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When Newsmen Become Newsmakers

The Warren Report makes clear that the press did more than cover a story in Dallas a year ago. Here the dean of the Harvard Law School argues the case for a measure of restraint.

By ERWIN N. GRISWOLD

FOR A good many years lawyers and the news media have been battling each other with great vehemence. The news media, on the one hand, champion "the public's right to know." This presented problems enough when only newspapers were involved; it became far more difficult with the advent of radio, as those who lived through the Hall-Mills and the Hauptmann cases in the 1920s and the 1930s will recall. The excesses experienced in those cases were, in fact, the specific background for Canon 35 of the Canons of Judicial Ethics of the American Bar Association, which forbids the use of radio and television in courtrooms, a rule now followed in all states except Colorado and Texas.

Lawyers, on the other hand, are concerned with the right to a fair trial, of which they are inevitably the guardians in a society such as ours. And the judges are sworn to uphold the Constitution and have the solemn obligation to see that no one is deprived of his life or liberty without due process of law. It takes little experience in the modern world to see that pre-trial publicity, and many sorts of publicity during a trial, are wholly inconsistent with the basic objective of a trial—which is not to entertain the public, nor even to let the public know what is going on, but the meticulous and dispassionate ascertainment of the truth. We have here a situation that has recently been described by William M. Kunstler as one in which "news media . . . hide behind one constitutional guarantee while destroying another." As the Toledo *Blade* has said, "A fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of human rights."

The efforts of the news media continue. We all remember the broadcasts of last November 22 and 23. It remains my best judgment that by November 24 Lee Harvey Oswald could not have obtained a fair trial anywhere in the United States and that the Supreme Court would have so held. This was the direct result of the television coverage in Dallas in the two days following the death of President Kennedy. In fairness, though, I direct my observation not only at the radio and television networks but also at the lawyers, the sheriffs, and the police officers who participated in and facilitated the radio and television coverage.

One widely syndicated columnist has criticized me rather sharply for undertaking to hold "any medium of communications responsible for the district attorney's statements about the Oswald case." He asserted: "The actions of any public official are his own responsibility; the communications media are there only to observe and record."

There is much to be said for this point of view. The basic problem will be greatly simplified if the legal profession—individually, through the organized bar, and through the courts—more fully recognizes its basic responsibility where pre-trial publicity is concerned and takes firm and clear steps to meet this responsibility. If the legal profession does recognize and accept this responsibility, then the problem of the news media will be greatly simplified. As the columnist said, they "are there only to observe and record." If there is nothing available for them to observe and record, they will not be presented with problems of interfering with a fair trial. If the lawyers will simply put their own house in order, much of the problem can be limited.

IN considering the problem of publicity before and during a trial, there are two groups of people who may be involved. One of these consists of the lawyers, including the district attorney, his assistants, and members of his staff for whom he is responsible. The other group is made up of the sheriffs, constables, police chiefs, and police officers, who, presumably, are not lawyers, though they are public officials.

The lawyers are officers of the court and members of a profession. They are subject to discipline by the court and to the appropriate rules of the profession. In England, from which our legal system and our legal profes-

sion sprang, the control of the court and the discipline of the legal profession are very strong. As a consequence, actions by lawyers such as those we have witnessed here many times in recent years would be unthinkable. If they did occur, they would be promptly dealt with, both by the court and through the disciplinary actions of the two branches of the legal profession there.

In this country we have relaxed our professional standards far too much. District Attorneys are generally elected, and defense attorneys are likely to have political ambitions. In most states, judges are elected and find it difficult to enforce high standards of professional conduct on the lawyers who appear before them. We have no centralized control of the bar, such as exists in England through the Inns of Court for the barristers and through the Law Society for the solicitors—bodies that would not for a moment tolerate conduct by lawyers that has become, alas, commonplace in many parts of the United States.

Our lawyers are members of the bar in their separate states. In addition, discipline is often enforced through local grievance committees, which have their hands full in handling embezzlement and other cases of gross professional misconduct. Because of this diverse and loose control, standards have generally fallen far too low with respect to lawyers who make public statements about pending cases and release information to the press.

ONE of the difficulties arises from the fact that our formal Canons of Professional Ethics are wholly inadequate to deal with the current situation. They were formulated at a time when it was taken for granted that a lawyer would not participate in public programs dealing with a pending case. As a result, Canon 20 of the Canons of Ethics of the American Bar Association is expressed in rather lukewarm language:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

Obviously, this is not clear enough, nor does it go far enough. The canons should be amended to include an absolute prohibition against the release by any lawyer, either for the prosecution or for the defense, of any material relating to a trial, either before the trial or while the trial is going on. This should specifically preclude appearances of any sort on radio or television relating in any way to the forthcoming or pending trial. It should also specifically forbid the release of any statements to the effect that the defendant has or has not confessed, or that he has or does not have an alibi. It should also specifically preclude the release of evidence that has been offered in court and excluded by the trial judge.

