



3-1-1961

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Recommended Citation

Wayland B. Cedarquist, *Televising Court Proceedings, a Plea for Order in the Court*, 36 Notre Dame L. Rev. 147 (1961).

Available at: <http://scholarship.law.nd.edu/ndlr/vol36/iss2/3>

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TELEVISIONING COURT PROCEEDINGS,
A PLEA FOR ORDER IN THE COURT

Wayland B. Cedarquist*

The Canons of Judicial Ethics, and many local rules of court, prohibit the photographing, broadcasting or televising of court proceedings. Most lawyers and judges agree this is a good rule. Most newspapers and broadcasters argue it is grossly unfair and violates freedom of the press and freedom of speech. The communication media are carrying on a long-range campaign to get their cameras into court. Individual photographers aggressively seek the right to take photographs during the trial of cases, even at the risk of being held in contempt of court. Much of the press is highly critical of any judge who refuses to permit photographs. The issue is timely and important.

The paramount consideration is what is necessary to secure a fair trial for every litigant. In other words, the primary concern here is with "order in the court."

An examination of the law makes it clear that judges *can* exclude photographers and broadcasters; and a review of policy considerations leads to the conclusion that judges *should* ban such activities in court.

I. *The rules against televising and photographing were adopted, and are almost universally accepted, as a guide to judges in their endeavor to assure every person of his right to a fair trial.*

The Canons of Judicial Ethics were originally adopted by the American Bar Association in 1924. There was at first no canon having to do with the photographing or broadcasting of court proceedings. It was not long, however, before the problem arose. In 1932, a complaint was made to the Committee on Professional Ethics of the American Bar Association that a judge in Los Angeles had permitted a radio broadcast of a murder trial. The committee held that this was a violation of the general principles of the Canons of Judicial Ethics.

Shortly thereafter the committee introduced Canon 35 before the association. 57 A.B.A. REP. 147 (1932).** The canon prohibited photographing or broadcasting; it was, however, not adopted at once. It remained for the *Hauptmann* case, in 1935, to move the bench and bar into action. There were 700 newspaper men and 129 cameramen assigned to cover the *Hauptmann* trial. On some occasions as many as 135 newspapermen were seated in the small courtroom (maximum accommodation 260 persons). Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. LAW REV. 453, 454 (1940). There were scare headlines; purported confessions; polls of the public on the issue of innocence as against guilt; a moving picture camera and sound recording equipment smuggled into the courtroom; and even gifts of subpoenas to

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** At Mr. Cedarquist's request, citations of authority in this article are a departure from the normal LAWYER form. Mr. Cedarquist's authorities will be cited in the text of the article, rather than in footnotes. (Ed.)

some persons who wanted to be sure of getting into the courtroom. See the Hallam Report on the *Hauptmann Case*, published as an Appendix in *Id.* at 477-508.

The reaction to these excesses was immediate and widespread. One of the results was the creation of a Special Committee on Cooperation between the press, radio and bar, which in 1937 reported, "We are . . . unanimous in believing that all extraneous influences which tend, or may tend, to create favor, prejudice or passion should be eliminated." Another result was the adoption of Canon 35 by the American Bar Association, without dissent, on September 30, 1937.***

It is clear that Canon 35 was adopted because lawyers and judges were convinced that the public interest was best to be served by seeking to preserve those things which make for a fair trial and excluding those things which make it difficult to have a fair trial. It is clear that they considered it essential that there be an impartial and able judge, a jury free from prejudice, honest and aggressive counsel, and as dignified a forum as possible. Trained in the Anglo-American way of hearing cases, they knew that whatever justice and truth was to be found, would be found in those few hours in the courtroom or not at all. To them, the courtroom was the fulcrum on which rested the scales of justice. To introduce any element which did not bear on the business at hand was to disturb that fulcrum and to endanger the cause of justice. To permit photographers in the courtroom was to introduce an element which not only had nothing to do with the case at hand but which was likely to distract attention, upset already nervous witnesses, increase tensions inside and outside the courtroom, and, in extreme cases, turn the whole proceedings into a circus. The general public and the press itself disapproved these results. The judges and lawyers, whose special skills were devoted to seeing that justice be done, therefore adopted Canon 35 to be a guide to the trial judges in their endeavor to provide a fair trial to every litigant. Philbrick McCoy, *The Judge and Courtroom Publicity*, 37 J. AM. JUD. SOC. 167-181 (1954).

