THE EVOLUTION OF CANON 35
AND THE TWO MAVERICK STATES THAT DID NOT FOLLOW SUIT

MICHAEL T. MARTÍNEZ, PH.D.
UNIVERSITY OF TENNESSEE - KNOXVILLE

LAW AND POLICY/HISTORY DIVISIONS
ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION
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ABSTRACT

The American Bar Association passed Canon 35 prohibiting the taking of photographs and the broadcasting of court proceedings in 1937. All but two states, Colorado and Texas, adopted Canon 35 and the ban on electronic media coverage of trials lasted slightly more than 40 years among the rest of the states. This paper explores the implementation of Canon 35 and seeks to answer why Colorado and Texas refused to fall into lockstep with the rest.

CANON 35 AND THE TWO MAVERICKS

> *Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.*
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> *– Canon 35*[1]

In 1937, the American Bar Association (ABA) passed Canon 35 that barred the taking of photographs or the broadcasting of court proceedings. At the time, all but two states adopted the ban, which stood until the 1980s when states started experimenting with allowing electronic media access to the courts. Today all 50 states *allow* electronic media access to the courts in some form or fashion, but the extent of access is determined by court rules and varies a great deal by state.

This paper explores the implementation and evolution of the ABA's Canon 35 and seeks to answer why Colorado and Texas, the only two states that did not adopt Canon 35, refused to fall in lockstep with the other states and what conclusions we may draw from it today.

THE SCOPES TRIAL: THE DAWN OF A NEW ERA

In 1925, a reporter from WGN in Chicago covered the Scopes trial on evolution, making it the first ever to be nationally broadcast and the "most 'attended trial' to that point."[2] The *Chicago Daily Tribune*, owner of WGN, persuaded the Tennessee court to allow the radio station to broadcast directly from the courtroom, the first attempt ever to

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[1] ROBERT T. MCCRACKEN, et al., *Recommendations of Changes in the Canons of Professonal and Judicial Ethics*, 23 American Bar Association Journal 635(1937).
[2] LLOYD CHIASSON JR., *The Case of John Scopes (1925) "In the beginning..."*, *in* The Press on Trial: Crimes and Trials as Media Events 89, (Lloyd Chaisson Jr. ed. 1997).

capture audio from an ongoing trial.[3] Between 100 and 150 reporters and photographers came to Dayton, Tenn., one of who was columnist H. L. Menken.[4] Clarence Darrow, one of the greatest trial lawyers in America, and William Jennings Bryan, a nationally best-known fundamentalist and three-time presidential candidate, faced off against each other in the trial of John Scopes, a Tennessee schoolteacher who taught evolution in his biology class.[5]

This trial was an early indication of how radio, movie newsreels and eventually television would become an influence in reporting national events.[6] What many Americans know about the Scopes trial comes from *Inherit the Wind*, a play written in response to the threat to democracy posed by McCarthyism.[7]

Ten years later the trial of Bruno Richard Hauptmann would have a profound effect on the ability of "cameras" to get inside courtrooms to cover trials.

"THE FLEMINGTON CIRCUS:" BRUNO RICHARD HAUPTMANN

In 1935, Hauptmann was tried for the kidnapping and murder of Charles and Anne Morrow Lindbergh's young son.[8] At the time, it was the most publicized trial in history with an estimated 700 newsmen and 120 cameramen covering the proceedings.[9]

Judge Thomas Trenchard issued orders that photographs could only be taken in the courtroom when he was not on the bench, and only four photographers would be

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[3] MARCEL CHOTKOWSKI LAFOLLETTE, Reframing Scopes 53 (University Press of Kansas. 2008).
[4] Id. at, 50.
[5] CHIASSON JR., 87, (
[6] LAFOLLETTE, 53.
[7] DOUGLAS LINDER, *Notes on Inherit the Wind*(2008), at http://law2.umkc.edu/faculty/projects/ftrials/scopes/sco_inhe.htm.
[8] MARJORIE COHN & DAVID DOW, Cameras in the Courtroom: Television and the Pursuit of Justice 15 (McFarland. 1998).
[9] S.L. ALEXANDER, Curious History: The ABA Code of Judicial Ethics Canon 35 3 (Law Division of AEJMC, Portland, OR, 1988).

allowed in the courtroom at one time.[10] A cooperative darkroom was set up in a bakery two blocks away to provide copies of courtroom pictures.[11] Five newsreel companies agreed to operate sound motion-picture cameras in the courtroom.[12] Judge Trenchard allowed them to film provided they showed no footage until after the verdict.[13] Radio broadcasters had to rely on microphones outside the courtroom.[14]

The trial was criticized for its "carnival-like atmosphere."[15] One newspaper headline screamed "The Flemington Circus – This Way to the Big Tent."[16] Outside the courthouse vendors sold toy replicas of the ladder Hauptmann allegedly used to kidnap young Lindbergh, bookends the shape of the courthouse and photographs of Col. Lindbergh with a forged signature.[17]

The Union Hotel in Flemington, N.J., had received messages from 900 people from all over the world requesting rooms for the duration of the Hauptmann trial, but most spectators had to settle for accommodations in Trenton 20 miles away.[18] Six rooms on the top floor had been reserved for the jury; and newspaper and radio reporters had commandeered the other vacancies long before the messages started arriving.[19]

Reporters arrived in Flemington to cover what many were calling the "trial of the century."[20] Among the more famous were Walter Winchell, Edna Ferber, Arthur Brisbane, Fannie Hurst, Damon Runyon, Kathleen Norris, Alexander Woollcott and

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[10] ALFRED N. DELAHAYE, *The Case of Bruno Hauptmann (1935)*, *in* The Press on Trial: Crimes and Trials as Media Events 120, (Lloyd Chiasson Jr. ed. 1997).
[11] Id. at.
[12] Id. at.
[13] COHN & DOW, 15.
[14] DELAHAYE, 120, (
[15] COHN & DOW, 15.
[16] Id. at.
[17] Id. at, 16.
[18] GEORGE WALLER, *Bruno Hauptmann*, *in* The Mammoth Book of Famous Trials 185, (Roger Wilkes ed. 2006).
[19] Id. at.
[20] Id. at.

