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Edward R. Brown

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Mr. Brown quickly summarizes the process by which the ABA Committee reached its conclusions and discusses several of the more important findings. Proceeding to a definitive examination of the proposed remedies, the author concurs with the Committee that the existing devices available to the defense in eliminating prejudice — change of venue, continuance, jury selection, and mistrial — should be invoked more frequently and that the standards used to justify these remedies should be reduced. Mr. Brown also discusses the expansion of news blackouts and the use of closed-door hearings and concludes with an analysis of the views expressed by those concerned with the Report as well as a delineation of two problems raised by the Report.

IN THE WAKE of the Warren Commission recommendations calling for the establishment of "ethical standards so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial,"[1] a special advisory committee was appointed by the President of the American Bar Association to study and report upon the problem of fair trial and free press. This eleven-member committee included five judges, one ex-judge, one law school dean, one ex-dean, and one ex-lawyer who resigned to accept an appointment to the United States Supreme Court.

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Supported by money from private grants, the committee and its staff labored for twenty months. On October 1, 1966, the committee released its 265-page report which included a barrage of "tentative" recommendations. The report is the most exhaustive study of fair trial and free press ever undertaken. The recommendations for remedial measures are generally conservative in that most have been recommended or adopted before, but the measures are innovative to the extent that new clothes have been placed on old remedies.

[1] U.S. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 27 (1964) [hereinafter cited as WARREN REPORT].

I. FINDINGS OF THE REPORT

The *ABA Report* includes a survey of all existing American decisions concerning the effect of prejudicial news publicity upon a fair trial as well as some English cases and a survey of most literature bearing on the subject. Moreover, the committee's staff studied for one-month periods twenty daily newspapers in twenty different large cities and sent questionnaires to judges, prosecutors, defense counsel, police chiefs, and newspaper editors in these same twenty communities. The committee staff also surveyed reports of psychological studies and tests which were pertinent to the question of what information can prejudice jurors.[2]

From this research and survey, the report concluded that the number of cases involving potential prejudice is larger than generally assumed.[3] For instance, in each of the twenty newspapers surveyed, there were at least fifteen cases reported "in which the nature, prominence, and timing of the news coverage raised the most serious questions of potential prejudice."[4] Between January 1963 and March 1965, there were one-hundred judicial decisions in which the issue of prejudicial publicity affecting a convicted defendant's right to a fair trial was raised. While few decisions resulted in reversal or mistrial, the *ABA Report* added that "a study of these decisions suggests that this may have been largely due to an excessive deference to the discretion of the trial judge, not to a lack of merit in the claim being made."[5] Moreover, the report noted that appellate decisions represented but the top of the iceberg and that responses to questionnaires sent to defense counsel indicated a much higher incidence of potential prejudice at the trial level.[6]

Necessarily, the *Report* defines its conclusions in terms of potential prejudice rather than actual prejudice, and to that extent these conclusions are based on inference and conjecture. The tools of social science research in this area are limited. Even the ultimate standard against which such research is conducted — the concept of fair trial — does not lend itself to any precise definition or measurement. Accordingly, although the evidence marshalled in the

[2] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO FAIR TRIAL & FREE PRESS 23-24 (Tent. Draft 1966) [hereinafter cited as ABA REPORT].

[3] *Id.* at 24.

[4] *Ibid.*

[5] *Id.* at 23 (commentary).

[6] *Id.* at 23-24 (commentary).

ABA Report is impressive, this alone does not serve as a categorical refutation of the oft-made charge: "The presumption of some members of the Bar that pretrial news is intrinsically prejudicial is based on conjecture and not on fact."[7] Another significant conclusion, that an individual juror's exposure to outside information may affect him below the level of the conscious mind so that he may thus be unaware that he has been affected and may be unable to express any conscious prejudice,[8] was based upon studies in the field of opinion research and studies of jurors' decisions in mock cases.[9] In the mock cases jurors were exposed to prejudicial matters in varying degrees and their verdict proportionately reflected the degree of exposure.[10] In another interesting experiment a class of students was asked to rate a guest lecturer, and their ratings were shown to have been influenced by the different descriptions of the lecturer appearing in a biographical circular distributed before the lecture.[11]

II. REMEDIAL MEASURES PROPOSED

To meet the problem of potential publicity affecting a fair trial, the committee considered three possible remedies:

> (1) direct restrictions on the news media, through increased use of the contempt power or specific statutory prohibitions; (2) expansion of remedies and preventive techniques available to a defendant who complains of potentially prejudicial news coverage; and (3) restrictions on the release of certain kinds of information and opinions for carefully defined periods by lawyers and law enforcement officers participating in the criminal process.[12]

Generally, the committee looked to the second and third remedies, rejecting the remedy of direct restrictions upon the press except in the two limited situations which will be considered later.[13]

A. Expansion of Remedies and Preventive Techniques Available to a Defendant

The *Report* concluded what common experience suggests,

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[7] REPORT OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION SPECIAL COMMITTEE ON FREE PRESS AND FAIR TRIAL 1 (1967) [hereinafter cited as ANPA REPORT].

[8] ABA REPORT 61 (commentary).

[9] *Id.* at 62-65 (commentary).

[10] *Id.* at 62.

[11] *Id.* at 63.

[12] *Id.* at 68.

