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NEWS MEDIA COVERAGE OF CRIMINAL CASES AND THE RIGHT TO A FAIR TRIAL*

Warren Freedman**

I. THE RIGHT TO AN OPEN OR PUBLIC TRIAL

A fair and open trial has long been recognized as a right of an accused under the Sixth Amendment to our Constitution:¹

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 defense.

¹Citations to and discussions of relevant Nebraska and general materials have been supplied by Staff member Sheldon Krantz, presently a junior, University of Nebraska College of Law.

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¹ U.S. CONST. amend. VI. As to the “speedy” trial to which this amendment entitles an accused, the interval between the filing of the indictment and the commencement of trial must be reasonably brief. However, should the accused acquiesce in or himself request successive delays of his trial, he in effect has legally waived his guaranteed right to a speedy trial. People v. White, 2 N.Y.2d 220, 140 N.E.2d 258, 159 N.Y.S.2d 168 (1957). But, in People v. Piscitello, 7 N.Y.2d 387, 165 N.E.2d 849 (1960), the New York Court of Appeals reversed a conviction entered on a plea of guilty where the accused had not waived his right to a speedy trial. The court held that the fact that he had been held for seventeen months in the federal detention headquarters, awaiting disposition of federal charges, afforded no explanation nor excuse for the delay; the accused could have been produced in the state court on request and then returned to federal custody.
Similarly it is so under more than forty state constitutions, including express statutory guarantees such as in Section 12 of the New York Civil Rights Law and Section 4 of the New York Judiciary Law, the latter statute requiring that "the sittings of every court within this State shall be public and every citizen may freely attend the same . . . ." It is questionable, however, whether in New York the public has any legally enforceable right to attend trials in view of the pronouncement in *United Press Ass'n v. Valente* to be discussed hereinafter. Ohio, on the other hand, has vested in the public an enforceable right to attend an open trial under Article I, Section 16 of the Ohio Constitution, to wit: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, . . . ."

Justification for open trials dates back to the traditional Anglo-Saxon distrust of secret trials ascribed to the Star Chamber. In these early days the English town, village, or city had responsibility for apprehending criminals, rather than any national governmental body, and it was therefore natural to expect the public to report the facts of the crime, and then to judge the guilt of the offender. The modern jury system grew up from such beginnings. In the *Oliver* case, the United States Supreme Court seemed to justify open trials as (1) a safeguard against attempts to use the courts as an instrument of persecution; (2) a notice to witnesses who will be encouraged to give voluntarily pertinent and truthful evidence; and (3) a public feeling of confidence in judicial remedies by observing the courts in action. The Supreme Court of Montana

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2 The Nebraska Constitution provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." NEB. CONST. art. I, § 11 (emphasis added). [Ed.]

3 NEB. REV. STAT. § 24-311 (Reissue 1956) provides: "All judicial proceedings must be public unless specially provided by statute." [Ed.]


6 *In re Oliver*, 333 U.S. 257 (1948). The court held that Michigan had denied a grand jury witness due process of law by convicting him of contempt in a trial from which the public was excluded.
thirty-two years earlier had expressed a similar view in the *Keeler* case:

Primarily it is for the benefit of the accused. . . . But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff, and clerk—conduct the public's business. . . . But the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end.

The famous Blackstone had opined in 1768 that:

This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer or his clerk, 'as was the usual practice' in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; 'for' a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There, 'too' an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken.

The meaning of "open" trial has been construed by perhaps a majority of courts as requiring a public trial where all members of the public must be allowed to attend within the physical limits of the court room. Other courts have delimited the right by declaring that "public" merely means that the trial may not be a "secret" one and that a judge may exclude certain members of the public as long as a reasonable group remains. In jurisdictions applying the former rule, the court must justify any exclusion, while in those adopting the latter the accused must affirmatively demonstrate that he has been hurt by the exclusion. The minority

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7 State v. Keeler, 52 Mont. 205, 218, 156 Pac. 1080, 1083-84 (1916).
8 2 BLACKSTONE, COMMENTARIES 373-74 (Kerr ed. 1876).
9 In Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916), the defendant in a murder trial contested the move of his trial from a small courtroom to a movie theater. The theater was crowded with spectators. The court, in reversing the conviction of the defendant, said: "The law requires that trials shall be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the court-room where the law requires such trials to be held, without interrupting the calm and orderly course of justice." Id. at 204, 158 N.W. at 932. [Ed.]
10 Nebraska apparently follows the former rule. In Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918), the trial court, after conferring with the
view would seem to be patently wrong, since, in a given situation, it may well be impossible to determine just in what way the accused was hurt. However, Professor Cooley has argued:11

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 only be drawn thither by a prurient curiosity, are excluded altogether.

