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## CAMERAS IN THE COURTROOM

GILBERT GEIS AND ROBERT E. L. TALLEY

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Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication.

—JUSTICE FELIX FRANKFURTER<sup>1</sup>

Relationships between the press and the legal and judicial professions have never been particularly cordial. Each group, approaching mutual problems from its own framework, accuses the other of base motives in its dealings and opinions. Newspapers, for example, complain that lawyers and judges make a deliberate attempt to withhold information from them, and thus undermine the constitutional right of "freedom of the press." The lawyers and judges, on the other hand, retort that newspapers are a big business, dedicated to profit, not public enlightenment, and that they distort or slant legal information to make it sensational and salable. The legal profession has its own constitutional password, the right of the accused to a fair trial by an impartial jury.

In essence, then, we have two groups holding contradictory viewpoints on a common issue. Each one supports its stand with a quotation from a fundamental source of semisacred nature. It is not surprising then that the legal and newspaper professions have arrived, today, at an uneasy compromise, marked by toleration, but by no apparent sympathy toward the divergent approaches to the problem of legal information.

Occasionally the compromise is upset momentarily, as one or the other group seeks a re-alignment of positions. In such cases, the lawyers and judges find themselves in a disadvantageous position because their side of the issue is not likely to receive the same amount of public attention as the newspapers', since the papers control the readiest access to the public's mind. On the other hand, concerted action by the judicial professions, with or without public opinion support, can be devastating to the newspapers because by the nature of its role the press is typically a supplicant, standing on the outside, wanting in.

A recent dispute has arisen to bring to the foreground again basic antipathies between the press and the legal professions. It involves the attempt of the lawyers, as represented by the American Bar Association, to continue to ban newspaper photography in courtrooms, and the concomitant drive of the press to have news-

<sup>1</sup> In his opinion respecting the denial of certiorari in *Baltimore Radio Show v. Maryland*, 193 Md. 300, 67 A. 2d 497 (1949), cert. denied 338 U.S. 912 (1950).

paper photographers at court trials. The dispute centers particularly about the periods when the court is in session, though many judges also refuse to allow photographs to be taken at any time or place in the courthouse.

Newspapers have long operated on the idea that "one photograph is worth a thousand words." Visual items, it has been found, make a quick and deep impression on the hurried, read-and-run American newspaper subscriber. And, of course, the more unique and eye-catching the picture, the more attention it will claim. This, in fact, represents one of the basic areas of conflict, because the legal profession articulates a code of over-all trial fairness in which the unique must be blended with everything else that is relevant in order to determine the precise conditions under dispute.

Through time, newspapers have typically scrambled along in a running, undeclared battle with the forces of law over the issue of press photography. Generally, sketchers have been allowed to make line drawings of courtroom scenes, and many of these are familiar to newspaper readers. Newspapers, particularly in the days when press ethics were rarer, used to employ young reporters exclusively for the purpose of stealing portraits of persons suddenly thrust into notoriety, often in connection with criminal cases. Ben Hecht for instance, relates in his autobiography of his picture-snatching exploits for a Chicago daily.<sup>2</sup>

#### CANON 35: THEN AND NOW

The basic principle of a fair trial was summarized succinctly by Justice Oliver Wendell Holmes in the 1907 case of *Patterson v. Colorado*: "The theory of our system," Justice Holmes wrote, "is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

To obviate such "influence" The American Bar Association in 1937, passed Canon 35 of its "Canons of Judicial Ethics." The Canon (with amendments added in 1952 appearing in italics) reads:

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, are calculated to detract from the essential dignity of the proceedings, *distract the witness in giving his testimony*, degrade the court, 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.*

The same principle was adopted in 1945 by the Supreme Court of the United States in Rule 53 of the Federal Rules of Criminal Procedure which states:

The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasts of judicial proceedings shall not be permitted by the Court.<sup>3</sup>

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<sup>2</sup> BEN HECHT. A CHILD OF THE CENTURY. New York: Simon and Schuster, 1954, pp. 123-127.

<sup>3</sup> FEDERAL RULES OF CRIMINAL PROCEDURE (WITH NOTES AND INSTITUTE PROCEEDINGS) edited by ALEXANDER HOLTZOFF. New York: New York University School of Law, 1946, pp. 89, 255, 268.

Dissemination of these principles throughout the 48 states has been sporadic and erratic. Today, there is a wide divergence in practice. In February, 1955, as an illustration, the *BULLETIN* of the American Society of Newspaper Editors conducted a survey on pre-trial news and courtroom photography, receiving responses from 35 states. A sample of the headlines provides summary data on the wide variation in practice:

Arkansas—"Relations Good But No Pictures."  
 Virginia—"Photographers Won't Risk It."  
 Tennessee—"Trend Appears Hopeful."  
 Arizona—"Courtroom Pictures Permitted."  
 Rhode Island—"Even Corridors Out of Bounds."  
 Iowa—"Pictures During Recess Only."

Perhaps, the headline for the State of Wisconsin can be allowed to summarize both the conditions in Wisconsin and the general situation around the country:

"No Uniform Policy."

