A STUDY OF CANON 35 OF THE CANONS OF JUDICIAL ETHICS AS IT RELATES TO RADIO AND TELEVISION BROADCASTERS

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A STUDY OF CANON 35 OF THE CANONS OF JUDICIAL ETHICS AS IT RELATES TO RADIO AND TELEVISION BROADCASTERS

By

Donald H. Blake

AN ABSTRACT

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ABSTRACT

A STUDY OF CANON 35 OF THE CANONS OF JUDICIAL ETHICS AS IT RELATES TO RADIO AND TELEVISION BROADCASTERS

by Donald H. Blake

The purpose of this study is to report the issues surrounding Canon 35 of the Canons of Judicial Ethics. Canon 35 is one of the 36 Canons of Judicial Ethics adopted by the American Bar Association to suggest the proper courtroom conduct for judges when presiding over criminal trial proceedings. Canon 35 prohibits the use of cameras or radio and television broadcasting equipment by newsmen in covering criminal court proceedings.

This thesis is confined primarily to the period from September, 1937, when Canon 35 was adopted by the American Bar Association, to July, 1965. The information contained herein resulted largely from a historical search of the applicable literature plus some personal observations of the writer from his earlier career in the broadcasting and journalistic professions. The material was gathered from professional journals, legal periodicals, trade publications, and court citations.

The major issues and the scope of the study are defined in Chapter I. Chapter II tells the history of Canon 35. Chapter III outlines the status in each of the 50 states. Chapter IV contains case studies of incidents which have led to rulings on Canon 35 in Texas, Colorado, and Oklahoma. Chapter V describes the major Constitutional issues and professional arguments which surround the Canon 35 debate. A general summary and recommendations are presented in Chapter VI.

The study points out that the adoption of Canon 35 by the American Bar Association in 1937 resulted from the recognition by judges and the press that measures were needed to prevent a continuance of the excessive publicity and sensationalism which surrounded several criminal court trials in the mid-1930s. Inability to reach agreement on a workable code of conduct resulted in a controversy which has continued for nearly 30 years.

The major issues of the debate have changed over the years. Canon 35 was amended in 1952 to extend the ban against radio broadcasting to include television. It has always been contended that broadcasting equipment disturbed the "dignity and decorum" of the courtroom. However, the major arguments of the American Bar Association seem to have been shifted from the alleged distracting influence of such equipment to the contention that constitutional rights of

trial participants are violated if television and radio broadcasting are permitted.

The constitutional issues which are described at length in this study include the guarantees of freedom of the press under the First Amendment, the public trial guarantees of the Sixth Amendment, and the due process (fair trial) clause of the Fourteenth Amendment. An opinion of the U. S. Supreme Court in the case of Billie Sol Estes v. State of Texas said that the rights of the petitioner under the due process clause of the Fourteenth Amendment had been violated by the presence of television equipment at his trial. The court, however, did not recommend a blanket ban against the use of broadcasting equipment in all court trials.

The writer concludes that beyond the constitutional issues which must be considered basic to the controversy, there are certain professional questions which only time and further study will answer. He recommends patience and caution on the part of the broadcasters and the American Bar Association while joint studies continue toward a resolution of the major issues.

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This is to acknowledge the encouragement of my parents who, since my childhood, have stressed to me the importance of education and who have sacrificed that I might receive it.

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CHAPTER I

INTRODUCTION

This thesis concerns a professional conflict. The parties to the conflict are the courts of the land and the communications media, especially those journalists and broadcasters whose working tools are cameras and microphones.

The dispute concerns Canon 35 of the Canons of Judicial Ethics, one of 36 Canons which have been adopted by the American Bar Association and have been accepted by the majority of the State Bar Associations and, in a number of states, have been made a part of the courtroom rules of procedure. In some states, a statute of similar intent has been enacted. Canon 35 forbids the use of cameras, microphones, or other pictorial or sound recording devices in courtrooms at local, district, and state levels. A similar rule applies to Federal courts (Rule 53 of the Federal Rules of Criminal Procedure).

The Canons, as such, are not law and unless they have been made a part of the courtroom rules of procedure, their intent is only to serve as a guide to the proper courtroom conduct of judges. A similar set of 47 Canons, The Canons of Professional Ethics, apply to practicing attorneys.

However, as noted above, it should be emphasized that some states have either adopted the text of Canon 35, verbatim, or have used it as a basis for legislative enactment.

Numerous negotiations and hearings looking toward the repealing or modifying of Canon 35 have resulted in only minor changes to its original wording. The current text of Canon 35 as adopted in February 1963 by the House of Delegates of the American Bar Association reads:

> Judicial Canon 35: Improper Publicizing of Court Proceedings
>
> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.
>
> Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.[1]

The legal profession justifies Canon 35 as a protection of the rights of the accused and as a means of maintaining the decorum of the court. The broadcasters and photographers contend that to deny them the right to enter the courtroom and to report what happens there, using their

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[1]This wording was recommended by the Special Committee on Proposed Revision of Judicial Canon 35 and was adopted by the House of Delegates of the American Bar Association on February 5, 1963.

working tools, while at the same time to admit newspaper reporters, is unjust discrimination and violates the Constitutional guarantee of freedom of the press.[2] Furthermore, the broadcasters and photographers contend that refinements in cameras and recording devices now make it possible to operate unobtrusively without disturbing the decorum of the court.

The Constitutional rights of the defendant, as opposed to the public's right to observe a trial, must also be considered. Does the guarantee of a public trial extended by the Constitution to every citizen in a criminal proceeding mean that the courtroom shall be open only to those who can obtain seating there, or does it mean that it shall be open to all who can see or hear through all means of reporting? Also, should an open courtroom be considered as a right of the general public or should it be a right of the individual to the extent that it guards against closed and unjust interrogation by law authorities, as was the case in the Star Chamber proceedings of early English courts?

When does an individual lose his right of privacy? Does this right apply to the person who is the subject of prolonged public inquiry because of his conduct or the conduct of his associates?

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[2]The Supreme Court has ruled that freedom of the press extends to every media that affords a vehicle of information or opinion. Lovell v. City of Griffin, 303 U. S. 444; Cf. Burstyn, Inc. v. Wilson, 343 U. S. 495.

Who shall determine if a specific trial or judicial proceeding warrants broadcast coverage? And if permission is granted, who should hold the "policing" powers?

The above questions will be considered in the following chapters.

Chapter II contains a review of the history of Canon 35, shows its relationship to the other Canons of Ethics, and describes the deliberations which have been held between representatives of the press and the broadcasting industry and the legal profession looking toward revising Canon 35.

Chapter III shows the status in each state of the Canons of Judicial Ethics and explains the extent to which they have been accepted as law.

Chapter IV cites instances in three states (Texas, Colorado, and Oklahoma) in which Canon 35 has been brought to a test and as a result has been modified or discussed extensively by the authority which enacts the rules of courtroom procedure for the criminal courts of each of the three states.

Chapter V explains the basic issues of the Canon 35 discussion, including freedom of the press, the right to a public trial, due process of the law, invasion of privacy, and other socio-psychological implications.

The Conclusions presented in Chapter VI are based on a subjective analysis of the arguments presented in the earlier chapters. The Recommendations are those of the

writer based on what he has learned from this study, and what he recommends for future study.

In this study, certain references apply to the press in general, but since the Supreme Court has ruled that broadcasting is a part of the press and is therefore entitled to the appropriate freedoms,[3] these citations and rulings will be applied to the broader scope of this study.

In Chapter II, the history of Canon 35 will be limited mainly to its status from 1937, when it was adopted, through February of 1963 when the House of Delegates of the American Bar Association voted to retain the Canon with only minor changes in its wording. However, it will be necessary to refer to the events of the 1920s and occasionally to early English law to establish the proper perspective for this study.

This thesis is mainly a historical research of the applicable literature plus some personal observations of the writer from his earlier career in the broadcasting and journalistic professions. The citations are mainly from professional journals, legal periodicals, trade publications, and applicable court reports.

The Bibliography is comprehensive in nature and lists all the major works through which the writer searched during the course of this study. If a student or researcher uses this bibliography as a reference for future study, he is

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[3] Ibid.

cautioned that there is much duplication in the content of the items listed. However, because progress reports on Canon 35 have been sporadic, it was necessary for the writer to undertake this extensive search of the available literature.

The writer chose the topic because of his intense interest in it, his journalistic background, and his earlier association with a radio and television corporation that pioneered "electronic journalism" in the courts of Colorado. He does not expect to find new arguments for or against the repeal of Canon 35 beyond those that have been the basis for the continuing controversy. However, he will attempt to point out what he believes to be some inconsistencies in the thinking of the members of the legal profession and the broadcasting industry.

CHAPTER II

THE HISTORY OF CANON 35 OF THE CANONS OF JUDICIAL ETHICS

Canon 35 of the Canons of Judicial Ethics arose from a situation in the 1930s which was casting a dark shadow on members of the press and the legal profession. Sensationalism and excessive coverage of certain criminal trials by the press, and the questionable conduct of the judges and attorneys who presided over those trials caused both parties to realize that unless the situation was corrected, it could result in a major interference to the proper administration of justice in the criminal courts of the land.

The American Bar Association realized as early as 1932 that a problem existed, but the matter had not been openly discussed, even though the Bar Association had recourse to a code of ethics which it had adopted to arbitrate such situations.

Historical Perspective

The Canons of Judicial Ethics should not be confused with their counterpart, the Canons of Professional Ethics. The Canons of Professional Ethics suggest the professional

conduct for attorneys. The Judicial Canons do likewise for judges.

The Canons of Professional Ethics to, and including, Canon 32, were adopted by the American Bar Association at its 31st Annual Meeting on August 27, 1908. Canons 33 to 45 were adopted in 1928, Canon 46 was adopted in 1933, and the House of Delegates, the policy making body of the American Bar Association, adopted Canon 47 in 1937. Several of the Canons of Professional Ethics have been amended or rewritten.

The suggested rules of conduct for judges, the Canons of Judicial Ethics, were not proposed by the American Bar Association until 1924. The Preamble of the Canons of Judicial Ethics reads:

> In addition to the Canons of Professional Ethics for lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and a reminder for judges, and as indicating what the people have a right to expect from them.[1]

The Canons of Judicial Ethics, 1-34, were adopted at the meeting of the American Bar Association at Philadelphia on July 9, 1924. Canons 35 and 36 were adopted in 1937.

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[1]American Bar Association, Opinions of the Committee on Professional Ethics and Grievances, with the Canons of Professional Ethics Annotated and the Canons of Judicial Ethics Annotated (Chicago: American Bar Association, 1957), p. 45.

Canon 35 was amended in 1952 to extend the ban against radio broadcasting to television, as well. The wording of the Canon was changed slightly in 1963, but the prohibition against broadcasting and pictorial coverage still remains.[2]

Canon 35 represents the desire on behalf of the legal profession to maintain dignity and decorum in the courtroom. In adopting it, the American Bar Association hoped the Canon would protect against the objectionable conduct of some media representatives and the apparent inability of some judges to maintain the dignity of their courts. Partial credit for the adoption of the Canon should go to members of the press and the legal profession for their alleged misconduct during some of the sensational criminal trials of the 1930s, including the trial of Bruno Richard Hauptmann.

The Hauptmann Trial

Charles A. Lindbergh, Jr., the 18-month-old son of the famed aviator, was kidnapped from the nursery of his home on March 1, 1932. Hauptmann was arrested and tried for the kidnapping more than two years later. The trial was held in Flemington, New Jersey, a town of about 2,500 population. It is estimated that as many as 20,000 spectators visited the town at the zenith of the trial just before the

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[2]See Chapter I, p. 2.

verdict was announced. The trial opened on January 2, 1935. A verdict of guilty and a sentence of death were pronounced against Hauptmann on February 14, 1935. Judge Thomas W. Trenchard of the Supreme Court of New Jersey presided. Estimates placed the number of newsmen, including 129 cameramen and radio broadcasters, at 700 during the trial.[3]

We can get some idea of the public curiosity surrounding the Hauptmann trial from this comment from the columns of the New York Daily Mirror:

> The Bronx subway was never like this court house. So many spectators were crowded into the chamber where Hauptmann was on trial that one woman, caught in the milling during the noon recess, narrowly escaped falling through a side window which broke, fragments of glass showering a dozen other women in the street below.[4]

Newspaper columnist Walter Lippman described the attendant problems of the Hauptmann murder trial by commenting on the "circus-like" atmosphere:

> We are concerned with a situation spectacularly illustrated in this case, but typical of most celebrated criminal cases in the United States, which may be described by saying that there are two processes of justice, the one official and the other popular. They are carried on side by side, the one in the courts and the other in the press, over the radio, on the screen, at public meetings--and at every turn this irregular popular process interferes with, destroys, and undermines the effectiveness of the law and the people's confidence in it.
> . . . . . .

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[3] 24 Minn. L. Rev. 453.

[4] Daily Mirror (New York), January 22, 1935.

> I do not for a moment think that Hauptmann was innocent. But that does not alter the fact that he had a right to be tried before a jury and to be tried nowhere else. Because he was tried in two places at once, thousands of persons came to believe that he was not tried fairly. But in the administration of justice it is of the highest importance not only that the right verdict should be reached, but that the people should believe that it has been reached dispassionately.
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> . . . . . .
>
> Now there is no use pretending that a case can be tried well in an overcrowded courtroom with every actor knowing that every word he speaks, every intonation of his voice, will be recorded and transmitted to the ends of the earth and judged by millions of people.
>
> Although it was forbidden to take pictures during the trial, pictures were taken, and the authorities took no action. The witnesses read the newspapers, the spectators read them, and no newspaperman needs to be told that the sentiment of a crowd communicated itself more or less to everyone. There is no way of isolating a jury in such a way as to protect it from the feeling of the crowd. . . . The publicity of the Hauptmann trial would have been less had the officers of the law and the parties to the trial not discussed the proceedings with newsmen.[5]

The Groundwork

Realizing the result of the excess publicity that surrounded the Hauptmann trial, the American Bar Association, in 1935, established a Special Committee on Publicity in Criminal Trials. The investigation of this committee lasted less than a year, but the results were not released because of the attending political implications which resulted when the name of the Governor of New Jersey was involved after

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[5]Walter Lippman, Problems in American Journalism, Speech delivered before the American Society of Newspaper Editors, 1936.

the Hauptmann verdict had been appealed to the State Court of Appeals. Also, it was an election year, and Justice Trenchard, who heard the Hauptmann trial, was campaigning for re-election.[6]

In January of 1936, the American Bar Association appointed a Special Committee on Cooperation Between Press, Radio and Bar Against Publicity Interfering with Fair Trial in Judicial Proceedings. Newton Baker was appointed committee chairman, but he died before the report was submitted. His work on the committee was assumed by Oscar Hallam. Representatives of the broadcast industry were not invited to participate, although the committee's name indicated they were to be a party to the study. The committee was composed of six lawyers, seven newspaper publishers selected by the American Newspaper Publishers Association, and five members chosen by the American Society of Newspaper Editors.[7]

The committee members disagreed on the extent to which cameras should be permitted in the courtroom. The lawyer members concluded that they should be permitted only through the complete approval of the judge, the defendant, and all witnesses and litigants. However, the newspaper representatives maintained that the consent of the judge

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[6]Weyland B. Cedarquist, "Televising Court Proceedings," 36 Notre Dame Law. 147 (1961).

[7]Maurice H. Oppenheim, "Shall Have Cameras in Our Courtrooms?", Student Lawyer Journal, XIX (December, 1958), p. 19.

would be a sufficient guarantee of the protection of the rights of all parties involved.[8]

Tha Hallam Committee reported to the American Bar Association at the annual meeting in 1936, and the committee was authorized to continue its work. One year later, in September of 1937, the committee's final report to the annual meeting of the Bar Association concluded:

> The committee is clear that if local bar associations would resolutely enforce the obvious and known requirements of the code of professional ethics upon the lawyers who are subject to the disciplinary action of the bar, a very substantial part of the most glaring evils of improper publicity would be overcome.[9]

The text of the general recommendation to the Bar Association read:

> In view of the considerations here set forth, the committee believes that there should be a continuing effort, local in character, to regulate the relations under discussion. We recommend that local bar associations appoint continuing committees on press relations to function with corresponding committees representing the press and other means of publicity (emphasis added). So far as the legal members of such committees are concerned, they should be carefully chosen from among the more thoughtful members of the bar and they should be men of such professional dignity that responsible editors would be willing to discuss with them the difficulties presented by a particular trial during its progress. The committee recognizes the inadvisability of a harsh use of the power to punish for contempt by courts, but at the same time appreciates that the power inherent in every court must be used as far as is necessary to

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[8] Ibid.

[9] "Regulation of Trial Coverage Urged in Bar Association Report," Editor & Publisher, LXX (September 18, 1937), p. 5.

> protect the fairness of the proceedings against the unfair competition of agencies of publicity which recklessly disregard that object and seek to capture customers of their competitors by publications of a sensational, scandalous, and inflammatory kind.[10]

At its September, 1937 meeting, the House of Delegates passed a resolution on the Hallam Committee report to the extent that it be approved with all parties concurring. The committee was authorized to work toward reaching final agreement between the legal profession and the news media regarding the control of publicity and photographic devices during sessions of a court.[11]

However, only three days after passing the resolution on the Hallam Committee report, the House of Delegates adopted two new Canons (35 and 36) without mention of the previous resolution. The Committee on Professional Ethics and Grievances, through the American Bar Association Journal, had asked for and received responses from members of the legal profession concerning proposed revision of the entire 46 Canons of Professional Ethics and 34 Canons of Judicial Ethics which were in effect in 1937.[12]

When the Committee on Professional Ethics and Grievances was formed in 1922, its purpose was stated as follows:

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[10] Ibid., p. 46.

[11] "Report of Sepcial Committee on Cooperation Between Press, Radio, and Bar," 62 A.B.A.Rep. 851 (1937).

[12] "Recommendations of Changes in the Canons of Professional and Judicial Ethics," 23 A.B.A.J. 635 (1937).

> . . . to express its opinion concerning the proper professional conduct when consulted by members of the association or by officers or committees of state or local bar associations. Such expression of opinion shall only be made after consideration thereof at a meeting of the committee and approval by at least a majority of the committee.[13]

The problem of radio broadcasting, which was one of the current topics of discussion by the special ABA committee in 1936 and 1937, had been considered by the Professional Ethics and Grievances Committee as early as 1932, nearly three years before the controversial Hauptmann trial. In its Opinion 67, dated March 21, 1932, the committee said:

> We have been asked to express an opinion as to whether it is proper for a judge to permit his courtroom to be used for radio broadcasting of any of the proceedings of the court over which he presides.
> Judicial proceedings should be conducted in a dignified manner. Radio broadcasts of a trial tend to detract from that dignity, and to change what should be the most serious of human institutions either into an enterprise for the entertainment of the public or for satisfying its curiosity, shocks our sensibilities. The promotion of publicity for a judicial officer by such a means is prostitution of a high office for personal advantage and is contrary to Canon 34 . . . which provides that a judge should not administer his office for the purpose of advancing his personal ambitions or increasing his popularity.[14]

Adoption of Canon 35

The Committee on Professional Ethics and Grievances proposed Canon 35 on the basis of the following recommendations which make direct reference to the alleged violations of courtroom procedure during the Hauptmann trial:

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[13] American Bar Association, op. cit., p. ix.

[14] Ibid., p. 163.

