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## Aftermath of Sheppard: Some Proposed Solutions to the Free Press--Fair Trial Controversy

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duced by acts not those of the offender. It also provided a new defense for those whose intoxication is caused by physical and psychological factors, in other words the chronic alcoholic.

Whether or not the legislature had the above considerations in mind, they did provide the alcoholic with a new defense. Thus both insanity and alcoholism may absolve an individual of criminal responsibility. In both cases the same factors must be proven. A similar situation exists for the narcotic addict in the District of Columbia, although here it has been judicially created. As noted above, narcotic addiction has been allowed as evidence of mental illness under the Durham rule due to the recognition of the close relationship between these two factors.<sup>71</sup> Thus alcoholism and addiction may be merely two of the total number of diseases which can be considered when discerning one's criminal responsibility.

The situation, however, is made more complex by the *Driver* decision. Prior to *Driver*, an alcoholic or addict would have to plead and prove the elements of mental impairment. Even under the Illinois statute where there is a specific provision for these individuals, the same elements must be shown as if the defense were insanity. Depending upon the state in which the offense is committed an individual might have to satisfy the M'Naughten test, the Durham test, ALI test, or any variation thereof. However, *Robinson* and *Driver* have shown that for certain offenses the Eighth Amendment requires a universal test. These cases are limited to narcotic addiction and public drunkenness, but they indicate that perhaps addicts and alcoholics require separate consideration. On the other hand, if the hypothesis discussed in this comment is correct, the Eighth Amendment re-

<sup>71</sup> See *Horton v. United States*, 317 F.2d 595 (D.C. Cir. 1963); *Brown v. United States*, 331 F.2d 822 (D.C. Cir. 1965).

quires a universal rule to be applied in all cases of criminal responsibility and not just for a separate class of individuals or offenses.

*Conclusion.* On its face the *Driver* rule appears to be so similar to the *Durham* rule that it does not seem unreasonable to contend that the latter is constitutionally required. When the two decisions are seen in context, however, differences begin to appear. The *Durham* rule requires a "but for" relationship while it is unclear what constitutes a symptom in the *Driver* sense. In fact, as seen above, the court in *Driver* may not really have meant what it said, or at least chose the wrong words to say it. Yet the court's concern about punishing a man in *Driver's* position is similar to that which has motivated the courts of this country to liberalize the standards of criminal responsibility. The judges on the *Driver* and *Easter* courts may not have been thinking of the *Durham* rule, but by attempting to formulate a new rule of criminal responsibility for alcoholics, in light of advanced medical knowledge, they unwittingly approximated another rule which had been formulated with a similar concern for modernization. Thus it is not so easy to dismiss the similarity of the two rules merely by pointing out the semantic differences.

The problem cannot be resolved, however, until the courts consider more cases in the area of alcoholism and narcotic addiction and determine exactly what they mean by the terms they use and what actions their decisions encompass. As in the area of mental illness, the courts must consider scientific studies in greater depth and take a more realistic look at the problems of the addict. It is only then that we can determine whether the *Durham* rule, or any rule governing criminal responsibility, is constitutionally required by the Eighth Amendment.

## THE AFTERMATH OF SHEPPARD: SOME PROPOSED SOLUTIONS TO THE FREE PRESS—FAIR TRIAL CONTROVERSY

RUSH T. HAINES II

The decision of the Supreme Court in *Sheppard v. Maxwell*<sup>1</sup>, if nothing more, added potent fuel to

<sup>1</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507 (1966). In that case the Cleveland newspapers had, for all practical purposes, conducted a campaign to obtain

the fire of the free press—fair trial controversy. Both sides in this argument seize upon the fact that

the indictment and eventual conviction of Dr. Sam Sheppard for the slaying of his wife. In reversing the conviction on the grounds that Sheppard had been