The question of photography in courtrooms—both still photography and television—is at present a highly dynamic one, primarily because of the drive by the newspapers to extend their area of privilege within the courtrooms. In the face of this pressure, there have been divergent tendencies to relax and to harden the rules against photographers; that is, there has been a strong tendency for jurisdictions, when pressed, to crystallize what had previously been a rather vague attitude.

Meanwhile, the courts have upheld the right of judges to ban photographers if they so desire. In the major court decision on the subject, the Ohio Court of Appeals affirmed a judgment of contempt against staff members of the *Cleveland Press* for refusing to obey an order that they refrain from snapping pictures of a defendant in the courtroom awaiting the return of an embezzlement indictment.<sup>4</sup>

On the other hand, recent instances in which photography has been permitted in courtrooms include the following:

—In Arizona, in July, 1954, William E. Demand of Scottsboro was tried for murder and photographs of the trial were permitted for the first time in Arizona's history.

—From December 29, 1954, through January 12, 1955, while Claude Nichols was being tried for murder in Waverly, Tennessee, the *BANNER* and *Nashville Tennessean* printed 107 pictures of the trial.

—In Galena, Illinois, early in 1955, Judge Robert Bracken of Dixon, Illinois, allowed photographs to be taken by a photographer from the *Dubuque (Iowa) Telegram-Herald* during a manslaughter trial.

More interesting has been the occasional use of television in reporting court trials. Some of these cases are:

—In February, 1954, Judge A. P. van Meter permitted Station WKY-TV in Oklahoma City to film, for the third time, portions of a criminal trial. The station recorded the sounds for the swearing in of the jury, the judge's charge, and the

<sup>4</sup> *State v. Clifford* (Ohio 1954), 118 N.E. (2) 853, cert. denied 99 L.ED. 646.

verdict, while a newsman commented on the other proceedings which were filmed from a special booth provided with a slit for the camera lens.

—On June 6, 1955, when Ernest Triplett, of Lamars, Iowa, was tried for the murder of a 9-year-old boy, District Judge R. G. Rodman discarded Canon 35 to permit televising and broadcasting of the trial, even to the point of allowing flashbulb shots in the Court.

—In December, 1955, television was permitted at the Waco, Texas, trial of Harry Washburn, a Houston businessman, charged with murdering his former mother-in-law. It was estimated that 200,000 persons watched the trial, including civics classes in local high schools and students at Baylor University.<sup>4a</sup>

The American Bar Association's position on photography in courtrooms is in accord with the practice in Great Britain, where Section 4 of the British Criminal Justice Act of 1925 specifies that no one is allowed to take a picture in court of any participant in a court proceeding. Nor may pictures be taken of such persons as they are entering or leaving the court. As defined by the law, the court includes the entire courthouse. Courtroom sketches are also forbidden by British law.

It is interesting also to note that an Inter-American Bar Association meeting at São Paulo, Brazil, in June 1954 approved a resolution condemning the broadcasts of trials by radio or television, as well as the taking of photographs or drawing of sketches in court.

Attempts to bridge Canon 35 have taken the form of the introduction of photography in courtroom circumstances where it had not been permitted before, and the propaganda campaign of the newspapers directed toward repeal of the Canon.

James S. Pope, President of the American Society of Newspaper Editors, keynoted his group's objection in December of 1954:

We object to Canon 35 because it does not simply underline the importance of dignity, but sets up an arbitrary prohibition against the camera, which today can frequently be used with as little offense or commotion as a pencil making notes on paper. We think the judgment in individual cases should be left to the judges.<sup>5</sup>

Pope's statement underlines one of the major arguments employed by the newspaper people—a stress on the technical possibilities of the use of photography without disrupting courtroom procedure. Joseph Costa, chairman of the board of the National Press Photographers Association, has summed up the argument by saying that:

Canon 35 was adopted in an era when we did not have the versatile equipment that we have today and it should now be relaxed.<sup>6</sup>

Neither statement, however, undercuts ethical, emotional, and constitutional objections to courtroom photography which, as we shall see, often form the core of the judges' and the lawyers' position.

The National Press Photographers Association recently advocated the substitution of the following resolution for Canon 35:

<sup>4a</sup>For a detailed history of Canon 35 during 1956 See GILBERT GEIS, *Canon 35 in the Light of Recent Events* which will be published early in 1957 in the A.B.A. JOUR.

<sup>5</sup> BULLETIN OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, January 1, 1954, p. 5.

<sup>6</sup> PUBLISHER'S AUXILIARY, September 3, 1955, p. 4.

. . . We recognize that the taking of photographs in a courtroom by accredited press photographers may in proper circumstances have a salutary effect upon the public to whose enlightenment the functions of a free press contribute so vitally.

Where, therefore, in the opinion of the judge presiding at a trial or hearing, it appears that photographs can be taken by accredited press photographers without interfering with the regular and customary procedure of the trial or hearing in that court, and without creating any misconceptions with regard thereto, such photographs may be taken therein during the course of the trial or proceedings as may be permitted by said court.

