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Journalistic Media and Fair Trial

William M. Ware* and Gerard D. DiMarco**

THE RIGHTS OF AN ACCUSED to a fair trial, and freedom of the press, both are fundamental rights guaranteed by the Federal Constitution.¹ Yet these constitutional guarantees, in collision, present one of the most critical current conflicts in the administration of criminal justice.² The problem involves what is presently called "prejudicial news reporting"—news which is prejudicial to the right of the defendant to a fair trial.³ This paper will try to analyze this conflict, hoping to reach some conclusions which will ultimately aid in the administration of justice without abridging the rights of any parties involved.

Before discussing the conflict, it is necessary to understand the rights and responsibilities of those involved in a criminal trial.

The responsibility of the defense counsel is to defend the accused by all lawful, fair and honorable means, by presenting every defense possible, so as not to deprive the accused of life or liberty, but through due process of the law.⁴ Further, the defense counsel has the responsibility of refraining from disseminating information or conjecture which would be likely to interfere with a fair trial.⁵

The prosecution (representing the public interest) has a duty not primarily to convict, but to seek, as an end, justice.⁶ He must prove the guilt of the accused "beyond a reasonable doubt." The prosecution is likewise bound not to disseminate any materials which might be prejudicial to a fair trial for the accused.

An extremely important role in a criminal trial is performed by the trial judge. His is the main responsibility to make certain that the accused receives a fair trial.⁷ The courtroom and courthouse premises being under the control of the trial judge,⁸ it most certainly is the court's

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[*Editor's Note*: This paper is the result of many long interviews and discussions with Mr. Ware, which have been used as the foundation for this article.]

¹ Thompson, *The Law Relating to Prejudicial News Reporting in Criminal Cases*, Northwestern University School of Law, *Free Press—Fair Trial* 8 (1964).

² Inbau, *Introductory Remarks*, *op. cit. supra* note 1, at 1.

³ Thompson, *op. cit. supra* note 1.

⁴ A.B.A. *Canons of Professional Ethics* No. 5.

⁵ Reardon, *The Fair Trial—Free Press Standards*, 54 *A.B.A.J.* 343 (1968).

⁶ A.B.A. *Canons of Professional Ethics*, *op. cit. supra* note 4.

⁷ *Estes v. Texas*, 381 U.S. 532, 548 (1964).

⁸ *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1965).

responsibility to ensure the preservation of decorum by instructing all present as to the permissible use of the premises.⁹

The involvement of *the press* (which means more than newspaper reporters alone) is a key factor of a criminal trial. The words of the First Amendment vest in the press the right to keep the public informed concerning issues of public interest. This also is a responsibility which the press has assumed, but must not in any way be a deterrent to an accused's right to a fair trial. Freedom of the press to publish includes the right of access to the information, followed by the public's right to know; but these rights must be subordinate to a defendant's right to an impartial trial.¹⁰

The Sixth Amendment guarantees to the accused a public trial where a fair and reliable determination of guilt must be proven.¹¹ It must be understood that the implementation of this Constitutional guarantee is carried out by employing the rules of evidence, which, as years of experience have shown, are designed to develop truth.¹²

In an attempt to avoid critical conflict between the rights of the media and those of the legal profession, the American Bar Association created an Advisory Committee on Fair Trial and Free Press. The chairman of this committee was the Hon. Paul C. Reardon. The main purpose of this committee was to investigate the effect of news reporting on criminal trials,¹³ and to recommend a method of sound regulation of the process. A tentative draft was drawn up, and after considerable changes and recommendations a final draft was approved by the House of Delegates of the American Bar Association.

There were four major areas covered in this final, approved draft. The first area relates to the conduct of attorneys in criminal cases, and proposes a new and enforceable canon of ethics relating to the release of information to the news media.¹⁴ The second section involves recommendations relating to the conduct of law enforcement officers, judges, and judicial employees in criminal cases.¹⁵ The third section involves recommendations which relate to the conduct of judicial proceedings in criminal cases.¹⁶ The final area spoken of recommends the limited use of the contempt power as a deterrent against those who "wilfully or wantonly" disseminate information which might be prejudicial to the trial of the accused.¹⁷

⁹ Reardon Report, Fair Trial and Free Press (Approved Draft) Sec. 3.5, a., 10 (1968).