the Court expressly refused to discuss whether courts have the power to restrict the news media in its dissemination of prejudicial material.<sup>2</sup> The free press exponents argue that such refusal was simply a reaffirmation of the seeming blanket immunity granted the press in the *Bridges*,<sup>3</sup> *Pennekamp*<sup>4</sup> and *Craig*<sup>5</sup> cases. Those who favor regulation of the press, on the other hand, see this refusal as a tacit invitation to restrict the press where the publication of prejudicial material is likely to affect the decision of the jury. To bolster their respective views, the advocates of both positions freely extract quotations from *Sheppard*, often out of context, so that each claims support from the same case.<sup>6</sup>

denied a fair trial, the Supreme Court criticized the trial judge: for not having granted a change of venue and a continuance; for failing to control commentary on the case by the attorneys, court officials, and police involved in the proceedings; for failing to maintain order and decorum in the court, and for failing to advise the news media of the impropriety of certain type of reporting.

<sup>2</sup> *Id.* at 358. "We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press."

<sup>3</sup> *Bridges v. California*, 314 U.S. 252 (1941). The contempt convictions of a newspaper, its editor, and a labor leader were reversed with the majority holding that the utterances directed at a trial judge sitting without a jury, did not meet the necessary clear and present danger for the infliction of punishment for contempt.

<sup>4</sup> *Pennekamp v. Florida*, 328 U.S. 331 (1946). The Court found that editorials and cartoons which criticized local judges for the actions in non-jury criminal cases did not constitute a clear and present danger to the administration of justice.

<sup>5</sup> *Craig v. Harney*, 331 U.S. 367 (1947). Articles violently criticizing a judge for his decision were held not to be contemptuous. The court said that judges "are supposed to be men of fortitude, able to thrive in a hardy climate." *supra* at 376.

<sup>6</sup> A case in point was the suit recently brought in the Supreme Court of Illinois seeking a writ of mandamus ordering the trial judge in the case of *People v. Speck*, Indictment Nos. 67 y 20-67 y 27 (10th Jud. Cir. of Ill. 1967), to abandon some of the rules he had adopted to prevent the dissemination of prejudicial news. *People ex rel. The Tribune Co. v. The Hon. Herbert C. Paschen*, No. 40507 (Sup. Ct. Ill., filed Feb. 21, 1967). Petitioner in its brief at 10, cites the proposition enunciated in *Sheppard* that, "a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. *Sheppard v. Maxwell*, 384 U.S. 350." A careful reading of the opinion in that case reveals, however, that immediately following this salute to the press, the Court qualifies its statements with a series of 'buts': "But . . . legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper . . . ; but it must not be allowed to divert the trial from the very purpose of a court system." *Sheppard supra* at 350. At approximately the same time that the Tribune Company was using the

That the Supreme Court found the prejudicial publicity surrounding the trial of Dr. Sheppard to be of such magnitude that reversal was in order, is no real surprise in light of the reversals in previous cases such as *Irwin v. Dowd*,<sup>7</sup> *Rideau v. Louisiana*,<sup>8</sup> *Marshall v. United States*<sup>9</sup> and *Estes v. Texas*.<sup>10</sup> Prior to these cases, appellate courts had usually demanded a showing of actual prejudice to the defendant. The voir dire examination and cautionary instructions were heavily relied on to guard against prejudice, and the trial judge was allowed broad discretion in granting or denying a motion for a continuance or change of venue.<sup>11</sup>

The trend of the above cases, however, has been such that courts no longer need find actual prejudice in order to reverse—inherent prejudice is sufficient. In *Rideau* the court did not even look to the voir dire to determine if there was evidence of prejudice, while in *Estes* and *Turner v. State*<sup>12</sup> the court cited the "probability" and the "potentialities" of prejudice. The discretion of the trial judge was no longer sacrosanct as it became the "duty of the Courts of Appeals to independently evaluate the voir dire test of the empaneled jurors."<sup>13</sup> As if it were not enough to assume that the jury read the

*Sheppard* case to support its arguments for freedom of the press, Judge Douglas S. Lambeth was, in Florida, restricting the news media from printing or broadcasting, "any testimony presented and/or evidence exhibited unless same shall have been in the presence of the jury." *Florida v. Carlton*, No. 98731 (Crim. Ct. of Orange County, Nov. 10, 1966), *aff'd*, No. C.L. 66-5014 (Cir. Ct. of 9th Jud. Dist., Dec. 23, 1966). As authority for so holding, Judge Lambeth cited the statement in *Sheppard* that, "The Court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial." *Florida v. Carlton, supra* at 10. Taken in context, however, this statement served primarily to introduce the Court's suggested restrictions on leaking of news by court officials, police officers, witnesses, and attorneys. Without here attacking the validity of these respective positions, suffice to say that unless there is further clarification by the Supreme Court, both positions will continue to be tenuously supported by *Sheppard*.

