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A BOOK REVIEW WITH AN EYE TO ETHICS

*William H. Erickson**

THE BEST DEFENSE. By *Alan M. Dershowitz*. New York: Random House. 1982. Pp. xxii, 425. \$16.95.

Will Rodgers never met Alan M. Dershowitz and never read his book, *The Best Defense*. I have not met Professor Dershowitz, but I have read his book. After reading *The Best Defense*, I reached the conclusion that Will Rodgers would have made an exception in the case of Alan M. Dershowitz.

Dershowitz describes himself as the lawyer of last resort. His book centers on the personal pronoun "I," and might have been entitled "Impossible Cases I Have Won."

Instead, the chapters, each describing a different case, bear titles such as "Whatever Else It May Be, It Is Not Murder to Shoot a Dead Body. Man Dies But Once," and "Defending Pornographers from Fundamentalist and Feminist Censors: *Deep Throat* and the First Amendment." The theme throughout is that Dershowitz was called to represent an "underdog-client" when all other lawyers failed. The clients he exposes in his book include nursing home operator Rabbi Bernard Bergman (called "the meanest man in New York" by the *Village Voice*); Soviet dissident Anatoly Shcharansky; F. Lee Bailey; porn star Harry Reems; Jewish Defense League bomb builder Sheldon Siegal; New York City police officer Robert Leuci, whose experiences were recounted in the book and motion picture entitled "Prince of the City"; and Frank Snapp, who found his published memoirs about the C.I.A. on review by the United States Supreme Court.

The legal maneuvers and strategies which Dershowitz describes are usually successful and sometimes reflect good, solid lawyering. In some instances, however, the well-known criminal defense tactics he sets forth constitute nothing more than the rediscovery of the wheel. And in other cases, what Dershowitz has to say about his tactics and his profession falls on the darker side of the line separating the merely irresponsible from the ethically bankrupt.

On every occasion Dershowitz slants the facts of the case to reflect his own genius. When he wins, the judge is a brilliant, honest, and courageous jurist. When he loses, the judge who rejected his theory is ignorant, incompetent, biased, and corrupt. Other judges are called "judicial midgets."

* Deputy Chief Justice, Colorado Supreme Court; Chairman of the American Bar Association Committee to Implement the Standards for Criminal Justice; Fellow of the American College of Trial Lawyers (former State Chairman for Colorado); Fellow of the International Academy of Trial Lawyers (former Secretary and Director); Fellow of the International Society of Barristers (former President); Chairman, Standing Committee of Standards for Criminal Justice (1975-1976); Judicial Member-at-Large, Board of Governors — American Bar Association (1975-1979); Chairman, Colorado Supreme Court Grievance Committee; Chairman, Criminal Justice Section — American Bar Association (1971-1972); Fellow of the National College of Criminal Defense Lawyers and Public Defenders. — Ed.

"Lying, distortion, and other forms of intellectual dishonesty are endemic among judges," according to Dershowitz. And so he develops his characters to support his own self-aggrandizement. For instance, in the last chapter, "Defending the Defenders," he describes his representation of F. Lee Bailey. Dershowitz asserts that Bailey is America's top criminal trial lawyer. It follows, of course, that he who defends the top criminal trial lawyer is the best of the best. Similarly, Dershowitz quotes the late Supreme Court Justice Felix Frankfurter's remark that he knew of no title "more honorable than that of Professor of the Harvard Law School." Dershowitz concludes: "I know of none more honorable than defense attorney." By some quirk, it turns out that Dershowitz is both a Harvard Law School Professor and a defense attorney.

Defense attorneys play a vital role in our criminal justice system. Chief Justice Warren E. Burger coined a now-famous metaphor by comparing our justice system to a three-legged stool or tripod. He said that justice can be attained in our adversary system only when a trial is held before a competent judge and both the prosecution and defense are represented by competent counsel.¹ Implicit in his metaphor is the recognition that if any one of the legs is weak or fails to render proper service, the tripod of justice loses its stability and collapses. Each leg of the tripod must be equally strong if our system is to produce justice as its final product. In short, the prosecutor, the defense lawyer, and the trial judge each have duties and responsibilities that must be met if justice is to be attained.

