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FREE PRESS AND FAIR TRIAL— PLACING RESPONSIBILITY

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The President of the American Bar Association has appointed a panel of eleven prominent lawyers and judges under the chairmanship of a Justice of the Massachusetts Supreme Court to serve as an advisory committee on fair trial and free press. Previously the A.B.A. launched a project for the formulation of minimum national standards for the administration of criminal justice in the United States.

A special committee of the Association of the Bar of the City of New York is working under a Ford Foundation grant to study the impact of radio and television on the administration of justice.

The National Conference of State Trial Judges has proposed a research project on the effect of publicity on juries, including experimental trials and interviews with actual jurors.

A committee of the American Society of Newspaper Editors is considering the same problem, as is the Brookings Institution.

In Massachusetts 26 of 40 daily newspapers have subscribed to a voluntary code prepared by the bar and press. In Philadelphia a similar code is being prepared by the Bar Association.

The United States Attorney for the Connecticut District issued an order to all federal prosecutors under his direction to make no public statements before or during trials that might be considered prejudicial to defendants.

The Warren Commission on the Assassination of President Kennedy made as one of its twelve recommendations "that the representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."

All of these and similar activities throughout the country have served to focus attention upon the problem of assuring to defendants a fair trial before an uninfluenced jury in this day of keenly aggressive media of communication.

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After all the surveys are completed, and all the resolutions adopted, however, the ultimate determination that must be made is where primary responsibility rests. A newspaper prints or a television station broadcasts the purported confession of a defendant accused of a heinous offense, including the defendant's previous criminal record. Assuming arguendo that the defendant is thus prevented from receiving a fair trial in the community in which he was arrested, upon whom is the onus and responsibility to be placed for this denial? Is it upon the newspaper which printed, or the television station which broadcast, the information? Is it upon the defendant himself who may have naively or designedly permitted himself to be queried by representatives of the media? Is it upon defense counsel, if the defendant had representation? Is it upon the prosecuting attorney who may have encouraged or acquiesced in the interview or the release of information to the media? Or is it upon the law enforcement custodian of the defendant, the police chief, sheriff, or jailer?

In order to prevent prospective denials of a fair trial we must abandon the broadside approach and try to establish basic responsibility for protection of defendant's rights. It is upon that subject that I shall offer some cursory observations.

Beginning with the case of *Bridges v. California*,[1] the Supreme Court of the United States has developed a body of law, based upon the free speech and press provision of the United States Constitution, that all but insulates news media from responsibility to the courts. Many commentators, considering the cases developed upon the *Bridges* theme, have concluded that absent statutory modifications or constitutional amendments the courts are powerless to punish news media for publishing, editorializing, or otherwise acting so as to affect the rights of a defendant or the state to a fair trial.

In 1951 the Supreme Courts of California and the United States decided the cases of *People v. Stroble*,[2] and *Stroble v. California*.[3] Defendant Stroble was convicted of first degree murder of a six-year-old girl and sentenced to death. While being transported to the district attorney's office, he confessed his guilt in a conversation with the accompanying police officer. He repeated this confession in the district attorney's office during an interrogation which lasted about two hours. While the confession was being made, the district attorney released to the press details of the confessions and also announced his belief that the defendant was guilty and sane. At the

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1 314 U.S. 252 (1941).
2 36 Cal. 2d 615 (1951).
3 343 U.S. 181 (1951).

time of defendant's arrest and at the time of his trial, there was widespread public excitement and extensive coverage by newspapers, radio and television, concerning crimes against children, and defendant's crime in particular. This was probably the first significant instance of television coverage, and may have established techniques used for TV commentaries thereafter. The Supreme Court of California, although deprecating the extensive news publicity and the actions of the district attorney in releasing the "play-by-play bulletins during the course of the defendant's confession," held that there was not a sufficient showing of prejudice to require a reversal of the conviction.