<sup>7</sup> 366 U.S. 717 (1961) (interviewing the public on television before trial as to guilt or innocence of accused and possible punishment).

<sup>8</sup> 373 U.S. 723 (1963) (film of defendant confessing to sheriff shown on television).

<sup>9</sup> 360 U.S. 310 (1959) (news accounts contained evidence not admitted at trial).

<sup>10</sup> 381 U.S. 532 (1965) (national broadcast of trial).

<sup>11</sup> For an excellent historical development of these pre-*Sheppard* cases see, Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. REV. 504-516 (1965). See also Thompson, *The Law relating to Prejudicial News Reporting in Criminal Cases*, Free Press-Fair Trial, A Report of the Proceedings of a Conference on Prejudicial News Reporting in Criminal Cases, 7 (Inbau ed. 1964).

<sup>12</sup> 379 U.S. 466 (1965).

<sup>13</sup> *Irwin v. Dowd*, 366 U.S. 717, 725 (1961).

prejudicial material, the Court went even further by cutting into the time-honored view that a juror who could put aside his prejudice was acceptable, by ruling that such a statement by a prospective juror was not dispositive of the issue.<sup>14</sup> Thus, to the extent that the decision turned on the failure of the trial judge to insure a fair trial by use of procedural remedies such as change of venue, continuance, sequestration and polling the jury, *Sheppard* did nothing more than fit nicely into the liberal trend of the above cases.

The decision, however, went further than citing these available remedial measures. The Court for the first time made a genuine effort to suggest means by which the prejudicial material could be suppressed before resulting in the harm which necessitates remedial measures.<sup>15</sup> It is these suggested means for preventing the dissemination of the prejudicial material in the first instance that make *Sheppard v. Maxwell* a landmark decision. And it is the purpose of the remainder of this Comment to examine the effect of these suggestions on proposed solutions to the free press—fair trial controversy.

#### CONDUCT OF ATTORNEYS

It is almost universally agreed that there is a distinct need for the bar to "put its own house in order" in the area of prejudicial news dissemination.<sup>16</sup> Heeding the admonition of the Court in *Sheppard* that, "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures,"<sup>17</sup> lawyers and bar associations have been quick to recognize their duty. Among the forerunners in the effort to insure an "orderly house" are the Reardon Committee of the American Bar Association on Free Press and Fair Trial and the Medina Committee of the Bar of New York. In an introductory passage, to the report of the latter group Judge Medina states the problem:

The true facts as set forth in our Interim Report, however, are that there is a wild scramble to get favorable publicity, and those leading the procession, more often than not, are the lawyers . . .

<sup>14</sup> *Marshall v. United States*, 360 U.S. 310, 313 (1959).

<sup>15</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

<sup>16</sup> Such regulation has been approved by not only the fair trial advocates, but also the press. See 55 *ILL. BAR J.* 556 (1967). See also A Report of the Proceedings of a Conference on Prejudicial News Reporting in Criminal Cases, *supra* note 11.

<sup>17</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

for both sides. . . . [T]his is true despite the fact that the number of lawyers who act in this manner is extremely small.<sup>18</sup>

The solution to the problem does not seem to pose any great difficulty. Both the Medina Report and the Reardon Report<sup>19</sup> recommend a strengthening of Canon 20 of the Canons of Professional Ethics. The present version of Canon 20 in effect in most jurisdictions not only is not enforced, but is so replete with loopholes that enforcement is practically impossible. Even Revised Canon 20 of the New York Bar Association contains an escape clause in that an attorney can in good faith "divulge information for publication in reply to any public statement which adversely affects the interest of his client."<sup>20</sup> In order to shore up the hole in this revised Canon 20, the Medina Committee proposed a new Canon 20<sup>21</sup> which clearly delineates certain conduct which is to be regarded as "unprofessional."<sup>22</sup> In doing so the Committee substantially subscribed to the view of former Dean Erwin N. Griswold of the Harvard Law School that:

The Canons should be amended to include an absolute prohibition on the release by any lawyer, either for the prosecution or the defense, of any material relating to the trial, either before the trial or while the trial is going on. This should specifically preclude appearances of any sort on radio or television relating to the forthcoming or pending trial. It should also specifically forbid the release of any statements to the effect that the defendant has or has not confessed, or that he has or does not have an alibi, or otherwise. It should also specifically preclude the release of evidence which would be inadmissible in court, or the release of evidence which has been offered in court and excluded by the trial judge.<sup>23</sup>

<sup>18</sup> SPECIAL COMMITTEE ON RADIO, T.V. AND ADMINISTRATION OF JUSTICE OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL, 15 (1966) (hereinafter cited as MEDINA REPORT).

<sup>19</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS §1.1 (Tent. Draft 1966) (hereinafter cited as REARDON REPORT). This report, as revised July 1967, was accepted by the ABA House of Delegates on February 19, 1968.

<sup>20</sup> Canon 20 of the N.Y.S. Bar Assn. as revised Jan. 25, 1957, cited in MEDINA REPORT *supra* note 18, at 16.

<sup>21</sup> MEDINA REPORT, *supra* note 18, at 25-26.

<sup>22</sup> Because the Canon 20 recommended by the Medina Committee is so clear, concise and inclusive, it is reprinted in Appendix.

<sup>23</sup> Speech before ABA convention in New York City,

The A.B.A. Report is substantially in agreement with the Medina Report on this proposition. The only substantial differences are that the A.B.A. tentative draft allows extra-judicial statements by attorneys as to: (a) evidence seized at the time of arrest, and (b) testimony during legislative investigations. With regard to the first exception, the Reardon Committee thought that it would be in the public interest—i.e. within the realm of material that was the “public’s right to know”—to release, for example, the fact that a valuable stolen object had been recovered.<sup>24</sup> The second difference seems to be more one of form than content and thus does not detract from the Medina proposal. It seems, however, that for the sake of clarity an explication of this exception might be added to the Medina Report.

The Reardon Report and the Medina Report also differ on the problem of enforcement. The Medina Committee, in keeping with its hope that the free press—fair trial controversy will be resolved by internal self-regulation of the various groups, recommends that enforcement not be implemented through the vehicle of the contempt power.<sup>25</sup> The Reardon Committee, on the other hand, feels that the most effective means of enforcement is an external force—here the court. Thus it calls for not only censure, suspension, and disbarment, but, in extreme cases, use of the contempt power.<sup>26</sup>

Aug. 11, 1964, “The Right of Fair Trial: Responsibility of the Public, The Legal Profession and the News Media,” cited in MEDINA REPORT *supra* note 18, at 24.  
<sup>24</sup> REARDON REPORT 90.

<sup>25</sup> In keeping with this idea, various prosecutors have introduced intra-departmental rules that prevent the dissemination of leads, confessions or statements of accused, potential evidence and results of tests. THE MEDINA REPORT, at p. 17, cites with approval the practice of District Attorney Hogan in New York City in this respect. Also the Office of the State’s Attorney in Chicago has a rule (initiated by Reardon Committee member Daniel P. Ward, now serving on the State Supreme Court), which prohibits any member of that office from giving out confessions or the existence of a statement, prior record, and results of scientific tests. Louis L. Jaffe points out that the currently favored solution in New Jersey and Philadelphia is to “shut the mouths of the . . . prosecutor and defendant’s attorney. A violation of these rules would constitute a breach of the Canons of Professional Ethics.” Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504, 519 (1965).