[13] See text accompanying notes 31-45 *infra.*

namely, that "the overwhelming proportion of potentially prejudicial information or comment appearing in the media is adverse to the defendant."[14] The remedial measures recommended first looked to the traditional techniques which primarily benefit the defense: continuance, change of venue, challenge for cause of a prospective juror, sequestration of the jury during trial, questioning during the trial individual jurors who are exposed to publicity during that period, court admonitions that jurors avoid the mass media during trial, and mistrial.[15] While these techniques have long been available, trial courts have been reluctant to invoke them at the request of the defense.[16] Indeed, in the first Sheppard trial, the judge invoked only a few of them, and this was sharply criticized by the United States Supreme Court ten years later.[17]

The innovations which the committee's recommendations afford to these traditional techniques are threefold: (1) when certain conditions are shown to exist by the defense, the court must, if requested, utilize one or more of these techniques; (2) the conditions requiring resort to any given technique fall short of a showing of actual prejudice by the defense; (3) the defense is protected if it requests the court to invoke any of these techniques.

For example, during the jury selection process, the defense may request that an examination of each individual be conducted outside the presence of other jurors, either prospective or selected, and the defense's request must be granted "whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material . . . ."[18] This simple device carries two benefits for the defense. First, defense counsel can pry and probe into the extent of the prospective juror's pre-trial exposure without fear of eliciting information which might affect other jurors already seated[19] and

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[14] ABA REPORT 73.

[15] *Id.* at 73-74.

[16] Sequestration of the jury during the second trial of Sam Sheppard was the first time in recent memory that a jury had been sequestered during a criminal trial in Cuyahoga County. Cleveland Plain Dealer, Nov. 1, 1966, p. 1, col. 3.

[17] Sheppard v. Maxwell, 384 U.S. 333, 357, 363 (1966).

[18] ABA REPORT 10 (Standard 3.4(a)).

[19] Even the most basic question may evoke a prejudicial answer. As reported of the voir dire before the trial of Dick Hickok and Perry Smith for the mass murder of the Cutter family:

> During the voir dire . . . the airport employee, a middle age man named N.L. Dunnan, said, when asked his opinion of capital punishment, 'Ordinarily I'm against it. But in this case, no' — a declaration which to some

without fear of antagonizing those jurors or the individual being examined. Second, if defense counsel believes that his extensive questioning has antagonized this individual, at least he can exercise one of his few peremptory challenges without concern as to its effect upon jurors already seated. Thus, the stage is set for a thorough, uninhibited voir dire examination.

Under the recommended standards the emphasis is more upon the degree of an individual juror's exposure to pre-trial publicity than upon persuading him to admit to an opinion which he cannot put aside. If the prospective juror admits to an opinion on the merits, "he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial."[20] Formerly, the defense was usually required to show unequivocally that the prospective juror could not be impartial.[21] Massive exposure requires dismissal for cause "without regard to his [the juror's] testimony as to his state of mind."[22] Thus, under the ABA's recommended standards, the defense is not faced with the usually insurmountable task of establishing prejudice from a prospective juror's own lips and at the same time avoiding the alienation of the entire panel for his efforts.

Similar procedures are to be utilized for questioning jurors who have not been sequestered and who may possibly have been exposed to prejudicial materials during the trial.[23] When the defense does successfully request sequestration upon a showing that "the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors,"[24] the court may not reveal which party requested sequestration.[25] Again the defense is protected from the risk of antagonizing a much-inconvenienced jury.

Motions for change of venue and for continuance must be granted upon a showing that "because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that

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who heard it, seemed clearly indicative of prejudice. Dunnan was nevertheless accepted as a juror. CAPOTE, IN COLD BLOOD 273 (1965).

Capote does not state before how many other jurors this remark was made.

[20] ABA REPORT 11 (Standard 3.4(b)).

[21] 50 C.J.S. *Juries* § 277, at 1061 (1947).

[22] ABA REPORT 11.

[23] *Id.* at 13 (Standard 3.5(f)). This procedure is already accepted practice in the federal courts. See Marshall v. United States, 360 U.S. 310 (1959).

[24] *Id.* at 42 (Standard 3.5(c)).

[25] *Ibid.*

in the absence of such relief, a fair trial cannot be had."[26] No showing of actual prejudice is required.[27] If upon the overruling of such a motion the defense elects to waive a jury trial, the defense is not precluded from raising on appeal the claim that the court erred in overruling the motion.[28] In this way defense counsel are spared the dilemma of going to trial before a jury believed to be prejudiced hoping to claim error on appeal, or else waiving a jury in favor of a hopefully more impartial tribunal of one or more judges but waiving at the same time any right to appeal the denial of the motions for change of venue and for continuance.[29]

B. *Restrictions on the Release of Certain Kinds of Information for Carefully Defined Periods—Before and During Trial*

The Warren Commission Report sharply criticized both the Dallas law enforcement officials and the press for releasing and reporting certain information respecting the detention and investigation of Lee Harvey Oswald.[30] While recognizing that a concerned public had the right to know what agencies were participating in the investigation, that Oswald had been apprehended, and that the state had sufficient evidence to charge Oswald with the murders of President Kennedy and Patrolman Tippit, the report added:

> [N]either 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. . . . 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]

Dean Erwin Griswold of the Harvard Law School amplified this theme in a now oft-quoted article originally appearing in the *Saturday Review*. Dean Griswold recommended a complete blackout on the pre-trial release of information by lawyers and law en-

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[26] *Id.* at 9 (Standard 3.2(c)).

[27] *Id.* at 9 (Standard 3.2(b)). The standards liberalize methods of proof by permitting opinion surveys and "other material having probative value."

[28] *Id.* at 9-10 (Standard 3.2(e)).

[29] The writer two years ago participated in a first-degree murder trial at which a motion for change of venue was made and later withdrawn when a jury trial was waived. At the time it was thought that waiver of a jury trial was, in effect, a waiver of any rights to change of venue; consequently, no issue of prejudicial publicity was raised on appeal. See State v. White, 9 Ohio App. 2d 271, 224 N.E.2d 377 (1967).

[30] WARREN REPORT 231-42.