¹⁰ Note, 19 U. Fla. L. Rev. 661 (1967).

¹¹ Note, 67 Duke L. J. 605 (1967).

¹² Cooper, article 42, Notre Dame Law. 857, 860 (1967).

¹³ Reardon, *op. cit. supra* note 5.

¹⁴ Reardon Report, *op. cit. supra*, note 9, at 1, 2.

¹⁵ *Ibid.* at 4-7.

¹⁶ *Id.* at 7-13.

¹⁷ *Id.* at 13, 14.

The net effect of these recommendations is to offer limitations, carefully defined as to content and timing, with direct regard as to the release of any information bearing on a pending or already-in-progress trial, and with appropriate remedies available where it is inevitable that such information has jeopardized a fair trial.¹⁸

It is very important to note that the problem arises with the dissemination of those materials that present a "clear and present danger" to the proper administration of justice. The disruption of justice must be extremely serious and the degree of imminence extremely high before any punitive measures are taken.¹⁹

The representatives of the press take issue with this report. Firstly, they maintain that it was not a mutually developed report between members of the press and members of the bar.²⁰ Further, the press feels that the use of the contempt power would be an invasion of their Constitutional right of freedom of the press, if such power were used against them.²¹ They maintain that the recommended uses of the contempt sanction against privately generated publicity are confined to instances in which the conduct was either wilful or wanton.²² The question then presented by members of the press is: "who is to decide what may be wilfulness or wantonness of another's conduct?"²³ Thus, this whole matter seems to further complicate an already existing problem.

The arguments presented by the members of the press have some validity. However, the important factor to be remembered is that the rights of the accused—a presumption of innocence until proven guilty beyond a reasonable doubt—must be protected. The recommendations presented are an attempt at assuring that needed protection against any disruptions.

It must always be remembered that our legal system involves an "adversary proceeding," wherein the decision of the jury must resolve itself from the evidence presented within the four walls of the courtroom.²⁴ Only that evidence which comes into the ken of the jurors within that framework should be applied towards their final decision. As Mr. Justice Holmes said: ". . . the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and

¹⁸ Reardon, *op. cit. supra* note 5, at 344.

¹⁹ Bridges vs. California, 314 U. S. 252 (1941); Pennekemp vs. Florida, 328 U.S. 331 (1946); Craig vs. Harvey, 331 U.S. 367 (1947).

²⁰ Comment in conference, by William M. Ware, Executive Editor of the Cleveland Plain Dealer, at Cleveland, Ohio, March 3, 1969.

²¹ *Ibid.*

²² Cooper, *op. cit. supra* note 12, at 882.

²³ *Id.* at 883.

²⁴ In an interview with Mr. Samuel Gaines, at Cleveland, Ohio, March 14, 1969. Mr. Gaines is an attorney then Chairman of the Cleveland Bar Association's Bar-Press Relations Committee.

argument in open court, and *not* by any outside influence, whether of private talk or public print.”²⁵ Thus, if the news media print any information which will in some way prejudice the minds of potential jurors, a link in the chain of justice will have been broken.

The press, however, states that a criminal trial is a public trial, and the press's right to access to the facts is a constitutional one. They say that not being able to inform the public concerning a particular case is an unconstitutional invasion of the right to a public trial.²⁶ The right to a public trial, however, was originated for the benefit of the accused. The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned.²⁷ The right of public trial was not, and is first and foremostly *not*, for the benefit of the public as against the accused.

Though the press sometimes has, over the years, been responsible for the dissemination of materials which have denied an accused a fair trial, it must be accepted by all that the press has been a mighty catalyst in awakening public interest with regard to many governmental scandals.²⁸ Also, the rights of citizens have often been protected by a newspaper's disclosure of improper methods used by police in arrest and investigation.²⁹ Thus, while the press should not be hindered in carrying on its important function in a democratic society, the exercise of this freedom must necessarily be subject “to the maintenance of absolute fairness in the judicial process.”³⁰

While viewing the press and its functions, with its faults and defaults, we must also take a good look at the other side of the coin—the legal profession. It is recognized that much of the information obtained by the press which is found to be prejudicial springs from the tongues of the lawyers themselves. Thus, in order to commence any kind of reform towards establishing a more benevolent relation between the press and the bar, it is necessary that the bar “put its own house in order”—in the area of prejudicial news dissemination.³¹

To implement such a change, both the Reardon Report and the Medina Report³² have recommended that Canon 20 of the canons of pro-

²⁵ *Patterson v. Colardo*, 205 U.S. 454, 462 (1907).

