CASE- TRIAL BY TELEVISION

Grammer Made an Appeal

The label, 'trial by newspaper', is one that has almost become a by-word in this country. It dates back to the days of the 'sensational' press, when crime became akin to a glamorous happening. This era, which still has its remnants today, was one of shame, for newspaper reporters turned policemen did their best to pre-judge criminal cases and exploit many innocent persons.

It is easy for the broadcasting industry to become complacent and smug and look down on their brother newsmen; but they too have committed similar errors, one of which will be our first study.

George Edward Grammer was tried by a judge, without a jury, in the Criminal Court of Baltimore City on an indictment charging him with the murder of his wife. He was found guilty, in the first degree, and a motion for a new trial was made and denied. He was sentenced to hang and he appealed his case.

This last appeal was based on three points: first he contended that the extensive television, newspaper and radio publicity as to the crime, before and after indictment, fostered by prosecuting officials and the police,

had convicted him of premeditated murder before he entered the courtroom; secondly, he said his confession was not voluntary; and third, he claimed the evidence presented in court did not constitute sufficient grounds for a first degree murder charge.

Mrs. Grammer's Death Was a Near Perfect Crime

Shortly after midnight on August 20, 1952, two Baltimore County policemen were making a turn in their radio cruise car into a road with a strong drop. As they turned they observed a Chrysler sedan coming downgrade at high speed. The car ran off the road, over a lawn, came back onto the road and crossed to the other side where it hit a bank, went up over it, hit a tree, and turned over on its right side against a telephone pole. Inside the car Mrs. Grammer was found dead.

At first it was assumed that Mrs. Grammer had died when her car went out of control; but a stone was found wedged under the heel of the accelerator so as to cause it to feed gas to the engine of the car, which had an automatic drive.

An examination by Dr. Russell S. Fisher, Chief Medical Examiner of Baltimore, revealed that death had been caused by wounds of the skull inflicted by blunt impacts. An examination of the car failed to reveal any evidence that these injuries could have been caused by the car. It was further indicated by Dr. Fisher that the bruises could not have come from the accident because dead

bodies do not bruise. He concluded that she had been murdered prior to the accident with the latter staged to conceal the nature of her death.

- Grammer maintained, at the time, an air of innocence, but public interest in the crime was fanned by newspaper accounts of the "near-perfect crime". If the car had been destroyed on impact or by fire the crime might well have been a 'perfect' one; but such was not the case.

On the following Sunday afternoon Grammer confessed that after a brief quarrel with his wife in the parked car, he had struck her with a piece of iron pipe. About 4:20 on that August 31 a formal statement was issued by the State's Attorney. The Statement read: "After an investigation in connection with the death of Dorothy May Grammer, and interrogation of a number of witnesses, including George Edward Grammer, Mr. Grammer will be charged with the killing of his wife..."[1]

The statement appeared in the newspaper the next day, but that evening, at 10:45 WMAR-TV carried a program which was later to play a key role in the Grammer appeal motion.

WMAR-TV's Program Prejudged the Defendant

WMAR-TV first jumped into the boiling pot of the Grammer case with the 10:45 program. Present in the studio

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[1] Maryland v. Grammer, 203 Maryland Report, 207 (October, 1953).

and shown to the television audience, were the State's Attorney of Baltimore City and two assistant State's Attorneys of Baltimore County as well as two Baltimore county policemen. What took place at this time will be recorded verbatim:

> The commentator said to the television audience that: "We aretold tonight by Mr. Anselm Sodaro, State's Attorney for Baltimore City, who is here in the studio with us, that Mr. Grammer has been charged with the murder of his wife..." In introducing those present, as the camera was focused on them, the commentator said: "...we'd like you to meet this team which has been responsible for bringing a conclusion to this case, that is, conclusion before pre-trial..." No one spoke, other than the commentators except Mr. Sodaro, who, after pictures had been shown of the Chrysler, the Towson Court House, of Grammer being taken to the scene of the crime, confirmed a statement that this was in Baltimore City about a sixth of a mile from the County line by saying: "That's correct." Several times the announcer warned of prejudgement. Once he said he would not go into details or motives because: "... we will not attempt to prejudge."; and again, "... we will ask for no comment from these police and prosecuting officials at this time in the best interests of Mr. Grammer so that we will not prejudice his case."[1]

On September 2, it was announced in the paper (WMAR-TV is owned by the Baltimore Sunpapers) that Dr. Fisher would explain on television step-by-step the facts which led to his conclusion that Mrs. Grammer's death was a homicide. This was carried out on one of a series of television broadcasts produced by the University of Maryland on a program entitled "Death and the Law". A summary of the program verified that Dr. Fisher had been scheduled to appear on the program before the Grammer murder occurred, to describe the functions of the office

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[1] Ibid. p. 208.

of the Medical Examiner. It was suggested to him, at that time, that the Grammer case would serve as a good illustration of his work. After gaining the prior approval of the State's Attorney he did the program. The appellant's name was not mentioned on the program although photographs of Mrs. Grammer were used.

The court answered Mr. Grammer's charge on prejudgement by television with this statement:

> This is not to say that the actions of the officials of the State should be either minimized or condoned. It was a manifest impropriety for the State's Attorneys to appear on the television program. The Medical Examiner should not have used a pending case as an example of the work of his office, and the State's Attorney should not have approved of his so doing. Officials of the State should not announce, or sanction the announcement, that an accused has confessed or that he has made a statement. The term statement includes those which are exculpatory in varying degrees but to the public mind it has come to be a euphemism which does not deceive but connotes an admission of guilt.[1]

With this terse statement the action of the station was dismissed.

A Sensitive Issue Resulted from the Program

All three appeals for a mistrial, based on supposedly valid charges, were refuted by the court which proved, in turn, that: he was not pre-tried on the charge; his confession was voluntary and the evidence before the court did, rather than did not, support a verdict of first degree murder (no further details will be given on the

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[1] Ibid. p. 210.

latter two points since they were not pertinent to the issue of 'trial by television'). Grammer was hanged for the murder of his wife, but the trial disclosed a rather sensitive issue in the struggle for a meeting of the minds between the ABA and the 'press'.[1]

Although it was proven conclusively that WMAR-TV did not pre-judge the defendant in this case this fact became an issue in the trial and could have resulted in a convicted murderer being given his life. If television and radio (the Industry) and the American Bar Association wish to reach a common understanding then a great deal more restraint in dealing with the issues of the latter must be made by the Industry. Today newsmen and the ABA are facing a decision on Canon 35. Any case, such as this one, could certainly weaken the probability of the 'press' achieving its goal.

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[1]Ibid. p. 205.

CHAPTER II

THE REES CASE - A JURY REENACTED ITS DELIBERATIONS ON TV

The TV Test Case

In gathering material for this thesis study perhaps the most startling chapter concerned the reenactment of the jury's deliberations in a murder case on a television station in Baltimore. As the station suggested in its publicity releases on the program this was a 'first' in the annals of television. WBAL-TV's program, on the evening of March 22, 1961, had nine of the twelve jurors in the murder trial reenact their parts in convicting kidnap-slayer Melvin Davis Rees, Jr. Their action provoked unfavorable comment from the Industry, and resulted in intervention by the office of the Justice Department and Attorney General Robert Kennedy as well as local legal action. This case is a vivid example of just how far a station will go to obtain national publicity (this purpose was readily admitted by station personnel). Hasn't many a man said, "I don't care what they are saying, as long as they are talking about me"?

To understand the nature of the program it is first necessary to understand the case itself.

Melvin Davis Rees Was Charged with Multiple Murders

Melvin Davis Rees, Jr. is a thirty-two year old former jazz musician from Hyattsville, Maryland. He is handsome, suave to the point of being cocky, and seems to lack the ethics one human could expect of another.

Rees was tried under the Lindbergh law for the abduction and slaying of two members of a Virginia family. There were four members of this family: Carroll, a twenty-nine year old part-time farmer and feed company employee; his wife, Mildred, 27; and their two children, Susan, age five and Janet, 1½. All four were abducted from a road in Louisa County near their home in Apple Grove, Virginia.

Six months after the abduction, Carroll was found shot through the head with a .38 calibre pistol at a sawmill site near Fredericksburg in Spotsylvania County (Virginia). His daughter, Janet, was found dead of exposure and suffocation beside him.

On March 22, 1959, about two months after the January kidnapping, the bodies of Mrs. Jackson and Susan were found in a shallow grave near Gambrills, Maryland.

In addition, Rees was arrested in the summer of 1960 on charges of killing Mrs. Margaret V. Harold, who had been ambushed in Anne Arundel County (Maryland) in 1957, and shot by her attacker.

The Federal Court trial, in Baltimore, was concerned only with the deaths of Mrs. Jackson and Susan, but charges are still outstanding in Anne Arundel County

against Rees, and the ex-musician has been formally charged with first-degree murder in Virginia.

The Television Program Was a Dull Presentation

If you were a television viewer in Baltimore, Maryland on the evening of Wednesday, March 22 and happened, by choice or chance, to be viewing the NBC-originated programs of channel 11, WBAL-TV, you might have been somewhat startled to hear, on the break announcements that you could witness history in the making.

Further limited information disclosed that the program originally scheduled for that hour (10-11), a documentary on the hardships in the city of Hagerstown, Maryland, would be rescheduled and in its place would be a dramatic program never before seen on television.

This researcher can testify that his own curiosity as well as that of many of his friends was almost raised to the fever point, for no one could imagine what might be forthcoming. The most educated guess, at that moment, seemed to be televised hearings of the legislature from Annapolis (an accomplishment that has yet to be reached in Maryland).

At precisely 10 p.m., Brent Gunts, general manager of WBAL-TV and vice-president of the Hearst-owned enterprise, introduced the yet unidentified program by saying the audience was about to witness a significant news contribution.

After Mr. Gunts's opening remarks (which were puzzling, to say the least), the camera focused on Rolf Hertsgaard, WBAL-TV newsman. Mr. Hertsgaard was seated in an aura of mystery as strong backdrop lights cast shadows around him. The newsman informed his audience that what they were about to see could never happen in Moscow and was a tribute to our democratic form of government.

At this point, with the listener still completely unaware of what he was about to see, it was announced that he would witness the reenactment of the deliberations of the jurors as they considered their recommendations in the sentencing of Rees.

The program was a difficult one in which to become interested. The jurors sat around a long conference table with the foreman presiding at the head of the table. The participants appeared to be more or less interested, depending upon how intent they were in being seen and heard on television (the 'play to the camera' often referred to by supporters of Canon 35). Several of the jurors managed to hold the interest of the cameraman and the director either by talking in turn or interrupting someone else. The camera work was very poor and evidently no effort had been made by the production staff of WBAL-TV to acquaint their guests with the correct use of microphones, for several of the participants turned away from the microphones or obscured their voices by placing their

hands over their mouths, or simply mumbled.

To compound the difficulty of the listener, information was introduced on the program that had not been admitted as evidence in the trial. The Rees case had received a great deal of play in the local papers and it would seem reasonable to assume that a Baltimorean interested in the trial was well acquainted with the evidence disclosed in the newspapers, but not with excluded evidence.

The legal problem occurred when the program, which had been originally placed on video tape the previous Sunday, was shown to the Baltimore audience the night before Rees was to be sentenced by Judge Roszel C. Thomsen.

Rees's Sentence Was Deferred

Melvin Davis Rees was scheduled to be sentenced at 10 A.M. on Thursday, March 23 (the morning after the television program), but when the Federal Court convened, William J. O'Donnell, court appointed lawyer for Rees, arose and asked Judge Thomsen to defer sentencing.

Mr. O'Donnell said the defense wanted time to obtain the script of the program broadcast over WBAL-TV the previous evening. He said that the jurors on the program "discussed facts which hadn't been brought out in the trial." He went on to say that he did not know whether the program had violated Rees's rights, but he wanted time to review the script and to consider a

possible motion.

Judge Thomsen granted Mr. O'Donnell his wish, saying that he was doing so "without intimating any opinion" on whether the program would have any effect on eventual sentencing.

It is interesting to note that Judge Thomsen said he first heard of the program when a friend called him and told him it was on the air (he did hear the last part of the program, as it was aired). Mr. O'Donnell said that he learned just two minutes before the program started that it was to be shown. O'Donnell's colleague, William J. Evans, and the two Government prosecutors, Robert E. Cahill and H. Russell Smouse, also said that they learned of the program only a few minutes before it was shown.

At this point it seemed questionable that WBAL-TV had received permission of the court to show the program. Further, the timing, or release, of the program seemed to be in poor judgement because the sentence had not been passed on the 22nd.

The Defense Filed a Motion for a Mistrial

After the defense attorneys had the opportunity to carefully view the video tape of the jurors' deliberations a motion was filed by them asserting that Rees's rights had been prejudiced and interfered with. They based their motion on six points (all directly related to the

television program):

1. The program "conspicuously avoided" the arguments opposing capital punishment, although the jury finally had agreed not to recommend death (during the program the jurors re-opened the discussion on whether Rees should have been sent to the gas chamber; in the actual deliberations the jurors had compromised on the guilty verdict in order to have a unanimous decision, when three jurors held out against execution). The one-sidedness of the televised deliberations (only one of the jurors on the TV panel spoke out against the death penalty, which leads one to assume the two others in opposition were not present for the taping of the program) could have influenced the judge in passing sentence, regardless of the decision of the jury.

2. The program, particularly arguments for capital punishment, could be construed as "tending to influence this court" whose sentence had not been announced at that time.

3. It appeared that some jurors discussed testimony admitted into evidence but "treated such testimony for purposes for which it would not have been admissable". This testimony refers to the discussion in the trial (evidence submitted) that part of Rees's gun, a pair of handle grips were found at the Jackson death site, and it was acknowledged that Rees had once sexually molested another woman. During the trial the defense attorneys had

objected that the gun had been illegally seized, while Judge Thomsen ruled that FBI agents had received permission to search for the evidence from Rees's parents and they were thereby entitled to seize the evidence as an instrument of the crime. The jurors, on the TV show, had reopened the legality of this matter and deliberated, at great length, on the use of the gun as evidence.

4. The jurors discussed points which were not part of the evidence of the trial. A written account of the murders, found in the same place as the gun, was not admissible as evidence. The account, in Rees's handwriting, was extremely brutal and obscene and contained some information about the murders that was not printed in any newspaper. Judge Thomsen had ruled that he had to distinguish between instruments of the crime, which could have been properly seized by the FBI, and mere evidence of the crime. The written account did not belong to the elder Rees so Judge Thomsen questioned his right to authorize the FBI agents to take it without the owner's permission (based on the Fourth Amendment related to search and seizure and the Fifth, relating to involuntary self-incrimination). Despite the fact that Judge Thomsen had refused to admit the written account as evidence and, further, that the jury had not seen the account, it was still discussed on the television program by the jurors.

5. The telecast prejudiced Rees's rights in the event that his conviction should be reversed on appeal

and the case sent back for a new trial. It seems obvious, at this point, that the rediscussion of the evidence in the crime and the introduction of non-admissible evidence, would certainly tend to prejudice possible future jurors who might have observed the television program or read the accounts of the program in the local papers.

6. The telecast reached Anne Arundel County where a murder warrent is outstanding against Rees, and into Virginia, where murder indictments had been obtained on the same evidence discussed by the jurors. WBAL-TV is a 50,000 watt station with a large coverage area. There is no doubt that the citizens in Anme Arundel County could very well have seen the program and been prejudiced against Rees (once again, in case of a future trial) by its contents. On the other hand, a discussion with WBAL-TV authorities led to considerable doubt that the program was even heard in the area of Virginia concerned with Rees.[1]

In concluding the motion, the lawyers asked for a hearing and indicated they had additional matters to present on behalf of the defendant.

Besides a new trial, the motion asked the court for a mistrial rulung and/or a ruling that would set aside the verdict of the jury.

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[1]"New Trial Asked by Rees Because of TV Statements," Sun, (March 31, 1961), 42.

Another Judge Criticized Rees's Jurors' Actions

The broadcast by the Rees jury members had its effect on other courts besides that which tried Rees. The question stands whether the example set by the Rees jury, a grand jury, was a desirable one for other jurors to follow.

In petit jury action Judge R. Dorsey Watkins referred to the television show as he opened his charge to the jury hearing mail fraud charges against the Commercial Savings and Loan Association and others, in Baltimore.

Judge Watkins noted that grand jurors are sworn to silence about matters they have heard in closed sessions unless a judge permits them to talk. But with petit jurors, the ban does not apply, the judge said. It frequently happens that lawyers and judges want to know of petit jurors, after a case, what points they discussed. "It's really up to the good sense of the individual juror," the judge said to the jury.

In direct reference to the television show, Judge Watkins said he would question the good taste and judgment of a jury who appeared on a panel show. "I suggest to you the general undesirability of such an appearance, but I leave it to your own judgment" he concluded.[1]

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[1]Theodore W. Hendricks, "TV Show Delays Rees Sentencing," Sun, (March 24, 1961), 46.

The Government Studied Action against WBAL-TV

While this was taking place, the federal government took two actions; first, Federal Judge Thomsen appointed two lawyers, William L. Marbury and William B. Somerville, to study the Rees jury panel show and report whether the telecast amounted to contempt of court, and, secondly, the Federal Bureau of Investigation entered the case to determine whether it violated Federal laws concerning the obstruction of justice.

Edward J. Powers, agent in charge of the Baltimore FBI office, opened the latter investigation. It was determined that all nine jurors taking part in the telecast would be called in by his office.