Canon 35, in the years since its adoption in 1937, has been officially adopted and incorporated verbatim in the rules of court in about 16 jurisdictions. 37 J. AM. JUD. SOC. 149, 150 (1954). It has been adopted as a canon of judicial ethics by bar associations in about 10 other jurisdictions. *Id.* at 150. In 1948, the United States Supreme Court adopted Rule 53 of the Federal Rules of

*** Canon 35 of The Code of Judicial Ethics:

35. Improper Publicizing of Court Proceedings.

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.

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 carry out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization. (Ed.)

Criminal Procedure, prohibiting photographs or broadcasting of court proceedings. The United States District Courts in eight jurisdictions have officially adopted the canon as a local rule of court (*Id.* at 150-151), and the great majority of district courts in other jurisdictions follow it as an unwritten rule of conduct. Most Illinois courts have adopted such a rule as part of their local rules of practice (*e.g.*, Rule 40 of the Rules of the Circuit Court of Cook County). Moreover, the trial courts of many other states have adopted a similar rule; and even where the courts have not adopted a formal rule, the principle embodied in Canon 35 is generally observed as a matter of custom and good sense.

In 1952, after the Kefauver Committee allowed the televising of committee hearings, and after the television media began to ask permission to televise court proceedings, the American Bar Association appointed a special committee to study Canon 35. The committee submitted a full appraisal of the subject and recommended that Canon 35 be amended to prohibit televising of court proceedings. The association approved the recommendation and amended the canon. 77 A.B.A. REP. 607 (1952).

II. *The judges, under the Constitution, statutes and decided cases, clearly have power to prohibit photographs, broadcasts and telecasts of court proceedings.*

The campaign of the communication media to get their cameras and microphones into court has been devoted, in large part, to a search for some precedent in the law which could be said to give them a legally enforceable right to carry on such activities in the courtroom. What is the law?

A. *Every trial judge has power to control the conduct of proceedings before him, including power to exclude photographers and broadcasters.*

The starting point, in any discussion of the law applicable to this problem, as well as in any discussion of the judicial ethics involved, must be that it is the business of the courts to serve the public interest by assuring a fair trial to all litigants. It is stated in 53 AM. JUR., *Trial*, § 34, pp. 49-50:

It is within the province of trial courts, in the exercise of sound discretion, to regulate the course of business during the progress of trials. . . . In the trial judge is vested the power and duty of preserving order, enforcing obedience to lawful orders and process, and controlling witnesses and the conduct of counsel, and all necessary precautions must be taken to insure a fair and impartial trial.

In the recent case of *State v. Clifford*, 118 N.E.2d 853 (Ohio Ct. App. 1954), *aff'd* 123 N.E.2d 8 (Ohio Sup. Ct. 1954), *cert. denied* 349 U.S. 929 (1955), the trial judge told a press photographer that he would not permit photographs to be taken during the arraignment of a man indicted for embezzlement. The photographer defied the judge and took a picture. The judge held the photographer in contempt. The judge's order was upheld in turn by the Appellate Court and the Supreme Court of Ohio, and the United States Supreme Court denied certiorari. The Ohio Appellate Court said (at 118 N.E. 2d 855-56):

A Judge is at all times during the sessions of the court empowered to maintain decorum and enforce reasonable rules to insure the orderly and judicious disposition of the court's business. . . .

Under the undisputed evidence in this case, the rule against taking photographs in a courtroom while the court is in session has much support. Such a rule is in force in all of the Federal Courts of the United States, is clearly stated in the Canons of Judicial Ethics of the American Bar Association, and is recognized as necessary courtroom decorum by many state and local Bar Associations and by a great many individual judges of state courts. It is therefore impossible for this court to hold that the trial court, in promulgating the rule against photographs . . . abused its discretion. . . .

When the court is in session it is under the complete control of the judge, whose directions, reasonably necessary to maintain order and prevent unnecessary disturbance and distraction must be obeyed. Deliberate disobedience of such orders constitutes a contempt of court punishable under statutes of this state.

Two of the many cases in accord with this result are *Ex parte Sturm*, 152 Md. 121, 136 Atl. 312, 51 A.L.R. 356 (1927); and *Re Seed*, 140 N.Y. Misc. 681, 251 N.Y.S. 615 (1931).

In other words, the law today is clear on the point that every trial judge has power to conduct the proceedings in his court so as to assure a fair trial. If the presence of photographers and broadcasters is likely to interfere with a fair trial, which most judges believe to be the case, the trial judge can prohibit photographing, broadcasting or televising.

