DISRUPTION IN THE COURTROOM

The courtroom is the final forum in which an individual can choose peace and reason over force and violence to resolve an overt confrontation between himself and what Society has set down as "The Law". There is only one object that any such proceeding must strive to attain: a genuinely fair trial for the determination of the accused's rights.

It is necessary at the outset to distinguish between two very different types of accused persons: (1) those who are angry or defiant because they are emotionally charged, and react spontaneously to the frustration they experience in the courtroom, and (2) those who are unruly, angry or defiant because of a preconceived plan of disruption to discredit the judicial system that they distrust or use the court as "political encounter". To put things in their proper perspective, in most cases the outburst of a defendant is a spontaneous reaction to a situation of enormous stress. It is his fate the trial is determining and even if guilty, he is understandably outraged by some incident he perceives to be unfair—whether an adverse ruling by the judge or distorted testimony from a witness. These honest emotional outbursts generally do not incur the full range of sanctions available to the trial judge. Obviously, repetition will exceed the limits of tolerance, but most judges will let the defendant know when his "patience is about to end". On the other hand, there are other defendants whose disruptions are preconceived to "condemn the system" or "abuse the process" depending upon which viewpoint you take. These defendants are likely to be met with the full range of sanctions authorized by sec. 577 of the Criminal Code:

> "(1) Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of the trial.
> (2) The court may
> (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible, or
> (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper."

It should be noted that the judge also has at his discretion the powers to convict and punish for contempt in the face of the court, and by s. 9(1) of the Criminal Code, when such a conviction and punishment has been imposed for contempt in the face of the court, that person has a right to appeal against the punishment imposed only, and not the conviction itself. In both the United States and Canada the trial judge has three techniques available for dealing with unruly defendants: they may be punished (for contempt); they may be excluded from the courtroom altogether; or as recently approved,[1] bound, gagged or manacled.

1. Chicago Seven, Conspiracy Trial in U.S.A.; the **Regina** v. **Sowha** trial winter assizes, Man. Q.B. per Justice Deniset (1972).

It must be a common starting point that a criminal trial cannot tolerate sustained disruption. Criminal adjudication is at best a fragile process—it is inherently dramatic and tension grips most of its participants. If the rule of law is to prevail it must proceed wisely, deliberately, fairly and rationally. It must never proceed emotionally to decide something as important as a man's liberty. Given that this premise is true, what then ought a judge to do when he finds the courtroom being continuously disrupted by the defendants hollering "Fascist", "pigs", "Racists" and hurling obscenities at the lawyers, judge and witnesses? There have been a number of feasible suggestions urged as an alternative to the barbaric gagging and manacling or conducting the trial ex parte. (1) It has been suggested that one method is to develop a soundproof booth with inter-communication such as was used in the Eichmann trial in Israel; the suggestion that the defendant be allowed to watch the proceedings and if he gets abusive the judge can flick the switch and cut him out. It is realized that such a booth would be impractical and expensive to put into every courtroom in the country, but at least one court in every jurisdiction could be equipped and any time such equipment were necessary, the case could be adjourned to that courtroom. (2) A second suggestion is put forth by Mr. Justice Hartt in an article in the Toronto Globe and Mail (November 28, 1970). He criticizes the rigid insistence on proper decorum where it would work distinctly to the political advantage of extremists. "They are satisfied that if a trial can be disrupted it goes to the very root of the political system . . . and I think in that they are correct. I don't think that in any way we should make it easier for them by adopting attitudes which are no longer realistic in this day and age. The dignity of a court need not be lost because a judge refrains from ending a disruption until even the dullest newspaperman understands that the "extremist" is in contempt. In fact, restraint and tolerance in the face of an obvious and abusive attempt to provoke a judge into an emotional reaction would *add* to the dignity of the court and the strength of the institution." The problem that arises here of course is that *every* judge simply is not of the kind of mental disposition that would enable him to cope effectively in this manner. Judges being human beings are subject to human frailties, this we must acknowledge. However, we are now in a position to be able to anticipate this happening and provide special psychological training to a certain group of judge so that they can effectively handle that which they will be intentionally subjected to. The result will be that they will react appropriately to the disruptions and therefore achieve the results that are desired. (3) A third suggestion is that the attorney in some of these cases be held directly responsible for the activities of his client. The rationale behind this approach lies in the fact that there adheres in the attorney-client relationship a large opportunity for lawyer

