Florida Law Review

Volume 11 | Issue 1 Article 3

March 1958

Broadcasting and Televising Trials: Fair Trial Versus Free Press

Wm. Terrell Hodges

C. Lawrence Stagg

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

Part of the Law Commons

Recommended Citation

Wm. Terrell Hodges and C. Lawrence Stagg, *Broadcasting and Televising Trials: Fair Trial Versus Free Press*, 11 Fla. L. Rev. 87 (1958).
Available at: https://scholarship.law.ufl.edu/flr/vol11/iss1/3

This Note is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

NOTES

BROADCASTING AND TELEVISING TRIALS: FAIR TRIAL VERSUS FREE PRESS

Historically, the fourth estate in this country has insisted on unrestricted journalistic coverage of trials, a sentiment that has at times conflicted with the legal profession's conception of dignity and decorum in courtrooms. The bar continues to view this position of professional journalists with suspicion and alarm.

The press's right to cover trials by traditional means is well secured.[1] Sensational newspaper accounts of criminal cases are often denounced as prejudicial to a fair trial, but the courts generally refuse to impose any strict limitations on such publicity.[2] With the development of news reporting by photographic reproductions, radio, and television, however, the conflict between the bar and the press centers on employment of these media in the courtroom.

IMPOSITION OF RESTRICTIONS

Canon 35

The first concrete manifestation of this conflict appeared as a resolution adopted by the American Bar Association in 1932.[3] It sought to place a complete ban on radio broadcasting of trials, condemning it "as a breach of the decorum of judicial proceedings and as an interference with the administration of justice."

Three years later Bruno Hauptmann was tried for the kidnaping and murder of the Lindbergh child.[4] Present in the courtroom were 141 newspaper reporters and photographers, 125 telegraph operators, and 40 messengers.[5] The very numerical strength of the press forced Judge Trenchard to forbid the taking of photographs while the court

---

[1]See Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[2]*Ibid.*

[3]*Proceedings of Fifty-Fifth Annual Meeting, Sixth Session,* 18 A.B.A.J. 761, 762 (1932).

[4]State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809 (1935).

[5]Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure,* 21 A.B.A.J. 301, 304 (1935).

Published by UF Law Scholarship Repository, 1958

was in session. He permitted the installation of one newsreel camera with sound equipment on the explicit agreement that no film would be made while he was on the bench. But, through a subterfuge, the cameraman filmed scenes of the testimony of some of the more important witnesses. As a consequence, newsreel films of the proceedings were shown throughout this country and in England.[6]

This three-ring judicial circus led to the adoption[7] in 1937 of Canon 35 of the Canons of Judicial Ethics of the American Bar Association. It was the result of studies made by various committees of that association, one of which was composed of editors and publishers as well as members of the legal profession.[8] Since its adoption, the canon has been construed several times by the A. B. A. and on each occasion has been given a strict interpretation.[9]

This canon, amended in 1952 to include television within its prohibition, has been the focal point of the current controversy. The first paragraph reads:

> "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 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."

Canon 35 has been a strong influence in this area. Since its adoption by the A. B. A., fifteen states have embodied its language in a court rule or statute, five of which have incorporated the 1952 amendment barring television. In addition, the canon itself has been adopted by nonintegrated bar associations in ten states and Hawaii. Four of these jurisdictions have included the language of the 1952 amendment.[10]

---

[6]*Ibid.*

[7]Address by Richard P. Tinkham, Regional A.B.A. Meeting, 19 F.R.D. 16, 20 (1955).

[8]Special Committee on Cooperation Between Press, Radio and Bar, *Report,* 62 A.B.A. REP. 851 (1937).

[9]See A.B.A., OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, opinion 212 (1957).

[10]BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 911 (1956).

