Fair Trials and the Free Press

Samuel Johnson once proposed that if Bishop Berkeley and other metaphysicians doubted the physical existence of things, they might reassure themselves by kicking a rock: those who had trouble arriving at reality abstractly would find that their feet would tell them the truth. A similar standard of common sense should govern lawyers and judges in their continuing debate over fair trials and a free press in the U.S. At the heart of this classic tension between two democratic principles is the question of whether jurors are capable of rendering a conscientious and just verdict even in cases they may have read about widely before they entered the courtroom. Recently, the legal fallout from two extraordinary events, the My Lai massacre and Watergate, has raised —and confused—the issue once again.

President Ford had been scheduled to testify two weeks ago before a congressional subcommittee about his reasons for pardoning Richard Nixon. He delayed that appearance until last week, after the jurors had been selected and sequestered for the Watergate cover-up trial, lest his testimony prejudice the jurors. That much seemed simple prudence. But so many millions of words about Watergate have already cascaded upon the American people that the Watergate defendants, if convicted, will surely appeal in any case on the grounds that among other things, a fair trial was impossible after so much publicity, no matter what Ford said.

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The other event that reopened the fair-trial, free-press issue came last month, when Federal District Court Judge J. Robert Elliott reversed the conviction of William Calley and ordered him released from confinement in the My Lai case. Elliott's foremost argument was that "massive adverse pretrial publicity" had prevented the six-officer panel at Calley's court-martial in 1971 from considering the case without prejudice and that, therefore, he had not been fairly tried.

Hard cases, it is said, make bad law. Watergate and My Lai are two of the hardest cases in recent American history, for each is freighted with immense emotional and symbolic meaning. Each involves trial of subordinates while the crime may lie higher up the chain of command. The My Lai massacre became a paradigm of everything that went wrong with the American venture in Viet Nam. Enemies of U.S. policy seized upon the event to dramatize their case. The Army, anxious to protect its name, sought to isolate the tragedy and its participants as untypical of military performance. Yet beneath the cloud of symbolism and larger issues, there remain the essential legal questions: Was William Calley indeed guilty as charged? Did the circumstances permit a panel of his fellow officers to judge his case fairly?

The same questions apply to the Watergate conspiracy trial now underway. Does the fact that a case is endlessly discussed and publicized before anyone is brought to trial mean that no jurors can possibly be found to decide guilt or innocence? The Constitution guarantees that a defendant will be tried on the evidence presented in court. The vast majority of cases never attract pretrial attention in print or on the air waves. Yet in an age of burgeoning communications, some of the most morally crucial cases—as well as many that are merely sensational—are so widely publicized before trial that scarcely any citizen sound of sight and hearing will have failed to learn at least something about them. Does the requirement for a fair trial mean then that all such cases must be dismissed? Surely not. Or that an impartial jury can be found only among the exceptionally oblivious? If so, then presumably Calley or the Watergate defendants could only be tried by twelve idiot cousins of Gomer Pyle. Says Columbia Law School Professor Abraham Sofaer: "No one has the right to get away with a crime that is so notorious everybody knows about it."

That is not to say that pretrial publicity is never a hazard to justice. The longstanding argument over the rights of free press *v.* the rights to fair trial goes back, in its modern phase, to cases like the Lindbergh kidnaping: the courtroom at Bruno Hauptmann's trial turned into a grotesque circus, jammed with 150 reporters and cameramen. In the case of Cleveland Osteopath Sam Sheppard, accused of murdering his wife in 1954, the local newspapers ran a virtual crusade for conviction before and during the trial. Incredibly, the jurors at first were allowed to go home at night to read the news accounts, which sometimes even contained predictions about the next day's testimony.

