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Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice -- Welcome and Statement of the Issue

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MR. MINOW: Good morning, ladies and gentlemen. I am Newton Minow, Director of The Annenberg Washington Program. We are pleased to welcome you to our forum on selecting impartial juries, "Should Ignorance be a Virtue in our Search for Justice?" We are happy that all of you could be with us. You have come from all over the country, and we promise you that this will be a very timely and important chance to be together.

What do we do here at The Annenberg Washington Program? We provide a neutral forum where members of diverse communities can come together to discuss and analyze important current issues. We are a bridge between academics on the one hand and practitioners and policymakers on the other. We try to link those who have the luxury to think and reflect with those who are on the firing line and must and do act. We sponsor research and meetings on a broad variety of communication policies, including: reform of the libel laws, European broadcasting and telecommunications practices, privacy and copyright issues, communications technology used to save lives in natural disasters, and communications used to facilitate or-
gan and tissue transplantation. We deal with all issues of communication policy affecting various parts of American life.

The issue we turn to today is one I have been thinking about personally for many years. I remember when Jack Ruby shot Lee Harvey Oswald. The question asked each juror in picking Jack Ruby's jury was: "Did you see that on television?" To find someone who had not seen the shooting on television was an impossible task. I have been thinking ever since about who should be on a jury. In an age of mass communications, who is a peer?

We did not think about the Mayor Barry case when we started planning this conference. But if you watched television last evening or this morning, or read the newspapers, or listened to the radio, and you were called to be a prospective juror in the Barry case, the first question would be: what have you read or seen about the case in the media? On this issue, the opportunities for close cooperation between academics, judges, researchers, lawyers, the courts, and the press are immense; yet, the linkages are sadly lacking.

Judge Abner Mikva and I were law clerks at the United States Supreme Court in 1952, when Justice Frankfurter wrote in *Stroble v. California*:

[S]cience, with all its advances, has not given us instruments for determining when the impact of press exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and pedestrian proceedings in the court.

We hope today that by bringing together scholars, lawyers, and judges, we can answer some of Justice Frankfurter's questions of thirty-eight years ago.

It is now my pleasure to introduce my co-convener and Fellow of the Annenberg Washington Program, Fred Cate, who will outline the issues. Fred came to us as a volunteer several years ago. He was practicing law at a private firm. He has helped us with a number of other projects, but this has been his main effort. He will become a professor at the Indiana University School of Law in Bloomington this summer, but he has been hard at work full-time with us on this project. I am very pleased to present Fred Cate.

2. 343 U.S. 181, 200 (1952) (Frankfurter, J., dissenting) (upholding murder conviction as not tainted by inflammatory newspaper reports during six week period prior to trial during which prosecuting attorney released details of defendant's confession and proclaimed him sane and guilty).
MR. CATE: Thank you. Let me add my welcome as well. I am certain that many of you here recognize each other, and therefore you appreciate the degree of talent that is gathered in this room. When we set out to start this project we tried to gather the people on the cutting edge of jury research and jury practice, and I think we have done so. We have represented here the bench, counsel’s table on both sides of the aisle, the world of research and experimentation, the press, and representatives from a number of professional organizations. We are delighted that each of you could take time out from your schedules to be here and to help us fashion a better understanding about the problems of selecting juries in media-intensive trials.

The focus today is not the press coverage about trials themselves or press coverage during the trials but, rather, the coverage of people and events which subsequently become embroiled in litigation. Sometimes this press coverage focuses on specific defendants such as Manual Noriega or Marion Barry. On other occasions the coverage treats the events themselves, such as the grounding of the Exxon Valdez or the rape and beating of a jogger in Central Park.