<sup>26</sup> In line with these views, Judges Raymond B. Mallard and E. Maurice Braswell of the Superior Court of the 13th Jud. Dist. of North Carolina, issued, on the 12th of September, 1966, a rule of court prohibiting lawyers in any case before that court from making any statement “for the purpose of publication or having reason to believe that it will be published, concerning . . . confession, . . . prior criminal record, . . . results of tests, . . . or what the evidence is expected to be.” Judge Paschen in *People v. Speck* has also proscribed

#### REGULATION OF DISSEMINATION BY POLICE AND COURT EMPLOYEES

The Court in *Sheppard* condemned the trial court judge for not having “made some effort to control the release of leaks, information and gossip to the press by the police. . . .”<sup>27</sup> It further stated that, “Neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.”<sup>28</sup>

With respect to judicial employees the duty of the court seems clear—it should issue a rule of court prohibiting extra-judicial statements by any officer of the court. The availability of contempt remedies in the event of a violation of such rules by a judicial officer seems to be equally clear and uncluttered by constitutional objections. This is the method suggested by the Reardon Report<sup>29</sup> and followed in recent cases.<sup>30</sup>

The duty of the court and the available remedies are not so clear in the area of supervision of the police. The Medina Report sees any attempt at imposing judicial control on the police as a potentially unconstitutional invasion of the executive branch by the judiciary.<sup>31</sup> While that group is willing to acknowledge judicial power over participating enforcement officers once the trial is under way, they find no authority “inherent in the courts or judges to discipline them for an alleged breach of their duties as police officers.”<sup>32</sup>

The argument that the courts have no authority over the police prior to the actual trial gathers support from *State v. Van Duyn*<sup>33</sup> and *State v. Thomp-*

any extra-judicial comment by attorneys in the case. Order No. IV (Cir. Ct. of the 10th Jud. Dist., Feb. 14, 1967).

Legislative proposals along these lines have been made in Massachusetts, Mass. H.B. 3991 (1965), and in the United States Senate. S. 290, 89th Cong. 1st Sess. (1965). The latter proposal provides that:

It shall constitute contempt of court for any employee of the United States, or for any defendant or his attorney . . . to furnish or make available for publication information not already properly filed with the court which might affect the outcome of pending criminal litigation except evidence that has already been admitted at the trial.

<sup>27</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966).

<sup>28</sup> *Id.* at 363.

<sup>29</sup> REARDON REPORT, §2.3.

<sup>30</sup> *People v. Speck*, Order No. VI (Cir. Ct. of the 10th Jud. Dist., Feb. 14, 1967). *Florida v. Mitchell*, No. 66-9439 (Crim. Ct. of Broward County, Nov. 5, 1966). *Florida v. Carlton*, No. 98731 (Crim. Ct. of Orange County, Sept. 7, 1966).

<sup>31</sup> MEDINA REPORT, 40.

<sup>32</sup> *Id.*

<sup>33</sup> *State v. Van Duyn*, 43 N.J. 369, 204 A.2d 841 (1964).

son.<sup>34</sup> In both of these cases the respective courts denied that they had disciplinary power over the police and suggested instead that the problem should be dealt with by police administrators themselves. More confusion arises in the area of pre-trial judicial control over police from the *Sheppard* decision itself:

Being advised of the great interest in the case, the mass coverage of the press, and the potential impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.<sup>35</sup>

Both the *Van Dwyne* and *Thompson* courts as well as the Medina Committee interpreted this passage as implying a lack of judicial power over the police prior to the time of trial. Thus they called instead for internal self-regulation to cure the problem of police dissemination of prejudicial news.

The Reardon Committee, however, did not find the constitutional objections to be an insurmountable obstacle to their effort to formulate judicial regulation of the police dissemination of news:

The concept of separation of powers is not one that necessitates rigid and simplistic categorization of every aspect of government; rather it is one that reflects concern over the assumption by one arm of government of the whole function of another branch. Within the basic frame work of checks and balances, it permits of areas of overlap and concurrent authority. The present problem, in the committee's view, falls into just such an area.<sup>36</sup>

Thus they proposed a rule of court which would, "from the time of arrest, issuance of an arrest warrant, or the filing of any complaint, information, or indictment in any criminal matter within the jurisdiction of this court, until the completion of trial or disposition without trial,"<sup>37</sup> prohibit release of certain matter such as confessions, prior record, and performance or results of tests.

