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NEWSPAPER AND RADIO COVERAGE OF CRIMINAL TRIALS: A MODERN DILEMMA

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Is the trial of an important criminal case before a jury in an average American city fair game for the city desk of the local newspaper, the manner and extent of coverage depending upon various elements of estimated reader interest like any exciting sports event?

The question is a leading one, of course, suggesting a negative answer. But, as a newspaperman moderately grounded in legal principles and one who confesses to a perhaps romantic faith in our ancient jury system, I have been getting the impression lately that some of us nowadays really do think of a big trial as little more than a legitimate news story; the newsplay and value of the story being chiefly affected by the seriousness of the offense, its vicious or unusual nature, and the appeal of the defendant's wife's figure.

We would all deny it in court, of course, but isn't the truth demonstrated in the way we act and talk and write about the cases we cover? And, what is worse, are we not encouraged in this error sometimes by the attitudes of judges and lawyers themselves? I think every reporter engaged in covering the courts has had, on frequent occasions, the experience of being tipped off in advance by attorneys or even judges to the fact that a certain case upcoming "is going to be a corker—it ought to make a good Page One story!"

You may argue that ethical lawyers don't do such things, or that patriotic and high-minded newspapermen would not lend themselves to sensationalizing a man's trial for life and liberty. And you would be right, undoubtedly. I'm merely saying that it happens, and few of us are innocent.

From the juridical standpoint, a troublesome dilemma is involved. The following quotation illustrates the point:

Freedom of speech and of the press must, of necessity, be jealously guarded, but not to the point of destroying the cornerstone of our judicial system—the right to a fair and impartial trial. The radio and the newspaper are invaluable and indispensable elements in the development of public enlightenment. But there is little to be gained, and a great deal of damage to be inflicted, by an unrestricted publication which serves to arouse public indignation, and unqualified prejudice against an accused.¹

1. SEE ROBERT H. KLUGMAN, *The Suppression of Radio and Newspaper Comment on Pending Criminal Trials*. 40 this JOURNAL (May-June, 1949, p. 56). See also *Pennekamp v. Florida*, 328 U.S. 331, 356-368 (1946), and note (1947), 41 ILL. L. REV., 690.

The article referred to was mainly about the power of courts to set up rules and punish for contempt, as applied to the situation of newspaper and radio comment on *pending* criminal trials, whereas the points raised here are meant to apply to coverage of the actual trials themselves. Nevertheless, Mr. Klugman has recognized the dilemma. On the one side, there is a strong public interest in the very fact that trials are public. On the other side, I have been led to believe that one of the principal reasons behind our traditional practice of having trials before juries under protected and safely policed circumstances is to get away from the mob on the courthouse lawn.

There is an interest in publicity, and an interest against it; and somewhere between, one would like to find a general, workable rule of conduct that would serve both interests as well as possible. In any particular case, defendants must be protected from community prejudice—that is perhaps most important. Yet, from the more distant perspective and taking a broader view, it would appear vitally necessary to maintain the dignity, security, and proper legal conduct of trials. That is a well accepted legal principle, too.

Mr. George E. Sokolsky, the noted columnist, put the newspaperman's side of it recently in better words than I can muster.

"The greatest safety that a defendant has in our courts is the openness of his trial; the fact that the newspapers send reporters to the court; that they often unearth evidence which lawyers try to hide or even miss; that judges are constantly under the kleig lights of their scrutiny."

Mr. Sokolsky inquires further who is to decide what would prejudice or interfere with a fair trial? He replies:

Certainly not the judge, for he is the person whom the press is watching. Actually, he is the one who could conduct the prejudiced and unfair trial. Certainly not the prosecuting attorney, for he is the one who could bring to bear all the resources of the power of government on a defendant with prejudice and unfairness.

One gets the idea that Mr. Sokolsky would be in favor of letting press and radio go quite a long way. This, even though his concluding and probably leading point seems to be indicated in the statement that, "while the press is not omniscient, it should be omnipresent. Out of the welter comes the truth. Out of suppression can come only falsehood."

I think in the above statements and opinions, a reader can get a good idea of the size and complexity of the dilemma involved. So far as I know, Mr. Sokolsky is the only editorial writer of national reputation who has discussed the matter recently. His discussion, it seems to me, presents valid arguments on the theoretical plane. But it seems that he overlooks the human weaknesses inherent in the newspaper profession,

just as he chooses to note the human fallibility of lawyers and judges. Not all reporters are competent to cover trials. Not all newspapers are honest and independent, although by far the majority of them are, in this country at least. Not all editors know what they are doing, nor are they able to keep in mind at deadline time the sacred rights that may be prejudiced by the news items they pass for publication.