The New York Legislature, in 1952, passed a statute generally prohibiting radio, television, or motion picture coverage of any proceedings in which the testimony of witnesses might be compelled by subpoena.[11] Violation of the statute was made a misdemeanor. The United States Supreme Court specifically prohibited radio and television coverage of federal criminal proceedings through Rule 53 of the Federal Rules of Criminal Procedure. At least ten United States district courts have supplemented this rule with individual court rules prohibiting such coverage in any federal judicial proceedings conducted in their district.[12]

Florida — Canon and Statutes

The Florida Supreme Court, in 1941, adopted a Code of Judicial Ethics that contained provisions similar to those of the A. B. A. canons:[13]

> "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 of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

Two variances from the language of A. B. A. Canon 35 should be noted. First is the omission of the words "distract the witness in giving his testimony." Without this language the Florida code appears more concerned with the protection of the dignity of the court than with any safeguards for individual principals connected with the trial. Secondly, the code has not been amended to expressly prohibit television.

Three Florida statutes add to the restrictions placed upon the press in this area.[14] Journalists readily concede, however, that these limited prohibitions, unlike Canon 35, are desirable because they insure justice in the isolated situations to which they apply. The first of these statutes prohibits "publication" of the name or identity of

[11]N.Y. Civ. Rights Law §52.

[12]BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 756 (1956).

[13]FLA. STAT. Code of Ethics, Rule A, §35 (1957).

[14]*Id.* §§794.03, 801.14-.15.

any female victim of rape or assault with intent to commit rape.[15] Another closely related statute[16] prevents revealing the name or identity of any unmarried person under the age of sixteen who has committed, been the victim of, or is to testify concerning any sex offense. This statute specifically refers to radio and television. The third, section 801.15, seemingly produces an anomaly. It provides that when any person under sixteen is testifying concerning any sex offense, the courtroom shall be cleared of all persons, with certain enumerated exceptions. Among these statutory exemptions are "broadcasters." By implication, this statute could be interpreted as contemplating the presence of broadcasters, which would seemingly contravene the provisions of Canon 35 and the statutes above. Further, this legislation would give broadcasters the right to remain in a courtroom that has been cleared of mere spectators; thus it becomes even harder to reconcile with the rationale behind Canon 35.

DOCTRINAL CONTENTIONS

Public Trial

A "public trial" is guaranteed by the United States Constitution to all defendants in criminal cases.[17] This guarantee applies only to trials in the federal courts;[18] but practically all states, including Florida,[19] have some provision, either constitutional or statutory, that guarantees a public trial in criminal cases.[20]

It has been contended that the sixth amendment was designed solely for the protection of the accused. Accordingly, it would be the exclusive privilege of the defendant, and he could waive it if he should so elect,[21] thereby effecting total exclusion of the press.

Journalists point out that the right to a public trial has been recognized by the common law courts since the demise of the Star Chamber, and that the rationale that gave birth to this principle is concerned with the public interest as well as with the rights of the accused.[22] The press argues that this "public interest" requires that

[15] *Id.* §794.03.
[16] *Id.* §801.14.
[17] U.S. CONST. amend. VI; see *In re* Oliver, 333 U.S. 257 (1947).
[18] Betts v. Brady, 316 U.S. 455 (1942).
[19] FLA. CONST. Decl. of Rights §11.
[20] See *In re* Oliver, 333 U.S. 257, 267 (1947).
[21] United States v. Kobli, 172 F.2d 919 (1949).
[22] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954); see *In re* Oliver, 333 U.S.

the public be allowed to see and hear proceedings in courts of justice in order to preserve inviolate their civil liberties and guard against governmental abuses that historically have flourished when afforded the shield of secrecy.

The Supreme Court of the United States has adopted this "general welfare" view of public trial, reasoning:[23]

> "A trial is a public event. What transpires in the court room is public property . . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."

One state, when confronted with the issue, followed the Supreme Court view, ruling that the press and public cannot be excluded from trials, even if the defendant in a criminal case so requests.[24]

The press reasons that photography, radio, and television are merely a means of expanding the public audience. Thus it is not the right to a public trial that is questioned by the bench or the bar; it is merely the means by which this privilege may be enjoyed.

Fair Trial and Free Press

Freedom of the press, guaranteed by the first amendment to the United States Constitution, is applied equally to the federal government and the states. Although the doctrine was originally applied only to printed matter, it has been extended to radio and moving pictures.[25] In all probability, the more recent medium of television would also come within the scope of its protection.

