University of Richmond Law Review

Volume 2 | Issue 5 Article 3

1966

Fair Trial - Free Press

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FAIR TRIAL—FREE PRESS

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Introduction

CONFESSED SLAYER OF TWO GOES ON TRIAL TOMORROW
CONFESSION DETAILED. EX-CONVICT CHARGED IN SLAYING
BLOETH MUST GO TO CHAIR: D.A.
WHY ISN'T SAM SHEPPARD IN JAIL. QUIT STALLING—
BRING HIM IN.

Blazing headlines such as these, followed by detailed accounts of the crime given to newspaper reporters by the police, and opinions of the accused's guilt expressed by prosecuting attorneys, or alleged confessions of the accused with an account of his previous criminal record, have been the basis of many recent appellate court reversals of convictions had in trial court criminal cases. The reason assigned: Denial of a fair trial by an impartial jury.

The publication of such material prior to the trial of the accused is defended by the news media on the ground of its guarantee of freedom of the press; that basic in this guarantee is the concept that "the public is entitled to know."

On the other hand, such publication is condemned by the legal profession on the ground that it destroys the constitutional guarantee of a fair trial, *i.e.* the case of the accused is tried in the newspaper before the very segment of the public which must try it later in court, *viz.* the jury.

Probably in no other area do two constitutional guarantees meet in such a diametrically opposed head-on

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clash as do those of the First Amendment with those of the Sixth and Fourteenth. Numerous proposals have been advanced regarding a solution of the problem, extending all the way from that of placing no restrictions on such pre-trial publicity to that of enactment of a statute prohibiting any such publication until such information comes out at the trial.

For a period of over a hundred years a dialogue between the professions of journalism and law has continued regarding various cleavages between the concepts of a free press and those of due process of law in the trial of criminal cases. As early as 1846, an article appeared concerning the effect of opinions formed by jurors from the reading of newspapers.[1] Other early articles appeared, notably two, one in 1887 and another in 1892.[2]

Joint efforts by the American Bar Association (sometimes later referred to herein as the ABA) and the American Newspaper Publishers Association (sometimes later referred to herein as the ANPA) in 1925 and 1937 to resolve the problem came to nought.[3]

Hundreds of articles, pro and con, have appeared through the years in reputable journals and periodicals.[4]

In recent years the problem has become more acute as a result of the increase in reversal of convictions in criminal cases due to alleged prejudice created at the trial by the activities of newspaper reporting.

The Warren Report

The matter reached a climax with the slaying of Lee

1. *Trial by Jury in New York,* 9 L. Rep. 193 (1846).
2. Foster, *Trial by Newspaper,* 144 North Am. Rev. 524 (1887); Forrest, *Trial by Newspapers,* 14 Crim. Law Mag. 550 (1892).
3. 62 A.B.A. Rep. 851 (1937).
4. A comprehensive list of these appears commencing on page 44 of the Report of the Special Committee on Free Press and Fair Trail of the American Newspaper Publishers Asso. (1967).

Harvey Oswald following the assassination of President Kennedy in 1963, followed by the Report of the Warren Commission thereon in 1964, which said in part:

> A fundamental objection to the news policy pursued by the Dallas police, however, is the extent to which it endangered Oswald's constitutional right to a trial by an impartial jury. . . . The disclosure of evidence encouraged the public, from which a jury would ultimately be impanelled, to prejudge the very questions that would be raised at trial. . . . Part of the responsibility . . . must be borne by the news media; . . . The general disorder . . . reveals a regrettable lack of self-discipline by the newsmen; . . . 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.

As a result of this ultimatum, many agencies began to intensify or restudy the entire matter which has come to be known by the title: *Fair Trial-Free Press* or *Free Press-Fair Trial,* depending upon the leaning of the agency doing the study. Foremost among the agencies have been two committees of the American Bar Association and of the American Newspaper Publishers Association, respectively, which on occasion have met jointly.

