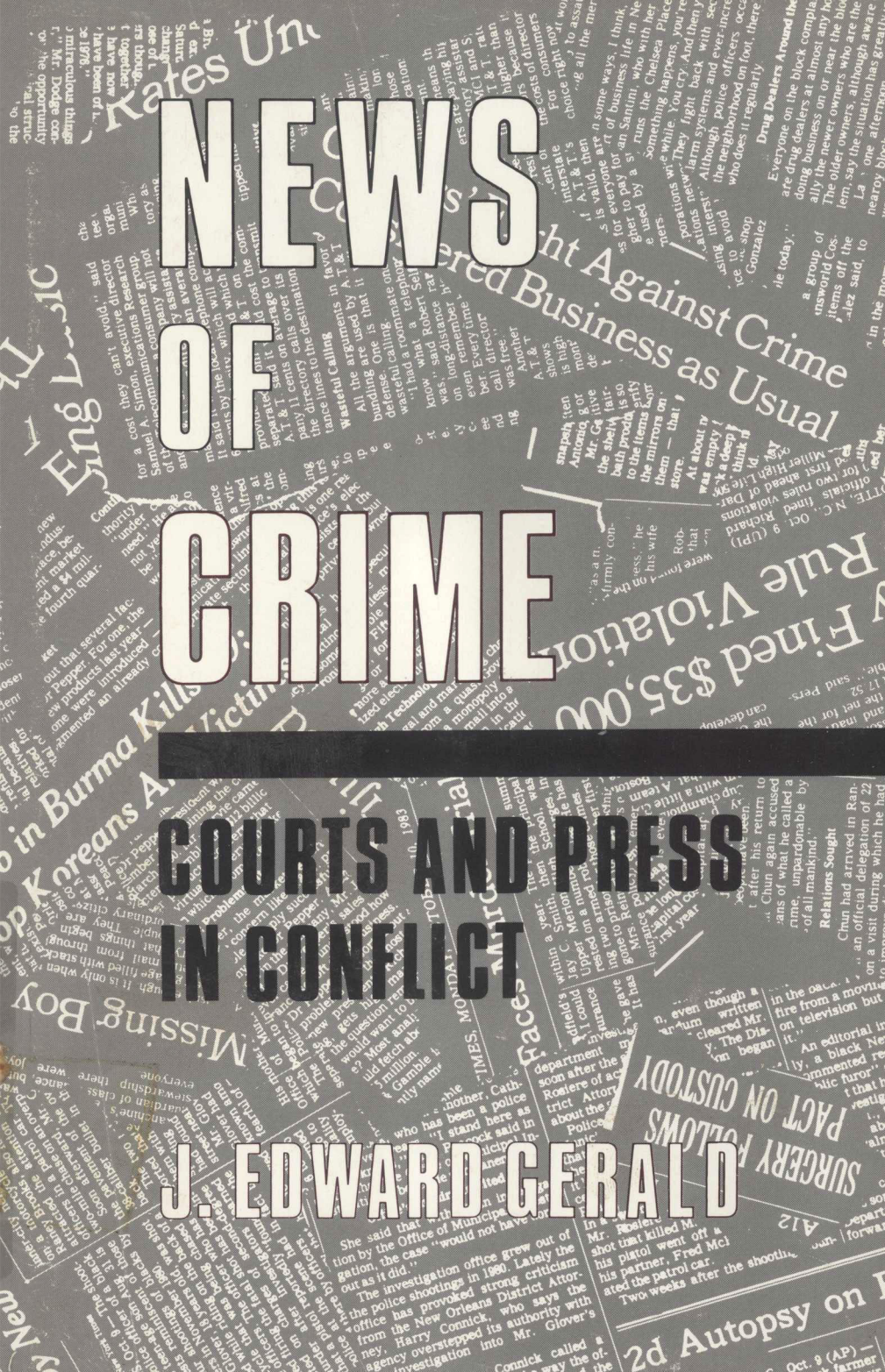
NEWS OF CRIME
COURTS AND PRESS IN CONFLICT
J. EDWARD GERALD

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Preface

This study focuses on mass media reporting of crime. It reports long-term interaction between the media and the judicial establishment characterized, in some instances, by exasperation and bitterness, and in others by a certain reasonable nobility.