The jurors were called in and questioned at great length, and Brent Gunts and Rolf Hertsgaard were summoned to the office of Attorney General Robert Kennedy, in Washington, where they were questioned about the program.

The Media Reaction to the Program Was Varied

The press reacted quite strongly to the action on the part of WBAL-TV in reenacting the jurors' deliberations on the Rees trial. The reaction ran from opposition to applauding the station's boldness.

"Variety", an entertainment trade journal, said, "With its 'unprecedented public revelation of jury room activity' in which it reenacted on tape with nine of the 12 jurors the deliberations of the jury that found Melvin

Davis Rees, Jr., guilty of kidnapping and killing a Virginia mother and her five-year-old daughter, WBAL-TV here stirred up a nest of hornets."[1]

Jack Gould, syndicated television columnist, spoke quite strongly in his column in "The New York Times". Included is an excerpt from his column:

> A touch of spring madness seems to have gripped a television station in Baltimore. Under the guise of registering a "first" in "Public Service", the outlet induced nine of twelve jurors to appear before the studio cameras and re-enact their deliberation that resulted in the conviction of a man for murder and kidnapping.[2]

After going on to tell the circumstances of the case Mr. Gould concluded:

> Some purely legal controversies already are in the making: whether the jurors in their TV debut went beyond the range of evidence admitted in court and whether trial juries are sworn to secrecy after arriving at a verdict.
>
> But from the standpoint of TV, which from time to time makes a hue and cry over its rights of access to the news, the notion of making public spectacle of a jury's role in a murder case is chilling to the extreme.
>
> In support of its extraordinary action, WBAL-TV offered assurance that jurors had not been paid and insisted that the program was an "exciting and lasting tribute to the American jury system." The Baltimore News Post, a Hearst paper, went so far as to insist that the program was a "repertorial break-through of the traditional silence of the jury room."
>
> The champions of electronic journalism may regard it as terribly old-fashioned, but the discussion of whether a man is to live or die may not strike everyone as just another Godson [sic] and Todman package.

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[1] Lou Cedrone, "WBAL-TV Stirs a Nat'l Rhubarb With Reenactment of Murder Verdict," Variety, (March 29, 1961), 2.

[2] Jack Gould, "TV: Three-Ring Circus," New York Times, (March 25, 1961).

> The legal rights of a defendant, let alone the dignity of court procedure, are not things to be broken through just to titillate the curiosity of the idle TV mob.
>
> But the larger significance of the WBAL-TV episode is the comfort it will afford to those who would hobble the [voice] of the TV medium. If a station is so insensitive to the need for the coupling initiative with reasonable restraint, one can hardly blame those who contend TV may turn serious proceedings into a three-ring circus. At least it would seem desirable to draw the line at having jurors weighing death sentences double as TV artists.[1]

"Time" magazine, in an article entitled "We, the Jury", also opposed the action of WBAL-TV:

> Combining Greek tragedy and judicial farce, a federal jury last week reenacted for a Baltimore television audience just how it decided to convict a man of murder and kidnapping. "An unprecedented public revelation of jury room activity," crowed a handout by WBAL-TV, an NBC affiliate owned by the Hearst Corp. Raptured the Hearst-owned Baltimore News Post: "A reportorial breakthrough of the traditional silence of the court room." It sure was.[2]

The article continued with a report on the taped show, then stated:

> The station's timing could not have been better, or worse, in airing the show. The verdict had been handed down on Feb. 23, but the televised version of their deliberations was beamed the day before Melvin Davis Rees Jr., 32, a Hyattsville, Md. dance band musician, was to appear for sentencing for the crime that could bring him life imprisonment.
>
> Rees's crime was shocking - he was convicted in Maryland of murdering a mother and her five-year-old daughter (in Virginia he is charged with killing the same family's father and a one-and-a-half year old daughter). WBAL induced the jurors to enact 'The Verdict is Ours' after receiving the counsel of its legal advisors, who assured the station that no permission was necessary from Judge Thomsen or anyone else.

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[1]Ibid.

[2]"We, the Jury," Time, (March 31, 1961), 38

> "If we had felt that it might influence the sentencing, we wouldn't have done it," said Promotion Director Henry F. Hines. "We felt that what we were doing was in the public interest. This was to be an exciting and lasting tribute to the American jury system." Exciting it was, but hardly a tribute.[1]

Roaring to the defense of WBAL-TV was one of the trade journals of the Industry, "Broadcasting". After covering the story as a news item in their issue of March 27, this editorial comment was made on the program:

> A number of newspapers, including the usually thoughtful "New York Times", have expressed shock over the recreation by WBAL-TV Baltimore of the deliberations of a jury that had convicted a man of murder.
>
> What the newspapers failed to emphasize was that the station did what newspapers have been doing for years - interviewing jurors after a trial. The technique of presenting them on video tape may have been more graphic, but it differed in no other sense from the practice of quoting them at length in newspapers. If the "Times" is upset by this phenomenon, it must be troubled by the company it keeps. To our personal recollection we have seen thousands of words of juror comment in newspapers coast-to-coast.
>
> Somehow the newspapers have found in the WBAL-TV case a suggestion of obstruction of justice. The foolishness of that argument is obvious. Before the program was put on the air the jury had reached its verdict and had been discharged, and the court had rejected all defense motions for reconsideration. Only the sentencing remained, and we can hardly imagine that the trial judge would be influenced in that decision by any television show.
>
> No matter what the outcome of this incident, the program cannot be judged as an obstruction of justice. It may have tended toward sensationalism, but it in no way distorted facts. That is more than can be said of a good many newspaper stories about crimes and criminal prosecutions.[2]

The news media have taken arms against one another

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[1] Ibid.

[2] "Scoop that Shocked," Broadcasting, (April 3,1961).

on many previous occasions and this is just another indication that the 'war' is continuing.

Rees Finally Was Sentenced

With the initial impact a matter of history, Rees's lawyers began contemplating their next move as Judge Thomsen set a hearing for three p.m. Thursday, April 6, in which the lawyers for the defense would have an opportunity to seek a mistrial, receive a new trial or completely set aside the verdict of the jury.

After Messrs. O'Donnell and Evans had been given an opportunity to present their case, based on the video tape presentation, Judge Thomsen denied their motion and that afternoon sentenced Melvin Davis Rees, Jr. to life imprisonment.

In hearing the case for the defense and passing sentence, Judge Thomsen did not, on this date, make public knowledge of the reason for his decision. The Judge did offer Rees and his attorneys ten days in which they might appeal Rees's conviction.

The Baltimore Papers Expressed Diverse Opinions

In Baltimore there are two large metropolitan dailies, the "Baltimore News-Post", a Hearst-owned publication which is highly sympathetic with television station WBAL, and the "Sunpapers", which own competing station WMAR, a CBS affiliate.

The "News-Post" kept its reports on the WBAL-TV

tape presentation, and the resulting legal play, to a minimum (this was checked in the morgue of the "News-Post") and quoted sources at the station when it carried news of the hearings.

On the other hand, the "Sunpapers", through their morning, evening and Sunday editions, carried complete coverage of all aspects of the program and the legal hearings.

In the "Sun" on Friday, April 14, for the first, and only, time the "Sunpapers" spoke editorially on the controversial program. Under the title, "TV Jury Show", they said:

> Judge Thomsen's reticence on the televised jury show in the Rees case is proper, since conceivably proceedings stemming from this singular exhibition could be in Federal District Court at some future time. The possibility makes it inappropriate for the chief judge to comment now. But the motion for a new trial of Melvin Davis Rees, Jr. is denied and the sentence of life imprisonment stands. The television show had no influence on the formulation of this sentence, the court declares. Nor will the court prejudge whether Rees's rights in any possible trials in the future will be affected by the television show.
>
> The television episode thus reaches at least an intermediate stopping place from which conclusions may be drawn. The main fact is that this effort to exploit crime and theatricalize the sobrieties of justice disrupted orderly process in a capital case. No careful citizen, no juror actual or potential, no one respectful of the rule of law would want anything like that to happen again. The secret jury room is not a stage.[1]

It is interesting to note that the "Sunpapers'" station, WMAR-TV, was also involved in a televised

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[1] "TV Jury Show," Sun, (April 14, 1961).

presentation affecting the legal process (CHAPTER I). Even within the medium of television rivalry runs high, as we all know.

The Federal Court-Appointed Attorneys Reported Their Findings

While Rees's attorneys were discussing with Washington, D.C. authorities the possibility that he could also be tried in Virginia for two charges of murder, after his conviction in Maryland, William L. Marbury and William B. Somerville, Federal Court attorneys appointed by Judge Thomsen to report on possible contempt proceedings against WBAL-TV, made their report.

The order for the investigation had begun by the admission to court of a seven-paragraph order in which it was noted that agents of the Hearst Corporation - WBAL-TV division "interviewed certain members of the jury panel which renderad the verdict" in the Rees case, recorded and taped the interview and incorporated it in a television program.[1] In addition it was noted that the program was telecast "following the verdict of the jury - but prior to the imposition of sentence on the defendant".[2]

Judge Thomsen had written that agents of the television station knew at the time of the program that Rees

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[1]"Rees Jury's TV Show Due Study," Sun, (April 25, 1961), 40.

[2]Ibid.

had not been sentenced and also knew that "appropriate authorities of the State of Maryland and the Commonwealth of Virginia" were considering proceedings against Rees.[1] In addition, he had said that "the court is advised that the interviewing of the members of the jury panel and the preparation and telecast of the television program was approved by counsel" for the television station. The order had concluded that the "court desires to be fully appraised as to whether the acts" of the television station had amounted to contempt of court.[2]

Up to this point Judge Thomsen had carefully refrained from comment about the program (as indicated in the "Sunpapers" editorial); and the tape of the program had been preserved for court action. The assurance for the preservation of the tape for court purposes had been announced by Theodore Sherbow, counsel for WBAL-TV.

With his order acted on by the court-appointed attorneys, Judge Thomsen dramatically declared on Tuesday, May 2, that the Rees jury television program did not constitute contempt of court.

The court accepted the view that its power to punish for contempt was limited to acts in the presence of the court or so physically near to the courtroom as to disturb order and decorum or to affect the orderly conduct of the trial. Nevertheless the court deplored the actions of the station, in presenting the tape. "It

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[1]Ibid. [2]Ibid.

seems beyond question that such a broadcast is against the public interest and should not be repeated or imitated," Judge Thomsen wrote in a memorandum concurred in by Judges W. Calvin Chesnut and R. Dorsey Watkins.[1]

"The general supervision of television stations has not been committed by Congress to the courts," the memorandum added. "However the courts and bar associations share the responsibility of seeing that lawyers comply with the standards of professional ethics."[2]

Judge Thomsen went on to ask the grievance committee of the Maryland State Bar Association to determine whether disciplinary action should be taken against counsel for the television station (none was taken). He also asked the bar group's president to appoint a committee to decide whether any legislation or rule of court should be adopted to prevent such portrayals of jury discussions.

In accepting the opinion of the court-appointed attorneys, Judge Thomsen quoted a long paragraph from the study which indicated jurors and witnesses might be reluctant to appear in court if their actions or words were to be publicly discussed.

While the Federal Court was censuring the action of television station WBAL, the station representatives

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[1]"Rees Case TV Ruling Given," Sun, (May 3, 1961).

[2]"Court Rules Jury Telecast Not Contempt," Evening Sun, (May 2, 1961).

were maintaining that the broadcast was offered only as pure public service.

WBAL-TV Explained Their Actions

While the charges against local station WBAL-TV continued to mount, station authorities were far from inactive.

Henry Hines, director of advertising and promotion for the station, said "the extent of soul-searching by all panel members in their joint effort to reach a just verdict was an exciting and lasting tribute to the American jury system."[1] He went on to say that none of the nine jury members who appeared on the program had been paid.

Later, in a telephone interview with the author of this study, Mr. Hines challenged the honesty of the press. He indicated, rather strongly, that the Washington, D.C. papers, "Time" magazine and the "New York Times" had chosen to misquote him and other sources identified with the station. Further, he averred, all the publications and syndicated columnists were afforded an opportunity, through closed-circuit television in their cities, to view the controversial program but few availed themselves of this opportunity.

Beyond the inaccuracies, it was pointed out that the "New York Times" had interviewed jurors at great length

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[1]"Rees Jurors Reenact Debate in TV 'First'," Baltimore News-Post, (March 23, 1961).

in the mistrial hearings on the Alger Hiss case in 1949. The interviews were carried in detail prior to any final decision of the courts.

When questioned on the lack of editorial comment in the "Sunpapers" (the interview was held prior to the editorial of April 14), Mr. Hines said that they would not dare to take such an action when they had carried interviews with jurors on a number of occasions.

The interview was concluded with the remark to the effect that the newspapers, in their battle for advertising lineage, sometimes fail to put their own house in order.

Meanwhile, another spokesman for the station (who preferred to remain unidentified) told the author the entire undertaking of the program had been on the highest level. From the initial meeting of the jurors and Mr. Gunts, general manager of WBAL-TV, the latter had stressed there would be absolutely no effort to sensationalize the program. Mr. Gunts informed the jurors there would be no need to clear the move with the Federal Court (contrary to the speculation in the local "Sunpapers") as the station was acting within the limits of the law.

Furthermore, it was mentioned that the final decision to run the tape had been only made after Judge Thomsen had denied a motion for acquittal and a motion for a new trial on the morning that the tape was to be run in the evening (Judge Thomsen had released a 21-page opinion that morning in which he wrote: "After carefully considering defendant's arguments on this point, I am satisfied

that the verdict of the jury was supported by the weight of the evidence and that the finding of guilty on both counts was a just verdict.")[1]

The Station's Research Was Thorough

As further evidence of the legality of the program, WBAL-TV compiled a research file which was released to this writer in an interview with a station representative on Friday, June 16. Part of the file contained information already included in this paper (the "Broadcasting" editorial, the ruling of Judge Watkins and the opinion of court-appointed attorneys Somerville and Marbury in their report to Judge Thomsen on possible contempt proceedings against the station). The remainder of the material is presented intact to give a more representative report on the defense of the station:

> The NEW YORK TIMES, in reporting on the famous perjury trial of Alger Hiss, published a detailed account of the substance of the jury's deliberations. This account was in connection with the first trial in which the jury had been unable to agree on a verdict, and therefore was with knowledge that the defendant would have to be retried. A caption to the account stated: "Vital role of Hiss typewriter is described by woman juror." Another caption stated: "Another say Talesman could not be sure about documents--Chambers disbelieved also."
>
> The Jury had been dismissed on July 8, 1949, unable to agree on a verdict. The article in question appeared on July 9, 1949 and contained the following excerpts:
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> "The Hiss trial jury stood immovably at 8 votes for conviction and 4 for acquittal and the outworn and currently famous typewriter that was one of the principal exhibits at the perjury trial of the former

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[1]"Rees is Due for Sentence This Morning," Sun, (March 23, 1961), 40.

State Department official played an important part in the jury's deliberations, according to statements made by the jurors after they were dismissed last night.

"The jurors gave varying statements on the number of ballots that were taken during the deliberations. Some said only two ballots were taken, others asserted informal votes were held, and still others said many formal ballots were made.

"The foreman of the jury, Hubert Edward James, a General Motors Acceptance Corporation executive, of 1067 Madison Avenue, said he was one of the four members who had voted for the acquittal of Hiss on the ground that for one thing he did not believe the Government's star witness, Whittaker Chambers, and for another, he did not think that the Government produced convincing evidence against Hiss.

"Mr. James said the three others on the jury who voted with him felt the same way but he did not name them. He said that the two women on the jury took opposing views, one of them favoring conviction and the other acquittal. He would not name them.

"In contrast to the statements of other jurors, Mr. James said that 'about a dozen' formal ballots had been taken during the deliberations.

"Mrs. Helen W. Sweatt, juror No.6, a real estate broker of 611 W. 158th Street, said the conflicting jurors had tested the creaky old typewriter in the course of their long deliberations.

"It had been alleged that this typewriter was the machine by means of which important government documents had been copied for transmission to Whittaker Chambers, confessed one-time Communist agent.****"

The article continued with other statements concerning the jury's deliberations, made by individual jurors.

In the second trial, in which the defendant was convicted, the jurors, according to the newspaper account, agreed among themselves that they would not discuss the case or their deliberations. The trial judge had recommended to the jurors before dismissing them, that they not discuss the case with newspaper reporters or others. However, there was no indication of any impropriety in publishing jurors statements as to their deliberations if voluntarily made.

In the recent California trial of Dr. R. Bernard Finch and Carole Tregoff for the murder of Dr. Finch's wife, United Press International released an article concerning the jury's deliberations which was carried by newspapers throughout the country. Excerpts from this article, published in the Baltimore News-Post of April 6, 1961, are as follows:

"The juror who portrayed slain Barbara Jean Finch in a re-enactment of her shooting said today that re-creation of the crime was the prime reason Dr. R. Bernard Finch and Carole Tregoff were convicted.

"Mrs. Mildred R. Brown, of Los Angeles, who acted the part of the surgeon's wife because she was the same height, said: 'It was the doctor's story of how the shooting occurred that led to the conviction. We didn't believe Carole's version either.'

"Mrs. Brown said the re-enactment showed that if it had happened as Dr. Finch said the bullet would have struck Mrs. Finch below the belt instead of in the back.

" 'We found that the shooting was not possible in the manner described by Dr. Finch such as his picking up the gun, its going off....' added Mrs. Brown. 'They just didn't add up.'