At its recent meeting held in New York in August, the American Bar Association, on the recommendation of its new president, Lewis F. Powell, of Richmond, Virginia, voted to establish a new committee to consider a complete revision of the Canons of Ethics of the Association. This would deal with all parts of the canons and would not be limited to pre-trial publicity. It is hoped that this committee will recommend a greatly strengthened version of Canon 20.

As I have indicated, this change should make it wholly clear that lawyers, both for the prosecution and the defense, must completely refrain from any sort of appearance or statement with respect to pending criminal cases from the moment of the arrest until the ultimate completion of the trial. When the canons have been adequately amended, lawyers will know clearly what they should not do. Then the American Bar Association, the state bar associations, the local bar associations and their grievance committees, and the courts should enforce this requirement without fear or favor. If this is done, we will have taken a great step toward providing the atmosphere for a fair trial in the United States. Until we do take this step, lawyers cannot criticize the news media very severely if they publish the information that lawyers give them or if they present radio or television programs in which lawyers participate.

The other part of the problem concerns sheriffs, constables, police chiefs, police officers, and other employees and subordinates of law enforcement and police departments. Generally speaking, these persons are not members of the bar. Thus their conduct is not directly governed by the Canons of Professional Ethics. In some cases these people may be subordinates of the District Attorney, and he may be responsible for their actions. However, disciplining the district attorney in such cases may not be either very feasible or very fair. We should work out a more direct means of control over these law enforcement officers and subject

them to the same requirements that should be made applicable to lawyers, both for the prosecution and for the defense.

The way to deal with this problem, I suggest, is through the rule-making and contempt powers of the courts. The contempt power has rather fallen into disuse in recent years because of the extreme views taken by the Supreme Court on the subject of free speech and free press. What I am saying now, however, has no relation to the press. I am not advocating use of the contempt power against the press. I am dealing with the responsibility of police and other law enforcement officers to the courts. It should be made plain to them, and to all concerned, that police and other law enforcement officers act improperly if they release any sort of information about a person charged with crime, other than his identity and the nature of the charge. They should not release any evidence or make any statements about the evidence. Specifically, they should not release any information that the defendant has confessed or that he has not confessed. They should not release any information to the effect that he has been charged with, or convicted of, any other crimes in the past. They should not characterize the defendant as "a notorious hoodlum," or anything else. It would be made plain to them that they are officers of the law and that it is their sworn duty to protect the defendant against outside pressures as well as to hold him in custody. It may be their duty to confine him, but they should clearly understand that that duty carries with it the responsibility to see that he is not forced to make statements to anyone, that he is not subjected to interviews in which he does not wish to participate, and that he need not have his picture taken if he does not want it taken.

WE should recall here that we are discussing only criminal cases, not civil cases. I suggest for serious consideration that there is no reason why counsel on either side, or law enforcement officers, should be making *any* sort of public statements about pending criminal cases from the moment of arrest until the completion of the trial.

With respect to rules in this area, we have a fine example in the so-called Judges' Rules in England. These rules, which have long been in force, were revised only last February. They prescribe in considerable detail the conditions under which the police may interrogate a person suspected or accused of crime. Among other things, they provide:

> As soon as a police officer has evidence which would afford reasonable grounds for suspecting a person has committed an offence he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.
>
> The caution should be in the following terms: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and put in evidence."

"It's kind of odd to have to start thinking of him, suddenly, as being out of the mainstream of the Party."

This is an example that might well be adopted in this country. If it were adopted, then the police would know where they stand. They would have clear instructions and could go about their duties in an effective way.

The Judges' Rules in England say nothing about public statements made by the police or by lawyers, because such statements would be unthinkable there. If we were to adopt the Judges' Rules in the United States, however, it would be well to include explicit provisions with respect to the release of information and the making of public statements by law enforcement officers and by lawyers in connection with persons accused of crime.

IT IS time, I suggest, that we should definitely formulate the ground rules for lawyers and for law enforcement officers. It should be made plain, both by appropriate amendments to the Canons of Ethics and by rule of court —or by statute, where that is necessary —that public statements, public appearances, and release of evidence in a pending criminal case, both before trial and during trial, are inappropriate. Having made this clear to lawyers and law enforcement officers, let us then enforce these requirements through disciplinary action and by the contempt powers of the courts. If the lawyers and courts will thus put their house in order, there will be far less basis for complaint about the news media—which are, after all, there "only to observe and record."

If there is nothing to "observe or record" as far as lawyers and law enforcement officers are concerned, then the news media will be able to go about their highly important business without infringing on the basic right to a fair trial. Of course, if the news media should obtain information by stealing it, or by bribing court officers, that would be another matter—one clearly subject to the contempt power. But if the lawyers will clarify the ground rules where lawyers and law enforcement officers are concerned, and will clearly publish these rules, most of the problems in the relations between the bar and the press will disappear—which is as it should be.

And we will be well on the way to seeing that persons accused of crime in this country will indeed have that "most basic" right—a fair trial.