The language of interaction is found, on the one hand, in the opinion of courts and, on the other, in popular journalism. The translation and reporting of such communication seems to involve certain obligations: (1) to describe fundamental aspects of both institutions in sufficient detail to reveal their common humanity, (2) to maintain a visible balance in reporting conflicts in point of view and factual claims, and (3) to reach an evaluation derived from critical observation of the values and acts of both institutions.

Much of what the media and the judges communicate about themselves is refracted through the lens of self-interest. The court decisions, while conforming to law, are sometimes tilted because some judges believe that publicity ordinarily enhances chances for fairness while others regard it as an impediment. Some judges favor less governmental control than others.

The public must decide whether justice has been done. The press is the medium by which the public becomes informed. The public is equally entitled to truthful information about the press in order to decide whether and to what extent the messenger has been fair and equitable in reporting the facts.

The general reader cannot translate the language of the courts without taking the time to become a specialist, and so summary and paraphrase are offered. As part of the effort to maintain a visible balance between the parties, statements of their contrasting positions frequently are juxtaposed. The difference between the judges and the media, as shown in the text, cannot be resolved by the collection and analysis of factual

data; the claims are inexact and the task of definitive research unacceptably large and complicated. For that reason, the most reliable data arise in the debates. The summary of cases and the opinions of journalists enable the reader to consider and evaluate this best evidence.

The courts and the press alike are entitled to our respect. The quality of their work accounts for the satisfaction with which most of us view self-government in comparison with other kinds. At the same time, the work is done by human beings; friendly and helpful evaluation is always in order. Life under any dictatorship is unacceptable, including one imposed either by the courts or by the press on what news the public is to hear about crime and the courts.

The main purpose of this book is to help dispel misconceptions based on irritation and anger and to encourage peace between the courts and the press.

Acknowledgments

This study extends over many years, and the list of persons and institutions who have shared their interest in the subject is too long to insert here. My wife, Opal Dutton Gerald, was a full-time associate in the pre-1966 preparatory work. This study begins with Sheppard v. Maxwell, 384 U.S. 333 (1966) and the draft of the American Bar Association's Reardon Report in the same year. The College of Liberal Arts of the University of Minnesota, from its McMillan Fund, supported field study from which I derived rich perspective on the relations of the police and the press in the United States and the United Kingdom. Dr. George A. Graham of Fort Lauderdale, Florida, was supportive and considerate. Herbert C. Morton of Washington, D.C., has been an invaluable adviser since his student days. F. Gerald Kline, director of the School of Journalism and Mass Communication, University of Minnesota, studied responses of mock jurors to prejudicial information. David L. Graven, while Professor of Law at the University of Minnesota, joined in a national study of the accommodation of working journalists to the American Bar Association standards of criminal justice (fair trial and free press). My associates at the University of Minnesota in the Graduate School, the College of Liberal Arts, and the School of Journalism, and the librarians at the Law Library, provided over many years time and support for study. Thanks to them and to all the many others who have helped me skim away the human passions that overlie the faith and fairness of the sturdy persons engaged in the fair trial controversy.

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NEWS OF CRIME

Introduction 1

PROLOGUE

Readers sometimes feel more comfortable when picking up a book if they can see, at the outset, the model or the pattern of discourse which the author has in mind to follow. This is a study of free press and fair trial, of an often one-sided conflict between the courts and the press over the control of news about crime. There are events in the foreground and in the background of the study which are of importance to the reader. The events in the foreground are generated by rules of court which restrict precise details of crime news, particularly news of pretrial events setting out as fact unofficial versions of guilt or culpability. The press—the print and broadcast media collectively—is opposed to some of the rules because they are relatively new, because they represent coerced changes in long-standing news reporting procedures, and because they impose conditions upon journalists which mock the power of the press and reveal the true limits of the First Amendment—the first freedom. The legal conflict is on the high ground of the First, the Sixth, and the Fourteenth Amendments. A lawsuit of constitutional character affects not only the issue in court but all those like it coming up in the future. Not only the administration of criminal law but of news reporting has been reshaped in less than two decades—an accomplishment truly revolutionary in view of the obstacles to change.