1. That no use of cameras or photographic appliances be permitted in the courtroom, either during the session of the court or otherwise.
2. That no sound registering devices for publicity use be permitted to operate in the courtroom at any time.
3. That surreptitious procurement of pictures or sound records be considered contempt of court and be punished as such.
4. That broadcasting of arguments, giving out of argumentative press bulletins, and every other form of argument or discussion addressed to the public by lawyers in the case during the progress of the litigation be definitely forbidden.[15]

The latter point was a direct reference to the proceedings of the Hauptmann trial, in which case the attorneys for the prosecution and the defendant made public statements concerning the projected outcome of the trial while it was in progress.

Judicial Canons 35 and 36 were adopted on September 30, 1937 without further discussion of the report previously submitted to the House of Delegates by the Special Committee on Cooperation Between Press, Radio, and the Bar. The Ethics and Grievances Committee proposed:

> . . . That a new Canon of Judicial Ethics be adopted as follows.
> Judicial Canon 35: Improper Publicizing of Court Proceedings.
> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in courtrooms during sessions of court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court, and

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[15] Editor & Publisher (September 18, 1937), p. 46.

> create misconceptions with respect thereto in the mind of the public and should not be permitted.[16]

In presenting his report on the proposed adoption of Canon 35, the chairman of the Committee on Professional Ethics and Grievances suggested that the reading of the report be waived because of its excessive length and moved that the recommendations of the report be adopted. The proposed Canon was not referred to by name when the report was presented to the House of Delegates. The only reference was to Recommendation (m) on Page 146 of the report. There was no reference to the work of the Special Committee on Cooperation Between Press, Radio, and Bar, whose work had been continued during the previous year for the express purpose of mediating the divergent opinions of lawyers and members of the press.[17]

At the 1938 meeting of the American Bar Association, the chairman of the Special Committee on Cooperation stated that representatives of the broadcast industry had not yet been invited to participate, and he again pointed out the disagreement between lawyers and the press which had been reported previously. The committee emphasized that the

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[16] 23 A.B.A.J. 636 (1937). (The second paragraph which pertains to the broadcasting and televising of naturalization proceedings was added when the Canon was amended in 1952.)

[17] Justin Miller, Courtroom Publicity, A Discussion of Amendments to Canon Thirty-Five and the Impact on Radio and Television (Chicago: American Bar Association, 1954), p. 13.

adoption of Canon 35 had made it difficult for its members to work with the representatives of the press since the newspaper people believed that the Bar, by adopting the Canon, had precluded further discussion of the subject.

Certain delegates to the annual meeting felt that the Special Committee was interfering with the work of the Committee on Professional Ethics and Grievances. A resolution from the floor suggested that the work of the Special Committee be continued . . . "except that it shall not express an opinion upon any question of professional or judicial ethics that may arise in connection with any of the following matters. . . . " The resolution was adopted and was accepted by the Special Committee.[18]

The action taken at the 1938 meeting limited the further usefulness of the Special Committee. Although the committee had accepted the proposed limitations, in 1939 it stated:

> Neither at the time this Canon was considered by the Committee (Ethics and Grievances), nor at the time it was presented to the Convention, was the controversy between the Committee and the committee of the press, nor the attitude of the press, presented or considered. When the press committee learned of the adoption of Canon 35, which, apparently, precluded further negotiation, it felt that consideration of the report by the newspaper associations would be useless.[19]

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[18] Ibid.

[19] Ibid.

At the 1940 meeting of the American Bar Association, the report of the Special Committee said that although the newspaper publishers refused to recognize Canon 35 as a proper rule, they had decided to continue discussion of the Canon for the time being. However, at the 1941 meeting, the Special Committee advised the Bar Association that the newspaper representatives had discontinued their study of Canon 35 and it recommended that the Bar Association do likewise. The recommendation was adopted.[20]

The opposing opinions seemed to emphasize an internal conflict within the American Bar Association, as well as to point out the resentment of certain of its members to all news media. The question concerned whether cameras and recorders should be restricted or prohibited during the sessions of court. The wording of Canon 35, as adopted, gave the victory to the latter faction.

The 1952 Amendment

The American Bar Association had little occasion to discuss Canon 35 during the next decade. It wasn't until 1952, when it was realized that television was becoming a major medium of communication, that the first revision of Canon 35 was proposed. On February 25, 1952, the House of Delegates adopted the following resolution:

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[20] Ibid., p. 20

> Resolved that the American Bar Association condemns the practice of television or broadcasting of judicial proceedings and recommneds that Canon 35 of the Canons of Judicial Ethics be amended to read as follows. . . .[21]

The resolution went on to recommend that the words, or televising, (emphasis added) be inserted immediately following the restriction against radio broadcasting.

The resolution, as adopted, also added a second paragraph to Canon 35 which permits broadcasting and televising of naturalization proceedings:

> Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than interrogation of witnesses) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.[22]

The new paragraph of Canon 35 was one of the major points of discussion when a new committee known as the Bar-Media Conference Committee was authorized by the Board of Governors of the American Bar Association in October of 1954. Its purpose was to consult with representatives of the press, radio, and television. One of the strong opponents of Canon 35 was Judge Justin Miller, formerly associate justice of the court of appeals, District of Columbia, and the former president and chairman of the board of the National Association of Radio and Television Broadcasters. Commenting on what he

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[21] 38 A.B.A.J. 425 (1952). The underlined words were added to the Canon by the amendment.

[22] Ibid.

considered to be the major issue surrounding Canon 35, Judge Miller said:

> The real question is, first, how to secure dignified proceedings in courtrooms, and second, how to insure dignified portrayal thereof by the media of information. Any proposal to outlaw broadcasting as presently performed would be as unreasonable as to contend that airplanes today are not capable of offensive warfare because of the limitations of the craft which the Wright Brothers flew at Kitty Hawk.[23]

Judge Miller went on to point out what he considered to be an apparent inconsistency introduced by the 1952 amendment to Canon 35:

> We are confronted with the incongruous situation that the first sentence of Canon 35 declares, unequivocally, that the broadcasting or televising of court proceedings is calculated to detract from the essential dignity of the proceedings . . . and creates misconceptions with respect thereto in the mind of the public . . . and then in the second sentence authorizes the use of broadcasting for demonstrating to the public the essential dignity and serious nature of court proceedings.[24]

The 1954 Bar-Media Committee suggested that an impartial fact-finding agency be retained to investigate the effects of photography and broadcasting on the judge, the courtroom, the participants, and the impact on public opinion which might influence the results of a trial. The Bar-Media Committee held several meetings during 1955 and 1956, but no agreements were reached.[25]

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[23] Broadcasting-Telecasting, L (February 13, 1956), p. 94.

[24] Ibid., p. 95.

[25] Oppenheim, op. cit., p. 19.

A New Proposal (1955)

In 1955, a Special Committee on the Canons of Ethics was appointed by the American Bar Foundation to re-examine all of the Canons of Professional and Judicial Ethics. After an 18-month study of Canon 35, the Committee submitted a Special Study Report recommending that the language be changed without affecting the restrictions against photography and broadcasting during trials. The proposed Text of Canon 35 read as follows:

> Canon 35: Conduct of Court Proceedings
> The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of the importance to the people and the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound-recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they should not be permitted. Proceedings other than judicial proceedings designed and carried out primarily as ceremonies, and conducted with dignity and decorum by judges in an open court, may properly be photographed or broadcast from the courtroom with the permission and under the supervision of the court.[26]

The Special Committee of the Bar Foundation emphasized that its survey of the current thinking regarding

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[26] American Bar Association, "Report of the Special Committee of the American Bar Association on Canons of Ethics," Judicial Canon 35, Conduct of Court Proceedings (Chicago: American Bar Association, 1958), p. 41.

Canon 35 led it to conclude that a solution to the continuing problem could be found if the matter were to be approached from a different point of view. The Committee believed that the Canon should be restated in terms of the recognized rules governing the conduct of court proceedings rather than with reference to "improper publicizing of court proceedings." Basically, the Committee was emphasizing the positive rather than the negative approach, considering the fundamental reason for the existence of the courts: to administer justice in accordance with the law of the land.

The Honorable Philbrick McCoy, Judge of the Superior Court of Los Angeles County and Chairman of the Committee, explained why the Committee chose the particular language for the proposed revision of the Canon:

> The more we analyzed the problem, the more we realized that the solution did not depend upon abstract arguments based on rules of law and scientific advances. We were forced to recognize that the controlling factor was the human element. It then became necessary to consider the relation to judicial proceedings of all persons who are affected by the Canon.[27]

The Board of Governors submitted the Bar Foundation's report and proposed revision of Canon 35 to the House of Delegates of the American Bar Association at its mid-year meeting in February of 1958. The House conducted a hearing as a "committee of the whole" during which statements from

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[27] Philbrick H. McCoy, "Statements of Proponents," Judicial Canon 35, Conduct of Court Proceedings, p. 12.

the proponents and opponents of Canon 35 were heard. At the conclusion of the hearing and on recommendation of the chairman of the Rules and Calendar Committee, further discussion on the amending of Canon 35 was delayed until the August, 1958 meeting of the American Bar Association in Los Angeles. The motion was adopted.

The problem now facing the legal profession was whether the restrictions of the present Canon should be reaffirmed in different language or whether these restrictions should be relaxed.

The Committee on Proposed Revision (1958)

At the Los Angeles meeting of the House of Delegates in August, 1958, the American Bar Association's Board of Governors submitted a recommendation that a further study of Canon 35 be undertaken by a new special committee of nine members. The House of Delegates adopted the motion. The resolution creating the new committee stated its purpose to be:

> To conduct further studies of the problem, including the obtaining of a body of reliable information on the experience of judges and lawyers in those courts where photography, broadcasting, or television, or all of them, are permitted. In the meantime, Canon 35 will remain in effect.[28]

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[28] American Bar Association, Special Committee on Proposed Revision of Judicial Canon 35, Interim Report and Recommendations (Chicago: American Bar Association, 1962), p. 4.

President Ross L. Malone of the American Bar Association announced the appointment of New York attorney Whitney North Seymour as chairman of the committee. In a news release from the ABA, Mr. Seymour announced that the Special Committee on Proposed Revision of Judicial Canon 35 would begin its study in the immediate future and proceed to collect available information from as many sources as possible, explore what sutdies of Canon 35 might be feasible and productive, and explore ways and means of conducting them. He anticipated that the Committee's work would continue for several months.[29]

Robert D. Swezey, chairman of the Freedom of Information Committee of the National Association of Broadcasters, hailed the Bar Association's action as:

> . . . a chance for lawyers, broadcasters, and the press, working together in the spirit of good will and cooperation, to find answers to the questions involved in the coverage of court trials by radio and television and still photographers. . . . Broadcasters stand ready to help the special committee in every possible way.[30]

The Special Committee, under the chairmanship of Mr. Seymour, held its first meeting in Washington, D. C., in May of 1959. Representatives of seven national media

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[29]American Bar Association, News Release dated October 15, 1958.

[30]"ABA Decision to Delay Action on Canon 35," Broadcasting, LV (September 1, 1958), p. 64.

organizations were in attendance.[31] All parties agreed to an attempt to obtain a grant from a national foundation for an independent survey by a professional fact-finding agency to obtain data on whether the presence of photographic and broadcast equipment in the courtroom interferes with the conduct of a fair trial. Later, the newspaper organizations announced that they had decided not to participate in a joint survey.

In his oral report to the House of Delegates at the August, 1960 meeting of the American Bar Association, Chairman Seymour said several foundations had been approached but none had agreed to a grant for the proposed feasibility study by a fact-finding organization. He said, however, that the Committee would approach additional foundations. Upon his installation as president of the Association at the national meeting, Mr. Seymour was succeeded as committee chairman by Richmond C. Coburn of St. Louis.[32]

A foundation interested in financing the study had still not been found by the time of the August, 1961 meeting of the House of Delegates. However, Chairman Coburn

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[31] American Society of Newspaper Editors, American Newspaper Publishers Association, National Association of Broadcasters, National Press Photographers Association, Radio-Television News Directors Association, Radio-Newsreel-Television Working Press Association, and National Editorial Association.

[32] American Bar Association, Special Committee on Proposed Revision of Judicial Canon 35, Interim Report and Recommendations, p. 5.

recommended that the work of the committee be continued. Failure to obtain a grant was reported to the national media organizations but their responses failed to produce any favorable suggestions. The House of Delegates voted to continue the committee for another year. John H. Yauch of New York City was appointed chairman.[33]

The Special Committee conducted a lengthy hearing in Chicago in February of 1962 at which media representatives testified and submitted written recommendations. Richard Cheverton, then president of the Radio-Television News Directors Association and News Director of WOOD-TV, Grand Rapids, Michigan, proposed a series of nationwide tests of photographic and broadcast procedures from courtrooms in cities of varying sizes and locations to determine the effect of the presence of the media on orderly trial procedure and on witnesses and other parties. In a follow-up proposal, Mr. Cheverton submitted a list of 21 television stations willing to cooperate with local bar-media committees in tests of controlled courtroom coverage by radio and TV in various parts of the country.[34] The Committee considered the proposal to be significant and said it had been "seriously evaluated in relation to the assistance and relevancy thereof to our committee making its final report and recommendations."[35]

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[33] Ibid.

[34] Ibid., p. 16.

[35] Ibid., p. 17.

The Special Committee continued for several months to hear testimony and record general correspondence concerning the proposed revision of Judicial Canon 35.

The Interim Report (1962)

In July of 1962, the Committee said in its Interim Report:

> The Special Committee for the Proposed Revision of Judicial Canon 35 recommends that it be continued for the purpose of completing a body of information 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 amended, revised, or otherwise dealt with. . . . A final report and definite findings of the recommendations will be made by this committee for consideration and action at the next mid-year meeting of the House of Delegates.[36]

It should be pointed out in connection with the recommendations of the committee that certain states, the major examples of which are Texas, Colorado, and Oklahoma, either permit or have in the past permitted, controlled coverage of their courts by photographers and broadcasters. These cases will be more extensively discussed in Chapter IV.

The Committee, being aware of these local modifications of Canon 35, further recommended 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

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[36] Ibid., p. 1.

> 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.[37]

The final report and recommendations of the Special Committee were presented to the House of Delegates when it met in New Orleans in February of 1963. The report signed by Chairman John H. Yauch and the eight other committee members recommended that Canon 35 be retained with only a slight change in its wording. The words in brackets were to be deleted and those underlined were to be added, as follows:

> Judicial Canon 35: Improper Publicizing of Court Proceedings
> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] participants and witnesses in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted.[38]

The second paragraph of Canon 35 was not changed by this amendment. The provisions pertaining to the broadcasting or televising of naturalization proceedings remained in effect.

The Committee's report went on to point out that the Canons of Professional Ethics and the Canons of Judicial

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[37] Ibid.

[38] American Bar Association, Report by Special Committee on Proposed Revision of Judicial Canon 35 (Chicago: American Bar Association, 1963), p. 3.

Ethics, as adopted by the American Bar Association, constitute the standards of policy recommended by the Bar Association for the consideration and voluntary guidance of the rulemaking authorities in each state, and have the force of law only where they are voluntarily adopted as a part of the state laws governing the courts. The committee recommended, furthermore, that the rulemaking authority of each state adopt the Canons of Ethics in the interest of uniformity and to avoid confusion and pressures that have resulted in some jurisdictions where some magistrates and judges have individually adopted rules concerning the conduct of their courts.[39]

In turning down the proposal concerning a series of experimental broadcasts made by Richard E. Cheverton of the Radio-Television News Directors Association at the February 1962 meeting in Chicago, the Special Committee commented:

> Our evaluation of the proposal has included not only the mechanics of the test plan, but its relevancy to the many facets of the total problem. While the experiments might tend to throw light on the technical and perhaps some of the procedural problems of courtroom broadcasting, we concluded they could not be fruitful in resolving the fundamental and complex issues bearing upon fair trial, and that therefore no positive purpose could be served by carrying the experiments forward at this time.[40]

The Committee concluded that the safeguards embodied in Judicial Canon 35 are in the best interests of the orderly

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[39] Ibid.

[40] Ibid., p. 9.

administration of justice and that the substantive provision thereof remain valid and should be retained.[41] The recommendations were adopted by the House of Delegates on February 5, 1963, and the wording of the present Judicial Canon 35 is as stated above.

The arguments for repeal of Canon 35 which were made by the broadcasters were based on the following contentions:

1. The constitutional rights of freedom of the press are being violated if radio and TV reporters are barred from the courtroom while newspaper men are allowed to enter.
2. Prohibition of broadcasting apparatus in the court restricts the constitutional right of a public trial.
3. The decision as to photographing or broadcasting of trials should rest entirely with the individual judge.
4. Trials can now be photographed or broadcast unobtrusively, which was not the case when Canon 35 was adopted.
5. Competitive pressures would be eliminated through voluntary pooling of manpower and equipment.
6. Canon 35 is legislation beyond the authority of a professional organization.[42]

To these contentions, the Special Committee replied:

1. Radio and television reporters have the same right as the newspaper reporter to attend sessions of a court and report from the outside what they see and hear.
2. The underlying principles with respect to the public trial are, we believe, misapplied in order to justify broadcasting or telecasting from the courtroom. The reason for public trial is to protect the accused against the ancient abuses of "star chamber" proceedings where defendants in a criminal case were tried secretly. The right of

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[41] Ibid., p. 12.

[42] "Court Access Fight Gets Major Setback," Broadcasting, LXIV (February 11, 1963), p. 42.

a public trial is a right of the accused, however, and not the right or privilege of the press.

3. Individual judges should not have to determine in each case whether broadcasting should or should not be permitted. The decision should be made uniformly by enacting laws through the rulemaking authority of each state, thus alleviating the situation under which a judge could be criticized by the press for failure to grant authority for broadcasting or photography.
4. The very presence of photographic and broadcasting equipment with operators working under competitive conditions causes distractions that are disruptive of the judicial atmosphere. The substantial advances during the past few years in partially eliminating the physical distractions that existed in the earlier days of photography and broadcasting are not of sufficient reason to allow access to the courts by such equipment.
5. In sufficiently newsworthy cases, where the competition for electronic reporting advantage is keen, there would be less of a desire on the part of the broadcaster to pool equipment and manpower.
6. The Canons are not legislative edicts. The American Bar Association is not an arrogant authority which dictates to judges and attorneys. Their acceptance by lawyers and judges is a matter of voluntary choice except in those states where they have been made a part of the rules of the court. The policy on broadcasting or photography of court proceedings rests upon the ultimate determination of the legislative or judicial authority in each state.[43]

It should be emphasized that the February, 1963 revision of Canon 35 eliminated the reference to radio and television as instruments that degrade the court. The emphasis on which the Bar Association placed its major objections seemed to shift from that of the actual presence of photographic and broadcast equipment in the courtroom to the need for protecting the rights of the litigants.

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[43] Ibid.

The failure of the American Bar Association to take actions on Canon 35 led the general counsel of the National Association of Broadcasters, Douglas Anello, to say:

> Broadcasting is a fact of public life. It is here to stay. It cannot be willed away by sticking our heads in the sand. Bench, bar, and media must get together and devise rules and procedures so that this young and graphic medium can serve the administration of justice.[44]

The Brookings Institution Study

On March 26, 1964, while lecturing at the Annenberg School of Communications at the University of Pennsylvania, Dr. Frank Stanton, president of the Columbia Broadcasting System, proposed an independent study to establish a voluntary inter-media code of fair practices to govern the coverage of legislative and judicial proceedings.[45] Dr. Stanton suggested that the study be undertaken by the Brookings Institution of Washington, D. C., an independent research organization in the fields of social science and education. He said the Brookings Institution should select a task force of lawyers, journalists, and government leaders to advise the study. Dr. Stanton added:

> CBS is willing to finance the study to get it out of an arena of contention that only drives us further away from a solution, and into an atmosphere of affirmative discussion and common purpose. In this age of electronic communications there exists a need

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[44] Ibid.