It is this very emphasis upon proof that the defendant must suffer damage before the public can be excluded that has bothered the courts. It is anomalous to condone a violation of fundamental constitutional rights because the individual cannot show specific damage—the violation of the right itself constitutes the damage. To compel production of specific damage items in most cases, in fact, amounts to a total deprivation of the right. The correct view would seem to be that the accused should not be deprived of his right to have the public attend the trial, unless it is demonstrated that granting of the right will interfere with the administration of justice.12

The right of the accused to an open or public trial is, however,

complaining witness in a rape prosecution, ordered those present merely as listeners to retire from the courtroom until authorized to return. The defendant contended that this was a violation of the Nebraska Constitution, Article 1, section 11, which guarantees a defendant the right to a public trial. This objection was sustained. “Under the Constitutional provision, the general public, as such, cannot be excluded. The public is admitted so that it may know that the accused is fairly dealt with and so that his triers will be keenly alive to a sense of their responsibility. Reasonable restrictions, for want of space, upon the number admitted are permissible; also upon persons of immature years where the evidence relates to scandalous, indecent or immoral matters. When those present conduct themselves in a manner tending to obstruct justice, or tending to give either the state or the defendant an unfair trial, the courtroom may be cleared of them. Other occasions may arise when, in the discretion of the court, such order would be permissible. It is difficult to say that the court’s order in this instance did not exclude the general public.” Id. at 752, 169 N.W. at 434. [Ed.]

11 COOLEY, CONSTITUTIONAL LIMITATIONS 380-81 (5th ed. 1883).
12 For a collection of cases discussing this right, see Annot., Exclusion of Public During Criminal Trial, 156 A.L.R. 265 (1945). [Ed.]
but part of the more significant right to a fair trial. Indeed, the failure to understand the difference between an open and a fair trial has been the subject of controversy between the courts and the press, radio, and television industries seeking protection of freedom of press and of speech under the First Amendment. The United States Supreme Court has this past term ruled in a 5-4 decision written by Mr. Justice Frankfurter that the right to a public trial was waived by a failure to object. In this case, Levine v. United States, the court’s earlier decision in the Oliver case was expressly distinguished:

This case is wholly unlike . . . Oliver. . . . This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public’s scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation where prejudice, attributable to secrecy, is found to be sufficiently impressive to render irrelevant failure to make a timely objection at proceedings like these. This is obviously not such a case. Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an after-thought on appeal.

Three dissenter were perturbed because the majority opinion not

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13 The question of a fair trial has been interestingly raised by those misdemeanor cases conducted in justice of the peace courts and presided over by justices having a pecuniary interest in their own decisions. The classic case is Tumey v. Ohio, 273 U.S. 510 (1927). Tumey had been tried and convicted of possessing intoxicating liquor by a mayor’s court in North College Hill, Ohio, after protesting that he could not receive a fair trial because of the mayor’s own financial interest in his conviction. He was tried before the mayor without a jury, without opportunity for retrial, and with review of his case confined to questions of law only. In event of acquittal, the mayor, of course, received no compensation. In this case the mayor’s fee and costs were twelve dollars. The United States Supreme Court, in reversing the conviction and disqualifying the mayor, said: “Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” Id. at 532. Of course, this constitutional objection may be waived, albeit improperly, by the accused himself; indeed, a few courts hold that due process of law is not denied where an appeal on facts and on law may immediately be taken from the trial judge’s decision.


15 Id. at 619-20.
only repudiated the Oliver case "in whole or in part," but simultaneoulsy had approved "a secret trial procedure which apologists for the Star Chamber have always been careful to deny even that unlimited and un lamented court ever used."\textsuperscript{16} The Levine decision also strengthened the Court's position in Brown v. United States,\textsuperscript{17} although the latter case did not involve the identical "exclusion" of the public from the courtroom, as did the Levine case. Brown had been summoned to appear before a federal grand jury investigating violations of the Interstate Commerce Act. Although he was assured that he would be granted immunity from prosecution, Brown refused to answer certain questions on the ground that the answers might tend to incriminate him. He was brought before the judge who, after ordering the courtroom cleared, repeated the questions to Brown, who persisted in his refusal to answer. The judge forthwith held him guilty of contempt "committed in the actual presence of the court."\textsuperscript{18} Brown's conviction was affirmed on appeal. Indeed, the Levine and Brown cases held that the "clearing of the courtroom" was not an exclusion of the public, because the defendants and their counsel were present throughout the proceedings, and furthermore, no specific objection to the "secrecy" of the proceedings was timely made.

The highly publicized New York trial of Minot F. Jelke on charges of compulsory prostitution gave rise to United Press Ass'n v. Valente,\textsuperscript{19} which gave extensive consideration to the elements of both a public and a fair trial. Trial Judge Valente had ordered the general public and the press from the courtroom during the presentation of the State's case, in "the interests of good morals" and "in the sound administration of justice."\textsuperscript{20} The United Press Association thereupon brought an action to restrain Judge Valente from enforcing his exclusionary rulings; but the highest New York court refused to accede to the demand of the press association, contending that no New York statute conferred any enforceable right upon the public to attend trials, and even if such a statute granted the public such a right, the right was conferred on the public-at-large and not on any individual member of the public. The Court, in holding against United Press, probably feared that,