A defense lawyer who fails to carry out his duties to his client causes the adversary system to fail in the search for truth. If he does not comply with his obligations as an officer of the court, justice is distorted and the adversary system becomes an impossible method for determining the guilt of an accused. Dershowitz, though, exalts the role of the defense attorney. He writes:

The zealous defense attorney is the last bastion of liberty — the final barrier between an overreaching government and its citizens. The job of defense attorney is to challenge the government; to make those in power justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves. [P. 415.]

He asserts that the criminal justice system must constantly be challenged "if we are to maintain the freedoms we have." Obviously, his premise is sound. The Constitution would quickly become a meaningless document if we granted only those freedoms which are publicly popular at the moment or those freedoms which *everyone* deems essential to liberty and justice. To protect future freedom, constitutional issues must periodically be taken to their most disturbing extremes. In this sense, Alan Dershowitz has played a role in protecting the Constitution from infringement and emasculation.

Advocacy is not for the timid or meek. It demands that the lawyer be

1. Address by Chief Justice Warren E. Burger, Second Plenary Session, American Bar Association Annual Meeting (July 16, 1971), see also Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, John F. Sonnett Memorial Lecture, 42 *FORDHAM L. REV.* 227 (1973); *STANDARDS FOR CRIMINAL JUSTICE* § 4-1.1(a) (2d ed. 1980).

both vigorous and courageous in his representation of an accused. In fact, Canon 7 of the American Bar Association Code of Professional Responsibility provides that a lawyer *should* represent a client zealously within the bounds of the law.² The position of the Bar is *not*, as Dershowitz intimates, that defense counsel impedes the administration of justice simply because he challenges the prosecution or goes against the wishes of the judge. The American Bar Association Standards of Criminal Justice correctly set forth the defense lawyer's role:

Role of Defense Counsel

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law.

(c) The defense lawyer, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. The defense lawyer has no duty to execute a directive of the accused which does not comport with law or such standards. The defense lawyer is the professional representative of the accused, not the accused's alter ego.

(d) It is unprofessional conduct for a lawyer intentionally to misrepresent matters of fact or law to the court.

(e) It is the duty of every lawyer to know the standards of professional conduct as defined in codes and canons of the legal profession and in this chapter. The functions and duties of defense counsel are governed by such standards whether defense counsel is assigned or privately retained.

(f) As used in this chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to the codes of professional responsibility. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of alleged misconduct of counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.³

One of the most disturbing features of Dershowitz's book is the recurring suggestion that because defense attorneys litigate against the government, they need not respect the institutional standards of this "tripartite entity," or abide by these rules of ethics. Dershowitz conceives the adversary system solely as a check on state power, and not as an instrument of justice. Thus he condemns prosecutorial misconduct as "elite corruption" but praises defense transgressions as necessary "toughness." This myopia prevents Dershowitz from recognizing the difficult truth that not every con-

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

3. STANDARDS FOR CRIMINAL JUSTICE § 4-1.1 (2d ed. 1980).

viction diminishes freedom, and not every acquittal serves the ends of justice. In the long run, procedural safeguards that protect innocent and guilty alike depend on their perceived legitimacy. Dershowitz neglects the lesson obvious from his experience in the Soviet Union: when the rules are discarded, it is not the powerless who win.

This theory that the best defense ignores professional ethics leads Dershowitz to a strange notion of professional integrity. He makes a bitter attack on what he calls "The Integrity Lawyer":

There are a handful of defense attorneys in most major cities who are regarded as "models of integrity." There are distinguished lawyers who see themselves as above the fray. Their hallmark is absolute candor with the court and with the government. They generally understate their cases and argue in unemotional tones. They would never dream of using a stratagem or trick, no matter how essential to their clients' case. Nor would they attack the government or the court. They win through respect rather than through intimidation or artifice. They are judicial statespersons whose names are often included on lists of potential judges.