In the same time period, writers and readers have sought to divest language of unintended sexist connotation. Both journalists and lawyers avoid potentially sexist usage when discussing general acts and attitudes, and that surely is intended here also. The use of "he" in the general sense is for convenience only and is not indicative of roles according to gender.

In the background, events have to do with the way the revolution

was accomplished by the professional bar and the inability of the press to make an effective response. It is not easy to keep this aspect of the study in the foreground without unacceptable disruption of the legal events. The reader is asked to keep both sets of events in mind. But it would be a serious distortion of reality if events were stated in a rigid court-press dichotomy. The real substance of the differences in opinion lies in the intellectual and humanistic values that characterize persons, not professions. The values that maintain democratic society, those which appear triumphant in this series of events, are well distributed among journalists and lawyers alike. The victories, such as they are, belong to individuals, not to either profession.

The bar is not a mere voluntary alliance of lawyers; it is integrated, for the most part, into the state and federal court system and some of the consultation among members leads to rulemaking which is legislative in character and affects the practice of law, the operation of the courts and the rights of litigants.

The rulemaking power is derived, by interpretation, from the judicial power set out in the Constitution under a loose convention which requires legislative consent. Before the reader raises a skeptical eyebrow at the words "by interpretation," let it be added that the extent and character of the Bill of Rights originated in Court action, too, but of a different kind.* Since the rulemaking power is shared with the legislature and the executive there is a possibility of conflict which, when it occurs, cannot easily be resolved. But the major branches of government are organically interdependent; more than one button has to be pushed before the ship of state moves through the political waters, and the Court button, when pressed in a constitutional crisis, energizes countervailing powers that legislatures and executives have to accept in a spirit of compromise.

The rules of court which appear in the foreground of this study have the effect of law and bind persons to the extent that they are, at the time, under authority of the courts. The events in the background tell us a lot about the ability of the press to perform effectively as a private agency defending the political integrity of democratic institutions. The American Bar Association generated the rules by study and discussion and recommended them to the state and federal courts. Since adoption

*In order to help the reader, the word court, standing alone, is capitalized throughout when it refers to the Supreme Court of the United States.

presumably is voluntary, affirmative action did not always take place. Nevertheless, drawing up the rules related lawyers and judges to each other in an organizational structure able to create court policy.

Journalists have a voluntary communications network in which they assert an identity of professional interest, but they lack legislative structure. They are governed by rules of shops in which they work and influenced by voluntary codes of ethics, statements of principle, which bind an individual only to the extent that he is already committed by conscience. Journalists were unready, in organizational terms, to act as partners in an action program with the bar to define fair trial and to apply the rules to all journalists. For reasons to be made clear in the narrative, they are not able to commit themselves to professional rule-making. Denied a partnership role, they had to become petitioners.

EXPLANATION OF THE PROBLEM

The conflict between the press and the courts is over what to publish, and when to publish news of crime. The operating convention in journalism is based on market competition, on the scoop. For that reason, the courts have been accustomed to a free-wheeling press that picks up news from the police and the prosecutors and prints or broadcasts it immediately. This is a natural flow of the news without much artificial restraint.

By contrast, the rules of fair trial are based not on nature but on law, a quite artificial construct. A prospective juror, so the legal theory goes, should be neutral in mind and spirit when he is sworn. As a juror he should hear only what the court decides is permitted by law. If he does hear anything else, he may no longer qualify as that artificial person, an acceptable juror, as defined by law.

