The Society for the Reform of Criminal Law

Ninth International Conference

December 1- 3, 1995

Santa Monica, California

The Media and the Criminal Justice System:

Fair Trial v. Free Press

An International Perspective

FREE PRESS v. FAIR TRIAL:

Judicial-Media Interaction

by

Justice F. B. William Kelly

Supreme Court of Nova Scotia

Visiting Associate at the

International Centre for Criminal Law Reform and Criminal Justice Policy

at the University of British Columbia

1822 East Mall

Vancouver, B.C., V6T 1Z1, Canada

Tel: (604) 822-9875 Fax: (604) 822-9317

FREE PRESS v. FAIR TRIAL:

JUDICIAL -- MEDIA INTERACTION

by F.B. William Kelly[1]

[1] The author is a Justice of the Supreme Court of Nova Scotia, presently on study leave at The International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver, B.C. He wishes to gratefully

When the media reports on the judicial process, freedoms collide. An accused's right to a fair trial and the media's right to freedom of expression are in frequent tension. The principle agents of these rights, the media and the judiciary are interdependent proponents of constitutional rights, often in conflict as to where the priority and emphases should be placed in the free press v. fair trial dichotomy. This paper explores the basis for these democratic principles as they relate one to the other, provides some background on the conflict, and suggests the tension between the two is an inevitable and perhaps necessary one. It also suggests some methods for the players involved to reduce the intensity of the conflict and improve their dialogue.

1. THE INTERNATIONAL PERSPECTIVE

One of the most important functions of an independent judiciary is to ensure the right to a fair trial. This obligation is enshrined in the 1985 UN *Basic Principles on the Independence of the Judiciary,* at Article 6, which states the judiciary is entitled and required " to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[2] The principles enunciated in this Article are also stated in similar language in the *International Covenant on Civil and Political Rights* (*ICCPR*)[3], which provides that "everyone shall be entitled to a *fair* and public hearing by a competent, *independent and impartial* tribunal" in the determination of any criminal charge or in a suit at law.[4] The *ICCPR*

acknowledge the research and editing assistance of Bruce Broomhall, and the encouragement of his associates at the Centre.

[2] *UN Basic Principles on the Independence of the Judiciary*, G.A. Res.146, U.N. GAOR, 40th Sess.(1985) art.6.

[3] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entered into force on 23 March 1976 in accordance with article 49.

[4] Art. 14(1), *ICCPR,* (1966) 999 UNTS 171, 1976 Can. T.S. No. 47, in force, including Canada, 1976 (my emphases).

acknowledges that the right to a public trial is not absolute and that certain limitations on public access are necessary.[5]

Article 19 of *ICCPR*[6] confirms that freedom of expression is also a fundamental part of a democratic society. It elaborates that freedom of expression includes the freedom of the press[7] and states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." It seems clear that this right as expressed would include an individual's right, including that of a media employee, to impart information to the public by writing, broadcasting and by television.

Under Article 10 of the *European Convention on Human Rights*, to which the UK and its other signatories are morally committed, the freedom of the press is paramount. Exceptions to that freedom may be made only such as are "necessary in a democratic society", permissible only to the extent that they correspond to "a pressing social need", and are proportionate to the end to be achieved.[8]

These international and multinational standards consistently place media freedom at the core of a democratic and free society. They do not make it secondary to an accused's right to a fair trial or to the requirement of an independent judiciary.

2. THE COURT/PRESS RELATIONSHIP

a. General

[5] Article 14(1) of the ICCPR provides that "[t]he Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of the private lives of the Parties so requires, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
[6] As well as Article 10 of the European Convention on Human Rights (ECHR).
[7] The words "press" and "media" are used interchangeably in this paper.

The conflicts which arise between the media and the courts are a consequence of the fact that our societies have recognized two values as fundamental, and have given them constitutional or quasi-constitutional status. These are the right to a fair and public trial and the right of a free press. More specifically stated for the thesis of this paper, it is the right of an accused to a fair trial and the right of the public to know what is happening in their nation's courtrooms, which can only be done practically through the media's right to gain access to judicial proceedings and records. At issue is whether we can ever achieve a harmonious relationship between the courts and the media, when each properly performs its proper role in the democratic process.

The purposes protected by the recognition of these rights are, of course, important ones. It is basic to our system of justice that trials, with few exceptions, be open to the public, and thus to the press, at all stages. In part, it is assumed that such publicity has some deterrent effect by reminding the public of the administration of justice. More importantly, however, such critical scrutiny increases the accountability of the judicial process, a scrutiny not always welcomed by the various branches of the administration of justice. To assess the conflicts between the media and the court in a principled way, the judiciary must accept that one of the valid roles of a free press in a democratic society is to analyse judicial performance, the exercise of judicial discretion and the fair trial right, to be critical where appropriate, and to disseminate this analysis. An informed public can then better appreciate the exercise of the rule of law in society.