These integrity lawyers generally place their own reputations — their standing at the bar — above the immediate needs of a particular client [I]n any particular case a given client may suffer grievously by the lawyer's refusal to play tough when toughness is demanded.

The integrity lawyer's general reputation is built on the imprisoned lives of those defendants whose short-term interest in freedom may have been sacrificed to the lawyer's own long-term interest in developing a reputation for integrity. . . .

The temptation to trade off one client against another or against one's reputation for integrity is often difficult to resist. [Pp. 404-05.]

Dershowitz's definition of "integrity" differs from that which most defense lawyers recognize. Integrity does not mean underzealous or mealy-mouthed, apologetic advocacy. Integrity means soundness of moral principle and character, honesty, and uprightness. Integrity means zealous advocacy. Any other standard would not only be unprofessional but also would be immoral.

Integrity serves many functions in our legal system. It is not, however, used by lawyers as a sword to win cases as Dershowitz claims, but merely as a shield to protect the lawyer from losing the case before he even starts. Dershowitz is also mistaken in his belief that there is a trade-off between integrity and good advocacy. The judiciary, as well as the public, depends upon the professionally ethical conduct of attorneys to guarantee that the truth-finding process is not improperly diverted. It is fundamental that a lawyer, as an officer of the court, cannot resort to unfair means or foul play to gain a victory. Integrity, honesty, and high professional standards have long been the goal of the legal profession.⁴ To urge that a defense lawyer

4. The Supreme Court, per Burger, C.J., has said:

States traditionally have exercised extensive control over the professional conduct of attorneys. The ultimate objective of such control is 'the protection of the public, the purification of the bar and the prevention of a recurrence.' *In re Baron*, 25 N.J. 445, 449, 136 A.2d 873, 875 (1957). The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. The state's interest in the

must abandon those principles to carry out his duties to his clients is to advocate that we abandon the adversary system because it fails to ferret out the truth and produce justice as a final product.

As a self-proclaimed "expert" on professional ethics, Dershowitz pays little heed to the spirit of the law which the Code of Professional Responsibility embodies. In his introduction to *The Best Defense*, he sets forth his rules of the "justice game." In declaring his rules, Dershowitz blatantly distorts the adversary system of justice in order to obtain public recognition by shock. In doing so he violates the Code of Professional Responsibility.⁵ His rules provide:

- Rule I: Almost all criminal defendants are, in fact, guilty.
- Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.
- Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.
- Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.
- Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV.
- Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.
- Rule VII: All judges are aware of Rule VI.
- Rule VIII: Most trial judges pretend to believe police officers who they know are lying.
- Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.
- Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.
- Rule XI: Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).
- Rule XII: Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.
- Rule XIII: Nobody really wants justice. [Pp. xxi-xxii.]

On February 20, 1950, in Wheeling, West Virginia, Senator Joseph Mc-

professional conduct of attorneys involved in the administration of criminal justice is of special importance.

Middlesex Ethics Comm. v. Garden State Bar Assn., 50 U.S.L.W. 4712, 4714-15 (U.S. June 21, 1982) (citations omitted).

5. The Code provides:

A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

DR 2-101 (A) (1980).

Carthy delivered the infamous speech which created national concern when he declared:

And ladies and gentlemen, while I cannot take the time to name all the men in the State Department who have been named as active members of the Communist Party and members of a spy ring, I have here in my hand a list of 205 — a list of names that were made known to the Secretary of State as being members of the Communist Party and who nevertheless are still shaping policy in the State Department.⁶

Dershowitz's allegations cast the same kind of aspersions on the criminal justice system that McCarthy aimed at the State Department. McCarthy's regrettable "witch hunts" were successful in a sense, since they caused a few poor souls who called themselves Communists to be identified. Dershowitz's "witch hunt" has turned up little but a self-aggrandizing interview with *People Magazine*.⁷

Dershowitz's book contains many of these undocumented charges. Most are again categorical, such as, "Beneath the robes of many judges, I have seen corruption, incompetence, bias, laziness, meanness of spirit, and plain ordinary stupidity" (p. xviii). Narrowing his accusation, he writes, "I recently heard a story about a highly regarded federal appellate judge that suggests how pervasive judicial dishonesty has become" (p. xx). He goes on to tell of a judge who claimed to have read a trial transcript that had been locked in a second judge's file drawer the whole time. A note that follows the anecdote reads: "I did not hear the story from either of the judges; I heard it from a reliable source within the court who personally saw all the documents" (p. xx).

