BOOK REVIEW

FREE PRESS AND FAIR TRIAL. REPORT OF A SPECIAL COMMITTEE ON FREE PRESS AND FAIR TRIAL OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION. 1967. Pp. xi, 143. $2.00.

STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS. RECOMMENDED BY THE ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS OF THE AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE. Tentative Draft, December 1966. Pp. xii, 265. Proposed Final Draft, December 1967.* Pp. ii, 36. $2.00.

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The *ANPA Report* on free press and fair trial makes it appear that America's newspapermen and lawyers are locked in mortal combat over the Constitution of the United States. The lawyers, according to the *Report*, are bent on suppressing news about crime, thus subverting the first amendment, which provides that there shall be "no law . . . abridging the freedom of speech, or of the press." Some lawyers, equally intemperate, have charged the newspapers with reckless subversion of the fifth, sixth, and fourteenth amendments (due process of law and trial by an impartial jury).

One would hope that the reality is not as exciting as this rumor of Armageddon. There is indeed an important conflict between the two professions about how much information should be made available prior to and during trial regarding persons accused of crime. But when one gets past the passionate calls to battle and the inflammatory slogans, one may find the real positions of the parties are not, in fact, so very far apart. One needs to know precisely what the issues are in order to choose sides intelligently.

First, what are the lawyers complaining about? Essentially, it is that in some cases newspaper stories published between the time of arrest and the time of trial create an atmosphere in which it is difficult or impossible to get an unprejudiced jury. This happens in the relatively few sensational cases.[1] The man arrested may have his

* The American Bar Association adopted the Advisory Committee's recommendations at the February, 1968, meeting of the House of Delegates. *See* Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343 (1968); N.Y. Times, Feb. 20, 1968, at 1, col. 6.

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[1] In its report, the Advisory Committee on Fair Trial and Free Press acknowledged that it owed its origin in part to the publicity surrounding the arrest and murder

picture plastered on every front page and flashed on the TV screens. He is exhibited before the public in handcuffs, surrounded by triumphant police. If he has a criminal record, it is fully reported. The horrible circumstances of the crime are highlighted, arousing the community's wrath against the man they already assume to be guilty. If he has given a confession, that fact is hammered home by the mass media, although it may turn out not only that the confession was obtained by improper police methods, but also that it is totally false.

The lawyers are concerned about such pretrial publicity not simply because it is difficult to impanel an unprejudiced jury in a community which has been saturated with anti-defendant news. Their concern extends to cases where no trial occurs (because the police discover they have the wrong man) or where the defendant is acquitted at trial. The damage to the unjustly accused person resulting from the glare of publicity cannot be undone. The papers never devote as much space to the release of an accused man as they gave to his arrest in a "big case."

What do the lawyers want done about the problem? Basically, the following:

1) They want to enforce *against lawyers* rules of professional ethics that would specifically forbid lawyers from disclosing certain information about cases in which they are involved. An attorney is supposed to make his arguments in court, not in the papers. Although the *Canons of Ethics* in their present form generally circumscribe pretrial disclosures,[2] the standards proposed by the ABA would make it clearly unethical for prosecutors to announce, in advance of trial, that guilt has been determined; that such-and-such witnesses will testify against the defendant; that the defendant has confessed; or that the

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of Lee Harvey Oswald. The Committee quoted the following conclusion from the Warren Report:

> 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 public to be kept informed and the right of the individual to a fair and impartial trial.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 19 (Tentative Draft 1966) [hereinafter cited as ABA TENTATIVE DRAFT], quoting REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 99 (1964).

The commentary accompanying the proposed standards pointed out that, over a two year period, questions of prejudicial publicity were raised in about 100 reported cases. ABA TENTATIVE DRAFT 23. Only a handful of cases result in reversal or mistrial on the ground of prejudice through publicity. *See, e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965).

[2] The present ABA CANONS OF PROFESSIONAL ETHICS No. 20 has been interpreted by the Supreme Court of New Jersey as proscribing

> 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. Such statements have the capacity to interfere with a fair trial and cannot be countenanced. . . .

defendant has failed or refused to take an examination or test.[3] The proposed standards will also prohibit equivalent attacks on the prosecution's case by defense lawyers outside court.