The concept of fair trial has been guaranteed by implication through judicial interpretation of the due process clauses of the fifth and fourteenth amendments.[26] The right of the press to fully report judicial proceedings may be extended to a point at which it ap-

257, 266 n.21 (1947).

[23]Craig v. Harney, 331 U.S. 367, 374 (1947).

[24]E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955).

[25]United States v. Paramount Pictures, 334 U.S. 131 (1947); Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied,* 338 U.S. 912 (1949).

[26]*E.g.,* People v. McMiller, 410 Ill. 338, 102 N.E.2d 128 (1951); State v. Haffa, 246 Iowa 1275, 71 N.W.2d 35 (1955); Helton v. Commonwealth, 256 S.W.2d 14 (Ky. 1953).

parently conflicts with the right to a fair trial, as interpreted by the judiciary. At this extremity the press proclaims "the people's right to know," while the bar demands full constitutional protection for its clients.[27] When the judiciary determines that the press has interfered with the right to a fair trial and the need for orderly procedure, it enforces this judgment through contempt proceedings.[28]

Early cases dealing with freedom of the press invoked the rule — vague as it was — that activity of the press that would have a "reasonable tendency" to impede the fairness of judicial activity is subject to contempt proceedings.[29] More recent cases have used the test of whether the conduct constitutes a "clear and present danger" to the orderly administration of justice.[30] Although the difference in these two views seems somewhat hazy and a distinction of degree only, the modern test indicates a relaxation of court restrictions on the press. Despite the inexactness that surrounds this terminology, the following language of the Ohio Supreme Court appears to summarize the current status of the conflict between these two constitutional guarantees:[31]

> "A court in enforcing reasonable court room decorum is preserving the Constitutional and inalienable right of a litigant to a fair trial and in preserving such right the court does not interfere with the freedom of the press."

Right of Privacy

An often cited reason for excluding radio and television is that subjecting a trial participant to public scrutiny violates his right of privacy.[32] This argument has just as often been rejected by the courts in favor of the position that press coverage of a trial does not violate the privacy of those involved in litigation. A majority of jurisdic-

---

[27]See Brannon v. State, 202 Miss. 571, 29 So.2d 916 (1947); State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954), *cert. denied*, 349 U.S. 929 (1955).

[28]*Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927); see Address by Florence E. Allen, Regional A.B.A. Meeting, 19 F.R.D. 16, 39 (1955).

[29]See Bridges v. California, 314 U.S. 252, 279 (1941) (dissenting opinion).

[30]Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[31]State v. Clifford, 162 Ohio St. 370, 373, 123 N.E.2d 8, 10 (1954), *cert. denied*, 349 U.S. 929 (1955).

[32]See *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956).

tions have adopted this view as exemplified in the following language from a recent Florida case:[33]

> "Where one, whether willingly or not, becomes an actor in an occurrence of public or general interest, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence."

APPLICATION OF CANON 35

Canon 35 is binding only in jurisdictions in which it has been adopted by statute or ethical code of an integrated bar. Furthermore, there are few sanctions to be used against a judge who does not wish to follow the dictates of the canon in his court. In Florida, the Supreme Court has held that The Florida Bar has no authority to take disciplinary proceedings against a judge.[34]

Although most American courts exclude photographic, radio, and television coverage of trials, this is not the universal practice. The National Association of Radio and Television Broadcasters lists fourteen states[35] in which some coverage condemned by Canon 35 is allowed. Although Florida is not listed by the Association, a random survey of Florida newsmen indicates that in many courts Canon 35 is ignored.

Mr. Ralph Renick, News Director of WTVJ, in Miami, writes that "most municipal judges permit our cameramen to take silent and sound-on-film motion pictures of trials, as long as the normal room lighting is used for illumination." Mr. Renick reports that a criminal court judge in Dade County allows silent moving pictures to be taken during trials, but that the camera must be placed outside an open rear door. For many years, trials in the Miami night municipal court were regularly aired on radio.