\textsuperscript{16} Id. at 621.
\textsuperscript{17} 359 U.S. 41 (1959).
\textsuperscript{18} Under FED. R. CIV. P. 42(a).
\textsuperscript{19} 308 N.Y. 71, 123 N.E.2d 777 (1954).
\textsuperscript{20} On appeal, incidentally, Jelke obtained a reversal of his conviction on the ground that his right to a public trial had been violated. See State v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).
if the courts were to rule otherwise, it would deprive an accused of all power to waive his right to a public trial and thereby prevent him from taking a course which he may believe best for his own interest: "To deny the right of waiver in such a situation would be ‘to convert a privilege into an imperative requirement’ to the disadvantage of the accused."21 Undoubtedly the New York court presumed that the primary function of a public trial was safeguarding the accused against possible unjust persecution based upon public prejudice and hysteria. It was contended that to give the public an absolute right to attend, would, in effect, determine the accused's right in a manner in which he would have had no voice to argue to the contrary. Any member of the public could therefore challenge the court's authority and stay the trial in collateral proceedings in which the accused would again have no standing to argue to the contrary. The opinion of the New York Court of Appeals conspicuously omitted, however, any discussion of the freedom of the press provision of the First Amendment.

Diametrically opposed to the holding of the highest New York court is the 1955 decision of the Ohio court in *E. W. Scrippss Co. v. Fulton*22 to the effect that newspapers and the public have a right to attend a trial, which right even the accused may not defeat by signing a waiver of that right. One Baker was being tried on a charge of pandering, when the trial judge excluded the general public and the press from the courtroom, upon the specific request of Baker. Judge Fulton commented that he as judge had exercised his discretion in granting defendant's request. One newspaper then instituted a successful, separate proceeding to restrain Judge Fulton upon the ground that the Ohio Constitution had conferred on the public a right to open trial; and thus the press and the general public re-entered the courtroom while the trial was in progress.

It is submitted that, although neither the New York nor the Ohio court discussed the First Amendment freedom of the press, the tenor of these two decisions does not vest in newspapers any *absolute* right to attend trials, which right of the press is any greater than the right of the general public. Only as a member of the general public, in the gathering and dispensing of news to the public, has the press a right to attend an open trial and report the

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22 100 Ohio App. 157, 125 N.E.2d 896 (1955).
occurrences in the courtroom subject, however, to the right of the accused to a fair trial. 23

In contrast to the Jelke and Baker trial decisions are the numerous instances in which the public is systematically excluded from the trial of juveniles, upon the assumption that the juvenile's interest will be better protected in a "closed" trial. A few states by statute have excluded the public also from prosecutions for rape, sodomy, adultery, fornication, and the like, possibly upon the ground of protecting the public morals, the interest of witnesses, and even the interest of the accused. 24 The fact that courts seek to exclude the press evidences the impact of "trial by newspaper" on the accused's right to a fair trial coupled with the courts' inability to use the contempt power to curb press abuses. 25 Fair administration of justice is impeded when the minds of jurors are prejudiced, not only during trial, but even before the trial has begun. In England, however, the courts are free to exercise their contempt power where newspapers interfere with orderly justice. But in the United States, appellate courts are very prone to disable a trial judge who has sought to deal effectively with press interference with the fair administration of criminal trials. 26

It should be noted that this right to open or public trial does not attach to particular individuals but to the public as a whole, i.e., the legal requisite for an individual's standing in court to enforce such an individual right is lacking. The rationale of this non-recognition of the individual's right appears to be that the prosecu-

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23 Upon this important point, research has uncovered no reported Nebraska case in which a member of the public has instituted an action to enforce his right to attend a trial. [Ed.]

24 An exception by statute in Nebraska is a trial to establish the paternity of children born out of wedlock. NEB. REV. STAT. § 13-112 (Reissue 1954) provides: "It being contrary to public policy that such proceedings should be open to the general public, no one but the parties, their counsel, and others having a legitimate interest in the controversy shall be admitted to the courtroom during the trial of the case." For a rather exhaustive discussion of paternity proceedings, with emphasis upon the New York practices, see Wysong, The Jurisprudence of Labels—Bastardy as a Case in Point, 39 NEB. L. REV. 648 (1960). [Ed.]

25 In Nebraska, however, an abuse of freedom of the press relating to undetermined cases in court will sustain a conviction for contempt. Percival v. State, 45 Neb. 741, 64 N.W. 221 (1895); Bee Publishing Co. v. State, 107 Neb. 74, 185 N.W. 339 (1921); State v. Lovell, 117 Neb. 710, 222 N.W. 625 (1929). [Ed.]

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Journalists defend the public interest, and the public or the press has no right to intervene in the criminal proceedings. Any remedy to the public, where the prosecutor fails to assert the public interest, must be through the political process. However, it can be argued that the public's right should at least be vindicated by allowing an individual member of the public to adjudicate in court that very right of the public. To compel the press and the general public to resort, for example, to amicus curiae briefs, by permission of the court, is hardly satisfactory to protect freedom of the press and the public's right to know.