[31] *Id.* at 240.

forcement officers with the exception of the accused's identity and the nature of the charge.[32] In addition Dean Griswold recommended the use of the rule-making and contempt powers of the courts to restrict pre-trial disclosures.[33]

The New Jersey Supreme Court, in late 1964, interpolated the core of the Griswold recommendations into Canons 5 and 20 of the Canons of Professional Ethics and suggested sanctions against both lawyers and law enforcement officials in the event of an unauthorized pre-trial release of potentially prejudicial information.[34] However, the New Jersey court did not assert the manner in which discipline should be imposed in the event of unauthorized disclosures by the police — whether by invoking the contempt power of the courts or otherwise.[35]

Similarly, the United States Supreme Court in *Sheppard v. Maxwell* implied approval of the Griswold formula without clarifying whether restrictions on unauthorized disclosures should be applied during the entire period from arrest to verdict or only during actual trial.[36] Further, the Court avoided the problems inherent in the enforcement of such restrictions against law enforcement officers and declined to suggest the use of the rule-making and contempt powers of the courts.[37]

With respect to the blackout period and the extent of the blackout, the ABA Committee's recommendations strike a middle ground. The blackout period extends from the moment of arrest or the filing of the charge to the conclusion of trial.[38] The extent of the blackout before trial includes information as to defendant's criminal record; existence or contents of a confession or suspect's refusal to submit to questioning or tests; information as to evidence uncovered, including identity of witnesses or test results; opinions

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32 Griswold, *When Newsmen Become Newsmakers*, Saturday Review, Oct. 24, 1964, p. 21, at 23.

33 *Ibid.*

34 State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964).

35 *Id.* at 389, 204 A.2d at 852.

36 Sheppard v. Maxwell, 384 U.S. 333, 361-62 (1966).

37 *Ibid.*

38 The *ABA Report* also recommends that law enforcement authorities promulgate regulations "governing the release of information, relating to the commission of crimes and to their investigation, prior to the making of an arrest or the filing of formal charges." ABA REPORT 7 (Standard 2.2(a)). Prosecutors are also restricted in commenting on matters pending grand jury investigation. *Id.* at 2 (Standard 1.1) (by implication).

about the merits of the case and characterizations of the defendant; and information respecting plea negotiation.[39]

While the blackout on extra-judicial statements during trial is to be complete,[40] the recommended standards specifically authorize the pre-trial release of factual information respecting the defendant's employment, family, age, and residence. In addition the police or prosecutor, "if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present."[41] Further, the law enforcement officer or the lawyer for either the prosecution or defense

> may announce the circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announce the scheduling or result of any stage in the judicial process; and may request assistance in obtaining evidence; and, on behalf of his client, may announce without further comment that the client denies the charges against him.[42]

If the ABA Committee recommendations respecting the extent of information which may be disclosed before trial strike a middle ground,[43] the committee assumes a decisive position with respect to the manner in which these restrictions are to be enforced. The courts are urged to adopt these recommendations as rules of court. Lawyers and law enforcement officers are to be subject to contempt proceedings for violating the restrictions as well as being subject to disciplinary action by bar associations and executive authorities supervising police officials.[44]

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[39] *Id.* at 5-6 (Standard 2.1).

[40] *Id.* at 4 (Standard 1.1). This blackout also applies to employees of the judiciary. *Id.* at 7 (Standard 2.3).

[41] *Id.* at 3, 5 (Standards 1.1 & 2.1).

[42] *Id.* at 6 (Standard 2.1).

[43] The United States Attorney General permits release by Justice Department officials of a defendant's record of federal convictions. See ATTORNEY GENERAL'S STATEMENT OF POLICY CONCERNING THE RELEASE OF INFORMATION BY PERSONNEL OF THE DEPARTMENT OF JUSTICE RELATING TO CRIMINAL PROCEEDINGS app. D. In contrast, the ABA recommendations, like those of a special group of the New York Bar Association and those of Dean Erwin Griswold, prohibit disclosure of any information pertaining to a criminal record. ABA REPORT 3, 5 (Standards 1.1(1) & 2.1(1)). See also MEDINA, FREEDOM OF THE PRESS AND FAIR TRIAL 32 (1967) [hereinafter cited as MEDINA REPORT]; Griswold, *supra* note 32 and accompanying text.

[44] ABA REPORT 5, 6 (Standards 3.1 & 2.1).

The committee realistically recognized that restrictions on lawyers alone were far from adequate and that if the restrictions were to be effective at all, they must subject every individual to the same sanctions.[45]

C. *Closed Hearings and Direct Restrictions on News Media*

If there are to be restrictions on both lawyers and law enforcement officers respecting pre-trial release of certain information, necessarily there must be restrictions respecting the nature of pre-trial hearings where this type of information is likely to be disclosed. Magistrates and commissioners frequently do not apply strict rules of evidence at preliminary hearings, which are not subject to review. At bail hearings a defendant applying for a bail reduction is sometimes characterized by prosecutors and police officers as a "known burglar"[46] or as a "dangerous killer."[47] In such hearings, of course, previous arrests or convictions may be relevant for purposes of determining the amount of bail. At hearings on motions to suppress evidence illegally seized, hearsay which would be inadmissible at the trial itself is both relevant and proper for purposes of deciding the motion.[48] If information disclosed at such pre-trial hearings were reported in the news media, the purpose of the pre-trial restrictions on lawyers and law enforcement officers would obviously be frustrated.

The ABA recommended standards afford the judicial officer conducting the hearings and the news reporters attending the hearings two options. At pre-trial hearings where a substantial likelihood exists that evidence or argument inadmissible at trial may be adduced and disseminated in the news media, thereby interfering with a defendant's right to a fair trial by an impartial jury, the judi-

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The exercise of contempt powers over law enforcement officers who violate rules restricting disclosure probably represents the sharpest divergence between the recommendations of the ABA Committee and the New York Bar (Medina) Committee. The Medina Committee takes the position that courts are without power to discipline law enforcement authorities for conduct occurring prior to trial. See material cited note 72 *infra.*

[45] ABA REPORT 98 (commentary).

