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A Radio and Television Newsman's View

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A RADIO AND TELEVISION NEWSMAN'S VIEW

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THE CONFRONTATION between newsmen and lawyers on the question posed by this symposium is sometimes a rigid one. Newsmen tend to talk of free press as an absolute, whereas lawyers sometimes tend to be a little self-righteous about the sacredness of fair trial.

Our discussion starts with an assumption that publicity in some cases may prejudice a jury and jeopardize a man's right to a fair trial. The assumption is largely untested, however, and more work should be done to verify it. But most newsmen suspect that, if and when it is tested, it will probably be found to have some validity. So we thus agree the problem is worth talking about.

Journalists also bring to this discussion an assumption of their own — that the free flow of information is important to the functioning of a democracy and that this flow cannot be diminished without some kind of damage. Many lawyers do not seem to take this assumption very seriously. Here's where the two professions come into conflict, because journalists happen to treat it as basic.

Lawyers are beginning to impress journalists with the idea that what they print and broadcast can complicate the matter of a fair trial. There are plenty of signs that the media are slowly undergoing an educational process on this point and that they are developing a heightened responsibility.

But the journalists do not often seem to be able to convince the lawyers that drastic formulas to cope with the problem could do more harm than good. The legal profession might be willing to agree with broad abstractions about a free flow of information, but they follow up by saying that a limited restraint on that flow will not do any damage.

Federal District Judge Will has written: "Why . . . should we have to tolerate the mere possibility of a contaminated panel of jurors when there is so little demonstrable benefit which flows from the disclosure of such information and so much potential harm which may be inflicted on the defendant, the public and the administration of justice?"

To a newsman this sounds like pure occupational nearsightedness; here, the jurist is glorifying the benefits of fair trial and diminishing the benefits of free press to a point of near extinction.

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Newsmen are reluctant to admit that press freedom is less than absolute. Lawyers, however, seem to take the position that the right to an antiseptically impartial jury — a virtual impossibility — must not give ground to any circumstance or conflicting right. The result is a conversation that is not much different from an argument over religion.

The question is, are we talking about a genuine balance, a decent, mutually respectful accommodation between fair trial and free press that recognizes the values of both, or are we talking about the surrender of free press to fair trial in any case of conflict? If we are to have meaningful discussions, the starting point should be an understanding on both sides that the *best* solution for our problems would be one that did no damage to either of these two fundamental institutions.

Let me suggest a situation, for instance, in which the free flow of information should probably have priority, not over the principle of fair trial, but over any particular technique for obtaining fair trial.

The Warren Commission to the contrary, I will argue for the fastest, widest dissemination of all possible facts on any assassination of a President of the United States. The need to know on the part of 190 million people, the crucial importance of spreading assurance and preventing alarm, require it. This nation, or any other, cannot be kept waiting for two, six or ten months, until a trial is held, to find out for sure that the President was not shot by an organized group whose plan might not yet be complete. The people need to know immediately. They found out immediately after the Kennedy assassination, and they weathered the shock without panic.

The American Civil Liberities Union, incidentally, published a statement harshly critizing the reporting of potential evidence in the Oswald case. The ACLU then had this comment on the public's response to the assassination: "Fortunately, there seems up to this point to have been a mature and sober reaction, in contrast to earlier periods of national distress." It apparently didn't occur to the ACLU that the mature and sober reaction grew out of the reporting they were condemning, out of the most massive fulfillment of the public's right to know in a moment of national shock ever experienced anywhere — an extraordinary communications effort.

Even so, with the tremendous volume of information that came out of Dallas, there were still some rumors and some stories to the effect that sinister facts were being withheld. If all the news that was reported had not come out quickly, think of the rumors, the wild tales, the uneasiness that could have resulted.

What if a President were shot during war time? Would anyone argue that facts steadying to the public, facts that could quite conceivably be crucial to the fate of the country, should be withheld because they would create a problem in trying the suspected assassin?

I cannot conceive, incidentally, of information controls that could really have protected Lee Harvey Oswald's right to an absolutely impartial jury.

But we can certainly look in directions other than the curtailment of information for a method of justice for assassins and others caught amid intense publicity. Surely, the thoughtful lawyers, judges, legal scholars, and Bar Association leaders of this country can arrive at a legal solution to meet the problem. If a defendant in one of those exceptional cases of intense public interest regards pre-trial publicity as too prejudicial for him to obtain an impartial jury, he could perhaps be permitted the alternative of appearing before a three-judge court. This is one suggestion made by a Washington, D.C. attorney and writer on the law, Ronald Goldfarb.

This is not to suggest that the media have no responsibility in this field. It is only to say that curtailing the media is not necessarily the only remedy. If there is an attempt to impose restraints on the press, or if an official policy of secrecy for lawyers and the police is created (a policy they may find convenient for use towards ends other than those of justice), the probable result will render a negative service to the cause of fair trial.