The Supreme Court of the United States in *Stroble v. California*,[4] upheld the conviction and substantially adopted the language of the Supreme Court of California. Of particular interest is this expression which comments on the release of the confession by the district attorney:

> While we may deprecate the action of the district attorney in releasing to the press, on the day of petitioner's arrest, certain details of the confession which petitioner made, we find that the transcript of that confession was read into the record at the preliminary hearing in the Municipal Court on November 21, four days later. Thus, in any event the confession would have become available to the press at that time. . . .[5]

Ten years after the decision in *Stroble*, the Supreme Court of California had before it a comparable problem in *People v. Brommel*.[6] Once again the district attorney released copies of the confessions and admissions of defendant to news media prior to the time that they were admitted into evidence by the court. While the conviction was reversed because the confession was found to be inadmissible, the court warned:

> During the course of the trial the district attorney released to the press copies of the confessions and admissions of defendant before they were admitted into evidence by the court, and even before they had been made available to defendant and his counsel. The obvious impropriety of this conduct is only emphasized by the fact that we have now determined that these statements were inadmissible against defendant on the trial. Prosecuting officers owe a public duty of fairness to the accused as well as to the People and they should avoid the danger of prejudicing jurors and prospective jurors by giving material to news-disseminating agencies which may be inflammatory or improperly prejudicial to defendant's rights.[7]

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[4] *Ibid.*
[5] *Id.* at 192-3.
[6] 56 Cal. 2d 629, 364 P.2d 845, 15 Cal. Rptr. 909 (1961).
[7] *Id.* at 636, 364 P.2d at 849, 15 Cal. Rptr. at 913.

The most dramatic change in crime reporting which has occurred in recent times has been the result of television news programming. Television, bringing for the first time to the public the concept of "presence," has within a few years caused our greatest problems and seems likely to create some of our future dilemmas. In *Rideau v. Louisiana*,[8] the United States Supreme Court met television head-on. Television lost a major bout.

On February 16, 1961, Wilbert Rideau robbed a bank in Lake Charles, Louisiana, kidnapped three employees and killed one of them. A few hours after the robbery Rideau was apprehended by state troopers and placed in the Calcasieu Parish jail in Lake Charles. On the night of his arrest he gave extensive written and oral confessions of the crime to the sheriff and the district attorney. The following morning Rideau, in company of the Sheriff of Calcasieu Parish and flanked by the two state troopers who captured him, was interviewed on television. This interview was shown on local TV stations on three successive days. Rideau was arraigned two weeks later and was subsequently tried and found guilty.

Rideau moved for a change of venue under Louisiana procedure on the ground that he could not receive a fair trial in Calcasieu Parish in light of the televised interview with the sheriff. Three members of the jury stated on *voir dire* that they had seen the interview at least once. Two members of the jury were deputy sheriffs of Calcasieu Parish. Rideau, having exhausted his peremptory challenges, moved to excuse these jurors for cause, but the challenges for cause were denied.

In reversing the conviction, the court held that it was not concerned with the question of who originally initiated the idea of the televised interview. For, said the court,

> we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.[9]

Moreover, the court stated that "without pausing to examine a particularized transcript of the *voir dire* . . . due process . . . required

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[8] 373 U.S. 723 (1963).
[9] *Id.* at 726.

a trial before a jury drawn from a community of people who had not seen and heard . . . (the) televised interview."[10]

Justices Clark and Harlan dissented on the ground that no showing of essential unfairness had been made.

There are several interesting features to this decision. One is the court's failure to consider the fact that the defense in *Rideau* did not establish actual prejudice by the jurors who tried the case. The prejudice seemed to be assumed, contrary to *Beck v. Washington*[11] which held that the burden is always on "him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."[12] *Rideau* also omitted to discuss whether the defendant's confession was ever received in evidence. It is, of course, no bar to the admissibility of a confession otherwise voluntary that it was televised or broadcast or published. If Rideau's confession was in fact received in evidence and seen and heard by the jury in open court, would it have been of significance that the jurors had seen it two months earlier?

It may be that California's *Brommel*[13] case, though decided earlier, gives us the answer, for the court held in effect, as indicated above, that pretrial release of the confession was per se prejudicial. There a district attorney was criticized for issuing to the press copies of a confession which he felt was admissible, which the trial judge held to be admissible, and which the district court of appeal found admissible. Reporters sitting in open court could have listened to the reading of the confession and reported it to their readers. Moreover, prior to trial the confession may have been made known to the press when the transcript of the proceedings before the grand jury was filed and became for all practical purposes a public record. Unless all preliminary proceedings in a criminal case are made secret, and I know of no one who has made any such proposal, despite the holding of prejudicial effect it is difficult to understand how pretrial dissemination of confessions and other evidence can be avoided.

