

Controversial Canon 35

By CARTER BRADLEY, '40journ

The contested ban on courtroom photography received some staunch legal support in the February *Sooner* from Hicks Epton, '32Law. But the "controversial canon" doesn't fare so well in this article from United Press International's Carter Bradley, '40journ.

The Canon

On September 30th the Oklahoma Supreme Court adopted Canons of the American Bar Association. Among them was the controversial Canon 35 which stops all courtroom photography and recording of courtroom proceedings. Recess photography is permitted at the discretion of the presiding judge. The language adopted by the court is as follows:

Proceedings in court should be conducted with fitting dignity and decorum. The broadcasting, televising, or the taking of photographs in the courtroom should be done only during recesses of the court with the consent of and under the supervision of the court, and at such time or times as may be authorized by the court.

The broadcasting, televising or photographing of active court proceedings serve to detract from the essential dignity of the proceedings, distract the witnesses and attorneys in the performance of their duties, create misconceptions with respect thereto in the mind of the public, and for these reasons should not be permitted.

Providing that this restriction shall not apply to the photographing, broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization; and provided further that nothing herein is intended to prevent the photographing, televising and broadcasting of ceremonial proceedings conducted in the court room.

"THE question is: Can the Oklahoma Supreme Court restrict or abolish basic freedom?"

The question was asked by an Oklahoma newsman who is opposed to the adoption of Canon 35. This rule, which the state's highest civil court invoked last September, bans news cameras and microphones from trial courts of this state. The court abruptly halted a type of news coverage to which hundreds of thousands of citizens had become accustomed.

Not only Canon 35, but the Supreme Court's procedure in adopting it, has come under attack from various news media, trade organizations and professional groups. A poll of Oklahoma Press Association members showed 100 newspapers of the state opposed to the Canon, compared with 35 endorsing it. Television and radio stations have been almost unanimous in their opposition to the Canon.

Some attorneys and judges have criticized the court's position. One of the strongest statements against the Canon came from Oklahoma's other appellate court, the Court of Criminal Appeals. This court does not possess rule-making powers equal to the Supreme Court, but it went to the heart of the matter in a decision rendered well in advance of the Supreme Court's ruling.

"A trial," said the Court of Criminal Appeals, "is a public event and what transpires in the courtroom is public property. Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."

Judge John Brett of the Criminal Appeals tribunal went on to say, "on numerous occasions, supervised televising in this court has been conducted. Our experience is that when properly supervised by the court, there is neither disturbance, distraction, nor lack of dignity and decorum."

In 1937, Canon 35 was included in the Canons of Judicial Ethics of the American Bar Association. In January, 1958, the Oklahoma Bar Association asked the Oklahoma Supreme Court to consider adoption of the other Canons, but specifically urged the court to bypass the news coverage restriction. Opponents of the Canon have declared that in view of the Bar Association's position at that time, the Supreme Court acted hastily when it embraced Canon 35 last September 30.

Ben Blackstock, '51journ, secretary-manager of the Press Association, said the newspaper group was advised on March 10,

1958, that the Bar Association exempted Canon 35 from its recommended code. Blackstock describes a letter from John H. Halley, '40ba, '47Law, Oklahoma City attorney and Bar Association leader, as "indicative of the strange unwillingness of the members of the bar to speak frankly on the subject of Canon 35." Halley advised Blackstock: "What we are anxious to have done at this time is to get all the non-controversial Canons of Ethics promulgated by the American Bar Association adopted by the Supreme Court of Oklahoma, but, so far as Canon 35 is concerned, we do not wish to ask the court at the present moment to adopt the Canon as it now exists . . . We do not care to have the Supreme Court consider Canon 35 until after the action of the American Bar Association in its annual convention is available."

The Press Association, along with numerous others fighting the Canon, asked the Supreme Court for a rehearing. In its memorandum brief, OPA declared that in November, 1958, the Supreme Court "informally advised" the Bar Association and opponents of Canon 35 "that a decision on the matter should be held in abeyance until the committee of the ABA made its report and action thereon was taken by ABA."

"No objection to this delay on the part of the Supreme Court was voiced by any of the parties involved," press attorneys declared. ". . . No more was heard of the matter until approximately one week before the action of the Court on September 30, 1959, at which time Justice (Earl) Welch ('12) called the attorney for OPA and the other attorneys for communications media and suggested alternative dates for a meeting relative to the reopening of Canon 35."