In arguing that this rule did not amount to an unconstitutional invasion of the executive, the Committee noted that courts have power to make rules governing procedure in civil and criminal litigation.<sup>38</sup> Although conceding that such rules normally relate to the manner in which a case shall be

tried, they pointed out that Rule 5 (a) of the Federal Rules of Criminal Procedure directing the arresting officer to take the arrestee before a commissioner without unnecessary delay,<sup>39</sup> is a "judicial command addressed to the conduct of law enforcement officers and designed to require them to take steps to provide that the person arrested be properly arraigned."<sup>40</sup> As a second constitutional basis for its proposal, the Reardon group argued that arrest marked the beginning of a judicial proceeding and thus made it appropriate for courts to control the conduct of those participating in that proceeding.<sup>41</sup> In support of this jurisdictional argument, the Committee also noted that occasionally the exercise of power over a police officer is based on the view that such person, when detaining one against whom criminal action is pending, is considered an officer of the court and thus subject to the court's orders.<sup>42</sup> Having decided that the judiciary indeed has power to issue the above order to the police, the Committee concluded that the resulting use of the contempt power as a means of enforcement was clearly within even the narrow confines of the federal contempt statute permitting punishment for contempt of one who is "in disobedience or resistance to [the court's] lawful . . . rule."<sup>43</sup>

While this argument is no doubt appealing, the logic is somewhat undermined by the fact that: (a) the rules of procedure derive from a legislative grant of power<sup>44</sup> and not necessarily from a power inherent in the judiciary; (b) enforcement of the provisions controlling police conduct has been through coercive exclusionary rules rather than direct contempt proceedings; and (c) cases dealing with the question of jurisdiction speak only in terms of when it attaches to a particular defendant<sup>45</sup> and do not explicitly support the proposition that it is at this point that participating witnesses and police officers are brought within the jurisdiction of the trial judge. That courts do indeed indirectly control the conduct of police is evident from the reaction of that body after a decision such as *Miranda*.<sup>46</sup> Charges are made that the police power to combat crime is being undermined,

<sup>39</sup> FED. R. CRIM. P. 5a.

<sup>40</sup> REARDON REPORT, 103.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 105.

<sup>43</sup> 18 U.S.C. §401 (1964). Cited in REARDON REPORT, 106.

<sup>44</sup> 18 U.S.C. §3771.

<sup>45</sup> 21 Am Jur 2d §376, 390.

<sup>46</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>34</sup> *State v. Thompson*, 139 N.W.2d 490 (Minn. 1966).

<sup>35</sup> *Sheppard v. Maxwell*, 384 U.S. 333,362 (1966).

<sup>36</sup> REARDON REPORT, 102.

<sup>37</sup> REARDON REPORT, §2.1.

<sup>38</sup> *Id.* at 102.

but they nonetheless strive to stay within the mandates of the judicial rule to avoid further reversals. Thus, while this constitutional argument will continue until the Supreme Court elucidates its position in *Sheppard* and decides whether courts have jurisdiction over police and witnesses from the moment of arrest until the start of the trial, the issue might possibly become moot by the self-imposition of regulations aimed at staying within the bounds of *Sheppard* to avoid reversals.<sup>47</sup> The Reardon Committee, in recognition of the steps that are being taken toward self-regulation, amended sections 2.1 and 2.2 of its Revised Tentative Draft to propose that "the entire matter be dealt with at the outset by department regulation and that with respect to the period from arrest to the completion of trial, a rule of court or legislative enactment be resorted to only if a law enforcement agency fails to adopt and adhere to the substance of the recommended regulation 'within a reasonable time'."<sup>48</sup> Nevertheless, the original proposal has some followers. At the present time a rule of court governing the release of information by the police from the moment of arrest is in effect in Wake County, North Carolina.<sup>49</sup>