The Sheppard Case

Meanwhile, during this study period, the Supreme Court of the United States, on June 6, 1966, handed down its decision in the *Sheppard* Case,[5] in which the Court excoriated the trial judge, the prosecuting officials, the

5. *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966).

police and the news media, and, in referring to some of the pre-trial publicity, used such phrases as these: "the 'editorial artillery' opened fire;" "the newspapers emphasized evidence that tended to incriminate Sheppard;" "For months the virulent publicity about Sheppard and the murder had made the case notorious;" "circulation conscious editors catered to the insatiable interest of the American public in the bizarre;" "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent."

Report of Special Committee of American Bar Association

Failing to reach a satisfactory accord with the news media, and spurred to certain conclusions by what the Court said in *Sheppard,* the special committee of the ABA released its Report and Recommendations on October 1, 1966. It abounds in platitudes and compliments to the press for *the essential watchdog and public information roles* it plays; and for its *substantial contributions to the administration of justice through the exposure of corruption and otherwise;* and for the adoption by some newspapers of voluntary codes to safeguard fair trials; and it deplored any attempt to restrict the reporting of crime news by statute or any expanded use of the contempt process against the news media.

But then comes the dagger in cloak recommendation. It is based upon the premise "that the primary burden for insuring fair trial rests upon" the legal profession and law enforcement agencies, but the news media have a parallel responsibility for voluntary restraint in reporting criminal cases. "In the absence of such restraint, no steps that can be taken (by the legal branch) will effectively ensure the preservation of the right of fair

trial."[6] Therefore, the Report recommends that the Canon of Legal Ethics be tightened to prohibit lawyers and prosecuting attorneys from divulging certain potentially prejudicial information and that police departments spell out similar restrictions in their internal regulations.

In other words, the recommendation is to cut off the information at the source. The Report denies that this is "to muzzle the source of information," and goes on to explain that the question "is not *whether* certain disclosures can be made, but *when.*"[7]

Report of the Special Committee of the American Newspaper Publishers Association

The special committee of the ANPA continued on with its study and on January 5, 1967, released its excellently documented 143 printed page Report. It likewise abounds in many platitudes of a broad Alphonso-Gaston nature, such as: "The American press remains as devoted to the principles of fair trial as it is to a free press;"[8] "Newspapers, of course, should not abuse their right to publish without prior restraint;"[9] "The press shares with the Bench, Bar and Law Enforcement officials the responsibility for preservation of the American liberties embodied in the First and Sixth Amendments;"[10] and many other statements of a similar general nature.

But, when the Report gets down to specifics, while it recommends "that the press stand at any time ready to discuss these problems with any appropriate individuals or groups," yet it "cannot recommend any covenants of control or restrictions on the accurate reporting of criminal matters, or anything that would impair such

6. A.B.A., FAIR TRIAL AND FREE PRESS 2 (Tent. Draft, 1966).
7. *Id.* at 78.
8. ANPA, FREE PRESS AND FAIR TRIAL 2 (1967).
9. *Id.* at 4.
10. *Id.* at 10.

reporting.'"[11] "In the reporting of crime news, the press cannot submit to any restrictions which would deprive the accused, as well as the public, of the right to full and unfettered dissemination of the truth.'"[12] "Aside from the First Amendment protection afforded newspapers to *allow* them to publish, there is a strong moral duty on newspapers which *requires* them to print all newsworthy information which comes to their attention and is in good taste.'"[13]

Thus, while the main thrust of the Report is opposition to the promulgation of a code of restraint, the background philosophy is crystal clear, *viz,* the news media has and reserves the right to print any and all factual material, and if problems of fair trial are created thereby, this is a problem of the legal profession to solve the best way it can by such procedures as delay in trial date, change of venue or venire, use of blue ribbon juries, *etc.*

The Report emphasizes, that of its ten more important conclusions, the following one is central to all others:

> 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.[14]

The Narrow Issue

There are several areas in which the reporting of legal matters may create an issue between the law on the one hand, and the press on the other. One of these areas is the manner of reporting the trial itself; another is the conduct of news reporters in the courtroom during the

11. *Ibid.*
12. *Id.* at 4.
13. *Id.* at 40.
14. *Id.* at 1.

progress of a trial; another is editorial comment upon the conduct or decisions of the judge. Significant though the problems associated with these and similar issues are, none of these is the area in which the current problem lies; consequently, most of the broad sweeping generalizations which one hears in the arguments pro and con are wholly beside the point.