[46] Transcript of bail reduction hearing, State v. Severino, No. 82743, Cuyahoga County, Ohio C.P., July 28, 1965.

[47] According to attorney F. Lee Bailey, during a bail hearing a Massachusetts district attorney asserted that Bailey's client was "one of the real killers of the Commonwealth." See Address by F. Lee Bailey, City Club Forum, Cleveland, Ohio, Nov. 26, 1966 (tape of Address in files of the Cleveland City Club).

[48] Jones v. United States, 362 U.S. 257, 267-72 (1960); Draper v. United States, 358 U.S. 307 (1959).

cial officer must on motion of the defense or may, on his own motion with the consent of the defendant, order such hearings to be closed to the public.[49] On the other hand, the judicial officer may obtain the agreement of news reporters to withhold publication of such information until after completion of the trial or disposition of the case or, in the alternative, issue an order to that effect, the violation of which would constitute grounds for contempt.[50] The same procedures and standards apply to portions of a trial conducted outside the jury's presence, but only if the jury has not been sequestered.[51]

Recognizing the dangers attendant to closed hearings, and recognizing that there must be continuing public scrutiny of every phase of the judicial process, the committee sought to establish a safeguard.[52] The recommended standards provide that whenever a pre-trial hearing is conducted as a closed hearing, "a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial."[53] The same standard is recommended when there is a hearing during the trial but outside the presence of a jury which is not sequestered.[54]

In addition to the carefully circumscribed contempt power described above, the recommended standards purport to confer upon the courts power to issue contempt citations against anyone — representatives of the news media and spectators, as well as lawyers and police — if, during a jury trial which he knows is in progress, he

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[49] ABA REPORT 8 (Standard 3.1).

[50] *Id.* at 15 (Standard 4.1(b)).

[51] *Id.* at 12, 15 (Standards 3.5(d) & 4.1(b)). This optional procedure for closed hearings or temporarily restricting newspapers from publishing matters of public record resulted from the response of the news media to questionnaires about this issue. As stated in the commentary of the *ABA Report*:

> The Committee's field research disclosed varying attitudes toward this problem on the part of media representatives. Some, recognizing a right of exclusion, would be content to have the same access to judicial proceedings as the rest of the public but would insist on reporting any proceedings at which they were present; others would oppose any exclusion of the media and state that they would seek to report even hearings held in chambers; still others would seek unrestricted access to proceedings but would ordinarily acquiesce in a judge's request to withhold certain information. *Id.* at 143-44 (commentary).

This latter alternative enabling reporters to monitor all hearings would seem preferable to the news media which is concerned about secret trials and possible corruption on the part of public officials.

[52] *Id.* at 117 (commentary).

[53] *Id.* at 8, 12 (Standards 3.1 & 3.5(d)).

[54] *Id.* at 12 (Standard 3.5(d)).

disseminates a statement through the news media, or makes a statement expecting it to be so disseminated, about matters which are not of public record and which are reasonably calculated to affect the outcome of the trial.[55]

III. Views of the Reaction to the Proposed Recommendations

Within a week of its release thirteen of fourteen major newspaper executives sharply criticized the *ABA Report*.[56] Judge George C. Edwards, Jr. of the Sixth Circuit Court of Appeals was quoted as terming the report "the most dangerous threat to the American ideal of free speech and press since the days of Joe McCarthy."[57] Early criticism persisted and prompted the committee chairman to remark two months after release of the report: "This report is not going to be smothered by overkill."[58] So far, the major criticism has come from three sources: the police, members of the bar, and the press.

A. The Police

The initial police response reflects uneasiness as to the courts again stepping in and telling them what they can and cannot do. As one police commissioner stated: "It's gotten to where now the police can't do anything."[59] Police representatives have also expressed concern over the effect restrictions on pre-trial disclosures will have in reducing public awareness of the crime problem.[60]

Police opposition is likely to increase in the future if and when

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[55] *Id.* at 14-15 (Standard 4.1(a)). The *Sheppard* opinion is replete with examples of stories and statements published during the trial which were reasonably calculated to affect the outcome of the trial. See Sheppard v. Maxwell, 384 U.S. 333, 345-49 (1966). However, Mr. Justice Clark, who wrote the opinion, did not urge direct use of the contempt power, suggesting instead that a warning by the trial judge would have sufficed: "Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom — not pieced together from extra-judicial statements." *Id.* at 362.

[56] See answers to questionnaires by fourteen metropolitan newspaper editors printed in N.Y. Times, Oct. 9, 1966, p. 89, cols. 2-7.

[57] Statement attributed to Judge George C. Edwards, Jr., United States Court of Appeals for the Sixth Circuit, as quoted in N.Y. Times, Oct. 4, 1966, p. 26, col. 1.

[58] 11 ABA News No. 12, at 3 (Dec. 15, 1966).

[59] Statement of East St. Louis, Illinois, Police Commissioner Russell T. Beebe, quoted in N.Y. Times, Oct. 5, 1966, p. 43, col. 2.

[60] Statement of Metuchen, New Jersey, Police Chief Edward F. Leiss, quoted in N.Y. Times, Oct. 5, 1966, p. 43, col. 2.

the proposals are ever put into effect. Under the proposed standards crime reporting is likely to shift its attention from the efforts of the police in solving the crime and arresting the suspect to the prosecutor's role in securing the conviction.

B. The Bar

Most members of the bar have remained silent and presumably have listened to the criticism of others, but a few have spoken on the merits of restraining lawyers.