The problem of pretrial publicity is certainly not new. In 1807 Chief Justice John Marshall, sitting as a trial judge, dealt with the issue in the treason trial of Aaron Burr. Mark Twain raised the issue in somewhat more acerbic terms more than 50 years later. In the days of Alfred the Great—in Twain’s view the father of trial by jury (I’m sure there are some here who would dispute that)—Twain wrote:

News could not travel fast, and hence Alfred could easily find a jury of honest, intelligent men who had not heard of the case that they were called to try. But in our day of telegraph and newspapers, his plan compels us to swear juries composed of fools and rascals because the system rigidly excludes honest men and men of brains.3

As you all know, Mark Twain’s newspaper and telegraph have given way to satellites, mobile equipment, broadcasting, cable television and other new technologies which, combined with an insatiable public curiosity, have led to an explosion both in news coverage of trials and in dramatic reenactments of crime. In 1980 only twenty-one percent of American homes had cable television service. Less than one percent of American homes had VCRs. Today more than fifty-seven percent of the homes in America have cable television and seventy percent have VCRs. The average hours of televi-

sion use by household has increased to a staggering seven hours per day. The television program, "L.A. Law," is seen today by more people then were even eligible for jury service in Mark Twain’s day. For those of you who miss the program, the *Legal Times of Washington* runs a weekly synopsis of the current episode for your convenience. Media proliferates in American life in ways never even imagined by Mark Twain. Yet, our approaches to dealing with the impact of media in the courtroom have not kept pace.

How do our courts respond to potential jurors who have been exposed to press coverage about the people or the events who are involved in the trial? Certainly the practices of judges vary widely. Anecdotal evidence suggests that some judges just dismiss outright prospective jurors who are media-literate. "Ignorance is the path to enlightenment" writes London’s *Daily Telegraph* about jury selection in the United States. “The slightest taint of interest in the world beyond home and work is enough to win dismissal from a jury.”

We are certainly familiar with the courthouse steps claim by defense counsel: My client cannot get a fair trial because prospective jurors have been biased by press reports about the case. Some judges, concerned about the possibility of not being able to seat a jury in media-intensive trials, go the opposite way and seat everybody. They ignore suggestions of deep bias from potential jurors. Transcripts of voir dire proceedings show jurors empaneled who told the judge they thought the defendant was guilty and they thought the defendant was likely to be convicted based on the evidence contained in newspaper coverage.

But the apparent majority of judges take a middle road. They attempt to inquire about possible media exposure bias and to determine whether that exposure will affect the ability of jurors to be impartial. Yet, a growing volume of research by attorneys and psychologists suggest that, although there is not a consensus, there is a significant view that judges may have too little opportunity and too few effective tools to make serious, skillful inquiry into the amount or degree of jury exposure to the media. Moreover, determining the potential for bias by having the juror assess himself or herself fails to acknowledge or even recognize the possibility that self-assessment is a difficult, if not impossible, task. According to experts, many of whom are here today, current methods of continuance, change of venue, peremptory challenges, judicial instructions, voir dire, and deliberation simply are not successful in ferreting out and remedying bias.

Today we consider how widespread the practice is of dismissing venireman solely because of their exposure to the media. Is it effective in routing out bias in the jury? Is it constitutionally mandated or even constitutionally permitted? We also want to address the variety of potential new solutions to pretrial publicity that have been tried by the judicial system, and to assess their effectiveness. Finally, we want to examine the very important issue of who is an impartial juror in an age of mass media. Earlier this year I posed this question to Jonathan Casper, Chair of Northwestern University’s Political Science Department, and he responded, as professors are want to do, with another question: What does impartial mean? I hope that we will have the opportunity to consider that question, particularly in the context of the jury system, because if in our search for impartial jurors we are looking for people without opinions, people without biases, we may be wasting the public's time and money. If, on the other hand, we are searching for someone who will conscientiously and in good faith attempt to apply the law to the facts as the judge has admitted them into evidence, then we need to consider how we are going to conduct that search effectively.

The first panel is an effort to get a grip on what social science research can tell us about the effects of mass media on potential jurors; how effective we are when empaneling impartial juries; and what more information we need to know. The second panel is a reality check from the courtroom. It will examine what judges and attorneys really seek in a juror and in juries; how they go about finding the right mix of people; and how they try to minimize the impact of bias in the face of intensive media coverage prior to the trial itself. The third panel seeks to focus more broadly on our ideas about the nature of juries. It examines the definition of impartiality in light of what research tells us is possible and what practice tells us is desirable and in light of the impact of the media on jury selection. The discussion in each panel will be led by a small group of experienced judges, attorneys, academics and members of the press. Their role is to incite energetic and thoughtful discussion.

We are extraordinarily fortunate to have Ford Rowan as our moderator. He is an attorney, a journalist, and a talk show host. He is well qualified for this role, and he is, I might add, ruthless in his duties.