But the newspaper publicity given to a recent Kentucky police court "persecution" of an elderly Negro who was convicted of loitering and disorderly conduct is of more than passing interest. Under Kentucky law there was no right of appeal, but the Louisville press took an interest in the defendant's plight. Finally, on March 21, 1960, the United States Supreme Court reversed the convictions and held, unanimously, that the Kentucky criminal convictions were unconstitutional as founded upon insufficient evidence. Thompson v. City of Louisville, 362 U.S. 199 (1960). Mr. Justice Black, writing for the court, determined that there was no evidence to support either charge, and that it was "a violation of due process to convict and punish a man without evidence of his guilt." Id. at 206.

It should, perhaps, be noted that in Kentucky the justice of the peace, in order to qualify for election, requires no legal training nor even formal education; such Kentucky courts have been frequently criticized also for their failure to maintain the dignity and decorum so essential to the judicial process. Kentucky justices of the peace handle civil cases up to $2,000 in damages, and criminal cases where punishment does not exceed one year in prison or a fine of $500 or both. In Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956), the Kentucky Court of Appeals said of these minor courts: "[N]o justification exists for perpetuating a system that is designed and calculated to deprive persons of due process of law. To say, . . . that the right to trial by a judge free from prejudicial influences may be waived, is unrealistic for, . . . the ordinary person is not aware of his right to object to the jurisdiction; he assumes that the court before which he has been taken is a lawfully constituted one." Id. at 748. Of course, legally, the accused could not waive the court's power to try him or the jurisdiction of the court, but only the judge's disqualification. Indeed, the demise of justice of the peace courts in Kentucky is forthcoming.

Mr. Justice Douglas, Associate Justice of the United States Supreme Court, has written that some persons maintain "that the 'right to know' is basic in our liberties and therefore the courtrooms, investigative hearings and all like sessions should be photographed and broadcast. Trials and investigations, it is said, have educational values to the general public; and, it is contended, the general public should be admitted so that they better understand the operations of their government." Douglas, The Public Trial and the Free Press, 46 A.B.A.J. 840 (1960). But Mr. Justice Douglas opined that "photographing or broadcasting of trials . . .
II. PHOTOGRAPHING, BROADCASTING, AND TELEVISING OF COURTROOM PROCEEDINGS

The right to an open and fair trial has been challenged in recent days by restrictions upon taking press photographs in court, and by prohibitions against broadcasting or televising of courtroom proceedings. In 1937 after a series of raucous publicity circuses during criminal trials which outraged the sense of decency of the judicial profession, the American Bar Association adopted Canon 35 of its Canons of Judicial Ethics. This dogmatic statement of principles barred newspaper photographers and radio broadcasters from court proceedings. Canon 35, as amended in 1952 to cover television, reads as follows:

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 as amended in 1952 qualifies the above pronouncement:

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.

The press photographers associations and the radio and television industry have naturally been aroused by this apparent interference with freedom of the press. The press photographers have particularly demonstrated before bench and bar alike that photographs can be taken surreptitiously and unobtrusively in courtrooms because modern, versatile camera equipment carries no flash bulbs and the like. Press photographers contend that discrimination against them has violated the public's right to be informed.

imperils the fair trial of which we boast. It is not dangerous because it is new. It is dangerous because of the insidious influences which it puts to work in the administration of justice.” Id. at 840.

29 Canon 35 of the Nebraska Canons of Judicial Ethics was adopted prior to the adoption by the American Bar Association of the amended version set out in the text. [Ed.]

30 Ibid.
All of the other mass media, such as radio and television, have obviously particular and different potentialities, varying liabilities and implications for the administration of impartial justice. But all media are agreed, however, upon the need for some relaxation of Canon 35. It is argued that Canon 35, in its assumption that “...broadcasting or televising 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, ...” is an arbitrary and unwarranted attack upon the media. Particularly distressing to the radio and television industries is the proposed 1958 revision of Canon 35 offered by a special American Bar Association subcommittee:31

The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound recording of such proceedings for broadcasting by radio or television, introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they should not be permitted.

Proceedings other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges in open court, may properly be photographed in or broadcast from the courtroom with the permission and under the supervision of the court.

The first “live” telecast of a court trial occurred on December 13, 1953, in an Oklahoma City court.32 Television cameras were housed in a specially-constructed booth, entirely enclosed, in the rear of the courtroom. Sound was recorded on a microphone hidden near the front of the court, while additional lighting was provided by photo-flood lights placed in the chandeliers. The swearing of the jury, some of the trial testimony and the sentencing of the defendant were televised. The films were later shown, after editing, during news broadcasts. Judge A. P. Van Meter, who presided at the trial, had a small button fastened to his desk which he could push at any time to discontinue automatically the operation of the cameras. The success of this telecast probably encouraged the tele-

31 83 ANNUAL REPORTS, AMERICAN BAR ASSOCIATION 643-44 (1958) (emphasis added).
32 State v. Manley, No. 22092, Oklahoma County District Court, Oklahoma, December 22, 1953. [Ed.]
cast, from a balcony, of the Washburn murder trial in Waco, Texas, on December 6, 1955. The reaction of Texas bench, bar and the press for the most part, favored some reasonable controls over television by the trial judge; it was also felt that consent of witnesses and jurors particularly to the telecasting was necessary.