²⁶ Haines, article, 59 J. Crim. L. 240 (1968).

²⁷ *In Re Oliver*, 33 U.S. 257, 270 (1948).

²⁸ *Estes v. Texas*, *op cit. supra* note 7, at 539.

²⁹ Cooper, *op. cit. supra* note 12, at 890.

³⁰ *Estes v. Texas*, *op. cit. supra* note 7, at 539.

³¹ Haines, *op. cit. supra* note 26, at 236.

³² Medina Report—Represents the work of a special committee on radio, T.V. and administration of justice, of the Association of the Bar of the City of New York. It concerned itself with freedom of the press, and fair trial, being similar in some conclusions to the Reardon Report.

fessional ethics, which guides the lawyer in this area, be strengthened.³³ Presently, Canon 20 simply states that a lawyer should not give a press release pertaining to a pending case.³⁴ The Medina Report and the Reardon Report recommend that the canon be amended to include an "absolute prohibition" on the release, by *any* lawyer (either by the defense or prosecution) of any material relating to the trial, either prior to the trial or while the trial is in session.³⁵ This prohibition should specifically preclude personal appearance of any sort on television or radio which involves a pending trial.

The American Bar Association has issued a proposed draft of new canons. In these new canons the problem mentioned has been considered.³⁶ However, the proposed replacement for Canon 20 is still very vague, and it seems that the proposed new canon will have as much effect as the present one. The problem is one that any reasonable man should understand. There really should not be a need for stricter enforcement of any canons, with regard to those who are supposed to represent the legal structure of society. There is a clear understanding of the problem, and those involved who attempt to violate this understanding make it much tougher for those who are prepared to meet the challenge voluntarily. Therefore, it is time that these violators "get with the program," and subsequently make it easier for the others.

Neither freedom of the press, as guaranteed by the First Amendment, nor the rights of the accused, as guaranteed by the Sixth Amendment, may be set aside or sacrificed for each other. For free press and fair trials are two of the most cherished policies of our civilization, and it would be a terrible task to choose between them.³⁷

This discussion is not trying to alleviate or deny any rights. But rather, it is an attempt to establish a median point between the two rights, at which all parties will agree. In an effort to bring about a solution to the conflict, one must not take lightly the importance of the judiciary. The judiciary has the power to control, or to place controls on, many aspects of a trial situation. In certain respects there should not have to be a choice between "compulsory limitations" on freedom of the

³³ Haines, *op. cit. supra* note 26, at 236.

³⁴ A.B.A. Canons of Professional Ethics, No. 20.

³⁵ Haines, *op. cit. supra* note 26, at 236.

³⁶ Proposed Canon of Professional Ethics, Canon 7, Sec. 3.4: "A goal of our legal system is that each party shall have his case, criminal or civil adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdicts solely upon evidence admitted in trial. A lawyer who releases out-of-court statements regarding an anticipated or pending trial may improperly offer the impartiality of the tribunal."

³⁷ *Bridges v. California*, *op. cit. supra* note 19, at 257.

press and on fair trial. The judiciary of our country can use the well known "tools" for protection of fair trials which have been produced by our legal history.³⁸

However, the right of the American public to a free press should not be imperiled by judicial impositions of instructions on all criminal matters because of the "rare and isolated case of prejudice."³⁹ This viewpoint emphasizes a liberalization of the view expressed by the Reardon Report with regard to the use of the contempt power.