The quick and easy method of making the news conform to the artificial requirements of a trial court, one still in use by British courts, is to issue orders restricting the press and to put editors in jail when they disobey, to fine them large sums, or both. With all respect to the mother country, this policy is censorship and the United States Supreme Court has outlawed it as a method by which the courts can control the content of the press.

In 1966, the American Bar Association (ABA) decided that fair trial rules had to be improved and it appointed a committee to accomplish that purpose.[1] This committee found that lawyers and law enforcement

personnel were, in large part, talking to journalists as friends and giving them whatever information they could about crime. In so doing, they neglected or ignored the artificial rules of fair trial.

The Supreme Court already had made clear that the press could not be censored or enjoined. It was almost equally difficult to punish journalists afterward for crime news which prejudiced, or appeared to prejudice, pending cases. The ABA committee proposed rules which directly regulated lawyers and affected the news media largely by closing up their dependable sources of facts about crime. The ABA adopted the new fair trial–free press standards and asked judges to implement them as rules of court or otherwise. Hundreds of cases have tested the application of the standards and the ABA has revised them several times. Constitutional questions raised by the rules, mainly under the First and Sixth Amendments, have been tested.

The new format differs from past patterns of rulemaking by judges for journalists. With rare exceptions, past efforts at control had resulted in conflict between one judge, frustrated by the tumult of publicity or criticism around a difficult criminal case, and his most visible tormentors, a journalist or two. The judge would demand that the journalists be silent and let him try the case in court, not in the papers. When journalists, as proud partisans of the First Amendment, refused they were sometimes tried without a jury and punished for contempt of court.

By 1966, when the ABA committee was appointed, both the bar and the media were organized in several national professional and trade groups. In view of the democratic temper of the society, the ABA consulted with journalists and with others before drafting its standards and making an effort to enforce them. When journalists discovered that the consultation was genuine, and not a polite cover for arbitrary behavior, they responded somewhat unsurely but with determination. They matched the ABA committee for committee and, facing a large and wealthy professional organization, they hired lawyers to coach them in the martial arts of lobbying the local, state, and national judicial establishment. Publishers previously had been active lobbyists on business matters, but this response was new to journalists as a group. Heretofore they had tried to make do with the editorial voice, sometimes indignant and often shrill, when confronting judges who, in the journalistic in-house metaphor, were "trampling on the First Amendment." Of course, they had hired lawyers previously on occasion to help them with lawsuits.

Courts, for the most part, move slowly and deliberately, and cushion

their power with rules of fair play; they also wield the force of government. They define freedom of speech and press and the rights of individuals before the law. They originate the rules of criminal procedure through their quasi-legislative processes. In conflict with the media they tend, in an extremity, to reject legislative restraints and to sit in their own cases. In the criminal process, they have the last word.

There is not much doubt that the press is an underdog in the face of so formidable an opponent. The odds in 1966 were that it would lose. But the courts use reason in their processes and discussion provides an opportunity for a range of judicial opinion to assert itself. The press has gained as well as lost in the long dialogue over fair trial; among other changes, it has come to rely less on emotion and more on reason in its efforts to persuade the legal establishment.

The goal of the courts is to assure a defendant—especially one accused of a crime which, by nature, startles or revolts society—that he will get a fair chance to prove his innocence, or, if not clearly innocent, an equally fair chance to establish the limits of his liability. The media are not much interested in routine cases of crime such as robbery and assault and do not ordinarily report them.

Perhaps a couple of examples, by way of introduction, will help demonstrate why concern for a fair trial arises in the news.

Two Illustrative Cases

The Federal Bureau of Investigation decides to stage a series of stings, identified by the code name Abscam, to test the honesty of certain public officials because it had doubts that they would earn a passing grade. Rum afflicted some, greed motivated others among the chosen. Using disguised actors and hundreds of thousands of dollars of government money, the bureau dangles bribes before—among others—a United States senator and five members of the House of Representatives. Unknown to the public officials, they are photographed and their voices are recorded as they react to the possibility of receiving money from an Arab immigrant. The FBI approach borders on incitement to crime and entrapment and the Department of Justice drafts formal accusations with caution. Documents have to be duplicated and moved back and forth from desk to desk.