In Colorado, on April 7, 1956, despite the affidavit of the accused (who was charged with dynamiting an airplane in flight) that television coverage of his trial should not be permitted, the Colorado District Judge permitted radio stations to tape record the proceedings for later broadcasting, and he permitted television stations to make sound-on-film movies for later telecasting. Since the trial judge exercised his discretion, it was contended that no unwarranted interference with or distraction from the trial resulted. Yet the exercise of such discretion by a trial judge clearly places an undue burden upon the judge, particularly since he is often at the mercy of the press in the manipulation of public opinion of him and his behavior. This appears to be one of the reasons that the press photographers and other media advocate a laissez-faire attitude by the organized Bar toward courtroom photography. However, the organized bar finds no justification for imposing upon any judge the requirement that he may or shall use his discretion in granting or withholding the right to take photographs or to broadcast or telecast the judicial proceedings over which he presides, as does the Supreme Court of Colorado which leaves the matter up to the discretion of individual trial judges. Indeed the United States Supreme Court in Craig v. Harney has stated that a trial is a public event; that what transpires in the courtroom is public property; that those who see and hear what transpires may report it with impunity; and that 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 that transpire before it.

Wisconsin and Rhode Island were unsuccessful recently in getting their Legislatures to enact statutes barring the telecasting

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33 The case is reported on appeal on other points in Ex parte Washburn, 161 Tex. Crim. 651, 280 S.W.2d 257 (1955); Washburn v. State, 164 Tex. Crim. 448, 299 S.W.2d 706 (1957). [Ed.]

34 This case was appealed over the defendant’s objection and is reported in Graham v. People, 134 Colo. 290, 302 P.2d 737 (1956), but the instant question was not discussed. [Ed.] Cf. In re Hearings Concerning Canon 35, 296 P.2d 465, 472 (Colo. 1956).

35 331 U.S. 367 (1947).
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of court room proceedings. In 1952 New York enacted Section 52 of the Civil Rights Law, which provides:

No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state. Any violation of this section shall be a misdemeanor.36

Fourteen states in all have similarly banned televising and broadcasting of trials by officially adopting Canon 35,37 the ban is also

36 In 1959, New York sought to amend Section 52 by adding the following after the phrase "...other tribunal in this state": "[W]ithout prior consent from the judge of the court, chairman or the duly authorized head of such commission, committee, administrative agency or other tribunal in the state." The bill was not passed; it was obviously in opposition to Canon 35, and was severely criticized because (1) it contained no requirement that permission of the accused in a criminal case be obtained, and (2) it did not require consent of the parties in a civil action. In opposition to the bill, the Association of the Bar of the City of New York declared: "Relaxation of the ban on the use of movie or television cameras during trial, even with judicial consent, may subject witnesses whose demeanor is being weighed by the triers of fact to additional and unwarranted pressures. Cameras in the court room may also have the effect of diverting the jury from its proper functions. Abuses may occur in a situation where a judge, presiding over a 'celebrated case,' invites TV cameramen to his court over the express objections of a criminal defendant or civil litigants. Significantly, Rule 53 of the Federal Rules of Criminal Procedure flatly prohibits 'the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room.' Furthermore, even in the few instances where states do permit the broadcasting and televising of trials, the trial judge's discretion in allowing such coverage is subject to objections of witnesses and jurors. See In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465 (Colo. 1956)."

37 On March 24, 1951, the Nebraska Supreme Court adopted the Canons of Judicial Ethics, including Canon 35. Thus, these Canons govern the conduct of proceedings in all courts in Nebraska. Just what effect this will have on Nebraska courts and judges has not yet been fully tested. In March of 1958 a contempt proceeding was commenced by the State of Nebraska on the relation of the State Bar Association against Judge James T. English, District Judge of the Fourth Judicial District, for allowing the taking of photographs during the sessions and recesses of the murder trial of George Daniel Jones in Omaha. The Information affidavit contended that since the State Supreme Court had adopted Canon 35 and since this was binding on all the Nebraska courts, the act of Judge English allowing the photographing was in contempt of the Nebraska Supreme Court. The Answer filed in behalf of Judge
embodied in Rule 53 of the Federal Rules of Criminal Procedure adopted by the United States Supreme Court for use in all federal courts. However, former United States Attorney General, Herbert Brownell, Jr., has urged the courts to remove obstacles from the path of newsmen and press photographers.  

The first clear-cut support for television of criminal proceedings occurred on September 3, 1958, when the Oklahoma Court of Criminal Appeals in *Lyles v. State* upheld television coverage of courtroom proceedings upon grounds that a criminal trial is a "public event." Lyles, who was given a fifteen-year sentence for burglary, had contended that the television cameras prevented him from getting a fair trial. Television pictures were taken in the courtroom before the jury was selected, although some members of the panel were in the room during the recess in which the films were shot. In an opinion by Justice Brett, it was said that:

"What transpires in the courtroom 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 . . . to suppress, edit, or censor events which transpire in proceedings before it."