James Russell Wiggins, editor of the *Washington Post,* wrote in *Quill:*

> There is hardly a jurisdiction in this country in which newspapers in the last fifty years have not discovered violations of the rights of accused persons in the period preceding trial. Accused persons have been kept secretly arrested, held without access to counsel or family, kept in the custody of police without proper arraignment, solicited for confessions without any warning as to their rights under the Fifth Amendment, searched without warrant, questioned improperly and otherwise maltreated. These conditions much more menace the rights of accused persons than pretrial disclosures in the press. . . . Newspaper publicity is the best way of treating these abuses in order to keep them at a minimum.

To indicate the dangers of secrecy, several hypothetical situations show how publicity can — and does — aid the cause of justice:

(1) A district attorney in a particular city is known to be fond of charging defendants with lesser crimes instead of the major crimes

often indicated. The courthouse newsmen are not quite sure whether he is lazy, overworked or improperly influenced, but he frequently charges a suspect with a misdemeanor when the man should be charged with a felony. In this city a man with a long criminal record is arrested and the local media mention his record. With people in the city aware of his record, the district attorney will be less likely to charge the man with a lesser count. The public is protected by the disclosure of the past record.

(2) In a deep southern town a white policeman is killed with a knife. A Negro is arrested. The next day one or two reporters ask to see the suspect but the sheriff denies them permission and refuses to say whether the suspect has a lawyer or to say anything else about him. The sheriff says there are rules and regulations protecting fair trial that prevent him from passing on any information. The reporters wonder what is happening to the suspect. They also wonder whom the secrecy rules are protecting, the sheriff or the suspect?

(3) In a certain California city the local residents are burning with anger at a motorcycle gang which has roared into town two or three times, drinking, cursing, fighting and terrorizing people on the streets. One day a dirty, bearded member of the gang is arrested on a charge of raping a popular high school girl. Word goes around the community by the grapevine that this repulsive character has admitted the crime in a defiant manner and boasted that he will escape punishment by a plea of insanity. A surge of feeling is building up against the suspect and the police hear talk of a lynching. Now, supposing that the facts of this situation, as known to the police, are less incendiary than the rumors, should not the press be permitted to pass them on?

Some lawyers are not troubled by questions like these. They have made up their minds that there is a serious threat to fair trial and some of them want to go so far as to adopt the British system for suppressing pretrial information. A transplant from Britain, however, would not necessarily flourish in this country. Britain and the United States are wholly different kettles of fish.

Britain does not have constitutional freedom of the press. Nor does it have elected judges and all the political problems and pressures that accompany them. Except for one national official, the public prosecutor, Britain does not have a system of district attorneys who serve as fulltime prosecutors, open to the political temptation to run up as many victories as possible.

Benjamin McKelway, editor of the *Washington Evening Star,* had this to say about the British system:

> I am interested in what things impress different people. Many of my friends among judges and attorneys are deeply impressed, on visits to Britain by the restrictions, as described by their British colleagues, on crime reporting. As for myself, reading British newspapers in London on occasional visits there, these restrictions are not easily apparent. The preoccupation of the British press with the more sensational and titillating aspects of crime is more pronounced than in this country. What impresses me more than the press restrictions are the wigs worn by the barristers and the judges. Their importation to this country would, I believe, help the administration of criminal justice even more than the press restrictions.

In Britain, incidentally, the contempt power was originally an instrument to counter disobedience and disrespect toward the King and his agents. Many years ago, there were attempts in the United States to apply the contempt power severely. Some of these attempts, however, brought about strong public reaction, and both legislatures and courts in the United States have tended to move away from the harshness and suppression of the British system.

In one British case, a publication attacked a man for his connection with vice and prostitution activities. A court found the publication in contempt because, prior to the appearance of the article and unknown to the editors, the man had been charged with keeping a brothel. The judge noted that newspaper publishing was "a perilous adventure." In another case, the *New Statesman* challenged the impartiality of a Catholic judge in a birth control case. The comments were made *after the case was over,* but they were found to be in contempt. A British court even found a magazine distributor guilty of contempt because of material in a European edition of *Newsweek* of which the distributor was completely ignorant.

But, and here I'd like to quote attorney Ronald Goldfarb again:

> The greatest failure of English contempt law is its disrelation with its most valuable object — protection of fair trials. It is of little service to an accused person who is written into jail by a prejudiced press that the publisher or editor is fined or imprisoned. His victory is a hollow one unless the conviction is reversed. The contempt power is only indirectly curative of unfair trials, if at all, though this is its most valuable purpose.

People arguing for the British system sometimes claim that the loss of press freedom it entails does not cost the British anything in

terms of the flow of information they need. A closer examination more likely would prove the opposite.