However, under the proposed standards prosecutors and defense attorneys *will* be permitted to release information about the occurrence of the crime, the circumstances surrounding an arrest, the identity of the arrested person, the description of any fugitive suspect,[4] the outcome of a preliminary hearing before a magistrate, the date when trial is scheduled, and the proceedings of the trial itself.[5] In view of these ABA recommendations, it is deplorable that the *ANPA Report* describes the dangers involved as "secret arrest and ultimately secret trial." (P. 5)

2) The lawyers believe that the police department should be subject to the controls that apply to the prosecutor.[6] There is no use in barring the prosecutor from announcing evidence of guilt in advance of trial, if the police are free to do so.[7]

3) Some lawyers have advocated application of the English contempt system.[8] In England the courts have extensive and loosely defined power to jail reporters, editors, broadcasters, lawyers, police-

The ban on statements by the prosecutor and his aides applies as well to defense counsel.

State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964). But the ABA advisory committee found that "the canon's general language fails to give adequate guidance and . . . has not been enforced." ABA TENTATIVE DRAFT 81. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 36 (Proposed Final Draft 1967) [hereinafter cited as ABA PROPOSED FINAL DRAFT].

[3] ABA TENTATIVE DRAFT 2-3.

[4] ABA TENTATIVE DRAFT 3-4.

[5] ". . . if the defendant has not been apprehended, [the lawyer] may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present. . . ." ABA TENTATIVE DRAFT 3. In view of this specific allowance for identification of fugitive suspects, it is difficult to understand editorial cartoons which invoke the terrors of preventing newspapers from printing descriptions of criminals at large, under some supposed but erroneous interpretation of the ABA recommendations. *See, e.g.*, Philadelphia Bulletin, Jan. 7, 1967, at 6, col. 3.

[6] ABA TENTATIVE DRAFT 5-7, 98-100. The standards for release of information would be applied to law enforcement officers through the promulgation of rules of court and departmental regulations. Control of pre-trial statements by police finds parallels in the application of due process concepts beyond the courtroom and beyond prosecutor's misconduct to activities of the police prior to trial. Giles v. Maryland, 386 U.S. 66 (1967) (non-disclosure of evidence favorable to defendant); Miranda v. Arizona, 384 U.S. 436 (1966) (interrogation).

[7] Here again, it should be noted that the police would be free to make statements necessary for apprehending criminals or for warning the public. ABA TENTATIVE DRAFT 99.

> In addition, law enforcement officers would be able to reply to charges of misconduct that are publicly made against them. The media would remain free to criticize or to defend official conduct, malfeasance or delay, and to urge prosecution. And even the restrictions that are imposed would be limited in duration, applying only during the period when the threat to the fairness of an impending or on-going trial is greatest.

Id.

[8] For articulate analysis of the British system with revealing illustrations of its operation, see A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 141-57 (1967), *reviewed*, Ainsworth, 42 TUL. L. REV. 450 (1968); Moll, 45 J. URBAN L. 200 (1967); D. GILLMOR, FREE PRESS AND FAIR TRIAL 158-76 (1966).

men or others who prejudice fair trial by advance publicity. The ABA Committee rejects the British contempt system as well as proposals to legislate limits on what the press may publish in advance of trial.[9] It does, however, recommend cautious use of the contempt power in a narrow class of situations against intentionally prejudicial publicity *during* trial.[10]

I have doubts concerning the constitutionality and effectiveness of this narrow remedy. Although the period of the trial itself is the most crucial from the standpoint of prejudice, it is also the period during which the constitutional guarantee of publicity is most explicit.[11] Statements during trial can be made by a wide variety of persons, more or less interested in the outcome, for a wide variety of reasons. The motive for such statements and their intended effect will be hard to prove. If the courts rigorously apply the requirements of prejudicial motive and intent to disseminate, the contempt power will seldom be exercised under the recommendations, and will be ineffective. On the other hand, if the courts relax the requirements, there will be a serious danger of stifling protected publication. As noted by the ABA Committee (p. 153), the Supreme Court has reserved the question whether sanctions on publication might be permissible when publicity is "aimed at influencing the outcome of a trial." [12] This is

[9] ABA TENTATIVE DRAFT 69. Most responsible commentators have rejected the idea of instituting a contempt system patterned after the British practice. *See, e.g.*, A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 155-57 (1967); D. GILLMOR, FREE PRESS AND FAIR TRIAL 176 (1966); SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL 10 (1967) [hereinafter cited as MEDINA REPORT, after the chairman of the committee, Judge Harold R. Medina].