Adela St. Rogers.[21] Ginger Rodgers, Lynn Fontanne, Clifton Webb, Jack Benny and Jack Dempsey were among the movie and sports celebrities who joined the spectacle.[22]

The court normally accommodated no more than 500 spectators and folding chairs were borrowed to squeeze in wherever possible.[23] A gallery looked down at the rear of the court where 150 reporters were seated with 18-inch pine boards serving as writing tables.[24]

The attorneys ran a daily gauntlet of hundreds of reporters and photographers outside the courthouse.[25] David Wilentz, the prosecuting attorney, held nightly press conferences in Trenton, and Edward J. Reilly, the lead defense attorney, was generally available in Flemington to answer questions.[26]

Media coverage of the trial was excessive.[27] The *New York Herald Tribune's* Joseph Alsop was under orders to file 10,000 words a day.[28] The Hearst Corporation paid Reilly, Hauptmann's defense attorney, a $25,000 retainer and signed Anna Hauptmann to a contract promising that she would speak only to the *New York Evening Journal*.[29]

THE MYTH PERPETUATED BY THE HAUPTMANN TRIAL

In the aftermath of the Hauptmann trial, the press was severely criticized for its actions. Reporters were accused of invading people's privacy and newspapers were faulted for printing rumors convicting Hauptmann in their columns.[30] Inside the

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[21] Id. at, 186.
[22] COHN & DOW, 15.
[23] WALLER, 188, (
[24] Id. at.
[25] COHN & DOW, 16.
[26] DELAHAYE, 127, (
[27] COHN & DOW, 16.
[28] Id. at.
[29] Id. at.
[30] RICHARD KIELBOWICZ, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 Judicature, 19 (1979).

courtroom, reporters were partly responsible for the disruption by frequently sending copy out by messengers.[31] An editorial in *Editor & Publisher* blamed newspapers, radio and newsreels for their part in "degrading the administration of Justice."[32]

The ABA established a committee, chaired by Judge Newton D. Baker, to report on the publicity surrounding the Hauptmann trial.[33] The committee conceded that "a state criminal trial should be a public trial…and that [p]ublicity is a safeguard against oppression and star chamber tactics."[34] The committee pointed out that its role was not to "review or analyze the rulings of the court or the conduct of the trial as they affect questions of the law or the facts involved therein."[35]

The committee found that the courtroom was packed with "crowds of spectators standing and impinging on the aisles and passageways."[36] Attorneys from both sides issued subpoenas to 'witnesses,' ostensibly to be called to testify, but were in reality "friends seeking a seat in the courtroom."[37] Former Minnesota Supreme Court Justice Oscar Hallam, quoting from the court record, described the crowds as being noisy, frequently laughing and applauding during testimony.[38] Judge Trenchard admonished the crowd several times, but the disruption in the courtroom continued.[39]

The committee was highly critical of the press coverage stating "more newspaper space was devoted to the Hauptmann trial than any other similar event in the history of

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[31] Id. at.
[32] DELAHAYE, 127, (
[33] OSCAR HALLAM, *Some Object Lessons on Publicity in Criminal Trials*, 24 Minnesota Law Review 453, 455 (1940).
[34] Id. at, 480.
[35] Id. at, 479.
[36] Id. at, 480-481.
[37] Id. at, 482.
[38] Id. at, 456.
[39] Id. at, 456-457.

journalism."[40] It reported that "[p]icture takers of all types invaded Flemington and pressed into the court house and the court room" and that even though the judge barred taking photographs during court sessions, "they were procured in some manner and published."[41] However the report barely made a distinction between which photographs were taken while the trial was in recess and noticeably absent in the report was any indication that the taking of photographs disrupted the proceedings.[42] The criticism came from seeing the photographs once they were published.

The committee stated that the motion picture equipment and wires for movie newsreels installed in the balcony were "plainly visible but not over-conspicuous and probably not offensive in themselves."[43] Recording while court was in session was prohibited and "[t]hey violated the court's injunction and proceeded to record in sound and picture all that occurred during the course of the trial."[44] Nobody in the courtroom was aware that the equipment was in operation and it only came to the court's attention when a newsreel was shown in a New York theater before the verdict was issued.[45] Once again, there was no indication that recording the trial by the newsreel companies disrupted the trial proceedings.

The legal profession was not without blame. Both the prosecution and the defense were criticized for giving "out-of-court statements."[46] Several months after the trial, Harold R. Medina, a Columbia University law professor wrote:

> I do not blame the newspaper reporters and the photographers for getting whatever news and whatever pictures they can. I do blame the lawyers for the

[40] Id. at, 484.
[41] Id. at, 491.
[42] Id. at.
[43] Id. at, 492.
[44] Id. at.
[45] Id. at.
[46] KIELBOWICZ, 19.