guidance. The client with any faith in his lawyer may well be far more anxious to do what his lawyer says than what the judge says. In a contentious trial, the judge is often perceived as an adversary; indeed the lawyer may be the only one in the courtroom that the client perceives as being on his side. In such a situation, a lawyer possesses great psychological control over his client and, has a duty to make his displeasure known to his client–firmly and forcefully. It is suggested that in those circumstances where he declines to try to curb his client's courtroom behaviour, he should be disciplined by the judge or the Law Society, for example, by refusing to allow him to appear again in this court or before this judge. In a recent annotation in 15 CRNS 384, it is suggested that the judiciary may not have the legal rights to discipline the lawyer, that such rights are within the exclusive jurisdiction of the Law Society. Be that as it may, the Law Society or the court could thereby exert pressure on the lawyer to control his client in the courtroom whenever possible.

This discussion leads to a second problem: a lawyer's role when the court is faced with the unruly or defiant defendant. Again, it is necessary to distinguish between the defendant whose outbursts are spontaneous reactions to his frustration in the tense courtroom and he whose outbursts are a planned course of "political encounter" between the Court (The Establishment) and him (The Anti-Establishment). In the former situation, as an officer of the court a lawyer's duty seems clear–he must try to restrain and calm his client whenever it is reasonably possible for him to do so. When he is representing a "political client"–one who is convinced that he is on trial not for his actions, but for his ideas, race, background, or political beliefs, the lawyer's duty is not so clear cut. In such a case, what is the lawyer's respective obligations to the court and to his client and how must he resolve any conflict of obligations between the two? There are two opinions, one focusing on the lawyer as an officer of the court dedicated to functioning within the judicial system as it exists, and the other focusing on the lawyer as the lawyer of a man dedicated to educate the judge, jury and public of his client's political ideas.

Let us discuss the second opinion, first. Perhaps the foremost advocate of this approach to the "political client" is William Kunstler. In an interview with Playboy Magazine (October, 1970), speaking about the Chicago Seven Conspiracy Trial he says, "In view of the nature of the defendants and the political issues they (defendants) felt it essential to bring into the case, the decision had to be made as to what kind of defence ought to be conducted to most clearly expose the trial for what it was and to most clearly illuminate what the defendants stood for. At the beginning of the trial, the defendants, Len Weinglass and I dis-

cussed three possible courses of action. We could conduct a straight criminal defence, doing everything to win, including having the defendants cut their hair, wear suits, act decorously at the defence table and avoid any speech or action that might antagonize the jury. A second possibility was for the defendants to remain themselves, try to convey their philosophy and try to get into the underlying issues of the case. The third possible course of action was to forget about winning entirely —to act as uproariously as possible and to deliberately make a farce of the judicial process. Despite the fact that we've been accused of following the third course, the defendants chose—and pursued—the second. They did want to win, but they also wanted to make clear the essential reasons they had come to Chicago in August: to protest the war, racism and poverty and to affirm their own lifestyles." The idea is that a lawyer must project his client's ideas in the legal forum—the trial is an educational instrument for the jury, the judge and the community and should be used to convince all of them that your client is being persecuted for his ideas and philosophies, not for his criminal actions. Kunstler further sets out that the rules of evidence as to res gestae, relevancy, probative value and admissibility were not made for "political trials" but rather for such crimes as supermarket robberies. The facts in issue at a "political trial" focus on the war in Viet Nam, racism, poverty and youth culture and the terribly binding rules of evidence are entirely inappropriate for such a trial.

In short, *everything* is relevant to the crime charged and counsel should be allowed vigorously to pursue these matters in the most dramatic and effective way he sees fit and be free to challenge the judge, the rules, the system to any extent that is necessary. He is not a person aloof from his client—he understands his client's ideas, he sympathizes with them and he acts as his "client's legal partner" if you will in the defence of the case. The lawyer's obligations are to his client and whenever these obligations are challenged by the court, there is no question but to side with the client.