Dershowitz also attacks the federal prosecutor's office in the Southern District of New York, considered by many to be one of the best in the country. He declares that the prosecutors in that office are

prepared to close their eyes to perjury; to distort the truth; and to engage in cover-ups — all in the name of defending society from the obviously guilty. They practice this elite corruption with the knowledge and blessing of certain judges — some with the highest reputation for integrity and honesty. . . .

The young assistant United States Attorneys are not only taught how to "cheat elite," but — much worse — they are taught that such cheating is acceptable, indeed desirable. [P. 381.]

Such a charge, even when buttressed with his experience in the Robert Leuci case (ch. 10), is reckless and overly general. Dershowitz also accuses Judge Arnold Bauman, who sat on the Jewish Defense League case, of consciously tailoring fact-finding in his opinion to the purpose of defeating any attempt by Dershowitz to win a reversal on appeal.

One of the most serious charges in the book involves the 1980 United States Supreme Court decision involving C.I.A. agent Frank Snepp and his book *Decent Interval*. Snepp had published his memoirs without clearance from the C.I.A., and the Court ordered him to turn over to the government all of the book's earnings. Dershowitz claims the Court's decision expressed the Justices' anger at the recently published book about the

6. T. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY* 224 (1982).

7. July 19, 1982, at 69.

Supreme Court, *The Brethren*. Authors Scott Armstrong and Bob Woodward had based their exposé of the Court on interviews with Supreme Court clerks, many of whom had revealed confidential information. But Dershowitz discloses no basis for his irresponsible claims about the Justices' motives. Again, Dershowitz fails to name any of the "many observers" who felt that *The Brethren* had a "decisive impact" on why the Court decided the *Snepp* case without first having heard oral arguments. Dershowitz's allegations are serious and are not supported by any concrete evidence — not even a confidential informant.

Dershowitz makes these allegations in the teeth of established ethical rules. Canon 1 of the Code of Professional Responsibility sets forth that "A lawyer should assist in maintaining the integrity and competence of the legal profession." DR 1-102(A)(5) provides that "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." DR 8-102(B) states, "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." One reason for this latter rule is that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."⁸

The second reason goes back to the maintenance of the integrity of the justice system. While "[c]itizens have a right under our constitutional system to criticize governmental officials and agencies," and while "[c]ourts are not, and should not be, immune to such criticism,"⁹ "every lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of the judges, while recognizing the duty to denounce or expose a corrupt and dishonest judge."¹⁰ *In re Meeker*,¹¹ declared:

We should be the last to deny that [an attorney] has the right to uphold the honor of the profession and to expose without fear or favor corrupt or dishonest conduct in the profession, whether the conduct be that of a judge or not. However, [canon 8] does not permit one to make charges which are false and untrue and unfounded in fact. When one's fancy leads him to make false charges, attacking the character and integrity of others, he does so at his peril. He should not do so without adequate proof of his charges and he is certainly not authorized to make careless, untruthful and vile charges against his professional brethren.¹²

In re Meeker held that an attorney who charged, but could not prove, that three justices of the state supreme court conspired to deny him a fair and

8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (1980) (footnote omitted).

9. *Konigsberg v. California*, 353 U.S. 252, 269 (1957).

10. *Kentucky State Bar Assn. v. Lewis*, 282 S.W.2d 321, 326 (Ky. 1955).

11. 76 N.M. 354, 414 P.2d 862 (1966).

12. 76 N.M. at 364-65, 414 P.2d at 869 (citations omitted).