In the higher courts of the state, photographic and television coverage is rare, but a circuit judge in Dade County, presiding at a trial that was televised with his permission, was quoted from a telegram as commenting:[36]

---

[33]Jacova v. Southern Radio and Television Co., 83 So.2d 34, 36 (Fla. 1955); see Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929).

[34]*In re* Investigation of a Circuit Judge, 93 So.2d 601 (Fla. 1957).

[35]Colo., Ga., Ill., Iowa, Minn., Miss., Neb., N. C., N. J., N. Y., N. D., Okla., Tenn., Tex.

[36]Address by Karl F. Steinman to Charleston Bar Meeting, Oct. 20, 1954, quoting

"Decorum was preserved. Could not tell TV cameras were present. Matters of public interest and public record should be made public. Open trial is public trial. Widest publicity of processes of justice serves public confidence and observance of law and order and respect for court."

A St. Petersburg editor reports that, in the Sixth Judicial Circuit, Canon 35 is strictly observed in the circuit courts but less frequently enforced in justice of the peace or municipal courts.

Although most circuit judges apparently have no objection to photographing and telecasting in the corridors and other locations outside the courtroom proper, a Tampa telecaster reports that one of his cameramen was cited for contempt after failing to heed the order of a Tallahassee municipal judge to destroy some film exposed outside the courtroom. Circuit Judge Stanley Milledge recently lodged contempt charges against several Miami newsmen who took photographs in a corridor of a rape trial defendant. An appeal is now being prosecuted by the newsmen, which may result in a Florida Supreme Court determination of whether photographs may be made outside courtrooms with impunity.

AGITATION FOR CHANGE

With Canon 35 and similar provisions strictly observed in most courts, the press has taken up the gauntlet to produce a change. Journalists, in order to hasten some modification of restrictions, continue to use their great resources for molding public opinion to exert pressure on the bar.[37]

The press persuasively argues that radio and television are important news sources for the public.[38] At the close of 1957 there were an estimated 194,600,000 radio and television sets in use in this country.[39] The press insists that these can be well utilized to educate the citizenry as to the nature and meaning of the rights preserved through the judicial system. The bar questions whether the motive of the press is actually to inform and to educate the public or to entertain, with resulting profit. Will there be commercial sponsorship of such broadcasts? If so, what will be the effect? Will only one party's

Judge Pat Cannon.

[37]Tinkham, *Should Canon 35 Be Amended?*, 42 A.B.A.J. 843 (1956).

[38]*Ibid.*

[39]WORLD ALMANAC 84 (1958).

side of the case be presented to the radio and television audience; will only part of a witness's testimony be broadcast?

The bar and bench maintain that batteries of cameras, a maze of wires, glare of floodlights, and other undesirable incidents of such coverage tend to detract from the dignity and decorum essential to a proper judicial atmosphere. Because of recent technological developments, the press contends that this argument is no longer valid. Newsmen have staged repeated demonstrations in an effort to convince the legal profession that they are now able to broadcast and televise judicial proceedings without disturbing normal dignity and decorum.[40]

Another objection voiced by the bar is that the presence of radio and television tends to distract witnesses and is conducive to stage fright. The press proclaims that their presence actually improves the quality of the testimony. The witness who fears that his audience will know if he lies is more likely to tell the truth.

The press also points out that the wholesome influence of the "public eye" extends to the court and counsel. Radio and television can often more exactly and more completely keep the public informed than can printed news alone. Not to be denied, the press contends, is the salutary effect that wider publicity would have on legal reforms, both as to substantive and procedural matters. Furthermore, more publicity should tend to discourage attorneys' use of demagogic tactics before juries. The bar expresses some apprehension, however, that court officials might be more concerned with making a favorable impression than with trying the case at hand.[41]

Prominent journalists also call attention to an inconsistency in the A. B. A. canon. The first paragraph of Canon 35 excludes the media because their presence is calculated to *detract* from the "essential dignity" of the proceedings. The second paragraph, however, makes an exception and permits such reporting of naturalization proceedings for the express purpose of publicly *demonstrating* their "essential dignity."[42]

With the growth of television, newsmen in Florida have taken every opportunity to attack Canon 35 and to use their influence to convince the bar that it is obsolete. Mr. Renick of WTVJ in Miami,

[40]See Panel Discussion, Regional A.B.A. Meeting, June 11, 1955, 19 F.R.D. 16 (1955); *In re* Hearings Concerning Canon 35, 296 P.2d 465 (Colo. 1956); Miller, *Should Canon 35 Be Amended?*, 42 A.B.A.J. 834 (1956).

