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SHOULD CANON 35 OF THE CODE OF JUDICIAL ETHICS BE REVISED?

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Ordeal by Publicity is the legitimate great grandchild of Ordeal by Fire, Water and Battle. The physical harm of those ancient adjuncts of trial was more direct and severe than that of their present-day descendant, but it is likely that the mental and spiritual injury to the litigant and the damage to society generally resulting from the violence of unnecessary publicity are immeasurably greater.

Whatever there may be of public value in photography, radio and television as currently used in legislative hearings and similar proceedings of deliberative bodies, it cannot be thought to apply to the search for justice in the trial of cases in the objective, orderly and dignified manner basic to our American version of Anglo-Saxon judicial tradition. The heat and interest generated by recent legislative hearings may strongly incline us to deviate from the precise question for consideration today, but the temptation to comment and compare should be resisted because the basic purposes and procedures of legislative hearings are entirely different from those of the trial of lawsuits, no matter how much the good or bad effects of publicity may be common to both. It may not be amiss, however, to quote a recent statement by a leading journalist in a *Life* magazine article:

> If the [McCarthy-Army] hearings have proved anything to date it is that courtroom procedure, with its strict rules on conduct and introducing evidence, is a most marvelous human invention.

After examining a good many of the considerable number of articles, treatises and speeches dealing with the subject for discussion today, I feel that nothing would be more helpful in clarifying the situation than an "A-B-C" review of the basic principles upon which any intelligent and dispassionate discussion of the subject must rest. Accordingly, at the risk of boring you with reviewing what you already know—but certainly should have in mind—I propose to take a look at the question as though it were a matter of first impression.

The cruelties, outrages and perversion of justice resulting from the proceedings heard in Star Chamber and in the Inquisition shockingly reveal the imperative necessity for guaranteeing that the guilt or innocence of any person accused of wrongdoing be tried and determined by

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public trial. It is unthinkable that anyone living in the free world outside the Iron Curtain would entertain a thought to the contrary even for a fleeting moment. On the other hand, it is of paramount importance that we keep in mind what the true meaning and purposes of "public trial" are.

At the time of the framing of the Constitution of the United States, when the horrors of the Inquisition and the atrocities of the Star Chamber were far fresher in mind than they are today, the only constitutional provision relating to public trial was written into the Sixth Amendment, which provides:

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

In the first place, it should be observed that the guarantee of public trial was only for criminal cases. Also, we should particularly note that the very language of the clause, and the balance of the Amendment, make it plain that the guarantee of public trial is for the benefit of persons charged with crime which, as the amendment says, is a right "the *accused* shall *enjoy*."

It is significant that the Constitution does *not* say that the public has the right to "enjoy" or even attend trials. There is nothing in the constitutional language indicating that any individual other than the accused in a criminal trial, and those of service to his defense, has either a right to attend the trial or to publicity emanating from the trial. This proposition is fully applicable to the gentlemen of the press and other publicity agencies, notwithstanding the freedom of press guarantee in the First Amendment, which accordingly is not involved in a consideration of Canon 35. These undisputed principles and the reasons for them are stated or implied in the much quoted statement by Cooley in *Constitutional Limitations* (Vol. 1, 8th Ed., 1927, at page 647):

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend

notwithstanding that those persons whose presence could be of no service to the accused, and who would be drawn hither by a prurient curiosity, are excluded altogether.

Apart from constitutional and legal requirements what considerations are involved?

Regardless of public interest, concern or curiosity, the primary, if not sole, purpose of any lawsuit is that the particular case on trial be fairly and impartially determined in as calm, detached and dispassionate a manner as it is reasonably possible for mortal beings to attain. The public's only legitimate interest or concern in any particular trial is that the trial be conducted in the manner indicated. Beyond that, the general public, aside from indivduals personally concerned in one way or another, have no proper claim to attendance, or to publicity by newspaper, radio, TV, or otherwise, whether arising from idle or morbid curiosity, entertainment or even education. Trials are conducted for the purpose of deciding cases as justly as human frailty will permit. If there be any reason for permitting publicity of any kind or to any extent whatever concerning any specific trial, it can only be for the purpose of assuring a fair and proper conduct of the particular trial, and trials generally, in a manner best calculated to accomplish true justice.

Our sole concern then with the present proposal for enlarging the legitimate field of publicizing trials should be whether it will help or hinder in the matter of assuring properly conducted trials designed to reach just results. If it would help, the proposal should be accepted; if it would hinder, or reasonably might hinder, the proposal should be rejected. Judged in this light, the negative answer seems to me so clear and convincing as hardly to admit of reasonable doubt.