Alfred Friendly, of the *Washington Post,* told a personal story concerning a discussion on fair trial and free press. He was serving as Washington correspondent for the *London Financial Times.* He got a cable from London asking him to write an article for them explaining why there seemed to be a degeneration in Anglo-American relations. The most important reason for it happened to be a bitter reaction in Congress to the treason of Klaus Fuchs in Britain. Friendly sent the piece to London, but the *Financial Times* could not print it because Fuchs was awaiting trial. As Friendly pointed out, the inability of the paper to print his article probably did not do any great harm. But the point is that trying to protect fair trial by restricting the media does possess the disadvantages and dangers of censorship. It exacts a price. In this case, the British people could not be told why Washington was irritated at their government.

What are the things that can be done to protect fair trial without the cost of restricting the press? The courts can make more use of their powers to postpone a trial, when necessary, to allow the effects of publicity to subside. They can move a trial from one place to another. Legal thinkers can work out more effective systems for examination and challenge of jurors against prejudice. Judges can counteract outside influences by instructions to the jury. Finally, the courts can grant new trials if the other devices fail to work.

Many lawyers, of course, feel these protective possibilities are inadequate in some cases. But the fact is that, in certain cases, judges have *not* taken full advantage of them.

Canon 20[1] can be enforced against the deliberate attempts of lawyers to use the press to influence public opinion in their own cases. The noted criminal attorney, Edward Bennett Williams, believes this is the most important thing to be done to ease the fair trial-free press controversy. He has said that, "the problem can be solved without tampering in any way with the freedom of the press."

In terms of media responsibility, it is important to continue to have discussions like this one between the press and bar. The news media do *not* want to be guilty of jeopardizing a man's right to a fair trial. As a result of the debate on this subject over the past few years, editors are now much more aware than before of the kind of press behavior that makes trouble for the courts. One sign of this is the development of voluntary codes, here and there, worked out by local press and bar groups. These codes are likely to be vague and meaning-

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less, if you expect too much of them; however, they reflect a greater sophistication, a heightened awareness and intensified concern about the problem. The hope of improvement is not so much in the codes but in the attitudes they represent.

Lawyers who feel cynical about the press say that it is hopeless to expect newsmen to do much about this situation unless they are compelled. There is evidence to the contrary. For instance, in most places the press now exercises voluntary restraint in not publishing the names of juvenile offenders and in refraining from editorial comment on pending trials. There also have been cases where prosecutors have sought and obtained the restraint of the press. Foreseeing special news interest in upcoming cases, prosecutors have, in some instances, requested the news media to hold publicity to a minimum in order to avoid the legal pitfalls connected with freewheeling coverage. The media, recognizing the problem, have cooperated.

There should be study and experiment to seek more knowledge and more constructive answers to the problem, rather than a crude resort to curtailment of free press. Is it really true that a news story about a man's criminal record, read six months previously, can weigh as a factor in a juror's mind against three days of detailed testimony just completed in court? Is it really true that the bar cannot find some new judicial technique, such as the right to waive trial by jury, to take care of the rare situations when a case receives saturation coverage?

Improvement of press coverage of the pretrial situation is already becoming visible and this gradual improvement will continue. It cannot be proved, nor do we maintain that we will reach perfection any time soon or even that perfection is attainable. But, even on the assumption that no improvement is forthcoming, I still would not yield free press to fair trial. It is probably common knowledge that dozens of guilty men, perhaps hundreds, escape the sentences due them every year because they have the money to hire able lawyers, because the prosecutors are overworked or because some judges are not competent enough to avoid errors. Under these circumstances, it does not embarrass me to recommend that if excessive publicity should make it impossible to try two or three persons every year, then they should be freed. In order to punish a few persons, we should not curtail the press freedom that helps to encourage legal reform and guarantee fair trial in thousands of cases that do not attract publicity. The same thought has been expressed by the distinguished Federal judge, J. Skelly Wright. He argued that, if a few persons literally cannot be tried because of publicity problems, it is a small price to pay for the benefits a free press brings to the judicial system itself.

As previously stated, it is not necessary to go this far. The media *do* have room for improvement in the handling of pretrial news and we are in favor of doing everything possible, in terms of press performance and judicial techniques, to safeguard fair trial.

Finally, there is one vital avenue open to the courts to stimulate public understanding, to educate the people to the principles of our judicial process and to lay the groundwork for various legal reforms that are obviously needed, such as judges of higher quality, better legal safeguards for the poor, reform of the bail bond system and so forth. That avenue toward a much higher, more consistent fairness of trials is the carefully planned and controlled admission of television to the courtroom.

Lawyers of this generation probably base their thought processes on this subject on the sort of general suspicion of television that is prevalent in intellectual circles. Television is a big, brash medium that has irritated many people. People, such as college professors, lawyers, and doctors are inclined to look on it as vulgar, to distrust it and to boast about never watching it.