(a) A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. An extrajudicial statement, other than one permitted by paragraph (b), ordinarily is likely to have such an effect when it refers to a civil matter or proceeding that could result in incarceration, and the statement relates to:

. . . (5) [i]nformation the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (Final Draft Aug. 10, 1982).

impartial review, and that they misstated and distorted the facts so as to allow the cause to fail on a legal technicality, must be disbarred. The court said:

He has wholly failed to prove his charges. He has been guilty of most reprehensible conduct. He has attacked the integrity, motives and character of three honorable men and able justices of this court. He has falsely attempted to bring disrepute upon an honorable profession and has attempted to destroy the trust of the people of New Mexico, and elsewhere, in their courts and in their judges. He has not sustained his charges in the slightest degree. The charges are simply a figment of the fertile imagination of one who feels personally aggrieved because he lost his case. He has displayed the disposition of one who feels he can do no wrong and that the courts of justice can do no right.¹³

As a further example, disbarment was ordered in *Oklahoma Bar Association v. Grimes*.¹⁴ The Supreme Court of Oklahoma held that a lawyer who made three false charges of bribery against certain members of the supreme court without adequate proof, and who published the accusations in pamphlets and caused them to be broadcast on television and radio news, cast doubt on the honesty of all judges serving on the supreme court. The Kentucky Supreme Court in *Kentucky Bar Association v. Heleringer*,¹⁵ issued a public reprimand to a lawyer who held a press conference to accuse a named judge of "highly unethical and grossly unfair" behavior. The judge had issued a temporary restraining order against enforcement of an abortion ordinance. The court held that the remarks tended to unjustly bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process.

In a chapter of Dershowitz's book entitled "The Press Presents Our Case," he describes how he won the *Reems* pornography case by taking it to the public through the press:

In the prevailing mood against obscenity, I could not afford to place all my reliance on a technical, legal argument. We had to persuade the media, the public, and the courts that the conviction of Harry Reems was an outrage. Before this case could be won in court, it first had to be won in the public mind. [P. 168.]

The provisions of the Code of Professional Responsibility are designed to preserve the role of defense counsel as the advocate who defends his client with evidence and argument in the courtroom, rather than by emotional and prejudicial appeal to the public outside the courtroom.

DR 2-101(A) relating to publicity states: "A lawyer shall not, on behalf of himself . . . use or participate in the use of any forum of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Canon 7 stands for the proposition that "A lawyer should represent a client zealously within the bounds of the law." DR 7-107(A) & (D) on trial publicity states that: "A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in the making of an extrajudicial statement that a rea-

13. *In re Meeker*, 76 N.M. at 363, 414 P.2d at 868.

14. 436 P.2d 40 (Okla. 1967).

15. 602 S.W.2d 165 (Ky. 1980).

sonable person would expect to be disseminated by means of public communication . . . and that relates to the trial, parties or issues in the trial or other matters which are reasonably likely (or substantially likely) to interfere with a fair trial . . .” DR 1-102(A)(5) also states, “A lawyer shall not engage in conduct that is prejudicial to the administration of justice.”¹⁶ Dershowitz, by his own admission, deliberately violated each of those rules.

In *Sheppard v. Maxwell*,¹⁷ the Supreme Court addressed the issues created by pervasive prejudicial publicity in a criminal case. While many of the cases dealing with trial publicity problems focus, like *Sheppard*, on the resulting prejudice to the defendant, the right to a fair trial and impartial adjudication also extends to the prosecution and through it to society. In *State v. Van Dwyne*,¹⁸ the New Jersey Supreme Court wrote:

16. See also STANDARDS FOR CRIMINAL JUSTICE § 4-1.3 (2d ed. 1980):

(a) The lawyer representing an accused should avoid personal publicity connected with the case before trial, during trial, and thereafter.

(b) The lawyer should comply with the standards of Fair Trial and Free Press herein. In some instances, as defined in the codes of professional responsibility, the lawyer's failure to do so will constitute unprofessional conduct.

Standard 8-1.1 limits extrajudicial statements of the defense counsel and provides:

(a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose a clear and present danger to the fairness of the trial.