Canon 35 was adopted in 1937 and amended in 1952 to include television. The necessity for some regulation of the kind was widely recognized by reputable and responsible representatives of press, bar and bench following the outrageous manner and extent of publicity given a number of criminal trials, including the Hall-Mills murder case and the trial of Hauptman for kidnapping the Lindberg baby. Canon 35 was drafted and approved by the ABA following extended, painstaking and thoughtful study of the subject by a committee consisting of eminent lawyers and of editors and publishers of the highest reputation in their field representing a wide variety of experience and opinion in that field. On that committee the members actively engaged in the publicity

business outnumbered the lawyers two to one and the views, problems and interests of publicity people were given full expression and consideration before Canon 35 was adopted. The Committee report included the following:

> . . . The committee is unanimous in believing that the highest interests of society require a system of judicial administration which, without fear or favor, will protect the rights both of society and of persons accused of breaching its peace. We are likewise unanimous in believing that all extraneous influences which tend, or may tend, to create favor, prejudice, or passion should be eliminated. (Reports of American Bar Association, Vol. 62, 1937, page 853.)

Considering the care with which the Canon was enacted, the character and ability of the men who drafted it, and its subsequent approval, in one form or another, by many of the States and in the Federal Rules, we may well ask: What, if anything, has developed in the past seventeen years to require or even suggest that the Canon needs revision? At the risk of being charged with a desire to return to, or remain in, the "horse and buggy days" I express the opinion that experience under Canon 35 has demonstrated the necessity of its unmodified retention, rather than the contrary.

It seems to me that the principal argument of the proponents of revision rests on the mistaken theory that the provision for public trial creates or implies a right on the part of the public to attend any trial and that, inasmuch as courtrooms are small and only a limited number of people can personally attend a trial, far greater numbers could enjoy the privilege of seeing and hearing the whole or portions of the proceedings if photographs, radio and television were given a more extensive franchise to operate in and about the courtroom. The basic fallacy of this argument has already been covered. The right to public trial is for the protection of parties litigant—not for their abuse. Neither is it for the amusement or instruction of the public.

Many of the proponents of revision argue, as did the editors and publishers on the 1937 committee, that the use of photography, radio and TV in or about the courtroom should be left to the discretion of the individual judge presiding at a trial. This solution, while flattering to the vanity of judges, in my opinion is wrong both in principle and practice. The serious harm of trial by or with publicity is so great that no individual judge ought to have the power of inflicting it under any circumstances. The legitmate occasions for permitting exception to a

general rule of exclusion would be so few as not to justify granting the power of exception. Experience has amply proven that photography, TV and radio are rarely suggested except in sensational criminal or scandalous civil cases. Judges, whether elective or otherwise, ought not to be subject to the pressure which publicity agencies might exert upon them if the protection of Canon 35 were removed. Finally, leaving the matter to the discretion of the judge is to place in his hands the power of discriminatory censorship—an evil rightly condemned and long fought even by the most vociferous opponents of Canon 35.

An argument made by those in the publicity business is that techniques and equipment for photography, radio and television have already progressed, or soon will do so, to the point where the physical distraction and annoyance formerly incident to their use have been greatly reduced and in the near future may be practically elimnated. Undoubtedly there is much merit in this contention and if this were the only consideration involved it might justify some revision of the Canon. In my opinion this is the only pertinent condition which has changed since Canon 35 was adopted. Every other reason for the original adoption of the Canon remains in effect, and today has more force than ever.

These reasons I can only briefly summarize. Before doing so, however, it should be recognized that it is not entirely accurate, in considering the application of Canon 35 to publicity agencies, to group newspaper reporting, radio and television broadcasting and to treat them without distinction. Important differences between them stem from the fact that newspapers have much greater opportunity than radio and TV for control of the material released for publication. The newspapers point out that in direct broadcasting radio and TV have very limited control over the release of objectionable and improper material; on the other hand, TV and radio claim to report more fully and fairly because their power to edit (and thereby "slant") is more restricted. I do not go into these arguments pro and con between the publicity agencies because every argument each advances against the other only adds to the weight of the argument against all in so far as revision of Canon 35 is concerned.

First: Witnesses, jurors, parties, attorneys and the judge must give undivided attention to the serious and all-important matter of attending to the case on trial. To err is human; even with no distraction whatever it is difficult enough to search out the truth as to facts and

correctly determine and apply the law. No reasonable person, be he editor, broadcaster or televiser, attorney or judge, can deny that picture taking, broadcasting and televising involve some confusion and distraction, however skillfully accomplished with the most modern equipment. Substantial distraction from the business at hand is bound to occur whenever the attention of any participant in a trial is directed toward posing or performing for public consumption. The very concealment of the means and occurrence may amplify the distraction since no one can know at what moment he may be on the air, the TV screen or posing for the next edition of the papers.

Second: The psychological effect on anyone legitimately concerned with the conduct of a trial if he knows that he is or may be performing for an extensive unseen audience, as well as for those directly concerned with his performance, can be easily understood even by one who has never been scared stiff by a microphone or embarrassed in the eye of a camera—whether television or Brownie. Hardened indeed is he among those present who will not be given concern for the superficial aspects of what he says or how he looks when the mike is on or the shutters are snapping. Whatever it might do for judges, lawyers or jurors, for witnesses it would be devastating! In many years of extensive trial practice I have seen but few witnesses take the stand who were not hindered in testifying by reason of apprehension, nervousness or plain stagefright.