[45] "A Code for Coverage of Arrests and Trials," Broadcasting, LXVI (March 30, 1964), p. 136.

> to overhaul the rules governing the press in its relations to the judicial process.[46]

The Board of Trustees of the Brookings Institution voted on May 8, 1964 to undertake a feasibility study to determine if Dr. Stanton's proposal merited further consideration. Professor J. Edward Gerald, a journalism professor at the University of Minnesota, agreed to coordinate the feasibility study.[47]

On October 23, 1964, the Board of Directors of the Brookings Institution voted to approve a broad study of the subject of mass media coverage of governmental processes, including television and newspaper coverage of court trials. George A. Graham, director of the Institution's Governmental Studies Division, was named to supervise the study. Brookings President Robert D. Calkins emphasized that his organization would only analyze the issues and would not recommend a code of ethics for the news media. He also stressed that the Institution would not accept financial assistance for the study from the broadcasting industry.[48]

The Brookings Institution has outlined its program to various agencies in an attempt to obtain a financial grant, but at the time of this writing the project has not

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[46] Ibid.

[47] "He Studies the Feasibility of a Study," Broadcasting, LXVII (August 17, 1964), p. 59.

[48] "Brookings Will Make Study of Mass Media," Broadcasting, LXVII (October 26, 1964), p. 9.

been underwritten. Meanwhile, Professor Gerald is continuing his preliminary studies to survey the status of Canon 35, clarify the issues, and identify the interested parties.

Summary

Thus, we find the present status of Canon 35 to be that of one of the 36 Canons of Judicial Ethics which, with the separate Canons of Professional Ethics, are a code of conduct suggested by the American Bar Association to govern the conduct of judges and attorneys. The Canons do not have the force of law in the courts of a state unless they have been enacted into law by the rulemaking body which governs the operations of the state's trial courts. A state-by-state survey of the status of the Canons will be found in Chapter III.

CHAPTER III

A STATE-BY-STATE LISTING OF THE CURRENT STATUS OF JUDICIAL CANON 35

The purpose of this chapter is to set forth a state-by-state listing of the status of Canon 35 of the Canons of Judicial Ethics. The major source of the material for this chapter is a report issued by the Legal Department of the National Association of Broadcasters.[1] Since the items contained under each state heading are a condensation of material from the NAB report, each will not be footnoted separately.

Although the NAB report was compiled about five years ago, a letter to the writer from an NAB official indicated there had been no changes in the status of Canon 35 since the report was issued.[2] However, Canon 35 has since come under extensive discussion in the State of Texas. These instances will be cited.

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[1] "Compilation of Material On Access to Courtrooms and Legislative Proceedings By Radio and Television Stations" (Legal Department, National Association of Broadcasters, Washington, D. C., 1959). (Mimeographed.)

[2] Letter to the author dated August 10, 1964, from Jonah Gitlitz, Assistant to the Director, The Code Authority, National Association of Broadcasters, Washington, D. C.

In the following paragraphs, the status of the Canon in each of the states will be described (listed alphabetically by state), accompanied by a listing of supporting legislation, court cases, and court rules. It should be remembered that the Canons do not have the force of law unless they have been enacted into the statute books of a state. In most instances, they are only suggested principles of exemplary conduct intended to promote efficient administration of justice.

ALABAMA

Legislation - None.

Court Rules - None.

ALASKA

Legislation - None.

Court Rules - None.

ARIZONA

Legislation - None.

Court Rules - Rule 45 of the Supreme Court: "The Canons of Judicial Ethics of the American Bar Association, adopted July 9, 1924, and all amendments thereto are approved and adopted as the Canons of Judicial Ethics governing the conduct of the judiciary in this state." (Adopted October 1, 1956)

ARKANSAS

Legislation - None.

Court Rules - On May 9, 1940, the non-integrated Bar Association adopted the ABA Canons of Judicial Ethics.

CALIFORNIA

Legislation - None.

Court Rules - Canon 30: "Proceedings in the 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."

The integrated State Bar of California, in 1928, adopted the Canons of Judicial Ethics of the American Bar Association. However, Canon 35, adopted by the ABA in 1937, has not been adopted by the California Bar Association.

Court Cases - People v. Stroble, 226 P2d 330, 36 Cal. 2d 615, 72 S. Ct. 599, 96 L. Ed. . . . the taking of news photographs and the televising of scenes in courtroom were improper but were not reversible error where the jury's verdict was not influenced thereby.

State v. Langley, 323 P2d 301. In criminal prosecution, action of trial court in permitting, in violation of Canons of Judicial Ethics, photographs to be taken of the proceedings and permitted violation, in favor of photographers, of court rules respecting persons who were permitted within the bar of the courtroom during trial were in error, but denial of new trial on these grounds did not constitute an abuse of the discretion.

COLORADO

Legislation - None.

Court Rules - Order of the Supreme Court of Colorado

(February 27, 1956): "It is ordered that Canon 35 of the Canons of Judicial Ethics as adopted by the Court July 30, 1953, be, and is hereby, amended to read as follows:

> "Proceedings in court should be conducted with fitting dignity and decorum."
>
> "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 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."
>
> "The above amendment to Canon 35 is adopted as a rule of court and shall supersede any rule or order of this court heretofore issued in conflict therewith."

Court Cases - In Re Hearings on Canon 35, 206 P2d 465, supra. Above Order of the Supreme Court of the State of Colorado was issued in this case.

CONNECTICUT

Legislation - None.

Court Rules - The following statement appears on page 15 of the Connecticut Practices Book (1951):

> "At a meeting of the board of delegates of the State Bar Association of Connecticut on April 17, 1950, the Canons of Judicial Ethics of the ABA were approved and at the annual meeting of the judges of the Superior Court on June 5, 1950, it was voted to adopt them and print them in the Practices Book."

Thus, the Canons as printed consist of ABA Canons 1-36, except that the amendment made by the ABA to Canon 35 in 1952 has not been adopted by the Superior Court of the State of Connecticut.

DELAWARE

Legislation - None.

Court Rules - Rule 53 of the 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."

This rule of Superior Court adopts Canon 35 of the Canons of Judicial Ethics, but not as subsequently amended in 1952.

FLORIDA

Legislation - None.

Court Rules - Canon 35 of the Code of Ethics of the Supreme Court of Florida, as printed in Volume 3, Page 3214, Florida Statutes (1957) reads: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during session 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

Legislation - None.

Court Rules - Rule 27 of the Superior Court of Fulton County: "No photography shall be taken in the courtrooms, 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."

The non-integrated State Bar, in 1947, adopted the ABA Canons of Judicial Ethics "as amended and brought up to date from year to year by the ABA."

HAWAII

Legislation - None.

Court Rules - None. The Honolulu Bar Association had adopted the Canons of Judicial Ethics of the American Bar Association as the standards governing practice within its courts. Hawaii was a United States Territory until it gained statehood in 1959. The status of the Canons has not changed there in the interim.

ILLINOIS

Legislation - None.

Court Rules - Rule 40 of the Circuit Court for Cook County and Rule 44 for the Superior Court of Cook County: "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 time when there are present court officials, parties, counsel, jurymen, witnesses, or others connected with proceedings pending therein. The Superior Court will extend the above provision to radio and television broadcasting."

Court Cases - People v. Ulrich, 376 Ill. 461, 34 N.E. 2d 393. "We can see where grave injury might result to the defendants in a criminal case by undue importance given to the case by the constant taking of photographs of the defendants in a place reserved exclusively for the administration of justice."

IDAHO

Legislation - None.

Court Rules - Rule 151 of the Rules of the Board of Commissioners of the Idaho State Bar Governing Conduct of Attorneys (approved by the Idaho Supreme Court in 1952): "The Canons of Judicial Ethics adopted by the ABA and now (1951) in effect, are hereby adopted by the Idaho State Bar." The amendment made by the ABA to Canon 35 in 1952 was approved by the Supreme Court of Idaho in 1954.

INDIANA

Legislation - None.

Court Rules - The non-integrated State Bar, in 1938, adopted the ABA Canons of Judicial Ethics, 1-36. The 1952 amendment to Canon 35 has not been adopted.

IOWA

Legislation - None.

Court Rules - The non-integrated State Bar Association, in 1948, adopted the ABA Canons of Judicial Ethics "as now amended." The 1952 amendment to Canon 35 has not been adopted in Iowa.

KANSAS

Legislation - None.

Court Rules - The non-integrated Bar Association of Kansas, in 1941, adopted the ABA Canons of Judicial Ethics. However, the 1952 amendment to Canon 35 has not been adopted.

In a separate statement, however, Judge Charles Wallace of the 24th Judicial District of Kansas has ruled: "The taking of photographs in the courtroom while court is in session and at recesses may be accomplished under reasonable rules without in any wise detracting from the essential dignity and decorum of the court, and without any calculation to degrade the court or create misconceptions with respect thereto in the minds of the public."

KENTUCKY

Legislation - None.

Court Rules - Rule 3.170 of the Rules of the Court of Appeals: "The Court recognizes the principle embodied in the ABA Canons of Judicial Ethics as a sound statement of the standard of professional conduct required of the members of the Bench, and regards these Canons as persuasive authority

in all disciplinary actions." The rule refers to the ABA Canons which were in effect on July 1, 1953, the date the court rule was adopted. Therefore, it includes the 1952 revision of Canon 35.

LOUISIANA

Legislation - None.

Court Rules - None.

MAINE

Legislation - None.

Court Rules - None.

MARYLAND

Legislation - None.

Court Rules - None.

Court Cases - Maryland v. Baltimore Radio Show, 193 Md. 300, 67 A2d 497. Defendant in a criminal case was not prejudiced by the radio broadcast of part of his confession. That he had a prior criminal record and that he was "not an obvious mental case" so as to make such publication contemptuous as an invasion of defendant's right to a fair trial since the above comments could have been brought into the trial as evidence.

MASSACHUSETTS

Legislation - General Laws of Massachusetts, Chapter 268, Section 39: "No person shall televise, broadcast, take motion pictures of any proceeding in which testimony of witnesses is to be taken, before a legislature, judicial body, executive body, or other public agency."

Court Rules - None.

MICHIGAN

Legislation - None.

Court Rules - Rule 14, Section 1 of the Supreme Court Rules Concerning the State Bar of Michigan: "The standards of conduct of members of the Bench include, but are not limited to, the Canons of Judicial Ethics. That those have been and that they may be from time to time hereafter adopted or prescribed are recognized by the Supreme Court of this State." (As amended October 13, 1955.)

MINNESOTA

Legislation - None.

Court Rules - On June 23, 1950, the State Bar, non-integrated, voted to adopt as its official code the Canons of Judicial Ethics of the American Bar Association, "as the same now are or hereafter may be amended."

MISSISSIPPI

Legislation - None.

Court Rules - None.

MISSOURI

Legislation - None.

Court Rules - None.

MONTANA

Legislation - None.

Court Rules - None.

NEBRASKA

Legislation - None.

Court Rules - Article X of Rule IV of the Supreme Court of Nebraska: "The Canons of Judicial Ethics for the State shall be the Canons of Judicial Ethics of the American Bar Association, as adopted on July 9, 1924, together with the additional Canons numbered 35 and 36, adopted September 30, 1937." (The 1952 amendment to Canon 35 has not been adopted.)

NEVADA

Legislation - None.

Court Rules - None.

NEW HAMPSHIRE

Legislation - None.

Court Rules - None.

NEW JERSEY

Legislation - None.

Court Rules - Rule 1, Section 7, Subsection 6 of the Rules Governing the New Jersey Courts: "Canon 35 of the ABA Canons of Judicial Ethics is amended to read as follows: 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 misconceptions with

respect thereto in the minds of the public and should not be permitted." (The 1952 amendment to ABA Canon 35 has not been adopted.)

NEW MEXICO

Legislation - None.

Court Rules - Rules of the Board of Commissioners of the State Bar of New Mexico (Adopted August 14, 1936; Revised June 4, 1941): "The Canons of Judicial Ethics of the ABA are hereby adopted by the Board." (The 1952 amendment to Canon 35 has not been adopted.)

NEW YORK

Legislation - McKinney's Consolidated Laws of New York, Annotated, § 52, Civil Rights Law, provides: "No person, firm, association, or corporation shall televise, broadcast, take motion pictures or arrange for the same within this state of proceedings in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency, or other tribunal in this state. Any violation of this section shall be a misdemeanor."

Court Rules - Special Rules, Appellate Division (Clevenger's Practice Manual, 1953, Court Rules 12.1-15): "The taking of photographs in a courtroom during sessions or recesses or the broadcasting of court proceedings is forbidden."

On January 22, 1938, the non-integrated State Bar adopted the ABA Canons of Judicial Ethics 1-36. The 1952 amendment of ABA Canon 35 has not been adopted.

NORTH CAROLINA

Legislation - None.

Court Rules - None.

NORTH DAKOTA

Legislation - None.

Court Rules - None.

OHIO

Legislation - None.

Court Rules - Rules of Supreme Court of Ohio, Rule XXVIII, Sec. 1: "The Canons of Judicial Ethics of the ABA are adopted (January 27, 1954) with the following exception: Canon 35. Proceedings in court shall be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during such proceedings and the broadcasting or televising of such proceedings from the courtroom tend to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, and create misconceptions with respect thereto in the minds of the public and should not be permitted."

OKLAHOMA

Legislation - None.

Court Rules - Canon 35 was adopted by the Supreme Court of Oklahoma on September 30, 1959.

Court Cases - Lyles v. State, 330 P.2d. 734
If at any time the representatives of the press 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 and no claim of justification on the grounds of freedom of the press would be available to those guilty of such offensive conduct.

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.

OREGON

Legislation - None.

Court Rules - The Canons of Judicial Ethics of the American Bar Association were adopted by the State Bar in 1935 and by the Supreme Court of Oregon (Rule 19) on November 17, 1952, but the amendment made by the ABA to Canon 35 on September 15, 1952 has not been adopted.

PENNSYLVANIA

Legislation - Rule 223(b) of the Pennsylvania Rules of Procedure: "During the trial of actions court shall prohibit the taking of photographs and motion pictures in the courtroom and the transmission of communications by telegraph, telephone or radio in or from the courtroom."

Court Rules - On January 8, 1948, the State Bar Association adopted the American Bar Association's Canons of Judicial Ethics 1-36.

Court Cases - In Re Mack, 386 Pa. 251, 126 A2d 679
The contempt conviction of persons who violated a local court rule by photographing a convicted murderer on his way to sentencing was affirmed. The reasonableness of the rule was said to rest upon preserving the "dignity of the court and the decorum of the trial," plus the prisoner's right of privacy.

Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486
This was a proceeding in Federal District Court to enjoin enforcement of a lower court order of the State of Pennsylvania, imposing restrictions on the taking of photographs by representatives of the press. The Court held that the approaches, ingress, egress, and the entire courthouse during the course of judicial procedures is in the vicinity of the court in the geographical sense and a state court order imposing restrictions on the taking of photographs by the press within the courthouse vicinity is proper so long as it bears a reasonable relation to the maintenance of the dignity of the court and is consistent with the orderly administration of justice. The fact that reasonable men could differ as to its propriety places this restriction within the orbit of reasonableness and justifiability.

RHODE ISLAND

Legislation - None.

Court Rules - None.

SOUTH CAROLINA

Legislation - None.

Court Rules - In June, 1956, the Canons of Professional Ethics were adopted, but no provision was made for adopting the ABA Canons of Judicial Ethics.

SOUTH DAKOTA

Legislation - None.

Court Rules - On September 4, 1942, the State Bar adopted, and on October 8, 1942, the Supreme Court approved, the ABA Canons of Judicial Ethics 1-36, but the 1952 amendment to Canon 35 has not been adopted.

TENNESSEE

Legislation - None.

Court Rules - Rule 38 of the Rules of the Supreme Court of Tennessee states: "The ethical standards relating to the administration of the law in this Court shall be the Canons of Judicial Ethics of the American Bar Association now in force, and as hereafter modified or supplemented." Rule 31 of the Rules of the Court of Appeals of Tennessee is the same as Supreme Court Rule 38.

TEXAS

Legislation - None.

Court Rules - Canon 28 of the Canons of Judicial Ethics, Integrated State Bar of Texas, was adopted by the Judicial Section of the Texas Bar Association in September, 1963. In Texas, it replaces the American Bar Association's Judicial Canon 35. The Texas Canon reads as follows:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings, unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of

such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

Court Cases - Billie Sol Estes, Petitioner v. State of Texas, On Writ of Certiorari to the Court of Criminal Appeals of Texas.
In the opinion handed down June 7, 1965, the U. S. Supreme Court ruled that the petitioner had been denied due process of the law under the Fourteenth Amendment when the trial judge permitted live television broadcasts of his hearing and trial in the District Court at Tyler, Texas. The Supreme Court opinion reversed the earlier decisions of both the District Court and the Court of Criminal Appeals. (At the time of this writing, however, the Judicial Section of the State Bar of Texas has made no announcement on its stand on Judicial Canon 28 in light of the Supreme Court ruling in the case of Mr. Estes.)

UTAH

Legislation - None.

Court Rules - On June 15, 1951, the State Bar adopted and on June 19, 1952, the Supreme Court approved the ABA Canons of Judicial Ethics 1-36.

VERMONT

Legislation - None.

Court Rules - None.

VIRGINIA

Legislation - None.

Court Rules - § 54-58, Code of Virginia: "The Supreme Court of Appeals may, from time to time, prescribe and adopt rules concerning a code of judicial ethics." Rule III of the Rules

of Integration of the Virginia State Bar (1938) adopted the ABA Canons of Judicial Ethics 1-36, but there has been no adoption of the 1952 amendment to Canon 35.

WASHINGTON

Legislation - None.

Court Rules - Effective January 2, 1951, the Supreme Court adopted as a part of a Code of Ethics, the ABA Canons of Judicial Ethics 1-36; however, the 1952 amendment to Canon 35 has not been adopted.

WEST VIRGINIA

Legislation - None.

Court Rules - §5183(1) of the West Virginia Code, Annotated says: "The Supreme Court of Appeals shall from time to time prescribe and adopt rules concerning a code of judicial ethics." In 1947, the Supreme Court of Appeals adopted the ABA Canons of Judicial Ethics 1-36, and on February 25, 1955, it adopted the 1952 amendment to Canon 35.

WISCONSIN

Legislation - §348.61; Wisconsin Statutes, 1951, states: "Any person who shall, either directly from the courtroom or by any means of 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."

Court Rules - On June 21, 1953, the State Bar adopted the 1952 amendment to ABA Canon 35.

WYOMING

Legislation - None.

Court Rules - None.

SUMMARY

A summary of the status of Canon 35 in each of the 50 states shows the following information:

In 15 of the states, the Canons of Judicial Ethics of the American Bar Association, including Canon 35, have not been adopted by the judicial bodies which govern the operation of the courts within the states. Neither has legislation of an intent similar to Canon 35 been enacted by the legislative bodies within these states. These states are:

Alabama	Nevada
Alaska	New Hampshire
Louisiana	North Carolina
Maine	North Dakota
Maryland	Rhode Island
Mississippi	Vermont
Missouri	Wyoming
Montana	

The Canons of Judicial Ethics have been adopted in each of the following states by the legislative or judicial

body which formulates the rules of procedure for the courts of the states:

Arizona	Kansas	Oregon
Arkansas	Kentucky	Pennsylvania
Connecticut	Michigan	South Dakota
Delaware	Minnesota	Tennessee
Florida	Nebraska	Utah
Georgia	New Jersey	Virginia
Hawaii	New Mexico	Washington
Idaho	New York	West Virginia
Indiana	Ohio	Wisconsin
Iowa	Oklahoma	

Although the above states have adopted the Canons of Judicial Ethics as rules of procedure for the courts, certain of them have not adopted the 1952 amendment to Canon 35, which added the prohibition against television broadcasts from the courtroom. These states are:

Connecticut	New Mexico
Delaware	New York
Indiana	Oregon
Iowa	South Dakota
Kansas	Virginia
Nebraska	Washington
New Jersey	

Although the 1952 amendment to Canon 35 has not been adopted by the State Bar Association of New York, the State Assembly has enacted legislation to prohibit the televising of court proceedings. Similar legislation has been enacted in Massachusetts, Pennsylvania, and Wisconsin.

