LET'S ABOLISH CANON 35

By HERBERT BRUCKER

ONE DAY in April, 1960, a respected judge of Connecticut's Superior Court, Abraham S. Bordon, took the unusual step of admitting news cameras to a murder trial at which he was presiding. He stipulated only that photographers must cause no distraction. They didn't.

Next morning two photographs appeared on the front page of the Hartford *Courant*. One showed the defendant, judge, witness on the stand, and other principals occupied with the business in hand. The second showed the jury. It is evident from the picture that no one in the courtroom paid heed to the fact that pictures were being taken. Participants and spectators alike were otherwise occupied. For all that, the fact that the pictures had been taken, and published, caused the temperature to rise in Connecticut's Supreme Court of Errors.

This final court of appeals is not only the apex of the state's judicial system. It is also, through the office of the Chief Justice, guardian of all the lower courts in the state. Chief Justice Raymond E. Baldwin, former Governor, Senator, and distinguished citizen generally, let Judge Bordon know that Canon 35 of the Code of Judicial Ethics was in effect throughout Connecticut, and this canon forbids pictures in court. There was no more photography.

The trial proceeded to its end as it had begun. The day the pictures were taken did not differ from the others before and after it. There was no hint that photography had in any way affected the trial, hampered the search for justice, or intruded itself into the judicial process. All that had happened was that through the pictures citizens were given an unusually graphic, and direct and accurate, report on one day's proceedings in court.

In one sense this was hardly of note, because the photograph has long since taken its place beside the written word as a means of reporting to the citizen what takes place in the world he lives in. Throughout our society the news camera, and now also radio and TV, are accepted as reporters different in method but equal in stature with the printed word. Even our churches admit cameras and microphones, whether it is the Ecumenical Council in St. Peter's or the crowning of England's Queen in Westminster Abbey. In all the length and breadth of our society, the courts alone forbid the use of cameras and microphones as reporters.

Yet it is easy to understand how this prohibition came about. News photographers are hardly shrinking violets. They are especially noticeable when they pop the flashbulbs that used to be universal, and under certain conditions are still necessary. As for broadcasters, particularly the TV crews with their lights and wires, they not only obtrude at a public event but often dominate. At times one can't tell whether what is taking place is a public event or merely an act put on for the TV cameras.

Unless there is control like that in the Connecticut courtroom, a raffish quality is likely to follow photographers and broadcasters into court. Consider this *New York Times* account of what happened in late September of this year, when Billie Sol Estes finally went on trial:

> A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.
>
> A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor.

This mechanical mess was soon brought under control, as it should have been from the beginning. Modern techniques are such that it is not difficult to photograph and broadcast trials, even over TV, without anyone in the courtroom being aware of the fact until he is told. This is done by using modern equipment that needs only available light, by concealing bulky equipment behind special walls, and by putting camera and electronic reporters under

—Hartford Courant photos.

The camera was there—Photographs of judge and jury at murder trial in Connecticut Superior Court.

the rules of good behavior that are enforced on everyone else in the courtroom anyway.

It was precisely a lack of such precautions that brought Canon 35 into being in the first place. The occasion was the 1935 trial of Bruno Richard Hauptmann in New Jersey for the Lindbergh kidnaping. Here was a trial that had the nation agog. Inevitably the still young medium of radio moved in on it, as did news photographers using the noiseless, smokeless but brilliant flashbulbs that had recently replaced the Vesuvius-like pan of open flash powder. Between them they made a circus of it. Decent members of bar, press, and public alike were disturbed.

SO it was that a committee representing the American Bar Association, headed by the eminent Newton D. Baker, met with representatives of the American Newspaper Publishers Association and the American Society of Newspaper Editors. Their mutual goal was to set up ground rules for the future appearance of photographers in court. The two sides found themselves almost in agreement. It is noteworthy that the difference between them was one of degree, not of kind. Even the lawyers were ready to admit cameras to court. It was simply a question of how to regulate their use:

"The lawyer members of the committee believe that in addition to the knowledge and approval of the trial judge, the consent of counsel for the accused in criminal cases and of counsel for both parties in civil cases should be required and secured. The newspaper representatives of the joint committee believe that the consent of the trial judge is full protection both to parties and to witnesses, and that no further requirement should be interposed."