A well-planned attempt to demonstrate the validity of the press photographers' viewpoint took place during the meetings of the American Bar Association in Philadelphia in September, 1955. During the course of a mock trial, photographers secretly stationed about the courtroom snapped 324 pictures of the proceedings. The next day the pictures were displayed in the convention halls. The unobtrusive manner in which the pictures were taken, according to Mr. Costa, should lead to "greater cooperation among all three groups—press, bar and bench—to keep the public informed of its judicial branch of government through discreet photographic reporting as well as word reporting, wherever possible."<sup>7</sup>

#### VIEWPOINTS ON CANON 35

The present survey attempted to gain a more representative opinion from groups professionally concerned with the problems posed by newspaper photographers and, possibly, television cameramen in courts of law. No attempt was made to achieve statistical preciseness in the survey through the use of large random samples; rather it was desired to obtain a general idea of the lay of the land among four groups—judges, lawyers, newspaper editors and academic criminologists—and to elicit the reasons put forth by the various individuals and, presumably, by the groups they represent, in support of their viewpoints. Thus, it was felt, the outlines of agreement and disagreement could be drawn more sharply for subsequent debate.

A questionnaire was sent to 200 persons, equally distributed among four professional groups. One person in each group was selected from each of the 48 states, and the remaining two from territories of the United States. The questionnaire, as a general rule, went to the following in each area:

- (1) The managing editor of the largest circulation daily newspaper.
- (2) The criminologist at the State University.
- (3) A higher court judge.
- (4) A lawyer in a metropolitan area in each state.

These individuals, while assuredly not representative of the rank-and-file, would seem to be in a position to represent with some authority the respective viewpoints of a large segment of the profession they pursue.

Of the 200 questionnaires mailed, 117 (58.5 percent) were returned. The percentages returned by each group are as follows: Attorneys, 62 percent; Criminologists, 68 percent; Editors, 62 percent; and Judges, 42 percent.

Those in favor of allowing photography in the courtroom during trials (with the exception of sex offenses of a gross nature, and juvenile offenses) were as follows:

<sup>7</sup> TIME, September 5, 1955, p. 76.

Attorneys, 10 percent; Criminologists, 28 percent; Editors, 97 percent; and Judges, 5 percent.

These are the viewpoints and substantiations of the viewpoints as they are given by the members of the four professional groups:

*Newspaper Editors.*—Only one of the 31 newspaper editors swung against the overwhelming editorial tide favoring the granting of permission to the press to be represented photographically in the courtroom. In this lone exception the editor tersely noted that “we favor the resolution passed by the American Bar Association.”

The remaining editors favored the withdrawal of Canon 35 for the following general reasons:

(1) Canon 35 is directed against courtroom photography on the ground that it upsets the decorum of the trial. This, many of the editors pointed out, is no longer mechanically correct.

Some of the replies underscored this point by the use of personal illustrations. For instance, Robert C. Notson, managing editor of *THE OREGONIAN* in Portland, wrote:

Starting about a year ago, *THE OREGONIAN* and *THE OREGON JOURNAL* have conducted a series of experiments in courtroom photography. The results have astounded the judges, attorneys, and other participants. The pictures have been taken quietly with cameras using telephoto lenses. We have used only available light.

None of the dire things predicted for courtroom photographs has been realized. We have always worked closely with the judge in planning our coverage and would be guided by his wishes in eliminating any photograph not considered suitable.

Two rather sharp retorts came from managing editor R. J. Watts of the *Houston CHRONICLE* and Royce Howes, associate editor of the *Detroit FREE PRESS*. Watts wrote:

I see no earthly reason why photographers should not be allowed in the courtroom the same as reporters. The judge, of course, can and should see to it that the court is not upset by photographers, reporters, or anyone else. Pictures are taken of ceremonies in church, including ordinations, baptisms, weddings, etc. The presence of photographers at work apparently does not disturb worship.

While Howes wrote:

... Canon 35 relates only to the dignity and decorum of the court. It has been repeatedly demonstrated ... that modern photography can be carried on in absolute secrecy ...

Bar associations and judges introduce all sorts of opposition arguments (right of privacy and sundry other matters) which are not concerned with the content of Canon 35 in any way whatever. ... Canon 35 was either drawn by an ignoramus or it is a deliberate fraud—for it doesn't deal with what its adherents claim ...

It is as senseless for the legal profession to deny that there is a new reportorial medium as it would be for them to insist that court news must be spread by a town crier because there really is no public demand for the product of the printing press.

And I firmly believe that what the public believes it should have in the way of information takes precedence over what any judge or bar group thinks it should have.

There seemed to be general agreement among the newsmen that the decorum and dignity of the courtroom must be preserved. Editors conceded that, in the words of one, “photographers working with flash equipment and moving noisily all over the courtroom ... upset the decorum.” The viewpoint presented under this heading was

ably summarized by Kenneth MacDonald, managing editor of the Des Moines REGISTER AND TRIBUNE, who wrote:

With modern photographic equipment, there is no reason why a photographer's presence need be more disturbing than that of any other individual in the courtroom. It may be necessary on occasion for the court to limit the number of photographers as, on occasions, the number of other persons is limited; it may be necessary to prescribe the type of equipment used. All of these points, however, have to do with rules of conduct. They serve only to illustrate that it is possible to permit photographs in courtrooms without abandoning our historical concepts of justice.