Of all the groups claiming infringement by restrictions on the dissemination of news, the one with a most pressing claim is the law enforcement agency. Due to the combination of a morbid interest in crimes of violence and fear that a vicious criminal may be at large, there is a demand by the public for a showing by the police of capability in solving a crime. Perhaps unwilling to acknowledge the existence of, and accept responsibility for, a degenerate element in its midst, the public tends to cast the blame for a successful crime on the police failure to prevent it. Thus there is constant pressure on the police to demonstrate that the case is near-

<sup>47</sup> Such self-policing has already been undertaken by the Office of the Attorney General of the United States. Its directive to personnel of the Justice Department advises against the release of observations about defendant's character, statements of defendant, tests given defendant, identity or credibility of prospective witnesses, and evidence. 28 C.F.R. §50.2 (1965). Similar regulations in New Jersey provide that release of information in violation of the rules would constitute "conduct unbecoming an officer" and would warrant "discipline at the hands of the proper authorities." Jaffe, *supra* note 25, at 520. Typical of such regulations is that under consideration by the Chicago Police Department (included in the Appendix *infra*).

<sup>48</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, 22-23 (Rev. Tent. Draft, 1967).

<sup>49</sup> Order of the Superior Court of the 13th Judicial District of North Carolina (Sept. 12, 1966).

ing solution and that the perpetrator will soon be in custody. To avoid the accusation of suppressing information to cover up malfeasance, there is a legitimate tendency on the part of the police to cooperate with the press and thus escape being cast in an unfavorable light. The pressures on the police were well explicated by former Los Angeles Police Chief, W. H. Parker:

Another factor is the police necessity for justifying a course of action or the lack of action. Unfortunately, there is a tendency in America to substitute the police officer for the defendant in a criminal trial, and thus there are all sorts of accusations made about the things the police did or did not do, and they have no arena in which to defend themselves. Particularly when there is a serious crime there is a clamor for action. What are the police doing? What progress have you made? Why haven't you arrested this man?

I think that in a truly American fashion, the police administrator is going to attempt to acquaint the people who represent the public—that is the news media—with a situation generally, so that the people can be informed and the police situation explained, because without public support, the whole police department should go home and save the taxpayer money.<sup>50</sup>

The ideal solution—from the point of view of the police—would be to allow them free rein in releasing information to reassure the public.

When Richard Speck was arrested in connection with the murder of eight nurses in Chicago, not only was his criminal record published, but the local police chief announced that he was "absolutely positive" of the guilt of the accused.<sup>51</sup> Such a statement obviously served as a placebo to the enraged and frightened public and further helped to eliminate criticism of the police department. It was not, however, consonant with the right of the accused to a fair trial with the presumption of innocence.<sup>52</sup> Thus it is incumbent on the police to

<sup>50</sup> Statement recorded in Conference on Prejudicial News Reporting in Criminal Cases, 134 (Inbau ed. 1964).

<sup>51</sup> MEDINA REPORT, 60.

<sup>52</sup> Recently two young boys were bound and shot to death in Rockford, Illinois in a manner that the news media described as an execution. The police, in a genuine effort to apprehend the killer, made many of their leads available to the press in the hope that the publicity would bring forth a woman who had called to tip the police off as to the killings. Even under the rules promulgated by the Reardon Committee, such disclosure would have been proper until the fugitive was caught. However, once an arrest was made in connection with the case, the authorities failed to call

adhere to standards consistent with those placed on other agencies of the criminal justice system—regardless of the source of these standards.<sup>53</sup>

#### CONDUCT OF JUDICIAL PROCEEDINGS

The remedies suggested in *Sheppard* as available to the trial judge to insure a fair trial once prejudicial news has permeated the community, were not surprising in light of the pre-*Sheppard* cases commanding reversal where inherent prejudice was found. The rationale for determining prejudice since that decision has not changed greatly from that in the *Irwin v. Dowd* series of cases.<sup>54</sup> Of course, in reversing for failure to avoid prejudice through change of venue or continuance, the appellate courts had another important case on which to rely, but most of these cases would have come out the same with or without *Sheppard*.<sup>55</sup> In this respect it is therefore important to note in passing that the trial judges since *Sheppard* have shown a keen awareness that their exercise of discretion in ruling on a motion for a change of venue or continuance is carefully studied on appeal.<sup>56</sup> Also the voir dire examination is becoming more scrutinizing.<sup>57</sup> And finally the "cause" for which a juror may be excused is less demanding.<sup>58</sup>