On the other hand, I think it has been demonstrated that a crooked or prejudiced judge usually gets his comeuppance. If he doesn't get it from the press, he is fairly sure to get it eventually from the courts of appeal. Assuming that newspapers, and perhaps radio, will be allowed to cover trials of criminal cases may there not be more chance of error and injustice on the side of unrestrained coverage?

I have in mind one trial which I covered recently in Indiana. Two men, one of them with a criminal record, were indicted for murder while in the commission of a robbery. It was an attempted hold-up of a cigar store poker game, according to the state's case; the cigar store manager and two players were killed in the gun fight. We were told in advance that the defense would inject local political issues into the trial, denouncing city officials for allowing midnight gambling games, et cetera. It looked, indeed, like a dandy. It was so, in fact.

Both defendants admitted visiting the cigar store on the night in question. One of them even testified that he came to town armed and with the intention of putting a crooked deck of cards into the poker game in order to win some money. Their version of it was that they were attacked, and fired in self defense. The city administration, true to counsel's prediction, came in for plenty of persiflage.

But that wasn't what made the case such a newspaperman's dream. What did it was the radio and the pictures. Urging a convincing case of public interest, a radio station was permitted to set up microphones in the courtroom, recording statements of the lawyers, testimony of witnesses, and the words of the presiding judge himself. These recordings were not broadcast at the time, but were put on tape records and broadcast each evening during the month-long trial. It was the talk of the town, naturally—your own radio crime thriller at your bedside.

Moreover, we of the newspapers were allowed unusual latitude in the taking of photographs. While flash photography was not permitted, witnesses were photographed on the stand as they testified. Other sensational shots were taken in the courtroom. All this, it should be remembered, was by advance arrangement and agreement with attorneys both for the prosecution and the defense.

It was, to say the least, a great local story and there was a fine opportunity to cover it completely. The judge believed he was acting properly, especially in view of consent of counsel, and I think the newspapers and radio presented the facts as fairly and completely as they could under the circumstances.

What happened? For one thing, a tremendous crowd turned out, packing the courtroom so that people even stood in the windows. A refreshment counter on the first floor of the courthouse broke all records in the sale of soft drinks and sandwiches—many of the spectators, of course, having their lunch in the courtroom. Each trial day the judge opened with a courteous request for quiet and co-operation by the audience, and for the most part they complied. But now and then, especially when defense lawyers scored against the city administration, they would break into cheers, whistling, clapping and laughter. Meantime, twelve good men and true sat with their backs to the pressing throng and tried to consider the evidence fairly. In the end, they acquitted one defendant and gave the other life. The latter filed a motion for new trial and it was sustained. His counsel offered to plead him guilty to manslaughter, but at the time this was written the result was in doubt and another trial was scheduled in the same courtroom.

Substantial justice may have been done. That is not, really, the point here; the case is used merely as an illustration.

Two points applicable here were developed. One, that the jury (they deliberated 29 hours) had a hard time making up its mind, and ended up with a verdict that did not stand. Conduct of counsel may have confused them; but we can never be sure that conduct of the press and radio and that of the excited crowd did not figure. The other point—and this may be most important—was that *the general public outside the courtroom didn't like the whole thing*. And, in a special sense, they were there.

Comment most frequently heard on the street was: "The whole damned thing's nothing but a circus."

Moreover, the specific instance given here is not very unusual. You hear such comments about a lot of trials. I don't believe all of us realize how poorly off we are with some of the public.

A remedy? I wish I could present one. There is always the dilemma: public interest in publicity, public interest in the proper conduct of trials. I doubt, as a practical matter, that legislation, rules of court, and similar "declarations of policy" by officials as suggested by Mr. Klugman in his excellent article will solve the matter. Newspapers are news-

papers, and radio is radio. Courts and juries, too, are made up of people.

Perhaps we of press and bar should be thinking about the question more. For my own part, I would like to be courageous enough to leave out a few points of a trial story—or rather, be public spirited enough to forego certain temporary journalistic winnings. All of us ought to quit being cynical about trials. Lawyers and judges might do well to formulate guiding principles in an attempt to resolve the general dilemma. In any city, press and bar could talk it over together, and arrive at workable policies together. I think this would be more effective—when the story breaks—than laws and rules of court.