English contended that the Nebraska Supreme Court was without jurisdiction to hear the cause as the adoption of Canon 35 was not a mandatory direction. The Answer further contended that if the adoption of Canon 35 was a mandatory direction then it was void and unenforceable as in violation of both the Nebraska and United States Constitutions. The reasons given were that Canon 35: (1) infringed on the right to a public trial; (2) infringed on the right to freedom of the press; (3) denied equal protection of the law as some media would be forbidden at trials while others are not, and (4) subjected a judge to an unreasonable and impossible rule of conduct as he might be guilty of contempt even though he might not be present when a photograph was taken. Before briefs were filed, however, due to the demise of Judge English, the action was dropped. State ex rel. Beck v. English, No. 34435, Nebraska Supreme Court, March 24, 1958. The method of enforcement of Canon 35 in Nebraska, therefore, is still in doubt.  


40 Id. at 740, quoting *In re Hearings Concerning Canon 35*, 296 P.2d 465 (Colo. 1956).
The court said that the doors of the courts must be open to the press "to report courtroom abuses, evil and corrupt influences which despoil and stagnate the flow of equal and exact justice." \(^4\)

The Oklahoma court held that television, broadcasting or photographing of the trial was within the sound discretion of the trial judge, subject to certain general standards of dignity and decorum. Specifically, Justice Brett held Canon 35 to be an "unwarranted presumption" since there is "neither disturbance, distraction, nor lack of dignity or decorum" when the telecasting is "properly supervised." [Justice Brett had pointed out that the television cameras were stopped whenever the defendant objected.] In effect, the Oklahoma court suggested that the American Bar Association had no right to legislate nor to dictate to the courts: "When abuses of discretion occur, we [in Oklahoma] will meet them on appeal and not in a manner of preconception..." \(^4\)

In summary, it is submitted that the rights of the accused should take clear priority over freedom of the press,\(^4\) and that the right to a public trial is the defendant's right and not the right of public communications media. This view is demonstrated in *United States v. Kleinman* \(^4\) where in 1952 the federal court refused to adjudge guilty of contempt of Congress a witness who had refused to testify before a committee of Congress with television cameras, newsreel cameras, news photographers and radio microphones "in close proximity." In acquitting the defendant the Court said: \(^4\)

\(^{41}\) Id. at 740.

\(^{42}\) Id. at 742 and 745. The words of Mr. Justice Douglas are pertinent: "Newspapers, radio and television are in the hands of men who have their own political philosophy and their own ideas as to what justice is and how it should be administered. Some newspapers dominate a community. When ownership of the paper is combined with ownership of the radio and television station, the community may become saturated with one point of view. We have had publishers who were tyrants and sought to impose their will on the courts as well as on the people." Douglas, supra note 28, at 840.

\(^{43}\) In an Ohio case, a newspaper photographer was fined $100 and costs for taking a photograph through the window of a door of a juvenile court while the court was in session. Under Ohio law the court may punish a person who misbehaves "... in the presence of or so near the court or judge as to obstruct the administration of justice." OHIO REV. CODE § 2705.01 (1953). The conviction was upset upon the ground that the record failed to show that the press photographer had, in fact, obstructed the administration of justice. *In re Greenfield*, 82 Ohio L. Abs. 120, 163 N.E.2d 910 (1959).


\(^{45}\) Id. at 408. Cf. Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74, 114 S.E.2d 421 (1960), in which the trial court's rule barring photography and tele-
The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

The American Bar Association in 1958 considered amendment of Canon 35 "in light of modern conditions of the practice of law and the administration of justice" so that all proceedings will be "conducted with fitting dignity and decorum." While retaining the ban against photographing, broadcasting or televising of actual court trials, the proposed 1958 amendment would grant permission to photograph or televise only ceremonial occasions in courtrooms such as naturalization or induction proceedings.

In this regard, specific mention should be made of the 1956 ruling of the Colorado Supreme Court which allows judges in that state to decide whether portions or all of certain trials are to be photographed or broadcast, according to their judgment in specific cases. Proceedings in court should be conducted with fitting dignity and decorum. Until further order of this Court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his express objection; and provided further that under no circumstances shall any court

vision from the courthouse sidewalks of any participant in or at the trial, was approved by the Supreme Court of Georgia, which held that the sidewalks were within the ambit of the court under the Georgia statutory law granting the court the power "to preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings." GA. REV. CODE § 24-104 (1959). Atlanta Newspapers, Inc. v. Grimes, supra at 114 S.E.2d at 424. Certiorari was denied by the United States Supreme Court on November 7, 1960, despite petitioner's claim that severe curtailment of freedom of the press and a substantial blackout of news-gathering would result. Atlanta Newspapers, Inc. v. Grimes, 364 U.S. 290, 88 S.Ct. 20, 888 (1960). See also Ex parte Sturm, 152 Md. 114, 136 Atl. 312 (1927).


47 In re Hearings Concerning Canon 35, 296 P.2d 465, 472 (Colo. 1956).
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proceeding be photographed or broadcast by any person without having first obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.

