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Commentary on Press Photographers and the Courtroom

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COMMENTARY ON PRESS PHOTOGRAPHERS AND THE COURTROOM

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The Attorney General of the United States, who happens also to be a graduate of the University of Nebraska School of Journalism, displays a certain ambivalence in the matter of the legal rights of press photographers. This is understandable enough, for there are many editors and reporters who are also of two minds on the subject. And it should be pointed out that the questions which arise with reference to Canon 35 must logically extend to the new communications medium of television which, if anything, will further complicate the whole business.

It is true, as the National Press Photographers Association has earnestly maintained for more than a decade, that Canon 35 was drafted in the days of noisy flash techniques of picture-taking, which also were the days of lurid "tabloid journalism." The picture-taking technique has quieted down, and the sensation-mongers among the country's daily newspapers have diminished in numbers—although they are still prevalent enough in the large metropolitan centers where there are most likely to be the type of headline-making trials which such papers delight in covering.

The ideal of the professional news or television photographer in the matter of trial coverage would be, of course, complete freedom to move about the courtroom, crouching beside the witness stand, perhaps, or developing an unusual angle shot from behind the judge's bench. The TV cameraman would welcome a courtroom equipped with a camera boom which would swing a crew of photographers and their equipment out over the heads of the assembly while they ground away.

It is easy to see how such extremes of photographic technique, even if done quietly, would jeopardize the dignity and impartiality of trial procedure as much as, if not more than, the oldtime flash powder. But news photographers, particularly for the great news services and for metropolitan newspapers, are a persistent, insistent fraternity whose stock in trade are the demands to "Hold it, bud," and "Let's have just one more shot." What I am trying to say is that, in the nature of things, one photograph of a trial in progress is just about like any other, unless the cameraman is ingenious enough to work out new ideas in coverage. In other words, the pictorial coverage of trials would soon become

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dull unless novelty were possible—and it is there that the photographer must inevitably create a disturbance or distraction.

Mr. Brownell recognizes that the inflexibility of Canon 35 as presently constituted leads to all sorts of extremes by literal-minded jurists—as in the case of the refusal to permit photographs of swearing-in ceremonies, or of judicial speakers at public events. It is clear that in practical operation the Canon has created certain difficulties which need to be resolved. The basic problem is, as one court has pointed out, to distinguish between the right to a public trial and the public's right to a trial—or, as someone else has put it, to distinguish between the public interest and what interests the public. The New York courts made this clear in 1953-54 when they affirmed, in *People v. Jelke*,[1] the defendant's right to a trial open to the public—and in the case of *United Press Associations v. Valente*,[2] growing out of the Jelke trial, rejected the news agency's argument that it had an inherent right to be present.

The press photographer, as well as the news writer, is present at a public trial by virtue of his individual right as a citizen to witness in person the conduct of a case at bar. In the nature of things he becomes the proxy for the thousands of individuals who lack the opportunity or inclination to attend such a trial in person. It would seem to follow, therefore, that whatever the average citizen would have a right to witness if he came into the courtroom should be legitimate subject-matter for the cameraman or reporter—provided that he creates no more disturbance than the average citizen who may be present watching the proceedings. And provided also that it be always recognized that he is there not by virtue of his appetite for the testimony in sensational cases but by virtue of the common law ideal of a fair and open trial.

Too often overlooked is the opinion of the Arizona Supreme Court in 1918, in speaking to this point. There, a trial court had barred the general public from the premises during the taking of testimony of a salacious nature, but the representatives of the press had been permitted to remain. Rejecting the appellant's argument that he had not been accorded a public trial, the court said:

> Protection from oppression or arbitrariness of the court, its officers, and the prosecuting officer, will be assured so long as trained and discriminating newspaper reporters are present at

[1] 284 App. Div. 211, 130 N.Y.S.2d 662 (1st Dep't. 1953), aff'd, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[2] 281 App. Div. 395, 120 N.Y.S.2d 174 (1st Dep't. 1953), aff'd, 308 N.Y. 71, 123 N.E.2d 777 (1954).

> the trial, keeping close and critical watch of everything done and said, for the purpose of publication in the daily press. A larger public is made acquainted with the salient facts of the trial. even when it is progressing, through the press than it is possible to reach through the open doors of the courtroom.[3]

As a practical matter, the public may be adequately served, and the cause of impartial justice as well, by admitting news writers and excluding news photographers. The test is whether a pictorial report on a particular case will give a more accurate account of what happened.

On the other hand, it is obvious that a report of a trial may be distorted as much by the written story as by an unusual pictorial shot. Lawyers and law school teachers are fond of warning everyone not to believe what they read in the papers about court cases—or almost anything else. In the matter of television, it is equally obvious that a profound effect upon public opinion can be wrought by adroit camera work. Recall the famous close-up shot of Costello's nervous hands during his testimony before the Kefauver committee—and the overnight collapse of McCarthy's popular appeal when the cameras bored in on him during his famous war with the Army. For that matter, Mr. Brownell undoubtedly recalls with relish the effects of television at the Republican National Convention in 1952, when the Taft forces refused to permit camera coverage of the hearing over the credentials of the Texas delegations. The national outcry against the Taft men's tactics, whetted by the TV shot of the closed doors, added to the impetus of the Eisenhower offensive.

Returning to the matter of cameras and courts, similar effects are possible without any photographers being present at the trial itself. Think of the frequent shots of crowded corridors, witnesses and trial principals being hustled through lines of policemen into the courtroom, knots of court officers leaving the courthouse after a day's session—all of these, incomplete and out of context as they may be, contribute to a distortion of trial reporting which might be offset by admitting the photographer to the actual trial.

In the last analysis, the news photographer and the news writer must justify their presence by using their privileges with responsibility. This is an old cliche, but it recurs as the only practical answer to the problem.

There is an apocryphal story of the newspaperman who gained admittance to a courtroom by announcing that he would write

[3] Keddington v. State, 19 Ariz. 457, 460, 172 Pac. 273, 274 (1918).

the story of the trial whether he was present or not. In the interests of accuracy, the court admitted him. How accurate and impartial such a reporter would be, whether he witnessed the trial or not, is a matter of conjecture. There are rare reporters, who have devoted lifetimes to an interpretation of the human and legal elements in the conduct of justice, who can write up a trial as great literature and capture its essence—witness Rebecca West's description of the treason trial of William Joyce (Lord Haw Haw) after World War II. There are probably equally rare photographers who could do a great service by sensitive coverage of the conduct of important trials. Better than ninety-nine per cent of the cases reported by writer and camera, however, will be out of this category.

In sum, Canon 35 might be modified, or court rules might be modified, to permit non-flash camera coverage under certain well-defined conditions and within definite physical limits inside the courtroom. As a matter of news value, most trials would never be photographed; the rules would cover those situations where the public interest is high and the photographers apt to become overzealous. If the court determines that the public should be admitted to a particular trial, various representatives of the press should also be admitted. Individuals who abused the right could be ejected just as the court may eject anyone who creates a disturbance in its presence. Within such limits, it probably would develop that camera coverage of trials was not such a momentous issue as both sides have made it up to now.