B. Photographers and broadcasters have no legally enforceable right to bring their cameras and microphones into the courtroom.

It is clear, from the *Clifford*, *Sturm* and *Seed* cases, that photographers and broadcasters have no legally enforceable right to carry on the activities of their professions in the courtroom. The media insist, however, that there is such a right. Their argument is based on several grounds.

1. The "free speech" argument: The media argue that the guarantee of freedom of speech by the first and fourteenth amendments of the federal Constitution gives them the right to broadcast court proceedings. No court, however, has yet seen fit to hold that the right of free speech is involved to such an extent as to give the media a legally enforceable right to bring their cameras and microphones into court. The reason is obvious and basic. There are two fundamental sets of rights involved — the right to a fair trial and the right to free speech. Neither of the two sets of rights is absolute, and in the event of conflict, one or the other must give way. In the present situation, while it is recognized that the public should have the fullest information about the courts, it is more important that every litigant have a fair trial. The rights of the individual person to a fair trial are of such paramount importance as to require the most scrupulous attention and protection. Mr. Justice Frankfurter eloquently pointed this out in his short statement (denying certiorari) in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1949):

It has taken centuries of struggle to evolve our system of bringing the guilty to book, protecting the innocent, and maintaining the

interests of society consonant with our democratic professions. One of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there, to the end that the public may judge whether our system of justice is fair and right. On the other hand, our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court. . . . It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of a criminal charge "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." . . . Proceedings for the determination of guilt or innocence in open court are not in competition with any other means for establishing the charge.

It is submitted that, between the two sets of rights, the right of an individual to a fair trial must prevail if our democratic principles, which arise from our belief in the dignity and worth of the individual citizen, are to prevail.

2. The "free press" argument: The media also argue that the first amendment guarantee of freedom of the press gives press photographers an enforceable right to photograph court proceedings. They argue that their right to comment on the case includes a right to photograph it. This argument must fail because photographs are not essential to a statement of what goes on in court in any particular case. Moreover, the same reasons, which led to the conclusion that the right to a fair trial must prevail as against an assertion of freedom of speech, apply here and lead to the conclusion that it must prevail over an assertion of freedom of the press. The courts have accordingly held that freedom of the press is not involved. The New York Appellate Court expressly so held in *United Press Association v. Valente*, 281 App. Div. 395, 120 N.Y.S.2d 179 (1953). *Accord: State of Ohio v. Clifford, supra; Ex parte Sturm, supra.*

3. The "public trial" argument: The media further argue that the public has a right to be present at all court proceedings; and that the photographers, broadcasters, and telecasters, as members of the general public, share in that right. It is true that the sixth amendment of the federal Constitution, and the constitutions of 41 states, require that criminal trials be open to the public. See Comment, *A Public Trial*, 4 CATHOLIC U.L. REV. 38 (1954). As a matter of fact, all trials are now public by law or custom except where attendance by the public (including the media) might affect public morals, health or safety. However, many courts have held that this right is one which belongs to the defendant alone, in a criminal case, and not to the general public nor to the media of communication. *United Press Association v. Valente, supra.* This is the majority rule. And, even if the right to a public trial can be said to be a right belonging to the general public, as was held in *E. W. Scripps Co. v. Fulton*, 125 N.E.2d 896 (Ohio App. Ct. 1955), it is far from being an absolute right. There are statutes in 40 states authorizing or requiring the exclusion of the public in certain classes of cases, more particularly rape cases and cases involving minors. 6 WIGMORE, EVIDENCE § 1835(1) (3d ed. 1940). These statutes have generally been held to be constitutional. *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921); and see Notes, 35 CORNELL L.Q. 395 (1950) and 49 COLUM. L. REV. 110 (1949). Moreover, the judges themselves, even in the

absence of statute, clearly have power to exclude persons whose presence is apt to make it difficult to have a fair trial. *State of Ohio v. Clifford, supra*. The media quote Wigmore's arguments as to the values of public trials (improvement of the quality of testimony, and so on) as though these values justified an extension of the courtroom into every living room by way of television. Actually Wigmore took no such extreme position. He clearly stated, 6 WIGMORE, EVIDENCE § 1835 (3d ed. 1940), that:

All the reasons for requiring publicity are of a contingent . . . nature. In the long run . . . no tangible and positive advantage is gained for a party in a given case by publicity or lost by privacy. Moreover, since the whole community cannot enter, the exclusion of some who might have entered does no definite harm. Finally, in certain conditions, the advantages may be overbalanced by disadvantages. The rule therefore need not be absolute and invariable. Exceptions may properly be recognized. It is an excess of sentimental obstinacy to deny the propriety of allowing exceptions.