The fair trial concern regarding media court reporting activities is that the publication of some information would prejudice the right of the accused to a fair trial. This concern includes pre-trial publication of information about the accused or the offence which might bias the potential jurors, and publication of material the court has ruled inadmissible as evidence in circumstances where it might come to the jury's attention. Some courts refuse access to the broadcast media in part out of a concern it will disturb the dignity and

---

[8] *Sunday Times v. United Kingdom* (1979) 2 EHRR 245 (Sometimes referred to as "the Thalidomide case").

decorum of the court in a way that will affect trial fairness. There is also a concern expressed by victims rights groups and others that reporting of certain trial information by the press is an unnecessary privacy invasion, principally the publication of information relating to jurors, victims, and child witnesses.

b. The Public Right to Information

As members of the public have the right to receive information, as well as to express themselves, the public has a right to information on the functioning of its institutions, including its courts. Public support for the judiciary and the judicial system is directly linked to the public understanding of them and public confidence in them as essential elements of our democratic system. The press right is thus founded on the public right to know: the public right to have access to information so that it may understand and monitor the functioning of its institutions.[9] The "public watchdog" status of journalists derives from the right of the citizen to be informed: "journalists hold the public's right-to-know hat in their right-to-print hand".[10]

The protection of freedom of the press serves numerous purposes. From the point of view of court administration, its most important function is to maximize public access to the courts. In modern society, print and electronic media have to a large degree become the eyes and ears of the public. Far more people learn about the appearance and workings of a courtroom through the media than ever see a courtroom in person. The consequence is that the media plays a specific role in maintaining the rule of law by scrutinizing the conduct of the judicial function and providing feedback to the courts. More generally, the media are given the freedom to report and comment on the activities of government as a whole. The courts, in protecting this purpose of the press, protects also the democratic underpinnings of civil society.

---

[9] As stated by Sir John Donaldson in *Attorney-General v. Guardian Newspaper(No 2)*[1988] 3 All ER 545, at 600: "It is because the media are the eyes and ears of the public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than the right of the general public. Indeed, it is that of the general public for whom they are trustees."

c. Court/Press Friction

There is a long-standing friction between the courts and the media as a result of the history of judicial restriction of media access to or reporting on the courts. The tension arises as the "open court" principle ensures the right of the public to view court proceedings. The courts encourage openness in order to protect the fairness of its own process and to advance the repute of the administration of justice and the rule of law. The media is thus seen as serving the public interest, and is normally undisturbed in its reporting on the judicial process. It is useful to remember that no day goes by without significant media coverage of judicial proceedings -- and only rarely does this material cause any concern to the administration of justice.

However, in every jurisdiction the media at times is perceived by the courts to threaten rather than support the fair administration of justice in some circumstances. The most obvious instance of this is where pre-trial publicity is thought to have influenced potential jury members to the extent that the accused can no longer be assured of a fair trial. Where such a perception on the part of the judiciary exists, the press, rather than enjoying the protection of the courts, is vulnerable to the court use of its powers to limit or exclude coverage.

d. The Court's Dilemma.

Courts appear to be increasingly reluctant to resort to the use of their contempt sanction powers, which in this context usually involves punishing journalists for revealing proscribed criminal trial information or for refusing to reveal the source of such information. The court use of contempt powers against the media is most often controversial, and courts are reluctant to use this power, perhaps in part because of the media's greater ability to influence public opinion. Because very few courts have an official "voice" (other than the

[10] Simon, Howard and Joseph A. Califano, Jr., *The Media and the Law* (New York: Praegar, 1976) at p. 4.

written reasons for decision), the actions of a court which the press perceives as an attack on its freedom of expression is interpreted to the public only by the wounded press! This may cause the repute of the administration of justice to suffer as a result of the courts' very attempt to protect the fair trial right.

While courts have a duty to protect their process from unfairness, they must also recognize that the press has an important role to play in ensuring that fairness through its scrutiny of judicial action. We can confidently predict that, in a democracy, courts and media will never agree on where to draw the line between fair reportage and reportage which taints the trial process. However, the history of this necessary tension between the freedom of the press and the right to a fair trial also suggests that some measure of the conflicting interaction is due to the failure of the judiciary and the press to understand the role of the other and to attempt to reduce the tension between them.

e. Judges Aren't Journalists -- and Vice Versa

The tension between the media and the courts is inevitable given that either party will place the boundary between the two spheres in a different place. Media and courts have different standards of allowable criticism which create friction between them. What a reporter thinks to be perfectly fair comment may strike a judge as indecorous in the extreme. What the press believes is interesting information about a person charged with a crime may be criminal record information which a judge is concerned might improperly affect the potential jury panel. Judges and journalists are not expert in each others' fields, and few fully understand the needs and priorities of the other. Where journalists seek to disseminate information as widely as possible, judges seek to limit the flow of information by the application of principles calculated to ensure fair trials. The introduction of technological innovations only exacerbates the problem by simplifying information flow world-wide over the Internet. To protect the right of fair trial, justice systems in every jurisdiction will have to become more knowledgeable concerning the information revolution.

These two institutions should be continuously focused on the task of seeking out the best possible relationship between them, a relationship that would allow the fundamental purpose of each to be fulfilled without undue interference from the other. At the same time, neither can fully submit to the imperatives of the other and still perform its constitutional function. Judges must be seen to be applying the law, not to be manufacturing popular decisions. Similarly, the press must report the news freely and without fear in order to serve the public interest which, in this context, involves subjecting the process of the courts to independent scrutiny.