It is clear that if jurors admittedly read newspaper articles during the trial, it will be treated as prejudicial because the jury is touched directly.[14] A distinction based on a time factor, that is, coverage before trial versus coverage during trial, rests on a slender reed. For it would seem if courts adhere to the concept that people are

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[10] *Id.* at 727.
[11] 369 U.S. 541 (1962).
[12] *Id.* at 558.
[13] People v. Biommee, 56 Cal. 2d 629, 364 P.2d 845, 15 Cal. Rptr. 909 (1961).
[14] Marshall v. United States, 360 U.S. 310 (1959).

impregnated ineradicably, then it matters little if the article is read before or during the trial.

Nevertheless some state courts have chosen to ignore the implications of *Rideau*. For example, the recent Vermont case of *State v. Truman*,[15] held that

> newspaper articles, even though denunciatory in character, are not in themselves in the absence of some evidence of the actual existence of a prejudice against the accused, sufficient to require the judge, in the exercise of his discretion, to conclude that a fair and impartial trial cannot be had.[16]

Other courts have made preventive efforts. In Rochester, New York, two admitted gamblers recently obtained an injunction to prevent the local newspaper from pursuing its announced purpose of publishing personal information and police records of the 29 individuals in the city who held federal gambling tax stamps, this because they alleged the publication would make it impossible for them to receive a fair trial on pending criminal charges.[17]

New York had a "Rideau situation" in *People v. Martin*.[18] The brief per curiam opinion dramatically presents the facts and the court's emphatic rejection of the police procedure involved:

> Defendants have been indicted for murder in the first degree. They move in this Court . . . for a change of venue. It appears by affidavit without contradiction that both defendants, 16 years of age, were arrested and brought to the 24th Precinct, where they were booked. The proceedings before the police lieutenant were filmed and the film was continued as the defendants were taken to the patrol wagon. On the way to the patrol wagon both defendants were questioned by reporters of the American Broadcasting Company and both the films and the questioning were telecast over Channel 7. It further appears that a deputy police commissioner had directed the police officers of the precinct to give as much cooperation to the press and television reporters as possible and specifically authorized the filming. Detectives engaged in the arrest were authorized to submit to interviews. While the exact figures of the number of people who saw the telecast is in doubt, there can be no doubt that it was a very large number and that the potential for influence on possible talesmen is significant. The effect of the telecast cannot but be prejudicial. The deputy police commissioner defends his action on the ground that the police should keep the public informed through the various news media; and further that the police should not prevent defendants from giving any statement to the representatives of these media that they might care to give. As applied to this case, the explanation is ingenuous. Here two very young men, after first being photographed without their consent, are allowed to be sub-

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[15] 204 A.2d 93 (Vt. 1964).
[16] *Id.* at 96.
[17] N.Y. Times, Dec. 5, 1964.
[18] 243 N.Y.S.2d 343 (1963).

jected to the insistent questioning of reporters bent on getting sensational details. Defendants far more experienced than these two would get the impression that their inquisitors were approved by those that had them in custody and that to rebuff them would not be advisable. To call this giving them an opportunity to state their version is an exercise in naivete. The practice defeats the very purpose of police work. People are not arrested to provide news stories or telecasts. They are arrested to be brought to justice. Any police conduct that prevents a fair trial could allow the guilty to escape conviction. Good public relations have their importance but being on good terms with the press at the expense of a scrupulous performance of the department's functions is hardly commendable. The motion is granted. Settle order on notice. If defense counsel and the district attorney can agree on a county for trial, the same may be inserted in the order.[19]

The *Martin* case vented its criticism on the police. For the most devastating castigation of journalistic conduct, no case matches the decision of the United States District Court for Ohio in *Sheppard v. Maxwell*.[20]

After a detailed discussion of various newspaper headlines and articles before and during the trial of Dr. Samuel Sheppard for murder, the federal court concluded:

If ever there was a trial by newspaper, this is a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public. Such a complete disregard for a sense of propriety results in a grave injustice not only to the individual involved but to the community in general. Public officials, the courts and the jury are unable to perform their proper functions when the news media run rampant, with no regard for their proper role. Numerous responsible newspapers and magazines noted this abuse of freedom of the press and published editorials which were highly critical of the Cleveland newspapers, especially the Cleveland Press.