The State of California does not recognize Canon 35. Rather, it has adopted its own regulation (State Bar Association Canon 30) which is similar in wording and intent.

In Colorado, the Canons of Judicial Ethics 1-36 have been adopted by the State Bar Association. However, the

Colorado Supreme Court has amended Canon 35 to permit interpretation of its provisions by individual judges.

In South Carolina, the State Bar Association has adopted the Canons of Professional Ethics, which are the suggested standards of practice for attorneys. However, the State Bar has not adopted the Canons of Judicial Ethics, which are intended to govern the conduct of judges and maintain the decorum within the courtroom.

The Judicial Section of the Integrated State Bar of Texas has adopted its own Canon to permit judges to grant or deny broadcasting, telecasting, or photographic rights, dependent on the circumstances of the trial in question. This Judicial Canon 28 is similar in intent to Colorado's revised Canon 35.

CHAPTER IV

CASE STUDIES OF CANON 35 IN THREE STATES

The intent of the writer in this chapter is to describe selected instances in which Canon 35 has been revised or in which it has been replaced by certain other rules of court which have permitted the photographing and televising of court trials. The most significant instances, for purposes of this study, have occurred in Colorado, Texas, and Oklahoma. The writer has singled out these states for further study because they have been the scenes of intensive efforts by television broadcasters and photographers to gain admittance to the states' criminal courts.

These studies do not appear in chronological order; rather, the writer has placed them in what he considers to be the order of their importance, starting with Texas, followed by Colorado, and concluding with Oklahoma.

The writer also wants to point out certain limitations of this chapter. Television and radio broadcasting has been permitted in many other states; however, only in Texas, Colorado, and Oklahoma has the highest court of each of these states ruled in a test case involving the presence of television and cameras in the courts. Also, there have been many

instances of courtroom broadcasting in each of the three states mentioned above. However, the writer has reported only what he considers to be the most significant court trial in each of the three states.

The First, Sixth, and Fourteenth Amendments to the United States Constitution are mentioned frequently, especially in regard to the appeal to the United States Supreme Court in the case of Billie Sol Estes of Texas. In these instances, the reader is referred to the Appendix for the exact wording of the Amendments. The implications of these constitutional provisions will be expanded upon in Chapter V.

Texas

In Texas, Canon 35 of the Canons of Judicial Ethics of the American Bar Association has been replaced by Judicial Canon 28 of the Canons of Judicial Ethics of the Integrated State Bar of Texas. Canon 28 reads as follows:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the minds of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude and control coverage in the proper case in the interest of justice. In connection with the control of such coverage the following declaration of principles is adopted:
> (1) There should be no use of flash bulbs or other artificial lighting.

(2) No witness, over his expressed objection, should be photographed, his voice broadcast, or be televised.
(3) The representatives of news media must obtain permission of the trial judge to cover by photographs, broadcasting, or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.
(4) Any violation of the Court's rules shall be punished as a contempt.
(5) Where a judge has refused to allow coverage, or has regulated it, any attempt, other than argument by representatives of the news media directly with the court, to bring pressure of any kind on the judge, pending final disposition of the case in trial, shall be punished as a contempt.[1]

It was this Canon 28 which permitted the criminal courts of the State of Texas to be used as a proving ground for the use of television, live and recorded, during significant trials.

The Washburn Trial (1955)

The first "live" telecast of a court trial took place on December 6, 1955, in Waco, Texas, as Harry L. Washburn was tried and convicted for murder in the 54th District Court before Judge D. W. Bartlett. The first broadcast of a trial by a television station, anywhere in the nation, had occurred in 1953 when WKY-TV of Oklahoma City, Oklahoma, televised portions of a burglary trial. The televised portions of this trial, however, were filmed by news photographers and the films were delayed until later in the

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[1] Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings, cited in 33 Law Week 4572.

day when they were broadcast during the station's daily newscasts.[2]

The Billie Sol Estes Trial (1962)

Probably the most significant court trial in the State of Texas in which television and still cameras were permitted occurred in late 1962 during the trial of Billie Sol Estes of Pecos, Texas. The trial received nationwide attention and resulted in an eventual appeal to the United States Supreme Court, whose decision on the appeal will be detailed at length later in this chapter.

Fraud and theft charges had been brought against Mr. Estes by the state, based on his dealings in the sale of ammonia tanks to West Texas farmers. Specifically, the evidence presented in court indicated that Estes, through false pretenses, induced certain farmers to purchase fertilizer tanks and related equipment which, in fact, did not exist, and sign over to him chattel mortgages on the fictitious property.

The Estes case was originally called for trial on September 24, 1962, in Smith County (Tyler), Texas, after a change of venue from Reeves County (Pecos), about 500 miles to the west. The change of venue had been granted on grounds that Mr. Estes would not have received a fair trial in his home county.

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[2]Gilbert Geis, "A Lively Public Issue: Canon 35 In The Light of Recent Events," American Bar Association Journal, XLIII (May, 1957), p. 419.

Television At The Pre-Trial Hearing

When the pre-trial hearing opened on September 24, 1962, a Dallas television station and the local Tyler television outlet pooled their equipment to cover the hearing, after Judge Otis T. Dunagan had granted permission for live television coverage.

Chief defense counsel John Cofer of Austin immediately filed a motion to prevent telecasting, broadcasting, and news photography, and asked for a continuance of the trial until a later date. The former motion was denied, but the latter was granted.

In overruling the objections of the defense to photographic and television coverage, Judge Dunagan said:

> I have permitted television in my court in the past. I have not encountered any difficulty through permission of it. I was unable to observe any distraction of witnesses or attorneys.
> We have watched television grow up from infancy to maturity. It is a news medium. I really do not see any justified reason why it should not be permitted to take its seat in the family circle, under restrictions.
> . . . . . .
> If a court permits a circus, it will be televised, that's true. But the television won't create the circus. This court will not be turned into a circus whether with or without television cameras.[3]

During the two days of pre-trial hearings, the Tyler courtroom was covered live by two television cameras. A third was stationed outside the entrance to the court. In

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[3] "Judge Permits Pix During Estes Trial," Editor & Publisher, XCV (September 29, 1962), p. 11.

addition, film cameramen and still photographers were allowed to operate from any position in the courtroom, as long as they did not disturb the "dignity and decorum."

On September 25, the names of witnesses were called and the absence of 30 witnesses led Judge Dunagan to grant the defense motion that the case be continued until October 22, 1962. It should be pointed out that it was the absence of witnesses, not the contention over whether broadcasting and photography should be permitted, which resulted in the continuance.

Restrictions Are Announced

When the trial was resumed on October 22, Judge Dunagan placed certain restrictions on television and still cameramen. He stipulated that no photographers or television cameramen would be permitted inside the bar railing, no flash bulbs or artificial lighting equipment would be permitted, noisy camera equipment would be prohibited, and all news media would be prohibited from taking pictures outside the courtroom. In addition, he stipulated that members of the press, including cameramen and technicians, would be required to carry an identifying badge issued by the court, although he did not specify that the badge be worn where it could be seen.

In a re-statement of his earlier decision to permit the use of television in the Estes trial, Judge Dunagan said, "This is a small courtroom. This case has attracted a

lot of attention. I feel that, if there is no televising, hundreds of people would try to press their way into the courtroom. This way, they can stay at home and still see it."[4]

The Judge's announcement brought immediate reaction from the American Bar Association. John Yauch, Sr., chairman of the special ABA committee which was studying proposed revisions of Canon 35, said:

> Telecasting courtroom proceedings in Texas is not new. But here is a case where the judge in question has permitted telecasting despite the fact the defendant did not agree to it. I think this might involve some constitutional question as to whether the defendant's rights have been violated.[5]

The defense counsel for Mr. Estes further objected to the use of "live" television for certain portions of the trial, in particular, the arguments of the defense before the court. As a result, the only significant parts of the trial carried live were the final arguments of the district attorney and the return of the verdict by the jury. Other portions of the trial, including the selection of the jury, were recorded on videotape for delayed broadcast, without a sound track, and using only an announcer's commentary. This restriction was placed on the coverage to comply with Article 644 of the Texas Criminal Code (adopted in 1925) which specifies that no witnesses may hear the testimony of another

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[4] Ibid.

[5] Ibid.

witness in the same case. (Texas law does not require that witnesses be sequestered.)

The trial was completed on November 7, 1962, and Billie Sol Estes was convicted of the charges brought against him and received an eight-year sentence. His attorneys appealed the conviction to the Court of Criminal Appeals of Texas, which upheld the decision of the District Court for the Seventh Judicial District at Tyler and refused to rule in Estes' favor.[6]

Previous to the trial in the District Court at Tyler, Mr. Estes had been convicted in a Federal court at El Paso on charges of mail fraud and conspiracy. He began serving a 15-year term for that conviction in the Leavenworth Prison in Kansas. In March of 1965, he was acquitted in a Dallas court of a third charge. These charges were independent of the case at point in the Seventh Judicial District and in no way affected its outcome.

An Appeal and An Opinion

Counsel for the petitioner then announced intentions to appeal the verdict directly to the U. S. Supreme Court, basing the appeal on the contention that the client had been deprived of due process of the law under the guarantees of the Fourteenth Amendment because the trial judge had erred in permitting television and photography over the objection

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[6]335 F.2d 609.

of the defendant. Counsel for the petitioner also contended that live television of the pre-trial hearing had jeopardized the opportunities for a fair trial.

In December, 1964, the U. S. Supreme Court agreed to review the appeal from the Court of Criminal Appeals, but the Supreme Court specified its review would be limited only to the question of whether the petitioner was denied a fair trial because certain portions of the court proceedings were broadcast with "live" television cameras.[7] As phrased by the petitioner, the Supreme Court writ of certiorari read:

> Whether the action of the trial court, over petitioner's continued objection, denied him due process of the law under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association and instead adopting and following over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the Integrated State Bar of Texas.[8]

Counsel for the petitioner further contended:

> It would seem an uncomplicated part of due process that he not be needlessly humiliated and commercially exhibited over his objections and required to submit to any trial technique or procedure which did not bear some fair and reasonable relation to the ascertainment of his innocence or guilt.
> If the edification of the public may be said to be an additional legitimate function of the trial of an accused, this worthy purpose (having no bearing upon determination of innocence or guilt) is certainly brought in question when the interest of the television

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[7] "More Restraints On Court News?", Broadcasting, LXVII (December 14, 1964), p. 102.

[8] 33 Law Week 4571.

> medium is confined to such cases; to be exploited in the sale of soft drinks, soaps, and soup.[9]

The petitioner's argument continued:

> A defendant in a criminal case is entitled to be tried by the law of the land, and criminal procedure is a vital part of such law for the protection of the accused. Most of these rules are fixed by statutes or court rules. No rule requires a defendant to submit to photography, television, and radio broadcasts of his trial.[10]

Representing the state bar of Texas, the American Civil Liberties Union, and the American Bar Association, several witnesses appeared to speak before the U. S. Supreme Court. Representatives of the National Association of Broadcasters, the Radio-Television News Directors Association, and the American Newspaper Publishers Association also appeared to file amicus curiae (friend of the court) briefs.

Representing the state in the Supreme Court hearings, Texas Attorney General Waggoner Carr told the Court that Estes' attorneys and interested parties had based their appeal on "broad conclusions, a rather loose relating of the facts, and a general cry of alarm over what might or could happen in the event a trial, or portions thereof, are televised."[11] Carr further emphasized the position of the state that the live television coverage of the two days of pretrial hearings in September, 1964, did in no way affect the

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[9] Broadcasting, (December 14, 1964), p. 102.

[10] Ibid.

[11] "High Court To Rule On Cameras At Trial," Editor & Publisher, XCVIII (April 10, 1965), p. 40.

rights of the defendant since it involved only the discussion of whether television and photography should be allowed, and at no time was there discussion of probable innocence or guilt of the defendant.[12]

The U. S. Supreme Court announced its opinion on June 7, 1965, but was widely split on the issue. The vote was 5 to 4 in favor of reversing the conviction of Billie Sol Estes. The majority opinion of the court was written by Justice Tom C. Clark. Dissenting were Justices Potter Stewart, Hugo L. Black, William J. Brennan, and Byron R. White. Chief Justice Earl Warren wrote a separate opinion concurring with the majority opinion, in which he was joined by Justices William O. Douglas and Arthur J. Goldberg. Justice John M. Harlan delivered a separate concurring opinion, and Mr. Justice White wrote a separate dissenting opinion concurred in by Mr. Justice Brennan.[13]

In the prevailing opinion, Mr. Justice Clark wrote:

> The question presented here is whether the petitioner, who stands convicted in the District Court of the Seventh Judicial District of Texas at Tyler, was deprived of his rights under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals have found against the petitioner. We hold to the contrary and reverse the conviction.[14]

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[12] Ibid.

[13] For the complete text of the Opinion, see: Billie Sol Estes v. State of Texas, On Writ of Certiorari to the Court of Criminal Appeals of Texas (June 7, 1965), quoted in 33 Law Week 4573 (June 8, 1965).

[14] "Defendant Subjected To Electronic Scrutiny," Editor & Publisher, XCVIII (June 12, 1965), p. 10.

Mr. Justice Clark cautioned, however, that Canon 35 should not be enshrined in the Fourteenth Amendment:

> Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the American Bar Association in opposition to the broadcasting, televising, or photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is of itself not law. In short, the question here is not the validity of Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirements of the Fourteenth Amendment.[15]

In addition to the due process provisions of the Fourteenth Amendment, Mr. Justice Clark commented on two other constitutional issues--the conflict between a free press and a fair trial--which basically is a conflict of First and Sixth Amendment freedoms. The First Amendment extends the rights of a free press and the Sixth Amendment guarantees a public trial to the accused to assure he will not be unjustly condemned. Said Mr. Justice Clark:

> While maximum freedom must be allowed the press in carrying out this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.
> Nor can the courts be said to discriminate when they permit the newspaper reporters access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter cannot bring in his typewriter or printing press.[16]

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[15] Ibid., p. 11.

[16] Ibid.

When it refused to reverse the Estes conviction, the Texas Court of Criminal Appeals ruled that live television coverage of the Estes trial did not deny the defendant the right of due process of the law, and furthermore, that the trial court had no power to suppress or censor its proceedings, and that the televising of criminal trials would be enlightening to the public and promote greater respect for the courts. Mr. Justice Clark, in the majority opinion, answered:

> It is true that the public has the right to be informed as to what occurs in the courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media.[17]

In his summary to the majority opinion, Mr. Justice Clark pointed out that there are certain situations, beyond those involving obvious constitutional conflicts, which would be so subtle that they would be beyond the control of the judge. These include the impact on witnesses and jurors, as well as the added pressure on the trial judge who must decide whether or not to admit television and photography to the courtroom. He stated that the presence of television is a "form of mental--if not physical--harassment, resembling a police lineup or the third degree. . . . A defendant on trial for a specific crime is entitled to his day in court, not in a stadium or a city or nationwide arena. The

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[17] Ibid.

heightened public clamor resulting from radio and television coverage will inevitably result in prejudice."[18]

Mr. Justice Clark commented on the growing influence of television in a free society and acknowledged that refinements might change the effect of television on the fairness of criminal trials, but he then said:

> We are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow, but must take the facts as they are presented today.[19]

Mr. Justice Harlan concurred in the majority opinion, with reservations, and wrote a supplementary opinion in which he stated:

> The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a state, over the objections of the defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest.
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> . . . . . .
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> The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another. I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved.[20]

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[18] Ibid., p. 12.

[19] Ibid.

[20] "Justice Harlan Says: TV Might Be Harmless in Run-of-the-Mill Trial," Editor & Publisher, XCVIII (June 12, 1965), p. 12.

Mr. Justice Harlan, in a continuance of his concurrance, pointed to another constitutional provision which he considered to be a relevant issue in the Estes case--the Sixth Amendment guarantee of a public trial:

> No constitutional provision guarantees a right to televise trials. The "public" trial guarantee of the Sixth Amendment, which respects a concept fundamental to the advancement of justice in this country, certainly does not require that television be admitted to the courtroom. Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.
> This one right to a "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, because the public will be present in the form of those persons who did gain admission. . . . A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.[21]

Mr. Justice Harlan also expanded upon the section of the majority opinion which discussed the conflict between the First and Fourteenth Amendments:

> The guarantees of free speech and press under the First and Fourteenth Amendments are greatly overdrawn. . . . The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of a courthouse, a news-gathering agency may publicize within wide limits, what its representatives

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[21] 33 Law Week 4567 (June 8, 1965).

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> have heard and seen within the courtroom. But the line is drawn at the courthouse door, and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be afforded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.[22]

Chief Justice Earl Warren concurred with Mr. Justice Clark and wrote additional comments which were subscribed to by Justices Douglas and Clark:

> I believe that it violates the Sixth Amendment for Federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base the conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.[23]

Mr. Chief Justice Warren refuted the argument that First Amendment rights to freedom of the press had been violated in the Estes trial, and he substantiated the opinion of Mr. Justice Clark when he said:

> So long as the television industry, like other commercial media, is free to send representatives to trials and report on those trials to its viewers, there is no abridgement of freedom of the press. The rights of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.
> . . . . . .

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[22] Ibid.

[23] "Drama Developed To Woo Sponsors," Editor & Publisher, XCVIII (June 12, 1965), p. 13.

> The television industry, like other industries, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that hallowed sanctuary, where the lives, liberty, and property of people are in jeopardy, television representatives have only the rights of the general public, namely to be present, to observe the proceedings, and thereafter, if they choose, to report them.[24]

Mr. Justice Potter Stewart wrote the dissenting opinion, in which he admitted that television should not be given a blanket privilege to enter the courts of the land. He could not, however, agree that the petitioner's Fourteenth Amendment rights had been violated because portions of the trial had been televised. Mr. Justice Stewart said:

> . . . I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks and detracts from the inherent dignity of the courtroom. But I am unable to escalate this personal view into a per se constitutional rule. And I am unable to find, on the specific record of the case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the U. S. Constitution.[25]

Mr. Justice Stewart took issue with the wording of the majority report which dwelled heavily on the adverse effect of pre-trial publicity on witnesses and jurors. In refuting the position of the majority, he wrote:

> We do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced jury, or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us

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[24] Ibid.

[25] "Dissenting View: Decision Offends First Amendment," Editor & Publisher, XCVIII (June 12, 1965), p. 13.

> is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pre-trial events can do no more than obscure the important question which is before us.
> . . . . . .
> What ultimately emerges from the record, therefore, is one bald question--whether the Fourteenth Amendment to the U. S. Constitution prohibits all television cameras from a state courtroom when a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceedings on television has no constitutional significance.[26]

Mr. Justice Stewart also disagreed with the majority opinion to the extent that it placed limitations on First Amendment guarantees. "The idea of imposing upon any media of communication the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms," he said.[27]

Mr. Justices White and Brennan, concurring in a separate dissenting opinion of a less sweeping nature than that of Mr. Justice Stewart, wrote:

> I agree with Mr. Justice Stewart that a finding of constitutional prejudice in this record entails erecting a flat ban on the issue of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. . . . There is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect

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[26] Ibid.

