North Dakota Law Review

Volume 41 | Number 1 Article 1

1964

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FREE PRESS V. FAIR TRIAL: THE BROADCASTER'S VIEW

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Courts, since ancient times, have had a dual role peculiar among public institutions: they have had an obligation to the individual—the assurance of justice—and an obligation to society—the assurance of stability. In an open society, this role carries with it a special burden because in such a society, the courts, like all other public institutions, are without the protective veil of any mystical authority. As a contemporary British thinker has put it, ". . .the closed society breaks down when the supernatural awe with which the social order is considered gives way to active interference. . . ."[1]

One of the most salubrious forms of active interference, especially for a society that is democratic in method, and a necessary ingredient in any open society, is criticism.

Because criticism is the lifeblood of open societies, if it is not based on knowledge rather than ignorance, respect rather than fear, and confidence rather than suspicion, it is going to be erosive, hostile, and destructive. Here, all the media of communications in this country have a very real responsibility—one that has not been wholly met in the case of the courts.

Perhaps there has been an insufficient realization that it is no less essential for the citizen of a democratic society to know what the courts are doing, and why, than it is to know what the legislatures and the executives are doing, and why. What any court does is not just the business of the higher courts and the bar. The functioning of all the courts is a prime business—a first responsibility—of the whole body politic. It is the business of people to prevent or correct, for example, the plight into which the judicial systems of the nation, the states, and the municipalities may get as a result of inadequate appropriations or inadequate manpower in the face of overwhelming pressures of population growth. The appointment or election to the bench of the best men available is everybody's business. Above all, confidence in the courts, without which all our institutions would collapse, must have its roots in the consensus of all the people, not just a few occupying special positions of interest and contact.

This kind of concern, of a public sense of responsibility, and of popular confidence, cannot be turned on when it is needed and

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1. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 294 (1963).

turned off when it seems troublesome. It must be constant. But the only way that it can be constant is by making it possible for the people of the country to touch base with the courts frequently and directly, just as they have become accustomed to doing in the case of their President, governors, mayors, senators, and representatives. It is the job of the press—all of it: television, radio, newspapers, magazines, and books—to bring this about. In some cases it has done this most effectively—for example, in the case of the Presidency. In some cases, particularly the courts, it has carried out this high and necessary mission falteringly, sketchily, inadequately.

The broadcast media—radio and television—have been far less effective in reporting the activities of the courts than they could be. This is the more disturbing because today we are living in an age of electronic communications. This does not mean the end or even the diminishing of other forms of communications, each of which will always have distinct and unique functions to carry out. But it was discovered recently, for the first time, that the burden of being the primary source of news to the most people in this country has shifted from newspapers to television, when fifty-five per cent of the American people said that they got most of their news from television, while fifty-two per cent named newspapers, as compared to fifty-two per cent for television and fifty-seven per cent for newspapers two years earlier.[2]

In spite of this reliance by a majority of Americans on television for their news, the Supreme Court of the United States is still closed to the camera and the microphone. State, county, and municipal courts—except in a few jurisdictions where it is left up to judicial discretion—are still closed to the camera and microphone.

Up until the development of electronic communications, direct access to the courts by the people was necessarily limited. Courtrooms are small, and the distances to them, for the vast majority of people, prohibitively great. And so the public rarely witnesses proceedings of the courts and depends upon the reports in the press, which has meant largely the newspapers. The quality of this coverage has been as varied as the quality of the newspapers and their reporters. Those given to sensationalism have been on the prowl only for sensationalism; those with a more thoughtful sense of their mission have concentrated on really significant cases. But all of them have been secondhand accounts—for the reader in no way comparable to witnessing the proceedings for himself.

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2. ROPER, NEW TRENDS IN THE PUBLIC'S MEASURE OF TELEVISION AND OTHER MEDIA 2 (1964). In both cases, some respondents named both, thus accounting for the percentile overlap.