"Mrs. Brown, who added that two men jurors acted Dr. Finch's part because they were of the same height, said: 'We also found it inconceivable that both Dr. Finch and Carole could have blacked out at the same time, for the same period, and both land back at the same destination.'"

"She referred to the story that Finch wandered in a daze back to Las Vegas--where he was arrested-- to see Carole who was there to get a divorce.

"'I would say that Dr. Finch and Carole were their own worst witnesses and convicted themselves,' said Mrs. Brown, adding that the jury 'started each day with a ballot and closed with a ballot.'"

. . . . . .

In the 1950's, it came to light that the deliberations of a certain Federal juries had been recorded in connection with a research project financed by a grant from the Ford Foundation. This project was conducted under the supervision of professors of law from the University of Chicago. The private deliberations of Federal juries in six cases which had been heard in the Federal District Court at Wichita, Kansas, were recorded without the knowledge of the jurors themselves. However, the recording was done pursuant to a prior agreement of the judge of the court wherein the trials were held. As a result of the revelation of this practice, the present Sec. 1508 of Title 18, United States Code Annoted, was enacted. This Section prohibits the recording of jury deliberations while such jury is deliberating or voting.

It is significant, that the Department of Justice, while expressing its unequivocal opposition to the practice, neither stated nor implied any criticism of the judge or professors who had participated in the practice. William P. Rogers, Deputy Attorney General, was further of the opinion that "there is no federal

rule or statute which now specifically prohibits eavesdropping upon the proceedings or deliberations of federal juries." It is further significant that the statute, as enacted, while prohibiting the recording of the actual jury deliberations, made no attempt to prohibit the interviewing of petit jurors after their deliberations had been concluded and they had been discharged. A practice giving rise to this legislation, involving the "bugging" of the jury room, without the knowledge of the jurors, is obviously a much more flagrant violation of jury proceedings than the television show in question. Yet, as indicated, no suggestion was made that the conduct of those responsible for the practice was in any way improper or unethical.

The practice of interviewing petit jurors with regard to their deliberations invoked after they have been discharged, is, of course, a widespread practice in this and other jurisdictions. It is also the practice for various news media to publish or broadcast jurors' statements as to their deliberations. This is done in practically every case of widespread interest, both in the state and federal courts.

There is no obligation of secrecy imposed on petit jurors after they have been discharged from consideration of a case. They are free, if they wish, in the absence of a contrary order by the trial judge, to discuss their deliberations with anyone they please.

. . . . . .

. . . , the Baltimore News-Post of March 23, 1961, reported that the Assistant United States Attorneys prosecuting the Rees case, Robert E. Cahill and H. Russell Smouse, "agreed that it is permissible for members of a petit jury to discuss a case with outsiders after a verdict has been reached." Furthermore, the Evening Sun of February 23, 1961, the day of the jury's verdict, published details of an interview with Mr. Charles Gomer, the jury foreman, with regard to the jury's deliberations and verdict. This article was published at a time when defense motions were to be expected. The following are excerpts from that article:

"The jury foreman, Charles A. Gomer, 40, a steel company sales manager, said the jury agreed on its first ballot that Rees was guilty.

"The jury could not agree on whether to recommend capital punishment, he said. Mr. Gomer did not disclose the jury's vote on the question.

"From other sources, though, it was learned that the jury split 9 to 3 in favor of recommending the death penalty.***

"One juror said the panel took nine or ten ballots

after receiving the case at 4.07 P.M. yesterday in an effort to agree on the question of the death penalty. Still deadlocked, the jurors were lodged overnight in a downtown hotel at 11 P.M.

"They returned at 9.30 A.M. today, and compromised on a simple verdict of guilty after one or two ballots.***

"Mr. Gomer said that the jury quickly rejected the defense alibi that Rees was at a jazz playing jam session in Washington on January 11, 1959, the night the Jacksons were slain.

"The jury foreman said that the jury did not think that the Washington musician and his wife, who gave that testimony were lying, but that they were confused about the date of any such jam session.

"He also said the jury had no difficulty concluding that Mrs. Jackson and Susan were alive when they were brought into Maryland from Virginia, an essential element of the crime under the Lindbergh kidnapping law."

. . . . . .

Even in the case of grand jurors, who, of course, are sworn to secrecy, disclosure by a juror of a proceedings before such a body has been held not to be improper. For example, in Atwell v. United States, 162 F. 97 (4th Circuit 1908), the 4th Circuit Court of Appeals held that the policy of the law does not require a grand juror to keep the evidence adduced in a grand jury room secret after the presentment and indictment has been found and made public, the accused has been apprehended, and the grand jury finally discharged. The court stated at p. 100:

"***What reason, therefore, can exist why the grand jurors, under such conditions, should be bound to secrecy? We can see none; and for these reasons we hold this fourth obligation of the grand juror's oath to require secrecy only so long as the policy of the law requires, and that that policy does not require it, so far as the evidence adduced before the grand jury is concerned, after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged."

Likewise, in Cammer v. United States, 350 U.S. 399, 76 S.Ct. 456 (1956) the Supreme Court of the United States, in holding that a lawyer could not be punished for contempt for sending letters and questionnaires to members of a grand jury who had indicted his client, stated at p. 404 of 350 U.S. p. 459 of 76 S. Ct.:

"Petitioner contends that his conduct was not 'misbehavior' within the meaning of the act, but was a good faith attempt to discharge his duties as counsel for a defendant in a criminal case. We find it

> unnecessary to decide this but it is not out of place to say that no statute or rule of court specifically prohibits conduct such as petitioner's.***"
>
> It is clear that petit jurors are not sworn to secrecy, and the widespread practice in this state and district is to question jurors after the rendition of their verdict and discharge with regard to their deliberations in the jury room.
>
> Whatever might be said as to the merits or demerits of the telecast as a matter of policy, it is clear, as Judge Thomsen himself found, that it did not constitute a contempt of court. See Nye v. United States, 313 U.S. 33, 61 S. Ct. 810 (1941); Cammer v. United States, 350 U.S. 399, 76 S. Ct. 456 (1956); United States v. Welch, 154 F. 2d 705 (3 Cir. 1946).
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> . . . . . .
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> Likewise, it was and is the opinion of counsel for the Station that no federal statute or rule of court [prohibits] the interviewing of petit jurors after their discharge, and the publication or broadcast by a news media of such interviews. Under these circumstances the Station had a constitutionally protected right to broadcast the program and is not subject to any punishment for exercising that right. See Craig v. Harney, 331 U.S. 367 S. Ct. 1249 (1947); Bridges v. State of California, 314 U.S. 252, 62 S. Ct. 190; and Pennekamp v. State of Florida, 328 U.S. 331, 66 S. Ct. 1029.[1]

The documented evidence here reported gave a strong legal foundation to the action of WBAL-TV.

The Jurors Denied WBAL's Assertions

Spokesmen for WBAL-TV said they had informed the jurors, prior to the broadcast, that it was not necessary to gain the clearance of the court and further, the jurors were not paid for their appearance on the program. Both statements were denied by jurors in interviews with "Sunpapers" reporters.

Charles Gomer, earlier identified as the foreman,

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[1]The foregoing is a report prepared by the attorney for WBAL-TV in support of the legal action of the station in staging the reenactment.

told a local newspaperman that he and eight other jurors were paid one dollar each to go on television and reenact their deliberations. He also said he was assured that the program would be cleared with Federal attorneys, but that later he learned it was not. He concluded the interview by saying "if I had it to do over I certainly would not go on that program again. I'm sorry it happened."[1]

Another of the jurors in the Rees case, Hilton J. Hicks, who did not appear on the television program but was in court for the scheduled sentencing said he was told by employees of the station that the show would not be put on the air without the court's permission.[2]

Rees Received the Death Sentence in Virginia

Melvin Davis Rees, on advice of his attorneys, decided not to appeal the decision of the court; but shortly thereafter ran into even deeper trouble when on Monday, June 5, he was indicted for murder on two counts in Spotsylvania County Circuit Court (Virginia). The County Court found Rees guilty of murder in the first degree and he was sentenced to death in the electric chair on September 28. A defense motion for a new trial failed, and on January 4, 1962 Rees and his attorneys

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[1]"Rees-Case TV Show Probed by FBI," Evening Sun, (March 24, 1961), 56.

[2]"TV Show Delays Rees Sentencing," Sun, (March 24, 1961), 46.

faced this new decision with further delaying tactics by appealing to the State Supreme Court.[1]

On Monday, October 8, Rees's sentence was upheld by the Virginia Supreme Court; meanwhile authorities in Prince Georges County, Maryland are still debating the indicting of Rees for the murder of two teenage girls on June 15, 1955. Charges are also outstanding against Rees in Anne Arundel County, Maryland.

Was the Case Public Service or Sensationalism?

There is no question that the tape of the Rees jurors' deliberations played a dramatic role in the trial of the convicted kidnapper and murderer. The only question remaining to be answered is whether WBAL-TV performed a true public service or did it contrive to sensationalize the case and thereby interfere with the actions of the court and the deliberations on a man's life.

From a legal standpoint the conclusion is evident. WBAL-TV acted within the limits of the law. It was investigated for contempt of court and cleared; yet ethically and morally there was a question of guilt.

In discussing this case with other personnel of WBAL-TV, several were quite frank in admitting that the station saw in the televised deliberations an outlook for sensationalizing the news and further, extensive free national publicity.

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[1]"Melvin Rees Given Death Sentence," Sun, (January 5, 1962).

On the management level, WBAL-TV executives maintained they were acting within the limits of the law to provide a public service that had hitherto not been offered. They were actually proud of their accomplishment.

Perhaps the best and most straight-forward answer would be found in the statement of the legal advisor of the station that WBAL-TV would not attempt a repeat performance.

On October 11 a special committee of the Maryland State Bar Association agreed it would be unconstitutional to attempt to prevent news media from disseminating information about the deliberations of a trial jury. The committee did mention, however, that it might be possible, by enactment of a law or adoption of a court rule, to keep jury members from discussing verdicts and the deliberations leading to those verdicts. Representatives of the press, radio and television participated in the meeting.[1]

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[1]"Trial Jury Information Seen Proper News Matter," Sun, (October 12, 1962), 26.

CHAPTER III

TEXAS BREAKS THE BARRIER OF JUDICIAL CANON 35

The Washburn Case Was Highly Publicized

The premier, or first, always seems to be the most exciting and this was certainly true of the first televised murder trial in the world - the Washburn trial in Waco, Texas. The trial, which began December 6, 1955, was televised in its entirety and wire services gave the coverage the big 'play'. As the news covered our country, other nations sought further information, and soon the televised trial was being covered by major news services all over the world. Newsmen, alone, took thousands of pictures of the trial with still and motion picture cameras, for this was the trial with the camera permitted in the courtroom.

Harry L. Washburn had been indicted for murder with malice in the death of Mrs. Harry Weaver, his former mother-in-law, who was killed in the explosion of a bomb as she entered her car parked in the garage of her San Angelo home. The case had been transferred to Waco on a change of venue and, at first, there was not much interest in the trial

The jury was selected on Monday, and by Tuesday afternoon there were very few people in the vicinity of Waco who had not watched at least a part of that trial.

What stand had Texas taken on Canon 35? There was, and is, no rule or statute in regard to the Canon, for the decision on the televising of hearings was left to the discretion of the trial judge.

The truly remarkable situation arising out of this trial is that everyone legally involved in the trial granted permission to KWTX-TV to televise the proceedings.[1]

KWTX-TV Explained Their Trial Coverage

Bill Stinson, news director of KWTX-TV, made the initial move in the television coverage of the trial by obtaining the consent of Judge D.W. Bartlett, of the 54th Judicial District Court, before whom Washburn was being tried. The attorneys on both sides and the defendant either gave consent or made no objections to the request to televise the proceedings. In years prior to 1955 Judge Bartlett had given permission for photographers to take pictures as long as a flash attachment was not used, and the photographers did not interfere with or disturb the trial. Similar restrictions were placed on the television coverage as to use of special lights, noises or disturbances in the courtroom.

The television camera was used in the balcony of

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[1] "TV on Trial in the Courtroom," Senior Scholastic, LXVII, (January 19, 1956), 7.

the courtroom about twelve feet above the main floor. Although the balcony ran around three sides of the courtroom it was decided to place the camera to the right and rear of the jury box so that the jurors could not see the camera unless they made a point of looking up after turning in their seats. The camera was pointed at the judge and the witness chair and over the left shoulders of the attorneys.

One man operated the camera, which had four lenses from 50 mm. to 15 inches for different shots and close-ups. There was no sound on the camera(however, two microphones were used).[1]. The only other piece of television equipment in the courtroom was the remote equipment (including a monitor screen) used by Gene Lewis, program director of KWTX-TV, and a small microphone a fraction of an inch from his mouth that he used to communicate with the cameraman.

The telecast began at nine o'clock on Tuesday morning, December 6, as the judge called the court to order and the indictment was read to the jury. The entire proceedings were televised with the camera focused on the attorneys and witnesses under examination and on the judge as he gave instructions or ruled on objections. The cameramen were instructed never to direct the camera on the jury, which was not even shown on the screen until they brought in their verdict.

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[1]Ibid. p. 8.

This was truly public service programming, for all regularly scheduled programs and commercials were stopped during the telecasting of the trial; and there were no commercials in the breaks in the trial except when the regular program schedule was resumed during recesses for meals and in the evening. Today, as the FCC hammers away at programming on the network and local level, this coverage seems all the more remarkable.

To make the programming of the trial even more of a public service, no editorial comments were made by television announcers interpreting developments. Only brief statements identifying the trial and its principals and short explanatory announcements were made when the judge and attorneys retired for a hearing on an objection.

Other Media Cover the Trial

Still cameramen were allowed to take pictures, providing they did not use flash attachments, a press table was set up, and motion pictures (silent) were taken during the trial.

The still cameramen were allowed inside the trial area enclosed by the rail, where they sat or stood to take pictures. There was one incident where two photographers from a popular international magazine were instructed by Judge Bartlett to leave when they stood between the attorneys and the jury to take a picture of

a witness.[1]

Although thousands of photographs were taken by many cameramen and though they made little attempt to hide the fact they were taking pictures, their actions were not considered annoying or detrimental to the decorum of the court.

The press was assigned a desk directly in front of the judge's desk and between the judge and the counsel table. Anywhere from three to ten reporters sat at the table or nearby, taking notes.

Movie cameramen filmed part of the trial from various points in the balcony and from the floor in the courtroom. In his office, during recesses, the judge refused to allow the use of some cameras that made loud clicking noises. Two motion picture cameras, on tripods about five feet high, were placed at the rail a few feet from the jury box while the jury was out for its deliberations, and the jury was filmed as it returned its verdict.[2]

Although the coverage of this trial must have sometimes assumed the proportions of a circus, everyone participating in the legal process seemed satisfied, to one degree or the other.

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[1]Waco-McLennan County Bar Association, "Courtroom Television", Texas Bar Journal, XIX, No. 2 (February 22, 1956), 106.

[2]Ibid.

The Audience Response to the Telecast Was Tested

KWTX-TV requested that the viewers of the trial cite their opinions in regard to the success, or lack of same, of the televised trial. The response, through phone calls and mail, was overwhelming and in favor of the televised coverage.

Officials of the television station reported that they received in the neighborhood of several hundred phone calls with by far the most in favor of the presentation. The unfavorable calls were, in the main, from children or parents who objected to the omission of the children's programs regularly telecast in the afternoon.[1]

Over 1,400 letters and cards were received by the station from people in the central portion of Texas who saw all or parts of the trial. All but four expressed approval and appreciation for the coverage. Of these four cards, three were from Waco (two unsigned) and one from Portland, Oregon.[2]

The following excerpt is a sample of the replies received by the station from those listeners who objected to the televising of the trial:

> "One card signed 'Generally a steady listener' stated there was more than enough about such an affair in the newspapers without having the TV channel taken up with it. 'Falls in the same category as political speeches.'
>
> "An unsigned member of the PTA who wrote that she had worked for years on the comic book problem

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[1] Ibid. p. 107. [2] Ibid.

objected that televising the trial brought the 'morbid side of human nature into our home and schools...'
"The one card from Waco that was signed, stated that the trial had little local interest and that her child had been crying for 'Mickey Mouse.'"[1]

The survey mentioned the possibility of more cards objecting to the program since, at the time the survey was conducted, the station had not had sufficient time to read all the responses. At that time, according to news director Stinson, there were only about 200 cards and letters remaining to be read.[2]

On the positive side, Judge Bartlett stated that he had received several hundred cards and letters, and that they predominately favored the experiment.[3]

In addition, the station turned over the responses to the study commission (a representative committee of the Waco-McLennan County Bar Association, working under the direction of Abner V. McCall, Dean of the Law School of Baylor University, and presently vice-president of the University), and here are their findings:

Picking up cards and letters at random from the stacks on tables in the KWTX-TV studio, a representative of the McLennan County Bar Association found comments such as the following were typical:
"...it is a great contribution to the education of the masses of the people in the functioning of our Democratic processes.
"By all means, give the people the facts. It is educational, constructive and enlightening for the people to SEE and know court procedure.
A minister from a nearby town stated that the telecasting of the trial was excellent and expressed his thanks. Other letters said: "Finest public service ever witnessed." "Give us more current news events in

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[1] Ibid. p. 108. [2] Ibid. [3] Ibid.

action." "It is a step forward... to inform and educate the public." "Great example of American freedom." "Most educational matter ever to come out of our TV set."

