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The Media and the Courts: A Troubled Symbiosis

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The Media and the Courts: A Troubled Symbiosis

An Address To The Idaho Press Club
September 8, 1983
Judge Don Burnett, Idaho Court of Appeals

My profession of law and your profession of journalism share a reverence for the written or spoken word. Both professions seek, through the use of language, to give form to ideas and to capture glimpses of truth.

The importance of language is illustrated in an ancient legend retold by Rudyard Kipling. A man who had achieved a notable deed wanted to explain to his tribe what he had done. However, when he tried to speak, he was smitten with dumbness. He lacked words, and he sat down. Then there arose another man who had taken no part in the deed, but who had the special virtue of expression. He told what he had seen. He described the merits of the notable deed in such a fashion that the words "became alive and walked up and down in the hearts of all his hearers." The tribe sensed a sort of magic; but, fearing lest the man with the words might hand down untrue tales about them to their children, they rose up and killed him. Only later, said Kipling, did the tribe discover that the magic was in the words, not in the man.

Journalists and lawyers alike can identify with the man who was mistrusted because of his control of words. Our professions share not only a common currency in language. They also share many of the same ideals. Robert H. Davis once spoke glowingly and metaphorically of the printing press as a symbol of journalism.

I am the printing press . . . I sing the songs of the world, the oratorios of history, the symphonies of all time . . . I make the human heart beat with passion or tenderness. I stir the pulse of nations and make brave men do braver deeds, and soldiers die. I am the tireless clarion of the news . . . I am light, knowledge, power. I epitomize the conquests of mind over matter . . . I am the laughter and tears of the world, and I shall never die until all things return to the immutable dust. I am the printing press.

Law is similarly said to be an inspired outgrowth of the human spirit. George Elliot once wrote:

Who shall put his finger on the work of justice and say, "It is there"? Justice is like the kingdom of God: It is not without us as a fact; it is within us as a great yearning.

Both of our professions are devoted to seeking the truth. Occasionally this task brings our professions into public disaffection. With words a journalist would appreciate, Horace Traubel once wrote, "No man hates the truth. But most men are afraid of the truth." This expression is remarkably similar to a description of law offered by the French philosopher, Emile Fourget:

The law should be loved a little because it is felt to be just; feared a little because it is severe; hated a little because it is to a certain degree out of sympathy with the prevalent temper of the day; and respected because it is felt to be a necessity.

The pursuit of truth in journalism parallels the pursuit of justice in law. These pursuits do not always reap material rewards. The newspaper that seeks the truth most diligently may not sell the most advertising nor have the greatest readership. Similarly, the lawyer or judge who is most purely devoted to justice may not generate the largest clientele or the greatest number of public admirers. But truth and justice are not measured by these scales of success. Henry George once noted:

For those who see truth and would follow her; for those who recognize justice and would stand for her, success is not the only thing. Success! Why,

falsehood often has that to give; and injustice often has that to give.

Our professions, in addition to sharing the common currency of language and the ideals I have mentioned, also play complementary roles in our system of government. In the *Federalist Papers*, James Madison wrote:

[W]hat is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.

It is emphatically the province of the press and of the courts to see that government controls itself. Journalism joins with the law, particularly the courts, in protecting individuals against the abuses of government.

Thus, our professions are symbiotically connected. Yet it is a troubled symbiosis. Both professions have suffered from the generally diminished public confidence in our country's basic institutions. The professions also have exhibited some distrust toward each other.

I return to Henry George for an observation of which both professions should take heed:

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That we should do unto others as we would have them do unto us — that we should respect the rights of others as scrupulously as we would have our rights respected — is not a mere counsel of perfection to individuals — but it is the law to which we must conform social institutions and national policy . . .

Journalism faces the unique challenge of striking a balance between the historical reverence for individual rights and what recently has been called "the public's right to know." Indeed, these conflicting forces may be found within the First Amendment itself, which guarantees freedom of the press but also has been construed by our courts to be a source of the individual's right to privacy.