Freedom of the press is truly one of the great freedoms which we cherish; but it cannot be permitted to overshadow the rights of an individual to a fair trial. As stated by Mr. Justice Jackson in his concurring opinion in *Shepherd v. Florida*, 341 U.S. 50, 53, 71 S. Ct. 549, 550, 95 L. Ed. 740 (1951):

. . . Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. . . .

On this subject, an often quoted opinion is that of Mr. Justice Frankfurter concurring in *Pennekamp v. Florida*, 328 U.S. 331, 354-356, 66 S. Ct. 1029, 1041-1042, 90 L. Ed. 1295 (1945), wherein he stated:

Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of

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[19] *Id.* at 343-4.

[20] 231 F. Supp. 37 (1964).

> a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. . . .
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> A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . . [Footnotes omitted.]
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> By its actions in the Sheppard case, the Cleveland Press showed no respect for its responsibilities. If ever a newspaper did a disservice to its profession; if ever the cause of freedom of the press was set back, this was it. The failure of that newspaper and the two other Cleveland newspapers to adhere to their responsibilities cannot be permitted to deny petitioner his right to a fair trial.[21]

Whatever the ultimate fate of Dr. Sheppard, students of journalism, and those concerned with fair trial and the free press, should read the factual recitation in the *Sheppard* case. One must be completely shockproof not to be deeply disturbed at the articles, headlines, editorials and cartoons, generally exhorting the court and jury to do their duty, clearly implying that this could be accomplished only by convicting the defendant.

Justice Blair of New Zealand had this cogent comment on the press: "It is idle for such newspapers to claim they adopt such practices in the public interest. Their motive is the sordid one of increasing their profits, unmindful of the result to the unfortunate wretch who may ultimately have to stand his trial for murder."[22]

Illustrative of how frenzied newspaper coverage can become in a dramatic situation is the discussion in the report of the Warren Commission on the Assassination of President Kennedy. The constant crowds of newspaper reporters and television cameras in the police station were, according to an F.B.I. agent who was present, "not too much unlike Grand Central Station at rush hour, maybe like Yankee Stadium during the World Series games."[23] Television cameramen set up their cameras and floodlights in the corridors, technicians stretched their television cables in and out of offices, newsmen wandered into the offices, sat on desks, used police telephones, and "indeed, one reporter admits hiding a telephone behind a desk so that he would have exclusive access to it if something developed."[24]

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[21] *Id.* at 63.

[22] Attorney General v. Tonks, N.Z.L.R. 141 (1934).

[23] Report of the President's Commission on the Assassination of President John F. Kennedy. (Washington, U.S. Government Printing Office (1964) at 202.)

[24] *Ibid.*

A secret service man had the impression that "the press and television people just . . . took over."[25] This freedom was apparently pursuant to General Order No. 81 of the Dallas Police Department which provided in part "that members of this Department render every assistance . . . to the accredited members of the official news-gathering agencies and this includes newspaper, television cameramen and newsreel photographers."[26] In a letter to all members of the Police Department dated February 7, 1963, Chief of Police Curry explained the previous order as follows: "The General Order covering this subject is not merely permissive. It does not state that the Officer may, if he chooses, assist the press. It rather places on him a responsibility to lend active assistance."[27]

As a result of this policy, during the Oswald investigation there were constant "impromptu and clamorous press conferences in the third floor corridor. Written press releases were not employed. The ambulatory press conference became a familiar sight during these days."[28] In fact, so many conflicting statements were given by various police officers, and F.B.I. reports given out indiscriminately, that F.B.I. Director J. Edgar Hoover "became concerned . . . and dispatched a personal message to Curry requesting him 'not to go on the air any more until this case . . . [is] resolved'."[29]

District Attorney Wade, stating he was concerned because people were saying they had the wrong man, "proceeded to hold a lengthy formal press conference that evening, in which he attempted to list all of the evidence that had been accumulated at that point tending to establish Oswald as the assassin of President Kennedy."[30]

The Warren Commission conceded that the people of the United States and of the world had a keen interest in learning of the events surrounding the death of President Kennedy including the developments of the investigation, but, it concluded,

> neither the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. Undoubtedly the public was interested in these disclosures but its curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury. The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime.[31]

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25 *Id.* at 204.
26 *Id.* at 225.
27 *Ibid.*
28 *Id.* at 231.
29 *Id.* at 235-6.
30 *Id.* at 236.
31 *Id.* at 240.