(2) Canon 35 takes from the individual judge the liberty of action which is rightfully his.

Walter Lister, managing editor of the Philadelphia BULLETIN, was the only newsman calling attention to this objection to the American Bar Association's rule. Lister noted that:

I think it smacks of presumptuousness for an editor to tell a judge what he ought to do. It is the clear duty of a judge to provide a fair trial for a defendant and he should conduct the court in a manner to assure this. I prefer to leave this to the conscience of the individual judge . . .

(3) A court trial is a public affair, and the newspapers should be allowed to represent the public to as great an extent as possible.

The major attack of the editors on Canon 35 concentrates on the "right" of the public to trial information of all types. Many editors state this right dogmatically as a basic principle of a democratic society; others defend the right as leading to increased public understanding and appreciation of judicial processes, while some point out that full court coverage serves as a check on possible judicial irresponsibility. One of the editors put his opinion bluntly: "News should be photographed everywhere," he wrote.

Some responses following the lines of this third approach included:

Someday, the Bar will come around to the view that what the 50 or 100 spectators see at the trial should be available to the millions not able to get into the courtroom. . . . The thinking of judges and lawyers is lagging far behind. (Frederick Sherman, picture editor, Miami HERALD).

If a man is entitled to a public trial then it should be 100 percent public. (John D. Paulson, managing editor, Fargo (N.D.) FORUM).

I favor photographs, properly handled of course, because courts are public and therefore the public is entitled to know what goes on. It is part of the people's right to know and see. (Stanley P. Barnett, managing editor, Cleveland PLAIN DEALER).

Neither democracy nor justice can be injured by full news coverage at any time news occurs.

On the other hand, the light of publicity will prevent many evils.

No one in public life, anywhere, at any time, should wish to prevent full coverage of all actions that pertain to the public.

The people have a right to know—a right to know in full, and not in part—all that goes on in the way of public business. And the administration of justice is one of the most important parts of public business. (Charles Henry Hamilton, managing editor, Richmond NEWS LEADER).

. . . The courts of the United States belong to the people, not to the lawyers . . . The citizen who may be interested in a trial but who is unable to attend has every right to see, through his representa-



tive, the press photographer, what is going on. (Gordon Hanna, managing editor, *THE COMMERCIAL APPEAL*, Memphis).

Only one of the editors addressed the question that proved to be vital in the minds of the lawyers, judges, and many of the criminologists; that is, the type of pictures which the newspaper would be inclined to take, and the effect of this type of newspaper photography on crime, public opinion, witnesses, justice, and the specific trial being held. It is interesting that the editor raising this point is himself a member of the Missouri Bar. H. T. Weeks, managing editor of the *St. Louis POST DISPATCH*, wrote:

Persons accused of crime are entitled to a fair trial, and, in most cases, a public trial. The time and place for taking pictures is immaterial so long as these two requirements are fully met. I forbear to argue whether taking pictures precludes a fair trial—that is too long a story for this place—but I do not think that taking pictures in court necessarily makes for unfairness or necessarily upsets the Court.

*Judges.*—Of the 21 judges returning questionnaires, 20 preferred to keep photographers out of courtrooms. The dissenting judge expanded on his viewpoint in the following words:

As a general proposition a Court should permit photographs to be taken of everything and anything that happens in a courtroom if, but only if, the decorum of trial is not upset . . .

I think that the publication of photographs may actually aid in ascertaining the truth, especially in large cities. For example, let us say that a witness by the name of John Smith testifies that he saw a specified happening at a specified time. Not many persons will know the identity of John Smith by his name only. John Smith may have given false testimony, and there is the chance that if his photograph were published members of the public upon seeing his photograph would recognize him as being the person seen by them at a time and place which would make it impossible for him to know the things to which he testified . . . (Name withheld).

On the other side, the huge majority of judges objecting to courtroom photography couched their objections in one form or another on the basic proposition that courtroom photography would interfere with the orderly processes of justice. Few interpreted this to mean that cameras would impose direct distractions upon the courtroom procedure as the pictures were taken. Instead, there was reference to the fact that the likelihood of photographs at any moment would unnerve witnesses, cause posturing, or otherwise undermine routine proceedings. Again and again, the judges insisted that courtroom photography would convey the idea that trials were "shows" or "spectacles" or "circuses." In broad outline, these were the viewpoints presented by the judges.

(1) Photographs would undermine the dignity of the court. These are several of the comments voicing the above objection:

. . . The taking of pictures in the courtroom detracts from the serious business of the trial, disrupts its decorum and lends itself to the nature of public entertainment rather than vital judicial inquiry that it is. (Charles H. Hayden, Circuit Judge, 13th circuit, Lansing, Mich.)

All of these modern performances in my opinion detract from the dignity of the Court and . . . put the Court on the level of a picture show. Courts are no place for show, advertisement, or politics. If the public is interested let it come to Court. . . . (Charles A. Holcombe, District Judge, 19th district, Baton Rouge, La.)