With so little separating them, negotiators for both bar and press looked forward to further meetings that would soon set up mutually acceptable rules. But while they still had the subject under examination the House of Delegates of the American Bar Association acted. Without so much as a by-your-leave to its own negotiating committee and Mr. Baker, it adopted Canon 35 in September, 1937. A 1952 amendment brought radio and TV under the blanket prohibition. Otherwise this canon reads to this day exactly as it did in 1937:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, 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 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."

There had been no inquiry into the question of whether photography did inevitably debase the judicial process or not. It was simply decreed that it did. Nor has any lawyer yet explained how the camera coverage that in Canon 35's first breath distracts, degrades, and creates misconceptions, can in its next breath demonstrate the dignity of court proceedings.

This reconciling of the irreconcilable is but a minor inconsistency. What is startling is the fact that a crushing majority of bar and bench defend Canon 35 against any change with an intensity like that put behind a matter of religious faith. In particular they resist any attempt to make the test of experience, to establish whether cameras and microphones under court control do in fact 1) distract and degrade; 2) demonstrate dignity; or 3) do nothing at all, one way or another, to the trial itself.

THIS animus on the part of lawyers is out of character. Lawyers pride themselves on rejecting hypothetical cases. They will tolerate no hearsay, no theories, no ifs or suppositions—only facts. For some reason it is different when anyone suggests getting the facts about photography and broadcasting in court.

If you do not believe that bar and bench thus take their stand on assumption, instead of after investigation, consider No. 53 of the Federal Rules of Criminal Procedure. Canon 35 applies, whether formally by court rule or simply with the irresistible force of a tribal taboo, to the courts in all our states except Colorado and Texas. Rule 53 extends Canon 35 to federal courts everywhere, without exception. Says this rule:

"The taking of photographs in the courtroom during the process of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

Rule 53 has now been stretched further, not only to include TV but to apply also to the environs of the court as well as to the courtroom itself. Does this mean just the corridors? The stairs and hallways? The street outside? Across the street? Down the block? We do not know. We know only that last March 12 a Judicial Conference of the United States, presided over by Chief Justice Earl Warren, issued this unanimous pronouncement:

"*Resolved*, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court."

No question here whether or not these alternate means of reporting are in fact inconsistent with fair trial. Authority simply "considers" them so to be. So that's how it is going to be.

It is hard to escape the feeling that somewhere one has been through this before. Perhaps it was when the Knave of Hearts stole those tarts and, as soon as the accusation had been read:

"Consider your verdict," the King said to the jury.

"Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!"

And again:

"No, no!" said the Queen. "Sentence first—verdict afterwards." I submit that this is not a matter to be settled by ex-cathedra pronouncements. Nor for that matter is it to be settled by debate. Bar and press have been exchanging arguments for a quarter-century without either persuading the other. Characteristic was a speech made in May, 1960, at the University of Colorado by Justice William O. Douglas of the Supreme Court. His title was "The Public Trial and the Free Press." The address was replete with statements like "in my view" photography imperils fair trial; "I feel that" trial on TV is quite different; "the very thought" of cameras, no matter how silent or concealed, "is repugnant"; "one shudders to think" what could happen; "imagine the pressure" judges "would be under"; and so on, without inquiry into what does actually happen when thoughts, shudders, and imaginings give way to facts.

I could marshal a regiment of arguments to answer Justice Douglas and the all but unbroken ranks of lawyers who stand with him on the battle line. Lawyers fear that judges up for election would ham it up before the cameras, while shy witnesses would clam up. One could answer that a judge who is a ham is a ham, cameras or not. And if judges court publicity because they

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STANLEY RESOR: PORTRAIT OF AN EDUCATOR

By JAMES WEBB YOUNG

STANLEY RESOR, who built the J. Walter Thompson Company into the first and largest around-the-world advertising agency, was as little like the stereotyped adman of Madison Avenue as a man could be.

He was never a hail fellow, never appeared at an advertising men's gathering except to deliver a serious paper, and was never photographed for an advertising journal with a highball in hand.

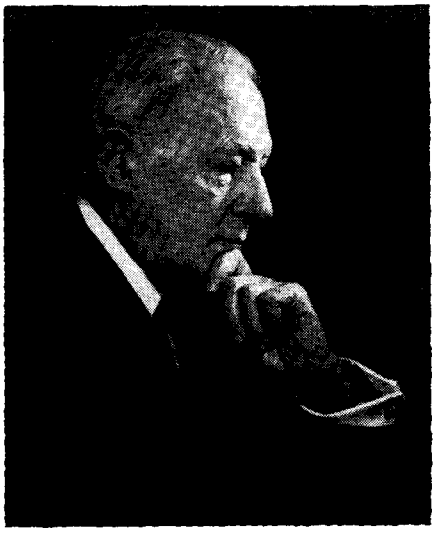
I suspect that if his family fortunes had permitted, when he graduated from Yale, he might have chosen to be an educator. Be that as it may, it was as an educator—a consumer educator and, it might be said, as educator of his own Hellas, or profession — that he approached his work.