The narrow area in which the basic problem lies is the pre-trial publicity given to certain features of a particular case, and the impact that such publicity has upon the legal process to follow.

Among the numerous facets contained in the concept of a fair trial, one of the most important is that the accused is entitled to a trial by an unbiased, unprejudiced and impartial jury. It may be noted also that the state is likewise entitled to the same, but that is not the thesis of the present article.

An unprejudiced juror is one who can honestly try the case upon the legal evidence submitted before him in the courtroom at a trial presided over by the judge, and upon the law as contained in the instructions given to him by the court. As Mr. Justice Holmes said over a half-century ago:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.[15]

If prior to the trial a juror's mind has been saturated with a barrage of prejudicial news accompanied by glaring headlines and inflammatory editorials, and yet the information does not come out at the trial proper, it is apparent that he cannot give the accused a fair trial no

15. *Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907).

matter how honestly he might try. Even judges, who by training and experience are experts in sifting the wheat from the chaff, often disqualify themselves from trying a particular case because they possess information which they feel might unconsciously affect their judgment.

To hear some of the arguments advanced, one might think that an attempt is being made to muzzle the press entirely from reporting any pre-trial information. This, of course, is not the case. Actually the issue is quite narrow. The chief complaint of the legal profession is that news articles often carry accounts of alleged confessions made by the accused, or statements by police officials which contain facts and opinions indicating the guilt of the accused, or similar statements made by the prosecuting attorney, or the previous criminal record of the accused. News articles of this sort, and the editorializing thereof, are sufficient to convince the average reader and prospective juror of the guilt of the accused prior to trial. But as a matter of fact, the confession may never be introduced into evidence because the court may rule that it was improperly procured. Similarly, the prior criminal record of the accused is admissible into evidence only in a few exceptional instances. Many factual successes of police investigation do not constitute legal evidence and as a consequence never get before the jury; yet, if broadcast by the news media in advance of the trial, the damage is done.

The news media complain that "What these critics (of pre-trial publicity) must realize is that a major difficulty for the newspaper editor lies in attempting to foresee what the Judge will consider admissible."[16] The legal profession is not asking that the news media be a Houdini; it only asks that certain definite narrow topics be not published prior to trial.

16. ANPA, FREE PRESS AND FAIR TRIAL 60 (1967).

It is not that the legal profession wants to withhold the information from the press, but it wants the press to withhold such information temporarily from the public, *i.e.* until such time as it comes out at the trial or later. But the press is unwilling to give the assurance of such restraint. This is precisely where the two professions have reached an impasse.

The Rights Involved Belong to the Public

The First Amendment to the Constitution guarantees freedom of the press—which is another way of saying that every citizen is entitled to know things from a free and unbridled press.

The Sixth and Fourteenth Amendments guarantee a fair trial by an impartial jury to every citizen—which is another way of saying that the jury must be able to try the accused upon legal evidence alone heard in open court.

Freedom of the press does not belong to publishers of newspapers; it is not a property right of those who make their living by composing, publishing and selling newspapers.

The concept of "fair trial" does not belong to the legal profession; it is not a property right of the lawyer just because it is something that goes on in the courtroom where he makes a living.

Both of these rights, "fair trial" and "free press," belong to the people of this country, to the clients of lawyers and patrons of newspapers. It is unthinkable, therefore, that where the people have two rights such as these, they must be required to make a choice. They are entitled to both, and if there be a clash of these interests in any area, there must be an accommodation between them.

In making this accommodation, the bickering that goes on is between the high priests of the two professions, law-

yers and publishers respectively, rather than among the people who are the real beneficiaries of both rights. If these two great liberties are permitted to continue to conflict, obviously, the way will soon be opened for unfair trials on the one hand, and for unbridled license on the other. If this ever becomes inevitably apparent, an aroused public will take a hand and there can be no guaranty of what will happen to either or both of the rights.