. . . It has been the rule of this Court that, under no circumstances, will a photographer be allowed to take pictures in a courtroom. This rule has even been extended to the halls approaching the court room. The reason for this is not so much the prevention of interruption of court proceedings but because we feel that the dignity of the court proceeding would thereby suffer . . . (Caleb B. Layton, 3rd., Associate Judge, Superior Court, Wilmington, Del.).

The most colorful response in this vein came from a judge in Arizona who asked that his name be withheld:

Being well along in life I have seen many changes in the law and in its administration. Most of them have brought improvement; not all of them have done so. In general, those coming from within the profession and brought about by informed thought have been more successful than others resulting from public clamor or from the desire for change that in certain eras is more insistent than in others.

I hear no desire, or substantially none, from within the profession that the proceedings of the courts . . . be opened up as a spectacle to regale the public either by pictures, still or motion, radio, television, or otherwise. . . . Almost all trials are sober and cold searches for truth having but little interest for others than those engaged in them, and an occasional student. It is only a very limited number and kind of trials that is adapted to the hippodrome or in which the public would be in the least interested from the standpoint of its being a spectacle. . . . What general benefit could come from catering to the taste, however natural it may be, of members of the public for the drama of hearing how the knife or the bullet struck home and for the raw passion that caused the crime to be committed I am totally unable to see. To the contrary I think it injurious for such spectacles to be fed to the public in any form . . .

However quietly and unobtrusively the picture taking or the televising may be done there could be no escaping the knowledge of those in the courtroom that they have no complete independence as judge, lawyer, witness, juror or spectator but they are parts of a great circus, and actors in it, and thus naturally tempted to wish rather that they be favorably judged in the portrayal of their respective roles than to serve well in their offices . . .

(2) Photographs would interfere with the objective of a fair trial by introducing a distractive element into court.

The first point is concerned primarily with the essential operation of the Court as a dignified, decorous branch of the government, dedicated to painstaking and sedate search for truth. The second raises more squarely the pragmatic assertion that cameras, in one way or another, would bias the integrity of courtroom proceedings. The justices do not disagree with the newsmen's statement that camera work can be done discreetly; rather, they point to the fact that the presence of the camera, though well camouflaged, is known to the participants and thus influences their behavior. Particular stress is laid on the disruptive influence which, it is claimed, the camera will have on witnesses. One judge's words illustrate the form of this objection:

In my experience, press photographers are just as avid in their search for sensationalism in lieu of news as are reporters. They either have not learned, or do not bother to practice, good manners in court. Privileges extended to the "gentlemen" of the press are abused almost as soon as granted in many cases. A court of law is a place devoted to justice and equity between litigants, wherein judge, jury and counsel strive with all their abilities to determine the merits and maintain the rights of the litigants. The conduct and demeanor of witnesses upon the stand may and should properly be considered by the jury or Court in determining the credibility of a witness, and that conduct may be materially altered by extraneous interference. How can a witness possibly comport himself in a normal manner, how can a juror pay attention, how can a judge preside with dignity and impartiality if he is to be confronted at any inopportune moment with a camera lens . . . focused on his subconscious acts? The news photographer does not belong in the courtroom. (Frank B. Gregory, District Judge, 1st judicial district court, Carson City, Nev.).

(3) Photographs would add nothing meaningful to present trial coverage except increased sensationalism. Present coverage is quite adequate.

Two judges addressed this point, in the following words:

I personally feel that an informed public is absolutely necessary, and certainly I do not oppose publication of the purported facts in the complaint or indictment and corresponding papers. However, to bring to the public pictures of the litigants prior to and during the judicial proceedings does not aid the Court or the jury in arriving at a just and equitable verdict and decision. On the contrary, it tends to influence impartial determination. Once the trial is concluded and the verdict is in or a decision has been rendered, then pictures of the litigants and counsel, as well as other avenues of dissemination of facts, I feel are proper. (Name withheld).

In the past our Court has neither permitted photographers nor broadcasters on radio to operate during the actual court sessions. . . . News reporters, either from newspapers or radio stations are provided a place where they may attend court sessions and make such notes as they wish during trials. . . . It is my opinion and that of those judges in the State with whom I have talked that this permits adequate coverage to inform the public of the progress made in the trial work of the Court. (John C. Pollock, Presiding Judge, 1st judicial district, North Dakota).

(4) Photographs interfere with the individual's basic right to privacy.

One justice penned an elaborate defense of this right as follows:

You have been courteous to ask permission to use my name. You must have done this for a reason. You seem to be recognizing that I have a private right of some sort concerning the use of my name. You are quite correct—indeed I do! And I also have a private right of some sort concerning the photography of my person and the use to which such photographs may be put.

Perhaps the foregoing illustrates basically why I would not permit the taking of photographs in the courtroom under any circumstances. Being charged with crime, or condemned to die, or being participant in a trial (often made "sensational" by newsmen) does not erase the individual's right to privacy of his person. It is understandable why newsmen do not develop sensitivity to this right, but it would be inexcusable for courts and the law not to protect it. . . .

*Lawyers.*—Thirty-one of the 50 lawyers to whom questionnaires were sent forwarded replies. Of the 31, all but 3 were opposed to the use of photography during courtroom proceedings. The major reasons closely resembled those advanced by the judges, as presented above, although where the judges were more concerned with the decorum and dignity of the court, the lawyers were primarily concerned with the fair outcome of the trial.