Apparently most of the people could not see that there were any objections to televising a trial. One card stated "... great example of American freedom. Only narrowminded people could possibly have any objections, and those would be groundless."

A letter said, "I consider this to be the most progressive step that has been taken in civic education. You will, no doubt, receive some criticism; however, it is my opinion that those who criticize are those who take no interest in civic problems, or are those who protest any advancement or progress."

A university professor expressed his appreciation for televising the trial and wrote, "The townspeople, the Baylor faculty and students think it is a great contribution to the education of the masses of the people in the functioning of our Democratic processes. I do not think you need to consider any of the adverse criticism, for it could not be legitimately based."

A school teacher wrote in to say that she had shown the telecast trial to her children in school and that it was "very educational". One viewer said, "Almost everyone is interested in a trial of this kind. By seeing it on television, they see with their own eyes and are able to draw their own conclusions. They do not have to read about it in the newspapers written by one reporter expressing HIS opinion."

Along a rather humerous vein, a woman wrote in that she was so absorbed in the trial that she could not miss one word, and that while she was at her television set, she burned a pot of beans she had been preparing for dinner. A husband wrote in that televising the trial was a great thing. "Most noteworthy around our house, is the inescapable fact, that for the first time in years, my ever-loving wife found one thing interesting enough to get her out of bed before 9.00 A.M."[1]

Participants in the Trial Favored the Telecast

During the trial (recesses) or after it was over, some members of the McLennan County Bar Association interviewed the judge and attorneys who participated in the

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[1] Ibid. p. 107.

trial. Stinson, of KWTX-TV, questioned the judge, defense and prosecution attorneys, witnesses, the jury foreman, the defendant and several other people who assisted in the trial or watched it in court. All of Stinson's interviews were recorded on 16 mm. film, with a sound track. Not one person interviewed indicated any objection or disproval of the televising of the trial.

The judge said the televising of the trial seemed to dignify the proceedings and that he felt the case was more orderly than any other case of like importance and public interest, with as many lawyers involved (there were about seven lawyers on both sides). The judge said, further, that he felt there was no "grandstanding" by the witnesses or attorneys and that the television camera was no more distracting than a court reporter taking notes or an electric light in the courtroom.[1]

A witness for the state, Mrs. Billy Rogers, was on the stand for thirty minutes, all thirty of which were televised. She knew the trial was being televised but said later that she had not even seen the television camera. She even believed that her testimony had not been telecast.[2]

Mr. Jack Woods, foreman of the jury and a government teacher at University High School in Waco, said that he had looked up and seen the television camera in the balcony in a recess on the first day of the trial.

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[1] Ibid. p. 108. [2] Ibid.

On the other hand, he stated that he did not believe that the television camera affected the jurors in any manner. He said, "They probably were a little apprehensive at first when they realized it was being televised, but within a matter of a few hours, they had probably forgotten it."[1] He said he saw no one make a 'play' to the camera.

When asked if they would object to televising future trials, based on their experience with the Washburn case, most of the participants indicated they would favor it and none expressed an objection. Interviewed were Judge Bartlett; Tom Moore, Jr., district attorney of McLennan County; Cliff Tupper, chief counsel for the defendant; Judge Glen J. Jenkins, a witness for the defense; and the previously mentioned Mrs. Billy Rogers and Jack Woods.[2]

The entire film of the interviews, according to the report in the Journal, is on file in the State Bar Office in Austin, but this researcher has not been able to obtain it.

The Lawyers Reacted in Favor of the Medium

To complete the present study, a questionnaire was sent to all the lawyers in the Waco-McLennan County Bar Association with a letter containing a brief discussion of the news coverage problem and quoting Canon 35. Sixty-one lawyers responded, each of whom signed the

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[1] Ibid. [2] Ibid.

questionnaire. Fifty-nine had observed the entire trial or a portion thereof either from the courtroom of by television.

Based on Canon 35, and its objection to televised trials, the first question asked was: "IN YOUR OPINION DID THE FOLLOWING DETRACT FROM THE DIGNITY OF THE COURT, DISTRACT THE WITNESSES OR JURY, OR OTHERWISE DISRUPT THE ORDERLY PROCEDURE OF THE TRIAL?"[1] Of those expressing an opinion, the following is the tabulation:

	YES	NO	% YES ANSWERS
Press reporters	10	39	20.4
Still photographers	9	37	19.5
Movie photographers	10	35	22.2
Television	5	47	9.6
Spectators in court	7	40	14.9

This is the first in a set of answers to indicate that television was the least disturbing agent in the courtroom.

A second question asked if the actions of the judge, lawyers, witnesses, jury and spectators were discernibly affected in any way by the four listed types of news coverage allowed at the trial: press reporters, still photographers, movie photographers, and television. There were about fifty responses in each of the twenty blank spaces for answers and no more than five answered that any of the types of news coverage allowed had discernible effect. Several responses even indicated that the judge was more attentive and that television improved the dignity

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[1] Ibid. p. 109.

and decorum of the attorneys trying the case.[1]

The third question asked was, "IN YOUR OPINION, WHICH TYPE OF NEWS COVERAGE ALLOWED IN THE WASHBURN TRIAL WAS THE LEAST DISRUPTING OR DISTURBING OF THE PROCEEDING? (Answer press reporters, still photographers, movie photographers, television or others, with any desired explanation. List least disturbing first.)" Twenty lawyers did not respond to this question. Of the forty-one who answered, twenty seven (65.9%) selected television (as the least disturbing) and the other fourteen (34.1%) listed press reporters. The total score indicated television was the least disturbing, in the opinion of the respondants, followed by press reporters, still photographers, and movie photographers, in that order.[2]

In response to the effect the televised trial had on public opinion of our system of justice, forty-eight of the lawyers responded that the televised trial did improve public opinion of our system of justice. Six felt it hurt public opinion and four felt there was no effect. Thirty-four answered that telecasting the trial improved public opinion of the legal profession, while eight felt that public opinion was hurt and twelve said there was no effect.[3]

The questionnaire further asked which type or types of news coverage they would be in favor of allowing

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[1] Ibid. [2] Ibid. [3] Ibid.

in future trials, if handled in the same manner as the Washburn trial and the response was:

	ALLOW	REFUSE	% ALLOW
Press reporters	53	4	92.9
Still photographers	43	13	76.7
Movie photographers	37	17	68.5
Television	49	7	87.5

When asked about restrictions to be placed upon reporters, still photographers, movie photographers and television, if they were to be allowed in future trials, most of the respondants indicated they did not feel they would interfere with or disturb the trial. Typical responses included: no noise, no movements, no moving from seats except during recesses and no questions except during recesses.[1]

For press reporters, the second most frequent response was that they should keep behind the rail in the trial area or stay in the audience area. In the other three areas, the second most frequent response was that no light bulbs or special lighting should be used.[2]

The next question dealt with whether the trial judge should have the discretion to impose restrictions on newsmen. There were sixty responses and forty-seven favored the trial judge having final authority. Eleven were opposed and two said the judge must allow the various types of news coverage.[3]

The last two questions dealt with the possibility of adopting, in Texas, a rule or statute controlling the

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[1] Ibid. [2] Ibid. [3] Ibid. p. 110.

types of news coverage in, first, criminal trials, and, secondly, civic trials. In the area of criminal trials, fifty-six replied with 53.3% favoring the passage of the rule or statute. In the area of civic trials, fifty-five responded with 50.9% favoring the passage of the rule or statute.[1]

This study, taken immediately after the completion of the trial (to insure the most accurate response) is perhaps one of themost significant in the annals of the deliberations over Canon 35 of the ABA. There is absolutely no question, that under the existing circumstances of the Washburn trial, the television coverage was well received. Under different circumstances this argument might not be too valid.

A Lawyer Responded to the Telecast in the Texas Journal

Woodrow Seals, secretary of the Houston Criminal Lawyers Association, responded to the Washburn television event with an appraisal of the status of Canon 35 in the same issue of the Texas Bar Journal where the study by the Waco-McLennan County Bar Association was reported. In an article entitled, "TV - A Pressing Problem", he said,

> With the advent of widespread use of television, this question of the propriety of photographing criminal proceedings has been of growing concern to all interested in our criminal procedure. We might now ask ourselves whether or not this practice of televising criminal proceedings shall be extended, as

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[1] Ibid.

> the trial judge in the Washburn case seems to think; or whether this practice shall be somewhat curtailed, if not eliminated, before our criminal judicial system is brought into further disrepute.[1]

Mr. Seals commentated that congressional hearings, which were televised nationally at an earlier date, first made the legal profession aware of the impact television could have on our legal system, although they were cognizant of the alarm that grew out of the Hauptmann kidnapping case when the press overplayed their role, resulting in the passage of Canon 35 in 1937.

From this point on in the article Mr. Seals attempted to present an objective appraisal of Canon 35. He cited one effect of Canon 35 in the courts of Iowa where the municipal Court said, "It is one rule that every court should follow whether Federal or otherwise, and in either criminal or civil courts." (Bisgnano v. Municipal Court of Des Moines (1946), 237 IA 395, 23 N.W. 2d 523).

While citing action in favor of revision of Canon 35, Mr. Seals commented,

> In 1938 in the case of High v. State, 197 Ark. 681, 120 S.W. 2d 24, the Arkansas Supreme Court could find no harm in pictures being taken during a criminal trial, over the objection of the defense, nor could the Supreme Court of California in Stroble v. State of California (1951), 36 Cal. 2d 615, 226 P.2d 330. "We can also assume that it was improper to allow the taking of news photographs or televising of scenes in the courtroom; but there is no indication that the jury's verdict was influenced by

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[1]Woodrow Seals, "TV - A Pressing Problem," Texas Bar Journal, XIX, No. 2 (February 22, 1956), 72.

the taking of pictures, or the televising of the courtroom scenes."[1]

Next the author quoted William O. Douglas, United States Supreme Court Justice, in an address before the American Law Institute in May of 1953. Mr. Douglas, speaking on behalf of the Canon said,

> The press will commonly reflect (or even try to create) the view that the end justifies the means. Those of us dedicated to the law must stand before those gales. Calm, dispassionate, and disinterested judgement is of course the first requirement. But this can only be had in an atmosphere of decorum and under rules of prodedure that keep every trace of the mob from the courtroom and reflect on the innate respect for the rights of man.[2]

Mr. Seals concludes his argument with these words:

> From the few cases that have concerned themselves with the problem, one would think that the appellate courts will not show much inclination, in the absence of a real showing of harm to the accused and a timely objection, toward solving this problem on a due process of law basis.
>
> May it then be safely left to the trial courts' discretion? One answer that is given is: "The serious harm of trial by or with publicity is so great that no individual judge ought to have the power of inflicting it under any circumstances. Judges, whether elective or otherwise, ought not to be subject to the pressure which publicity agencies on occasion might exert upon them if they were without the protection of Canon 35." George H. Baldt, Should Canon 35 Be Amended? 41 ABAJ 55.
>
> How about the defense counsel? Should the decision be left to him - assuming he could object? Not hardly. The economic value of the publicity would probably outweigh the speculative harm that any one defendant would suffer.
>
> In an editorial in the prominent religious weekly, The Christian Century, the profit motive is felt to be the controlling issue:
>
> "The factor which, more than any other, has worked to turn American trials into circus performances is the pursuit of personal publicity by officers of the

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[1] Ibid. p. 113. [2] Ibid. p. 111.

> court, including members of the Bar, and of profit by the media which controls such publicity. More often than not, when the press offends against the dignity or impartiality of the judicial process, it is encouraged in so doing by police, counsel, prosecutors or sometimes even judges avid for public notice." The Dignity of the Law, Vol. LXXII, P. 71, The Christian Century (1955).
>
> From this hasty and casual look at the problem, one obvious inference might be safely drawn: Unless the organized Texas Bar comes forth shortly with a solution, the answer will go by default.[1]

It is interesting to note that Texas has not enacted legislation or court rules relative to Canon 35; but in 1957 the 55th Legislature passed a rule permitting radio and television stations, as well as representatives of the newspapers and the wire services, to attend precinct conventions, county conventions and the State convention for the purpose of reporting the proceedings.

Other States Reacted to the Telecast

On December 9, 1955, at 6:25 P.M., Harry Washburn was found guilty and was sentenced to life imprisonment. His story was told; but the battle over Canon 35 was just beginning. As mentioned earlier, Texas does not recognize the Canon but leaves the discretion of a televised trial to the presiding judge.

Within a short time after the Washburn trial, a California court had refused permission to televised a criminal trial and the Colorado Supreme Court had imposed a ban on the use of cameras and recorders in all trials (since revoked). In a change of pace in Colorado, a

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[1] Ibid. p. 113.

Denver television station had requested permission to televise the trial of the infamous John Gilbert Graham (who had killed 44 persons, including his mother, by placing dynamite in the plane carrying the passengers). The request was allowed.[1]

Since the Washburn case was the first major break from Canon 35 relative to televising trials, the researcher might wish to seek more information on this most significant accomplishment. The information presented in this chapter is part of a complete report made by the Waco-McLennan County Bar Association. The report is available on writing to William E. Pool, Texas State Bar Association.

The televised Washburn hearings, for the first time, gave broadcasters substance in their challenge of Judicial Canon 35.

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[1]Waco-McLennan County Bar Association, "Courtroom Television," Texas Bar Journal, XIX, No. 2 (February 22, 1956), 74.

CHAPTER IV

WCAX-TV CONDUCTED A TRIAL TELECAST IN VERMONT

Successful Coverage by a TV Station

In the February 26 issue of a trade journal a report of an experimental courtroom telecast in Burlington, Vermont was cited as follows:

> Is television a disruptive influence in a courtroom, as many attorneys say? WCAX-TV in Burlington, Vt., was given permission to telecast a Chancery Court proceeding as an experiment by Chief Superior Court Judge Harold C. Sylvester.
>
> WCAX-TV set up a three-sided, paneled booth with a camera slot. Bob Mesterton, cameraman, shot newsfilm for two days. A WCAX-TV questionnaire distributed to a number of lawyers involved in the case brought no objections. A number of lawyers said the tv reporting had been better than newspaper versions. The coverage marked the first deviation from the American Bar Assn. Canon 35 broadcast-photo ban.[1]

Further data on the coverage were obtained by this writer through correspondence with John A. Sullivan, news director of WCAX-TV. Included in the material Mr. Sullivan forwarded was a resume of the coverage, the actual responses to the questionnaire sent to the judge and lawyers and photographs of the courtroom and the enclosed

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[1] "TV was There - but Few Knew It," Broadcasting, (February 26, 1962), 96.

film booth.

The chancery (equity) hearing was held on Vermont Senate reapportionment. WCAX-TV covered the hearing with an Auricon sound camera, with no microphone, so that the electric camera might be used and thus avoid spring noises from a hand camera. The decision not to use a microphone was that of the court although the station did not object since it was anxious to carry off the camera experiment.

WCAX-TV had planned to set up a mixing console outside the courtroom leading to the sound camera, with microphones on the judge's bench, another at the witness box and a third in the center of the bar for the lawyers.

The camera was enclosed in a large paneled booth (as previously indicated) in an unobtrusive location in the courtroom, which in no way obscured or diverted the participation in or observation of the hearing in the courtroom itself.

An interesting technical problem occurred, but was reasonably mastered, in that natural light had to be used in the courtroom. The day was sunny and the blinds were wide open, but the lawyers, unused to the glare of the sun, demanded that some blinds be closed; and they were. A new, faster lens was purchased for the camera which somewhat compensated for the light problem.

The experiment was allowed "because of the WCAX-TV record of responsible, serious and professional news

coverage."[1] Furthermore, it was indicated by the judge and some of the lawyers involved that if the news attitude of the station had been different the experiment would not have been agreed upon.

Following is a replica of the questionnaire sent by Mr. Sullivan to the judge and the lawyers:

> TO JUDGE SYLVESTER AND LAWYERS AT HEARING ON MIKELL PETITION...
>
> PLEASE ANSWER QUESTIONS land 2 BEFORE THE FILM IS EXHIBITED AND QUESTIONS 3 and 4 AFTERWARDS.

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1. DID YOU FIND THE MOTION PICTURE PROCESS IN USE IN COURT TODAY IN ANY WAY OBJECTIONABLE? IF SO, PLEASE STATE WHY.
2. HAVE YOU ANY SUGGESTIONS FOR A DIFFERENT OR AN IMPROVED "SHOOTING" PROCESS?
3. DID YOU FIND ANYTHING OBJECTIONABLE IN THE FILM STORY ON TELEVISION? IF SO, PLEASE STATE WHY.
4. HAVE YOU ANY SUGGESTIONS IN THIS REGARD?[2]

The replies verified the conclusions stated in the trade journals. Only five of the eleven lawyers present at the hearing replied to the questionnaire although three others who did not reply by mail told Mr. Sullivan that they had no objections.

Judge Sylvester replied "no" to the first three

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[1]The foregoing is quoted from a letter the writer received from John A. Sullivan, News Director, WCAX-TV, dated June 8, 1962.

[2]The foregoing is quoted from a questionnaire which had been submitted to the judge and lawyers involved in this case and which, likewise, was inclosed with the letter previously mentioned.

questions and commented, in response to number four, "Handled in an excellent manner. Good job."[1]

Lawyer Asa Bloomen stated, in response to the first question, "All right for Chitterden County." He answered in the negative to question number two, and commented on number three by saying, "I did not get home on time to see your TV news report at 6:30." Number four was simply checked.[2]

Lawyer Clark Gronel replied "no" to question number one, commented on number two by saying, "I would 'build in' facilities in any new court room.", replied "nothing" to number three and made an interesting comment on number four in saying, "If possible, more witnesses and less lawyers."[3]

Attorneys Hilton Wicks and William Mehell, replying together, responded "no" to all four questions.[4]

Finally, lawyer Austin Foster replied "no" to number one, commented on number two by saying, "If the shooting box could be placed a little further to the front it might be an improvement.", answered "no" to number three and stated, in answer to the last question, "I thought it a creditable job considering the experimental

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[1]The foregoing is the response to the questionnaire by Judge Sylvester.