3. COURT RESTRICTIONS ON THE PRESS

a. General

If the tension between the media and the courts is necessary to the proper functioning of a democratic society, it remains to be determined how this tension may best be modified, or even harnessed, in the service of justice. Changes in the relationship must not compromise the ability of each institution to fulfil its function. The challenge for the courts is to make an accurate and unbiased assessment of the media activity that can legitimately be deemed to interfere with court process. There are other contributing factors which affect the nature of media reportage of the judicial function which must be acknowledged in any assessment of the problem. Media objectivity may be affected by such factors as competitiveness among the media, the commercial interests of media management and ownership, and limited legal knowledge on the part of many journalists. To understand how this media assessment has been made by the courts in practice, it might be useful to review briefly common law responses to the media, particularly in Canada, the United Kingdom and the United States of America.

b. General common law approach

In all common law countries the courts have some level of prior restraint jurisdiction over publication of trial evidence by the media. This power to prevent the press from publishing what they have heard in court varies from jurisdiction to jurisdiction, but generally extends to the reporting of most evidence presented at committal proceedings, the identity of complainants in sexual offenses, the identity of children involved in criminal proceedings, and any court proceedings taking place in the absence of the jury.[11] Section 10 of the *Madrid Principles*[12], developed in 1994 by a group of distinguished international legal experts and media representatives, outlines permissible limits on the freedom of expression:

> 10. Laws may restrict the Basic Principle[13][of a free press] in relation to criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society
>
> (a) for the prevention of serious prejudice to a defendant;
>
> (b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim.

This restrictive authority is exercised in a discretionary way by the courts, with some few exceptions.[14] In recent years, there has been a tendency by the appellate courts in major common law countries to require that this discretion be exercised in a more reasoned way, requiring that a strong case be made for suppression of publication in the interests of the administration of justice with less emphasis on protecting individual

---

[11] Naylor, Bronwyn. "Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Reports of Criminal Trials" (1994) 53 *Cambridge Law Journal* 492 at p. 497.

[12] *The Madrid Principles on the Relationship between the Media and Judicial Independence*, established by a group convened by the International Commission of Jurists, its Centre for the Independence of Judges and Lawyers, and the Spanish Committee of UNICEF, March, 1994. See Appendix A attached. For material filed for the conference, see CIJL Yearbook, vol. 4, (1995), *The Media and the Judiciary*.

[13] *Id.* at p.2

interests.[15] More and more, the judiciary in the major common law jurisdictions appear to be strongly endorsing the principles of open courts and press freedom. In Canada and the UK, senior appeal courts have been critical of sweeping use of gag orders and have emphasized they should be used only where there is a substantial risk of serious prejudice which cannot be adequately reduced by the tools available to the trial judge.[16]

I would also express the opinion, not based on significant research or authority, that the courts are now less likely than before to use the other enforcement tools available to them for breach of publication bans; contempt proceedings and an appeal court's reversal of a conviction because of prejudicial media publicity.[17]

c. The United States of America

Although the American First Amendment is expressed in rather absolute terms -- "Congress shall make no law...abridging ... the freedom of speech, or of the press..." -- the American courts restrict the right to publish to varying degrees, depending on the jurisdiction. In the 1950's, most states and the federal courts exercised considerable restrictive powers over the press, both in its publication of information and its attendance during parts of the judicial process. However, in a number of landmark decisions, commencing with *Sheppard v. Maxwell, Warden*[18], the U.S. Supreme Court outlined a direction to resolve the tension between the First Amendment right and the Sixth Amendment free press obligation. In *Sheppard* the court found the trial judge did not fulfill his duty to protect the accused from considerable prejudicial publicity and instructed judges in what they must do to insure a fair trial. Judges were instructed to:

---

[14] A Canadian exception is that the identity of a sexual assault complainant *must* be protected *if requested*. Increasingly, such victims are rejecting this protection in the interest of public education of the topic or because such restriction may also protect the accused with the same family name.

[15] See *Dagenais v. Canadian Broadcasting Corp.* [1994]3 S.C.R. 835 (S.C.C.) in Canada and *R. v. Evesham Justices, ex parte McDonagh* [1988] Q.B. 553 in the UK, and generally Robertson, G. and Andrew G.L. Nicol, *Media Law: The Rights of Journalists and Broadcasters* (London: Oyez Longman, 1984) at pp. 339-340.

[16] See *Degenais, supra* note 15, in Canada and *Re Central Television plc.* [1991] 1 W.L.R. 4 (C.A.) in the UK.

[17] Notable exceptions to the restricted use prejudice as a successful ground of appeal in the UK are *R. v. Taylor* [1993] *The Times*, 15 June and *R. v. Reade* [1993] *The Independent,* 19 October, discussed in Naylor, *supra* note 11.