F. Lee Bailey asserted, "We have no need of restraints such as have been suggested by the American Bar Association, a panel headed by a Justice of my own Supreme Court of Massachusetts, with whose recommendations I hasten to disagree."[61] When pressed by a question as to what specifically in the recommendations he disagreed with, Bailey responded in part:

> I don't disagree with specific parts; I disagree with the suggestion that the press be shackled to any extent or that lawyers are to be barred from talking about those parts of a criminal case which will not be harmful to the defendant. And the recommendations, if they become the rule, are far too general. A great deal of discretion must be left to responsible members of the Bar as to what they may say because it may be of great importance to the defendant that the truth come out.[62]

Mr. Bailey's assertion that discretion should and can be left to "responsible members of the Bar as to what they may say" is not borne out by experience.[63]

But disregarding recent examples of irresponsibility by individual lawyers, can any defense lawyer realistically expect the courts to muzzle the police without also muzzling members of the bar? Since Bailey apparently advocates restrictions on police disclosure,[64] his rejection of restrictions on disclosures by lawyers is both unfair and unworkable.

In a similar vein, Judge George C. Edwards, Jr. released a statement sharply criticizing the *ABA Report* and asserting:

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[61] Address by F. Lee Bailey, *supra* note 47.

[62] *Ibid.*

[63] See, *e.g.*, KAPLAN & WALTZ, TRIAL OF JACK RUBY 81 (1965). For an incredible account of how a writer, engaged by Belli to write a definitive book on the Ruby trial, left Belli before trial because his book was being overshadowed by a planned television documentary inspired by Belli and because he was not getting much more information than the working press who also had unlimited access to Belli and his strategy, see *id.* at 57.

[64] See Address by F. Lee Bailey, *supra* note 47. In his address Bailey asserted that police and prosecutors should be precluded from making pre-trial disclosures about confessions, matters of evidence, and opinions as to guilt or the merits of the case.

> But there is another great concern. Lawyers traditionally the most useful controversionalists in our nation's history, can be muzzled by the amendment of the Canon of Ethics. And if they are, a mighty factor would be removed from what Holmes called "our free market place of ideas.[65]

This statement, coupled with Judge Edwards' later allusion to Clarence Darrow's great debate on freedom of education immediately preceding the 1925 trial of John T. Scopes,[66] suggests a distinction between types of criminal trials. In the usual criminal trial, the primary concern is the fact-determining process: Did or did not the defendant commit the offense for which he is charged? Since the outcome of this type of trial usually carries enormous consequences for the defendant and his liberty, the primary concern is the fairness and integrity of the fact-determining process, and, as far as humanly possible, this process should not be contaminated by outside influences. In another type of criminal trial, however, both the fact-determining process itself and the outcome of that process, the jury verdict, is relatively unimportant as far as the individual defendant is concerned. In the Scopes trial, for example, the factual issue of Scopes' teaching evolution in the classroom was conceded by the defense, and Scopes was not faced with imprisonment in the event of a finding of guilty.[67] Yet, almost everyone was concerned as to whether Darwinism or Genesis was the true doctrine and whether a state could prohibit the teaching of evolution in the classroom.

The problem, of course, is the impossibility of devising standards which recognize the distinction between these two classes of trials.[68] Since the first type of trial occurs far more frequently than the second, it is important to muzzle the grandstand lawyer even if

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[65] N.Y. Times, Oct. 4, 1966, p. 26, col. 2.

[66] *Id.* col. 4.

[67] See Keebler, *Limitations Upon the State's Control of Public Education: A Critical Analysis of State of Tennessee v. John Thomas Scopes*, 6 TENN. L. REV. 153 (1928). The Tennessee anti-evolution act under which Scopes was charged carried a maximum penalty of a five hundred-dollar fine. Scopes was actually fined one hundred dollars after the jury found him guilty.

[68] During the last three years, this writer has participated in several trials, all of them in the misdemeanor courts, where the principles involved were believed to be far more important than either the factual determination or the outcome as it affected the defendant. See, *e.g.*, State v. McLaughlin, 4 Ohio App. 2d 327, 212 N.E.2d 635 (1965). In *McLaughlin*, the defendant was found guilty by a jury of contributing to the delinquency of a minor because she had counseled her teenage daughter, whom she knew to be promiscuous, about birth control. The issues raised — free speech, right of privacy, right of a parent to educate her child — evoked considerable public debate pending the outcome of the appeal. Yet, the defendant, after her conviction, was placed on inactive probation and was hardly concerned about what happened thereafter.

it means muzzling the great debater. Furthermore, the proposed standards impose a blackout on certain facts, not ideas or principles, and any member of the bar other than those engaged in the trial itself, is free to speak out on those principles before trial without violating any of the standards.

C. *The Press*

Generally, the press has had no quarrel with those portions of the proposed standards which restrict comment by members of the bar engaged to try the case[69] and with those portions which strengthen existing remedies available to the defense for avoiding potential prejudice.[70] The press has, however, mounted an increasingly intensified attack upon those standards which restrict disclosure of certain types of information by police officers, arguing that such restrictions obstruct the public's right to know and constitute an unwarranted usurpation of authority by the courts over law enforcement officers who represent the public.[71]

Disregarding the long-standing question of whether the right to gather news is protected by the first amendment along with the right to print the news, this assertion overlooks two important facts. First, law enforcement officers have traditionally withheld certain information from the press and the public, primarily because the prosecution has been reluctant to tip its hand to the defense. Second, the pre-trial blackout is not like a blackout by the federal government on the release of classified information but is only temporary.[72] After the verdict or disposition by plea, the press is free to

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[69] A brief of the American Newspaper Publisher Association asserts: "In respect to suggested restrictions by Bar associations on their own members, this Committee feels that this is a matter of decision for the Bar itself." ANPA REPORT 9.