The Jury System

The focal point of the attack upon prejudicial pre-trial publicity is that it makes it impossible to obtain an unbiased jury. Is something wrong with the jury system? One critic has observed that he sometimes wonders "whether the Bar and the Bench do not try to get jurors who are the most perfect approximation of a moron. They seek as jurors those who never studied anything; who don't know anything, period."[17] This reminds one of the quip credited to Mark Twain, which goes: "We have a criminal system which is superior to any in the world and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read."[18]

Such quips are, of course, an oversimplification of the real truth. We do want jurors who are ignorant—not "ignorant, period," but ignorant of any of the facts surrounding the case they are about to try; ignorant of the opinions of prosecuting attorneys, police and newspaper editors, concerning the guilt of the accused.

As a corollary of the criticism by the press concerning the present type of jury personnel, they suggest that we secure blue ribbon juries, *i.e.* specially selected citizens

17. Bruckner, 2 CRIM. LAW BULL. 23.
18. MARK TWAIN, WIT AND WISECRACKS 19.

of higher intellect who supposedly have the capacity to disabuse their mind of opinions formed from inflammatory pre-trial newspaper publicity.[19] Hark, hark, the millennium is just around the corner!

The entire theory of the Anglo-American jury system is that an accused is entitled to trial by a jury of his peers, *i.e.*, by those of the same rank and quality: a comrade, a fellow-associate. Thus our juries are drawn from a cross-section of free men. As the Supreme Court has aptly said of this system:

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of man, has bequeathed to us safeguards for their preservation, the most precious of which is that of trial by jury. The right has become as much American as it was once the most English.[20]

The press also suggests that changes of venue or changes of venire be used to guarantee a fair trial if newspaper publicity has destroyed a fair trial at home. The answer to this is two-fold. First, the accused is entitled to trial by a jury of the vicinage, and not just by a jury from anywhere. Second, in this day of statewide coverage by both newspapers and radio, there is little reason to expect that a jury from another community within the orbit of the same press would be less prejudicial than one from the vicinage.

The Guarantees Are Based Upon Reason

In addition to the right to trial by an impartial jury, a person charged with a felony is entitled to counsel at the expense of the state if he be indigent; he is presumed

19. ANPA, FREE PRESS AND FAIR TRIAL 39 (1967).
20. *Irvin* v. *Dowd*, 366 U.S. 717 (1961).

to be innocent until proven guilty beyond a reasonable doubt under an elaborate system of rules of evidence designed to exclude all unfair testimony. All of these precautions are taken to insure a dispassionate trial based upon *reason.*

Similarly, the guarantees of freedom of speech and of the press are to guarantee the factor of reason in public affairs, for as Mr. Justice Brandeis said: "Those who won our independence . . . believed in the power of reason as applied through public discussion. . . ."[21]

Thus, the element of *reason* is engrained in both guarantees, but the Constitution does not tell us what to do when the requirements of fair trial conflict with protection of a free press, yet the conflict must be resolved.

In the excellent Appendix to the ANPA Report, reference is made to an alleged concept of the framers of the Constitution that "the rights of free speech, press and belief, are primary natural rights fully exercised by individuals independent of organized society, while other rights involving an individual's protection against his society or government arise from the 'social compact.' "[22] The veiled innuendo by the Committee is, therefore, that the right of a fair trial is secondary to the right of freedom of the press. One might quickly observe in reply, that even if it were conceded that, due to the exigencies surrounding a newly formed republic, freedom of speech against tyranny of government was of uppermost importance due to recent Colonial experiences with the Crown, it does not follow that today, with our highly complex society and staggering crime rate, which necessitates a complex judicial process, that one constitutional guarantee is any more fundamental than another. Indeed, the Report concedes that "no freedom is ever absolute,

21. *Whitney* v. *California,* 274 U.S. 357, 375 (1927).

22. ANPA, FREE PRESS AND FAIR TRIAL 26 (1967).

and freedom of the press is no exception"[23] and "there can be no fair trial without a free press and without fair trial no freedoms can exist."[24]

If this be true, then in order for the two guarantees to co-exist, the interests on both sides must be balanced, and if the balancing is to be based upon *reason,* then to the extent necessary to protect an individual's right to a fair trial, there must be some limitation upon absolute freedom of the press. Either that limitation must be wrought through an exercise of self-restraint by the press itself or some other method must be devised.