The strength of the judiciary was proved, not long ago, in the courtroom of Judge Kalbfleisch, who is Chief Justice of one of the Federal District Courts. Judge Kalbfleisch issued an order representing how decorum would be established in and around his courtroom. To maintain the integrity of the trial the Judge ordered that no lawyer associated with the prosecution or defense should give or authorize any extrajudicial statements or interviews relating to the trial, or to the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.⁴⁰

The judge placed the same restrictions on all officers and employees of the court. There was further restriction placed on the news media, not allowing them to interview or converse with prospective jurors.⁴¹ The news media were assigned certain seats in the courtroom, from which they could take notes and attentively follow the proceedings of the trial.⁴² This example represents one instance where a judicial officer used his power to control the decorum of his courtroom. Such control subsequently led to the type of trial each and every individual should have.

Conversely, *Sheppard v. Maxwell* represents what could occur if controls were not stringent enough. The Supreme Court states the facts as follows:

the accused's wife was bludgeoned to death. He was subsequently arrested on murder charges and indicted. During the entire pre-trial period virulent and incriminating publicity about the petitioner and the murder made the case notorious, and the news media frequently aired charges and countercharges besides those which the petitioner was tried. . . . Prior to the trial, newspapers published the names and addresses of prospective jurors, causing them to receive letters and telephone calls about the case. . . . Newsmen were allowed to take over almost the entire small courtroom. Their move-

³⁸ Cooper, *op. cit. supra* note 12, at 894.

³⁹ *Ibid.*

⁴⁰ U.S. of America v. Orville Stiffel, Criminal Case, No. Cr. 68-476 (N.D. Ohio, E. Div., 1969).

⁴¹ *Ibid.*

⁴² *Id.*

ment in the courtroom caused frequent confusion and disrupted the trial. . . .

The Court continued that "despite his awareness of the excessive pretrial publicity, the trial judge failed to take effective measures against the massive publicity which continued throughout the trial." Nor did he, "take adequate steps to control the conduct of the trial."⁴³

In the *Estes v. Texas* case, the Supreme Court stated:

that the accused had been indicted by a Texas county grand jury for swindling. . . . Massive pretrial publicity had given the case national notoriety. Television cameras were allowed in the courtroom; and the profusion of cameramen and news reporters in the courtroom caused considerable confusion.⁴⁴

Perhaps more judicial restraint prior to and during this trial would have alleviated many of the problems presented. In both of these cases it seems that the judicial function, if applied more sternly would have aided all involved, and thus given the accused the full benefit of the Sixth Amendment.

It is evident that this conflict of "fair trial and free press" is not the result of the wrongdoings of the press alone, nor of the legal profession alone, nor of the court itself, but rather represents the result of certain wrongdoings by all three groups combined. There have been solutions offered to this conflict, none of which has yet been a determinative factor in ending the strife among the parties.

The Reardon Report has recommended enforcement through the "limited use of the contempt power."⁴⁵ The report recommended that the contempt power should be used only with considerable caution but should be exercised against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial, disseminates by any means of public communication any extra-judicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case; that is wilfully designed by that person to affect the outcome of the trial; and that seriously threatens to have such effect; or if one makes such a statement intending that it be disseminated by any means of public communication.⁴⁶ It was further recommended in parts of this report that the contempt power be used against any person who "knowingly" violates a valid judicial order not to disseminate, until the completion of the trial or disposition without trial.⁴⁷

⁴³ *Supra* note 8, at 333, 334.

⁴⁴ *Supra* note 7, at 532, 533.

⁴⁵ Reardon Report, *op. cit. supra* note 9, at sec. 4.1.

⁴⁶ *Ibid.*

⁴⁷ *Id.*

There seems to be a disagreement with regard to the usefulness of the contempt power. Two of the chief complaints with regard to its use are that too much discretionary power is placed in the hands of one person, and that the safeguards of trial by jury are not observed.⁴⁸

Some of the critics of the contempt power look to the adoption of a "Statutory Scheme" for the solution. Such a solution calls for the creation of a statute which would make the premature publication of certain kinds of prejudicial information a crime.⁴⁹ This would be an ordinary statute, independent of the contempt power.⁵⁰ It is contended that such a statute should be restricted in its operation to criminal cases, during the time of arrest and verdict, and only to those in which a jury trial is either used or would have been used but for the prejudicial publicity.⁵¹