A spokesman for the American Society of Newspaper Editors asserted in commenting recently on the New York Bar's Medina Report: "We have no quarrel with efforts to subdue public statements by counsel that are calculated to interfere with fair trial. However, we think it is neither necessary nor proper to shut off virtually all communications between attorneys or public officers and the press before or during trial." N.Y. Times, Feb. 24, 1967, p. 18, col. 5.

[70] The *ANPA Report* discusses at some length existing remedies available to the defense, such as change of venue, jury sequestration, and voir dire, in support of its contention that existing remedies are adequate and new restrictions are not necessary. ANPA REPORT 38-40.

[71] The Association stated: "It is quite clear that freedom of the press means the right to gather, to print, and to circulate information. Any judicial restraint of that right at any point constitutes a prior governmental restraint. It is, in fact, censorship at the source when judges, by court order, prohibit law enforcement officers of the public from providing information to the public." *Id.* at 3.

[72] As the chairman of the ABA Advisory Committee on Fair Trial and Free Press,

interview police and prosecutor who are then under no restrictions whatsoever. Granted, this postponed right to gather news which is old may not satisfy a press struggling for increased circulation, but it does mitigate the theoretical argument respecting the public's right to know.

The second prong of the attack against restrictions on police disclosure is based upon the doctrine of separation of powers and raises a serious question.[73] Traditionally, the courts have confined their sanctions to regulating their courtrooms and prohibiting evidence acquired by abusive practices from being introduced in a courtroom trial.[74] It is almost unthinkable for a court to punish directly a law enforcement officer for allegedly seizing evidence or eliciting an involuntary confession unless an order or injunction against such abuse has first been issued and directed to a specific law enforcement officer,[75] or unless such abuse is so flagrant as to constitute an offense under some existing statute.[76] The ABA standards which seek to restrict pre-trial disclosures by law enforcement officers and which are proposed for adoption as rules of court are aimed indiscriminately at all law enforcement officers subject to the rule-making court's jurisdiction and cover disclosures which are neither flagrant nor prohibited by existing laws.

Massachusetts Supreme Judicial Court Judge Paul Reardon asserted after the first week of intense reaction to the report:

> Rather, the committee has attempted to formulate restrictions on the release of information by lawyers and law enforcement officials that are carefully limited as to both content and timing, for it is the committee's view that the question is not whether certain disclosures may be made but when. It is the "when" that will be crucial in . . . [assuring] that both the accused and his accusers will obtain a fair trial by an impartial jury. Quoted in N.Y. Times, Oct. 16, 1966, p. 82, cols. 1, 4.

[73] Again, as the brief of the American Newspaper Publishers Association asserts:

> The Committee states that it is a matter of public concern when court orders place restrictions on law enforcement officers in the release of information. Such action could easily lead to judicial domination of the executive branch of government, and may well be an invasion which would threaten the historically honored separation of powers and responsibilities. ANPA REPORT 7-8.

[74] Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 376 U.S. 643 (1961).

[75] In Rea v. United States, 350 U.S. 214 (1956), the Supreme Court sustained an application to enjoin a federal law enforcement officer from testifying in a state criminal trial following a determination by a federal court that a search conducted by the narcotics agent required application of the exclusionary rule in federal court. *Id.* at 217. In Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), the Fourth Circuit issued a broader order against the entire Baltimore Police Department enjoining members of the department "from conducting a search of any private house to effect the arrest of any person not known to reside therein, whether with or without an arrest warrant, where the belief that the person is on the premises is based only on an anonymous tip and hence without probable cause." *Id.* at 206.

[76] *E.g.*, Screws v. United States, 325 U.S. 91 (1945).

Nonetheless, the ABA Committee deliberately rejected executive regulation or legislative enactment as a means of restricting disclosures by law enforcement officers in favor of rules of court "because the matter falls properly within the judicial sphere and because use of the rule making power permits greater flexibility whenever the need for change is demonstrated."[77] While the Committee did not so expressly state in the *Report*, it may also have noted the difficulty of persuading elected legislators to enact statutes or elected executives to adopt regulations in the face of expected intense press opposition.

In anticipation of the separation of powers attack, the Committee has marshalled an effective brief in rebuttal.[78] Yet, it remains to be determined whether the courts, and particularly the state courts, will agree with the Committee's conclusions. It may be necessary for some states to enact contempt statutes permitting punishment of one who is in "disobedience or resistance to its [the court's] lawful writ, process, order, rule, decree, or command"[79] before state courts can invoke their contempt powers to punish rule violations.

While press criticism of other segments of the ABA standards has been less vocal, press opposition to these other provisions can be expected to continue.

At the outset, newspaper editors termed the provisions for closed hearings as a license to reinstate Star Chamber proceedings with both secret arrest and trial.[80] After study of the closed hearing provisions and the safeguards they hold for individual defendants, the press turned its attention from the rights of the defendant to the rights of the public to be present through the news media at all phases of the trial, including pre-trial hearings. In short, the right to a public trial exists for the benefit of the public as well as

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[77] ABA REPORT 102 (commentary).

[78] *Id.* at 102-07.

The report of the New York City Bar Association's Medina Committee reached an opposite conclusion:

> The Committee is firmly of the opinion that the courts lack any power whatsoever over the police or the news media during the first stage of the pretrial period, except the ever present power to control activities in and around the courthouse. . . . Furthermore, as to the police, we find no authority inherent in the courts or the judges to discipline them for alleged breach of their duties as police officers. MEDINA REPORT 40.

[79] 18 U.S.C. § 401 (1964). This device is discussed in ABA REPORT 106 (commentary).