[27] Ibid., p. 61.

> of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television. The opinion of the court, in effect, precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials.[28]

Thus, the justices of the U. S. Supreme Court, in their widely divided opinion reversing the conviction of Billie Sol Estes, left unanswered the broader question as to the legality of the use of cameras in state courts during criminal trials. The court ruled 5 to 4 in favor of Mr. Estes on the question of whether he had been denied the right of a fair trial because the presiding judge had granted permission for live television coverage of the pre-trial hearing and portions of the trial proper.

Left unanswered was the constitutional question as to whether cameras of any kind should be permitted to cover criminal trials in state courts. Only four members of the Court voted for a total ban against pictorial and television coverage of criminal proceedings. While the decision did not fully support Canon 35 of the Canons of Judicial Ethics, it may have produced the same result. Sidney E. Zion, in a column he authored for the Associated Press, said of the decision:

> Nevertheless, the deep division in the court has more than likely assured a future test on the issue which has so sharply split the nation's lawyers, broadcasters, and citizens.

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[28] Ibid.

> The issue has not been debated in terms of experience. Instead, both sides have based their main arguments on the Constitution. It was on constitutional grounds (due process of the law) that the Supreme Court ruled in the Estes appeal.
> The pro-television people look primarily to freedom of the press as guaranteed by the First and Fourteenth Amendments. They insist radio and television are an important part of the press and furthermore cite the Sixth Amendment guarantee of a public trial for criminal defendants.[29]

Judge Otis Dunagan, who was the presiding judge in the Estes trial in October, 1962, is now the Chief Justice of the 12th Court of Civil Appeals. When asked if the Supreme Court opinion had changed his mind on the use of television at criminal trials, he replied, "Not a bit in the world, if it is under proper supervision. There is nothing I can say that would change the Supreme Court decision. It is now law. We will have to abide by it."[30]

Colorado

Televised coverage of the criminal courts in the State of Colorado had been permitted at the discretion of the trial judge for nearly six years prior to the Billie Sol Estes trial in Texas. The judges and trial participants have reported very little concern with the presence of television film cameras, and the judges have maintained complete control of their courts under the provisions of Colorado

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[29]Sidney E. Zion, "Hopes For TV In Court Dim," The Denver Post, June 8, 1965, p. 7.

[30]"Judge At Trial Still Backs TV," The Denver Post, June 7, 1965, p. 5.

Canon 35, which was a topic of nationwide interest to broadcasters, attorneys, and judges when it was adopted in 1956. The events leading to a modification of Canon 35 in Colorado are described below.

Canon 35 Is Relaxed

On November 1, 1955, John Gilbert Graham, a student at the University of Denver, placed a home-made explosive device in his mother's luggage before she boarded a commercial airliner at Denver's Stapleton Airfield. The plane exploded in mid-air near Longmont, Colorado, killing Graham's mother and the 43 other persons aboard. This mass murder proved to be a milestone in the broadcasters' test of Canon 35 in Colorado, for from the events surrounding the ensuing trial grew a precedent-setting ruling by the Colorado Supreme Court.

Graham was arrested as the chief suspect in the bombing (he later admitted it), and the state proceeded to bring first degree murder charges against him. Sheldon Peterson, who was then News Director of KLZ Radio-TV in Denver, requested permission to film and record Graham's arraignment in District Court. He made the request on behalf of the newly-formed Denver Area Radio and Television Association. The request was denied by Judge B. V. Holland of the Colorado Supreme Court, who was charged with supervising the rules of all district courts in Colorado. The

John Gilbert Graham case was unique in that the Federal courts had jurisdiction under a ruling making it a federal offense to sabotage an airliner. The case, however, was tried in the state's criminal court because the charges against Graham accused him only of the murder of his mother.

When Judge Holland denied the broadcasters the opportunity to bring their cameras and recorders to the Graham arraignment, Hugh B. Terry, president and general manager of KLZ Radio-TV, broadcast numerous editorials over his station in which he stated the position of the Denver Radio and Television Association. Here is a representative editorial:

> Is it the function of the court to determine just what is good or bad publicity and just how much and what type of report of a public hearing can be made to the public? If we (radio and television) or any other media violate this order we can be cited for contempt of court. We feel that this order is in direct violation of the constitutional guarantee of freedom of the press and freedom of speech. We can interpret this action in no other way than as a barrier erected in the path of the free flow of information--and the right of the people to know to the fullest extent what goes on in courtrooms of the states--which is truly the people's business.[31]

The sentiments of a large faction of the broadcasting industry toward the exclusion of radio and television from Colorado courtrooms was reflected by John F. Day, then Director of News for the Columbia Broadcasting System, when he said:

> In Colorado this week there was an apparent step backwards. . . . If reporters carrying pencils and pads

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[31] Broadcasting-Telecasting, XLIX (December 5, 1955), p. 75.

> were refused admittance to the courtrooms, the outcry would be steady and rising. And well it should be. But cameras are just as much a tool of television as pencils are of the printed page. And today, television is as much a primary medium for conveying news as is any method in all history.[32]

On December 12, 1955, the Colorado Supreme Court entered the following order into the record:

> It is this day ordered that Mr. Justice Moore be, and he hereby is, appointed referee to consider the Canons of Professional and Judicial Ethics to be found in Appendix B of the Rules of Civil Procedure for Courts of Record in Colorado, appearing in Volume One, Colorado Revised Statutes, 1953. Public hearings will be held before the referee in the courtroom, Monday, January 30, 1956, at which time and place anyone interested in sustaining or amending said canons is invited to attend and present his views.[33]

The hearings before Justice Moore were concerned with all the Canons of Ethics, but the major interest was centered on Canon 35 because of the immediacy of the John Gilbert Graham trial, the scheduling of which was delayed until after the Supreme Court hearings.

During the arguments before the Court, many witnesses appeared, many points of view were presented, and many photographic, television, and radio broadcasting techniques were demonstrated. Approximately 200 exhibits were received, many of which were photographs taken during the hearing. Portions of the hearing were presented to those present in the hearing room by means of closed-circuit television. The

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[32] Ibid., p. 74.

[33] In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465 (February 27, 1956).

Denver area broadcasters pooled their facilities to demonstrate this coverage. Equipment was placed in a small booth at the rear of the courtroom, and only the available light in the room was used.

For six days Justice Moore listened to evidence and witnessed demonstrations of the use of television and still photography equipment, following which he entered into the record his Report of Referee. The following significant comments are taken from the report:

> The absolute prohibitions against Canon 35 of the Judicial Ethics have given rise to the conflict between the exercise of rights guaranteed by the Constitution and the exercise of power inherent in the judiciary. As we said in Hamilton v. Montrose, 109 Colo. 229, 124 P.2d 757, "Here then is another case involving a conflict between liberty and authority, a conflict that is sometimes labeled 'civil rights v. police power' or 'liberty of the individual v. the general welfare'."
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> . . . . . .
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> We are concerned with the realities and not with conjecture. Canon 35 assumes the fact to be that use of cameras, radio and television instruments must in every case interfere with the administration of justice in the particulars above mentioned. If this assumption of fact is justified the canon should be continued and enforced. If the assumption is not justified, the canon cannot be sustained.
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> . . . . . .
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> I am sure that many well meaning persons, including some leaders of the bench and bar, are of the firm conviction that some or all of the prohibitions contained in Canon 35 should be continued and enforced without variation. I must confess that prior to this hearing I leaned definitely toward that view insofar as television and radio were concerned. . . . I am equally certain that the vast majority of those supporting continuance of Canon 35 have failed, neglected, or refused to expose themselves to the information, evidence, and demonstrations of progress which are available in this field. I am also satisfied that they are unfamiliar with the actual experiences and recommendations of those who have permitted supervised

> coverage by photographers and radio and television of various stages of court proceedings. I do not mean to say that in every case photography, radio and television broadcasting should be permitted. There are doubtless many cases and portions thereof which, in the court's discretion to insure justice, should be withdrawn from reproduction by photo, film, or radio and television. The responsible leadership in each of these fields are in agreement that the trial court should have complete discretion to rule out all, or any part, of such activity in those instances where the proper administration of justice requires it.[34]

In his report, Justice Moore detailed the various arguments and suggestions which were submitted to him during the hearings. All of the evidence led him to believe that the entire matter of courtroom television should be left to the discretion of the trial judge. He said he could not substantiate a blanket limitation which should be inflexibly applied to all cases because each case involves different personalities and circumstances.

On February 20, 1956, Justice Moore wrote the following recommendation which was approved on February 27 by the Colorado Supreme Court, sitting en banc, and was published in the official records of the Court. The effect of the recommendation was to revise Canon 35 in Colorado. Justice Moore's recommendation and the new wording of Canon 35 are as follows:

> I recommend that the following rule be adopted, effective forthwith, which shall hereafter govern trial courts in matters pertinent thereto, and that it shall supersede any rule heretofore issued in conflict therewith.

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[34] Ibid.

> Proceedings in court should be conducted with fitting dignity and decorum.
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> Until further order of this court, if the trial judge 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 by him.[35]

Certain representatives of the broadcasting industry were uncertain as to the future implications of the Colorado ruling. John Daly, who was then Vice-President in charge of News and Public Affairs for the American Broadcasting Company, said:

> The Colorado decision might prove to be a Pyrrhic victory because it is far from a fulfillment of our inherent right to freedom of information and freedom of the press. The decision still permits the judge to bar radio or television where he wouldn't think of barring newspaper reporters. Anyway it is a foot in the door. Our hammering on courtroom doors is being heard. It seems judges are distrustful of change.[36]

Harold Baker, then president of the Radio-Television News Directors Association, commented:

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[35] Ibid.

[36] "Fight For Access Must Continue: Daly," Broadcasting-Telecasting, L (April 23, 1956), p. 118

> The Colorado decision, not withstanding the excellent work of our members, the media, and the initiative of the court, is challengable in part and must be improved upon, particularly regarding unreasonable and unnecessary restrictions placed upon the media by the whim of witnesses or jurors who, in reality by their assignment, have been called to public service in the quest of justice. Conflict of opinion on questionable gains in the Colorado decision has been tempered by the realization that possible limitations may be overcome in actual practice in the future. The fact that the media at least will be allowed in the courtroom on occasion is a consolation and victory of sorts.[37]

A Pioneering Experiment--Results and Reactions

The Denver Radio and Television Association was now in line to demonstrate, in an effective manner, coverage of an actual court situation. The John Gilbert Graham trial began in the Criminal Section of Denver District Court on April 16, 1956. Judge Joseph M. McDonald, presiding in the Graham case, denied live radio and television coverage, but under the privileges granted him by revised Canon 35, he allowed sound-film cameras and radio recording equipment to be present to record the proceedings for delayed broadcasts.

Four television and 14 radio stations in the Denver area pooled their facilities to cover the trial. All agreed to adhere to a set of rules formulated by the Denver Area Radio and Television Association for suggested courtroom conduct. The rules stipulated the requirements for pooling broadcast equipment, the necessity to obtain permission from

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[37] Ibid., p. 119.

the court to cover the proceedings, and certain recommendations for dress and personal conduct.[38]

John Gilbert Graham was convicted of first degree murder, was sentenced to die, and was executed in January of 1957. Soon after, KLZ-TV, in cooperation with the Denver Area Radio and Television Association, prepared a sound film which contained excerpts from the actual trial coverage. Broadcasting-Telecasting magazine published in text form the entire soundtrack of the film, which was entitled, "Electronic Journalism In The Courtroom." The following are some of the important statements made by the individuals most closely connected with the Graham trial.

Judge Joseph M. McDonald was asked if he felt that the presence of radio and television equipment in the court hampered in any way the rights of a fair trial for the defendant. He replied:

> Obviously I don't, or I wouldn't have permitted it. I don't feel that any of his rights were violated by permitting radio and television coverage.[39]

When asked if the right of his defendant was in any way violated by the presence of radio and television, chief defense attorney John Gibbons replied:

> During the trial, I can truthfully state that not once at any one period or state of the trial was the decorum

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[38] "How Radio-TV In Denver Adheres To Court Order," Broadcasting-Telecasting, LII (May 13, 1957), p. 143.

[39] "Principles In Murder Trial Provide Eloquent Argument For Broadcasting In The Courtroom," Broadcasting-Telecasting, LII (May 13, 1957), p. 136.

> of the court, was the dignity of the court, or any other procedure affected, in my opinion, as a result of televising this case. . . . I do not feel that they were jeopardized save and except that it has always been my contention that a defendant has the right to determine whether or not he will be televised.[40]

The question of possible distracting effects was also posed to Prosecuting Attorney Bert M. Keating, who answered:

> . . . It could have been, but by the way it was handled I don't think it was. The booth that contained the cameras was quite a ways away from the witnesses and the jurors. I don't think it was distracting in the least. Each juror was asked whether he or she objected to being photographed and there wasn't one juror who objected.[41]

Keating was asked if television had detracted from the defendant's right to a fair trial. He replied:

> Not in the least. I think the trial was conducted fairly, honestly, and honorably and would not have been conducted any differently had there been no cameras in the courtroom. The decorum of the courtroom was maintained at all times. There was no noise and confusion.
> I was not conscious of the cameras being in the court, nor were any of the deputies that assisted me in the trial, and I might further say that I have heard of no one who took part or participated in the case that even knew that the cameras were grinding during the trial.[42]

The above responses were concerned mainly with the constitutional rights of the defendant and the importance of maintaining the dignity and decorum of the court. Another

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[40] Ibid., p. 138.

[41] Ibid., p. 136.

[42] Ibid., p. 138.

group of questions concerned the relative educational value to the public of televising the Graham trial.

Judge McDonald was asked if the public benefited in any way from the television and radio coverage of the trial. His answer was:

> I do. In view of the fact that very few people do get to see what goes on in our courts, I believe this was an excellent opportunity and from all reports that I got from the people who did view the accounts on the television screen, they were greatly pleased and somewhat surprised by the pictures.[43]

Supreme Court Justice Moore added this comment:

> I have always been of the belief that the procedures in courtrooms, as generally understood by the public, were not accurate accounts and I think that some very definite benefits are to be derived from an accurate, truthful presentation of what goes on in the courtrooms of America.[44]

Chief defense counsel John Gibbons stressed what he considered to be some definite educational benefits:

> I feel that youngsters, children in school--children of teen-age and high school--were greatly benefited by being able to take into their homes or be brought to their homes, various excerpts in the trial to show the actual functioning of the court, to show the way a trial is conducted.[45]

Expressing the outlook of a juror, Chief Foreman Ralph Bonar said:

> The fact that teenagers, grownups, so many of them have never been in a courtroom. They have no idea of court procedure. You can take the people that

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[43] Ibid., p. 143.

[44] Ibid., p. 136.

[45] Ibid., p. 138.

> are going to be called for jury duty--they have never been inside--they have no way of knowing what it is. I think that the medium is very, very good to educate prospective jurors in the future.[46]

Judge McDonald was asked if the events of the trial had in any way changed his attitude toward radio and television coverage of the courts, or if he had in any way regretted his decision to allow television coverage. His reply is encouraging to the broadcasters:

> I do not regret having permitted it, and if it were requested again in the proper case, I would again permit it--and of course, the cooperation of the people who were involved was greatly appreciated by the court.[47]

Justice Moore was asked if the events of the Graham trial had justified the findings of the Supreme Court hearings regarding Canon 35. He stated:

> I thought the coverage of the trial was very exceptional and it seemed to me to be proof positive that the findings of our hearings were amply justified.[48]

Time has tested the working relationship agreed to by newsmen and court officials in Colorado. It is again emphasized that the broadcasters and photographers do not have complete freedom to enter a courtroom at their own whims. The judge maintains complete control and must authorize the presence of television and still cameras and radio recording devices.

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[46] Ibid., p. 140.

[47] Ibid., p. 143.

[48] Ibid., p. 136.

In August, 1961, The Honorable Frank H. Hall, who was then Chief Justice of the Colorado Supreme Court, appeared in St. Louis, Missouri, before the Conference of Chief Justices to comment on the experiences of Colorado courts since adoption of revised Canon 35. He emphasized that the new rule had not been violated:

> . . . It speaks for itself--history records its workings--the judiciary, lawyers, litigants, news media agents, and the public have for five and one-half years been exposed to its benevolence and malevolence, if any.
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> . . . . . .
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> 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.
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> . . . . . .
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> Our Colorado judges and those agencies which gather and disseminate news through the press, pictures, TV and radio have worked harmoniously under our Rule 35. The public response has been favorable. Our judicial processes are better understood. The press has been scrupulous in conforming to the judges' wishes and have exercised their rights and privileges in the best traditions of their profession. I have heard no Colorado voice in opposition.[49]

A year later, Justice O. Otto Moore of the Colorado Supreme Court, who presided at the 1956 hearings on proposed revision of Canon 35, paralleled the comments of Justice Hall when he said, "We have had a long and very satisfactory experience in the courts of Colorado where cameras and sound

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[49]The Honorable Frank H. Hall, Chief Justice, Colorado Supreme Court, Untitled speech delivered before the Conference of Chief Justices, St. Louis, Missouri, August 2, 1961. (Mimeographed.)

equipment are permitted under regulations which have proven fully adequate to guard against any legitimate objection to their use."[50]

A Test Case Is Possible

It was not until June, 1965, that the constitutionality of Colorado's Canon 35 was questioned. Perhaps it was coincidental that the verdict of the Colorado trial in question--in which courtroom television and photography were permitted--nearly coincided with the decision of the U. S. Supreme Court in the Billie Sol Estes appeal referred to earlier in this chapter.

On June 9, 1965, District Judge James C. Flanigan of the Criminal Division of Denver District Court barred television and newspaper photographers from his courtroom until he could determine the extent of the decision against television in the Supreme Court reversal of the conviction of Billie Sol Estes. Judge Flanigan turned down requests by The Denver Post and KLZ-TV to photograph the arguments for a new trial by the defense attorneys for Phillip D. Gonzales, the convicted killer of a Denver patrolman.[51]

Gonzales' attorneys had asked for a new trial on grounds that parts of the proceedings were televised against

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[50]"Radio-TV Urged To Fight News Curbs," Broadcasting, LXIII (August 20, 1962), p. 68.

[51]"Denver Judge Bars Photos," The Denver Post, June 9, 1965, p. 1.

the permission of the client. The attorneys had asked before the trial opened that television be banned, but Judge Flanigan denied the request. Only part of the Gonzales trial was filmed for delayed telecast. Part of the jury selection was filmed with a silent camera. The verdict of the jury was recorded with a sound-on-film camera.

Judge Flanigan said the ban on all types of photography in his courtroom was not indicative of his personal feelings on the matter:

> I don't see any reasonable objection to limited televising and picture taking as long as it does not detract from the trial or reduce the dignity of the court. As long as the cameramen follow the guidelines established by the court, there is nothing objectionable to me about the photography.[52]

He also said that television and newspaper photography was not detrimental to the defendant in the Gonzales trial, nor did it harm the dignity of the court.

The other judges of Criminal Court (Sherman G. Finesilver and Edward J. Keating) did not issue the temporary ban against television and photography in their courts. Judge Finesilver said, "We're going to follow the present program until we thoroughly review the Supreme Court report and study the brief that was filed in the Billie Sol Estes case."[53]

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[52] Ibid., p. 3.

[53] "Other Judges Permit Photos," The Denver Post, June 9, 1965, p. 3.

The motion for the new trial in the Gonzales case was filed with the District Court before the U. S. Supreme Court announced its opinion on the Estes appeal. The Denver case, as a result, took on added significance and it could result in a test of Canon 35 in Colorado. Judge Flanigan continued the motion for a new trial in the Gonzales case to allow the prosecution and defense to study the briefs of the Supreme Court decision.