The other viewpoint is that a lawyer's only obligation is to vigorously present his client's case within the existing legal framework. By "existing legal framework" I mean the rules of courtroom decorum, and the rules of evidence. It is perhaps not possible to advance this viewpoint independent of a rebuttal of the contrary opinion. Five basic arguments come forward:

1. An attorney is never justified in attempting to bring about reform by unruly conduct in the courtroom, be it by encouraging his client in such behavior or by engaging in it himself. His role as an officer of the court means that he must be an accessory in preserving the basic system as it exists today. Whether he likes it or not he is a spokesman for the

establishment—he is committed in the courtroom to preserve the due process of law as it exists. The proper and only place for activist reform in the legal system is outside the courtroom—in the political forum. This is not to say that the lawyer in the courtroom should ignore judicial tyranny when it exists. It merely insists that there is a basic framework of respect, order and rules within which all objections must take place.

2. The trial process has its own built-in corrective measures. If judicial bias is alleged it can be challenged before trial by a motion for change of venue, or after trial by certiorari to quash a decision based on bias. Any unfairness at the trial, the statute itself, the sufficiency of the evidence, and the rulings of the trial judge are all subject to appeals and counter appeals to superior and differently constituted courts. There is an orderly and rational procedure to deal effectively with any denial of the defendant's rights.

3. A trial should represent a search for truth and such a search will never succeed in a "circus atmosphere". The administration of justice must proceed wisely, deliberately, fairly and rationally. Will those who seek "carte blanche" approval for defence presentation of their case, also be willing to give the Crown and the Court that same freedom? Should the Crown be allowed to adduce the most highly prejudicial evidence even though it be of little probative value? Should the Crown be allowed to use "shock tactics" to engender in the juror's mind the "kind of man" the accused is? Should the judge be allowed to interrogate the accused against his will? What of witnesses—should they be subjected to the frenzy of a terrifying cross-examination? Surely not.

4. The court is convened for one purpose, and only one purpose—to determine whether or not the accused committed an alleged act without lawful excuse. If his life style, his politics or his race are related to his lawful excuse or to an abuse of the court process by the police or Crown, by all means such matters are relevant and ought to be brought out. The forum in which to do it is cross-examination. E. F. B. Johnston in an article entitled "The Art of Cross-Examination" 66 C.C.C. 41, makes this point: "Cross-examination exposes bias, detects falsehood, and shows the mental and moral condition of the witness, and whether a witness is actuated by proper motives, or whether he is activated by enmity towards his adversary." A vigorous cross-examination based upon extensive pre-trial research into the background of each witness can forcefully bring out facts that show the accused is being tried for what he is, or believes as opposed to any acts he did. For example, in cross-examination of a police witness in what you believe to be a "political case", he can be approached this way: "Officer, is it not true you moved out of the suburb of Lincoln Heights in 1961? Did not your move co-incide with the moving in of the first black family

in that community? At this little gathering how many whites were present? Did you place any of them under arrest?"

The point that I am making is that the effective and imaginative advocate can normally find wide freedom in representing his political client within the framework of the judicial system as it stands. For a lawyer to engage in (or encourage) the hurling of obscenities and epithets at the judge, prosecutor, jury or witness or promote courtroom disturbances to dramatize points of his defence, shows nothing more than his inability in the art of advocacy—cross-examination.

5. To be an effective lawyer you must not become emotionally involved with your client—presenting the case as if you yourself were on trial.

A trial, especially one before a judge alone, is supposed to be a completely impartial and *objective* hearing. For a lawyer to know what evidence will or will not sway someone sitting objectively, he must be able himself to make an objective analysis of all strategy and evidence before he puts it forward. He owes this to his client and if he is emotionally involved he will be unable to make such an analysis. Also, if the lawyer, as Kunstler insists, only takes the political cases of clients he can empathize with, what is to become of all those *other* unfortunate political clients that you simply are *unable* to empathize with? Are they to be represented by you objectively or left to find some other lawyer who *can* empathize with their ideas?

Probably, few trials are completely fair, without the slightest trace of injustice, nor are many trials completely unfair, if conducted within the system, but it is the writer's opinion that the only way to eliminate the injustice that does exist within the system is by rationale and calm deliberation and never by emotion and force.

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