- Adopt strict rules governing the use of courtrooms by the press.
- Limit the number of press in the courtroom "at the first sign that their presence would disrupt the trial."
- Insulate prospective witnesses from news media.
- Prohibit "extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."
- Continue a case or transfer it to another county "not so permeated with publicity" whenever there's "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."
- Sequester the jury[19]

What was most noteworthy about *Sheppard* for other common law jurisdictions was that the Court avoided direct infringement of the First Amendment, thus avoiding restricting press publication. Instead, the court recommended "gags" be placed on those who might give prejudicial information to the press. This is contrary to the approach of other common law jurisdictions where the emphasis is on the restraint of the press. The American approach of restricting the flow of information to the press is also accomplished by various policy directives and American Bar Association (ABA) recommendations. Examples are the Katzenbach-Mitchel Guidelines and the ABA Reardon Committee report. The Katzenbach-Mitchel Guidelines specify that, commencing with the criminal investigation, federal Department of Justice officials can disclose to the public only factual information about a person, such as their identity and limited circumstances concerning their arrest. To restrict the danger of prejudice, Justice personnel are ordered not to make available the following:

- observations about a defendant's character;
- statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement;
- references to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or the refusal by the defendant to submit to such tests or examinations;

---

[18] 384 U.S. 333 (1961).The accused, Dr. Sam Sheppard, was a prominent Cleveland physician who was accused of murdering his wife.

[19] As listed in Francois, W.E. *Mass Media Law and Regulation (5th ed.)* (Iowa State U. Press, 1990) at p. 362.

- statements concerning evidence or argument in the case;
- statements concerning the identity, testimony, or credibility of prospective witnesses; and
- any opinion as to the accused's guilt, or the possibility of a plea to a lesser offense.[20]

The ABA "Reardon Committee" report was adopted in 1966 and has been subsequently expanded. These standards recommended that lawyers, law enforcement officials and judges not release the type of information banned under the Katzenbach-Mitchel guidelines. This report called for the exclusion of the public (and thus the press) from preliminary hearings, bail hearings, or other pre-trial hearings in criminal matters if material could be disclosed that could be inadmissible at trial. The substantial press reaction to these standards was at least the partial cause of their subsequent modification by the ABA. In response to the reaction, the ABA emphasized that the standards did not apply to the media and did not restrict the media from using public information they could obtain through their own initiative, nor prevent them from criticizing the administration of justice or the courts directly.[21]

About one-third of the American states have adopted guidelines developed by bench-bar-press groups for media coverage of the courts. In a 1965 decision, *Estes v. Texas*,[22] the US Supreme Court reversed a conviction solely because of the presence of cameras in the courtrooms. However, a number of states nevertheless decided to permit cameras in the courtrooms, with certain safeguards to protect against the "circus atmosphere" of *Estes*. One of these states, Florida, adopted rules which allowed coverage at the discretion of the trial judge. This exercise of discretion was challenged by a reluctant defendant, and in 1980 the U.S. Supreme Court in *Chandler v. Florida* [23] unanimously held that the Constitution did not prohibit a state from experimenting with electronic coverage of trials. Notably, *Chandler* did not declare that the electronic media were guaranteed access to the courtrooms by the First Amendment. Presently, almost all states allow some form of

---

[20] *Id.* at p. 366.
[21] American Bar Association (Legal Advisory Committee on Fair Trial and Free Press), *The Rights of Free Trial and Free Press, (*Chicago, Ill.:1969), Appendix A, p.10.
[22] 381 U.S. 532 (1965).

permanent or experimental camera coverage of judicial proceedings.[24] The Supreme Court then clarified the "overriding interest" principle in *Press Enterprises Co. v. Superior Court of California (Press Enterprise II)*[25] where it stated that a preliminary hearing could only be closed if a "substantial probability of prejudice" could be shown that would only be avoided by closure.[26]

d. The United Kingdom

Although the concept and the phrase "a bill of rights" were invented in Britain, basic human rights enjoy no special legal protection there, as they do in Canada and the United States. In fact, Britain is the only country in Western Europe which has neither entrenched a bill of rights nor incorporated the European Convention on Human Rights[27] into its domestic laws. In spite of a 1991 poll which showed four out of five Britons support the idea of a bill of rights, there is considerable political and legal institutional opposition to the idea, based largely upon the perception of a bill of rights being a threat to the sovereignty of Parliament and an anti-democratic transfer of powers to non-elected judges.[28] In Britain news media are restricted from publishing anything more than the simple facts of an arrest and crime and, in reporting on a trial, can only report on the information presented in court. One could argue that the British media has suffered as a result of no entrenchment of the free press right, if one were to rely on such evidence as the court decisions supporting the broadcasting ban on Sinn Fein, the political wing of the IRA, and the failure to remove the injunction against newspaper publication of the book *Spycatcher*. Courts in The United Kingdom and Australia[29] have no explicit authority to strike down laws limiting publication nor explicit constitutional principles to act as guide when interpreting laws and applying procedural rules in court.

---

[23] 449 U.S. 560 (1981).
[24] As of 1990 six states and the Federal courts do not allow cameras in the courtroom.
[25] 478 U.S. 1 (1986).
[26] Id. at p.14.
[27] Article 10 provides a right to freedom of expression.
[28] *The Economist*, October 21st-27th, at p.64
[29] New Zealand adopted a bill of rights in 1990

e. Canada

In *Dagenais v. Canadian Broadcasting Corp.*[30], the Supreme Court of Canada held that judges exercising their common law discretion to protect the fairness of the trial process must exercise that discretion "within the boundaries set by the principles of the *Charter.*"[31] The common law recognizes the right of an accused to a fair trial, the importance of a free press and the right of public access to the courts. At common law, the media were not regarded as having any greater or lesser right of freedom of expression or access to the courts than that enjoyed by the general public. Thus, at common law (at least in its Canadian pre-*Charter* version), where there was a conflict between the right to a fair trial and the freedom of expression, the courts usually ensured that the fair trial right prevailed.