The press attorneys said "the impression was gained" by media lawyers "that no formal hearing was to be held or decision rendered at the proposed meeting." Nevertheless, the court issued the order on September 30, disallowing, in effect, requests of the news media to be heard, and to present briefs.

This was the situation which prompted attorneys for the Fourth Estate to make the following remark:

" . . . The protestants must now request the Court to reverse an order already entered rather than having the opportunity of presenting briefs and arguments before the Court came to a conclusion in the matter . . . In fairness it is felt that the action of the court places the parties in opposition to the adoption of the proposed modification of Canon 35 in a much more difficult position than would have been the case had the opportunity of filing briefs and full scale argument been afforded before a determina-

Carter Bradley

To present the newsman's side of the Canon 35 dispute, the Sooner has selected Carter Bradley, '40journ, one of the state's most vigorous opponents of the courtroom broadcast-photograph ban. As Oklahoma City bureau manager of United Press International, Bradley is closely associated with all the communication media, dealing daily with UPI's 80 leased wire clients—44 newspapers, 29 radio and 7 television stations.

As a senior at O.U., Bradley was editor of the Oklahoma Daily. Following graduation he worked as a reporter on the Ponca City News and the Oklahoma City Times. In 1944 he joined United Press and became Oklahoma City bureau chief in 1947.



tion of question had been made by the court."

The news media spokesmen go ahead to point out that the American Bar Association still has not completed its restudy of Canon 35, and has set up a joint project in this direction with newspaper, television and radio news committees at the national level.

Blackstock says newspapers of the state "still are waiting for the proponents of Canon 35 to cite one specific case where justice was hampered by an Oklahoma newsman engaged in activity now banned by the Canon."

Other briefs filed by parties seeking a rehearing in the matter have dealt in detail with the contention of Canon 35 sponsors that it is needed to preserve "the essential dignity of the proceedings" in Oklahoma court trials. The Supreme Court, in its much-debated order of September 30, found that broadcasting, televising or photographing of active court proceedings serve to detract from the dignity, "distract the witnesses and attorneys in the performance of their duties, create misconception with respect thereto in the minds of the public, and for these reasons should not be permitted."

Oklahoma County Attorney James W. Bill Berry, '40Law, told the court, "all news agencies, including television, are entitled to report the proceedings of such trials so long as the orderly proceedings of the court are not disturbed . . . We believe the matter of photography, broadcasting and televising of all proceedings and trials should be left to the sound discretion of our trial judges."

An attorney for Governor J. Howard Ed-

mondson, Norman Reynolds, '41ba, '47 Law, reminded the court that Canon 35 "is unnecessary as trial judges have power and authority by statute and judicial decisions to control all proceedings and actions in the presence of the court." Reynolds added, "One of the prime reasons for the enactment of the constitutional provisions providing for freedom of speech and liberty of the press is because of the fact that they are vehicles of information for the benefit of the public at large and are absolutely necessary for the education and enlightenment of the public."

Newsmen have a monumental law library of cases dating back to the Magna Carta to support their stand in favor of free access to the courts and to other sources of information in government. King John's historic guaranty of the rights of Englishmen, signed June 19, 1215, included the words:

"The king's courts of justice shall be stationary, and shall no longer follow his person; They shall be open to everyone; and justice shall no longer be sold, refused, or delayed by them."

Ralph Sewell, '42ba, assistant managing editor of the daily newspapers in Oklahoma City, has taken a forward position in the anti-Canon 35 struggle. Sewell is a member of the executive committee of Sigma Delta Chi, national professional journalistic fraternity. In talks to civic clubs and other groups, he has made these points:

"Trial judges already have the inherent power to maintain order and dignity of their courtroom. The press suggests that

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one way to approach the problem would be for the Supreme Court to exhort inferior judges to diligently maintain order and dignity in their courts against all comers.

"Actually," Sewell continues, "this has been done in Oklahoma County. The rules were pretty strict. Judges are in charge. No photos are permitted by the judge if any of the parties at issue object.

"As for distraction of witnesses and attorneys, this goes to the heart of the trial itself—development of the truth. Witnesses are not only under oath to tell the truth, but a judge must require them to answer questions under pain of jail or fine for contempt of court.

"Since Supreme Court judges presumably seldom attend trials, I think they should listen to our description of what radio stations and news photographers do in the courtroom. Radio stations merely put another mike beside the mike which is already in front of witnesses. The first mike already has been placed there by court reporters who make various recordings as well as take shorthand notes. In some courts, additional mikes amplify testimony in the courtroom. It is a fair question to ask how a radio mike can keep the witness from telling the truth if the stenographer's mike has not done so.