But fears of press photography in the courtroom similar to those implied in the Canons of Judicial Ethics have been expressed from the bench. Judge Gourley, in Tribune Review Pub. Co. v. Thomas, thoughtfully opined:

The very thought of members of the press and/or amateur photographers and others employing cameras, no matter how silent and concealed, to photograph different parties and witnesses to a court proceeding while the parties and the court are engrossed in the determination of matters of tremendous moment to the parties involved, is repugnant to the high standard of judicial decorum to which our courts are accustomed, and, indeed, may prove an opening wedge to a gradual deterioration of the judicial process.

... [T]he greatest danger to freedom may well stem from those who seek the license and luxury of increased liberties at the expense of the processes which feed life blood to our free institutions.

III. MISCELLANEOUS CONSIDERATIONS

A. TELEVISION AND BROADCASTING

Although Rule 53 of the Federal Rules of Criminal Procedure, promulgated by the U.S. Supreme Court, declares that "the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court"—the televising and broadcasting of congressional hearings, for example, have been more and more frequent. The hearing often becomes a trial in which the entire nation sits as a jury. The television trial certainly saturates the country with such prejudice or partiality against an accused that a fair trial may later be next to impossible. As stated by Professor Harry W. Jones:

If several million television viewers see and hear a politician, a businessman or a movie actor subjected to searching interrogation, without ever having an opportunity to cross-examine his accusers or offer evidence in his own support, that man will stand convicted, or at least seriously compromised, in the public mind, whatever the later formal findings may be.

Indeed, the use of television in these inquisitorial procedures puts in jeopardy some of our basic tenets. Commercial sponsorship of such telecasts can only cheapen or vulgarize processes of govern-


ment that should be sacrosanct. Television trials may give incomplete presentations of the evidence; the sensational parts of the hearing may distort or slant it one way or another. These are undoubtedly some of the reasons behind the observation in a national magazine after the Army-McCarthy hearings on television in 1954: "If the 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."

B. RECORDINGS

Recently, there has been some judicial sentiment favoring the making of sound or tape recordings of trials involving the death sentence. In the Chessman case, for example, a tape or sound recording would have perpetuated the voices of all parties including the judge, and thus have guaranteed the accuracy of the record for appeal.

C. TRANSCRIPTS

The transcript of the trial and in particular of a trial judge's charge to a jury, was the subject of a New York case brought by the New York Post Corporation against a trial judge. After the acquittal of a probationary police officer charged with the crime of manslaughter in the first degree arising out of the fatal shooting of a fifteen-year old boy, a New York Post reporter requested a transcript of the official stenographic notes of the judge's charge to the jury. Although the court stenographer agreed to furnish the requested transcript, he later refused to do so upon order of the judge. The lower court refused to compel the court stenographer to furnish the transcript, upon the ground that a newspaper had no special right or privilege not possessed by an ordinary citizen, and furthermore that New York statutes did not accord to the general public the right to demand a trial transcript. The New York Appellate Division affirmed upon the ground that, while the

51 Chessman v. Teets, 354 U.S. 156 (1957). The trial court reporter had died before he could transcribe his notes, and his successor, a relative of the one of the prosecutors, prepared the transcript. Chessman contended that the notes of the deceased trial reporter could not be transcribed with reasonable accuracy.
A stenographer was free to furnish a copy of the charge to any other person if he chose so to do, one not a party to the action possesses no clear right to obtain such a transcript, if the stenographer refuses to furnish it, even upon payment of the prescribed fees.\textsuperscript{53}

Finally, in 1957, the New York Court of Appeals unanimously reversed, holding that any member of the public, not a party to the action, has an enforceable right to the transcript upon payment of the prescribed fees.\textsuperscript{54} Judge Fuld, speaking for the Court, declared: \textsuperscript{55}

We are all agreed that fundamental considerations of public policy demand that court proceedings in a publicly held trial be open to the fullest public scrutiny, so long as the case is not one in which preservation of secrecy in respect of the court records has been recognized. . . . It has been aptly observed that "A trial is a public event" and "What transpires in the court room is public property." . . . The function of publicity, especially in the form of newspaper reporting and comment, as "an effective restraint on possible abuse of judicial power" is, indeed, one of the fundamental safeguards of a free society. . . .

The Court then touched briefly upon the freedom of the press: \textsuperscript{56}

The Constitution of this state explicitly mandates that "judicial opinions or decisions shall nevertheless be free for publication by any person" (art. VI, § 22). The trial judge's charge to the jury may properly be regarded as a "decision" within the ambit of that provision, since the charge embodies the law of the case as decided and declared by the trial court . . . . The clear import of the constitutional mandate is that neither the legislature nor the courts may unreasonably curtail or restrict free access by all persons to judicial opinions and decisions. . . . No other rule is conceivable in a society nurtured on freedom of discussion of matters of public interest. Without access to the official records, the press might well be hampered in reporting opinions or decisions for fear of transgressing the limitations imposed by the law of libel, that the report be a "fair and true" one (Civ. Prac. Act § 337). To permit a judge to prohibit the stenographer from transcribing or furnishing copies of decisions rendered by him would thwart and tend to nullify the basic purpose of the constitutional safeguard.\textsuperscript{57}


\textsuperscript{55} Id. at 682, 143 N.E.2d at 258, 163 N.Y.S.2d at 412-13.