It is difficult enough for the honest, conscientious witness, unaccustomed to court procedure and the tension of a trial, to relate what he knows in an understandable fashion and without confusion. If these unavoidable human characteristcs jeopardize the full and fair disclosure of "the truth, the whole truth and nothing but the truth," it is simply preposterous to suggest that as good a result will be obtained if the witness at the very moment of his testimony may be, and knows that he may be, under the scrutiny of a considerable audience outside the courtroom, only a very few of whom have any direct interest in a proper result for the proceeding at hand.

A further point in this connection arises from the almost universal reluctance of persons not directly interested in a lawsuit to appear and testify as witnesses—a circumstance which constitutes a substantial obstacle to the administration of justice, as is well known to every lawyer with any trial experience. This being so, how much

greater the obstacle if the limited protection from undesired publicity now afforded witnesses under Canon 35 be relaxed or removed.

Third: Photography, radio and television of court proceedings, at very best, would involve only fragmentary presentation of the trial. Even if an entire trial be broadcast or televised it is unlikely that more than a few of the audience of the air would see or hear more than single scenes or acts of the "performance." In a trial we carefully caution jurors, and as judges remind ourselves, that final verdict or decision must await and rest upon all of the evidence and all of the instructions as a whole. Is it right or fair to the public themselves, let alone to the parties litigant, that public judgments rest on any less? It is true that the same argument may be made with almost equal force to newspaper reporting of trials, but that does not eliminate or diminish the evil. To that argument we must simply say it is regretable that newspaper accounts of court proceedings do not, or cannot, await the final result and more fully and fairly report what has occurred. It is further regretable that some individual judges permit violations of the letter and spirit of the Canon. To amplify and give more effect to an existing evil by broadening its power and scope, or increasing the frequency of its occurrence by relaxing the Canon, is hardly a reasonable way of mitigating the evil.

A further point deserving of special mention is the misconception of judicial proceedings which will arise in the public mind if we permit trials to be programmed somewhat in the manner of wrestling matches, with or without sponsor. Generally speaking, the people of America have a high regard for and confidence in their courts, and it is vital to our way of life that they continue to feel so and be justified in their faith. The people believe that courts are committed to pursuing truth and judging rightly irrespective of public clamor or opinion of the moment. Few, even of those joining in clamor at a given moment, in their calmer judgment would really want a court to be even remotely influenced in its judgments by opinion outside the courtroom. How could the people retain faith and confidence in courts if courts so obviously seemed concerned with the hour-to-hour opinions of radio and television spectators, or even newspaper readers? It is hard for me to believe that anyone seriously and conscientiously considering the matter can honestly supply a satisfactory answer.

For lack of time I will mention only one other reason for Canon 35, because it leads to the final thought I wish to leave with you. I refer

to the controversial matter of the "right to privacy." As we know, violation of privacy by sensational publicity is a commonplace and lightly regarded in America. Whether this is a serious harm in theatrical, sporting, business or political life is not for our concern here today, but can there be a one of us, even the gentlemen of the opposition, who honestly believe the ends of justice are served by publicity of this kind emanating from the courtroom? With some possible exceptions, the only persons concerned with intimate details of courtroom proceedings are the participants themselves. Is there any real reason why any person, summoned or voluntarily appearing in court for the purpose of seeking or aiding in establishing justice, thereby should be made a free target of public curiosity? I think unnecessary violations of privacy against those involved in litigation serve no useful private or public purpose and ought to be condemned. I think it is another reason why Canon 35 should not be changed.

Finally, I wish to suggest for your consideration that rather than enlarge and extend the publicity arising from trials, we ought to consider further restricting it—not necessarily by fiat of canon rule but at least by an appeal to the conscience and self-restrain of those entrusted with responsibility for releasing publicity. Presumption of innocence is one of the most sacred and important principles of our Constitution and judicial processes. Every jury in a criminal case is admonished in the most emphatic terms that in this country every person, no matter what his station, character or record, is presumed to be innocent of the crime with which he is charged. In accordance with our law, we charge the jury that the presumption of innocence attaches to the defendant and continues with him throughout all stages of the trial and throughout the deliberations of the jury until the jury find as a fact from the evidence and under the law that the presumption has been overcome beyond a reasonable doubt. I cannot imagine that any newspaper man or any radio or television operator will suggest for a moment any change in these principles so fundamental to our liberties. If so, why should we permit the fact of a charge being laid, the details of a trial, or any other matter relating to a criminal prosecution to be unnecessarily disseminated to the public before it has been judicially established that the person charged is guilty? If we would give more than lip service to the presumption of innocence and would put real substance and effect into it, would we not be well advised to let the general public await introduction of all of the

evidence and the verdict of the jury, before we irreparably damage the person entitled to the presumption of innocence? Because many accused persons are convicted, or that many defendants in criminal trials are not virgin to such proceedings, cannot possibly justify the wrong we do to the innocent, even if found to be few.

Self-interest, if not concern for our more benighted or unlucky brothers, suggests that we give objective thought to the matter while we may. Personally, I prefer trial by court and jury, within the reasonable restraints of Canon 35 in the high tradition developed over centuries, to trial by or with publicity—however "modern" or "liberal" its proponents may claim it to be.