Notre Dame Law Review

Volume 42 | Issue 6 Article 8

1-1-1967

Case for Television in the Courtroom

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THE CASE FOR TELEVISION IN THE COURTROOM

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Because Canon 35[1] is in many respects irrational and harsh, the arguments produced to support it have a ring of metallic rigidity. The notion that a medium that covers church services, the Senate Foreign Relations Committee, and the United Nations cannot cover courtrooms quietly and unobtrusively, without affecting the proceedings, is absurd almost on its face. Yet Canon 35 sweepingly declares that *nothing* that happens in any courtroom is suitable for *any kind* of radio or television coverage. This declaration is reminiscent of the thinking of savages who fear photography because it is bad magic to let another man possess one's image.

The supporter of Canon 35 often seems to find himself condemning the idea of electronic coverage without the slightest genuine consideration for its possibilities. He can draw from a large stock of well-worn assumptions and comfortable clichés and tell us that television coverage would convert judges into ham actors, make jurors into celebrities, and paralyze witnesses with fright. The self-assurance of those offering these frothy speculations is remarkable, especially since at least one important trial, to be discussed below, was covered by television film cameras under carefully planned rules with results exactly opposite in every respect.

From a selfish point of view, it is not in the immediate interest of television stations and networks to get into the courtroom. The last thing television needs is another kind of news event requiring unusual, costly, carefully planned coverage. Presidential news conferences, space shots, election nights — almost all of the occasions calling for special coverage — represent not profit, but financial loss to broadcasters. This is true even when there is sponsorship, because the equipment and man-hours for such coverage are so expensive. It is doubly true without sponsorship, and any continuous courtroom coverage probably would be done without sponsorship, just as continuous coverage of Senate committee hearings is customarily done without it.

The courts, on the other hand, both in their own immediate interest and in the long-term interest of improving our processes of justice, should be actively exploring possibilities for introducing television and radio coverage. Responsible use of the electronic media can let a healthy light into public places. In Wash-

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1 Canon 35 of Judicial Ethics of the American Bar Association, adopted September 30, 1937, amended, September 15, 1952: IMPROPER PUBLICIZING OF COURT PROCEEDINGS.

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, 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.
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> 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 the 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.

ington today there is a gathering movement in the House of Representatives to overturn the Rayburn tradition and allow coverage of House committees. This movement is being led not by demagogues, but by some of the most thoughtful members of the House, who have come to realize that Senate hearings, covered by cameras and microphones, have had a valuable impact on public affairs far outdistancing that of similar House hearings, which cannot be seen and heard in the home. The courts seriously need such illumination. Lawyers and judges are the first to cry that the methods of justice are not well understood. The courts need public support, and the public cannot effectively be reached today through newspapers alone. According to a Roper survey, more than half the people in the United States now depend on television as their primary source of news. And as the influence of television grows, only one branch of government, the judiciary, seems to have adopted a total hostility toward it.

What does this judicial hostility mean for the future? American cities of any size formerly had three or four competitive newspapers. Today most cities are served by newspaper monopolies. What is going to happen if the courts tell television and radio stations they cannot discuss a case in *advance* of trial, and *during* trial they cannot use the reporting instruments that provide their unique effectiveness, the microphone and the camera? The broadcasters will feel substantially excluded from court coverage and they will tend to concentrate the efforts of their limited news staffs on other stories where they can use sound and picture. Thus, the courts will have deliberately put themselves at the mercy of newspaper monopolies to interpret their activities to the community. Keeping television out of the courtroom may provide a comfortable illusion of maintaining the status quo, but the actual fact seems to be that the judicial system is consigning itself to a dwindling contact with the public. Television doesn't need the courts, but the courts *do* need television in the long-range interest of a strong, well-illuminated system of justice and the fair trials of the next century.

The judge and the lawyer, however, claim that television would destroy a man's right to a fair trial. Would it? Surely it is an assumption with such serious adverse implications for the courts that it bears much more thought and examination than the American Bar Association so far has been willing to give it.

There are two possible drawbacks to television coverage that need calm study, preferably based on controlled experimentation, by both the bar and the media. One is the possibility that television's physical presence, the clutter of equipment and men, would be distracting and offensive to the dignity of the court. The other is that, even without physical distraction, the mere consciousness of television coverage would offer a psychological distraction, affect the participants, and subtly change the character of the proceedings.

In considering the danger of physical distraction, it is worth noting that a rather striking kind of physical distraction exists in the courtroom at this time during heavily publicized trials. It is a distraction that is accepted as routine in the interests of a public trial and a free flow of information. Even defense attorneys do not attack it as a challenge to the fair trial of their clients, and

yet, many newsmen and laymen have been struck by this distraction on their first attendance at a widely covered trial. Typically, there are one or two tables for newsmen prominently placed in sight of judge, jury, witness, and attorneys. Perhaps twenty reporters sit there, notebooks before them, pencils in hand. When the testimony is routine, they listen quietly, almost in boredom. But when the testimony heads into vital territory, twenty bodies jerk to attention, twenty heads bend over the tables in unison, twenty hands start writing feverishly. The witness has been put on dramatic notice by this sudden activity that he has plunged across the border line from fine print, or no print at all, into large black headlines. The jury has been alerted to the fact that the newsmen present place great stress on the testimony at hand. The witness may be unnerved by the newsmen's reaction. The jurors may be distracted. But the judge and the lawyers pay no attention; they are accustomed to it. The trial continues.