Supreme Court Justice Hugo Black once wrote that "free press and fair trial are two of the most cherished policies in our civilization, and it would be a trying task to choose between them." That choice need not be made if both law officials and journalists work at sensible accommodations. Most of the prejudicial information leaked to the press before a trial comes from police officers, prosecutors, wardens, lawyers and even judges themselves. In 1966 Massachusetts Supreme Judicial Court Justice Paul Reardon's landmark study on pretrial publicity recommended a series of guidelines for lawyers and law officers, forbidding attorneys, for example, to release any opinion or information on a pending case that might interfere with a fair trial, including the defendant's previous record or the existence or content of confessions. Reardon points out that the standards are for lawyers, not journalists. "The press," he says, "is at liberty to write whatever it chooses, but it ought to be responsible enough not to print all it gets."

AP

CROWDS AT HAUPTMANN TRIAL COURTHOUSE (1935)

Journalists need to weigh the effect of what they publish in the light of the public interest, trying to avoid the merely sensational extravagances that attended the Lindbergh or Sheppard trials. The public, of course, exercises some control over the press, to the extent that subscribers register their protests at what they consider unfair coverage. At the same time, Jack Landau, Newhouse News Service reporter and a member of the Reporters Committee for Freedom of the Press, sees an ominous rise in the number of cases in which the courts are attempting to interfere with journalistic prerogatives. "There are now," he says, "two dozen or so major confrontations between press and judi-

ciary a year, from excluding the press from *voir dire* [the preliminary examination of witnesses or jurors] to forbidding reporters to talk to jurors after the verdict is rendered." He notes moves to seal off all arrest and indictment records, observing: "We believe you cannot keep secret the public contacts between police and citizens. That type of secrecy is exactly what the framers of the Constitution sought to prevent, to protect individuals against the power of the state."

Those on the judicial side argue with equal reason that the individual also needs to be protected from the power of the press. Some sensible equilibrium seems possible between the conflicting sides. The law possesses numerous mechanisms for protecting jurors from undue outside influence: continuances of trials, sequestration of juries, changes of venue—although moving the trial to another site is not always helpful in an age of television.

Beyond all these, however, it seems fair to place somewhat more trust in the skepticism and objectivity of the jurors themselves. Despite the miasma of Watergate, Maurice Stans and John Mitchell were acquitted in their New York trial last spring, leading both defendants to praise the robust open-mindedness of those who judged them. "You want jurors," says Sofaer, "who are sensitive to reasonable doubt. You are more likely to find this quality in people of some education, who in turn are more likely to read anything published before the trial. What is important is whether a juror can set aside whatever predilections he has in order to consider the evidence presented in court."

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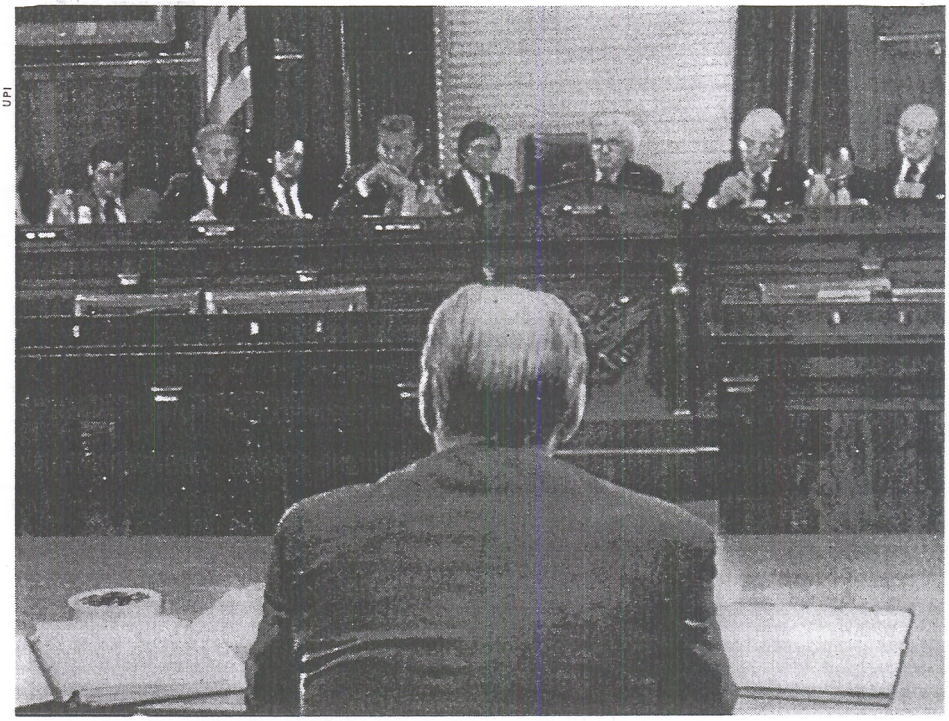
It may be, as Judge Elliott ruled last month, that the overheated publicity and other factors surrounding the Calley case made it impossible for the six officers at his court-martial to reach a fair verdict. Whatever the special circumstances in that instance, as a general principle it seems likely that officers, who after all are not citizens randomly chosen, but seasoned military professionals, are capable of judging one of their own. The ethics committee of a bar association would doubtless be outraged if it were suggested that pretrial publicity would prevent it from fairly judging a fellow attorney's conduct. In the Calley case, furthermore, most of the brutal details reported in the press were also ruled admissible at the court-martial.