Wigmore believed exclusion was in order when there was a risk of mob violence, or the possible moral harm of satisfying pruriency in certain cases, or danger of overcrowding, or the likelihood that the attendant publicity might turn the trial into a circus. Wigmore approved of the statement of Judge Walker in *State v. Saale*, 308 Mo. 573, 274 S.W. 393 (1925), affirming the action of a trial judge who, faced with a courtroom in which every seat was occupied, ordered the sheriff not to admit any more spectators (cited at 6 WIGMORE, EVIDENCE § 1835 [3d ed. 1940]): "The publicity enjoined by organic laws must, in the administration of justice, be subordinated to reason."

Were Wigmore alive today, he would undoubtedly approve of the use of Canon 35 as a guide. The media have elaborated on the "public trial" argument to the point where it might almost seem that John Lilburne made his famous attack on Star Chamber proceedings in the England of 1649 for the sole purpose of assuring newsmen and their heirs of a "right of access" to court proceedings. Nothing could be farther from the truth. John Lilburne was a cantankerous and obstinate *individualist* who was insisting on *his* right to a fair and public trial. And this, essentially, is what the right to a public trial means today; it is the right of the *individual defendant* in a criminal case to have enough of the public present to assure that *he* is fairly tried and judged.

4. The "equality of access" argument: Some of the communication media, particularly the broadcasters, argue that there is unlawful discrimination when newspaper reporters are admitted to court but not television cameras and microphones. The complete answer to this argument is that the broadcasters and photographers have just as much access to the courtroom as anyone else. They can attend in person. They can observe and later tell others what went on. They can "gather and disseminate the news." They, however, are not satisfied with this; they want more; they want to bring cameras and microphones with them. A logical extension of this argument would be to say that every courtroom spectator has a legally enforceable right to bring his camera with him and take pictures. It is, of course, clear that what each of the media wants is not "equality of access" but "access to carry on my business in the courtroom."

Another answer to this is that no court has yet been persuaded to hold that there is any such right. To the contrary, it has been held in one case, where a trial judge allowed only one radio broadcaster to put his microphone in the courtroom, that another broadcaster had no basis to claim that such violated his federally guaranteed civil rights. *Anthony v. Morrison*, 83 F. Supp. 494 (S.D. Cal. 1948); *aff'd* 173 F.2d 897 (9th Cir. 1949); *cert. denied* 338 U.S. 819 (1949). The "equality of access" argument is of interest, however, in that it reveals the keen competition which exists between the various parts of the communication profession. No one of the media will content itself with staying outside the courtroom if other media members are permitted inside; all want the same chance at "coverage." This indicates some of the problems which are certain to be encountered by a trial judge in any sensational case. The media have argued that they can avoid part of this problem by "agreeing" to pool their resources in such a case and entrust them to some one team of cameramen; but the philosophy and practice of free enterprise in the newspaper, radio and television fields (as well as the history of their conduct at most sensational trials in the past) makes it clear that, when the competition is keen, it will be difficult to get the media to agree on anything, and that, in any event, a "pooling agreement" will be a slender reed on which to rely.

5. The Colorado Case: The Colorado Supreme Court, in 1955, held hearings to determine whether it should modify its rule patterned after Canon 35. In February, 1956, it adopted a recommendation that the rule be modified. The modified rule provides that it is up to the trial judge in each case to decide whether to permit photographing or broadcasting, provided that no witness or juror in attendance under subpoena shall be photographed or broadcast over his objection. 296 P.2d 465 (1956). The media have hailed this as a victory for their point of view. Actually it is no victory for the media; it merely confirms the arguments set forth in this article, namely, that the trial judge has the right to ban these practices and the media have no legally enforceable right to bring their cameras and microphones into court. The only difference between Canon 35 and the Colorado rule is one of emphasis; and, on this point, most courts have ruled that they prefer to follow Canon 35 verbatim. See *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956). The Arizona Supreme Court adopted Canon 35 verbatim, after argument, in December 1956; and the West Virginia Supreme Court, in March, 1956, after argument and briefs, amended its Canon 35 to include a ban on broadcasting. The reason these other courts prefer Canon 35 to the Colorado rule is clear. The new Colorado rule, by requiring the trial judge to rule on photographing and broadcasting in each case, subjects the trial judge to the combined pressures of two of the most vocal parts of the community, namely, the newspapers and broadcasters. This, in addition to the other duties of the trial judge, places too great a burden on him. Most state supreme courts, therefore, prefer to assume the responsibility for stating, as a valid exercise of the rule-making power of the courts, over judicial proceedings, that photographing and broadcasting shall not be permitted.