It is difficult to ascertain where the "public's right to know" ends and an individual's right to privacy begins. Justice Brandeis of the United States Supreme Court may have been correct when he said that "we are particularly at fault in America in making private things public and in keeping public things private." Surely the media has a right, and a duty, to ferret out and to report official misconduct by public servants. But just as surely, the responsible media should voluntarily refrain from invading a citizen's private life, exposing him to embarrassment or ridicule, over events which have no clear nexus to the public welfare.

I hold no special credentials to comment upon journalism. But I can appreciate that one of the frustrating tasks facing journalists must be what a Tulsa newspaper editor, Jenkins Lloyd Jones, once called "the inexact science of truth-telling." An example arises when an accusation of improper conduct is made by one citizen against another or against a public official. The fact that the allegation has been made is true. But this does not mean that the accusation itself is true.

News editor Jones had "a personal lesson in this matter." Jones was very suspicious of his community's police chief. His newspaper editorialized against the chief and reported enthusiastically those occasions when someone alleged that

things were going wrong at the police department. One day the police chief encountered Jones and asked why he was receiving this treatment. Jones answered, with an air of righteous innocence, "Is there anything that we have said that isn't true?" The police chief had no answer for that question. However, sometime later, Jones was preparing to visit a South American country that required a certificate of good conduct before it would grant a visa. Jones sought the usual form letter from the police department. He received a copy of the letter, signed by the chief, which read: "An examination of the files fails to reveal any instance in which Mr. Jones has been convicted of a felony. However our files are very incomplete." Appended to Jones' copy of this letter was a note in the chief's handwriting. "All of this is true, too." Jones learned the difference between superficial truth and real, underlying truth.

More than fifty years ago, the American writer George Herbert Mead suggested that there were two models of journalism — the information model and the story model. Information journalism simply reported facts and emphasized the truth value of news. The story model emphasized the enjoyability and consumption value of the news, helping people to relate events to their own lives. The story model seems to be prevalent today, especially in the electronic media.

This is another area where it appears that journalists must strike a balance. I suppose it is a hard reality of economic life that straight information journalism will not sell many newspapers or reach many living rooms. On the other hand, story journalism — when taken to an extreme — can distort the news gathering and reporting processes themselves. Edwin Diamond, a noted writer on American Journalism, has a term for the recent trend in television toward easily consumed and digested news stories. He calls it "disco news." The stories are upbeat, catchy, and attuned to the mass audience's short attention span.

I recently had occasion to refer to a similar phenomenon in a concurring opinion I wrote in a case decided by the Idaho Court

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of Appeals. In that case, *State v. Brooks*, I referred to "packaged news." With apologies to those who already may have read the opinion, I will recall some excerpts here:

Modern media coverage of news events bears little resemblance to news reporting of decades past. Today, competition for public attention between print and electronic media, and between sources within each medium is heightened. The sheer volume and intensity of information reaching prospective jurors has taken a quantum leap, especially in urban areas of the state where news marketing techniques are most highly developed. At the same time, the dissemination of information necessarily has become selective. Potential news stories are evaluated, in part, for ease of assembly and anticipated audience interest. The selected stories are edited to meet deadlines, to fit available space, or to fill broadcast time slots. They are, in short, packaged for public consumption.

This process does not, of itself, condemn the media. Most reports and editors follow high professional standards. The problem is structural, not individual. So long as news stories are forged in the crucibles of time constraints and competition, the packaging process will be with us.

Packaging of the news affects the news itself. When the subject is a criminal case, the process may yield a stream of selected, easily digested news stories, drawn primarily from the police blotter and from other readily available, official sources. Each story typically may carry a summary of previously reported information, to keep the audience oriented on the case. Taken together, such stories are largely repetitive in content but urgent in tone. They reinforce each other and develop a sense of momentum. By the time of trial — when the true test of facts is supposed to begin — prospective jurors already may have absorbed substantial, untested information about the case.