Shortly thereafter, however, the Colorado Supreme Court announced a change in the state's Canon 35 after the justices had reviewed the decision of the U. S. Supreme Court in the Billie Sol Estes case referred to earlier in this chapter.

Chief Justice Edward E. Pringle of Colorado announced the revision of Canon 35 without any reference to the personal views of the justices on the subject. As amended, Colorado Canon 35 now reads:

> Until further notice of this court, if the trial judge 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 beginning with the selection of the jury and continuing until the issues have been submitted to the jury for determination, no photograph of any portion of the trial of any criminal case shall be taken, nor shall any broadcasting or telecasting

> thereof be permitted unless all persons who are then on trial shall affirmatively give their consent; 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 by him.[54]

The Colorado Court emphasized that the amendment was made solely for the purpose of avoiding expensive retrials and delays of justice in criminal matters under the U. S. Constitution as interpreted by the United States Supreme Court. Justice Pringle stressed that the amended canon retains all previous restrictions which enable the presiding judge to restrict courtroom television if the situation demands.

Oklahoma

In Oklahoma, the status of Canon 35 has been uncertain, largely because of the conflicting interpretations of the enforceability of the canon by two separate courts.

The Supreme Court of Oklahoma has held that cameras can't be used in a courtroom. The Court of Criminal Appeals has authorized their presence at a criminal trial at the discretion of the trial judge. District courts in Oklahoma are under the supervision of the Supreme Court in such matters as trial procedure.

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[54]"Colorado Court's Ruling: Cameras, Broadcasts Barred," The Denver Post, July 2, 1965, p. 37.

In Lyles v. State, the Court of Criminal Appeals ruled in 1958 that the constitutional requirement for a public trial opens courtroom doors to news photography. The Appeals Court refused to reverse a conviction of Edward Lee Lyles, who contended that he did not receive a fair trial in district court on a charge of burglary because newsmen were permitted to televise it. The court ruled that courtroom doors should be open to the photographic news coverage, and that only a witness or a juror had a right to object.[55]

The evidence presented in the Lyles appeal consisted only of proof that television pictures were taken while the court was not in session; that the jury had not been selected at the time; that the television pictures were taken during a five-minute recess of the court; and that most of the pictures taken were of the defendant. The defendant asserted that the television pictures and newspaper photographs emphasized the importance of the trial, and thereby denied him a fair and impartial trial.

One Ruling Says "Yes"

On September 3, 1958, a three-judge appellate tribunal of the Oklahoma Court of Criminal Appeals handed down its decision in Lyles v. State, saying that Canon 35 of the American Bar Association is obsolete and unrealistic, and radio and television are entitled to the same courtroom

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[55] Lyles v. State 330 P.2d 734.

rights as the press. The decision was written by the presiding judge, Justice John A. Brett, and concurred in by Justices John C. Powell and Kirksey Nix.

Justice Brett's opinion, as cited by Broadcasting magazine, said:

> 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 the administration of justice. They are subject to modification in keeping with the constitutional rights of the people.[56]

It was the contention of the defendant that the taking of television and newspaper pictures of him in the courtroom invaded the right of privacy to which he was justly entitled. Judge Brett held that the defendant, due to the circumstances which led to his appearance in court, had no right of privacy:

> When one becomes identified with an occurrence 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 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.[57]

Furthermore, Judge Brett held that the rights of radio and television to be present at the trial are clearly stated under guarantees of freedom of the press:

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[56] "High Court Integrates News Media," Broadcasting, LV (September 8, 1958), p. 29.

[57] Ibid.

> Freedom of the press as guaranteed by the state and Federal constitutions is not confined to newspapers and periodicals, pamphlets and leaflets, but those provisions of the free press extend to broadcasting and television, as well. The courts make no distinction between various methods of communication in sustaining freedom of the press. Freedom of the press is not a discriminate right, but the equal right of news-gathering and disseminating agencies, subject only to the restrictions against abuse and injurious use to individual or public rights and welfare.[58]

The opinion of the appellate court also refuted the arguments advanced by the defendant, as well as other proponents of Canon 35, that the right to a "public trial" should not be extended to a broadcast audience. The counsel for the defense contended that the provisions of the Sixth Amendment of the U. S. Constitution and Article II, Section 20, of the Oklahoma Constitution guarantees a "public trial" only for the protection of the accused and should not be extended to satisfy the idle curiosity of the public. The court answered:

> The courts in certain unusual circumstances may restrict the attendance of the public for various sound reasons, which under proper circumstances, might include some press and television representatives, but they cannot under the Constitution exclude the public generally or entirely. As was said in Craig v. Harney 331 U. S. 367, "A trial is a public event and what transpires in the courtroom is public property. Those who see or 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.[59]

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[58] Ibid.

[59] Ibid., p. 31.

Justice Brett summed up the opinion of his court in the matter of Edward Lee Lyles v. State, thusly:

> The courts must be open to the press and its prying eyes and purifying pen to report courtroom abuses, evils, and corrupt influences which despoil and stagnate the flow of equal and exact justice. Basically, there is no sound reason why photographers and television representatives should not be entitled to the same privileges of the courtroom as other members of the press.[60]

The decision of the Oklahoma Court of Criminal Appeals left the status of radio and television coverage of criminal courts within the discretion of the trial judge, as was the case with the Colorado ruling on Canon 35.

Leaders of the broadcasting industry in Oklahoma and elsewhere made significant comments about the ruling. Harold Fellows, who was then president of the National Association of Broadcasters, expressed:

> . . . [G]ratifying recognition of the position of the broadcast industry that the ultimate arbiter of the question of coverage by radio and television should be the presiding judge.[61]

Edgar T. Bell, general manager of KWTV and secretary-treasurer of the Oklahoma Television Association, said:

> The decision offers a new pattern of judicial thinking toward television as a free medium of information. It is especially significant because it deals with a specific criminal case and the relation of television newsfilm reporting to it. No other court actions have been so far-reaching or all-encompassing in dealing with television as the disseminator of news from the courtrooms.[62]

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[60] Ibid.

[61] Ibid., p. 30.

[62] Ibid.

Norman Bagwell, manager of WKY-TV in Oklahoma City, whose photographer took the film which brought about the Oklahoma appeal, commented:

> This is the most important legal decision on freedom of the press ever handed down in Oklahoma. For the first time the rights of radio and television are clearly defined in a responsible and intelligent manner. We will justify the court's confidence by continuing our co-operation with court officials and our decorum in the courts. We feel our pioneering efforts in courtroom coverage have been rewarded.[63]

On its editorial page, Broadcasting magazine looked to the future, and at the same time had some words of caution for broadcasters:

> There are two ways in which broadcasters can exploit the Oklahoma decision. The first is to quote it proudly in a continuation of the vigorous campaign for radio and television admission to the courts and other public events. The second is to make a conscious effort to deserve the recognition that the Oklahoma court has given to radio and television.
> But Broadcasting urges caution and care on the part of broadcasters. The television cameraman who is admitted to a trial on the strength of the decision and who fails to conduct himself with propriety will have undone for himself and for all broadcasters a good deal of what has now been done for them by the Oklahoma court. The decision is sort of an emancipation proclamation. Whether the broadcasters acquire the freedoms which it says they are guaranteed will be a matter for their own determination.[64]

Another Ruling Says "No"

Nearly a year later, on September 30, 1959, the Supreme Court of Oklahoma, in effect, reversed the decision

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[63] Ibid.

[64] "The Next Step," Broadcasting, LV (September 15, 1958), p. 106.

of the Oklahoma Court of Criminal Appeals when it adopted the American Bar Association's Canon 35 and included it in the rules which govern the district courts of the state.[65]

As was stated earlier, the Oklahoma Court of Criminal Appeals and the Oklahoma Supreme Court have parallel jurisdiction in criminal matters. Although the Court of Criminal Appeals has ruled in favor of television and pictorial coverage of criminal trials, the decision, in effect, was annulled by the Supreme Court, which has jurisdiction over the district courts of Oklahoma.

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[65] Okla. Stat. Ann., Tit. 6, at 66.

CHAPTER V

THE ISSUES--CONSTITUTIONAL AND PROFESSIONAL

Chapter II has detailed the history of Canon 35 of the Canons of Judicial Ethics from the time it was adopted in 1937 by the American Bar Association through the present, and has followed the deliberations between the American Bar Association and organizations representing the press, radio, and television in their attempts to solve the controversy surrounding Canon 35.

Chapter III has surveyed the status of Canon 35 in each of the 50 states and has outlined various court citations and judicial rules which prohibit or govern the use of cameras and television and radio equipment in the criminal courts of each state.

Chapter IV has described significant court trials which have affected the status of Canon 35 in Texas, Colorado, and Oklahoma.

The writer now wishes to describe what his research has uncovered as the major issues in the controversy surrounding Judicial Canon 35. He has classified these issues as follows: Interpretations of Constitutional Freedoms, under which several interpretations of the First, Sixth, and Fourteenth Amendments to the U. S. Constitution are cited;

and Conflicting Professional Opinions regarding Canon 35, under which arguments for or against the relaxation of Canon 35, as advanced by members of the broadcasting and legal professions, respectively, are presented.

Interpretations of Constitutional Freedoms

The conflict surrounding Canon 35, as it relates to the provisions of the U. S. Constitution, concerns various interpretations of the First, Sixth, and Fourteenth Amendments, as well as those privileges which the courts, the press (including radio and television), the public, and individual members of the public contend to be their exclusive freedoms.

The First Amendment prohibits any law which would restrict freedom of the press or freedom of speech. The Sixth Amendment guarantees to the accused in a criminal proceeding the right to a speedy and public trial. The Fourteenth Amendment says that no state shall deprive any person of life, liberty, or property without due process of the law.[1]

The Sixth Amendment and the constitutions of 41 states require that criminal trials be open to the public.[2] The question which often arises is whether this public trial

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[1] See the Appendix for the complete text of the applicable sections of the First, Sixth, and Fourteenth Amendments.

[2] "A Public Trial," 4 Catholic U.L. Rev. 38 (1958).

guarantee is a right of the accused to protect him against the abuses of a secret trial, or whether it is a right of the public as a whole to observe the trial proceedings through every available means.

The U. S. Supreme Court has established the right of an accused person to a public trial in a state court but the opinion of the court was based not upon the authority of the Sixth Amendment but rather on the due process clause of the Fourteenth Amendment.[3]

The Supreme Court has interpreted "due process" to mean: "the compendious expression of all those rights which the courts must enforce because they are basic to our free society."[4]

The Right of Fair Trial

The popular conception of the proponents of Canon 35 is that the right of a public trial exists primarily for the benefit of the accused, and that the incidental observer attends not as a matter of right but as a matter of courtesy extended by the court. The U. S. Supreme Court, in United Press Association v. Valente, which is considered to be the first direct ruling on the question, held that the right to

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[3] In re Oliver, 333 U.S. 257, 266; 68 S.Ct. 499 (1948).

[4] Wolf v. Colorado, 338 U.S. 25, 27.

a public trial is the right of the defendant alone and not of the general public or the news media.[5]

If the right of a public trial is an exclusive right of the accused in a criminal prosecution, the question then arises as to what privileges he retains under this guarantee. Does he have the right to request that the public be excluded or, to the contrary, does he have the right to request that a criminal trial be open to the public, even though the court has determined that this situation would not be in the best interests of all members of the general public. In this regard, Max Radin, writing in the Temple University Law Quarterly, has stated:

> What is a public trial? It is frequently stated that such a trial is one in which any member of the public may be present if he wishes. . . . If the courtroom is too small for the numbers who desire to be present, and if the "public" means all such persons, why cannot the defendant demand that the trial be transferred to larger quarters? . . . Nor is there any good reason why the modern methods of communication should be rejected. Photographing the scenes of the courtroom, or broadcasting the proceedings may affront the dignity of the court, but if a constitutional right is involved, the dignity of the court can hardly weigh in balance.[6]

However, some who argue that the defendant has no right to request that the "public" scope of his trial be extended through photography point to a Maryland court decision of 1927 which commented on the subject of photographers

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[5] United Press Association v. Valente, 281 App. Div. 395, 120 N.Y.S.2d 174, 179 (1953).

[6] Max Radin, "The Right to a Public Trial," 6 Temp. L.Q. 381, 392.

in a "public" trial. In Ex parte Sturm, it was held that the defendant had no right to have the proceedings photographed and that the presiding judge was in order when he held in contempt a newspaper photographer who took courtroom pictures which were later published against the wishes of the judge.[7]

It has been held by the courts, however, that the right to a public trial is abridged if the press is excluded. In Craig v. Harney, the U. S. Supreme Court said:

> 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 perquisite of the judiciary which enables it, as distinguished from institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.[8]

In a similar ruling in the case of Maryland v. Baltimore Radio Show, Mr. Justice Frankfurter wrote:

> One of the demands of a democratic society is that the public should know what goes on in its courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. What a travesty it would be if accused persons had power, by virtue of the Sixth Amendment--perhaps with the connivance of pliant judges--to close the courts to the people by waiving public trials, thus preventing them from judging whether our system of criminal justice is fair and right.[9]

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[7] Ex parte Sturm et. al., 152 Md 114, 136 Atl. 312, 51 A.L.R. 356.

[8] Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1254.

[9] Maryland v. Baltimore Radio Show, 338 U.S. 912, 920.

However, in an opinion to the contrary, Mr. Justice Holmes said:

> The public welfare cannot override constitutional privileges, and if the rights of free speech and free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress or any state, since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them.[10]

At variance, then, are the constitutional questions as to whether the words "speedy and public trial," as contained in the Sixth Amendment, should be interpreted as a right of the defendant or as an inherent right of the general public to know whether its courts are dispensing justice.

Wilbur Schramm has placed in perspective the question of a fair trial and the relationship of the communications media to judicial proceedings by saying:

> The accused individual has a right to a fair trial. The court has the responsibility of dispensing justice. The public has the right to know whether its courts are dispensing justice. And the mass communications media have the responsibility to represent the public.[11]

Because the media must represent the public's interest at court proceedings, Kent Cooper advocates safeguards which would guarantee that the right remain with the public and not become, by default, an exclusive right of the press. In The Right to Know, he comments:

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[10] Patterson v. Colorado, 205 U.S. 454.

[11] Wilbur Schramm, Responsibility in Mass Communications (New York: Harper Brothers, 1957), p. 180.

> . . . [i]t represents the people's right as it actually is, and not merely the selfish right of printers alone, as it is not. It means that the government may not, and the newspapers and broadcasters should not, by any method whatever curb delivery of any information essential to the public welfare and enlightenment. To do so should constitute malfeasance and be punishable.[12]

In summary, the above opinions indicate that the accused's right to a public trial in a criminal proceeding is a part of his broad rights to a fair trial under the Sixth Amendment and extended by the due process clause of the Fourteenth Amendment. There is a divergence of opinion, however, on the question of whether the general public has a similar constitutional guarantee.

Freedom of the Press

The argument most often advanced by those who seek a relaxation or repeal of Canon 35 is that the prohibitions against the broadcasting, televising, and photographing of court trials is a violation of their constitutional rights under the First Amendment to freedom of the press. It is unfair, say the broadcasters and photographers, for the courts to exclude them while admitting the "pad and pencil" reporters of the press.

When these representatives of broadcasting and pictorial journalism seek access to the courts with their working equipment--that is, cameras, microphones, and other

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[12]Kent Cooper, The Right to Know (New York: Farrar, Straus, and Cudahy, 1956), p. 16.

electronic equipment--the freedoms they seek under the First Amendment come into direct conflict with the guarantees of the Sixth and Fourteenth Amendments. As former Chief Justice Vinson said in American Communications Association v. Douds, "the courts must determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[13]

Mr. Justice Clark, in writing the majority opinion of the U. S. Supreme Court in the case of Billie Sol Estes v. State of Texas, recently stated that freedom of the press is not violated when broadcasters and photogrpahers are denied equal access. The opinion reads:

> While maximum freedom must be allowed the press in carrying out this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.
> Nor can the courts be said to discriminate when they permit the newspaper reporters access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The newspaper reporter cannot bring in his typewriter or printing press.[14]

Another constitutional issue that is often discussed by both parties to the Canon 35 argument is the extent of press freedoms under the First Amendment. The question arises, then, as to what is included under the words "speech"

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[13] American Communications Association v. Douds, 339 U.S. 400.

[14] Billie Sol Estes v. State of Texas, On Writ of Certiorari to the Court of Criminal Appeals of Texas, quoted in 33 Law Week 4573 (June 8, 1965).

and "press." The Supreme Court has held that speech and press as contemplated by the First Amendment and as extended by the Fourteenth Amendment "comprehends every sort of publication which affords a vehicle of information and opinion, including, as well, circulation and distribution."[15]

That no distinction is made between the various methods of communication was also pointed out by the Supreme Court in Lovell v. City of Griffin, where the court said:

> It is equally well established that freedom of the press is not confined to newspapers and 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 entertainment.[16]

Proponents of Canon 35 further contend that television borders on entertainment and, as such, cannot be covered by the guarantees of freedom of the press. It cannot be denied that entertainment of the public is one of the main functions of television, radio, and newspapers but the issue was placed in proper perspective in Winters v. New York where the Supreme Court said:

> The line between the informing and the entertaining of the public is too elusive for the protection of that basic right [a free press.] Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another doctrine.[17]

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[15] Thornhill v. Alabama, 310 U.S. 88, 89.

[16] Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 96 L.Ed. 1098; Cf. Burstyn, Inc. v. Wilson, 343, U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, and Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068.

[17] Winters v. New York, 333 U.S. 507

There also exists the conflict between the guarantees of freedom of the press under the First Amendment of the U. S. Constitution and the Judicial laws which go beyond the limitations placed on the states by the Fourteenth Amendment; the broadcasters claim that in those states where Canon 35 has been enacted into law, there is a direct violation of their First and Fourteenth Amendment freedoms. It was pointed out in Near v. Minnesota that freedom of the press has been incorporated into the due process clause of the Fourteenth Amendment.[18] This was the first case in which a state statute was held, by virtue of its general character, to deprive a person of liberty without due process of the law because it placed unreasonable restrictions on freedom of speech and freedom of the press.

In Near v. Minnesota, the court also pointed out that the First Amendment guarantees not only the interests of the press in dispensing news, but also the interests of the public in acquiring it.[19]

In summary, we find that the courts in their interpretation of freedom of the press under the First Amendment to the U. S. Constitution must decide how far these guarantees can be extended without encroaching on equally important rights guaranteed by the Fourteenth Amendment to citizens of the United States. (In this study we are concerned with the

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[18] Near v. Minnesota, 283 U.S. 697.

[19] 283 U.S. at 722.

particular rights of the citizen when he appears as a defendant in a criminal trial.) Also, the communications media contend that their First Amendment freedoms are further supported by the due process clause of the Fourteenth Amendment which guarantees equal protection of the law.

Conflicting Professional Opinions

Beyond the constitutional issues which must be considered basic to any study of Canon 35, there are what the writer wishes to call "professional" opinions--those arguments which are advanced in favor of, or against, the canon by members of the Bar or the broadcasters, respectively. At this point, the wording of the first paragraph of Canon 35, as was stated in Chapter I, is repeated for convenience of reference, since many of the comments below will relate directly to the wording of the canon.

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

Entertainment v. Information

The news media are generally recognized to be engaged in a fourfold function: the dissemination of news (including that of an educational nature), the entertainment of

the public, the editorial guidance of public opinion, and the conducting of a business in which it is hoped profits will be made. It is sometimes difficult to determine which of the four is foremost, except that it is usually recognized that the first three are undertaken for the attainment of the fourth.