The validity of the statute in any one situation would depend on a finding of "clear and present dangers" to the administration of justice.⁵² Such a finding might be followed by a jury determination on "clear and present danger" in each case brought under the statute.⁵³

Thus, the factual determination of whether the publication posed a "clear and present danger" to the administration of justice during the case would be in the hands of a jury.⁵⁴ An important aspect to be considered by the jury would be the *intent* of the person involved. This view would alleviate any possibility of prosecution for purely innocent publication.⁵⁵

The Medina Report⁵⁶ believes that a settlement of the conflict will come to fruition by "internal self-regulation of the various groups," *i.e.*, bar, bench, and press.⁵⁷ It recommends that enforcement not be implemented through "the vehicle of the contempt power."⁵⁸

Finally, in several states there have been efforts to formulate and adopt guidelines to be used by the bench, the bar, and the press. One of the most noteworthy examples of such an effort has been in the state of Washington.⁵⁹

The committee involved has outlined eight basic principles. These principles were mutually drawn up and submitted for voluntary com-

⁴⁸ *Green v. United States*, 356 U.S. 165, 199, 219 (1957).

⁴⁹ *Cooper, op. cit. supra* note 12, at 875.

⁵⁰ *Ibid.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Medina Report, op. cit. supra* note 20, at 17.

⁵⁷ *Ibid.*

⁵⁸ *Id.*

⁵⁹ *Reardon Report, op. cit. supra* note 9, at Appendix A (29).

pliance by each group. In these principles are enumerated the various duties of each group, with an emphasis on the importance of each group's cooperation in order to bring about the proper administration of justice.⁶⁰ They also say that "No trial should be influenced by the presence of publicity from news media, nor from public clamor, and lawyers and journalists share the responsibility to prevent the creation of such pressures."⁶¹ Further, it is stated that while decisions about handling the news resting in the hands of the editors, the editors should always remember that, "An accused person is presumed innocent until proven guilty, that readers and listeners and viewers are potential jurors, and finally that no person's reputation should be injured needlessly."⁶² A final principle emphasizes the important task of the lawyers:

The public is entitled to know how justice is being administered. However, no lawyer should exploit any medium of public information to enhance his side of a pending case. It follows that the public prosecutor should avoid taking unfair advantage of his position as an important source of news; this shall not be construed to limit his obligation to make available information to which the public is entitled.⁶³

It is difficult to reflect on the problem presented and to contemplate the fact that two noble and ancient professions, such as the press and the bar, have not been able to solve this problem. Each side has blamed the other. Both sides, it would seem, have reacted in a non-professional way to a professional problem.

Without a doubt, both are seeking the same goal—the proper administration of justice for all. It's about time that they combine their forces, acting as reasonable men should, and as intelligent men would.

The writers agree with the press, regarding the uselessness of the contempt power. To invoke such a power would not serve justice for all, or perhaps for any, but rather would further widen the already existing gap.

The "statutory scheme" would also be too involved to be of any help. Once a statute is passed, there is the problem of construing its meaning. This could lead to confusion and frustration, thus making more difficult and complex the already existing problem.

The best solution is, as the Medina Report suggests, self-regulation: such self-regulation as was suggested by the men of the State of Washington when they set up their present working code. For it must be remembered that this conflict involves professionally educated men. It should not be resolved through coercion. It should not be resolved

⁶⁰ *Ibid.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

through the dictates of one party. There must be a "meeting of the minds" where each side is given equal opportunity to express itself. A joint committee or "authority" must be formed, consisting of various members from both the press and bar. This committee, working with various materials, can organize and establish determinative and definitive standards.

The committee or authority which initiates and sets up these standards must act as a unifying force. They must maintain a watchful eye to see that the enumerated guidelines are followed. If a violation occurs, this authority will have the responsibility of constructively reprimanding the violators.

There is reason to believe that such an organization can eventually solve the problem. But there must be a start. The writers of this paper firmly believe that the bench, bar, and press all are peopled with reasonable men, and if the leaders of these respective professions will only sit down together and thrash things out, a solution will be found—a solution that is desirable and acceptable to all concerned.