> statements they make to reporters and for the deliberately planned propaganda purely for the purpose of personal publicity which pollutes the administration of justice and discredits the bar as a whole.[47]

Critics of the media both in the 1930s and later wanted to lay blame for the carnival like atmosphere of the Hauptmann trial at the feet of photographers and newsreel cameramen. Even as late as 1968, Malcolm C. Bauer, the associate editor of the *Portland Oregonian* erroneously wrote:

> It was a Roman holiday. Photographers clambered on counsels' tables and shoved flashbulbs in to the faces of witnesses. The judge lost control of the courtroom and press photographers lost control of their senses.[48]

Bauer later conceded that he had confused what took place outside the courtroom with what took place inside.[49] The myth that arose from the Hauptmann trial was that photographers and cameramen were the cause of the disruption.

Joseph Costa, founding president of the National Press Photographers Association (NPPA) and longtime advocate for cameras in the courtroom, photographed the Lindbergh trial for the *New York Daily News*.[50] He pointed out that there were only three violations of Judge Trenchard's order barring photography and recording while he was on the bench, none of which disrupted the trial.[51]

First, a "relief man" who was new on the job, and did not know of the judge's order, photographed Charles Lindbergh on the witness stand.[52]

Second, two newsreel cameras were allowed in the trial, one in the rear and the other on the balcony overlooking the courtroom.[53] Both were covered with sound

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[47] Id. at, 20.
[48] JOSEPH COSTA, Cameras in the Court: A Position Paper (1980) (Communications Report, Ball State University). 4
[49] Id. at.
[50] Id. at, 5. 5
[51] Id. at, 7.
[52] Id. at.

deadening material.[54] Footage was made when both Lindbergh and Hauptmann testified. The film was released in newsreel theaters before the end of the trial.[55] The judge was upset and ordered the cameras removed immediately.[56]

Third, the editors of the news services and newspapers covering the trial decided that a pool photo of the verdict being returned should be made both for its immediate news worthiness and also for posterity.[57] Richard Sarno, from the New York *Daily Mirror*, "drew the long straw and was selected to make the picture."[58]

Costa admits the ethics of defying the judge's order to make the verdict photograph may be questioned, but none of these instances disrupted the trial, because nobody was aware that the still and newsreel photos were being made until after they were published.[59]

Richard B. Kielbowicz wrote, "No evidence was produced to show that pictures taken in the Flemington courtroom detracted from the decorum or jeopardized the defendant's right to a fair trial. Even Hauptmann's appeal did not include photography and newsreel footage. The appeal was concerned with "[c]onfusion and disorder 'reigning' in the courtroom, viz., running about of messenger boys and clerks employed by the press."[60] In affirming the conviction, Justice Parker wrote in the opinion:

> Without doubt there were messengers going to and fro. Again, it was inevitable. The press and public were entitled to reports of the daily happenings, and it was quite proper for the trial judge to afford reasonable facilities for sending such reports. During the trial, the court seems to have taken proper action of its own

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[53] Id. at.
[54] Id. at.
[55] Id. at.
[56] Id. at.
[57] Id. at.
[58] Id. at.
[59] Id. at, 8.
[60] State v. Hauptmann, 115 N.J.L. 412, (N.J. 1935). 444 *Cert. denied,* 296 U.S. 649 (1935)

> motion to preserve order, and to have responded properly to any suggestions in that regard.[61]

In effect, the canon "pilloried newspaper photographers and newsreel cameramen for the performance of the press in general and for the conduct of the participants in the Hauptmann trial."[62]

THE INTERNAL POLITICS OF THE ABA'S CANON 35

Before Canon 35 was implemented members of the electronic media faced a myriad of judicial stances. Courts in Chicago prohibited all photographic coverage.[63] Some judges flatly banned cameras in their courtrooms, some tailored their decision based on each particular case and others welcomed photographic coverage with few reservations.[64]

In the wake of the Hauptmann trial, the ABA appointed a special committee headed by Judge Hallam to investigate the press coverage and other facets of the Hauptmann trial.[65] This committee came back with 16 recommendations, two of which were to ban cameras and recording devices from the courtroom.[66]

It was clear in reading Hallam's report that he knew that news cameramen were not the major problem in the Hauptmann trial.[67] However, he was still concerned with the use of cameras in the courtroom stating in the report "[o]ur own opinion is that a

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[61] Id. at.
[62] KIELBOWICZ, 23.
[63] Id. at, 16.
[64] Id. at.
[65] HALLAM, 477.
[66] Id. at, 508-508.
[67] Id. at, 480-506.

courtroom is not a proper place for clicking cameras or photography at any time and that such practice should be strictly forbidden."[68]

Hallam's greater objection was to the use of motion pictures and radio in the courtroom stating in the report, "we do not approve of public broadcasting in sound of proceedings in court in a murder trial, and we believe such reproduction is more objectionable than the reproduction of a stenographic record of proceedings in the press."[69]

The committee cited four reasons; recording in sound reproduces everything and does not allow for deletion of offensive matter, recording would include inadmissible and prejudicial material, recording dramatizes court proceedings and most significantly – broadcasting "brings the revolting details of a murder trial, its crime story and its sensational matter to children of all ages, who would not be admitted as auditors into any court room while such a trial is in progress but who may at any time be "listening in" on the radio."[70]

Prompted by the Hallam Committee's findings, President William L. Ransom formed the Special Committee on Cooperation Between the Press, Radio and Bar against Publicity Interfering with the Fair Trial in Judicial and Quasi-Judicial Proceedings at the ABA convention in 1936.[71] The committee, chaired by Baker, consisted of representatives from the American Newspaper Publishers Association, the Society of

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[68] Id. at, 492.
[69] Id. at, 493.
[70] Id. at, 494.
[71] KIELBOWICZ, 21.