[80] N.Y. Times, Oct. 9, 1966, p. 89, col. 2. See comments of editors of *Des Moines Register and Tribune*, *New York Times*, and *St. Louis Post-Dispatch* in New York Times' poll of major newspaper editors. *Ibid.*

of the defendant.[81] Whether the sixth amendment guarantee that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial" justifies such an interpretation has never been fully clarified by the courts. However, the press has argued with some success in state courts that equivalent state constitutional provisions inure to the benefit of the public as well as the defendant.[82] The press will most certainly litigate this issue whenever and wherever the standards are put into effect.[83] Defenders of the standards will answer that the right to a public trial must in certain limited circumstances temporarily yield to the right to a trial by an impartial jury.

In addition, the press will certainly contest any use of the contempt power over newspapers directly, whether resort to such power purports to safeguard closed hearings or to prevent extrajudicial statements reasonably calculated to affect the outcome of the trial and which seriously threaten to have such an effect. Very recently the press has won significant victories in asserting first amendment rights in the fields of libel, defamation, and right of privacy.[84] In the area of resort to judicial contempt powers to insure fair trials, a New York City Bar group, which studied the fair trial and free press problem at the same time as did the ABA Committee, has already asserted that first amendment rights are paramount.[85]

Again, in anticipating this problem, the ABA Committee has carefully circumscribed judicial contempt powers with an eye to existing Supreme Court decisions.[86] One example of this caution is

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[81] The brief of the American Newspaper Publishers Association asserted: "Criminal trials are required by the sixth amendment to be 'public.' Although the Constitution confers this right to the accused, he cannot waive the right and thereby bar the public from his trial." ANPA REPORT 125. This assertion appears in the report's critique of Estes v. Texas, 381 U.S. 532 (1965), which held that televising a public trial violated defendant's rights to due process of law.

[82] For different holdings on this question, see cases discussed in ABA REPORT 116-17 (commentary).

[83] See Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966). In this case the newspapers obtained a writ of prohibition against the trial court's proceeding with a contempt action against the newspapers for reporting the outcome of a habeas corpus hearing conducted just before the beginning of a first-degree murder trial. See also *In re* Shaw, No. 16942, Super. Ct. Mass., Nov. 4, 1966, where a reporter was adjudged in contempt of court and fined one hundred dollars for publishing a ruling of the trial judge on a pretrial motion to suppress evidence in violation of a court order requested by the defense.

[84] *E.g.*, Time, Inc. v. Hill, 87 Sup. Ct. 534 (1967) (New York right of privacy suit against *Life* magazine); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Alabama defamation suit against *New York Times*).

[85] N.Y. Times, Feb. 24, 1967, p. 18, col. 1.

[86] The general contempt power conferred by the proposed standards, as opposed

the requirement of proving at least an implied intent as to extra-judicial statements made during trial. Such statements must be reasonably calculated to affect the outcome of the trial. This requirement approximates the requirement in defamation and right of privacy cases where intent, express or implied, to make false statements must also be proven.[87]

IV. Two Problems Under the Proposed ABA Standards

Police disclosures reported in the press are a major source of pre-trial discovery available to defense counsel, for what the police will tell the press they will not tell the opposing lawyer. Although such disclosures are limited, they frequently suggest other sources which the defense can tap for discovery purposes. In this way defense counsel in jurisdictions where no formal discovery procedure is available are able in some instances to learn what evidence in the possession of the prosecution the defense must be prepared to meet at trial, or if such evidence cannot be met, to attempt to negotiate a guilty plea. A pre-trial blackout such as that proposed in the ABA recommended standards will virtually wipe out this informal source of pre-trial information.

In the federal jurisdiction the expansion of formal pre-trial discovery as provided in the recently amended rules of federal criminal procedure materially reduces this new discovery problem.[88] However, many states do not provide equivalent pre-trial discovery procedures. Thus a problem which is already intolerable will be further aggravated in these states by adoption of the recommended standards unless the scope of pre-trial discovery is expanded.

A second problem concerns the protection of even the most vicious defendant from what sometimes can only be termed the

to the narrow contempt power associated with the power to conduct closed hearings, is limited to statements which are made during the trial only for mass media dissemination. In Wood v. Georgia, 370 U.S. 375 (1962), criticism by an elected sheriff of a court's charge to a grand jury investigating the bribery of Negro voters by certain public officials was held to be protected by the first amendment, and a contempt conviction was reversed. The Court suggested it might be a different matter if at the time the statement was made an individual was on trial or a judicial proceeding pending. *Id.* at 389-90.

[87] In Garrison v. Louisiana, 379 U.S. 64 (1964), the conviction of a New Orleans district attorney for criminal libel was reversed because under existing Louisiana libel law the state was not required to adduce proof of actual malice or implied malice — "that is, [that a statement was made] with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 67. See also Time, Inc. v. Hill, 87 Sup. Ct. 534, 541 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[88] Fed. R. Crim. P. 16.

cruel excesses of an outraged community. Granted, the United States Constitution does not guarantee a humane trial as it guarantees a trial before an impartial jury; and, granted, no judicial decision has equated the two. Nonetheless, this problem is of increasing concern to lawyers as well as to newsmen.[89]

This problem arises not only in trials of national interest but also in proceedings of only local concern which frequently are concluded by disposition without trial. The writer has witnessed a young woman seated in the defendant's chair in the courtroom, head down, surrounded by flashbulbs and television cameras. This moment of exposure occurred but seconds before the judge returned to the bench to sentence this woman to prison for the first time in her life for the offense of allowing her child to starve to death.