[2]The foregoing is the response to the questionnaire by one of the lawyers involved in the case.

[3]Ibid. [4]Ibid.

basis and the limitations by which it was limited."[1]

It is interesting to note that at no time did anyone complain to Mr. Sullivan about the coverage of the hearing. WCAX-TV has not done any more courtroom televising since that date, although they have tried to gain permission to cover several criminal trials. This experiment was unprecedented in Vermont at the time and the station still has hopes of continuing their work on televised coverage of the courts in Burlington.

In Vermont no legislation or court rules are in effect regarding Canon 35, but lacking further evidence and since the filming of this hearing is unprecedented, it is assumed by this writer that Canon 35 is still accepted in each courtroom in the state.

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[1] Ibid.

CHAPTER V

THE LYLES CASE SUPPORTED ARGUMENTS FOR FREEDOM OF SPEECH AND PRESS

An Appeal Case Proved Interesting

A burglary case in Oklahoma has led to an interpretation of Canon 35 which offers great promise to radio and television stations in decision whether or not to report on trials or hearings in the state. The defendant and the Oklahoma Television Association requested a hearing in the Criminal Court of Appeals of the state which was granted, leading to a thorough study of Canon 35. The results of this hearing parallel findings in the state of Colorado where many courts have sought a modernization or streamlining of Canon 35 of the ABA.

Lyles Objected to Television Coverage in His Trial

Edward Lee Lyles was charged in the District Court of Oklahoma County, Oklahoma, with the crime of burglary in the second degree after a former conviction of a felony. The charge was for breaking and entering and taking candy, cigarettes, etc., from the Barton North West Drive-In Theater. At the trial evidence of

the theft, in the form of a pop corn sack and candy box, with the Barton name inscribed thereon was placed in evidence. A confession was obtained by two police officers which was sufficient to identify the defendant with the crime alleged and proved. The defendant was tried by jury and convicted; and since the jury was unable to agree on the punishment it was decided that the trial court would perform this function. The punishment was set at fifteen years in the state penitentiary. After the judgment and sentence were entered the appeal was perfected.[1]

This case and the subsequent appeal are of direct concern to this study since parts of the proceedings were televised and the motion for appeal was partially based on the defendant's assumption that he had not been granted a fair trial because of the presence of television cameras and other equipment in the courtroom.

In presenting his appeal, the defendant made four suggestions of errors in the trial. Only the points relative to the televising of the trial will be presented here.

Mr. Lyles contended, first, that the trial judge committed an error in not granting a mistrial for reasons that television cameras were permitted in the courtroom,

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[1]National Association of Broadcasters, Syllabus, Edward Lee Lyles v. the State of Oklahoma, No. A-12,595, in the Criminal Court of Appeals of the State of Oklahoma. p. 2.

and that pictures taken in front of the jury were prejudicial to him and prevented him from having a fair trial. The only proof offered on this count was that television pictures were taken while the court was not in session, that the jury had not been selected, that television pictures were taken during a five minute recess of the court and that most of the pictures were taken of the defendant, some while the jury was out of the room and some while it was present in part. On this submission of evidence the trial court overruled the defendant's motion for a mistrial.[1]

During the trial the defendant further objected to the taking of any more pictures and the trial court acceded to his request.[2]

In his final point relative to the televising of the trial, Lyles asserted that newspaper articles and the taking of television pictures gave great weight to the importance of the trial so that he did not receive a fair and impartial trial, all in violation of his constitutional rights, as well as being contrary to Canon 35 of the ABA.[3] In regard to this latter charge the court of appeals ruled:

> The adoption of the canons of ethics by the courts did not give the canons force of law. They are nothing more than [a] system of principles of exemplary conduct and good character. They are recommended to the bench and bar as patterns which, if adhered to, will promote respect for the bar and better administration of justice. Dupree v. Garnett, Okl.,

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[1] Ibid. [2] Ibid. [3] Ibid.

> 277 P. 2d 168, 175. They are subject to modification to meet the condition of changing times in keeping with the constitutional rights of the people. In re Hearings Concerning Canon 35, (Colo.) 296 P. 2d 465.[1]

The court of appeals found that the discretion of the trial court did not abuse the rights of the defendant. In any event, the defendant had urged that the higher court pronounce a rule concerning courtroom photography in criminal cases in relation to the modern media of communication to govern representatives of the press, radio and television. There was no precedent in Oklahoma from which to seek direction; so the high court deliberated the matter.

The Oklahoma Court Interpreted and Ruled in Favor of the Medium

A number of key issues were deliberated on by the higher court involving the use of, or permission granted to, television in the courtroom.

The initial issue was that of the basic feedoms of press and speech. In discussing the freedom of speech concept, the court cited,

> It suffices that the right may be freely exercised so long as it does not infringe upon or injure the rights of others. It is not an absolute, but rather a relative right. . . . Its abuse entails penalties of law provided therefor. But, it is like a twin sister to freedom of the press since they are both modes of communication and so closely allied that we hardly think of one without the other. Both are provided for in the United States Constitution, First Amendment, reading, in part, as follows:
> "Congress shall make no law *** abridging the

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[1] Ibid. p. 2.

freedom of speech, or of the press;***"
Article II, Section 22 of the Constitution of the State of Oklahoma provides:

"Every person may freely speak, write, or publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.***"[1]

The court went on to discuss equal accessibility to the courts by both the press and television. It questioned, "How can the right of all to gather and disseminate legitimate matter to the public be denied to one without doing violence to the right of all?"[2]

A number of briefs were cited to prove that the courts of the United States do not make a distinction between the various methods of communication. They included: Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L.Ed. 1098; Public Utilities Com. v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; Wrather-Alvarez Broadcasting Co. v. Hewicker, 147 Cal. App. 2d 509, 305 P. 2d 236; Superior Films, Inc. v. Department of Education, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329.[3]

After citing these cases the court ruled, "We are of the opinion that to deny television the same privileges as are granted to the press would constitute unwarranted discrimination."[4]

The Sixth Amendment to the United States Constitution, even though it was written well before the

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[1] Ibid. p. 3. [2] Ibid. [3] Ibid. p. 4. [4] Ibid.

advent of television, says, in effect, the same thing. This was borne out in Neal v. State, 86 Okl. Cr. 283, P. 2d 294, when it was said:

> "The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed. As the expression necessarily implies, a public trial is a trial at which the public is free to attend. It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken as the exclusive representatives of the public. Men may have no interest whatever in the trial, except to see how justice is done in the courts of their country."[1]

The opinion of the court conceded that in certain unusual circumstances the attendance of the public, including television personnel, might be restricted. However, Star Chamber sessions "must be open to the press and its prying eyes and purifying pen to report courtroom abuses, evil and corrupt influences which despoil and stagnate the flow of equal and exact justice."[2]

The exclusion of the press, abridging the right of a public trial, was mentioned in several cases: Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 and Maryland Radio Show, Inc., 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562.[3] In the former case, this pertinent language is found:

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[1] Ibid. [2] Ibid. p. 5. [3] Ibid.

"'A trial is a public event. What transpires in the courtroom is public property. ** Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.' It is equally well established that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and '***in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666,669, 82 L.Ed. 949; Burstyn, Inc. v. Wilson, (suprs) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.

"Tempering the effect of the foregoing is the oft repeated truism that 'No freedoms are absolute.' The freedoms of speech and press are not exceptions. No one denies the existence of broad powers inherent in the judiciary. This power unquestionably includes the right of the courts to determine the manner in which they shall operate in order to administer justice with dignity and decorum, and in such manner as shall be conducive to fair and impartial trials and the ascertainment of truth uninfluenced by extraneous matters or distractions. If at any time the representatives of the 'press' in any field of activity interfere with the orderly conduct of court procedure, or create distractions interfering therewith, the court has the inherent power to put an immediate stop to such conduct. No claim of justification on the ground of freedom of the press would be available to those guilty of such offensive conduct."[1]

There are, generally speaking, two principal reasons why the courts are opposed to invasion of their domain by photographic representatives of the press and television. They are the alleged invasion of the defendant's right of privacy and the possibility that the introduction of photographic equipment to the courtroom will introduce extraneous influence into the proceedings which will produce bad psychological results and divert

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[1] Ibid.

the proper objective of the trial.

On the first contention (the right of privacy) the Colorado Supreme Court, in hearings on Canon 35, answered as follows:

> "First: One needs only to cite the law applicable to the question, which unequivocally and repeatedly has stated that when one becomes identified with an occurence of public or general interest, he emerges from his seclusion and it is not an invasion of his 'right of privacy' to publish his photograph or to otherwise give publicity to his connection with that event. The law does not recognize a right of privacy in connection with that which is inherently a public matter. Numerous cases are available on the subject and I have found no disagreement as to the law. Berg v. Minneapolis Star & Tribune Co., D.C., 79 F. Supp. 957. Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P. 2d 491; Jacova v. Southern Radio & Television Co., Fla., 83 So. 2d 34; Jones v. Herald Post Co., 230 Ky. 337, 18 S.W. 2d 972; Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.S. 752; Smith v. Doss, 1948, 251 Ala. 250, 37 So. 2d 118; Elmhurst v. Pearson, 80 U.S. App. D.C. 372, 153 F. 2d 467; Gauthier v. Pro-Football, Inc., 1952, 304 N.Y. 354, 107 N.E. 2d 485; Ettore v. Philco Television Broadcasting Corp., D.C. Pa. 1954, 126 F. Supp. 143.
>
> "Second: To uphold Canon 35 on the ground that it prevents a violation of the individual's 'right of privacy' would be to repudiate the provision of our constitution by rule of court, and to make effective the prior restraint upon freedom to publish, although the constitution expressly prohibits such restraints by clearly indicating that the remedy for abuse of the constitutional right to publish 'whatever he will on any subject' is that the publisher shall be 'responsible' for all abuse of that liberty.' How can it be contended that the prior restraint upon conduct imposed by the canon is valid when the constitution clearly indicates that the remedy for abuse of the 'right of privacy' must be compensatory in its character?"[1]

In Oklahoma the same is true, for there is very little language difference between the constitutions of Colorado and Oklahoma in regard to this matter. The

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[1] Ibid. p. 7.

opinion of the higher court of Oklahoma is:

> . . . that when one becomes involved in law violations he abandons his right of privacy at the risk of apprehension and when identified with crime, he becomes a public figure in which the public has more than the ordinary interest. We are further of the opinion that in this case since the trial was open to the public, simply extending the privilege of seeing some of the proceedings to televiewers was merely in support of that principle.[1]

The second objection was relative to interference with the court proceedings, introduction of extraneous influences and degradation of the court. The Court of Appeals feels that Canon 35 presumes that the taking of pictures will in <u>every</u> case interfere with the decorum of the court. This leads the Court to assume that the language of the Canon is presumptuous for the trial court <u>is</u> the master of the forum and as such should not tolerate conditions that would in any way distract the true and traditional purposes of the court. The Court believes that its own experiences in permitting the use of television in the courtroom has proven that there is neither disturbance, distraction nor lack of dignity and decorum, when properly supervised. The Colorado Supreme Court substantiates these opinions of the Court of Appeals of Oklahoma with their own experiences in the 'controlled' use of television in the courtroom. It believes "that the presumption upon which Canon 35 has been constructed is fabricated out of sheer implication and not hammered out on the anvil of experience."[2]

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[1] <u>Ibid</u>. [2] <u>Ibid</u>. p. 8.

The Oklahoma Court of Appeals firmly believes that the proper use of television in the courtroom will educate and inform their people concerning the proper function of the courts. It even indicates that "there is no field of government about which the people know so little as they do about the courts."[1]

Justice Moore, formerly of the Supreme Court of Colorado, had this to say regarding the restrictive use of the courts:

> "It is highly inconsistent to complain of the ignorance and apathy of voters and to 'close the windows of information through which they might observe and learn.' Generally only idle people pursuing 'idle curiosity' have time to visit courtrooms in person. What harm could result from portraying by photo, film, radio, and screen to the business, professional and rural leadership of a community, as well as to the average citizen regularly employed, the true picture of the administration of justice? Has anyone been heard to complain that the employment of photographs, radio and television upon the solemn occasion of the last Presidential Inauguration or the Coronation of Elizabeth II was to satisfy an 'idle curiosity'? Do we hear complaints that the employment of these modern devices of thought transmission in the pulpits of our great churches destroys the dignity of the service; that they degrade the pulpit or create misconceptions in the mind of the public? The answers are obvious. That which is carried out with dignity will not become undignified because more people may be permitted to see and hear."
> It is even suggested a theatrical atmosphere will be created and
> "that some trial judges, and lawyers 'who are hungry for publicity, will conclude that they are actors, and by some psychological motivation "play to the galleries" and so conduct themselves as to satisfy their own vanity, or otherwise exploit themselves.'
> "Any judge or lawyer who so demeans himself before a camera does not change his inherent characteristics for that particular occasion. A 'show-off' or a

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[1] Ibid.

> 'strutter' will be just that whether a camera is present or not. They are readily identified by any person of ordinary intelligence and are ultimately adequately and justly disposed of by the people. If a larger segment of society is permitted to witness such offensive conduct the offender will be properly judged by the people sooner than might otherwise be possible. *** It is perfectly obvious that the solution of the problem does not lie in arbitrarily forbidding the photographing of court proceedings. A constitutional right of all citizens cannot be denied because a very few persons may conceivably make fools of themselves before a larger audience than that which might otherwise be subjected to their offensive conduct. In the case of State v. Hensley, 75 Ohio St. 255, 79 N.E. 462, 463, 9 L.R.A.N.S., 277, the court said:
>
> "'The people have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare.'"[1]

Another argument against opening the courts to photographers and television personnel is that hordes would invade the courtroom. An association of the press and broadcasting interests in Oklahoma has already been formed so that they might pool their facilities. A procedure governing access to the courtroom has been outlined by the broadcasters:

> "'Whenever any of the member stations wish to cover a given trial, they will communicate with the secretary who will carry the request to the judge. Should the judge decree that radio and television coverage will be permitted, he need deal with only one individual -- that is the secretary -- in laying down the ground rules for such coverage. Having reached a clear understanding where the microphones and cameras shall be placed in the courtroom, the secretary shall then make the necessary arrangements for equipment and personnel. In all cases the Association pledges that it shall be a minimum amount of equipment. It is understood that the judge must be fully satisfied with the installation before the trial begins.'"[2]

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[1] Ibid. p. 9. [2] Ibid. p. 10.

For this purpose the court has suggested that the cameras should be concealed in a booth in the rear of the courtroom or from an installation outside the courtroom with only the lens appearing from an exterior wall. The microphones would also be installed so as to attract the least amount of attention.

The Colorado Supreme Court has restated Canon 35. The new rule reads as follows:

> "Until further order of this Court, if the trial judge" in a criminal action "in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the courtroom, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed to him."[1]

The Lyles Case Brought Out Two Conclusive Points

The Lyles case in Oklahoma gave evidence of two significant trends. First, some legal authorities are questioning Canon 35 as it is now written. Secondly, these same authorities have found two general criteria sufficient and preferable to Judicial Canon 35.

The two propositions, as advanced by the judiciary,

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[1] Ibid. p. 11.

are: the trial judge must at all times remain in complete control of the proceedings of a trial; and, secondly, mutual understanding by members of the legal profession and the working press can result in a significant learning or educational situation for the people of our country.

As long as there is room for debate our news services and members of the ABA can well say they are serving the people.

CHAPTER VI

THE STATUS OF JUDICIAL CANON 35 IS REVIEWED

The Fifty States Examine the Canon

In concluding this study, an examination of the status of Canon35 in the fifty states and a run-down on trial cases in a number of states revealed the conflict over support of the ABA's Canon 35.

To simplify reporting the legislative action by the individual states on adoption or non-acceptance of the Canon, four categories will be introduced: (1) states which have adopted the Canon, including the revision of 1952 (whereby the phrases "or televising" and "distract the witness in giving his testimony" were added to the original Canon of 1937); (2) states which accept the ABA's Canon of 1937 but have rejected the revision of 1952; (3) states which have adopted their own canons; and (4) states which have not enacted legislation or court rules pertinent to Canon 35.

The states in the first category are Arizona, Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, and Wisconsin.

States which accept only the original Canon are California, Connecticut, Delaware, Indiana, Iowa, Kansas, Nebraska, New Jersey, New Mexico, New York, Oregon, South Dakota, Virginia, and Washington.

States which have adopted their own canons (and in a few cases have accepted Canon 35, yet made slight revisions) are California, Colorado, Delaware, Florida, Georgia, Illinois, Massachusetts, New Jersey, Oklahoma, and Wisconsin. Their revisions are evident in the rewording of their state canons, applicable to the use of broadcasting equipment and personnel in the courtroom.