Newspaper Editors and members of the ABA.[72] Judge Hallam was one of the six ABA members on this committee.[73]

Notably missing was anyone representing radio or newsreels. Some members of the Baker committee were self-conscious that there were no representatives from radio, but other members felt the current committee "adequately represented those most directly concerned."[74]

During this era, there was a battle between newspapers and radio for two reasons.[75] First, radio's development was taking advertising dollars away from newspapers.[76] Second, radio was broadcasting news and delivering it faster than newspapers could.[77] In 1932, the American Newspaper Publishers Association (ANPA) recommended "press associations should not sell nor give away news in advance of publication in newspapers. The broadcasting of news should be confined to brief bulletins that would encourage newspaper readership and radio logs would be treated as paid advertising."[78]

The committee was formed to work out standards governing publicity of criminal trials.[79] Baker preferred limitations on trial publicity worked out by the ABA in cooperation with the newspaper publishers and enforced by the courts.[80] Baker believed

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[72] COSTA,
[73] ALEXANDER, 7.
[74] Id. at, 9.
[75] Id. at, 1.
[76] MICHAEL EMERY, et al., The Press and America: An Interpretive Histsory of the Mass Media 276 (Allyn and Bacon. 2000).
[77] Id. at.
[78] Id. at, 321.
[79] COHN & DOW, 17.
[80] KIELBOWICZ, 21.

that reputable newspapers would abide by guidelines and "violators among the lesser press" could be kept in line by the courts.[81]

At the 1937 ABA convention, the committee asked the House of Delegates to adopt six recommendations, all refined from the Hallam report, but asked if they could continue to work on a seventh recommendation they had not resolved – cameras and sound equipment in the court.[82]

The ABA members on the committee insisted that permission from the defense attorney in a criminal case should be obtained before cameras should be allowed while the newspaper representatives argued that only the judge's permission should be required and pointed out that there was a constitutional right to take photographs.[83] The impasse was *how* to implement courtroom coverage not *whether* to allow it.[84]

Three days later the same House of Delegates accepted a report from another committee, the Committee of Professional Ethics and Grievances, which proposed a wide range of Canons of Professional and Judicial Ethics, one of which was Canon 35 which banned cameras and recording equipment in the courtroom.[85] Canon 35 was adopted without a reading, without discussion and without any reference to the committee report accepted three days earlier.[86]

It is understandable that a standing committee may be given deference over a special ad hoc committee but it is poor management, and certainly raises questions, when the top administration does not make sure that what had been agreed to by one committee

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[81] Id. at.
[82] Id. at.
[83] ALEXANDER, 11.
[84] Id. at.
[85] COSTA,
[86] KIELBOWICZ, 22.

was not brought to the second committee's attention, particularly when both came before the full House of Delegates.

The members of the press on the joint committee felt they had been deceived and the relationship with the bar members became strained after that.[87] The committee made no further progress after its work on cameras had been rendered meaningless and was disbanded in 1941 at its own request.[88]

Once the media realized they had been outmaneuvered by the ABA, the broadcast trade press started editorializing against Canon 35 and for the next 50 years both broadcast journalists and news photographers fought to eliminate or revise it.[89]

Costa spent much of his career as an advocate for news photographers to gain parity with the written press in the courts. In 1946, at the invitation of Judge Samuel Leibowitz, Costa addressed the Brooklyn Bar Association.[90] After Costa's talk, two members of the association were to debate the issue and then the members were to vote on whether to approve the ban on cameras in the courts.[91] Costa wrote that he felt his talk was well received and thought the proposed ban would fail.[92]

After the debate the president of the organization announced that a last-minute speaker had flown in from Washington, D.C., just for this meeting. Judge Medina, from the U.S. Court of Appeals and one of the authors of Canon 35, spoke passionately in favor of the ban because "he believed so deeply that the dignity of the courts had to be

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[87] COSTA,
[88] Id. at, 12.
[89] ALEXANDER, 14.
[90] COSTA,
[91] Id. at.
[92] Id. at.

preserved and protected from the bad influence of cameras."[93] Costa wrote that he could only "watch as victory slipped away."[94]

Canon 35 remained in effect for more than 40 years and there was only one significant revision in 1952 – to include television.[95] It read:

> Proceedings in court should be conducted with the fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recess 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 misconception with respect thereto in the mind of the public and should not be permitted.[96]

In 1956 Costa finally gained some success. Justice O. Otto Moore held hearings to determine whether Canon 35, as adopted in Colorado in 1953, should be continued, revoked or modified.[97] After the hearings in Colorado, the ABA appointed at least three more committees to study the issue each lasting two years or more and each one still supporting the ban on the electronic media in the courts.[98]

During this time television was entering its Golden Era. Coast-to-coast broadcasting came about with the development of coaxial cable. The first lines were laid by 1946 between New York, Philadelphia and Washington. Boston was added by 1947 and the Midwest by 1948. In 1951, a microwave relay system added the west coast.[99] By 1960, 86 percent of the homes in American had television sets.[100] By the mid-1960s

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[93] Id. at, 11-12.
[94] Id. at, 12.
[95] COHN & DOW, 17.
[96] GILBERT GEIS, *A Lively Public Issue: Canon 35 in Light of Recent Events*, 43 American Bar Association Journal 419, 419 (1957).
[97] In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591, (Colo. 1956). 591
[98] COSTA,
[99] EMERY, et al., 365.
[100] Id. at.

Americans were telling pollsters that they relied more on television for news than newspapers or radio.[101]

In advance of the 1963 ABA convention in New Orleans, the Special Committee on Proposed Revision of Judicial Canon 35, chaired by John H. Yauch, sought comments from members of the ABA.