III. *The Judges not only can, but should continue to follow the rules against photographing and televising court trials. Those rules are as good a guide for assuring fair trials today as they were when adopted.*

The campaign of the communication media is not limited to arguments about the law. They have also attacked Canon 35 and related rules on the ground that they are outmoded and no longer have any basis in fact. What are the facts?

The argument of the communication media is that Canon 35 and related rules were adopted at a time when the physical equipment of the photographer and broadcaster was both bulky and noisy; today the equipment is quiet and can be almost completely concealed; therefore the rules are outdated and unnecessary. It is submitted that this argument misses the point. The rules were adopted not merely because the cameras and microphones were a physical bother but just as much, if not more, because they created psychological distractions. To the extent that human nature on the American scene has remained pretty much the same over the last two decades, to that extent the rules are as up-to-date and necessary as ever.

It is conceded that there have been tremendous technological changes in this field in the last several years. It is common knowledge that today there are high-speed still cameras with fast film, which not only do not need flash bulbs to take pictures indoors but which are so small they fit in the palm of one's hand. There are moving picture cameras with mechanisms so quiet they can't be heard a few feet away. There are television cameras sensitive enough to transmit a picture from a darkened room lit only by one candle. It is possible to construct an auditorium so that radio and television transmission can be carried on with a minimum of disturbance — witness the General Assembly of the United Nations.

The fact remains, however, that the Anglo-American system for getting at the truth in court is still the same. It is still our notion that the best way of securing justice in the trial of a case is to have an impartial judge, and a jury free from prejudice, sitting in judgment on facts brought before them by the adversaries. The best way to get at the truth is to have the adversaries bring their witnesses into court, put them under oath, and then examine and cross-examine them. The best way to do this fairly in any case, be it a murder trial, a divorce proceeding, a personal injury action or a minor traffic charge, is to concentrate on the business at hand and, so far as possible, to exclude every outside influence.

Viewed in this perspective, have the facts so changed that the rules against photographing and televising are out of date?

What about the judges? The rules were adopted in the belief that photographers and broadcasters were likely to distract the judge from the business at hand by requiring him to devote considerable attention to special arrangements and to the settling of disputes between competing photographers and broadcasters. As a matter of fact, this problem is considerably more acute today than it was at the time of adoption of Canon 35 in 1937. The tremendous growth of the communication media and the keen competition between them

today would greatly add to the burdens of the trial judge, who would inevitably be confronted with persistent demands for space and for equal time.

What about the newspapers and press photographers and telecasters? Have they changed? The rules were adopted in the belief that the communication media would usually be most interested in covering those cases which would attract the largest audience; that such cases were apt to be the ones most charged with emotion in the first place, and therefore most in need of an impartial judge and jury; that, if photographing and broadcasting were permitted, the tension within the courtroom would mount, and the general public would become so aroused that waves of emotion would roll back into the courtroom from outside: and that all this would make it difficult, if not impossible, to secure a fair trial for the parties. Times have not changed so much as to make it unlikely that these things will happen again. The communication media are as interested as ever in sensational cases. The Sheppard murder trial in Ohio attracted over 70 newspapermen and 50 press photographers. 87 EDITOR AND PUBLISHER 11 (Dec. 1954).

The media argue that they themselves have changed and that they now want only to educate and inform the public. The fact of the matter is that the media are still in business for profit. They are necessarily governed by considerations such as amount of circulation and number of listeners or viewers. The officers and directors of the various media are directly responsible to their shareholders to see to it that the companies are so run as to make a profit. Although the media would like to cover ordinary cases and thus inform the public how the courts work, they will inevitably concentrate their efforts on the sensational cases. And these are the very cases most in need of a fair and impartial judge and jury.