The three lawyers in favor of the abandonment of Canon 35 advanced the following general reasons to support their position: (1) a court is a public place and the proceedings are open to the public; therefore, why bar photographers?; (2) "through the medium of television, at least, the public in general could become acquainted with court procedure and perhaps lose some of its fear of having to go to court;" and (3) "the widest possible outlet of publicity is quite advantageous for all parties in the best interests of justice."<sup>8</sup>

The remainder of the replies, all opposed to courtroom photography, will be represented by a few of the more articulate defenses of the lawyer's position:

<sup>8</sup> For a cogent statement by a lawyer favoring "access equality"—the right of all communication media to be represented in court—see SAMUEL I. SHUMAN, *Publicizing Judicial Proceedings*, WAYNE LAW REVIEW, 1 (Winter 1954), pp. 1-44. A virulent counter-viewpoint, excellently documented, can be found in PAUL J. YESAWICH, JR., *Televising and Broadcasting Trials*, CORNELL LAW QUARTERLY, 37 (Summer 1952), pp. 701-717.

... Let us not forget that our primary responsibility is to the man accused and to the public in general as demanding a fair trial. Many cases involve complicated evidence which is difficult to follow. Involved is the life, liberty, property, and happiness of our citizens. We should not interfere with the solemnity of the courtroom which serves to impress on all concerned the responsibilities which they are expected to discharge. (Name withheld).

It can be successfully argued that photographers are detrimental from a public policy point of view, because it has been the experience of the Bar that the more salacious and sensational the litigation the more avid the reporter and those in charge of reporting are in printing and illustrating the sordid. (Name withheld).

I do not favor extension of our concept of a public trial, because:

(a) It would inject another trier of the law and/or facts in the case, thereby possibly diluting the duties of the judge and/or jury.

(b) It would add, by virtue of publicity, a possible monetary, political, etc., value to the role played by the judge, jury, party or parties and/or witnesses.

(c) At most, only the spectacular cases would receive attention, thereby possibly giving the public a perverted opinion of the role of our courts.

(d) Most of all, it would tend to lower the dignity of meting out justice by our courts, by substituting a less desirable, so it seems to me, concept of public participation. I am against the trend to commercialize and sensationalize the obligations of courts and lawyers. (Name withheld).

We are engaged, when in Court, in the trying of issues. Anything that detracts from this purpose makes a laughing stock of the lady with the scales. God forbid that we treat our courts as would Mr. Barnum, were he living.

Witnesses have enough distraction through stage fright and an abhorrence of getting up and talking before a group of people without adding to their fears. . . . (William H. Benethum, Wilmington, Del.).

The trial of every case involves constantly changing attitudes, behaviors and conduct, not only of the parties to the case, but also of witnesses. The publication of a picture taken at an inopportune time often carries with it a misconception of the subject's real attitude or even his character. (William H. King, Richmond, Va.).

I oppose the taking of photographs in the courtroom. I will pinpoint two key reasons with outlined support.

A. No purpose, either social or legal, is served by photographs taken in the courtroom.

(1) No real information is disseminated thereby. The only real interest to the vast public in a given trial is the sensational aspects thereof, i.e., those which sell newspapers. No interest has ever been detected in many more common trials such as construction contract disputes, or automobile collisions resulting in no injury, or litigation over fire losses, etc.

(2) The constitutional guarantee of public trials does not insure the sale of such public information. Trials are "public" in that they may be attended and observed by all who are interested. They are not "public" in the sense that those in attendance may record and sell what they observe. . . .

B. Photographic publicity, or the knowledge that it may occur, will impair the efficiency of our legal procedures. It is difficult enough for a sincere layman to control his emotional reaction to the completely new experience of litigation. Recollections may be obscured by nervous confusion and justice submerged in makeup and posture before the camera. A trial is a forum for the calm disclosure of the truth and quiet judgment under law on the truth thus disclosed. Any non-essential pressures which may affect this functioning of the court procedures should be avoided. (Name withheld)

... Photographs, moving pictures and television distort the processes of judicial administration, unnecessarily emphasize the lawyers and judges participating therein; amount to unethical advertisement of the Judge and the attorneys; and, finally, amount to an invasion of the personal liberties of the parties involved and the witnesses.

You may recall the Kefauver hearings. . . . All of the participants were actors and the hearings failed to accomplish their ultimate objectives.

There seems to be no more reason for taking pictures of court proceedings than the taking of pictures of any other public agencies such as mental institutions, prisons, coroners' inquests, legislatures or Congress in session. The removal of an appendix of an indigent patient in a public hospital may be of interest on television, but not desirable. (Name withheld).

. . . In reading a reporter's account of the conduct of any type of hearing, the reader, to some extent at least, must realize that his reactions are dependent upon the personal observations of the reporter. In viewing a picture, however, a viewer cannot help but form opinions based solely on his own reaction. If this is true, then the extremely narrow limits of a single photograph improperly portraying the entire atmosphere of the complete hearing must be recognized. The tangible and intangible damage possible through viewer reaction to pictorial distortion of the attitude or conduct of any participants in the hearing . . . cannot be overemphasized. . . . (Robert F. Preti, Portland, Me.).