Moreover, a decision by city desk editors or station managers to treat a criminal case as a major, continuing news event may shape the expectations of a reading, watching and listening community. The case becomes a "big story." The elevated profile may profoundly affect the willingness of jurors to serve, and the strived-for impartiality of those who do serve.

Of course, not all problems relating to pretrial publicity in criminal cases can be laid at the doorstep of the media. Dr. Frank Stanton, a president of CBS, and one of the communication industry's most articulate spokesmen, has made the point well:

There is no question . . . of abridging the right of access of all media to coverage of police activities, including arrests, detentions and the nature of charges. At the same time, there are problems involved in such coverage which have been deeply disturbing to conscientious men and women equally anxious to safeguard the rights of individuals and those of society. In my judgment, the crux of the matter lies not in the existence of the media's access to police activities, which is essential to our basic freedoms, but in the use of that access. And this involves a re-examination not only of all the media, including television, but also of the activities of the police, of prosecutors and of defense counsel.

Moreover, I must readily acknowledge that, while your profession is grappling with problems in the pursuit of truth, my profession is experiencing difficulties in the administration of justice. Our criminal justice system is burdened with controversy. This is nothing new. A president of the United States once remarked, "It is not too much to say that the administration of the criminal law in this country is a disgrace to our civilization . . . The trial of a criminal seems like a game of chance, with all the chances in favor of the criminal." The President was William Howard Taft, and his remarks were uttered in 1909.

In 1920, Edwin Sims, head of the then-new Chicago Crime Commission, declared, "There has been too much mollycoddling of the criminal population." A few years later, an Illinois state court held that an accused person's purported "confession" to a crime was inadmissible in evidence because it had been obtained by the use of the "third degree" — physical beating. A Chicago police official reportedly was outraged by the decision, saying that ninety-five percent of his department's work would be rendered useless if that decision were allowed to stand. In 1928, while campaigning for the presidency, Herbert Hoover said, "In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from protection of society." These words have a familiar ring today.

By citing these historical parallels, I do not suggest that our present problems in the administration of criminal justice are any less urgent or should go unremedied. However, it is important to recognize that in our system of government, the courts are charged not only with protecting society but also with protecting the constitutional rights of individual citizens. This will always produce some disgruntlement among people who do not understand that an accusation by the police or a prosecutor does not automatically divest an individual of his constitutional rights. Diligent protection of these rights is necessary to assure that government does not break the law while endeavoring to enforce it. It also helps to ensure the reliability of any judgment that an individual is, in fact, guilty of the crime charged.

Our Idaho police, prosecutors and trial courts usually perform their jobs competently. This is evidenced, in part, by the fact that

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In our Court of Appeals the affirmance rate on criminal convictions is well over ninety percent. Even in those few cases where a reversal occurs, the matter usually is remanded for a new trial; and the convicted criminal is not simply "set free." Unfortunately, this is a point which the general public, and some news reporters, occasionally overlook.

Once an adjudication of guilt has been made, the focus of the criminal justice system shifts to sentencing. In my view, trial judges in Idaho traditionally have been stricter in sentencing than their counterparts in large urban areas elsewhere in the country. And they have become even stricter lately. Our philosophy on the Court of Appeals is also strict. We have thus far rejected all claims by convicted criminals that their sentences were excessive.

Although the public at large is probably glad to hear about these strict attitudes, sentencing in Idaho is not entirely free from problems. The most immediate difficulty is that by sending more convicted criminals to prison and keeping them there for longer terms, we have overloaded the capacity of the Idaho State Correctional Institution. At last report, that facility held about twice as many inmates as it was designed to accommodate; and the number is increasing. The taxpaying public must face this grim reality. Taxpayers must be willing to support the Legislature in providing funds for increasing the capacity of our correctional system, intensifying the supervision of individuals who are released on parole, and providing more local facilities for job training and work-release of low-risk inmates who will be returning to society in the near future.