[41]Address by Florence E. Allen, Regional A.B.A. Meeting, 19 F.R.D. 16, 42 (1955).

[42]Miller, *supra* note 40, at 836.

addressing The Florida Bar convention in 1956, made the point that "the Canon doesn't just say that pictures in a courtroom have the effect of detracting from dignity and are degrading. It says they are 'calculated to' detract and degrade." Mr. Renick argued that photographic methods employed in 1937, when the canon was drafted, probably did hamper trial procedure; but, due to technological improvements since that date, photography in the courtroom can no longer be described as "calculated to" detract and degrade.

Replies from Florida newsmen to the random survey indicated a unanimity of opinion: a policy commitment to obey the law in every respect, but strong opposition in principle to the present ban against the camera and microphone in the courtroom. This attitude is exemplified in the reply received from Mr. W. M. Pepper III, City Editor of the Gainesville Daily Sun:

> "Canon 35, the barrier to photographic coverage of trials, has never, I fear, been realistic as far as the small modern camera operating off natural lighting is concerned. . . . Our policy in the coverage of all trials is to remain as unobtrusive as possible. In the question of photographic coverage, we would operate strictly within the wishes of the court itself."

Recent Developments

In Colorado

Recently, in Colorado, the press won its first major victory in opening trials to the camera and radio. A petition was submitted to the supreme court of that state with a prayer that Canon 35 be amended.[43] The court appointed Mr. Justice Moore as referee to hold hearings on the proposed change. During the course of these hearings newsmen installed various equipment to demonstrate to the justice the antiquated nature of the canon. Justice Moore reported that of all the photographs taken at the hearing, he was actually aware of only one or two. He further stated that a newsreel camera operated for half an hour without his knowledge and that radio microphones were so placed that he did not know of their location. No special lighting was used, and all equipment was capable of installation outside the courtroom with only the lens appearing on the interior wall.

---

[43] *In re* Hearings Concerning Canon 35, 296 P.2d 465 (Colo. 1956).

As a consequence of the favorable impression made on Justice Moore, he recommended amending Canon 35 to permit the court in its discretion to allow radio and television broadcasting of trials, provided no objection is raised by the principals in the cause. The supreme court adopted his report, and Canon 35 was amended in conformance with his recommendations.

In the A. B. A.

Another giant step along the road to a sensible solution of this controversy was recently taken by the press. The House of Delegates of the A. B. A., meeting in Atlanta, resolved itself into a committee of the whole in order to hear the media representatives for the first time and to entertain a debate on Canon 35. Unfortunately from the press's point of view, at the culmination of the debate the delegates decided to defer further consideration of a revised Canon 35 until the annual meeting of the A. B. A.[44] At any rate, this action by the bar is a milestone in the ever-present conflict and undoubtedly encourages the battle-weary journalists.

CONCLUSION

In general, the position of the bar in regard to this problem is embodied in canons, court rules, and statutes. If one should casually peruse these sources, the law would seem to be well settled. The continued efforts of the press throughout the years, however, have brought about dissatisfaction in many quarters, and the various restrictions are sometimes disregarded. This indicates a growing sentiment among members of the bench that such coverage is unobjectionable, or even desirable, as a means of educating the public on judicial procedure.

Continued improvement of the apparatus necessary for trial coverage will also be a factor insuring renewed effort by the press. It should be apparent to the legal profession that photographers and broadcasters are determined to gain a place in the courtroom.

The debate over the various constitutional rights will continue to be relegated to a secondary position behind the more practical considerations of dignity, decorum, effect on witnesses, and other factors in the minds of judicial officers. They will find weight in

---

[44]See 6 A.B.A. COORDINATOR AND PUBLIC RELATIONS BULLETIN 3 (1958).