Arch M. Cantrell, former president of the West Virginia State Bar, wrote that the concern over electronic media in the courts should not be whether it affects the dignity and decorum of the courts but whether it causes a reluctance on the part of witnesses to testify.[102]

Erwin N. Griswold, Dean of the Harvard Law School, wrote that the words of Cannon 35 are "simply a recognition of the obligation of the legal profession to see to it that the highest standards are maintained it the administration of justice. We must never lose sight of the fact that a courtroom is a place for ascertaining the truth in controversies among men, and has no other legitimate function."[103] Griswold showed little respect for the electronic media, writing "They have important roles to perform in the modern world. But…[w]hen their interests run into conflict with another vital interest, their rights must be adjusted accordingly."[104]

Albert E. Blashfield, the former president of the State Bar of Michigan and a member of the House of Delegates at the American Bar Association in 1962, shed some light on the internal politics that led to the adoption of Canon 35 in 1937.

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[101] WM. DAVID SLOAN, The Age of Mass Comunication 449 (Vision Press 2nd ed. 2008).
[102] ARCH M. CANTRELL, *A Country Lawyer Looks at Canon 35*, 47 American Bar Association Journal 761, 761 (1961).
[103] Id. at, 615.
[104] Id. at, 616.

The report that Judge Hallam's special committee put together evaluating the media coverage of the Hauptmann trial was not made public because of a heated political controversy involving the governor of New Jersey and the Court of Pardons regarding the Hauptmann case.[105] After Hauptmann's appeal had been decided, the Executive Committee of the ABA published the conclusions and recommendations of the report, but decided not to publish the entire report while Hauptmann was alive.[106] However, copies were given to both the Standing Committee on Professional Ethics and Grievances and the Baker Committee on Cooperation Between the Press, Radio and Bar.[107] Finally in 1940, the full Hauptmann Report was published as an appendix to a law review article written by Judge Hallam.[108] Judge Hallam made his beliefs clear on the role of the judiciary and the role of the media when he wrote:

> We can easily agree that the major purpose of a criminal trial is to mete out justice to the accused, safeguarding the interests of both the accused and the state. Criminal courts are not established for the purpose of furnishing entertainment to the public, nor to satisfy popular curiosity, nor even to educate or inform the public.[109]

Judge Hallam's narrow view took only the Sixth Amendment right of a fair trial into account and gave no credence to the First Amendment right of a free press, which provides for the public to be informed about the operation of their government and the feeling of security that justice had been served. This unpublished report from the Hallam committee flatly recommended that "photography in and broadcasting from the court should be barred and that violations should be considered a contempt of court."[110]

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[105] ALBERT E. BLASHFIELD, *The Case of the Controversial Canon*, 48 see id. at 429, 429-430 (1962).
[106] HALLAM, 455.
[107] BLASHFIELD, 430.
[108] HALLAM, 455.
[109] Id. at, 453.
[110] BLASHFIELD, 430.

Baker was seriously ill when the report came before the House of Delegates so Hallam, who was also a member of this committee, presented it.[111] As mentioned earlier, the Baker committee could not come to an agreement regarding cameras in the courts and was granted more time to resolve the conflict.[112]

Three days later, when the report and a supplemental report from the Standing Committee on Professional Ethics and Grievances came before the House of Delegates and Canon 35 was adopted, there was no written comment with the supplemental report and no reference was made to the Baker report.[113] There also was no discussion regarding the canons and a blanket motion to accept the report and adopt all thirteen recommendations carried without a dissenting vote.[114]

ABA members Elisha Hanson in 1958 and Blashfield in 1962, representing media interests determined to revise or revoke Canon 35, were the first to point out the ABA internal politics that lead to the ban in 1937.[115] On Feb. 18, 1962, Costa, Arthur B. Hansen, general counsel for the American Newspaper Publishes Association (ANPA), John H. Colburn, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors (ASNE) and Frank P. Fogarty, Chairman of the Freedom of Information Committee of the National Association of Broadcasters (NAB) testified before Yauch's special committee.[116]

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[111] Id. at.
[112] Id. at.
[113] Id. at.
[114] Id. at.
[115] S.L. ALEXANDER, "Mischevious Potentialities": A Case Study of Courtroom Camera Guidelines, Eighth Judicial Circuit Florida, 1989 (1990) (Dissertation, University of Florida). 55
[116] COSTA,

Up to that point, there had not been any outrageous incidents involving the media in courtrooms but that changed with the swindling trial of Billie Sol Estes.[117] A judge in Tyler, Texas, allowed the broadcast media free reign during a pre-trial hearing on Sept. 24, 1962, for Estes, the "Texas Wheeler Dealer," who was accused of "obtaining property through false pretenses."[118]

In the Supreme Court opinion that overturned Estes' conviction for violation of due process, Justice Tom Clark described the scene writing, "at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table."[119]

In a concurring opinion, Chief Justice Warren also described the scene writing, "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."[120]

The ABA sent a photographer to the scene at Estes' preliminary hearing and photographs of the fiasco were displayed at the entrance to the ballroom of the Roosevelt Hotel in New Orleans where the House of Delegates was meeting for its annual convention in February 1963.[121] The campaign to retain Canon 35 proved successful. The

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[117] Id. at.
[118] Estes v. Texas, 381 U.S. 532, (1965).
[119] Id. at, 536.
[120] Id. at, 553.
[121] COSTA,

House of Delegates voted to sustain a modified version of Canon 35 that eliminated some offensive language, but the ban remained in effect.[122]

Canon 35 did not have the force of law, but all the states adopted rules that banned cameras in the courts except two – Colorado and Texas.