The American Bar Association contends that since entertainment is the lifeblood of television, and since the public has come to recognize it as a medium of entertainment, television should not be recognized as an agency for gathering and disseminating news. To this contention, John Daly, the former Vice-President of News and Public Affairs for the American Broadcasting Company, has replied:

> Let us set the record straight on a few basic facts. Admittedly, entertainment, show business, is one of our industry's major functions; but the news function is broadcasting's first responsibility to the public. This fact is universally accepted; with two notable exceptions--the courts and the United States Congress. We've been in both on occasion, but all too rarely. Yet, the Constitution of the United States guarantees freedom of the press.[20]

Furthermore, it was emphasized in Winters v. New York that it is difficult to determine just what is information and what is entertainment.

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[20]John Daly, The News--Broadcasting's First Responsibility (Washington, D. C., National Association of Broadcasters, 1957), p. 2.

Idle Curiosity of Spectators

Closely related to the foregoing argument is the contention on the part of Canon 35 proponents that any extension of the coverage of courtroom proceedings beyond what is portrayed by the newspaper reporter would serve only to satisfy the "idle curiosity" of spectators who want only to be entertained.

Those who look upon television as a vital means of communication reply that the public is poorly informed about the courts and that additional coverage of judicial procedures would serve a valuable educational purpose. Justice O. Otto Moore of the Colorado Supreme Court has said:

> It is highly inconsistent to complain of the ignorance and apathy of voters and then 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?[21]

Former federal Judge Justin Miller, who at one time was also president and chairman of the board of the National Association of Broadcasters, stated that the televising of courts would do far more than satisfy idle curiosities. Stressing the value of educating the public concerning the operation of the courts, he said:

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[21] In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465.

> Nothing contributes more to the hostility of the people toward attorneys and judges than the impression that the court is either of a disgracefully inferior character where slapdash justice is administered to drunks, addicts, and traffic violators, or if of the superior or appellate variety, than that it functions in a quasi-ecclesiastical setting where medieval procedural mysteries are performed and from which the people are excluded, except on the rare occasions when they appear as humble suppliants or as unwilling participants on subpoena or under indictment.[22]

Placing Undue Pressure On The Judge

Another argument in favor of retaining Canon 35 concerns the responsibility of the judge to assure that justice is dispensed in a proper manner.

The American Bar Association contends that individual judges should not have to determine in each case whether broadcasting and photography should or should not be permitted. The Association contends that the decision should be made uniformly by the rulemaking body of each state, by enacting a law which would govern courtroom procedures. This, the ABA says, would alleviate the situation under which a judge could be criticized for failure to grant authority for broadcasting or photography.

Representatives of the broadcasting industry say, however, that the trial judge is the only person who can properly determine whether pictorial coverage of a trial is justified. And only through experience at the local level,

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[22] Testimony of Judge Justin Miller in a Hearing Before the Supreme Court of Colorado in Regard to Canon 35 (Denver: Colorado Supreme Court, 1956), p. 39. (Mimeographed.)

the broadcasters contend, can a judge know what is right or wrong for his court.

Publicity-Seeking Judges and Attorneys

Closely allied with the above argument is the belief that some trial judges and lawyers who are hungry for publicity would use television as a stage to "play to the galleries"--to exploit the courtroom "drama" for their own personal gain. In advancing this argument, the members of the Bar and Bench have openly admitted a weakness of certain of their members.

In answer, those who argue against the retention of Canon 35 say that any judge or lawyer who conducts himself as a "showoff" before a camera does not assume that character for the particular occasion. Rather, they say, this type of personality will be evident whether a camera is present or not. Furthermore, if this be the case, the proponents of courtroom television believe that such broadcasts would permit a larger segment of society to witness such offensive conduct and the offender would be properly judged by the people sooner than might otherwise be possible.

Judge Justin Miller has some comments on this point, also. He said:

> We recognize that in jurisdictions where judges are required to go to the electorate every so often for a continuance in office--and considering the relative difficulty which judges have of campaigning, compared with candidates for other offices--opportunities for

> publicity are sometimes eagerly sought. That some of this is entirely legitimate cannot be denied. . . . In any event, the solution to the problem does not lie in arbitrarily forbidding all broadcasting of trials. If a judge is of the "show-off" or "strutter" type, the remedy eventually lies in the hands of the people. Should we let the people know, or should we conceal the facts?[23]

If it is true that a judge might use television as a means of personal publicity, will the situation arise where he will need a press agent? Arch M. Cantrall summarized the situation when he said:

> I cannot believe that publicity of this kind will be conducive to the better administration of justice. I am forced to believe that laymen will think it is a self-seeking movement by Bench and Bar to obtain favorable personal publicity.[24]

Obtrusive Equipment

It is also argued by the proponents of Canon 35 that to open the courts to broadcasting and photography would set the courts back nearly 30 years to the situation with which they were confronted in 1937 before the canon was adopted. The judges and attorneys who advance this argument envision a courtroom cluttered with cameras, microphones, cables, lights, and numerous technicians. The broadcasters themselves are partially at fault for this obtrusive image, for judges and attorneys, on occasion, have seen instances

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[23]Justin Miller, "The Broadcaster's Stand: A Question of Fair Trial and Free Information," Journal of Broadcasting, I (Winter, 1956-57), p. 17.

[24]Arch M. Cantrall, "A Country Lawyer Looks at Canon 35," 47 A.B.A.J. 761 (1961).

inside the courtroom and outside, as well, where highly competitive photographers and broadcasters with microphones have fought for positions to photograph and question a celebrity, a public figure, a material witness, or the accused in a criminal trial.

To this argument the broadcasters can point only to the advancements that have been made in broadcasting and in photographic techniques during the past 20 years. They point to the technical and engineering advancements in the field of optics and electronics which have permitted unobtrusive coverage of events such as state funerals, inaugurations and coronations, and the presidential nominating conventions. Broadcasting magazine told of a new advancement in the television industry--a camera which can be hand held, much the same as a movie camera, requiring no bulky power supply or generating equipment. At the same time, the magazine revealed laboratory experiments which are being conducted to develop a "fiber optics" lens which electronically amplifies reflected light and sound and transmits them to a location entirely removed from the source of the transmission, where relay equipment would send them to the television transmitter.[25]

These advancements of the "Space Age," say the broadcasters, will permit them to enter a courtroom or other public place and televise or broadcast the proceedings unobtrusively without disturbing the "dignity and decorum."

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[25]"Commercial TV to Benefit from Space," Broadcasting, LXIV (April 1, 1964), p. 88.

The broadcasters further contend that they are capable of policing their own operations, are willing to abide by rules established by the presiding judge and, if requested, they would pool their equipment in order to avoid a competitive situation which might lead to an obtrusion in the court.

Competition In Multiple-Station Areas

Because of the competitive nature of broadcasting and its role as a profit making enterprise, the judges and attorneys who support Canon 35 say that competition would be keen if the courtrooms were to be opened to all broadcasters and photographers who, individually, seek permission to attend.

Realizing that the danger of too much coverage by too many stations exists, the National Association of Broadcasters has urged its member stations who seek, and are granted, permission to televise, broadcast, or film court trials to pool their equipment when possible and to abide by the following rules for courtroom conduct:

> The sanctity of public trial and the rights of the defendant and all parties require that special care be exercised to assure that broadcast coverage will in no way interfere with the dignity and decorum and the proper and fair conduct of such proceedings. In recognition of the paramount objective of justice inherent in all trials, broadcast newsmen will observe the following standards:
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> 1. They will abide by all rules of the court.
> 2. The presiding judge is, of course, recognized as the appropriate authority, and broadcast newsmen

will address their applications for admission to him and will conform to his rulings. The right of appeal to higher jurisdiction is reserved.
3. Broadcast equipment will be installed in a manner acceptable to the court and will be unobtrusively located and operated so as not to be disturbing or distracting to the court or participants.
4. Broadcast newsmen will not move about while court is in session in such a way as to interfere with the orderly proceedings. Their equipment will remain stationary.
5. Commentaries on the trial will not be broadcast from the courtroom while the trial is in session.
6. Broadcasting of trials will be presented to the community as a public service, and there will be no commercial sponsorship of such trials.
7. Broadcast personnel will dress in accordance with courtroom custom.[26]

The broadcasters say that a pooling operation will work if it is properly organized and supervised. The television and radio stations of the Denver, Colorado metropolitan area have successfully worked under such a plan since the Denver Area Radio and Television Association was formed in 1956 to establish guidelines for covering court trials, in particular the trial of John Gilbert Graham, which was described in Chapter IV. The Denver association functions as follows:

> 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 shall be permitted, he need deal only with 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

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[26]National Association of Broadcasters, An Operational Guide for Broadcasting the News (Washington, D. C., National Association of Broadcasters, 1958), np.

> 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.
> From this basic equipment, duplicate tape recordings and film prints will be made available to all the Denver area radio and television stations that desire them. In this way, as many stations as wish may derive the benefits from the pool, yet there will be only one set of equipment for radio and one set for television. If the judge deems that live television of a trial shall be permitted, the same pooling shall prevail.
> The radio and television industries in the Denver area are highly competitive. The newsmen of these stations are fully as eager to exceed each other as are the newspaper photographers. Moreover, they are firmly convinced that under the freedoms guaranteed by the Constitution, they have the right of access to the courts with microphone and camera. But they are mindful, too, that the decorum of the court must be preserved at all costs. That is why they have decided to forego the possibility of gaining competitive advantage and have agreed to cooperate through this system of pooling.[27]

The broadcasting organizations and news associations are quick to recognize that these pooling arrangements must be established according to local demands, but they caution that cooperating stations must put aside all competitive urges before they can hope to convince local judges of the merits of such a plan.

Partial Coverage Of A Trial

In still another argument for retaining Canon 35, the American Bar Association contends that a television or radio station would not broadcast the entire proceedings,

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[27] 296 P.2d 465 (1956).

but would be selective because of time limitations, as well as the desire to select and present to its audience only the most absorbing parts of a trial. Hence, they say it would be unfair to the trial participants because the television and radio audiences would form their own opinions as to the innocence or guilt of the accused solely on the basis of what they see or hear broadcast.

Representatives of the broadcasting industry question the validity of this argument. They say that a casual spectator who sits in a courtroom for a few minutes or a few hours could not hope to get a true perspective of the trial proceedings and would learn no more than the average member of the radio or television audience.

Likewise, the broadcasters point to descriptions of trials as they are printed in our daily newspapers. They say that the description of what goes on inside the courtroom is also incomplete because it is the selective judgment of a reporter who cannot begin to tell, word for word, what happens in a trial from its beginning to its end. Seldom is the complete daily transcript of a trial printed verbatim.

Newspaper artists are permitted to sketch their observations of a courtroom scene as long as they remain seated in one location. In addition to being discriminatory, the broadcasters maintain that these pictorial representations show only a fleeting glance of the true picture and portray only the facial expression or bodily action that the artist chooses to portray.

In summary of the above opinions of the broadcasters, Judge Justin Miller has said:

> Now compare what happens when proceedings are broadcast. To the extent that any broadcasting takes place, it will be an accurate and faithful presentation of what goes on in the courtroom. To the extent that any part of the trial is televised, the picturization will be in proper perspective; it will show to the outside public exactly what each participant looks like, how he acts, his changing expressions, the reactions of the jury, of the witnesses, the sincerity or falsity of advocacy. In this connection, it is pertinent to remember the old Chinese maxim: "one picture is worth a thousand words."[28]

Speaking against the contention that broadcasting would present only portions of the trial and would concentrate on dramatic proceedings, John Daly said:

> . . . Even if this were ture, and it isn't, I think it's well to remember that the jury sees the entire proceedings and their verdict is highly unlikely to be affected by the radio and television showing.[29]

Distraction of Witnesses and Participants

There are certain unpredictable elements in a criminal trial which would be adversely affected by the presence of broadcasting equipment, say the advocates of Canon 35. They believe that the presence of cameras and microphones would create a psychological barrier that would make the "timid"witness withhold testimony or, on the other hand, would encourage the "little" man, suddenly trust into the public limelight, to overemphasize his importance.

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[28]Justin Miller, op. cit., p. 16.

[29]John Daly, op. cit., p. 13.

Furthermore, those who advance this argument say that the witness or juror, once he learned that he was being televised, would be preoccupied with the thought that at any given moment he was being viewed and heard by thousands of persons outside the courtroom.

Judge Justin Miller presented the views of the broadcasters on this subject, also, when he said:

> The distraction of a witness in giving his testimony is a relative matter. Many of the normal incidents of a courtroom procedure are highly distracting to witnesses. Restrictions imposed by the rules of evidence, reprimands administered by the judge, searching cross-examination, the scrutiny of the jurors, and the courtroom audience may all be very distracting. Compared with these normal incidents of courtroom procedure, the effect upon the witness--of broadcasting properly performed--would be infinitesimal, even assuming he knew it was taking place.[30]

Invasion of Privacy

Can a person who is called to a court as a defendant or a participant claim that his right of privacy is violated if television or radio broadcasting, or photography, is permitted over his expressed objections?

The consensus seems to be that the right of privacy does not exist in the dissemination of news about a person or event to which the public has a rightful interest. In the case of Berg v. Minneapolis Star & Tribune Co., it was ruled that when a person becomes identified with an occurrence of public or general interest, it is not an invasion of his

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[30]Justin Miller, op. cit., p. 3.

right of privacy to publish his photograph or to otherwise publicize his connection with that event.[31] In the case of Public Utilities Commission v. Pollak, the U. S. Supreme Court rejected the argument that the right of privacy derives from the due process clause of the Fourteenth Amendment.[32] And in the case of Elmhurst v. Pearson, decided by the United States Court of Appeals for the District of Columbia, it was ruled that a defendant in a criminal case, through his own misfortune, made himself the object of legitimate public interest, and thereby lost any right on his part to be let alone.[33]

A similar problem might arise concerning the right of privacy of trial participants other than the defendant, such as jurors and witnesses. Would an otherwise willing juror or witness be less willing when confronted with the fact that his presence would be widely publicised? The broadcasting interests reply that a witness or juror loses his anonymity the very moment that he enters the courtroom and is exposed to spectators there, as well as to the general public when its members read accounts of the trial in the newspapers. However, it is doubtful that these persons must

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[31] Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957; Cf. Ettore v. Philco Television Broadcasting Corp., 126 F. Supp. 143.

[32] Public Utilities Commission v. Pollak, 343 U.S. 451, 461, 464-65.

[33] Elmhurst v. Pearson, 153 F.2d 467.

relinquish their rights to privacy to the extent which is expected of the accused.

Warren and Brandeis recognized the importance of maintaining privacy many years ago, but they also recognized that laws change with time. Their comment, as follows, is encouraging to the broadcaster today:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.[34]

Legislative Intent

The broadcasters contend that Canon 35 has been legislated against them unfairly by a professional organization (American Bar Association) which has no authority to do so. The ABA replies that the Canons of Judicial Ethics are not legislative edicts and that their acceptance by judges is a matter of voluntary choice unless they have been made a part of the rules of court. The ABA emphasizes that the policy on photographing or broadcasting of court proceedings rests upon the ultimate determination of the legislative or judicial authority in each state.

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[34]Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

The broadcasters, however, protest the blanket rule against them in each state and hope for the day when the decision on courtroom television and radio will be made at the local level by presiding judges.

CHAPTER VI

SUMMARY AND RECOMMENDATIONS

The foregoing chapters of this thesis have reviewed the history of Canon 35 of the Canons of Judicial Ethics, surveyed the extent to which it is accepted as law in each of the 50 states, described events which have led to its amendment or replacement in three states, and presented the major issues which have been, and continue to be, the cruxes of the debate.

The intent of the writer in this chapter is to summarize the material presented in the earlier chapters, and to present a series of recommendations which he considers basic in solving the major issues.

Summary

Control of Courtroom Publicity Was Necessary

Before considering the questions of what is good or bad about Canon 35, we must ask why it exists. What led to the adoption of Canon 35 by the American Bar Association?

In 1937, radio was still in its youth and newspaper photography was a medium requiring "flash powder" and large photographic plates. The country was divided geographically

because of slow and limited means of transportation. It was a difficult enough task for the highly competitive news forces to cover routine, daily events.

Now add a sensational news event such as the Bruno Richard Hauptmann trial in New Jersey, which demanded nation-wide attention, and the news media became even more competitive. The Hauptmann trial, along with other spot news events, provided radio an opportunity to prove its worth in bringing news to the public.

Such was the scene when Mr. Hauptmann was tried for the kidnapping and murder of the infant son of Charles Lindbergh. As with other sensational court trials of the mid-1930s, the broadcasters, reporters, and photographers were accused of bringing a "circus" atmosphere to the court-room in their attempt to outdo each other in covering the news.

However, a review of these sensational court trials shows that the presiding judges and practicing attorneys were as much at fault as the news media in allowing the courts to assume the undignified atmosphere. The following quote is repeated from Cahpter II to show the situation which existed:

> The Bronx subway was never like this court house. So many spectators were crowded into the chamber where Hauptmann was on trial that one woman caught in the milling during the noon recess narrowly escaped falling through a side window which broke, fragments of glass showering a dozen other women in the street below.[1]

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[1] Daily Mirror (New York), January 22, 1935.

Publicity in the Hauptmann trial would have been less had the officers of the law and the parties to the trial not discussed the proceedings with the newsmen. It is apparent that the physical limitations of the courtroom, the nation-wide interest in the Hauptmann trial, and the inability of the judge to maintain control of his court resulted in events which, when added to the similar atmosphere which prevailed at other criminal trials of the mid-1930s, made judges and newsmen realize that regulatory steps were necessary.

Confusion surrounded the events which led to the adoption of Canon 35. Following the Hauptmann trial in 1935, the American Bar Association established a Special Committee on Publicity In Criminal Trials. The work of the committee lasted less than one year and it did not release a report. Shortly thereafter, the Bar Association formed its Special Committee on Cooperation Between Press, Radio, and Bar Against Publicity Interfering With Fair Trial In Judicial Proceedings. Even today, broadcasters who seek relaxation of Canon 35 emphasize the discriminatory nature of the committee. Although the committee's name indicated that radio representatives were to participate, such an invitation was not extended.

The committee concerned itself mainly with the extent to which cameras should be permitted in the courtroom and it is emphasized that the argument which divided the members of the committee still exists today as one of the major issues--should the judge have the authority to authorize their use,

or should the consent of all trial participants be required? This is one of the major issues which remain unsolved by nearly 30 years of sporadic discussions.

It was not, however, the Special Committee whose deliberations led to the adoption of Canon 35 by the American Bar Association. Rather, it was the Committee on Professional Ethics and Grievances, which had existed for nearly 15 years to rule on charges of misconduct in professional practice by judges and attorneys. Again, the broadcasters and photographers considered the procedure to be unfair because the question of courtroom publicity had not been considered separately. Rather, it was contained in a report on the revision of the entire 34 Canons of Judicial Ethics and 46 Canons of Professional Ethics which existed in 1937. It is emphasized that this report represented the views of attorneys and judges only. Canon 35 was adopted by the American Bar Association without further consideration of the work of the Special Committee on Cooperation Between Press, Radio, and Bar, which had been created to mediate the divergent opinions.

From the circumstances surrounding the adoption of Canon 35, we can conclude that newsmen and broadcasters (although they were excluded) recognized that special studies were necessary to correct flagrant violations of courtroom ethics. Judges and attorneys also recognized the need to police the courts against excess publicity and they took the initiative in doing so. However, all efforts toward

agreement were countered by differing factions of the American Bar Association. Broadcasters and photographers have never forgotten the circumstances under which Canon 35 was adopted.