. . . The news value of courtroom pictures is almost invariably of the sensational type, which I believe is completely foreign to the purpose of court trials.

I have in mind the reluctance of witnesses to appear in court if wide publicity were to be given to their appearing as witnesses. I also can imagine that certain witnesses would be more interested in the publicity given to their appearing in court than they may be in seeing that justice was to be administered properly. . . . (William S. Pfadt, Erie, Pa.).

. . . It seems to me that the urge to sell newspapers and magazines is too great a temptation to editors, judging from past performances, to expect much improvement in self-restraint on their part.

While a newspaper or magazine can be sensational in the coverage of a trial, even without courtroom photographs, the bench and bar should not add fuel to the fire by abandoning the present restraints on photography in the courtroom. Especially is this true in criminal proceedings, as to which a substantial segment of the bar has the feeling that in many cases a defendant cannot get a fair trial in any of the large metropolitan areas where the sensational style of journalism is particularly rampant. . . .

When the press is able to demonstrate a greater capacity for good citizenship and restraint in the use of the media of communication as instruments of public information, I will be glad to revise my views and agree to an experimental program of courtroom photography under controlled conditions. (I. E. Krawetz, St. Paul, Minn.).

. . . The main reason for encouraging the public to attend trials in the first place, and to have the context reported in the public press, is to assure the public that our courts are free from bias and undue influences, and to act as a check upon any arbitrary policies of any officer of the court. I do not believe that these desirable social purposes would be enhanced by permitting photography. (Howard H. Campbell, Portland, Ore.).

*Criminologists.*—The majority of academic criminologists contacted in this study are members of departments of sociology at major American universities. Sociology regards itself as a social science and, as a science, it eschews value judgments. This presumably does not imply that the individual sociologist, after evaluating the information available to him, cannot determine—in terms of his own values—which of two alternatives he finds more attractive. Many of the sociologists, however, appeared reluctant to shed their academic roles for those of informed citizens, and there was considerable hedging of the issue among this group.

Thirty-four responses were received from the 50 questionnaires sent to the criminologists. Of the respondents, 9 favored allowing photographers into the courtrooms, 23 opposed such a move, and 2 were uncertain.

In general, the reasons provided by those favoring courtroom photography were the same as those set forth by the managing editors. Most prominent was the stress on the right of the press in a free society to full coverage of public events. One response favorable to courtroom photography stressed the great need for further research on the subject, a line taken by several of the respondents who opposed the use of photography in trials, but noted that their answers stood only for "the present time and on the basis of present information."

Several arguments previously unmentioned appeared in the answers of the criminologists opposed to courtroom photography. In particular, two stood out: (1) That juvenile court procedures bar both newsmen and photographers because this is deemed to be in the best interest of the miscreant (if this be true, would not the same argument be valid for the adult offender?); and (2) That newspaper photography has no deterrent effect on crime.

These are a sampling of the responses of criminologists who would prefer not to have photographers admitted to courtrooms.

Professor Gordon Brewer, chairman of the Department of Sociology and Anthropology at Montana State University, Missoula, ably summed up three of the major points raised by the lawyers and judges in the following words:

I am opposed to the taking of news photographs in the courtroom for the following reasons:

1. Such practice would tend to increase the emphasis on the more sensational aspects of the trial. There is already too much playing up of the sensational in certain types of criminal trials, especially where murder and sex offenses are involved.
2. Despite efforts to minimize interference with trial procedure, the introduction of photographers and photographic equipment within the courtroom is almost bound to cause distraction. Nothing should be permitted which is likely to increase the self-consciousness of witnesses and other participants, or is otherwise likely to divert their attention from the serious business at hand.
3. It seems to me that permitting the photographing of principals during a trial, at least during the actual course of the trial procedure, might well constitute an unwarranted invasion of privacy.

Other statements were these:

No public interest is served by the kind of publicity we have on court trials. I am assuming public interest is not the same as public curiosity. If the trials by press would have any significance in deterring crime there might be some justification for the sort of publicity given. Not only are courts interrupted and judicial processes interfered with, but great harm is done to sensitive persons by photographs and gossip about cases brought before a court. (Name withheld).

... A trial can be horribly distorted by a particular "peculiar" picture that may have come about as a meaningless incident in a trial but which becomes of great "human interest value" and therefore "newsworthy" in the current tradition, but yet has no legitimate significance as part of the trial...

A formal posed picture... is not objectionable, but few newspapermen I know want that kind of picture. They want to be free to wait around for the particular "shot" that will illuminate something they want to dramatize—and it is this aspect which is most objectionable. A witness can easily be made to look like a moron simply by snapping him at the strategic "lucky" moment. It cannot be left to the discretion or sense of good taste of the photographer, especially the news photographer with an assignment to come up with "something interesting." (Name withheld).

I am very much in favor of de-emphasizing the news coverage on crime, including news stories, coverage of trials and hearings, grand-jury procedure, arrests, photographs and films of any aspect of the crime, the criminal, the locus, etc.