What about the witnesses? The rules were adopted in the belief that witnesses, already nervous at the prospect of what would very likely be their one appearance on the witness stand in a lifetime, would be made apprehensive and tense at the prospect of having photographs taken and broadcasts made of their testimony. The behavior of the average person has not changed so much that he can pose for press photographers or appear on a telecast with ease. People still grow tense and nervous when being photographed. They feel that way, not so much because of the paraphernalia, although this has some effect, but principally because of the knowledge that the photograph or telecast will be looked at by a vast audience. Whatever the result of this tension, whether it makes the person's mind go blank or induces him to put on an act, it is not conducive to close attention or truth-telling. These tensions, arising from activities that have nothing directly to do with the judicial system itself, but which are even likely to interfere with the judicial process, should be eliminated. The entire story of the evolution of trial by judge and jury teaches that we are most likely to get at the truth by concentrating on the testimony of witnesses under oath and eliminating all outside influences. We know that trial by wager of battle was no way to settle disputes. We know that trial by ordeal of fire or water was based on superstition and not related to the issue of

where the truth lay. We should not now substitute a new form of trial, *trial by ordeal of camera*, for *trial by judge and jury*.

Can we prove what we say about the witnesses? The media claim that an impartial scientific study would show that witnesses are not seriously affected by the presence of cameras or television. In 1956 your author began research along this line. Starting with the *Journal of Psychological Abstracts*, it became clear at once that there was not too much written on the subject, although there appeared to be some studies on the psychology of testimony, the elements of error in testimony, and so on. However, your author was brought up short by some observations in 2 WIGMORE, EVIDENCE, *The Science of Judicial Proof*, § 296 (3d ed. 1937). Wigmore discusses scientific studies of the extent of testimonial error. He raises the question whether it is at all scientifically possible for there ever to be an accurate study of the degree of error in testimonial evidence. Wigmore concludes that it is doubtful whether such a study is possible, because there is generally no way of establishing the objective facts of a litigated matter other than by way of a trial; and to substitute "a staged trial" for a real trial affords no basis for scientific conclusions. Wigmore states:

When the testimonial scientist desires to observe the effect of a type of event upon the truth-telling narration of three hundred witnesses under oath in court, half of whom have been formerly convicted of forgery and half have not been, he cannot *himself* know *what the truth of the event was in those three hundred cases*; and it is only by the known objective truth of the case that the correctness of their utterances can be tested and the tendency of a forger to lie can be measured. Perhaps in half a dozen cases out of the three hundred he might satisfy himself on the actual event, as his basis for testing. But in all the rest, he can only establish the fact-test by listening to the other witnesses (for whom he has as yet no test), or by laboriously checking the facts by outside inquiry of his own, and here again he lacks a basis for checking. In short, it can only be by a long series of years of observation, gradually accumulating enough cases in which an objective truth-basis was known at the start, that the data would be ripe for generalization. 2 WIGMORE, EVIDENCE § 296 (3d ed. 1940), at 692-93.

In view of this, it appears to the author that no scientific answer can readily be found to this problem. The matter must be resolved largely by value judgments, based upon common human experience and related to the aims sought to be achieved by our society.*

Conclusion

What are the values deemed most important by our society? Trials with or without television?

The society which deems it wise that the fights of individuals, with each other and with their government, be heard by judge and jury, with witnesses brought before them by the adversaries; to get at the truth, so far as possible, by examination and cross examination; and to make every effort to achieve justice by this means, and thereto abide the result — that society will choose

* For a discussion of the position of the American Civil Liberties Union on the problem of televising court proceedings, see Bok Review, 36 NOTRE DAME LAWYER 239 (1961). (Ed.)

to have the matter so arranged that, subject to all human frailties, the judge and jury can nevertheless concentrate on the business at hand and try to reach for the truth, within the framework of our judicial system.

The society which chooses to televise the trials; to interest the greatest number of people; and to bring the testimony of witnesses into millions of homes and other viewing places — that society, by letting a trial become a spectacle, turns the entire matter into a public issue, subject to being resolved, not by judge and jury alone, but by judge and jury pressured by the most excited and aroused part of the public. This way could lie dictatorship and anarchy. Witness the “trial” after the Reichstag Fire and the recent televised Cuban “trials.” Mr. Justice Douglas, in an address delivered at the University of Colorado Law School, on May 10, 1960, *The Public Trial and the Free Press*, observed, “was it not Juvenal who wrote ‘Two things only the people anxiously desire — bread and circuses?’”

Is our society concerned to have “order in the court”?