In fact, it suggested if "Oswald had been tried for his murders of November 22, the effects of the news policy pursued by the Dallas authorities would have proven harmful both to the prosecution and the defense."[32]

In concluding Chapter V of its report the Commission indicated that

> the burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne . . . by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the people to be kept informed and the right of the individual to a fair and impartial trial.[33]

Where a fair trial is involved, is there any distinction between a court and a jury? The California Supreme Court has indicated trial judges, as distinguished from jurors, are impervious to the influence of news media. In *People v. Lichens*[34] the court said,

> Trial judges often read newspapers, hear radio reports, or even overhear conversations or receive unwelcome letters containing statements relative to a case they are hearing; but if they are qualified for their office, they disregard all such statements insofar as evidentiary consideration is concerned. The trial judge is as capable of disregarding these facts as he is of disregarding irrelevant evidence to which he has sustained objections, or has struck from the record, in a trial to the court without a jury.[35]

Parenthetically, while most defendants complain about excesses of publicity, leave it to California to come up with a case in which a party appealed because of lack of media attention! In *Cembrook v. Sterling Drug Inc.*[36] the plaintiff contended he was denied a public trial, as guaranteed by Article I, Section 13 of the state Constitution and Section 686 of the Penal Code, because of a "publicity blackout" as a result of which no crowds attended the trial and this gave to the jury an erroneous impression that the case was of minor importance. The appellate court held that "the right to public trial does not carry with it the concomitant that the trial be publicized in news media,"[37] and suggested that while the participants may believe their controversy to be of paramount significance, there can be no assurance the media will weigh newsworthiness on the same scale.

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[32] *Id.* at 238.
[33] *Id.* at 242.
[34] 59 Cal. 2d 587, 381 P.2d 204, 30 Cal. Rptr. 468 (1963).
[35] *Id.* at 588, 381 P.2d at 205, 30 Cal. Rptr. at 469.
[36] 231 A.C.A. 77, 41 Cal. Rptr. 492 (1964).
[37] *Id.* at 85, 41 Cal. Rptr. at 496.

Perhaps the most dramatic turn on this entire subject—certainly the most widely discussed—was the recent New Jersey Supreme Court opinion in *State v. Van Duyne*[38] rendered on November 16, 1964. The New Jersey court ordered prosecutors, policemen and defense attorneys to cease making statements to the press that might prejudice fair criminal trials. The judges made clear that they would enforce the rules with their disciplinary powers over the bar.

"Unfair and prejudicial newspaper stories and comment both before and during trial of criminal cases," the opinion said, "are becoming more and more prevalent throughout the country."[39]

The court held that, so far as lawyers were concerned, contributing to such prejudicial comment was in conflict with the canons of professional conduct. Then came the specific restrictions.

"We interpret these canons," the court said, ". . . to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests."[40]

The opinion extended the restriction to policemen who are not lawyers, and to defense counsel. As to the latter, it said that the state was as entitled as the defendant to a trial before an impartial jury.

The New Jersey court sought to reassure the press that no undue restraints were being imposed. "Fair criminal prosecutions and exercise of the guarantee of a free press are not incompatible with the constitutional right of a defendant to a fair trial by an impartial jury,"[41] the court said. "Only the will to recognize and to subscribe responsibly to that fact has been lacking."[42]

To return to our original query—upon whom does the ultimate responsibility for our basic problem rest? The press, radio, and television may adopt codes or standards of ethics, but at best they will be voluntary and subject to the whims and caprice of highly competitive gladiators. Normal sensationalism, solicitation for the diminishing newspaper market, greed for the expanding television audience—these and other economic factors will result in abandonment of most voluntary codes under the exigencies of an Oswald,

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38 204 A.2d 841 (N.J. 1964).
39 *Id.* at 851.
40 *Id.* at 852.
41 *Ibid.*
42 *Ibid.*

Stroble, Chessman, Ma Duncan, Barbara Graham, Burton Abbott or similar case. "Journalistic codes of ethics are all moonshine,"[43] H.L. Mencken said in 1932. "Essentially, they are as absurd as would be codes of street-car conductors, barbers or public jobholders."[44]

So perhaps we must bow to the inevitability of failure to achieve voluntary restraint by the media of communication. Assuming so, is compulsory limitation feasible? In view of the trend of Supreme Court decisions, from *Bridges*[45] to *New York Times v. Sullivan*,[46] there is grave doubt that the current judicial majority would sit still for any curbs on the unbridled press. Certainly the political realities suggest no legislative or executive body would attempt any regulation, assuming a constitutional method could be devised. (Though, curiously enough, the Chicago Tribune suggested many years ago that restrictions must come because the "penetration of the police system and the courts by journalists must stop."[47])

That leads us to the bar, prosecutors and defense counsel, and law enforcement officers. Both are subject to reasonable restraint, the former by the courts of which they are officers, and the latter by legislative bodies and in some instances by courts. And, I submit, that is where appropriate action must be taken.