California (which has accepted the original Canon but not the revision) has its Canon 30, which states,

> Proceedings in court should be conducted in an atmosphere of fairness and impartiality and with dignity and decorum. The taking of photographs in the courtroom during court proceedings, or broadcasting or recording for broadcasting, all or any part of a proceeding before a court by radio, television or otherwise, is an improper interference with judicial proceedings and should not be permitted by a judge at any time.[1]

Colorado has amended Canon 35 to read,

> Until further order of this Court, if the trial judge in any court shall believe from the particular circumstances of a case that the taking of photographs in the courtroom or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair

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[1]National Association of Broadcasters' Legal Department, "Compilation of Material on Access to Courtrooms and Legislative Proceedings by Radio and Television Stations," (February 11, 1959). This and the following nine states fall in the first three categories on page 79.

trial, it should not be permitted; provided, no witness shall be forced to submit to the foregoing over his expressed objection; and provided that none of the foregoing shall be carried out without the permission of the judge.

Delaware has taken the same position as California but with this revision,

Rule 53 of Rules of Criminal Procedure for the Superior Court of Delaware - the taking of photographs in the courtroom during the progress of judicial proceedings or radio or television broadcasting or transmitting of judicial proceedings from the courtroom shall not be permitted.

Florida has its own Canon 35 which states,

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions or recesses, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Georgia, while falling in the first category, has Rule 27,

No photography shall be taken in the courtroom, witness rooms, jury rooms, entrances to the court, and passageways to and from the witness rooms and jury rooms. This rule shall apply to all times whether in session or during recess.

Illinois has its Rule 40 of the Circuit Court for Cook County and Rule 44 S2 of the Superior Court of Cook County which states,

No photographs shall be taken in any courtroom over which this court has control, or so close to such courtroom as to distract the order and decorum thereof, while the Court is in session or at any other time when there are present court officials, parties, counsel, jurymen, witnesses, or others connected with proceedings pending therein. The Superior Court will extend this provision to radio and television broadcasting.

Massachusetts has its General Law of Massachusetts, Ch. 268, Sec. 39.

> No person shall televise, broadcast, take motion pictures of any proceedings in which testimony of witnesses is to be taken, before a legislature, judicial, executive body or other public agency.[1]

New Jersey has amended Canon 35 to read,

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs or the making of sketches of the courtroom or of any person in it, during sessions or recesses, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the Court and create mis conceptions with respect thereto in the minds of the public and should not be permitted.

Oklahoma has rejected Canon 35 with this ruling Lyles v. State, 330 P 2d 734 (p.5),

> Where court proceedings may be taken for reproduction on sound tracks and television without disruption or in a manner not degrading to the court and without infringement upon any fundamental right of the accused, such agency should be permitted to do so within reasonable rules prescribed by the courts.

Wisconsin, although adopting Canon 35, has added its own provision,

> Any person who shall, either directly from the courtroom or by means of any recorded transcription made in the courtroom, broadcast by radio or any like means of disseminating information all or any part of the proceedings in any criminal trial or examination in this state purporting to be the actual voices of witnesses, counsel or judge, shall be guilty of a misdemeanor. No court or judge shall permit the making of any such recorded transcription for the purpose of broadcasting the same.

Other states fall in the last category - they have not enacted legislation or court rules pertinent to Canon 35.

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[1]Italics are presumably the NAB's.

They include Alabama, Alaska, Hawaii, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Rhode Island, Texas, Vermont and Wyoming.

It is interesting to note, again, that only Colorado, and Oklahoma have adopted legislation permitting the opening of their courts to television, subject to the discretion of those legally involved, while Wisconsin has the strongest legislation forbidding the opening of courts to television.

Some Instances of Coverage of Courtroom Proceedings

A number of television stations in the country have been successful in televising all or part of judicial proceedings in their states. They will be classified by the same method used to classify the states on acceptance, rejection or modification of Canon 35.

The first category includes states which have adopted the Canon, including the revision of 1952:

> Texarkana, Arkansas - Murder trial was recorded and filmed by KCMC-TV for late broadcast (State Side, Vol. III, No. 11, August 1957).[1]
>
> Minneapolis, Minnesota - KEYD-TV was allowed limited coverage rights in a murder trial (Broadcasting-Telecasting, November 14, 1955, p. 104).
>
> Pittsburgh, Pennsylvania - A murder trial was

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[1]This and the following cited cases are from the mimeographed materials of the National Association of Broadcasters' Legal Department, "Compilation of Material on Access to Courtrooms and Legislative Proceedings by Radio and Television Stations," (February 11, 1959).

covered by KDKA-TV (Radio and Television Daily, February 13, 1958).

Nashville, Tennessee - WSM-TV was allowed to record and take photographs in the courtroom in a murder trial (Radio-TV News Directors Bulletin, March, 1955, p. 3).

Milwaukee, Wisconsin - WTMJ-TV covered the sentencing of a man found guilty in a murder trial (Radio and Television Daily, March 15, 1956).

The second category pertains to states which accept the ABA's Canon of 1937 but have rejected the revision of 1952:

Hollywood, California - Station KNXT-TV covered a perjury trial with a silent news camera (Radio Daily, January 26, 1956).

Topeka, Kansas - WIBW-TV was allowed a pickup from the Kansas Supreme Court (Broadcasting-Telecasting, December 17, 1956).

New York, New York - Aspecial sessions judge permitted TV film cameramen (WRCA-TV) to cover arraignment proceedings (Radio and Television Daily, October 2, 1958).

New York, New York - Again, WRCA-TV was involved; this time in the taping of the proceedings of a trial for violation of an anti-trust injunction (Radio and Television Daily, December 12, 1957).

New York, New York - Television film cameramen were allowed to take photographs during a trial in Domestic Relations Court (Radio Daily, March 31, 1955, p. 1).

In the third category are states which have adopted their own Canons:

Denver, Colorado - KLZ-TV was allowed to film and record the Graham murder trial for later use (Journalism Quarterly, Vol. 34, No. 3, summer 1957).

Pueblo, Colorado - KCSJ-TV was allowed in the courtroom for coverage of a murder trial (News Release from KCSJ-TV, January, 1955).

Chicago, Illinois - WNBQ-TV was permitted to film and tape testimony in a traffic case (Radio and Television Daily, June 3, 1958).

Oklahoma City, Oklahoma - WKY-TV was permitted to cover sessions of the Oklahoma Criminal Court of Appeals (Broadcasting-Telecasting, September 29, 1958) and the same station was allowed to televise, without limitations, an entire District Court torture-robbery

trial (Highlights, December 20, 1954, p. 595). Still again, WKY-TV was allowed to cover the murder trial of Billy Manly in the District Court (Broadcasting-Telecasting, January 18, 1954, p. 94).

In the last category, states which have not enacted legislation or court rules pertinent to Canon 35, were the following cases:

Columbia, Missouri - A murder trial was covered by KOMU-TV (Broadcasting-Telecasting, April 14, 1958).

Charlotte, North Carolina - Hearings on alleged misconduct of a city police captain were covered by WBT-TV (Radio and Television Daily, September 9, 1958).

Charlotte, North Carolina - A judge permitted TV filming of a trial in Superior Court (Broadcasting-Telecasting, February 14, 1955, p. 80).

San Antonio, Texas - WOAT-TV was allowed to cover a courtroom hearing (Radio Daily, October 20, 1955).

Lubbock, Texas - KDUB-TV was allowed to film courtroom proceedings (News Release from KDUB-TV, August 16, 1956).

To add to this list, the National Association of Broadcasters has released citations on cases involving Canon 35 in more recent years. The list covers legislative hearings and radio test results, but for our purpose only legal cases involving television will be covered. The concise reports are listed by states.

Florida - The coverage of a criminal trial by WFGA-TV, of Jacksonville, resulted in comments of approval by Criminal Court Judge Lloyd A. Layton. Judge Layton said, "It was not distracting, and I don't think the majority of persons in the courtroom even noticed it." (July, 1959)[1]

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[1]National Association of Broadcasters' Legal Department, "Freedom of Information Report to State Presidents," (February, 1961), 1.

Georgia - WTOC-TV, of Savannah, filmed portions of court proceedings including the pronouncement of the death penalty of the two defendants. Attorneys for both defendants demanded new trials on the basis of the telecast (not granted). (August, 1959)[1]

Indiana - Judge Thomas J. Faulconer, Jr., of Marion County Criminal Court allowed radio, television and other newsmen to cover court proceedings in the Connie Nichols murder trial. Judge Faulconer stated that he is convinced more than ever that the American Bar Association's Canon 35 is "outmoded as the horse and buggy."[2] The judge also stated that the conduct of the radio-TV newsmen and photographers was "exemplary". He also felt that the photographs had been taken in a "very unobtrusive manner that had not upset the decorum of the court." (April, 1959)[3]

Louisiana - During the convention of the Radio-TV News Directors Association, a mock trial in the Civil Court was telecast. The purpose was to demonstrate modern techniques in broadcast coverage of court trials. (March, 1959)[4]

Oklahoma - On November 22, 1960 the Oklahoma State Supreme Court reaffirmed an earlier ruling upholding a modified version of Canon 35, to the effect that "the broadcasting, televising or the taking of photographs in the courtroom should be done only during recesses of the

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[1] Ibid. p. 2. [2] Ibid. [3] Ibid. [4] Ibid.

court with the consent of and under supervision of the court and at such time or times, as may be authorized by the court."[1] The Supreme Court said it would permit photographs in the courtroom during recesses and ceremonials that may be conducted in the courtrooms.

Rhode Island - Residing Justice of the Superior Court of Rhode Island, Louis W. Cappelli, ordered a ban on all tape recording coverage and film cameras in the courts of the state (the Judge is also the administrator of the State's District Court).[2] (August, 1959)

1961 Brought Its Recommendations from the ABA

In August of 1961 the American Bar Association heard, once again, from its special committee on the proposed revision of Judicial Canon 35. The committee had been established by the Board of Governors in 1958.

The recommendation of the committee was to make a fully objective study of the effect of the presence of the media on the participants in trials. They consulted Mr. Elmo Roper, the well known research analyst, who suggested a pilot study be made to determine the methods to be used in ascertaining the reaction of trial participants and to determine the feasibility of making a more comprehensive examination of the subject. He estimated the pilot study would cost $35,000 and a study of any

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[1] Ibid. p. 3. [2] Ibid. p. 4.

length considerably more.[1]

A joint meeting of representatives of the media had been held, in Washington, in May of 1959. The media suggested they would not offer the funds but perhaps a foundation might be interested in at least financing the pilot study.[2]

Meanwhile, the Bar Association Committee had sought the aid of a number of foundations without success. The ABA Committee, while indicating it did not expect the ABA to finance the study completely, requested, and was granted, permission from the House of Delegates to continue the committee until August of 1962 in order to pursue any feasible means to complete the study.

In pursuit of an answer to the problem of how the study would be conducted, posed by the ABA, this researcher wrote to Robert V. Cahill, an attorney for the National Association of Broadcasters, charged with handling the Canon 35 situation. Mr. Cahill, in a reply dated October 3, 1961 stated, "With respect to your recent letter on the ABA's 'Report of the Special Committee on Proposed Revision of Judicial Canon 35', naturally our reaction is one of disappointment. The Association hopes that there are still avenues which can be explored which

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[1]Richmond C. Coburn "et al.", American Bar Association, "Report of the Special Committee on Proposed Revision of Judicial Canon 35," No. 82, (August, 1961).

[2]Ibid.

will lead to a solution of the Canon 35 problem. As you state, it is true that Foundation support to date has not been forthcoming. However, the Association will continue to work with the ABA and its special committee in hopes of finding a solution."[1]

Justices Hall and Douglas Discussed the Status of Judicial Canon 35

While addressing the Conference of Chief Justices in St. Louis, Missouri, on August 2, 1961, Chief Justice Frank H. Hall, of the Colorado Supreme Court, spoke quite strongly in favor of revising Canon 35. In presenting his argument, Justice Hall attempted to refute the words of Supreme Court Justice William Douglas, point-by-point, in an address the latter had given at the University of Colorado Law School on May 10, 1960. Since Justice Douglas is a strong advocate of Canon 35 his arguments will be presented, followed by the counter arguments of Justice Hall.

Justice Douglas -

> There is pressure these days on courts all over the land to put trials and hearings on radio and television. In one state the radio and television industry leveled its guns at a court which had banned those broadcasts. At fifteen minute intervals there were spot announcements over the air reminding the people that "the courts do not belong to the lawyers" and urging the listeners to get busy and write the members of the court to change the rule.[2]

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[1]Letter from Robert V. Cahill to the writer on October 3, 1961.

[2]This and the following statements by Justices Douglas and Hall were taken from Justice Frank H. Hall's

Justice Hall -

Recently in one of our District Courts the case of Joseph Corbett, charged with the kidnapping and murder of Adolph Coors III, was set for trial. This case had attracted nation-wide interest. Corbett's picture appeared in most newspapers in the United States and even in Canada. In connection with his picture was a request: "If seen call police." Through this publicity Corbett was located and arrested in Canada and returned to Colorado for trial. Pursuant to our Rule 35, and with approval of defense counsel, arrangements were made to televise the proceedings, or a portion thereof. Two days before the trial, defense counsel notified the trial judge that defendant objected to the televising of any portion of the trial. The trial court promptly sustained the objection -- to the dismay and chagrin of defense counsel, so I am informed. The news media representatives graciously and without a whimper bowed to the court's ruling, so the trial was not subject to the charge of unfairness, a matter of deep concern to Justice Douglas.

Justice Douglas -

The trials recently held in Cuba at a stadium filled with hooting people are the very antithesis of our conception of fair trials. When the famous communist trial was being held in New York City, a motion was made to transfer it from the Federal Building to Madison Square Garden so that the crowds could pack in. That motion was denied. Those who sponsored it apparently were interested in making the trial a spectacle. Spectacles, however, do not comport with the quiet dignity and dispassionate search for truth which we associate with judicial proceedings.

This January in Baghdad the government gave the mob a circus in the form of a televised trial of some 70 defendants. The court was the People's Court; the charge was a plot to assasinate Premier Karim el-Kassem. The accused were herded handcuffed into a pen ablaze with kleig lights. A hand-picked studio audience jammed the room. The trial began at 7 p.m. to accomodate the television audience. The judge and the prosecutor vied for star billing while the studio audience, true to the cues, shouted and applauded.

"Address to Conference of Chief Justices," St. Louis, Missouri, (August 2, 1961).

Justice Hall -

I feel sure that none of the judiciary of Colorado, or elsewhere in America, would sanction the doing of any of these things that Justice Douglas warns against. We do not have a Madison Square Garden, but we do have a Bears Stadium -- no trials have been held there and I know of no request for such. Procedures pursued in Cuba and Baghdad have not proven indigenous to the judicial climate of Colorado as softened by our Rule 35.

Justice Douglas -

With all deference to the Supreme Court of Colorado, I feel that a trial on radio or television is quite a different affair than a trial before the few people who can find seats in the conventional courtroom. The already great tensions on the witnesses are increased when they know that millions of people watch their every expression, follow each word. The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Rome Coliseum. When televised, it is held in every home across the land. No civilization ever witnessed such a spectacle. The pre sence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth.

Justice Hall -

Under our Canon the wishes of witnesses under subpoena, declining to be photographed or to have his [sic] testimony broadcast, is expressly guaranteed. I surmise that in all all hard-fought cases all of the participants are under stress and tensions; certainly litigation does not lend itself to relaxation -- tranquility is often on leave while controversies are being resolved. . . . I am sure that many thousands of viewers and listeners in the Rocky Mountain area have witnessed such spectacles and I doubt without appreciable impairment of civilization.

Justice Douglas -

. . . Picture-taking in the courtroom is more than disconcerting. It does not comport with traditional notions of a fair trial. A man on trial for his life or liberty needs protection from the mob. Mobs are not interested in the administration of justice. They have base appetites to satisfy.

Justice Hall -

Since the adoption of our Rule 35 I am sure there have been hundreds, if not thousands, of photographs taken in courtrooms during recesses and during sessions -- a vast majority of them unbeknown to any person in the courtroom. I have several of such pictures here -- you may examine them. I doubt if you will find anything in them to indicate that the defendant was not being afforded a fair trial, that the proceedings were lacking in essential dignity, that the court was degraded, or any witness distracted. They do not depict a mob scene or indicate that the defendant was in need of any "protection from the mob." Some of the photographs which I have here were taken of our court sitting en banc. I have one here that shows members of the court hearing arguments in a case. I was there and I do not have the slightest idea who took the picture, or when or how. Who, back there, said I must have been asleep? For once -- not so, and I have the picture to prove it, it shows my eyes to be open. It could be admitted in evidence for it was taken in accordance with our rule and is not subject to the objection of evidence illegally obtained.

Justice Douglas -

Prosecutors usually run for office, and today about three-fourths of our States (that includes Colorado) provide for the election of judges. Prosecutors and judges -- as well as defense counsel -- are human; and the temptation to play to the galleries will be stronger than many can resist.

Justice Hall -

I wish to be recorded as concurring in the statement that judges are human.

We have not observed any judge yielding to temtation to play the galleries through the means of Rule 35. We are, of course, all aware of the fact that there are judges who play to the galleries -- I apprehend that the best and only way of overcoming such propensity is to replace the offender. I doubt if Canon 35 will ever serve to reform a publicity hound into a person of quiet dignity.

Justice Douglas -

Moreover, commercial sponsorship of such broadcasts can only cheapen or vulgarize processes of government that should be sacrosanct.

Justice Hall -

I assure you that no one in Colorado has ever suggested a commercial sponsorship for any broadcast of a court proceeding.