The broadcasting profession has misused lights and cameras and behaved badly enough on occasion to reinforce the suspicions of the bar. And sometimes, it must be said, courtroom circuses have been created, not by the overwhelming presence of television, but by the underwhelming presence of the judge. But television reporting of court proceedings can be accomplished with complete unobtrusiveness — no equipment visible, no extra lights, just a glass lens looking through a small opening in the far corner of the room. It can be done with much less obtrusiveness, in fact, than that which is inherent in newspaper reporters visibly sitting and writing at tables close to the witness.

Canon 35[2] is wrong; it is irrational in its harsh and sweeping statement that *nothing* that happens in any courtroom, case, or phase of a case is suitable for *any kind* of radio or television coverage. The idea that a medium which covers church services, presidential news conferences and the United Nations cannot, under any circumstances, cover courtrooms with dignity is absurd on the face of it. This attitude of the Bar Association makes about as much sense as that of the savages who fear photography because it's bad magic to let another man possess your image. Television, used responsibly, can cast remarkable light into public places. Witness the recent Senate hearings on China policy which immediately spread the interesting idea that it might be useful to contain China without isolating her.

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The courts are undoubtedly our least understood branch of government. One special reason they need public attention is because they are not perfect and the lawyers feel inhibited about criticizing judges or the judicial system. In other words, reform from within is not necessarily a swift, sure process.

According to a Roper survey, more than half of the people in the United States now depend on television as their primary source of news. The number of daily newspapers continues to decline. As the influence of television grows in the informational field, only one branch of government, the judicial, seems to be developing hostility towards it. Keeping television out of the courtroom may provide a cozy feeling of thwarting change and preserving the status quo. But does such a negative decision really leave the judicial system unchanged? Consider today's high-pressure competition for the attention of the American citizen. If one excludes the unique instruments of this modern form of communication from the courtroom, is the judicial system really maintaining the same contact with the people that it has always had? Or is it losing contact? If it is felt that the courts need public understanding and support, much thought should be given to the above factors before the present hostility of the courts towards broadcasting hardens into a tradition for the ages.

Here is a subject that cries out for openmindedness, study and experimentation. The case against television in the courtroom has not been proved. It has not even been thoroughly discussed. Instead it has been irritably and shamefully swept under the rug by the Bar Association. Admittedly, it is a complex matter. The most important argument against television coverage is that the mere knowledge of electronic reporting would worry and distract a witness and others in the courtroom. This is a serious question that must be answered. But the experience in the *Graham*[3] case suggests that the answers are not necessarily those inherent in Canon 35.

Graham was tried in Colorado for placing a bomb on an airplane, killing 44 persons, to collect his mother's insurance. The proceedings were filmed from a booth in the back of the courtroom and excerpts on film and on audio tape were used in evening newscasts. When the trial was over, the presiding judge, the jury foreman, the attorneys on both sides and the defendant's wife said that, to their knowledge, the broadcast coverage had not distracted anyone and had not interfered with the fairness of the trial. Veteran court reporters did not detect any awareness by witnesses of the broadcast operation. And the jury foreman's comment was, "Frankly, I had forgotten that it

3. Graham v. People, 134 Colo. 290, 302 P.2d 737 (1956).

was there." Colorado Chief Justice Frank H. Hall, talking about the trial, said that the television coverage had provided a true picture:

> Truth is not per se objectionable. One can find nothing indicated that there was a particle of detraction from the essential dignity of the proceedings. Nothing appears to indicate that any witness was distracted in giving testimony — we have never heard of the complaint of any witness. Did it degrade the court? Those participating might well demand proof of these broad charges — the visual and auditory recording speaks the truth; it shows a competent judge and district attorney, competent defense counsel, witnesses and a jury charged with a frightening task, all going about their public duties in an orderly, dignified, efficient and legal manner.

With the increasing influence of television as an informational medium, any final decision to exclude it from the courts might well mean a progressive loss to the courts of public contact, support and understanding. The bar should abandon its old, largely emotional approach to the matter of television reporting and take a new, positive attitude of trying to find some way of using television for the mutual benefit of the public and the courts — some way that would, of course, provide protection to the right of fair trial.

The bar has taken great pride, and justifiably so, in the concept of a living Constitution and in such national leadership as is evident in the 1954 school integration decision of the Supreme Court. It is urged that the bar recognize freedom of the press as a living concept within the Constitution, one that should expand and change with the technology of communications.

It would be a tragedy, while the executive and legislative departments use electronics to make their activities clear to all, for the courts to insist that the people will never be allowed to see into the courtroom through a glass lens — a lens looking on quietly, virtually invisible from the spectator area set aside for the public. It is my belief that a twentieth century concept of free press is vital in the long run to the twentieth century development of fair trial.