Scholarly debate about the possibility of legislating restrictions on pre-trial publicity has concentrated on the Morse Bill:

> It shall constitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial. Such contempt shall be punished by a fine of not more than $1,000.

S.290, 89th Cong., 1st Sess. (1965), quoted in D. GILLMOR, FREE PRESS AND FAIR TRIAL 235 (1966). Although recommended vigorously by some, *see* S. ZAGRI, FREE PRESS, FAIR TRIAL 38 (1966), the bill was opposed by the Department of Justice and the American Civil Liberties Union, among others. D. GILLMOR, FREE PRESS AND FAIR TRIAL 192 (1966). Legislative attempts to control prejudicial publicity are open to much the same criticisms as discretionary controls through use of the contempt power. *Id.* at 195-96; MEDINA REPORT 10-11.

[10] Thus if a person, knowing that [a criminal] trial is in progress, makes a statement about the defendant or the case that goes beyond the public record, that is reasonably calculated to affect the outsome, and that seriously threatens to have such an effect, he should be subject to judicial discipline.

ABA TENTATIVE DRAFT 72-73 (footnote omitted). *See id.* at 150-54. In the ABA PROPOSED FINAL DRAFT, the recommendations relating to use of the contempt power were narrowed by substituting the phrase "wilfully designed by that person" for "reasonably calculated," and by requiring a showing of actual intent to disseminate. *Id.* at 27-28.

[11] "In all criminal prosecutions, the accused shall enjoy the right to a speedy *and public* trial . . . ." U.S. CONST. amend. VI (emphasis added).

[12] Wood v. Georgia, 370 U.S. 375, 389 (1962).

hardly a firm foundation for an experiment in regulating the press by use of comtempt sanctions. In any event, the bar should certainly first try to clean its own house by controlling the lawyers and personnel involved in investigation.

4) Some lawyers would like to see journalists agree on a code of ethics regarding publication of news prejudicial to a fair trial. Such a code would not comprise rules of law, violation of which would result in the imposition of sanctions such as fine or imprisonment. The code would express only what journalists could agree to be the proper line of self-restraint. Many journalists are keenly aware of the unfairness of extensive pretrial publicity.[13] Some feel compelled to sansationalize because their competitors are exploiting the situation.[14] If the newspapers could come to an agreement among themselves about professional standards in this area, much would be accomplished.

The *ANPA Report* proposes a number of arguments to answer those made by the legal profession. It stresses that sensational cases, where any danger to a fair trial might occur, comprise only a very small proportion of all criminal proceedings. Any danger, the argument runs, can be remedied by existing legal procedures. For example, the *Report* suggests that trial can be postponed for a time if the community has been excessively stirred up, or that the trial can be moved to another locality. However, there are serious political obstacles to continuance of a sensational criminal trial, and a change of venue in this age of wide news coverage can do little to avoid the possibilities of prejudice. It is true, as the *Report* points out, that jurymen can be eliminated if it appears, on questioning, that they are so biased as not to be able to make their decision solely on the basis of evidence presented in court. But where prejudicial publicity has been pervasive, *voir dire* is an insufficient remedy. The *Report* recommends more extensive isolation and instruction of the jury, but recognizes the impracticality of the former, and should recognize the difficulty of dispelling prejudicial impressions through instructions.[15] The only other safeguards suggested by the *Report* are the various post-conviction remedies (retrial, appeal, and habeas corpus). (Pp. 38-40)

The *ANPA Report* is an indiscriminate and intemperate rejection of all reform proposals. What can one say to an eminent committee that presents one of its principal conclusions as follows:

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13 There are several impressive examples of voluntary guidelines adopted by news media to reduce the possibility of prejudice. *E.g.*, CBS News, Official Communication, May 24, 1965, reproduced in part in Taylor, *Crime Reporting and Publicity of Criminal Proceedings*, 66 COLUM. L. REV. 34, 60 (1966); Massachusetts Guide for the Bar and News Media (1963), reproduced in ABA TENTATIVE DRAFT 262-65. *See* A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 123-26 (1967); AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, FREE PRESS AND FAIR TRIAL 100-06 (1967) [hereinafter cited as ANPA REPORT].