A second difficulty is that of sentencing disparity. Sentencing in Idaho traditionally has been a function of shared discretion between our trial courts and the Commission on Pardons and Paroles. Ordinarily, our trial courts will sentence convicted criminals to the custody of the Board of Corrections for an indeterminate term not exceeding a certain number of years, leaving it to the Commission on Pardons and Paroles to determine whether or when the individual should be released within that period of custody. The maximum periods of custody prescribed by trial judges often vary considerably, even in roughly similar cases. These differences may turn on individual judges' sentencing philosophies, the recommendations of prosecutors, and local community attitudes toward certain types of crimes.

To some extent, these disparities can be "evened out" by the Commission on Pardons and Paroles after an individual has been placed in custody of the Board of Correction. However, parole recently has been eliminated or strictly limited in many other states. Recent action by our Legislature with respect to one of the members of the Commission on Pardons and Paroles may indicate that the parole system in this state is also coming under review. Increased public scrutiny of the parole system is a good thing. But one result could be that if the Commission's parole discretion is narrowed, then the disparities among sentences imposed by the trial courts may have larger practical consequences. We might be trading one problem for another.

Moreover, partly as a result of the strict sentencing attitudes I have mentioned, there has been a slight increase recently in the use of "fixed" sentences. These sentences mandate confinement for a specified period of time, without the possibility of parole. I personally share these stricter attitudes, particularly toward crimes of violence. Here again, however, it is obvious that as we enlarge the practical consequences of sentences imposed by trial courts, there is a greater need for guidelines to reduce sentence disparity.

Such guidelines would not only enhance the fairness of our sentencing processes, but would underscore the message to convicted criminals that they are serving time in confinement because of what they did, and not because of any good or bad "breaks" in the system. This is the first step in teaching the inmate accountability for his own actions. Accordingly, I personally believe the time has come for a special study com-

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mission to be established by the Legislature, including key legislators, the Governor's staff, selected trial and appellate judges, and representatives of our correctional system, to review Idaho's criminal sentencing statutes. The Commission should examine the possibility of establishing formal, detailed sentencing guidelines to replace the informal and general guidelines which now exist.

The challenges to effective administration of justice are not found solely in the criminal system. Our courts also have encountered difficulties, and public misunderstanding, in the processing of civil cases.

Civil suits involve disputes between individual citizens or business entities. Ordinarily, they do not present the classic confrontations between the government and the individual found in criminal cases. For this reason, perhaps, the media tend to under-report the civil work of the courts. Although approximately sixty percent of the cases decided by our Court of Appeals are civil cases, we have found that our criminal cases seem to attract a greater share of media attention.

Moreover, it is often the unusual case, the multimillion dollar lawsuit for personal injury, or the bizarre claim — such as a child suing his parents for "parental malpractice" — which receives media coverage. Listeners to Paul Harvey's radio news broadcasts are familiar with his periodic feature, called "The Suers," in which such unusual claims are reported. Media emphasis on the bizarre or spectacular cases presents a distorted view of our civil dispute resolution process to the general public. The public comes to perceive outrageous or greedy claims as the norm. This may encourage disrespect for the courts or, on the other hand, may fuel the fires of litigiousness among impressionable people.

Of course, one cannot blame the media for covering the newsworthy case. However, it seems not too much to ask that when an unfounded and frivolous lawsuit is dismissed, or when an outrageous claim is resolved at a more reasonable figure, these results should be reported to the public with the same prominence as the news stories published at the inception of the case. To use one of Paul Harvey's phrases, I wish the public would learn "the rest of the story."

Moreover, I suggest that the media should give greater attention to the routine civil work of the courts. Our trial courts could aid in this process by providing periodic news releases or informal media contacts concerning decisions in significant and instructive cases which have not already attracted publicity. As you know, both the Idaho Supreme Court and the Court of Appeals provide news releases on all appellate decisions.