A clear vision of the true opportunity the broadcast media offer for strengthening knowledge of the courts by the people has been badly obscured by the troublesome problems that keep arising from the often ill-considered and disproportionate treatment of criminal trials. These problems need to be faced with far more resolution than they have been in the past, and with a longer, deeper look. Whether the life or liberty of any individual in this land is permitted to be put in jeopardy because of actions of any news media ought not to be even debatable. Such practices as publication of alleged confessions, declarations of guilt made by police, and attempts to try cases in the press, away from the safeguards of the courtroom, ought to be eliminated in a just society.

The real problem is not whether to do it, but how to do it, without sacrificing the freedom of inquiry and of reporting, which the courts would be the first to maintain are necessary to all institutions in the open society, except the courts themselves.

A tempting prospect—because it appears swift and sweeping—is a statute specifying what cannot be published or broadcast, or when it can be. Such a statute, even if its constitutionality were upheld, would generate far more serious and less isolated problems than it would cure. Not the least of these would be imposing upon the courts the explosive job of sitting in virtually continuous judgment over the press. The costs of the constant surveillance, and the trials and appeals of erring publications and broadcasting stations, would far outpace such costs in the occasional cases now involving prejudicial publicity.

But that is not the important thing. The important thing is that a wedge would be driven between the courts and the communications media so wide and so deep that the entire judicial system would be gravely, continuously, possibly irreparably, weakened. Certainly the courts of this country would hardly welcome opening up any such prospect as policing the press, subjecting to scrutiny, possibly leading to arrest and punishment, what every newspaper, magazine, radio and television station publishes or broadcasts, relating not only to trials but to pre-trial information divulged by the police or private citizens. It would be difficult—perhaps impossible—to draw lines between what is publishable and what is punishable—except after the fact. In view of appeals and retrials, it is hard to see how a "safe" time to publish temporarily proscribed materials could be established. Nor could hostilities between a press subject to constant judicial inspection and judges thus burdened quietly end with the punishment or acquittal of the news organization. Surely they would leave a residue of bitterness that would hang over both the press and the courts. This could be highly hazardous when the public looks for information and guid-

ance to the news and discussion media on such matters as the election of judges, legislation affecting the courts, executive appointments to the bench, and the reporting of other cases and judgments of the courts.

A more realistic and manageable course than plunging the courts into such a maelstrom lies in the direction of controlling the conduct of those responsible for the apprehension, custody, and trial of the accused.

Newspapers and broadcasting stations do not extract confessions. Newspapers and broadcasting stations do not ordinarily originate evidence. These materials are usually furnished the press by overzealous police or by too ardent prosecutors and defenders. The way to stop them from appearing in the press seems to me to be to stop them from being issued to the press. To the layman it is somewhat mystifying that Canon 20[3] of the American Bar Association on this subject seems wholly unenforceable, while Canon 35,[4] forbidding cameras in courtrooms, has seemed relentlessly effective. But if the canons of the bar associations are for some reason unenforceable in this respect, then the hands of the courts must obviously be strengthened.

It hardly seems necessary, however, to conclude that the press, the bar, the police, and all others concerned are so venal that coercion and threats of prosecution are the only avenues by which situations resulting from excessive zeal in some cases and honest confusion in others can be corrected.

It was such considerations that led me last spring to suggest an inquiry by The Brookings Institution into the whole question of journalism's practices and methods in covering governmental institutions, the policies of the institutions governing their relations with the press, and the extent and rationale of the closed door fiats that categorically ban anything but a lead pencil from covering such fundamental governmental processes as significant proceedings of the appellate courts, sessions of the Congress and of state legislatures, and open hearings on matters of wide and deep public interest. The Brookings Institution staff for governmental studies has proposed a project which seems to me most promising, and which was authorized by The Brookings Board of Trustees at its last meeting.

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3. CANONS OF PROFESSIONAL ETHICS, No. 20: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement."

4. CANONS OF JUDICIAL ETHICS, No. 35: "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. . . ."

The American Bar Association, the deans of law schools, distinguished jurists and attorneys all over the country have responded to the announcement of this study with interest and explicit offers to help. Many responsible representatives of the news media have expressed a serious and purposeful interest in this approach to finding a solution to these perplexing problems.