With five years of experience behind us, I assure you that none of the horrible possibilities that filled Mr. Justice Douglas with grave apprehension have come to pass in Colorado. During that period there have been several television broadcasts of criminal trials of wide public interest -- the most notable that of John Gilbert Graham, who paid the supreme penalty for planting a time bomb on an aeroplane on which he had put his mother so she might enjoy a well-earned rest and vacation. She and forty-three others met their frightful deaths when the bomb exploded shortly after the takeoff. Liberal portions of the trial proceedings were televised. ABA Canon says that such actions: "are calculated to (1) detract from the essential dignity of the proceedings; (2) distract the witness in giving his testimony; (3) degrade the court; (4) and create misconceptions with respect thereto in the mind of the public. . . ."

One may view and hear this telecast -- for sure it gives a true picture of the person and things viewed; it gives a true record of the voices and sounds. Truth is not per se objectionable. One can find nothing (and I have heard of nothing) indicating that there was a particle of detraction from the essential dignity of the proceedings. Nothing appears to indicate that any witness was distracted in giving testimony -- we have never heard of the complaint of any witness. Did it degrade the court? Those participating might well demand proof of these broad charges - the visual and auditory recording speaks the truth; it shows a competent judge and district attorney, competent defense counsel, witnesses and a jury charged with a frightening task, all going about their public duties in an orderly, dignified, efficient and legal manner. Did this telecast create misconceptions with respect to the court? Only true conceptions of the court could arise out of viewing that telecast. If misconceptions of the court arose, they had to come from other sources -- the telecast spoke the truth.

We have experienced no difficulties with reference to our Canon 35. We have not been urged to modify or repeal it, or any portion of it. Naturally judges make no complaint for they have complete control. Neither litigants nor witnesses have, to my knowledge, voiced any complaint -- the Colorado Bar Association has never expressed dissatisfaction with the canon during the time it has been in force.

Justice Hall made two other points in his speech

which bear repeating: (1) the ABA has issued its gavel award to newspapers, television and radio stations for published articles and demonstrations which "increase public understanding and appreciation of the American system of law and justice" yet Canon 35 seems to hamper the media from seeking such awards; and (2) in the July 1, 1961 issue of the American Bar Association Co-ordinator, President Seymour (of the ABA) suggested that the school and community could be closer to the courts with an "organization of visits to our courts al all levels by school children and adults, observation of impartial, dignified judges administrating justice without fear or favor, jorors serving without regard to personal convenience, lawyers obeying standards of professional ethics and etiquette and saying what can be said for the poor as well as the rich -- these should be encouraged as a part of Law Day or Law Week programs[1], yet, once again, Canon 35 bars the way.

On August 5, of the same year, Justice Hall appeared, along with Chief Judge Charles S. Desmond, of the Court of Appeals of New York State (where the ABA's Canon 35 is strongly supported) on St. Louis's KMOX-TV to debate the issue, "Should Television Cameras Be Allowed in the Nation's Courtrooms?". The remarks made by the participants were largely repetitious of the preceeding comments; but a copy is available on writing to Information Services,

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[1] Ibid. p. 14.

KMOX-TV, Channel 4, Twelfth and Cole Streets, St. Louis 6, Missouri.

1962 Is a Significant Year in the Study of the Canon

The first significant event of 1962 in the deliberations over Canon 35 was the establishment of closed-circuit television facilities on the Ann Arbor campus of the University of Michigan whereby law students may observe actual trials. This interesting teaching aid was established on January 12 and dedicated by John C. Satterfield, president of the ABA, who said the device was a return to the early emphasis in the training of lawyers in the practical experience of the law in actual courts. He went on to declare his own special interest in the project because of his college experiences as a local radio newscaster and as a stringer for the Associated Press.[1]

The television facilities cover all actual trials of the Washtenaw County Court that Judge James R. Breakey, Jr. wishes to be carried or that professors of the Law School wish their students to hear; however the public does not have access to this coverage.

The camera in the courtroom is at ceiling height in a rear corner. It is a small Vidicon in an unobtrusive box that matches the wall paneling. The transmission is carried by telephone cable (the whole system

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[1]Robert L. Shayon, "The Law and Television in Washtenaw County," Saturday Review, (February 10, 1962), 62.

cost only $10,000 to install and $400 a month line charges from the telephone company)[1] and witnesses are not aware whether it is on or off. The camera is controlled by remote control and can pan right, left and zoom in for closer shots (but no tight close-ups).

Originally the Law School proposed the television link three years ago (through the efforts of Assistant Dean Charles W. Joiner) but the old courtroom had inadequate lighting and it would have been necessary to have installed an image-orthicon camera, which would have required a courtroom operator and a fairly large observation booth, all too expensive for the academic budget.

The experiment is such a success that Wayne University (Detroit) has asked for permission to run a TV cable from the Ann Arbor court to its own campus.

This experiment may lead to a re-examination of Canon 35 for it has proven that TV transmission need not disturb a court. As Professor Joiner has said, "I watched for three hours and I began to appreciate anew our adversary system of law. Lawyers arguing against each other but working with the judge to find solutions to the problems of their clients. That's damned important to people."[2] This observation of the courts, operating in dignity and with proper decorum, has been sought by the Industry for many years.

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[1] Ibid. p. 63. [2] Ibid.

The Industry Made a Plea to the ABA

On February 18, of this year, the ABA's House of Delegates, meeting in Chicago, heard, once again, from the special Canon 35 committee. Representatives of the broadcasting industry said the Canon "should be overhauled in line with progress in the last quarter-century."[1]

Representing the National Association of Broadcasters was Frank P. Fogarty (WOW-TV, Omaha, Nebraska), chairman of that organization's Freedom of Information Committee. Mr. Fogarty requested that the decision on broadcasting a court trial should be placed "where the responsibility belongs, in the discretion of the individual judge."[2] He went on to cite a number of cases where trials had been successfully broadcast and even cited the closed-circuit telecast of the 1955 meeting of the ABA's House of Delegates. The NAB code was also mentioned as a strengthening factor.

Richard E. Cheverton (news editor of WOOD-TV, Grand Rapids, Michigan), president of the Radio-Television News Directors Association, proposed that the ABA select a group of cities in which broadcasters would volunteer to conduct a one-year test of courtroom coverage. The tests would not be aired unless the ABA and local bar associations approved the move.[3]

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[1]"Radio-TV Makes Plea for Court Access," Broadcasting, (February 19, 1962), 53.

[2]Ibid. [3]Ibid. p. 54.

It was suggested that different size communities and different types of trials would be selected for the test with all results turned over to the ABA with information as to when the material would have been used and under what program format.

In closing Mr. Cheverton offered the ABA full cooperation "in arriving at an equitable solution which will insure the orderly administration of justice, will guarantee the rights of participants, but will not arbitrarily deny the right of an established media [sic] to communicate, using the tools which will insure the dissemination of truth."[1]

Gabe Pressman (NBC news), president of Radio-Newsreel-Television Working Press Association, said that opponents of the revision could only see the glaring lights and whirring cameras, accompanied by hustling technicians, whereas, "It would be easy to construct a courtroom so as to make the cameras, microphones, and television crews completely invisible."[2]

The entire transcript of these hearings (203 pages) is available from the American Bar Association at the cost of $21. 50. Mr. Fogarty's address to the House of Delegates may be secured from the NAB.

The Judicial Conference Opposed Television Coverage

On March 12 the Judicial Conference of the United

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[1]Ibid. [2]Ibid.

States, composed of a group of top Federal judges, condemned the radio-television broadcasting of any Federal judicial proceedings and the taking of photographs in and near the courtrooms.[1]

The conference noted that radio and photography were already prohibited by Rule 53, with the conference adding television to the original ruling.

This new action of the Judicial Conference favored extension of the ban to all judicial proceedings and to the environs of the courtroom as well as the courtroom itself. Although this action is not binding as law it was noted that all Federal jurists would take notice of the judge's position.

The resolution stated,

> Resolved, that the Judicial Conference of the United States (consisting of the chief judges of the eleven Federal Courts of Appeal, the eight district judges from each of the eleven courts, the chief judges of the Court of Claims, and the Court of Customs and Patent Appeal and Chief Justice Earl Warren) condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding and the broadcasting of judicial proceedings by radio, television or other means and considers such practices to be inconsistent with fair judicial proceeding; in fact, they ought not to be permitted in any Federal court.[2]

Industry Leaders Spoke in Favor of Revision of the Canon

LeRoy Collins, president of the National Association of Broadcasters, and Newton Minow, chairman of the Federal

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[1]"Courtroom TV Opposed by Judges," Sun, (March 13, 1962).

[2]Ibid.

Communications Commission, added their voices to those of other Industry representatives in favor of revising Canon 35 at the annual meeting of the NAB, in Chicago, the first week in April.

Mr. Collins argued that "Whenever the public has a right to go and hear and see, so does the broadcaster"[1] on his way to advancing ideas for the revision of the controversial Canon. He went on to say that only through the broadcasters' facilities could most people understand how the government is being conducted.

In noting the ABA's concern over the public image of the courts, Mr. Collins said:

> I propose that we start at the top and ask the U.S. Supreme Court on a trial basis to select some cases involving issues of great interest and importance to the American public, as for example the recent one dealing with legislative apportionment, and allow the broadcasting profession to show the people what this court, which is of such great importance in our democratic system, is really like. Let the people hear the brilliant arguments of the advocates, see the judges at work. What an exciting experience for the people - what a meaningful aid this would prove in developing understanding of our government here and all over the world.[2]

FCC Chairman Minow informed the ABA committee he was in favor of the RTNDA test idea. He also agreed the time had come to amend the Canon, though he did state that broadcast coverage should not disturb legal proceedings.[3]

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[1]"Chicago TV Hearings: Grounds for Divorce," Broadcasting, (April 9, 1962), 46.

[2]"Bright Spots in Court Access Fight," Broadcasting, (April 9, 1962), 92.

[3]Ibid.

The Iowa News Association Opposed Canon 35

At a meeting of the Iowa Radio-Television News Association, held in Cedar Rapids on May 18-19, broadcast newsmen decided to set up a co-operative move to oppose Canon 35. The idea was prompted by the barring of the working press from a mock trial held in connection with Law Day ceremonies at the University of Iowa Law School.[1] Iowa is one of the states which has adopted Canon 35 (without the revision of 1952).

Other Viewpoints Are Presented

In reflecting on two years of research in a field that has held the author's interest, three comments (not already quoted) stand out in my notes:

After televising portions of a criminal trial (January, 1954) WKY-TV, Oklahoma City, Oklahoma, newsmen asked Judge A.P. Van Meter what he thought of the television coverage of the court proceedings and he replied:

> If television is used in an educational and factual manner as it was in this case, without any of the spectacular portrayal, it should be very helpful. There is no question in my mind but what there is a need for people generally to know more of their courts in action. Many people rarely have any contact with the courts. Too often what is said or shown about courts is not a true portrayal. If TV can present courts as they actually function, this

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[1] "Iowa Newsmen Oppose Canon 35 Ban," Broadcasting, (May 28, 1962), 9.

should be a real public service.[1]

After the first nationally televised murder trial (April, 1959) in Indianopolis, Indiana, Judge Thomas J. Faulconer (presiding over his first major case) commented on the televised coverage by saying, "The [TV men] have. . . shown that court proceedings can be covered by all media without disturbing the orderly administration of justice."[2]

When the Waco, Texas, Washburn murder trial was over Harry L. Washburn, the defendant, already found guilty oddly said, "I think televising trials is a fine thing. It's educational."[3]

The question of revising Canon 35 has become so paramount to the NAB that it has announced it will use the research facilities on the campuses of major universities where this issue will be considered of primary importance.

KRON-TV Manager Charged Ban Against TV

Harold P. See, general manager of KRON-TV, San Francisco, charged that three of his news cameramen were asked to leave a panel discussion on "The Press, the Courts and Canon 35" at a meeting of the National Conference of

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[1]"TV in the Courtroom," Newsweek, XLIII, (May 8, 1954), 75.

[2]"We Found Her Guilty," Newsweek, LIII, (April 27, 1959), 34.

[3]"TV on Trial in the Courtroom," Senior Scholastic, LXVII, (January 19, 1956), 7.

Trial Judges in a San Francisco hotel on August 4. The program, a scheduled event in the annual ABA convention, was opened to newspaper photographers but closed to the TV representatives.

Boston Superior Court Judge Frank J. Murray, chairman of the session, said the TV station was not invited to attend and had not requested permission to cover the discussion. KRON-TV denied the latter statement, saying arrangements had been made through the bar association's press relations staff, which had been co-ordinating some relations with news media for the conference.

Richard E. Cheverton, president of the Radio-Television News Directors Association, said he would check into the matter.[1]

Special Committee on Canon 35 Reports to the ABA

The Special Committee of the ABA working on the proposed revision of Judicial Canon 35 released their findings at the annual ABA convention the first week in August. The committee made two recommendations:

> The Special Committee for the Proposed Revision of Judicial Canon 35 recommends that it be continued for the purpose of completing the obtaining of a body of reliable factual data on the experiences of judges and lawyers in those courts where either photographing, televising or broadcasting are permitted and for the purpose of concluding its prior comprehensive study and survey to determine whether or not Judicial Canon 35 should be continued in its present form or be

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[1]"KRON-TV Manager Accuses Judges," Broadcasting, (August 13, 1962), 52.

> amended, revised or otherwise dealt with, all with the objective of preserving the right of fair trial, and considering and evaluating objectively the contentions and material and data submitted by interested media representatives. A final report and definite findings and recommendations will be made by this committee for consideration and action at the next mid-year meeting of the House of Delegates or at the 1963 annual meeting of the Association.
>
> Our committee also proposes that the American Bar Association recommend to the Bench and Bar throughout the various States that until such time as the American Bar Association has acted officially after filing of this committee's final report and recommendations, that the status quo of the present practices and procedures of the courts of the various States with respect to Judicial Canon 35 be maintained. We urge this recommendation because of our conviction that the subject should be dealt with on a national basis in order to influence possible uniformity among the States.[1]

In their report the Special Committee of the ABA stated that they had considered all the published material that had been accumulated over the last ten years relating to the publicizing of courtroom proceedings through the added media of radio, television and photography. They stressed their intention of Avoiding "a stodgy conservative consideration and evaluation based on inherent opposition to change."[2]

The Committee went on to say that they recognized extraordinary improvements in the field of communications and it was the purpose of their report to consider only the most relevant materials and contentions that had come

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[1] Interim Report and Recommendations of the Special Committee on Proposed Revision of Judicial Canon 35 (San Francisco: American Bar Association, 1962), p. 1.

[2] Ibid. p. 7.

to their attention.

One of the many interesting findings of the Committee was an opposition to obtaining survey data by a professional fact-finding organization, suggested earlier in this study. The Committee felt that the report, regardless of expense, would not be justified since there was considerable doubt that the project would produce truly reliable conclusions.

The report went on to trace the history of the Committee and its actions in the Chicago hearings in February, discussed previously in this study.

One area, not previously discussed, dealt with a survey the Committee made of the various state bar associations concerning their positions on Judicial Canon 35. The study, which began with letters to the presidents of the State Bar Associations on January 19 of this year, requested their co-operation by reporting (1) the concensus of the Bench and Bar of their states on whether Judicial Canon 35 should be revised; (2) whether each state had experimented with the telecasting, etc. of courtroom proceedings, and if so, their conclusions; and (3) if there was a difference between the Bench and Bar of the state that the views of each side be submitted.

The results of the survey revealed that thirty-six of the State Bar Associations favored retaining Canon 35 without change; two favored change, allowing telecasting, etc., subject to the judge's discretion; five had not

reached a decision when the report was published; and nine had not answered.

The reports from the State Bar Associations were based on four factors: (1) State Bar membership poll; (2) State Bar Board of Governors or Directors vote; (3) sampling of opinions of the Bench and Bar and (4) a State Bar Association Resolution adopted at a membership meeting.[1]

In their study the Committee surveyed members of the Bar and Industry leaders in an effort to present both sides of this interesting issue. The personal comments of a number of these individuals, so canvassed, will be cited later in this chapter.

NAB Vice President Urged Broadcasters to Fight News Curbs

In a speech delivered to the Oklahoma Broadcasters Association, Howard H. Bell, NAB vice president, urged the broadcasters to fight for their rights as journalists. The address, delivered on August 18, called for broadcasters to take their news coverage problems to the people in order to overcome limitations on news functions already placed on them.

Mr. Bell, in alluding to the report of the Special Committee of the ABA in their San Francisco convention, said, "The handwriting would appear to be on the wall as to any further progress of our joint efforts with the Bar." He made particular reference to the portion of the report

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[1]Ibid. p. 26.

substantiating the action of the Federal Judiciary Conference.

In reference to the action of the National Conference of State Trial Judges in banning the TV cameras of KRON-TV from the debate on Judicial Canon 35, Mr. Bell had this to say:

> I believe the time has come for broadcasters to stand up and be counted on this issue. If we are going to persuade the lawyers and others . . . then it's time we took our case to the people, for it is the public which has the greatest stake in this issue.
>
> The broadcasters, through forums and the use of the airways need to mount a major campaign to enlist the support of the people in the fight to advance the people's right to know. At the same time, broadcasters generally need to be more aggressive in seeking out local coverage of public proceedings and in strengthening further the quality and character of the news and informational services provided to the public.[1]

KRON-TV Continued the Debate on the Canon

On September 10, KRON-TV continued its effort to make Judicial Canon 35 a public issue by broadcasting a panel discussion on, "TV Before the Judge". The broadcast, part of the station's documentary series, "Assignment Four", featured the arguments of Superior Court Judge Joseph R. Weisberger, of Rhode Island, who supports the Canon, and Chief Justice Edward Day of the Colorado Supreme Court who believes the Canon is untenable and perhaps unconstitutional.