\textsuperscript{56} Id. at 684, 143 N.E.2d at 259-60, 163 N.Y.S.2d at 414.

\textsuperscript{57} Judge Fuld also examined Section 66 of the New York Public Officers Law as to whether the newspaper has a clear legal right to compel the court stenographer to furnish the transcript: "[T]here is no doubt that it expresses a strong legislative policy to make available to public
Judge Fuld distinguished *United Press Ass'n v. Valente*, pointing out that:

[T]here is no possible conflict between the position asserted by the petitioner and the rights of the defendant. Indeed, the trial has been concluded, and neither the defendant nor the People could in any way be prejudiced by allowing the petitioner or any other member of the public to have a copy of the charge.

### D. Trial Publicity

Canon 20 of the Canons of Professional Ethics of the American Bar Association dates from 1908 and relates to the practices of some lawyers of "trying their cases in the newspapers" or "getting publicity by sensational statements" to press, radio and television. In New York the State Bar Association has adopted an amended canon 20 which reads as follows:

It is unprofessional for a lawyer to make, or to sanction the issuance or use by another of any press release, statement or other disclosure of information, whether of alleged facts or of opinion, for release to the public by newspaper, radio, television or other means of public information, relating to any pending or anticipated civil action or proceeding or criminal prosecution, the purpose or effect of which may be to prejudice or interfere with a fair trial in the courts or with the due administration of justice. The foregoing inspection and access all records or other papers kept 'in a public office,' at least where secrecy is not enjoined by statute or rule. Effectuation of the policy in favor of full publicity accordingly demands the broadest possible interpretation of the scope and content of that section, so far as some overriding consideration of policy does not forbid.

"It requires no straining to reach the conclusion that the office of an official court-appointed stenographer is a 'public office' within the meaning of section 66. * * *"

[Accordingly] "* * * section 301 of the Judiciary Law and section 66 of the Public Officers Law should be interpreted as entitling any member of the public to obtain a transcript from the stenographer, at least, of the trial judge's charge to the jury, upon payment of the prescribed fees." Id. at 686, 687, 143 N.E.2d 260-61, 262, 163 N.Y.S.2d 415-16, 417.

As to the furnishing of a transcript to an indigent defendant, see Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958), holding that the state of Washington could not deny such a defendant a copy of the record of his trial merely because he could not afford to pay for it. Otherwise a convicted defendant with money could have appellate review of his trial while a convicted defendant without money could not.


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shall not be applicable to publications of statements made in Court or to quotations from public records of the Court, or from depositions, or filed or served pleadings, or affidavits filed or submitted to the Court. However, this canon shall not be so construed as to limit the right of an attorney in good faith to divulge information for publication in reply to any public statement which adversely affects the interest of his client, provided that the information is supported by facts and does no more than contradict or mitigate the effect of said statement.

Violation by attorneys of Canon 20 has resulted in many reversals in higher courts of verdicts and judgments for the prosecution in criminal cases, because lawyers' comments to the press before or even during trial had either poisoned in advance the entire panel of eligible jurors or tended to make the verdict the result of things said and done outside the courtroom, a typical case being Delaney v. United States. A survey of these instances revealed that lawyers themselves "handed out stories" to the press, and were therefore to blame for prejudicial comment. However, it appears that there has seldom been a disbarment proceeding brought against such lawyers. The mild and palliative tone of Canon 20 probably accounted for its disuse:

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.

Certainly the enforcement of an amended Canon 20 would promote fair and open trial because it prevents the leakage to the jury of items of evidence not displayed in open court to the accused or his counsel, but introduced, via newspapers, behind their backs when there is no chance to submit them to standards by which admissibility is governed. Canon 20 does not interfere with the press except that lawyers may not feed them gossip or matter, the purpose or effect of which may be to prejudice or interfere with a fair trial or with due administration of justice. Many details of a case can be published in advance if their publication will not have an undesirable tendency.

Canon 20 is not limited to criminal cases, but also governs lawyers' conduct in civil cases with particular reference to matri-

60 199 F.2d 107 (1st Cir. 1952).
monial actions, stockholders' suits, proxy fights, and the like. Canon 20 is aimed at lawyers who make it a practice of trying their cases in the newspapers as a means of forcing a settlement contrary to justice, or of frightening a timid opponent, or in extreme cases of frightening the judge and jury, too.

IV. CONCLUSION

The right to an open or public trial, the right to a speedy trial, and the right to a fair trial are guaranteed under the Sixth Amendment, and the fair administration of justice is the cherished right of all citizens. It is agreed that our traditional concept of a presumption of innocence until proof of guilt must not be placed in jeopardy, yet this human want is occasionally in conflict with the freedom of the press, and the right of the people to know and participate in the governmental process. Such a conflict, stemming perhaps from an unfortunate lack of faith in the tenets of our democratic institutions, should be resolved by our courts in such a way as to satisfy a maximum of human wants with the minimum of sacrifice of others. Our courts have adapted to our changing needs, and the dynamism of life today requires a resolution of this conflict.