(b) Subject to paragraph (a), from the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a lawyer may be subject to disciplinary action with respect to extrajudicial statements concerning the following matters:

(i) the prior criminal record (including arrest, indictments, or other charges of crime), the character or reputation of the accused, or any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case;

(ii) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;

(iii) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;

(iv) the identity, testimony, or credibility of a prospective witness;

(v) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(c) It shall be appropriate for the lawyer, in the discharge of official or professional obligations, to announce the accused's name, age, residence, occupation, family status, and, if the accused has not been apprehended, any further information necessary to aid in the accused's apprehension or to warn the public of any dangers that may exist; to announce the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and the use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; to announce the identity of the victim if the release of that information is not otherwise prohibited by law; to announce, at the time of seizure, a description of any physical evidence (other than a confession, admission, or statement); to announce the nature, substance, or text of the charge, including a brief description of the offense charged; to quote or defer without comment to public records of the court in the case; to announce the scheduling or result at any stage in the judicial process; to request assistance in obtaining evidence; and to announce without further comment that the accused denies the charges.

(d) Nothing in this standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her.

17. 384 U.S. 333 (1966). See generally STANDARDS FOR CRIMINAL JUSTICE ch. 8 (2d ed. 1980) (“Fair Trial and Free Press”).

18. 43 N.J. 369, 389, 204 A.2d 841, 852 (1964).

The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue

Dershowitz admits he was aware of the legal and ethical prohibitions against a lawyer using the media to affect the outcome of a pending case. He asserts that because he did not actively seek the media coverage, but only responded to press inquiries, the ethical rule does not apply to him. In a case involving a well-known lawyer dealing with a matter of great public interest, this technicality offers an absurd justification for "masterfully employing the media to communicate [the] story to the public" (p. 174). Dershowitz writes, "Reems and I were invited to appear on TV and radio talk shows. The media were writing and distributing our briefs for us" (p. 169).

"Trial by press" is a disservice to the fair administration of justice. The prosecutor was criticized for his press releases in *Sheppard v. Maxwell* and it cannot be argued that defense counsel has a greater right to poison a jury panel with self-serving, inadmissible evidence. A careful balance must be struck between the needs of the public for information and the necessity of preserving the fairness of the trial procedure. But when the attorney himself disseminates the information solely for the purpose of circumventing the justice system, the lawyer's first amendment rights can hardly be said to outweigh society's interest in justice.¹⁹ Justice can hardly be served when officers of the court subordinate the pursuit of truth to self-advancement and ego gratification. Fairness requires that the limitations imposed on the prosecution should also prevent the defense attorney from flaunting his violations of the Code of Professional Responsibility and the Standards of Criminal Justice under the camouflage of the first amendment.

Because of Dershowitz's position at the Harvard Law School and his success in handling civil rights claims and criminal cases, he attracts national attention to his careless, if not reckless, accusations against the bench and the bar. He makes himself, in this book, an inquisitor, oblivious to the need for evidence to support his charges. History reflects that our common-law adversary system of justice has not escaped criticism, but no lawyer disputes that it is superior to the inquisitorial system. Dershowitz's general criticism is defamatory and borders on libel. His charges that prosecutors routinely suborn perjury and that some judges ignore their oath of office in dispensing justice are libelous *per se*.²⁰ For Dershowitz to make such allegations without any substantial foundation or on the basis of uncorroborated hearsay, and for the purpose of selling his memoirs, shows a lack of professionalism that is a discredit to both academe and the trial bar. In my view, Dershowitz's scathing critique of the American legal system is disingenuous and self-serving. He confesses that "defense lawyers are an egotistical lot" (p. 118) and his book proves his point very well.

It would be unfair to suggest that many readers will not be impressed and will not enjoy reading about some well-known cases. Those with knowledge of the legal profession, however, will recognize *The Best Defense*

19. See *Hirshkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc). See also STANDARDS FOR CRIMINAL JUSTICE § 4-1.4 (2d ed. 1980).

20. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1971).

as nothing more than one person's distorted observations which have been eloquently directed toward a self-portrait of the author's genius.