The Fear of Censorship

The method devised by the Special Committee of the ABA, while thought to be necessary, is unfortunate. Carried to its logical conclusion, it could readily become the means of lowering the iron curtain behind which prejudice or corrupt police and court officials could enjoy invulnerability. Furthermore, it leaves the news gathering media free to publish what they can dig out, and it puts a premium on "bootleg" and other unreliable information, gossip and rumor, with the result that what is published may not only endanger a fair trial more than if the truth were published, but, as Dr. Frank Stanton, President of Columbia Broadcasting System, has said, "would plunge the judiciary system of this country, the bar and the police, into an abyss of public suspicion and distrust."[25]

The argument most vociferously advanced against denying information to the press is that such a rule, be it a canon of ethics, rule of court, or a statute, would be the first step to censorship in its vilest form; that any brid-

23. *Id.* at 29.
24. *Id.* at 2.
25. 22 NATIONAL PRESS PHOTOGRAPHER (Jan. 1967).

ling of the press will be a denial to the people to know what goes on in crime, law enforcement and government circles; that publicity on such matters is an important check on corruption and incompetency of public officials; that the camel of censorship must not be permitted to get his nose under the tent.

This argument is, of course, based upon fear rather than upon reason, and against it must be based the fear that the individual may lose his right to a fair trial by the inflammatory activities of an unbridled press.

Furthermore, what is desired by the legal profession is not a complete suppression of all news surrounding crime, but only such major items as alleged confessions made by the accused, his prior criminal record, editorial comment upon his alleged guilt, *i.e.,* those things which may never be produced in evidence at his trial and which, therefore, a prospective juror should not know or consider. Second, even as to such prejudicial matters, proscribed publication is needed only for such length of time as is necessary to ensure a fair trial, and if and when the matters come out in evidence at the trial, they may then be published. Of course, after the trial anything may be published whether it came out at the trial or not.

One answer of the press to this is: "The characteristic that most distinguishes democracy from totalitarianism is that the means are as important as the end. It is not enough for the public merely to know the end result of a trial, they need to know the means to that end."[26]

But here again, even if the major premise be conceded, which many will not, the argument as it applies to the problem at hand overlooks the element of timing. There is no objection to full disclosure of the means used as they unfold at the trial and thereafter.

But be it fear or any other emotion of the press, it is

26. ANPA, Free Press and Fair Trial 2 (1967).

unfortunate that the legal profession feels driven to the device of censorship of what may be revealed to the press by the profession and law enforcement officers. *Reason* would seem to dictate a better mutual solution to the problem.

Just because there is fear that the whole of the camel may get in if we let his nose get under the tent, is no reason why we must imitate the ostrich by burying our heads in the sand.

The fallacy of much of the position taken by the press is that they do not want merely to report news, they want to make it. They do not want to wait until a witness under oath, and subject to cross-examination, has made news by actually giving his testimony—they want to publish ahead of time, either the hearsay of the police or lawyer as to what the witness expects to testify, or the unsworn statement of the witness himself. As pointed out before, much of this will not be legal evidence, will not be admissible into evidence, will never get before the jury; indeed, the witness may not even be available at the trial due to absence from the jurisdiction or death.

In this connection, one of the conclusions of the ANPA Committee Report is: "The press has a responsibility to allay public fears and dispel rumors by the disclosure of fact."[27] In legal matters, a statement is not a fact until a judge has ruled it to be admissible into evidence. The physical phenomena that an accused has made a statement purporting to be a confession, does not make that statement a confession until a judge has ruled that it is one as a matter of legal fact. The fact that the police or prosecuting attorney utters an opinion as to the guilt of an accused, will never become a legal fact. Therefore, if the news media has a responsibility in the area of reporting legal matters, *i.e.,* to disclose legal facts, then they

27. *Id.* at 1.

should wait until physical phenomena becomes legal fact before reporting it.