There are always, of course, those who are unwilling to discriminate between liberty and license or between freedom and anarchy. But the pace of human progress cannot be set by those who lag farthest behind, nor can the capacities of a great and responsible people be defined by those whose vision of their duties is narrowest. Out of the tragic debris of the aftermath of events in Dallas last November has come a deepened awareness of the extralegal obligations of all citizens. In sensitive areas like this, where the law is reluctant or unable to intervene, there is new hope of voluntary action that can bring about essential reforms, without adding to the burdens of the courts or subtracting from ancient ideals of freedom that, however imperfect, must be permeating.

But preoccupation with problems that are as old as the town crier ought not to delay forward movement in other and possibly generally more pressing areas. The quite justifiable concern about the reporting of trials and their preliminaries ought not to blind communications media and judicial institutions to the need for more extensive, more immediate, and more compelling reporting of significant proceedings and judgments of the higher courts that involve neither witnesses nor juries.

The courts at the appellate levels very often enunciate broad public policies on social, moral, and economic matters which, in a self-governing society, are just as susceptible of ultimate oversight by the citizen as executive or legislative actions. Yet no part of the proceedings of these courts comes directly to the citizen. He is entirely dependent upon the often tenuous objectivity of the news vehicle reporting arguments, opinions, and dissents. In cases charged with emotion, such as civil rights and prayer in the public schools, the most maimed impressions are left in the minds of the people. Misconstructions, misinterpretations, and distortions of court decisions are inevitable if the only voices in government to whom the people are denied direct access are the voices of the judges.

As a result, great and historical decisions that ought to be clarifying the most basic issues in our civil life are sources all too often only of further division and controversy. High courts, in some respects the only forces of reason in our society, are regarded all too often as speaking *ex cathedra* from distant and aloof pinnacles

of power to which only the initiated have access. Judges, laboring long, earnestly, and with wisdom to reconcile the complex realities of our time with the necessary principles of a free people, are all too often the subjects of uninformed attacks. Finally, the vast educational potential of the higher courts as continuing constitutional conventions is reduced to an echo and a murmur.

It is for these reasons that many responsible people in broadcasting have urged the opening of the higher courts to the broadcast media's cameras and microphones. They are persuaded that the premises of the open society require it, in the interest both of strengthening the judicial institutions and of enlightening the people.

No question of disturbing witnesses arises here. No question of distracting juries arises. Objections that lawyers or judges would play to the galleries seem a poor and unsupportable indictment of judges and their ability to control the behavior of the officers of the courts. Finally, the cumbersome, disruptive equipment that once beset audio and visual communications is no longer necessary. There are now in use television cameras measuring 5 x 4 x 10 inches, including the lenses, and weighing six and a half pounds, and they can use the ordinary light available in the courtroom. The camera and the microphone need not be any more intrusive than the movement of a lead pencil and can be infinitely more accurate.

Television coverage of the UN is an excellent example.

Every open session of every United Nations body—the General Assembly, the Security Council, the commissions, and the committees—is available for coverage by television cameras and radio microphones. Every chamber of any size has built-in camera accommodations, adequate lighting, and permanent microphones. In times of the tensest crisis, over and over again, by simply flicking a switch, United Nations proceedings have gone out over the air live. As a matter of routine, television is used to record deliberations on tape for later broadcast.

The dignity of the United Nations has not suffered because of it. Delegates—despite the fact that tapes are made available to them to send home—have not played to the television audience. The debaters have not been distracted. And the force of these broadcasts in educating the people not only as to the issues but as to the United Nations itself has been incalculable.

If—in spite of the wide diversity of language and of national temperament and tradition, and in spite of the highly charged atmosphere of potential world conflict—the United Nations has no

problem with television, it is unlikely that our judicial institutions, with no disparity of tradition, practice, and language, should.

Electronic communications, in this time of social unrest, offer the higher courts of the states and the nation an opportunity fully to bring the people, whom they serve, and to whom they are ultimately answerable, within reach of their presence, their intellectual influence, and their moral force. To realize this opportunity is clearly in the interest of the courts. It is overwhelmingly in the interest of the people.

The powers of emotion, of fanaticism, and of impetuosity in this hectic age and in this burgeoning country are infectious and many. The powers of reason, of deliberation, and of thought are, in comparison, lonely and few. The broadcast media and the courts can together give them new horizons.