Not long ago in this community a twenty-two-year-old parolee was arrested for kidnapping and sexually molesting a seven-year-old girl.[90] The young man was interviewed before microphones by reporters and photographed at the police station;[91] his lawyer appeared on a television newscast; his parents pleaded in the news media for understanding.[92] The young offender was placed in a solitary cell presumably for his own protection. A few weeks later he was found dead, hanging by a sheet.[93] Who knows why the young man took his life — perhaps because he was all alone to face the horrible realization of how his community regarded him?

While the *ABA Report* nowhere focuses on this problem of humane criminal proceedings, the Committee does suggest a partial remedy in its recommendations that law enforcement authorities adopt regulations prohibiting:

> (i) the deliberate posing of a person in custody for photographing or televising by representatives of the news media and (ii) the interviewing by representatives of the news media of a person in custody unless he requests an interview in writing after being adequately informed of his right to consult with counsel.[94]

The purported safeguards in this recommendation are not strong enough. A defendant or a defendant's lawyer can be cajoled by newsmen or police into permitting such an interview. The prohi-

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89 See generally KAPLAN & WALTZ, *op. cit. supra* note 63, at 370.

90 Cleveland Plain Dealer, Jan. 25, 1965, p. 1, col. 1.

91 Cleveland Plain Dealer, Jan. 26, 1965, p. 1, col. 3, p. 8, cols. 1-8.

92 Cleveland Plain Dealer, Jan. 25, 1965, p. 1, col. 1.

93 Cleveland Plain Dealer, Feb. 17, 1965, p. 29, col. 1.

94 ABA REPORT 7 (Standard 2.2(b)).

bition must be absolute, as urged by Dean Griswold[95] and as recommended in the New York City Bar group's Recommended Code for Police and Law Enforcement Agencies. That code states: "News media shall not be permitted to interview the defendant, with or without his attorney's consent, while he is in police custody."[96]

Furthermore, it is unfortunate that these ABA standards are relegated to the status of recommended executive regulation rather than court rule. If the courts have power at all to regulate police conduct by resort to contempt proceedings, then the courts have power to regulate police conduct in this sphere as well as in those spheres which bear more directly on the problem of insuring a fair trial before an impartial jury. A defendant who claims prejudice before a jury has a variety of remedies upon which to rely. A defendant who is subjected to camera and interview exposure may look only to the protection of the courts' contempt powers if he elects to forego a jury trial.

V. CONCLUSION

The ABA recommendations have encountered vigorous opposition because they are strong and effective. Even those recommendations which have not been publicly criticized — the new standards governing motions for change of venue and for impaneling a jury — will encounter silent opposition, namely, the reluctance of the courts to spend additional time and expense to insure an impartial jury. Realistically, the ABA Committee has recognized that this additional expense must be reduced as far as possible by direct restrictions upon the police and bar so that conditions requiring a change of venue or jury sequestration will not frequently occur.

In proposing that these restrictions be enforced by the recognition and exercise of the judiciary's contempt power, the *ABA Report* has stirred a controversy even beyond that which the Committee itself may have expected. Implicit in the recommendations

[95] It . . . [should] be made plain to . . . [law enforcement officers] that they are officers of the law and that it is their sworn duty to protect the defendant against outside pressures as well as to hold him in custody. It may be their duty to confine him, but they should clearly understand that that duty carries with it the responsibility to see that he is not forced to make statements to anyone, that he is not subjected to interviews in which he does not wish to participate, and that he need not have his picture taken if he does not want it taken . . . . Griswold, *When Newsmen Become Newsmakers*, Saturday Review, Oct. 24, 1964, p. 21, at 23.

[96] MEDINA REPORT 33. A flat rule would protect the non-consenting defendant from retaliation by the news media in the form of editorial comment upon the defendant's refusal to permit interviewing and photographing.

of this *Report* is the conclusion that voluntary codes between the press and bar are not enough,[97] that the bar must put its own house in order and have the courage to do the job effectively.[98]

If the *ABA Report* is approved by the American Bar Association,[99] an enormous task lies ahead in implementing its recommendations. Local trial judges must be persuaded to agree upon and adopt rules of court; state statutes authorizing challenge for cause of prospective jurors must be revised; and even interstate compacts respecting changes of venue may be required. Protracted litigation on key contempt provisions is a virtual certainty. Meanwhile, the *ABA Report* provides a rich variety of source material which defense lawyers may utilize in their efforts to persuade the courts to adopt new remedies that will ensure impartial jury trials.

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[97] Some representatives of the press also disfavor adoption of voluntary codes: "In the early stages of the study the most often recommended course for the press by the Bar was the adoption of codes of conduct. Such a course must be rejected. From a practical standpoint any such codes would be without value because there is no way to enforce them." ANPA REPORT 8. See also *id.* app. D. for examples of codes and statements of principles adopted by the press and bar in some states; Statement of Principles and Standards adopted by Cleveland Bar Association and Cleveland Plain Dealer, March 22, 1966. Cleveland Plain Dealer, March 23, 1966, p. 1, col. 2.

[98] Both the ABA Advisory Committee and some segments of the press have expressed willingness to continue discussions on the problem of fair trial and free press. 12 ABA NEWS, Feb. 15, 1967, p. 6. See also editorial in N.Y. Times, Feb. 26, 1967, § E, p. 10, col. 3.

[99] The *ABA Report* must be considered by the ABA Sections of Criminal Law and Judicial Administration before it can be recommended to the ABA House of Delegates which is scheduled for February 1968. ABA REPORT vi; 12 ABA NEWS, Feb. 15, 1967, p. 6. In addition to the *ABA Report* and the *Medina Report*, another committee, chaired by United States Court of Appeals Judge Irving R. Kaufman, is expected to report to the Judicial Conference of the United States in March 1967 on the problem of prejudicial publicity as affecting juries in the federal courts. N.Y. Times, Oct. 7, 1966, p. 1, col. 5, p. 31, col. 1.