As Attorney General of California, I suggested a course of conduct for law enforcement agencies, in the form of six simple intra-office rules. Many sheriff and police departments in California have adopted these or similar devices for the conduct of their officers, and, while the reaction of the press has not been uniformly laudatory, some improvement of reporting procedure has been noted in subsequent cases of widespread community interest.

The suggested rules, simply stated, were:

1. In the ordinary course of duty, no officer below the rank of —— shall be allowed to make any statement or divulge any information concerning any felony investigation unless specifically authorized to do so by ——.

2. No officer shall allow his picture to be taken with a prisoner or someone depicting the prisoner.

3. Unless the person in custody is represented by counsel, and

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[43] Quoted in footnote, Pennekamp v. Florida, 328 U.S. 331, 365 (1946).
[44] *Ibid.*
[45] Bridges v. California, 314 U.S. 252 (1941).
[46] 374 U.S. 820 (1963).
[47] Quoted in Pennekamp v. Florida, 328 U.S. 331, 364 (1946).

both the prisoner and counsel give their written consent thereto, no news media representative shall be allowed to interview the prisoner.

4. Unless the prisoner is represented by counsel and both the prisoner and counsel agree in writing, no photographs shall be allowed to be taken of any person in custody.

5. Confessions, admissions, or other statements by the person in custody, or summaries of them, shall not be released to the news media representatives by any person. In the unusual case, release may be authorized by the sheriff or chief of police with the concurrence of the district attorney.

6. A designated department employee shall be responsible for maintaining close liaison with members of news media.

Press critics may complain that we are proposing the English method of news reporting. There the entire burden falls on the editor; mere publication regardless of intent subjects him to contempt.[48] Other press editorialists will shrilly cry that the legal profession seeks a news blackout. I suggest neither is accurate.

I believe the problem of fair trial may be solved if discipline is directed not at the press, but at law enforcement agencies and lawyers.

Once police agencies understand that their indifference to rights of defendants will assuredly result in reversals of convictions, and thus a waste of all their efforts of apprehension—once they realize that their blundering may free a desperate criminal, to the ire of their constituency—they will be less likely to respond to the pressures exerted by media representatives. What most peace officers need are simple guides of conduct. Whether my suggestions suffice, or another set may be more desirable, is of no consequence. Some helpful rules must be prescribed by state Attorneys General, or the highest ranking police agency in each jurisdiction.

Rules failing, however, it is not impossible to establish authority, judicially or legislatively, that will subject law enforcement agencies to contempt process for interfering with the proper administration of justice. That should be a last resort, of course.

Finally, courts must be prepared to deal firmly with lawyers who choose to conduct their litigation in the forum of newspaper columns or television, instead of in the courtroom. Contempt for interfering with the administration of justice and the functions of the court must be the big stick available for those prosecutors and

[48] See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935).

defense counsel who issue press releases, bulletins, purported confessions, criminal records, alibis, calculated to influence public opinion and through it the prospective jury panel.[49]

At the time of the celebrated Hauptmann trial three decades ago, the organized bar was disturbed at coverage of trials. It made recommendations then which have largely gone unheeded.[50] The advent of television has compounded the damage that can, and frequently is, being done to our constitutional concept of fair trial.

The New Jersey Supreme Court in the *Van Duyne*[51] case helpfully warned peace officers and the bar. It is to be hoped other jurisdictions will be similarly resolute. Perhaps then the current trend of irresponsibility can be reversed.

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[49] See Barnes, *Constitutional Law: A Changing View Toward Trial by Newspaper*, 16 OKLA. L. REV. 337 (1963).

[50] 22 A.B.A.J. 79 (1936).

[51] State v. Van Duyne, 204 A.2d 841 (N.J. 1964).