In *Dagenais* the Supreme Court of Canada has changed this balance and held that a hierarchical approach to Charter rights must be avoided. The court re-formulated the common law rule concerning the imposition of publication bans. Chief Justice Lamer stated the rule as follows:

> A publication ban should only be ordered when:
>
> > (a) Such a ban is <u>necessary</u> in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> >
> > (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[32]

The Chief Justice stressed that courts, when balancing competing freedoms, should be clear on the objectives of a publication ban and should examine the possibility of other

---

[30] *Supra,* note 15
[31] Per Lamer C.J.C., at p.875, referring to the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[32] *Id.* at p.878

reasonable alternative measures to achieve the objective. *Dagenais* also clarified the right and outlined the procedure for a third party, such as the media, to challenge publication bans and to have standing at hearings where publication bans are being considered.

4. THE PRESENT TECHNOLOGICAL ENVIRONMENT

a. General

Many of the problems in the court/press issue, and indeed many of the solutions, emanate from rapid communication technology change. The universal flow of information has created a situation in which courts, with their limited jurisdictional spheres, have had to confront a variety of new challenges in protecting their processes. At the same time, society is more literate than ever before and is exposed to an ever-expanding quantity of information. Whether or not this has resulted in a better-informed citizenry may be debatable -- nevertheless more information about the court process is transmitted to more recipients than ever before. Admittedly, much of this information is sensational and devoid of meaningful commentary, not least because of the highly competitive environment in which both local and international market-driven media now operate.

New computer related technological advances will also have some effect on the dissemination of information. For example, increasingly inexpensive publishing and printing methods are opening an era of small independent publishing. Perhaps some level of in-house publishing of information will not be beyond the courts of the Twenty-First Century! Individual citizens have also gone from being passive recipients to being producers of information with the increased use of the Internet. The result is that courts are under an increasing level of public scrutiny and are also confronted with new means whereby the fair trial guarantee can be challenged and the privacy of participants in the judicial process can be invaded.

b. The Unwelcome Intruder: The Television Camera

The medium which has been most affected by the uneven application of the free press principle has been television, which is frequently denied access to the courts. Media in the courts is not a new phenomenon, but "electronic" media is. Why should television not be accorded the same access as any other media, and subject as well to similar court restrictions? Should it not be given the same basic right of access and reportage, subject only to such limits as are strictly necessary for the protection of the fair process of the courts?

If this latter question is answered in the affirmative, it remains to be determined what these limits should be in any particular circumstances. In what ways does television interfere with the fair trial process? Television cameras themselves no longer pose a technical interference with the process of the courts. Perhaps in the past the unwieldy cameras, the cables and other paraphernalia constituted a distraction, but it is clear that present technological advances are such that cameras can be given free access to proceedings without impairing the calm deliberative process of a trial. Such minor interference as may arise could easily be dealt with through the promulgation of simple guidelines by the courts themselves. The issue is no longer the camera's presence, but only whether the transmission of courtroom images affects the fairness of a trial. Television cameras *per se* no longer constitute an interference with the trial process.

The only other ground on which television cameras could conceivably be placed under a blanket exclusion is if it could be established that there was something inherent in television coverage itself which somehow constitutes an essential interference with the trial process. The resistance to the television camera is frequently based on the fear that a media-created circus will invade the trial arena and impair the dignified deliberation necessary for a fair trial. But no one seriously disputes that the trial judge has the jurisdiction to control the trial process -- including the decorum in the place of trial. There are some other problems raised by cameras in the courtroom, principally how to respect the privacy of

witnesses and victims. However, electronic media technology is sufficiently advanced that a trial judge can exercise discretion to limit the extent of the access of the television camera. Thus the apprehension is really about the capacity to control the genie once it is let out of the bottle. Television provides an important means of ensuring fair process through raising the level of awareness of the public as to the administration of justice. That one finds disagreeable the limits imposed on television coverage by its commercial constraints is not, without more justification, reason to exclude this medium.

Therefore, why should we not accord to television the same basic principle of free access which we provide to other media? When it comes to exclusion, we must be prepared to carry the burden of demonstrating an interference with the process of a fair trial. To do so will require, moreover, a different analysis in the case of different media.[33] If indeed certain television coverage interferes with a fair trial, it may do so in a different way than would print media coverage. As a consequence, the response of the courts will have to be tailored to the *modus operandi* of the individual medium as well to the unique circumstances of a particular trial.

Any discussion of cameras in the courtroom would be incomplete without a reference to Court TV, a US television channel. Court TV is a 24-hour court channel which broadcasts one or two complete trials each weekday - usually live. In the evenings it presents more conventional programs analysing the day's court proceedings and providing continuing legal education programs. Its continuous coverage presents a more realistic view of judicial proceedings than the dramatic sketches often seen on television news. In effect, Court TV shows real courtrooms to the general public, most of whom had never visited a trial in progress, and thus breaks down the walls of ignorance and misunderstanding that exist between the public and their laws.