In apparent recognition of the delicacy of the problem involved, many individual newspapers and regional news media have adopted guide lines of self-restraint restricting the pre-trial publication of certain information considered potentially prejudicial by the legal profession. An example is the set of guidelines recommended by the American Society of Newspaper Editors:

> Full disclosure of the facts of a crime before, and at the time of arrest to inform, allay the alarm of, or assure the public of the extent and quality of law enforcement;
>
> Exercise of great care by all parties in the sensitive area of pre-trial, particularly in the use of extra-judicial statements (off-hand assertions by police or prosecutors, as to the guilt of an accused, and publication of 'confessions' before they are ruled admissible as evidence);
>
> Release of all pertinent facts in the immediate post-trial state (*i.e.*, before any appeal has been concluded).[28]

The apathy of the ANPA Committee to these moves made by individual segments of the news media is illustrated by its comments preceding that portion of its Report. "This particular section of our report merely attempts to present factually ideas of this nature which are representative of actions taken to date. . . . It is also interesting to note that there has been no wide-spread acceptance by any substantial number of news media of the restrictions which we are discussing."[29]

28. 2 TRIAL 5 (Oct.-Nov. 1966).
29. ANPA, FREE PRESS AND FAIR TRIAL 95, 96 (1967).

Foreboding Clouds Overhang the Press

The concepts of freedom of speech and freedom of the press have enjoyed peculiar protection in the past from the interpretations placed upon the First Amendment by the Supreme Court of the United States. In the broad general area under discussion here, this protection has resulted from application of the so-called "Clear and Present Danger Test," which only outlaws utterances in which "the substantial evil" flowing from any such utterance "would be extremely serious" and the "degree of imminence extremely high." But the cases enunciating the doctrine have been contempt citations against newspapers and individuals critical of the government or government officials, judges and the like.[30] The balances weigh heavily, in such cases, in favor of the press. But when a powerful corporate press is on one side and the "substantial evil" to be avoided on the other side is the right of a citizen to a fair trial, there is no assurance that the test would be the same, or if it is, that the application would be the same. Indeed, the Court has called attention to the fact that the contempt cases referred to did not "represent a situation where an individual is on trial" where "prejudice might result to one litigant or the other," and "of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation."[31] Observe also the comment of two dissenting justices in the same case: "The right of free speech, strong though it may be, is not absolute. When the right to speak conflicts with the right to an impartial judicial proceeding, an accomodation must be made to preserve the essence of each."

30. *Bridges* v. *California,* 314 U.S. 252 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Craig* v. *Harney,* 331 U.S. 367 (1947).

31. *Wood* v. *Georgia,* 370 U.S. 375 (1962).

In this day of tumbling constitutional cornerstones, the press may no longer smugly rest upon laurels won by it in the past in the legal arena—it may rest no more than many other segments of our society, which, in recent years, have seen one traditional constitutional concept after another of long standing, swept aside by the increasingly aggressive legislative prerogatives arrogated to itself by the Supreme Court of the United States. That Court is fully capable of sufficient ingenuity to find an answer to Jefferson's dilemna which occasioned his statement: "I deplore . . . the putrid state into which our newspapers have passed. . . . It is however an evil for which there is no remedy, for our liberty depends on the freedom of the press and that cannot be limited without being lost."[32]

Indeed, the handwriting on the wall may be indicated by such recent statements as the following in Mr. Justice Frankfurter's concurring opinion in *Irvin* v. *Dowd*:

> This Court has not decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.[33]

Consider also the implications contained in the following statement of the Court:

> While maximum freedom must be allowed the press in carrying on this important function [exposing corruption and reporting public events]

32. PANDOVER, DEMOCRACY 150-151.
33. *Supra* note 20, at 730.

> in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.[34]

More pointedly are the remarks of the Court in *Sheppard:*

> And where there was "no threat or menace to the intergrity of the trial," *Craig* v. *Harney,* we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism. But the Court has also pointed out that "legal trials are not like those of elections, to be won through the use of the meeting-hall, the radio, and the newspaper," *Bridges* v. *California.* . . . "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice," *Pennekamp* v. *Florida.* But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the court-room according to legal procedures," *Cox* v. *Louisiana,* 379 U.S. 559, 583, 85 S. Ct. 466, 13 L. Ed. 2d 487 (1965).[35]

In refering to those things which the trial judge might have done to guarantee Sheppard a fair trial, the Court said:

> More specifically, the trial Court might have proscribed extra-judicial statements by any lawyer, party, witness or court official, which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; the identity of prospective

34. *Estes* v. *Texas,* 381 U.S. 532, 539 (1965).
35. *Supra* note 5.

> witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. . . . the court could have also requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.[36]

These statements by the Court refer obviously to pretrial matters, and they are the statements upon which the recommendations of the ABA Committee are based; and they forebode a rude awakening by the press with respect to its cavalier, if not defiant, position taken in the current problem.

Few lawyers, however, desire to see the issue resolved by statutory enactment, although there are those who recommend this procedure. A small minority would support regulation by rule of court, with the contempt process enlarged to make amenable thereto a newspaper which violated any such rule of court. As has been observed earlier herein, the organized bar seems headed for self-restraint imposed upon its members through a tight canon of legal ethics which will dry up the information at the source.

F. Lee Bailey, counsel for Dr. Sheppard in his successful bid to have the Supreme Court reverse his conviction, envisions still another remedy, *viz.*, a civil suit for damages against a newspaper by an accused whose right to a fair trial has been destroyed by deliberate newspaper publicity.[37] Now that Dr. Sheppard has been acquitted on his second trial, we may see just such an action brought. The press is suitably restrained from frivilous defamation by the prospects of damages recoverable in libel actions. Exercise of freedom in this area is costly.

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36. *Ibid.*
37. 2 TRIAL 55 (Apr.-May 1966).

Should it be less so for deprival of the right to a fair trial? Time will tell.

In this same vein, one of the recommendations of the ABA Committee is, that, whenever a person is held in contempt of court in this area of the law, the court shall have authority to allocate any fine imposed to pay the accused for any extra costs he has been put to in securing a change of venue or a new trial.

Conclusion

The press claims that they cannot impose upon the news media a code of restrictions upon reporting; that it is unlike the legal profession which is a licensed profession, and in which, therefore, it is proper to have a canon of legal ethics for the violation of which a member may be disbarred. That news reporting is by its very nature an unlicensed profession; that if it is to be free, then by necessity it cannot have a canon of ethics in the professional sense which would prohibit or license what shall be reported; that to discipline a news reporter would be to undermine the very freedom involved in the concept of freedom of the press. So runs the contention.

The fact is, however, that the press does exercise self-restraint in many areas of reporting. Except for certain "rags" found on some of the urban news-stands in our larger cities, the overwhelming number of respectable papers which find their way into the American home, do exercise self-restraint in matters of taste. And, as has been noted earlier, there being no license to slander, the prospects of a damage suit is sufficient restraint against publication in this area.

Reason would dictate that the current problem be resolved by making all information available to the press—and that in return, the press, by voluntary self-restraint, hold up on the publication of those matters considered po-

tentially prejudicial by the legal profession until such matters have been produced at the trial, and if not produced at the trial, then until the trial has concluded.

It is quite immaterial whether the press exercise this self-restraint by a code of ethics, policy, guidelines, or gentleman's agreement or any other method. Any such restraint for a short time period, *i.e.* until the trial, upon publication of a few crucial matters which potentially endanger a fair trial, is not a bargaining away of the right of the public to know. The public's right to know these things in a given case, does not mean the right to know *now*. It is only due to the desire of the newspaper to sensationalize the matter, and sensationalize it now, that the problem of pre-trial publicity arises at all.

By a procedure of delayed publication, the press would fully discharge its duty to the public. It could continue its proper watchdog activities of possible corruption in high places; it would be possessed of all the pre-trial information; it could use the unprejudicial portion of this information at any time; and it could make use of the balance at a time when it would not jeopardize a fair trial to the accused.

It is to be hoped, therefore, that the two professions will work out their differences before either Association adopts *in toto* the reports of their respective special committees.