Also appearing on the program were Superior Court

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[1]"Radio-TV Urged to Fight News Curbs," Broadcasting, (August 20, 1962), 67-68.

Judge Frank J. Murray, of Boston, and Harold P. See, general manager of the station. The latter pointed out what he believed was the distinction to be made between courtroom behavior and the rights of the public.[1]

Filmed Coverage Failed to Impress Lawyers at Convention

Four days prior to the KRON-TV telecast, on September 6, the Industry misused an opportunity to show favorable film coverage to a large gathering of the Bar at the Federal Bar Association's convention in Washington. While a panel of experts were arguing the pros and cons of televising judicial (as well as congressional and executive) proceedings a film crew halted the proceedings on a number of occasions and at other times interfered with the spectator's attention to the discussion.

Participating in the panel discussion were Senator Estes Kefauver, Democrat from Tennessee, Richard Salant, CBS news president, Max D. Paglin, FCC general counsel, Harry M. Plotkin, Washington communications attorney (and former FCC assistant general counsel) and Clark R. Mollenhoff, Washington correspondent for the Cowles Publications.

The filming was carried on by a Telenews crew which was hired at the last minute by the Federal Bar Association when WTOP-TV, Washington, had to cancel its

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[1]"Canon 35 Issue Slated for KRON-TV Airways," Broadcasting, (September 3, 1962), 58.

part due to a lack of technical facilities. The film setup included one fixed camera on a tripod (situated in the center aisle of the hotel meeting room about one third of the way back from the stage), a hand camera (noisy enough to be heard), two 650 watt sun guns (flanking the fixed camera), two 250 watt spotlights (at the sides of the room), a single floodlight (on one side of the room) and an 1800 watt flood (which covered the stage).

Every twenty minutes the cameraman ordered the discussion halted while he changed reels, and at one time one of the lights went out and had to be repositioned.

After three reels had been made the Federal Bar Association ordered an end to the filming and suggested that the rest of the discussion be recorded on tape from which a transcript might be made. When the camera crew dismantled its equipment, packed it and removed it from the room the discussion was continued for fifteen to twenty minutes.

In the uncomfortable situation the initial attendance of 200 lawyers dwindled to about twenty before the session was over. Further, it occasioned Mr. Plotkin to remark, "Why doesn't the television industry practice what it says it can do? Not just say it is feasible to cover a meeting without distracting anyone, but do it."[1]

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[1]"Lawyers See Film Coverage in Bad Light," Broadcasting, (September 10, 1962), 42-43.

Television Was Admitted to the Estes Trial

The television cameras made a dramatic appearance at the proceedings of the Billie Sol Estes trial in Tyler, Texas September 24-25. All three networks used coverage based on two live cameras (placed in the courtroom by WFAA-TV, Dallas). In addition to the live cameras, a fifteen-man crew, TV tape equipment and another live camera, this one located outside the courthouse, were used to cover the trial. A half-dozen film cameras also took footage in the courtroom (sound-on-film mounted on tripods and hand-held cameras).

The trial was presided over by Judge Otis D. Dunagan who had permitted television equipment in his court in the past and had not encountered any difficulty with it or any detraction from the witnesses or attorneys.

As the trial opened John D. Cofer, chief counsel for the defendant, objected to the broadcast equipment, saying it would interfere with proper conduct of the trial and he subsequently asked that all TV, movie and still cameras be removed.

Judge Dunagan denied the request, citing TV's growth as a news medium. He said he did not see "any justified reason why it shouldn't be permitted to take its proper seat in the family circle." Judge Dunagan went on to say that in the court, TV would be under strict supervision. He mentioned viewing a sermon from the First

Baptist Church in Dallas the day before and said, "There wasn't any circus in that church." Likewise, he said, "They won't be creating a circus in this courtroom."[1]

In concluding his remarks, he said, "Under proper supervision I am unable to see how it would prejudice the defendant for the public to actially look in and get an eye view of what's going on." The judge further commented that since the public would be reading about the trial in their newspapers and hearing about it on their radios that he did not wish to discriminate among the news media.[2]

On September 25 the "New York Times" carried a descriptive story detailing the "forest of equipment" and a microphone that "stuck its 12-inch snout inside the jury box." The story carried a three column headline and a photograph on page one showing four film cameras on tripods and one live camera inside the bar.[3]

Meanwhile, the preliminary proceedings completed, a number of new developments arose: (1) A group of Texas Bar Association members pushed for the invoking of Canon 35 when a new trial would begin on October 22; (2) Judge Dunagan considered barring broadcast-camera equipment from the courtroom when the case would go to trial again; (3) The Radio-Television News Directors Association, NAB and other Industry groups started to work on ways to pool

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[1]"Radio-TV Court Coverage," Broadcasting, (October 1, 1962), 66.

[2]Ibid. [3]Ibid.

facilities to show that trials could be covered without a forest of equipment; (4) The board of directors of the Junior Bar Association of Texas recommended, on September 26, that Texas trial judges should retain full authority over their courtrooms, including still and live photographers; and (5) Homa S. Hill, chairman of the Texas Bar Association's public relations committee, recommended that the Texas judges ban Canon 35 from their ethical document.[1]

In an editorial in the October 1 issue of Broadcasting magazine the trade journal spoke of television being on trial with Mr. Estes:

> It may have been a lucky break for television that the trial of Billie Sol Estes was postponed. If the trial had proceeded, television just might have booted the biggest chance it has ever had to demonstrate that it deserves to be admitted to court coverage.
>
> Everything started out in television's favor. The trial judge overrode defense objections to the presence of cameras and microphones and in so doing delivered as eloquent an argument on television's behalf as anyone in television itself could have devised. As court convened, however, the physical arrangements of television equipment persuaded some observers that the judge may have been precipitous in saying television had reached maturity as a journalistic medium. The arrangements permitted the New York Times' reporter, Homer Bigart, to write:
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> "A television motor van, big as an intercontinental bus, was parked outside the courthouse, and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar, and four more . . . were aligned just outside the gates . . . Cables and wires snaked over the floor."
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> We have no doubt that Mr. Bigart, an unreconstructed newspaperman, was pleased to be able to describe the mess that tv had made of the courtroom. The regretable part of it was that television itself had provided his material. Those who oppose television as

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[1]Ibid. pp. 66-67.

> a distracting presence in the courts would have had their cause advanced be a continuation of last week's tv arrangements.
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> The postponement of the trial to Oct. 22, for reasons having nothing to do with television, will give broadcasters a chance to tidy up their coverage plans of a trial that will attract national attention. If a remote van is to be used, let it be moved to a less obvious location. If live cameras are to be used, admit the absolute minimum and pool their coverage. If it is possible to erect some kind of screening to conceal both live and film cameras, by all means put up the screens under the direction of the best stage manager obtainable.
>
> In this case television is on trial with Mr. Estes. If tv loses in this court it has dimmer prospects on appeal than Mr. Estes will have if he loses.[1]

As a result of the television coverage, concerning so many people, Judge Dunagan ruled that opening courtroom events at the trial of Billie Sol Estes would be covered by live television and radio as well as silent film cameras, but, he added, live coverage would stop when the selection of the jury began.

The ruling which would permit only silent films during testimony was based on Article 644 of the Texas Criminal Code which specifies that no witness may hear the testimony of another witness in the same case (adopted in 1925).

After the ruling, Mike Shapiro, general manager of WFAA-TV, said two live cameras would still be used inside the bar at about the same position they had occupied in the first trial. Mr. Shapiro said WFAA-TV's live coverage would be fed by concealed equipment over direct line to the Dallas headquarters where it would be made available

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[1]"Order in the Court," Broadcasting, (October 1, 1962), 102.

to any station or network desiring the service. He specified that no cables would be visible in the courtroom and the audio would be taken from the courtroom's P.A. system.

It is believed that when live coverage of the preliminary proceedings is stopped one film camera each will be allowed to AP, UPI, each of the three networks and WFAA-TV. Futher, at the end of the trial it is anticipated that live broadcast coverage of the prosecution and defense summations will be allowed.

The proposal to invoke Canon 35 was bypassed at the October 19-20 meeting of the judicial section of the Texas Bar Association. An effort was made to bring up the subject at the meeting but the plan was not presented.[1]

The television coverage of the rescheduled Billie Sol Estes trial will certainly, as was indicated by Broadcasting magazine, play a key role in future plans for possible televised coverage of trials.

A Few Prominent People Express Their Views on the Status of Judicial Canon 35

In the Introduction to this study the pros and cons relative to the status of Judicial Canon 35 were discussed. In researching this paper a number of interesting comments were studied, and some bear repeating in this concluding chapter.

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[1]"Radio-TV to Carry Pre-trial Coverage," Broadcasting, (October 15, 1962), 93.

One of the end products of this study reveals that of those involved most favored the retaining of Judicial Canon 35 as it is now written. Of the people surveyed in this study, most of them were associated with the Bar, which accounts for the previous finding. To present their feelings about the Canon this researcher will first quote from individuals favoring Canon 35 in its present form, then conclude with statements from those in favor of revision.

Harry M. Plotkin, Washington communications attorney and former FCC assistant general counsel, in addressing the Federal Bar Association in early September opposed most vigorously the televising of courtroom trials. The purpose of the court, he said, is to insulate the judge, the jury and the witnesses from extraneous influences. TV, he said, would render the determination of justice more difficult. "The presence of TV, no matter how unobtrusive, converts the courtroom into a stage and the participants into actors."[1]

FCC Commissioner Frederick W. Ford, participating in a panel discussion on the broadcasting of governmental and judicial hearings, held on WMAL-TV, Washington on September 5, felt that Canon 35 should not be withdrawn yet. He raised two questions: (1) Is television interested in reporting, or in the spectacle of a court trial?

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[1]"Lawyers See Film Coverage in Bad Light," Broadcasting, (September 10, 1962), 43.

and (2) Is it going to telecast an entire trial or just use clips on the air? Commissioner Ford commented further that he and some other commissioners complained of the powerful lights and the tangle of cables during the television coverage of the commission's network hearings in February.[1]

Peter H. Gerns, of Charlotte, North Carolina, in corresponding with the Special Committee of the ABA wrote:

> We have had a celebrated case here recently which was subjected to television filming. It was a criminal case in which the defendant was declared not guilty by verdict of the jury. However, the newscaster presented such a picture to the public by editing their [sic] films that the public was very much aroused at hearing the verdict, and I am only too well aware that many of the jurors received a great number of calls and understand one of the jurors lost considerable business because of this attendant publicity.[2]

President R.B. Reavill of the Minnesota Bar Association, also writing to the Special Committee, said:

> That Canon 35 should not be modified, I think, was evidenced in this state just recently. Within a period of a week the Chief Justice of our Supreme Court resigned, one of the Associate Justices was appointed Chief Justice in his place, and a few days later one of our District Judges was appointed Associate Justice. On the occasion of the swearing in of the new Chief Justice and new Associate Justice, which occurred in the Supreme Court Chambers, both T.V. and news cameramen were permitted to be present. They took over the courtroom, to the exclusion of friends and relatives of the two Justices who were present to witness the ceremonies. The court room was filled with flash lights, the Justices were ordered to take certain

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[1]"WMAL-TV Airs Preview of Bar Group's TV-in-court Discussion," Broadcasting, (September 10, 1962), 42.

[2]Interim Report and Recommendations of the Special Committee on Proposed Revision of Judicial Canon 35 San Francisco: American Bar Association, 1962), p. 63.

> positions, and the cameramen, in short, had a field day. I recognize that this was not a court proceeding, but it seems to me that this would have been a fine opportunity for the cameramen to demonstrate their claim that they can take pictures in the court room without anyone knowing that it was being done.[1]

Dan H. McCullough, of Toledo, Ohio, in writing to the Committee about a debate on Canon 35, broadcast over WINS-TV, referred to a participant's remark in terms that grossly stretch the rebuttal that he is making:

> I am especially impressed with Mr. Blashfield's claim that as trials are conducted in public buildings and the courtroom is public property and the proceedings in court are public business, the trials therefore, should be thrown open to the broadcasters. Following his argument to its logical conclusion, I assume that T.V. cameras will be installed in the toilets, the judges' chambers where so much business is conducted, the conference room of the Court of Appeals, the jury room, the grand jury room, and, in municipally owned hospitals, the delivery room. Then, too, much business is conducted in conference with the Internal Revenue officers in the Federal Building. That, too, should be open to the T.V. camera.[2]

It would be nearly impossible to present all the statements of individuals favoring the revision of Canon 35 in this paper, but the following persons expressed viewpoints reflecting the opinions of the majority:

Senator Estes Kefauver, of Tennessee, speaking at the same Federal Bar Association meeting as Mr. Plotkin said:

> TV should be permitted in the courtroom provided it is not offensive. This should be at the discretion of the presiding judge. What is wrong with putting the real thing on TV so the public can see a true trial, rather than the fictitious ones already on the air?[3]

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[1] Ibid. p. 33. [2] Ibid. pp. 64-65.

[3] "Lawyers See Film Coverage in Bad Light," Broadcasting, (September 10, 1962), 43.

At the same meeting, Richard Salant, CBS News president, took the position that wherever a hearing or trial was open to the public, radio and TV should be permitted. He asked, "What better way to give the people the vital knowledge of the working of their government?"[1]

Clark R. Mollenhoff, Washington correspondent for the Cowles Publications, likewise addressing the same group, contended that everything should be open to TV provided this does not materially alter the purpose of the hearing. TV should be permitted wherever the press is permitted, he said. There should be no flat ban on TV in courtrooms, he added, but each case should be decided individually.[2]

Appearing on the same panel discussion as Mr. Ford, NAB Counsel Douglas Anello called for the repeal of Canon 35. He stressed that in Colorado, Texas and Oklahoma it has been shown that TV can be so unobtrusive that no one is disturbed by its presence. He continued by saying that the electronic medium should be present whenever the press is allowed in the courtroom.[3]

Commentator John Charles Daly, commenting in the Nebraska State Bar Journal, in an article entitled "Radio and Television News and Canon35" had this to say:

Our constitutional rights are hardly being served

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[1]Ibid. [2]Ibid.

[3]"WMAL-TV Airs Preview of Bar Group's TV-in-court Discussion," Broadcasting, (September 10, 1962), 42.

if we are barred while other segments of the press remain. There aren't two sets of rights - one protecting the newspaper reporter and another the news broadcasters; we are protected by the same Freedom of the Press; what applies to one must apply to the other.

There are some who would permit us (T.V.) in the courtroom with a pencil and paper so long as we leave our tools - our cameras and microphones outside.

I submit that the presence of television will create in the would-be perjuror and embroiderer a psychological barrier denying his wish to tell a lie.

I do not claim that the presence of the camera will produce a Solomon on every bench - but It'll sure keep 'em on their toes.

Perhaps there is fear that some of your members will misbehave and disgrace you. There are ways of discouraging this within your own profession; don't penalize us.

I submit that it's the obligation of each of us to go along with history - and to stop fighting it. Radio and television are the most effective vehicles yet devised for the dissemination of news to all the people simultaneously. . . [1]

District Court Judge E.E. Jordan, of Amarillo, Texas, cited a personal experience with a televised trial.

At the outset, let me say that I see no reason in law for preferring one form of reporting above another. If telecasting in any way impairs the right to a fair trial, it is bad; if not, it should be permitted.

In the McKnight case, I required written consent of the defendant and his counsel, so that there would be no reversible error. . .

My personal feeling is that the televising of the McKnight trial in no way affected the outcome of the trial. There was no noise, no extra lighting, and the cameras and personnel were entirely concealed. I did not permit anyone to enter or leave the projection room except during recess. I detected no evidence of anyone 'playing to the gallery', and in fact all seemed to forget the trial was being telecast. I fully approve the telecasting of trials, under control of the court.[2]

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[1] Interim Report and Recommendations of the Special Committee on Proposed Revision of Judicial Canon 35 (San Francisco: American Bar Association, 1962), p. 84.

[2] Ibid. pp. 71-72.

The Future Status of Canon 35 Is Now on Trial

The American Bar Association, through the action of its Judicial Conference and the support of the Special Committee on Judicial Canon 35, has made it clear that the Canon will remain intact, at least until early next year, when further studies will be completed.

It is safe to say that no one can predict what will happen in 1963, but the fact that representatives of both the ABA and the Industry are meeting on a common plane to study the Canon, its strengths and weaknesses indicates that great forward strides have been made by both groups.

The Special Committee of the ABA and officials of the medium have agreed to conduct a series of test cases. It now seems obvious that the television industry is 'on the spot' for it must prove that a trial can be televised while preserving the dignity and decorum of the court.

In New York, on October 18, NAB president LeRoy Collins, while addressing a regional conference of the Association, served notice that the NAB would be stepping up the fight for radio-TV access to court proceedings despite any opposition by the ABA. Governor Collins asserted that the Industry's case would be taken to the people. In elaborating on his speech, he told newsmen that the NAB would ask member stations to contact local judges, congressmen and other officials in their quest for

broader coverage rights. He added, stations might even editorialize on the subject.[1]

This study is one that perpetuates itself. It will be interesting to see what awaits Judicial Canon 35 in 1963.

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[1]"Collins Announces NAB Will Hold Program Clinics Next Year," Broadcasting, (October 22, 1962), 76.

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