The Amendment To Include Television

From 1940 until 1952, few occasions arose to discuss Canon 35. It was enforced by judges and seldom questioned by newsmen. In 1952, when television was being recognized as a major means of communication, the American Bar Association acted to extend the ban against radio broadcasting to television, as well. In so doing, ABA added a second paragraph which excluded from Canon 35 the broadcasting or telecasting of naturalization proceedings. The purpose of this exclusion, said the ABA, was to permit the coverage of a ceremony which would demonstrate the "essential dignity and serious nature" of naturalization. The radio and television broadcasters were thus presented with a Canon which implied that their presence in a courtroom would be a distracting influence, yet the following paragraph emphasized their potential for demonstrating the dignity of the courtroom.

We must question, however, the shallow reasoning of the American Bar Association in adding the second paragraph to Canon 35, for the sharp differences between a criminal court trial and a naturalization proceeding are evident. We can conclude that the only reason for the second paragraph of Canon 35, as added in 1952, was to permit the physical

presence of cameras and broadcast equipment in courtrooms, where most naturalization proceedings are held. This provision permits the presiding judge to grant access to naturalization proceedings at a local level without violating the mandate of the first paragraph of the canon.

Interim Proposals

Throughout the 1950s, the American Bar Association re-examined at various times the wording of Canon 35 in an attempt to change it without softening the restrictions against broadcasting and photography. The question was how to preserve the dignity and decorum of the courtroom. The emphasis was slowly shifting from an objection to the physical presence of the equipment to the adverse psychological effect which its presence was held to produce on the participants. In 1955, the Special Committee on the Canons of Ethics appointed by the American Bar Association proposed a new Canon 35 which read, in part:

> The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of the importance of the people and the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound-recording of such proceedings for broadcast by radio or television introduce extraneous influences which tend to have a

> detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they should not be permitted.[2]

In this proposed rewording of Canon 35, the Special Committee acknowledged for the first time the importance of the human element and de-emphasized the legal and scientific factors. The committee at this time also chose to lessen its accusations of excessive and improper publicity and, instead, emphasized that the wording of the canon stressed the recognized rules for governing the conduct of court proceedings.

It is apparent that the many special committees which were appointed at various times by the American Bar Association were working at cross purposes with the House of Delegates of the Association, for when their reports were submitted to the House of Delegates, action was invariably delayed for discussion and for a vote of the entire delegation at the annual meetings of the ABA.

These interim discussions and reports emphasize that the committees, and the Association as a whole, were split into two factions--those favoring complete prohibition against courtroom broadcasting and photography, and those who advocated further study to determine its adaptability under local circumstances.

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[2]American Bar Association, "Report of the Special Committee of the American Bar Association on Canons of Ethics," Judicial Canon 35, Conduct of Court Proceedings (Chicago: American Bar Association, 1958), p. 41.

The Special Committee on Proposed Revision of Judicial Canon 35 was formed in 1958 to collect available information and to explore what studies of Canon 35 might be feasible and productive. The work of this committee represented one of the most harmonious eras in face-to-face discussions and testimony concerning the canon. Representatives of the news media were heard and feasibility studies were discussed, but a lack of adequate financing postponed further consideration of the studies.

In July of 1962, the Special Committee filed an Interim Report in which it recommended that the work of the committee be authorized to continue until the February, 1963, meeting of the House of Delegates. This report clearly indicated that the ABA faction which urged a complete ban against broadcasting and photography was in the majority. A major recommendation contained in the Interim Report read:

> 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 (emphasis added).[3]

The final report of the Special Committee was approved as submitted by the House of Delegates at its annual meeting in February, 1963. The effect of the report's

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

acceptance was to change only slightly the wording of Canon 35. The restrictions still remained and the only consolation to which the broadcaster could point was that he no longer was considered to be a degrading influence on the court.

The Brookings Institution of Washington D. C., is currently conducting a feasibility study to determine whether a broader investigation of the issues surrounding Canon 35 would be profitable. Such a study hinges on the conclusions of the preliminary report and the availability of funds to finance it. Such a study is significant because it represents the first time that a comprehensive study of Canon 35 has been undertaken by an impartial third party.

A review of the periodic discussions of Canon 35 indicates that little action was taken on the preliminary findings of numerous committees. If any change is made in the future, it will depend on intelligent, dispassionate persuasion supported by statistics, experiments, and mutual cooperation between broadcasters, judges, and attorneys. If the Brookings Institution decides that a broad study of the canon is worthwhile, it is hoped the results will be studied and wisely applied to existing conditions by all parties concerned.

Present Status of Canon 35

The opponents of Canon 35 argue that the canon represents legislation beyond the authority of a professional organization such as the American Bar Association. The ABA

emphasizes that Canon 35 is one of 36 Canons of Judicial Ethics which are suggested as a guide to the proper professional conduct of judges. The Association also points out that Canon 35 was not adopted solely as a restriction against cameras and microphones; rather, it was approved as a guide for judges in the 1930s when excessive interest in certain criminal trials threatened the dignity of the judicial process.

Much of the controversy surrounding Canon 35 can be attributed to the lack of uniformity in its acceptance or rejection in the several states. To become law in a state, the canon must be enacted by the state's legislative body or it must have been accepted by the authority which formualtes the rules of procedure for the criminal courts of the state. Acceptance by a state bar association does not give the canon the force of law. Many states have adopted the entire group of 36 Canons of Judicial Ethics. Others have not accepted the canons. Many states have adopted Canon 35 as originally worded, but have not adopted the 1952 amendment. Still other states have a canon or statute of similar intent. The American Bar Association does not urge uniformity of wording in its canons at the state level, but it does encourage uniformity of intent. State bar associations and judicial bodies have followed, with notable exceptions, the leadership of the American Bar Association in formulating canons of ethics.

The three states in which Canon 35 has been modified or frequently discussed are unique. Tests of Canon 35 have occurred in Texas, Colorado, and Oklahoma because of broadcasters who took the initiative and whose proposals for local tests of broadcasting and photography were accepted by a willing judiciary.

Canon 35, or its equivalent, in each of the above states uniformly says that broadcasting is permissible if properly controlled. There is a lack of uniformity, however, in a negative or positive attitude toward the presence of broadcasting and photographic equipment. Texas Canon 28 (equivalent of ABA 35) states that unless properly controlled, television and broadcasting can detract from the dignity of the court. It implies, however, that their presence is allowable.

Colorado's Canon 35 does not state specifically whether broadcasting or telecasting should be permitted or prohibited, but it does emphasize strongly the importance of the presiding judge in determining from the circumstances of a trial whether to permit or prohibit it. Recent changes in the Colorado canon have also reinforced the right of the trial participants to object to the presence of broadcasting or photographic equipment.

An Oklahoma court ruling clarified the issue in that state but it conflicts with the jurisdictional authority for Oklahoma's criminal courts. In the case of Lyles v. State,

the Oklahoma Court of Criminal Appeals said that Canon 35 is obsolete and is subject to modification in keeping with the constitutional rights of the people.[4] Although the Court of Criminal Appeals and the Oklahoma Supreme Court have equal jurisdiction in matters involving criminal intent, the Supreme Court has virtually annulled the decision of Lyles v. State by adopting American Bar Association Canon 35 as a rule of procedure for criminal courts.

Professional Arguments

The parties to the Canon 35 controversy have, for a number of years, concerned themselves with a number of professional arguments which must be proved or disproved to the satisfaction of all parties before they can be eliminated as major issues.

Entertainment versus Information

Although entertainment is one of the major functions of the press, including radio and television, is it the foremost function? The proponents of Canon 35 say that radio and television are not entitled to basic rights of freedom of the press under the First Amendment because of their basic nature as entertainment media. However, the U. S. Supreme Court has held in Thornhill v. Alabama that freedom of the press

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[4] Lyles v. State, 330 P.2d 734.

comprehends all media of information and opinion.[5] The Supreme Court has also ruled that the point at which entertainment stops and information begins is too elusive to define in a discussion of freedom of the press. This decision was substantiated in the case of Winters v. New York.[6]

If the purpose of televised court trials is to satisfy the "idle curiosity" of viewers, then it should be considered as entertainment. In its increasing role as an information medium, however, television can serve the two-fold function of educating the public about the courts and insuring its members that justice is being properly administered.

Influence on the Judge

The judge is a vital link in the operation of criminal justice. He must assure to the public and the participants in a trial that his court is being operated fairly and openly. He must at the same time remember that the rules of his court are dictated by a group of canons, or statutes, to which he must answer professionally and, if they have been enacted into law, which he must follow legally.

The American Bar Association contends that a judge should not be faced with the additional burden of deciding whether broadcasting should be permitted in his courtroom.

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[5] Thornhill v. Alabama, 310 U. S. 88, 89.

[6] Winters v. New York, 333 U. S. 507.

The broadcasters contend, however, that the presiding judge is the only person properly qualified to determine whether pictorial coverage of a trial is justified. A blanket rule such as Canon 35 is unfair, say the broadcasters, who contend that only through trial and error at the local level can a judge determine what is right or wrong.

In addition, the American Bar Association argues that the judge who must depend on popular support for re-election would bow to the temptation to use courtroom television to his best advantage. Also, a judge who knows the importance of support by a news medium in an election year would be faced with possible retaliation if he refused access to broadcasters or newspaper photographers.

Obtrusive Equipment

The image of broadcasting and news photography as it existed in the 1930s still remains. Scientific advances of the "Space Age" have brought refinements in cameras and electronic equipment. Such equipment is capable of operating unobtrusively in the courtroom, but only a few broadcasters have been granted the privilege of demonstrating these accepted capabilities.

The conduct of certain newsmen and photographers at public events outside the courtroom has done little to remove the image of obtrusiveness. Duplication of coverage, while in itself not harmful, can be pointed to by a judge or a public official as being excessive. Properly supervised

pooling operations which meet the standards of the court are an answer to this objection. A model example for pooled coverage of courtroom proceedings has been used in the District Courts of Denver, Colorado, for nearly ten years.

Partial Coverage of Trials

In additional support of Canon 35, the American Bar Association contends that broadcasters would be unable to cover an entire trial and that this partial coverage would be unfair to the participants and to the public. This contention would be valid if the accused were to be judged by the public. However, a man's innocence or guilt is judged by the jurors who are present in the courtroom to see and hear all proceedings. Furthermore, defense of the argument against partial coverage by television must depend on the requirement that newspapers publish the entire transcript of a trial and that a spectator who enters a courtroom must stay to see and hear the entire trial. If the public sees the accused, observes that the court is being conducted openly and fairly, hears the charges against the defendant, knows that witnesses are properly sworn, and hears the verdict of the jury, little is omitted.

Constitutional Issues

The issues which have emerged during recent years as being paramount to Canon 35 are not professional, judicial, or technical in nature; rather, they concern the basic

constitutional issues between the individual, society, and the press, as guaranteed by the First, Sixth, and Fourteenth Amendments to the United States Constitution.

The First Amendment guarantees freedom of the press. Radio and television have been interpreted as being information media which qualify them for inclusion with the press.

The Sixth Amendment guarantees to the accused in a criminal trial the right to a "speedy and public" trial. The question is whether this right to a public trial is exclusively that of the accused or whether this Sixth Amendment guarantee is extended only to the general public.

The Fourteenth Amendment guarantees to citizens of the United States a fair trial and equal protection of the law--the controversial due process clause of the amendment.

The courts must determine from the circumstances whether the press or the individual demands the greatest protection. Definite convictions are forming that the rights of the defendant takes precedence over the freedom of the press, along with an interpretation that the right of a public trial is a right of the defendant only. It has been decided that public trial is a safeguard for attaining a fair trial, but it is a right belonging to the accused. As Mr. Justice Harlan of the U. S. Supreme Court, concurring in the case of Billie Sol Estes v. State of Texas, said, ". . . The one right to a public trial is not one belonging

to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered."[7]

If the right of a public trial is the right of the accused only, can the press plead a violation of its First Amendment freedoms on the basis that it is denied the right to represent the public? Denver judge Marshall Quiat has said on this subject:

> The question really is not a legal one to be dealt with by scholarly footnoted appraisals of the words of judges. The question is one of social-psychological philosophy. What is the privilege of a public to disclosure and examination of society's efforts at justice? . . . If there is a probability that observation affects the process, which shall prevail in the ultimate conflict between the free speech and press and the independent judiciary in our constitutional government?[8]

If an open trial is judged to be the right of the general public, should every citizen be guaranteed the right to attend? In United Press Association v. Valente, the question arose as to what agency or authority, if this were true, should enforce the right.[9] Should it be the press?

Another conflict of constitutional interpretation concerns the due process clause of the Fourteenth Amendment. Does the presence of television equipment deprive a defendant in a criminal trial of the right to a fair trial? If so,

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[7] Billie Sol Estes v. State of Texas, cited in 33 Law Week 4567 (June 8, 1965).

[8] Marshall Quiat, "The Freedom of Pressure and the Explosive Canon 35," 33 Rocky Mt. L. Rev. 11 (1960).

[9] United Press Association v. Valente, 120 N.Y. 2d 642.

must all cameras be banned from a state courtroom when a criminal trial is in progress? The Supreme Court interpreted the due process provisions thusly, and in reversing the conviction of Billie Sol Estes established a precedent which will be far-reaching.

As was pointed out by the Supreme Court, the ruling in the Estes case was based not on experience, but on constitutional law. The question is whether an interpretation of the Estes ruling by state criminal courts will lead to a blanket ban against courtroom television, thus precluding the opportunities for intelligent assessment of what the American Bar Association considers to be the hazards of television in criminal trials.

In summary, it must be remembered that rights are not absolute. The courts have a duty to assure fair trials. The public has a right to know that justice is being dispensed in its courts and the press has a duty to inform the public. In the end, the emphasis must be placed on the constitution instead of on individual rights. As was said in Brunfield v. Florida:

> There is little justification for a running fight between the courts and the press on this question of a fair trial and a free press. Both are sacred concepts in our system of government. Both are in one constitution and govern one nation of millions of individuals. All that is required to preserve both is for the press and the courts to place the emphasis on the Constitution instead of themselves.[10]

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[10] Brunfield v. Florida, 108 S.E.2d 33.

Recommendations

Based on the conclusions of this study plus his personal observations, the writer offers the following recommendations with the hope of placing the issues of the Canon 35 controversy in their proper perspectives.

(1) Avoid the "All or Nothing" Demand

Broadcasters must not pursue an all or nothing demand. If a judge denies live television coverage of a court trial, broadcasters should not protest merely for the sake of protesting. If lesser coverage such as film or delayed broadcasting, or no coverage at all, is indicated, they should evaluate objectively all circumstances.

(2) Avoid conflict with other news media

Although television and newspaper photography are in many ways different in their technicalities and intents, the two media should not be separated entirely in their fight for pictorial access. It has been suggested that television pursue its access rights separately. The writer, however, urges caution because this could place the broadcasters in direct competition with the newspapers and could create another unnecessary conflict. Television and newspapers have different potentials and liabilities but their goals are similar.

(3) Studies should be undertaken jointly

Future studies of Canon 35 should be undertaken jointly by the American Bar Association and representatives

of the broadcasting industry. Little will be gained if both parties continue to conduct research whose only goal is to support biased opinions and preconceived ideas. Issues, conflicts, and common interests must be defined.

(4) The public must be enlightened

The public stands in the middle of the controversy between the courts and the broadcasters. Its members know little about the issues. The average citizen does not understand such abstract constitutional issues as public trial, due process of the law, and other constitutional freedoms. Every citizen must be told the basic issues in terms he can understand if he is to determine whether the presence of television in the courtroom is a hindrance or a help to the defense of his fellow men.

(5) Forget professional jealousies and traditions

The courtroom is a dignified hall where justice is dispensed, but it is not a sacrosanct institution where only a robe-enshrouded judge may enter. Judges who, because of tradition and pride, protect their magistracy from intruders cannot complain of an ignorant public when many of its members have a fear of the court because of its hallowed atmosphere. Television could do much to overcome this image.

Also, the broadcasters must not be jealous of newspaper representatives who are permitted access to courtrooms to observe proceedings, for the broadcaster also possesses this right--to observe and then describe, as a newspaper reporter can observe and then publish. Television is a new and

dynamic news medium, but its elements of immediacy and realism are not arguments enough to justify its admission to the courtroom.

(6) Be mindful of proper conduct

Nothing is more injurious to the cause of the broadcasting industry than improper conduct of its representatives at public events where this conduct can be observed by all. Television must bear the stigma of such action when it is committed by newspaper photographers, and vice versa. Judges and public officials do not soon forget photographers and newsmen who often interfere with a speaker or distract his audience. The working press is partly to blame for the situation it faces. To erase the stigma it must use public meetings and gatherings to convince the legal profession that it can work unobtrusively.

(7) Broadcasters must answer new accusations

Television must answer new accusations which arose from the unfortunate circumstances following the assassination of former President John F. Kennedy in Dallas, Texas, in November, 1963. These circumstances indirectly hindered the broadcasters' fight against Canon 35. The findings of a special committee appointed to investigate the assassination indicted the press for interfering with the proper administration of justice.[11] The events in Dallas, said the

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[11]See: Report of the Warren Commission on the Assassination of President Kennedy, (New York: Bantam Books, Inc., 1964).

report, demonstrate a need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair trial, including a guarantee against excessive pre-trial publicity. The writer recommends further study of the implications of the report, as well as the rights and responsibilities of television in the coverage of criminal news.

(8) Accept the findings of impartial third parties

Impartial studies are recommended. The Brookings Institution of Washington, D. C., is investigating the feasibility of such a study. If undertaken, its findings should be implemented by the broadcasters and the members of the legal profession into codes of conduct to guide coverage of criminal courts and the release of crime news.

(9) React cautiously

The opinion of the U. S. Supreme Court in the case of Billie Sol Estes v. State of Texas was a setback to the broadcasters but it was not a sweeping indictment of television. Broadcasters and judges must maintain a harmonious relationship. Nothing must be said or done to disturb this relationship, especially in those states where courtroom television is at the discretion of the judge. The implications of the Estes decision must be interpreted locally, and the broadcasters should not be disappointed if local judges lean heavily toward the opinion of the Supreme Court.

(10) Broadcasters should be patient

Television is a young news medium. Canon 35 has prohibited courtroom television since 1952. Time is on the side of the "electronic" media. It should be remembered that the press (newspapers) fought long and hard to gain consistent access to such public events as trials, hearings, and legislative assemblies. The widespread use of print to publish news and opinions was once considered detrimental to society. The resistance was overcome and so probably will the resistance to television be overcome. The writer agrees with William Clark Mason, a member of the Philadelphia bar for more than a half century, who said:

> It may be like the bikini bathing suit. Not many years ago they wouldn't have been tolerated at Miami Beach. Now they're acceptable. When the public becomes accustomed to television, the time may come when it will not be harmful in the courtroom.[12]

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[12]"The Silent Witness," Broadcasting, XLIX (August 29, 1955), p. 57.

APPENDIX

APPENDIX

This Appendix is included for the convenience of the reader so that he might have available the applicable sections of the First, Sixth, and Fourteenth Amendments to the United States Constitution, which are frequently referred to in Chapters IV, V, and VI. Specific, numbered Amendments to the Constitution are cited as Articles. The writer has underlined key words to add emphasis to the clauses of each Amendment which have a direct application to this study.

ARTICLE I

Article I was contained in the Bill of Rights (Amendments I through X) which was ratified on December 15, 1791. It reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE VI

Article VI was also contained in the Bill of Rights. It reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

and to have the assistance of counsel for his defense.

ARTICLE XIV

Article XIV was ratified on July 23, 1868. It is divided into five sections. The one most applicable to this study is Section I, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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