14 *See* A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 35-37 (1967).

15 For the Supreme Court's view of this difficulty, see Bruton v. United States, 88 S. Ct. 1620, 1623-28 (1968).

> The people's right to a free press which inherently embodies the right of the people to know is one of our most fundamental rights, and neither the press nor the Bar has the right to sit down and bargain it away. (P. 1)

To pose the issue as whether freedom of the press may be bargained away is the kind of inflammatory nonsense that can only impede the efforts of concerned men in both professions who are seeking a legitimate and practical solution to a difficult problem.

The ANPA would have done better to come forward with at least one or two suggestions for a voluntary code of ethics on the subject of pretrial publicity.[16] After all, most newspapers do have ethical standards of a similar character. For example, newspapers voluntarily withhold the names and addresses of women who have been raped, and of children who get involved in small-scale delinquency. The press often—perhaps too often—delays the release of information relating to the national defense, at the request of government officials. Newspapers frequently follow a policy of professional courtesy under which they avoid or minimize reports adverse to other journals or publishers. Why not come to an understanding of what professional ethics demand in relation to pre-trial publication?

As I hacked my way through the rhetoric of the *ANPA Report*, I began to realize that the real bone of contention is the proposal to restrict the police from supplying pretrial news to reporters. The *Report* dramatizes the difference between "free and uninhibited access to information" and "censorship at the source of news." (P. 1)

The problem is a tough one, and deserves better, more reflective treatment than the ANPA gave it. A moment's thought would explode the position that newspapers under all circumstances have an absolute right to know and publish anything the public would be interested to read. National security, to begin with, necessitates "censorship at the source;" nobody expects the Defense Department to disclose all it knows about the intentions or armaments of potential enemies, or our own counter-measures. Interests far less important than national survival suffice to cut off news at the source. Interests in property and profits are accepted as justifying the settled policy allowing giant publicly-held corporations to control the news they distribute. Newspapers themselves do a little healthy "censorship at the source" when they deny the right even of courts and grand juries to know the confidential sources of a reporter's exposé of political corruption and tolerated crime.

However, deciding whether or how to control the release of information concerning matters which may become the subject of a

[16] For the mixed reactions of some eminent newsmen to the idea of self-imposed standards, see D. GILLMOR, FREE PRESS AND FAIR TRIAL 107-14, 177-80 (1966). Examples of voluntary guidelines are cited in note 13 *supra*.

criminal trial involves a more subtle balancing of constitutional interests than is required in the instances just described. The first amendment guarantees freedom of the press, and the sixth amendment guarantees "a speedy and public trial, by an impartial jury." The necessity for adjustment arises because total lack of self-restraint by the press at times may be inimical to the right to be tried by an impartial jury.[17]

Although the *ANPA Report* asserts that "liberty of the press supports nothing except a freedom from [all] censorship," (p. 23), there is strong authority that as a historical proposition, freedom of the press meant freedom to publicize views and information about *public matters*.[18] The potentially prejudicial details surrounding a private individual's alleged crime add little to informed public discussion of political or social ideas. If necessary to preserve free trial, such details could be withheld without infringing true freedom of the press.

So the question is not whether there can or should be "censorship at the source," but rather how to draw the line between information which can constitutionally be withheld, and information which must be released in the public interest. In view of the admirable role played by some newspapers in the discovery and disclosure of important political and governmental evils, it would seem reasonable and appropriate to expect the press to help delineate the cases where a temporary delay in releasing some details of a crime would inhibit the type of publication guaranteed by the Constitution. Unfortunately, the *ANPA Report* is silent on this point.