"As for news photographs, press and television cameramen have shot pictures of trials for years in Oklahoma County. The only case that went to the appellate court as a result was settled by the Court of Criminal Appeals. (This is the decision previously quoted herein.)

"In that case, the defendant did not complain the dignity of the court was destroyed, or that witnesses froze up in front of cameras and did not tell the truth. He complained that he was prejudiced with the jury because he was pictured with some other prisoners. In that case the appellate court upheld the right of 'the purifying pen and prying eye' to operate in open court under the supervision of the trial judge."

An attorney for television station KWTV Oklahoma City observed that the Supreme Court "has denied television stations the right to televise court proceedings, but newspapers still retain the right to report such proceedings. Both should have equal rights . . . When reporters from a newspaper are reporting a case, they are writing in front of the jurors, witnesses, and parties, the same is true of artists, who sketch the pictures of the participants in a trial. Such type of reporting has not been held to have interfered with the orderly

proceedings of the court, nor disturbed the court's dignity. It has been demonstrated in numerous courts in Oklahoma and other jurisdictions that television reports can be made without any more interference or disturbance than made by newspaper reporters.

This brief also slapped at the procedures leading to the adoption of Canon 35.

"This court apparently relied solely on the application filed herein," it stated. "It is urged that the order was prematurely issued, since the application recites that Canon 35 was being reconsidered by the American Bar Association and applicants made no specific request for its adoption."

Counsel for The Oklahoma Publishing Co. and WKY Television System, Inc., declared that the distractions of old-time photographic equipment, upon which Canon 35 must have been based, no longer exist. This brief also asserted that freedom of speech and press "apply not only to oral and printed communications, but to those disseminated through other media of which your petitioners are representative."

A restraint such as Canon 35 should not be applied, the brief declared, unless the court finds "clear and present danger" or a "substantive evil if the curb is not imposed."

"We respectfully submit that neither of these factors was present . . . to warrant so broad and all-embracing a rule as that which the court was constrained to promulgate."

These attorneys argued that a citizen who has been acquainted with court procedures through news stories, pictures and film will become a better witness, or juror, or other party, when and if he becomes part of a courtroom scene.

"John Henry Wigmore," the brief stated, "in his great treatise on the Anglo-American system of evidence, points out some of the reasons for open trials. He points out that open proceedings improve the quality of the testimony by 'producing in the witness' mind a disinclination to falsify' in the presence of spectators 'who may be ready to scorn a demonstrated liar.' Wigmore says

they improve the testimony objectively by securing the presence of witnesses who may be able to furnish evidence in chief or in contradiction. They have, he notes, a 'wholesome effect upon the judge, jury and counsel,' who, while 'acting under the public gaze' are more strongly moved to a strict conscientiousness in the performance of duty."

The attorneys said openly-conducted courts offer these advantages:

1. Witnesses are more inclined to tell the truth for fear of contradiction by persons in court or by persons learning of their testimony through news reports.

2. Citizens, not parties to the case, may learn they are involved and be put on notice to defend themselves.

3. Witnesses unknown to the court may be inspired to add new evidence, or contradict evidence already given.

4. The public gains a schooling in its rights and in the means of defending them.

5. Good judges are protected against false accusations of wrong-doing.

6. Confidence is inspired in the judicial process.

7. Society is protected alike against the menace of a court unduly lax and those unduly severe.

The Oklahoma Broadcasters Association warned that Canon 35 could defeat the purpose of the other ethical pronouncements included in the list.

"The canons, for instance, call for personal behavior beyond and above reproach on the part of attorneys and judges," the radio group said. "Abolishment of Canon 35 . . . could help insure those high ideals. The public would see and hear the unprofessional behavior and personal histrionics and dramatics which now too often occur in our courts. As it is, misbehavior is seen and heard by only a few, and the patently sketchy notes made by a pad and pencil reporter cannot begin to reveal this unseemly action to the public . . ."

The question remains: "Can the Oklahoma Supreme Court restrict or abolish a basic freedom?" For an answer, one can turn again to the Oklahoma Court of Criminal Appeals landmark statement:

"It has been said that without education the people perish. There is no field of government about which the people know so little as they do about the courts. There is no field of government about which they should know so much, as about their courts. The courts do not belong to the lawyers, but are institutions by, of, and for the people. In this modern age, it is well that the veil of mysticism surrounding our courts be removed and that the people be confronted with reality."

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