Part of the emotional resistance to television inside courtrooms stems from the fact that we are *not* accustomed to it. It is a novelty. Novelties understandably cannot be quickly accepted when they would add a new element to a process, such as our judicial system, which has been refined and improved gradually over so many centuries. When a novelty holds some possible advantage, however, it should at least be seriously considered.

The fact is that there need be *no physical distraction whatsoever* in radio-television coverage of a trial. With the equipment and techniques now in use, electronic coverage can be completely unobtrusive, silent, and invisible — in short, *less* distracting than the procedures now accepted in the courtroom for coverage by pencil-and-paper reporters.

It is true that electronic gear has been a physical distraction in certain courtrooms where it has been permitted. Television people, being human, will do things the cheap and easy way if they can. However, the remedy is simple. Judges should not permit such clutter. They should lay down basic guidelines for unobtrusive coverage, insist on a coverage plan in advance for all visual media in a trial, approve the plan, and enforce it.

Television people do not want to participate in circuses. It is an undeniable fact, of course, that they have done so on occasion, invariably under the ringmastership of a lax judge. It is an embarrassment and an irony because, carefully handled, television and radio can be the *least* conspicuous of media.

On November 9, 1965, the District of Columbia Bar Association held a panel discussion on fair trial and free press. NBC News obtained the permission of bar association officials for WRC, the NBC station in Washington, to arrange closed-circuit television coverage of the meeting with concealed equipment. More than an hour after the program had begun, the lawyers present were told that their meeting was being televised on closed circuit at that moment and recorded on videotape at the studio four miles away. A television set was brought out on which they could see their own meeting in progress. They looked around the room to locate the equipment, but neither a camera nor a cable was visible. There was no extra lighting to augment the normal lighting of the Mayflower Hotel meeting room. It had to be explained that two cameras were operating through two openings at the rear of the room that looked like ventilation ducts.

They were square openings about nine feet above the floor, built into a false wall and covered with wire mesh. The cameras looked through the grid, but looking straight at them all one could see behind the grid was darkness.

In other words, physical distraction can be totally eliminated. And actual courtroom experience suggests that if physical distraction can be eliminated, psychological distraction is eliminated along with it.

Television film coverage and radio coverage were permitted[2] in the courtroom during the Colorado trial of John Gilbert Graham, who was accused of placing a time bomb on an airplane, killing forty-four persons, in order to collect insurance on his mother. The proceedings were filmed and recorded from a booth in the back of the courtroom that screened technicians and equipment from view. Film and sound tape excerpts from each day's court session were used in evening newscasts and repeated in the newscasts of the next day. Public interest in the broadcast coverage was extensive. 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 significant comment was, "Frankly, I had forgotten that it was there."

Colorado Chief Justice Frank H. Hall, commenting on the Graham trial, said:

> 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.[3]

What this experience underlines is that it is vital to exclude the physical presence of cameras, bright lights, cables, and — probably most important — technical personnel from the courtroom. Once this is done, the attention of participants in a trial *cannot* linger on the unheard, unseen presence of television. It cannot because the mind is inevitably drawn to what can be seen and heard in the immediate foreground — the statements of witnesses, the arguments of attorneys, the rulings of the judge. The static presence of television cannot compete for attention with the activity in the courtroom — the voices, the faces, the men in contention, the issue to be decided, the job to be done. There is nothing present to nourish a consciousness of television. There is everything present to nourish concentration on the trial.

2 Permission was granted under a Colorado court rule quoted in Address by Colorado Chief Justice Hall Before the Conference of Chief Justices, in St. Louis, Mo., Aug. 2, 1961, p. 1.

3 *Id.* at 6.

If this was true in the Graham case, as apparently it was, it will be even more true in courtrooms of the future when television is no longer a novelty, but an accepted journalistic presence serving the highest purpose of public trial in a complicated twentieth-century society. Obviously, it will be at least a matter of decades before electronic courtroom coverage is widely accepted. The Supreme Court decision in *Estes v. Texas*[4] did not, in the view of most broadcasters, close the door on such coverage in the future. But it came close to doing so, and it expressed, certainly, the present widespread suspicion and hostility of the American bar to the idea of television coverage.

Perhaps the acceptance of television might actually be hastened if broadcasters, rebuffed and weary of fruitless knocking on oaken doors, decided to relax and not push the issue. The courts change slowly, and properly so. The matter of television's potential usefulness to the courts in the interest of better justice is more the problem of the courts than it is that of broadcasters. Let the courts think about it for a few decades. Then, one year when they least expect it, when they have become reconciled to their drab life outside of the courtroom, broadcasters will get an invitation. It will be carefully worded, cautiously limited, tentative, and conditional. It will suggest media-bar discussions, perhaps carefully controlled experimentation. It will signal that the courts are on their way to a decision that the electronic component of a free press is vital to the public communication of their proceedings and that it can be employed simply and quietly without a trace of sawdust in the courtroom and without damage to fair trial. When that invitation comes in ten or twenty years from now, it is to be hoped that broadcasters will be pardoned if they let it sit around a week or so before answering.

4 381 U.S. 532 (1965).