---

[33] Two of the finest (and most pessimistic) analysis of television as a medium of communication are Neil Postmans's *Amusing Ourselves to Death* , (Penguin Group,1986), and Postman and Steve Powers' *How to Watch TV News,* (Penguin Group, 1992). In the latter, the authors conclude that what television news says and what it delivers are two different things. They also conclude at p. 143 that television in the courtroom "might increase public understanding of the judicial system, but only if coverage extends beyond TV's need to dramatize the moment".

Many recent high profile cases have received enormous media coverage, and consequently have raised the profile of the justice system throughout the world. One may argue that the very fact of such extensive coverage may have an adverse affect on the right of the accused person to a fair trial, perhaps by putting pressure on the jury to render a certain verdict or bringing information to the jury that was not part of the trial evidence. Although the judge has such tools as sequestering the jury and restricting news information to guard against these intrusions, in a media-saturated trial some non-evidence information could seep through to the jury. One would hope that competent and conscientious jurors would nevertheless keep their oath to be unbiased. In such high profile cases the “media frenzy” will take place whether or not the camera is in the courtroom. Is it then not more important that the public form their impression of justice administration from watching the trial rather than having it filtered by news reports?

Weighed against the risks of television cameras in the courtrooms is the possible benefit of the trials being watched by people who might come forward when they realise that a witness is in error or that they have additional relevant evidence. Even if we acknowledge that television creates some additional problems, perhaps we should also be open to the possiblity that cameras in the courtrooms could have a positive effect on the trial process. Does the presence of the media intimidate or does it spur the parties to perform their function in a more careful and through manner? In the final analysis we should ask whether the fear of a negative effect provides sufficient grounds to censor the press, whether it be the print medium or television.

Who does not believe there will be a significant benefit to the cause of justice in the world as a result of the televising of the Yugoslavia Tribunal trial of a Serbian alleged to have committed war crimes, the first such trial since the Nuremberg and Tokyo Tribunals?

5. IS IT TIME FOR A REASSESSMENT OF ATTITUDES?

It may be useful for judges, lawyers, and all others involved in the administration of justice to review their attitudes towards the media and its performance in communicating the activities of the justice system. Those involved in judicial administration should acknowledge that they feel that media exposure, let alone criticism, of most anything they do is an invasion of personal privacy that preferably would be avoided -- unless of course it is most complementary! Perhaps judges and others should acknowledge that they harbor some antagonism toward the media based on some experience of legal reporting we would characterize as inaccurate, sensational, misleading or even biased. They have all probably experienced or noted news-gathering methods they have judged to be an inappropriate invasion of privacy of victims and others required to participate in the system. Few judges cannot acknowledge an apprehension that the decorum and calm reflection desired for a fair trial is threatened by an unrestricted press invasion of the courtrooms: good judges know that judicial control of the courtroom is the best guarantee of a fair trial and most are apprehensive of how that control will be affected by television. We all know that sensational crime stories make juicy headlines and journalistic reputations, and that in the drive to get such stories sometimes little consideration is given to the fair trial rights of the accused.[34]

However valid such criticisms are, it is only fair also to acknowledge that the justice system is frequently well served by media reporting, and that the media is not the only player that has failings in the performance of its function? Is it not also accurate to concede that lawyers, judges, and other justice officers and professionals are not the only "judges" of what is in the best public interest?[35] Of course the press makes mistakes, but surely we all contribute to the error agenda of the world. Can we not concede that courts have no right to "censor" the media, except within the limited jurisdiction to restrict

[34] See generally *How to Watch the TV News, supra* note 33.

[35] In Clive Walker, Ian Cram, and Debra Brogarth, "The Reporting of Crown Court Proceedings and the Contempt of Court Act 1981" (1992)55 *Modern Law Review* 647, the authors comment at p.669: "[T]he realization that the media are capable of misbehavior should not blind us to the fact that judges and the legal system can also perpetrate considerable injustices, which may neither be exposed nor remedied without media pressure."

publication only as much as is clearly necessary to protect the objectives of a fair trial and certain other privacy rights?

Would or should the members of the media admit that an examination of their collective attitude toward the participants in the justice system (police, the defense bar, prosecutors, judges, witnesses, victims, etc.) is in need of re-assessment? Do they feel they report fairly on the role and performance of these participants in the system? I will leave the self-assessment response to individual members of the media. The responsibility of the media goes beyond their obligation to respond to the public right to know: the media also has an obligation to report fair and impartial accounts in the public interest.

It may, as well, be useful for the other actors or agents involved in the administration of justice must to review their attitudes toward the press and their position in the free press-fair trial dialogue. Has their perception of their special role in the administration of justice colored their attitude? Many privacy-seeking accused would prefer a trial be held with as little publicity as possible, perhaps in complete secrecy! From time to time, the best defense might require the opposite. The point being that defense counsel's attitude to the press may be colored by the best interest of the client, not the public. Are the attitudes of prosecutors to the issue affected by the public interest or the state interest? Or perhaps by some of the players -- the witnesses, the victims or themselves as counsel? Even legislators responsible for creating criminal laws, who as public figures are also anxious to be shown in the best public light, cannot be said to be disinterested in discussions on press invasions of privacy. Obviously, all the players have some conflicting interests which must be factored into a reassessment of their attitudes of the fair trial/free press dilemma.