COLORADO

Colorado adopted Canon 35 in 1953 but its existence was short lived. In 1956, Justice O. Otto Moore held hearings over six days to determine whether Canon 35 should be continued, revoked or modified.[123]

Costa testified before the court on the first morning and seven members of the *Denver Post* photographed the proceedings without creating a disturbance.[124] The film was processed during lunch and the photos were introduced into evidence in the afternoon when Costa resumed testifying. Costa stated from the witness stand, "that just as word reporters took their notes openly and unobtrusively in court, we were asking for permission to report court proceedings with our cameras, openly but unobtrusively, and for the professional recognition of the press photographer as a member of the reporting team serving the public interest."[125]

In his report, Justice Moore wrote:

> For six days I listened to evidence and witnessed demonstrations, which proved conclusively that the assumption of facts as stated in the canon is wholly without support in reality. At least one hundred photographs were taken at various stages of the hearing, which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and, with one or two exceptions, without any knowledge on my part that a photograph was being taken. A newsreel camera operated for half an hour without knowledge on

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[122] Id. at.
[123] *See generally*, In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics.
[124] COSTA,
[125] Id. at, 18.

> my part that the operation was going on. Radio microphones were not discovered by me until my attention was specifically directed to their location.[126]

Justice Moore came to the six-day hearing as an opponent to cameras in the courtroom but left it as an ardent supporter.[127] He wrote:

> A trial is a public event. 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. It is equally well established that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[128]
>
> It is highly inconsistent to complain of the ignorance and apathy of voters and then to "close the windows of information through which they might observe and learn." Generally only idle people, pursuing "idle curiosity" have time to visit courtrooms in person. What harm could result from portraying by photo, film, radio and screen to the business, professional and rural leadership of a community, as well as to the average citizen regularly employed, the true picture of the administration of justice? Has anyone been heard to complain that the employment of photographs, radio and television upon the solemn occasion of the last Presidential Inauguration or the Coronation of Elizabeth II was to satisfy an "idle curiosity?" Do we hear complaints that the employment of these modern devices of thought transmission in the pulpits of our great churches destroys the dignity of the service; that they degrade the pulpit or create misconceptions in the mind of the public? The answers are obvious. That which is carried out with dignity will not become undignified because more people may be permitted to see and hear.[129]

Justice Moore's findings caused the Colorado Supreme Court to abolish Canon 35 and replace it with Colorado Rule 35, thus opening the Colorado courts to both still and television cameras.[130]

In 1962, as an ABA Special Committee was studying whether Canon 35 should be modified, Judge Frank H. Hall, an Associated Justice of the Supreme Court of

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[126] In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics.
[127] EDWARD E. PRINGLE, *The Case for Cameras in the Courtroom*, TV Guide March 3. 1979, at 6.
[128] In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics. 593
[129] Id. at, 597-598.
[130] COSTA,

Colorado and former Chief Justice, wrote about Colorado's six years experience *without* Canon 35 and pointed out that the courts have experienced no difficulties since the establishment of Rule 35.[131]

He wrote of the first major trial after the establishment of that rule. Liberal portions of the trial of John Gilbert Graham, who planted a bomb on an airplane that exploded killing his mother and 43 others shortly after takeoff, were viewed on several channels in the Rocky Mountain area and other portions of the United States. "One may view and hear the telecast without consciousness of degradation or distraction – for certainly it gives a true picture of the persons and the things viewed and a true record of the voices and sounds. Truth per se is not objectionable," Justice Hall wrote.[132]

In 1979, shortly after the Conference of State Chief Justices adopted a resolution that allowed the highest court in each state to establish standards and guidelines to allow television radio and photographic coverage of court proceedings and while many states were beginning to experiment with electronic media access, the Hon. Edward E. Pringle, an Associate Justice of the Colorado Supreme Court and president of the National Center for State Courts, wrote:

> [M]y experience in Colorado and elsewhere tells me that photography and broadcast coverage of court proceedings is in the best interest of good government and the American people."[133] …Those who oppose cameras in the court argue that there will be a loss of decorum in the courtroom. I could not disagree more. "That which is dignified to begin with does not lose dignity because more people can see or hear it."[134]

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[131] FRANK H. HALL, *Colorado's Six Years' Experience Without Judicial Canon 35*, 48 American Bar Association Journal 1120, 1121 (1962).
[132] Id. at.
[133] PRINGLE, at 6.
[134] Id. at, 8.

Justice Moore recognized the fallacies inherent in Canon 35 and came to the conclusion that with recognized standards of conduct, the electronic media could cover trials without threatening the rights of a fair trial. Today, Colorado remains one of the states with the greatest amount of access by the electronic media.[135]

TEXAS

Texas did not adopt Canon 35 after it was established in 1937 and judges permitted photography, radio and television broadcasting in courtrooms at their own discretion.[136] The state had a long history of allowing cameras into court proceedings, particularly in larger cities like Fort Worth and Dallas. Televised court proceedings were almost a nightly feature of newscasts.[137] The reason Canon 35 had never been adopted in Texas was because the press and the judiciary had mutual respect for each other. "Aside from a few isolated cases, cordiality and understanding have prevailed between Texas judges and the state's press…As a result, the Texas judiciary never felt the need for a regulatory canon such as Canon 35."[138]

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[135] *Cameras in the Court: A State-By-State Guide*, Radio Television Digital News Association(2011), at http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php.
[136] TEXAS PRESS ASSOCIATION, *Fair Trial Issues: Photography in the Courtroom*(2009), at http://texaspress.com/index.php/publications/law-media/748-law-a-the-media-in-texas--fair-trial-court-photos-a-gags.
[137] WERNER K. HARTENBERGER, *After Estes, What...?*, 12 Journal of Broadcasting 43, 46 (1967).
[138] JOSEPH COSTA PAPERS, *No Need for Canon 35, by Harvey O. Payne, Public Information Director of the State Bar of Texas, in The Texas Press Messenger, December 1957 (Box 32, Folder: FOI, American Bar Association Convention General 1958 III) Special Collection Research Center, Syracuse University Library*.