Some insiders apparently thought the news was too good to keep;

others were fearful, perhaps, that the voters wouldn't hear the news in time. The best and biggest story, with names and pictures, appears in the *New York Times*,[2] and NBC network cameras get exclusive pictures by being outside the right house at the right time. Soon all the other carriers of news have the story, too.

The United States attorney general, sworn to uphold the law, watches helplessly while the news ripples across the television screen and into print. Law enforcement on this scale is politics, as well as police work, and with the press the proper time to publish is *now*.

The Sixth Amendment promises every person a fair trial by due process of law. That is, the accused will not be victimized by official acts outside the law. Instead, these accused officials are tried by law enforcement insiders in the media. The journalists who took the story are among the finest and most ethical the profession affords. Their code of behavior attaches no guilt to getting and spreading the news. Some of them will be threatened with arrest if they do not tell where they got the story. A federal prosecutor and several officers will admit that they talked discreetly and legally to friends and official letters of criticism will go into their personnel files. But a journalist who got the story early will be cited for contempt and face jail unless she answers questions in court.[3]

From Abscam let us turn to homicide. Let us assume, for example, that two men are walking in the street. Pausing in the doorway of a bank, one says to the other, "Wait here while I cash a check." The speaker walks to the teller's counter, draws a gun and demands money. Loot in hand, he turns to find a policeman in line behind him, a surprise for which he is not mentally prepared. He fires his gun and the helpless officer is killed. More police rush in, but the gunman and his companion cannot be found. The police publish pictures from the bank's automatic cameras and ask the public to help find the gunman. He is arrested.

What about the other man? A woman customer finds the likeness of a youthful offender in the police file of persons previously arrested, a picture two years old, and she is willing to testify that he was seen with the killer. A second arrest is made.

The man with the gun is charged with murder. How shall the other man be charged? Eyewitness identification under the circumstances is unreliable. The police and the prosecutors interrogate both men, hoping they will accuse each other. It is important to the community's self-respect that the second man not be tried in the atmosphere of

the case against a police killer, but the two could go to trial together unless the public defender, acting as their attorney, can obtain separate trials.

The prosecutor finds his decision far from easy. Who can he believe? His decision may have to be reviewed in a pretrial hearing as jurors gather for trial. Will journalists, when they report the hearing, catch the nuances, the doubts, the differences? Will the news stories be limited to the facts which can be admitted in evidence, or will the juvenile record and the identification rumors be published? If they are, will the stories reach and bias prospective jurors?

This is one of the central problems of law enforcement, infinitely varied by personalities and circumstances. Its most important element is reasonable doubt, a doubt the Constitution entrusts to a jury, not to anyone else. If the media tilt before trial toward the police theory that both men are guilty, fairness become tougher. Few cases are solved by policemen who give first priority to the presumption of innocence and it may be that the media will be influenced by the police suspicion and their hatred of cop killers. Perhaps the media, if they share the fury, will help the prosecutor resolve his doubts.

These two examples are common in the annals of law and journalism. The rules tell the police to keep their opinions to themselves, to be silent about the evidence and their belief in guilt until they testify in court. Journalists are not compelled at this stage to be considerate of the artificial legal rules. They are constrained by habit to publish and let the defendants take the consequences. If a pretrial hearing should take place, the contraband evidence may still come out. If so, who broke the rules? A policeman, or a prosecutor, in all probability, but who can take time to locate the right one in a crowd? The court would simply have to postpone the trial or move it out of town.

The cases demonstrate that the subject is complicated and that the system—the police, the prosecutor, the lawyers, the judges, and the journalists, living together in the institution of law enforcement—needs brief explanation before the discussion continues. This is written for laypersons who may wonder why human beings caught up in law enforcement behave as they do.

Police and Prosecutors

According to popular conception, police work under discipline, but it is self-discipline for the most part and out of sight of superiors. The