6. WHO SPEAKS FOR THE COURTS?

a. Should Judges Speak To and About the Media?

Judges in most democratic societies, and certainly those in the Anglo-American jurisdictions, have historically adopted a judicial legal culture based on the principal that a judge should be seen and not heard to speak out to the media . This is essentially a group-imposed restriction, often enforced by peer scrutiny: a judge who speaks out is often considered to be publicity-seeking and self-serving and, by speaking out, risking the reputation of the institution of the judiciary. However, although all judges accept that they have a right to speak out in a very limited way on matters directly relating to the administration of justice, very few feel they are should address the public on these issues or on a broader range of subjects publicly through the media.

In most jurisdictions, judges follow the admonition of Lord Chief Justice Widgery that they "should not court publicity and certainly should not do their work in such a way as to 'catch the eye of the newsman.'"[36] The exceptions are rare, but often notorious, and few judges reach the public recognition of Lord Denning who stated "my appearances on television have been so frequent that taxi-drivers and passers-by recognize me"[37] -- but then we must acknowledge that few judges have had as much of value to say as Lord Denning!

In the last decade judicial attitudes are (slowly) changing in non-American common law jurisdictions, although in many of the fifty-one American jurisdictions such change came earlier. Shortly after Lord Chancellor MacKay's appointment in 1987, he abandoned the Kilmuir Rules which had prevented judges from broadcasting on any legal subject, even if the offering was non-political in nature.

---

[36] *The Times*, 7 August 1972

[37] Denning, Alfred Thompson, Baron (Lord Denning), *Landmarks on the Law* (London: Oyez Longman, 1984) at p. v.

The traditional spokespersons for the judiciary, the attorneys-general and the bar have separate agendas, sometimes in conflict with the judiciary, and appear to be less likely to speak out on behalf of judges. The modern judiciary must look to a knowledgeable and interested media to communicate the important principles of judicial independence and the fair trial right to the public.

The courts, more so than any other part of the governmental process, remain substantially isolated from the majority of citizens in too many jurisdictions -- and, more significantly, many of the court processes are incomprehensible to the public, and, regrettably, also to most of the media.

b. Those TV Cameras again!

If judges, lawyers and others involved in the administration of justice are truly interested in educating the general public in the workings of the legal system, it is absurd to ignore the most popular medium of mass communication - television. At the same time it must be acknowledged that the unrestricted use of television in the courtroom, particularly during the criminal trial, may well sometimes impinge on the public interest in fair trials unless controlled by the court. Such difficulties, however, should not result in a Luddite blanket rejection of cameras in the courtrooms. In my opinion, there is virtually no valid legal reason not to allow television coverage of any appeal hearing, any sentencing hearing, or any non-jury trial motion. I would suggest that the fairness of any civil trial would only rarely be threatened by the camera's eye. I also suggest the only significant area of concern is with the fairness of the criminal trial process. The real discussion should not be whether the cameras eye should be allowed into the courtrooms, but rather under what conditions: what are the necessary legal and technical controls that should be imposed? What conditions and restrictions are truly essential to ensure the courts can properly perform their functions?

Most of the objections raised against television in the courts apply equally to the other media as well: that the industry is commercially motivated, that the selection of what is newsworthy tends to the sensational and that the parties to the proceeding (the witnesses, the jury, the lawyers and the judge) may be affected by the presence of the media. Even if we acknowledge that television creates some additional problems, perhaps we should also be open to the possibility that cameras in the courtrooms could have a positive effect on the trial process. Does the presence of the media intimidate or does it spur the parties to perform their functions in a more careful and thorough manner? In the final analysis we should ask whether the fear of a negative effect provides sufficient grounds to censor the press, whether it be the print medium or television.

7. OPTIONS FOR CHANGE

In response to the frequent friction between the courts and the media, various formal and informal initiatives have been undertaken in many jurisdiction to improve communication of judicial activities. By developing pro-active strategies, many courts have been able to make significant improvements in their relations with the media. The press often complains that while the judicial system wants good “press”, it rarely helps the media in its information collection. The following is a partial list of some techniques that have been effective in some jurisdictions to communicate court activities. These are not meant to be exhaustive, and some techniques will be more effective in some jurisdictions or courts than others:

- **Press Liaison Officers or Media Spokespersons.** Many courts have designated a person to be the official contact person for the media. This person’s duties can range from advising the press on court related information to being designated the official

spokesperson for the court or judicial territory, authorised to make public comment on behalf of the court.

- **Court/Media Liaison Committees**. These have been established in a number of jurisdictions, usually on an informal basis and sometimes including bar representation. Many of these committees make no formal decisions but merely discuss mutual problems in depth and attempt to reach resolution that can be translated into a court policy. These groups have frequently contributed to the development of written court/media guidelines.