In the Calley trial as in the Watergate trials, publicity alone does not seem compelling reason to abort the jury system. By *reductio ad absurdum,* that would establish a principle that fame, not the truth, shall make you free. All a defendant's constitutional guarantees remain, but the basis of the jury system is still a faith that in the end, jurors are rationally capable of rendering judgment, as if they were kicking Dr. Johnson's rock. ■ Lance Morrow



UPI

PRESIDENT FORD APPEARING BEFORE THE HUNGATE SUBCOMMITTEE

THE WHITE HOUSE

The Pardon: Questions Persist

The actors and props were assembled for an occasion of high drama. For the first time in the nation's history, a President was appearing on Capitol Hill to submit himself formally to the questions of a congressional committee. What was more, President Ford was there to discuss an intensely controversial and emotional subject—his pardoning of Richard Nixon for any offenses he had committed while in the White House. But despite the setting and expectations, last week's event was something of a disappointment—nearly as inconclusive as the soap operas it displaced in two hours of network time. The session left troubling questions unanswered, doubts unresolved, and Ford still struggling to find a way of exorcising the wraith of Nixon that haunts his presidency.

Good Reasons. The questions about the pardon were posed by a subcommittee of the House Judiciary Committee, the body that had so diligently weighed the evidence against Nixon before recommending his impeachment. The subcommittee had originally submitted its queries to the White House; what it got in reply was a handful of presidential statements and transcripts of news conferences. When committee members bristled at that response, Ford resolved to appear before the group himself, stubbornly prevailing over the fears of some of his lieutenants.

The President, in fact, had good political reasons for going up to the Hill. His decision to grant the pardon had shaken public confidence in his candor and judgment and damaged the chances of G.O.P. candidates in the November elections. Indeed, the initial reaction from Democrats in Congress to Ford's self-invitation was anger at Subcommittee Chairman William L. Hungate for inadvertently giving Ford the chance to get off the hook.

Appearing in the imposing room where the impeachment hearings were held, Ford was completely at ease. For the most part, he was treated with reverence by subcommittee members, who looked down from the top row of the long tiers of desks. Speaking earnestly and confidently, Ford hammered home his answers to the two basic questions. Was there a deal between Nixon and himself? "I assure you that there never was at any time any agreement whatsoever concerning a pardon to Mr. Nixon if he were to resign and I were to become President," said Ford in his opening statement. Later he added: "There was no deal, period, under no circumstances."

Why, then, had Ford pardoned Nixon? He was afraid that possible criminal proceedings against the former President, which could have dragged out for years, would have riven the country. Said Ford: "I wanted to do all I could to change our attentions from the pursuit of a fallen President to the pursuit of the urgent needs of a rising nation."

Ford did admit that the question of pardoning Nixon had come up while he was still Vice President. On Aug. 1 Alexander Haig, then White House chief of staff, mentioned it to Ford as one of a number of options being considered in the White House. But Ford insisted to the subcommittee that he had not replied yea or nay to Haig's comments.