Although Texas was not the first state to allow television in a trial, it was the first to allow live television coverage.[139] Harry L. Washburn was on trial for murder in Waco, Tex., on Dec. 6, 1955.[140] A Waco television cameraman worked from a balcony situated behind the jury.[141] Judge D.W. Bartlett agreed to the live coverage after a successful press photography experiment was staged during a trial before him the previous summer.[142]

Abner V. McCall, Dean of the Baylor Law School, produced a report on the use of television in the Washburn trial.[143] McCall found that the television station received several hundred calls in favor of the telecast, except for a few who objected to the omission of their favorite programs.[144] Of the 1,400 letters and cards that were received by the station only four were opposed to courtroom television.[145] Fifty nine of the 61 members of the Waco-McLennan County Bar Association who responded to a questionnaire said they had seen at least part of the televised trial and that television was the least disturbing of the mass media covering the trial.[146] The majority responded that they would be in favor of allowing television in future trials "if handled in the same manner as the Washburn trial."[147]

The adoption of Canon 35 was briefly considered after a heated debate during a 1956 Texas Bar Association convention in Houston. The resolutions committee

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[139] DUANE SILVERSTEIN, *TV Comes to the Courts*, 53 State Court Journal 14, 19 (1978).
[140] GEIS, 420. Oklahoma was the first state to let television in a criminal trial during the 1953 trial of Eugene Manley in Oklahoma City. Television cameras were housed in a specially constructed booth in the rear of the courtroom and a microphone that was hidden near the front recorded the sound. WKY-TV filmed the swearing in of the jury, some of the trial testimony and the sentencing. Nothing was broadcast live. The film was edited and shown during regular newscasts
[141] Id. at.
[142] Id. at.
[143] Id. at, 421.
[144] Id. at.
[145] Id. at.
[146] Id. at.
[147] Id. at.

recommended the adoption, but once it reached the convention floor it was killed on a point of order, however the board of directors felt that is was advisable to study the issue and appointed an advisory committee.[148]

An 11-person committee of lawyers and judges headed by Judge Spurgeon Bell held hearings and invited members of the media to appear before them. The committee heard from attorney Richard Schmidt who represented 17 Denver radio and television stations in the Colorado hearings, they studied briefs by the ABA, listened to a representative of KWTX-TV from Waco who televised the Washburn murder trial and radio technicians and newsmen from KITE Radio who were the first radio station to broadcast a murder trial in Texas – the Nixon murder trial in San Antonio.[149] Judge Bell permitted still photographs to be made during the hearings and none of the committee members knew they were being photographed until the finished prints were shown to them.[150]

In his report to the Texas Bar, Judge Bell stated: "We have concluded that there is no need nor demand for the adoption of Canon 35 by the Bar, generally, or the public, and we recommend against its adoption."[151] The committee did recommend a set of principles that established guidelines to be followed in Texas. They were:

- That no flashbulbs or other than normal, existing lighting be used

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[148] JOSEPH COSTA PAPERS, Judge Al Heck letter to Harvey O. Payne, Public Information Director of the State Bar of Texas, commenting on speech (with speech attached) presented at the Annual Meeting of the Louisiana State Bar Association, April 11, 1958, (Box 32, Folder: FOI, American Bar Association Convention General 1958 I) Special Collection Research Center, Syracuse University Library 1-2. [Henceforth SCRC]
[149] Id. at, 2.
[150] Id. at.
[151] JOSEPH COSTA PAPERS, *No Need for Canon 35, by Harvey O. Payne, Public Information Director of the State Bar of Texas, in The Texas Press Messenger, December 1957 (Box 32, Folder: FOI, American Bar Association Convention General 1958 III) Special Collection Research Center, Syracuse University Library*.

- That no witness be photographed, or his voice broadcast or he be telecast, over his expressed objection
- That permission must be obtained by the news media from the judge and his rules be complied with
- And if after a judge refuses permission, a news medium attempts to bring pressure on him other than discussion between the two, the news medium shall be held in contempt and punished accordingly[152]

The committee's report went on to state, "We feel that the control of trial coverage by various news media should be left to the trial courts. They have inherent power to exclude or control coverage in the proper interest of justice."[153]

The committee's report was accepted and the executive committee approved the principles that were recommended.[154]

Finally in 1964, the State Bar of Texas formalized its own court rules and established Judicial Canon 28.[155] While the canon itself was not law, judges used Judicial Canon 28 of the Integrated State Bar of Texas as guidance. The canon stated that it "leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings."[156] This canon is what the judge who heard the Estes' case used as guidance.