In appearance he had more than a touch of the aristocrat, in character and personal habits a trace of the Scotch Covenanter. Yet he loved good food, had a nice taste in wines, and relished his after-dinner cigar. Had he become an academic educator he would have been at home at the High Table of a C. P. Snow tale.

At some early period—perhaps at Yale—Resor had been profoundly influenced by Buckle's "History of Civilization in England." In Buckle's concepts of regularities in the mass behavior of people, and the possibility of statistically predicting such behavior, Resor thought he saw the basis for a science of advertising. Thus, for years, Buckle was required reading for every key person who joined the J. Walter Thompson staff.

Along with this went a somewhat naïve respect for the Ph.D. Thus, early in Resor's rebuilding of the Thompson staff, there appeared on it a noted professor of psychology from Johns Hopkins; one of American history from Yale; one of economics from Harvard; and others of like ilk. These scholars, interestingly enough, sometimes became good advertising men. Certainly they helped emphasize the approach to advertising as education, as applied social science.

Resor had come into advertising early in this century, when most of it was still mere publicity for a name or trademark. Seeing it as education, plus persuasion, he made many of the earliest contributions to the revolutionizing of its content, and became marked for his advertising successes in doing so.



Stanley Resor—A talent for education with persuasion.

Thus it was his advertising that first taught American women to use a vegetable cooking fat; to use a soap for "The Skin You Love To Touch"; to turn foods previously shown only in packages into appetizing dishes shown on the table; to wash woolens without shrinkage, and delicate lingerie without damage; to find in a fifty-cent jar of face cream the same satisfaction as in one several times more expensive. In short, to teach them these and many similar practical means to better living.

To do these things soundly he employed the first domestic science woman and set up the first experimental kitchen in any agency; had on his staff a specially trained reader of medical literature; and, most of all, under the leadership of his own brilliant wife, trained able women writers to talk to women in their own language. Thus advertising became more informative, helpful, persuasive—and profitable.

But the continuing success and growth that came to the Thompson Company under Resor's direction did not result wholly from his concept of advertising as education.

He was a canny business man. When, in 1912, he tried to persuade me to leave the publishing business for the agency business, he said he would not want me to change just for money. So the starting salary would be just what I was already getting—$40 a week. I had to refuse the job before it was upped to $60!

He had vision and courage. He foresaw the future for international trade and advertising when America was in its isolationist mood; and he made a heavy investment in his foreign offices.

He had principles and integrity, for himself and his clients. Some products he would not advertise—hard liquors, "cures," or those for "feminine hygiene." He considered his agency the "trustee" for its clients' advertising appropriations and, as such, responsible for their proper expenditure. He never deviated from the "Standards of Practice" for the agency business that he himself had drafted for the American Association of Advertising Agencies.

He had the greatest tenacity of purpose of any man I ever knew. He often lost a battle but seldom gave up a cause. When he died he was still trying to implement an idea for the political health of the nation that he had been working on without success for at least fifteen years.

And most of all, he was a glutton for work and a perfectionist. No employee ever put in as long hours as he did; and all major ones learned that they could be sure of uninterrupted weekends with their families only by getting out of telephone communication. Said one who had just been through an all-day Sunday workout, with copy and layouts, at Resor's home: "Do you know what he said to me when we had finished? It was: 'Gee, Ed, wasn't this fun? We must do it often!' "

All this was rooted in Resor's profound belief in the importance of advertising as education in a free society, and in its potential uses. When I became chairman of the Advertising Council, early in the development of its program for public service advertising, he said to me: "Now you are the head of what is potentially the greatest educational institution in America." And he always gave the Council unstinting support.

Yet, paradoxically, after Resor came into command of J. Walter Thompson, the word "advertising" never appeared on its letterhead, office entrances, or with its signature on any printed matter. When I asked him why he only said: "You know that famous building at Broad and Wall streets? All it says over its door is 'J. P. Morgan & Co.' "