We have also undertaken in the Court of Appeals to make our decisions as readable as possible by lay persons as well as by lawyers and other judges. Last year, a few of my own decisions attracted media interest because of their style. News stories about our approach to appellate opinion writing appeared in many Idaho newspapers. They were also picked up through United Press International by newspapers all around the country and overseas. While this notoriety was a little startling, it was encouraging to note that the media are interested in the subject of judicial writing.

Appellate opinions take time to write. Occasionally, we are asked why we devote time to explaining our decisions in detail when there is a backlog of cases awaiting decision. The answer is four-fold. First, the discipline of preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law bearing upon those facts. Snap judgments are avoided. The written opinions compel thought — rigorous thought. Even in these days of caseload pressure, it is more important to decide cases correctly than to be wrong quickly.

Secondly, in a legal system based upon due respect for precedent, the opinions perform a law-announcing function. This is the function of opinions most emphasized among law students, law teachers, members of the bar, and journalists who follow developments in the law. These judicial opinions

originate, develop, or clarify the legal rules, principles and standards which comprise the main body of law in our society.

Third, the most immediate function of an opinion is to explain to the parties and their attorneys the decision made in their cases. It is important for one litigant to know why he prevails, and for the other litigant to know why he has lost. The parties may not always agree with our decision, but if it is fully explained in an appellate opinion, the parties are more likely to accept it.

Finally, appellate opinions assure that the public can see and evaluate the work of our third branch of government. In a democratic society, the validity of law depends upon public confidence in it. That confidence can come only from understanding of our work product.

With the advent of the Court of Appeals, the structure of the appellate system in Idaho has become sufficient to meet the demands placed upon it by a growing case load. In fact, during 1982, the average length of time consumed by a case on appeal was actually reduced by a full month. In 1983, due largely to a

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significant increase in opinions written by our Supreme Court, our total appellate system is disposing of more cases than are being appealed; so the backlog is being reduced. Hopefully, this will result in a further reduction in the average length of time consumed by pending cases.

We are also encouraged by the fact that the growth in the case load this year appears to be moderate. Although there were signs of rapid growth early in 1983, the rate of increase has slowed considerably during the spring and summer. We now project that new filings of cases on appeal during 1983 will be only slightly above the 1982 level. We believe the increased productivity of our appellate system, and our ability to move cases faster, have discouraged some appeals that might otherwise be taken solely for the purpose of delay.

However, the achievements of 1982 and 1983 should not induce us to become complacent. There is still a substantial backlog. The greatest test of Idaho's appellate system, in both criminal and civil cases over the remainder of this decade, will be to continue increasing our quantitative output of decisions, while maintaining quality through well-written opinions. In this sense, the time constraints facing us are analogous to those which face news reporters and their editors every day in the field of journalism.

As lawyers, judges, and journalists, we must never allow the frustrations of daily deadlines, or the institutional conflicts between our professions, to obscure the need for cooperation with each other. The law's search for justice is directly correlated to journalism's search for truth. Without the accountability created by a free and inquiring press, neither the judiciary nor any other public institution is likely to be fully responsive to the people. Conversely, without a strong and independent judiciary, committed to the Constitution and to government by law rather than government by men, our press could not long remain free.

Thus, I end where I began. A symbiosis exists between our professions. We share the common currency of language, the pursuit of truth and justice, and the historical mandate of protecting individual rights. But each profession has its problems. You face the challenges of responsibly defining the "public's right to know" and of distinguishing between superficial truths and real truths. We face the challenges of improving the criminal justice system and of coping with civil and criminal case backlogs. I am confident that each profession is equal to its tasks. Although we may not always find perfect solutions, perhaps we can take some comfort in the aphorism that people "who try to do something and fail are infinitely better than those who try to do nothing and succeed."

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