After the 1965 Supreme Court decision finding that Billie Sol Estes' due process was violated, television coverage disappeared in Texas.[157] Following the Estes decision,

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[152] Id. at.
[153] Id. at.
[154] Id. at.
[155] TEXAS PRESS ASSOCIATION.
[156] Estes v. Texas.
[157] SILVERSTEIN, 55 See FN 3.

the Texas Code of Judicial Conduct was revised and now stated "[a] judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during session of court or recess between sessions…"[158]

"Between 1965 and 1990, the ban on cameras in Texas remained in effect. Photographers had to limit themselves to shooting court proceedings through the small windows in the courtroom doors (when they were not covered with cardboard) and trailing trial participants in the courthouse hallways or lobbies."[159]

In 1990, after public hearings, the Texas Supreme Court added Rule 18c to the Texas Rules of Civil Procedure and Rule 21 of the Texas Rules of Appellate Procedure allowing electronic media access to civil trials, the Texas Court of Appeals and the Texas Supreme Court.[160] In 1997, Rule 21 was replaced with Texas Rule of Appellate Procedure Rule 14 providing the court with extremely broad discretion in determining whether to allow camera coverage.[161]

The Texas Supreme Court rules do not apply to criminal cases. Without guidance from the Court of Criminal Appeals, individual criminal court judges may decide whether to allow the electronic media in their courtrooms.[162]

Texas is unique among the 50 states because the Texas Supreme Court will approve local rules governing electronic media access to the courts. So far, 12 Texas Counties have established local guidelines.[163]

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[158] THOMAS S. LEATHERBURY & JOHN D. THOMPSON, *Cameras in the Courtroom*, Freedom of Information Foundation of Texas(2010), at http://www.foift.org/foihandbook/index.php?page=chapter&ch=11#g0.
[159] Id. at.
[160] Id. at.
[161] Id. at.
[162] Id. at.
[163] Id. at.

There have been legal challenges to electronic media access to criminal courts in Texas, but so far none have been successful.

In 1995, a district attorney in Houston asked the Texas Court of Criminal Appeals to prevent state District Judge Jan Krocker from allowing a video camera in her court.[164] In 6-3 ruling, the court declined to intervene without issuing an opinion.[165] The court left the status of electronic media access to criminal courts unclear; but because the court declined to intervene, Judge Crocker said, "I think it is a significant step forward for cameras in the courtroom."[166]

In 2003, Clifford William Graham appealed his conviction of arson claiming, among other things, that the presence of a camera in his trial interfered with his right to a fair trial basing his claim on *Estes*.[167] The Court of Appeals overruled his claim stating that neither the Texas legislature nor the Texas courts have directly addressed the issue of cameras in criminal courts.[168] "Absent a constitutional provision, statute or rule to the contrary, the trial court has the power to control all procedural aspects of the case."[169]

The court acknowledged that the "circus-like" atmosphere in *Estes* is undesirable and inappropriate for criminal prosecutions, but the "broadcast equipment circa 2001 is a far cry from the black and white pedestal camera used in 1964."[170] In reaching their decision, they looked at the court rules governing civil and appellate cases and said, even

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[164] JENNIFER LIEBRUM, *Appeals Panel to Stay Out of Courtroom Camera Flap*, The Houston Chronicle Jan. 28. 1995.
[165] Id. at.
[166] Id. at.
[167] Graham v. Texas, 96 S.W.3d 658, (Tex. App. - Texarkana 2003). 4
[168] Id. at, 4-5.
[169] Id. at, 5.
[170] Id. at.

though these rules do not govern criminal trials, it provides guidance for what procedures are acceptable in Texas.[171]

It is clear that Texas exercised independent thought by allowing judges to decided for themselves whether to allow cameras in their courts. It was only after the 1965 Supreme Court ruling in Estes that cameras were banned in Texas courts and that was once again reversed in 1990. Even today, Texas exercises independent thought by allowing local jurisdictions to establish their own guidelines.

FALLACIES OF CANON 35

Canon 35 was established on the myth that still photographers and newsreel cameramen disrupted the Hauptmann trial and, on the assumption put forth by the Hallam committee, that "clicking cameras" and broadcasting from trials would be inherently disruptive, would affect the decorum of the courtroom and would create misconceptions in the minds of the public.

Judge Hallam's committee report showed that the dignity of the proceedings and disruption of the decorum of the trial were caused by overcrowding in the courtroom and the officers inability to control the noisy unruly crowd. Any misconceptions presented in the media were caused by the sensational nature of the press at the time and the extra-judicial comments made by both the prosecution and the defense.

While there were three incidents of open defiance of Judge Trenchard's order banning photography and newsreel recording, the remedy would have been citations for contempt of court. However, a challenge to the constitutionality of Judge Trenchard's

[171] Id. at, 5-6.

original order banning broadcasting and photographic coverage of the trial might have settled the issue prior to the ABA ever establishing Canon 35.

The ABA has mounted a campaign throughout the years to keep electronic media out of the courts despite several demonstrations that disruptions and threats to judicial solemnity are not inherent in electronic media coverage. While it is true, during the Hauptmann era, that newsreel cameras were big and bulky and in the Estes era, television cameras were the same way, the newsreel cameras in the Hauptmann trial were concealed and the same occurred with television cameras in the Estes trial. The only disruption to occur by the electronic media was in the Estes preliminary hearing. That was not one of the electronic media's finest hours, nor is it inherent in electronic media coverage of all trials.

The establishment of Canon 35 was based on the false premise that cameras and newsreels were the disrupting factor of the Hauptmann trial. This fallacy was perpetuated by all the states that subsequently adopted Canon 35. There were only two states that questioned this premise and looked for evidence to support the need for Canon 35 or disprove the premise that cameras and broadcasting were inherently disrupting to proceedings. These two states believed that with guidelines and cooperation between the media and the judiciary, a free press would *not* necessarily compromise a fair trial.

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