One may or may not agree with every proposal of the ABA Committee's recommendations, but the legal profession can take pride in its thorough documentation, in the scrupulous fairness with which the problem was examined, and in the temperance with which conclusions were expressed. One would expect no less from the group of eminent, and on the whole, conservative, judges and lawyers constituting the ABA Committee. One might have hoped that the press would deal more fairly with these recommendations. Perhaps this will yet come about; for, after delivering itself of the *ANPA Report*, the Publisher's Association now proposes to study the matter.[19]

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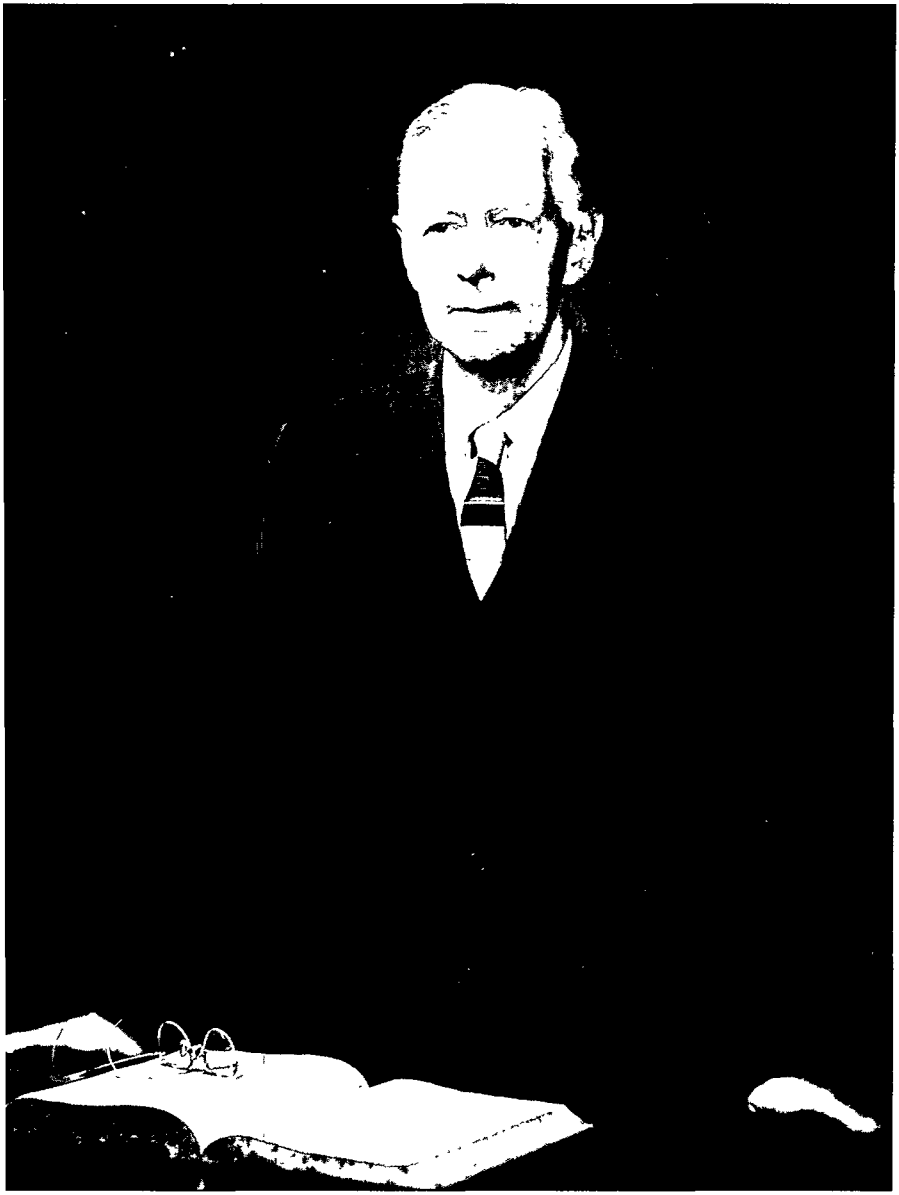
17 As the ANPA REPORT points out, it is not clear whether the guarantee of public trial runs to the public or the accused. (Pp. 31-32.) But a decision on the point may make little practical difference, since publicity can detract from fair trial whether publicity is a right of the public or of the accused, and since it is probable that the right to publicity belongs to both the public and the accused.

18 The evils to be prevented were . . . any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

T. COOLEY, CONSTITUTIONAL LIMITATIONS 604 (7th ed. 1903), *quoted in* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 11 (1954).

19 Phila. Bulletin, Jan. 4, 1968, at 6, cols. 3-5. The sum of $150,000 was appropriated for the project. *Id.*



ALEXANDER HAMILTON FREY

The Editors dedicate this issue to Professor Alexander H. Frey upon his retirement from the faculty after more than thirty years of service to the Law School.