Crime coverage should be limited, either by law or agreement of publishers, to small public notices—such as marriage licenses. There should be no coverage before or during the trial. After the trial, there could be a short, objective summary of the trial and its outcome.

Trial by newspaper in my book is really quite bad—bad for criminal justice and bad for crime control. Pictures of Dr. Sam Sheppard eating breakfast in jail or his attendance at his mother's funeral may help newspaper circulation but it does not give crime control.

The televising of the Kefauver organized crime investigations gave the public and the school children interesting insights. But the net result is practically zero. There has been no follow-through with control of organized crime. One cannot control organized crime by the searchlight of TV films, or news coverage. The public merely gets the story—a spectacle like the Rose Bowl. . . . (Walter C. Reckless, Ohio State University, Columbus).

The prospect of having a picture taken in court has never deterred anyone from the commission of a crime, and I think that it has the effect of making jury service and testifying as a witness even more unattractive citizen duties than they now are. Obviously, the pictures are taken only during the more sensational trials—the famous picture of the “pig-woman” testifying in bed in a courtroom during the Hall-Mills trial is an illustration of this point—and it is my opinion that the sensational trials already have enough publicity. (Donald D. Stewart, University of Arkansas, Fayetteville).

. . . Too much coverage of court proceedings could make honest but unpopular decisions very difficult. (Name withheld).

#### CONCLUSIONS

The object of this paper has not been to adjudicate definitively the obvious dispute between the press photographers and editors on the one side and the lawyers and judges on the other. Rather, it has been to attempt to assemble these viewpoints so that they may be reviewed side by side. We have quoted at some length so that the feelings as well as the summary ideas of the groups might become more clearly evident.

It seems clear that these feelings run deep. The newspapers are united in their belief that they are being barred from a legitimate function, while the lawyers and judges are only very slightly less united in their contrary belief that the American Bar Association's Canon 35 is, and should remain, a guide to the sound administration of criminal justice.

One point seems to stand out. None of the groups is arguing on the same ground. That is, no group posits a viewpoint to which the other takes exception; both posit different claims and virtually ignore the claims of each other. More specifically, the press maintains that it has the right to photographic access to trials because of the right of freedom of the press. The bench and bar reply by stressing the defendant's right to a fair trial. They do not deny freedom of the press, nor do the editors deny the right of a fair trial.

There is only slight suspicion of the motives of the lawyers and judges voiced by the editors, but a great dissatisfaction with the press is evident amongst the other three groups surveyed. In this respect, the arguments of the non-editorial groups seem to be much more persuasive. The newspapers insist that they have the right to take photographs since photography demonstrably does not upset the court decorum. But they are embarrassingly silent on the point raised again and again by the other groups: What photographs of what trials do they want to take? And for what purpose?

The answers seem to be rather self-evident. The press, in general, is interested in

sensational pictures of sensational trials. And the reason is to sell newspapers: these are the type of pictures the public will pay money to see.

In this respect, the editors are comparatively dishonest, because they raise their claim for courtroom access in terms of a legitimized motive, but not the real motive; a good reason, but not the real reason.

On the other hand, there is no gainsaying the press' argument that, unless one becomes psychologically subtle in determining witness reaction, Canon 35 is highly pregnable, and needs either to be revoked or rewritten. Newspaper photography, it has been amply demonstrated, can be carried on without upsetting the surface functioning of the court. If the legal professions are concerned with the mental state of their witnesses because of real or imagined lurking dangers, then they should place this fact specifically in the Canon rather than reading it into it.

It is quite interesting to observe that extremely few of the persons responding manifested any interest whatsoever in excluding the writing segments of the press from trials. The lawyers and judges are not always happy with press coverage, and the criminologists are even less pleased, but, while many respondents are highly adamant against photographers, they often make the statement that they have no objection—in fact, they would encourage—press representation at trials. But, they say, this is enough. In a democratic context, this argument appears specious: If you admit A, and B is much the same as A, why not admit B, too? Why discriminate against him? Or, specifically, if you grant that news cameras are no more distracting than reportorial note-taking, why bar the cameras from court?

In a logical context, however, the speciousness disappears. If juvenile delinquency can be cut in half by 10 new playgrounds, it does not follow that 20 playgrounds will eliminate juvenile delinquency altogether. Nor, if production of potatoes is increased 20 percent by an additional 100 tons of fertilizer, it does not follow that 5,000 tons will have a proportionately greater effect. The 5,000 tons might, in fact, smother the crop. So, too, reporters may be adequate and necessary and photographers super-numerary.

There remains to be considered the right to a "public" trial as guaranteed by the Sixth Amendment, and the question of just whose right this is. The question is still being argued by Constitutional authorities.<sup>9</sup> So, too, is the question of the precise meaning and limitations of "freedom of the press." It is undoubtedly true that this press freedom is a relative one, and presumably it is relative to the public weal. Newspapers, for instance, cannot print with impunity libelous matters. The present question then becomes one of determining whether it serves the public good to have photographers admitted to courtrooms, and, further, of determining more precisely what is meant by public good. The present paper can but point out the sharp disagreement that presently exists on the question.

<sup>9</sup> See FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT*. Lawrence: University of Kansas Press, 1951, pp. 61-63.