- **Court/Media Guidelines**. Many jurisdictions have established clear, comprehensive and practical guidelines relating to media access and reporting. Such guidelines minimize disputes and establish consistency at all court venues. Guidelines can deal with the logistics of media coverage and other areas of court/media irritations. They may cover only minor matters or deal with the full range of potential problems, and further may be reviewed and improved on a regular basis. Everyone works more comfortably in an arena where the ground rules are clear and in writing.
- **Joint Conferences and Seminars**. These can occur at a regional, state/provincial, or national level. Mutual discussion of problems leads to mutual understanding and often to mutual solutions. These gatherings can also serve to educate the parties: judges can be trained in effective communication with reporters, and reporters trained in effective coverage of court news.
- **Court Outreach**. The courts can make planned and effective efforts to speak to the public, directly and through the media. Courts have used this technique by using trained personnel or judges to communicate matters of public interest in an informal but structured way. This can be done in many fora, from talk shows to personal talks to a community group or a classroom. In some jurisdictions courts will hold an “Open Court Day” or a “Meet Your Judges” event, usually in the courtrooms and in co-operation with the bar and court staff. An important aspect of any outreach program would be to involve the judiciary in the education of journalists.
- **In-house Projects**. These would include projects that educated the judiciary in effective community and media relations. The judiciary could also develop methods of mutual

assistance, communications and support. This could consist of ongoing communications between individual judges on the subject of press relations by informal meetings, a newsletter, or Internet lists. The subject matter could not only be court/media issues, but also public education matters generally.

Beyond such initiatives, lawyers, judges and reporters have established fora for the exchange of ideas, under the auspices of professional associations and academic institutions, at the national and international levels. The most recent prominent international example of this led to the 1994 *Madrid Principles* referred to earlier. Such international statements of principal can form a valuable basis for an objective debate on media/court issues. Their value lies, of course, in the prominence they are able to lend to both the problems and the solutions in this area, as well as in their ability to promulgate guidelines and principles for the assistance of those who deal with these problems on a day to day basis.

Many courts have already taken a pro-active informal approach to conflict management in this area. They have done so, no doubt, because of the long-term benefits which come of improved media awareness of legal processes and improved media/court relations. Such initiatives are, of course, affected during a period of financial restraint. Although many of the above suggestions are not expensive, they do require considerable judicial hours and energy at a time when the burdens on many courts are onerous. Judicial leadership and commitment, and some financial resources, are each needed to mount such programs. While both preconditions are essential, the former is undoubtedly the more important.

8. URGING A BROAD APPROACH

It is basic to democratic theory that public institutions exist as a result of a public mandate, in order to serve the public interest, and at public sufferance. The last is the most

important of these: no institution can exist in a democratic society without the support of the public. Before true democracies were established, David Hume asserted this point in 1742:

> ... as force is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded....[38]

One might add that it is on *informed* opinion that government is founded. Jeremy Bentham argued that public opinion, and its most effective organ, a free press, was a force not to be feared, but trusted and allowed a central role in the political process. [39] It is on the basis of such a conception that the freedom of the press has been protected under law in our societies. The mass media is infinitely more important today than in Bentham's time as a instrument for informing the public and for shaping public opinion. That a democratic institution disagrees with the way public opinion is so shaped is irrelevant. The media is a force too significant to ignore and institutions which deny the media its due as the “public watchdog” are bound to regret it.

Because the two conflicting rights of freedom of the press and fair trial are such essential cornerstones for any democracy, the measure of the commitment that the justice community has to the democratic process may well be assessed by the objectivity and wisdom it brings to the resolution of this issue. To attempt seriously to understand the tension inevitable in the application of these freedoms in the criminal trial process, and to try to reduce them, is a major initial step in pursuing that commitment.

CONCLUSION

The two values at play here, free press and fair trial, are too fundamental to democracy to impose a hierarchy; to conclude that one should supersede the other in the

[38]Green,T.H. and T.H. Grose, eds., *The Philosophical Works* (4 vols.)(London,1882) at 110, vol. 3.

trial process in every case. The tension between these two essential institutions must be respected, even while recognizing that at some point in a trial they may be seriously in conflict.

The courts are obliged to respect the freedom of the press because of the essential societal interests this principle serves: the enhancement of democracy, the vigour of the marketplace of ideas, self-expression and the public scrutiny of the administration of justice. However, by doing so, the courts do not endorse those aspects of the media which tend towards the commercial, the sensational, the shallow or the prurient.

The judicial system should not dismiss, without reflection, complaints that it is uncreative, close-minded and technophobic concerning the free press/fair trial issue. Nor should it decline any opportunity to reach out to communicate to the media and the public, merely because it resents criticism or is critical of press performance. The judiciary, the police, the bar and others operating within the judicial system are not entitled to freedom from criticism nor to uniformly positive assessments; they are entitled to no more than a fair hearing.

The media must also understand that although the courts support it out of respect for the societal interests it promotes, the support it receives is conditional and sometimes secondary. Just as the courts must accept all manner of fair criticism, the media must accept and act on criticism, and also acknowledge that the nature of its institution is such that it has considerable potential to interfere with the proper administration of justice.

It is therefore in the interests of both sides of the issue to seek to develop greater mutual understanding and respect. This will not occur unless these parties have the resolve to devote substantial time, goodwill and resources to understanding and minimizing the court-media dilemma.

---

[39] See Schofield, Paul, "Bentham on Public Opinion and the Press", in *Economic with the Truth: The Law and the Media in a Democratic Society*, (Oxford: ESC pub. Ltd. 1990), at pp. 106-107.