a halt to the release of news. Thus, Chicago television stations were able to broadcast live interviews with the suspect's father in which a record of prior arrests for sniping was brought out. One station went so far as to interview a shop owner who sold a .22 caliber pistol to accused (the pistol is still not found), and elicited the statement that accused had said to his father, "I want that gun!" Obviously most of the leads which enabled the enterprising newsmen to ferret out the subjects interviewed and the fact of the prior record, were traceable to the local police. In spite of the fact that such post-arrest leaking by the police is understandable, it still is not in keeping with the right of the accused to a fair trial. The suspect here involved has since been found guilty of murder.

<sup>53</sup> In the recent investigation into the slaying of Valerie Percy, daughter of Senator Percy, the police, invoking *Sheppard*, firmly refused to release leads to the news media. Even though that crime is as yet unsolved, criticism of the police was slight, and publicity quickly died down.

<sup>54</sup> Cases cited notes 7 and 8 *supra*.

<sup>55</sup> For examples of the application of *Sheppard*, *Dowd*, et al in these cases see: *Rubenstein v. State*, 407 S.W.2d 795 (Tex. Cr. App 1966) (reversed for failure to change venue); *People v. Meyers*, 35 Ill.2d 328 (1966) (change of venue denied—*Sheppard* distinguished); *Baldwin v. Kentucky*, 406 S.W.2d 862 (1966) (hearing on requested change of venue allowed).

<sup>56</sup> Thus in the recent trials of Richard Speck in Illinois, and Carl Coppolino in Florida, changes of venue were granted. *Chicago Sun-Times*, April 4, 1967, at 6.

<sup>57</sup> In the Speck case, 610 prospective jurors were examined before the entire panel was filled. *Chicago Sun-Times*, April 4, 1967, at 34.

The Reardon Committee, in an effort to exercise the maximum power of the court to insure a fair trial, recommended not only liberal use of venue change and continuance, but also individual examination of the prospective jurors out of the presence of the other talesmen. In this way it is hoped that the true feelings and prejudices of the juror will be elicited.<sup>59</sup> Desiring to avoid, as much as possible, a head-on collision with the press, that committee also recommended that pretrial proceedings not in the hearing of the jury be conducted *in camera* when the publication of the subject matter of such hearings would involve a risk of prejudice to the defendant.<sup>60</sup> Thus, if during these pretrial hearings certain evidence was found to be inadmissible, potential jurors would not read about it in the morning papers. The press has called this proposal an unconstitutional invasion of the right of public trial.<sup>61</sup> But it might be asked to whom the right to a public trial belongs—the defendant or the press. In *United Press Association v. Valente*,<sup>62</sup> the New York Court of Appeals held that the right to a public trial was the defendant's, and that members of the public at large, including the press, had no enforceable right of their own to insist that a criminal trial be open to the public.<sup>63</sup> In spite of the fact that there is some authority to the contrary,<sup>64</sup> the Reardon Committee felt that the need to avoid prejudice to the defendant outweighed the policy in favor of open proceedings.<sup>65</sup>

<sup>58</sup> One prospective juror in the Speck case was excused for cause when it was revealed on voir dire that he remembered vaguely that Speck was an "ex-con." No inquiry was made as to whether this prospective juror could dismiss from his mind this fact and decide the case solely on the evidence. *TIME*, April 7, 1967, at 63.

<sup>59</sup> REARDON REPORT, §3.4.

<sup>60</sup> *Id.* at §3.1 and §3.5. In *Speck* most of the pretrial hearings were held *in camera*.

<sup>61</sup> *TIME*, March 10, 1967, at 94.

<sup>62</sup> *United Press Association v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954).

<sup>63</sup> *Id.* at 73-79, 778-783. *cf.* *Geise v. United States*, 265 F.2d 659 (9th Cir. 1959).

<sup>64</sup> Some cases have held that defendant cannot prevent public attendance by waiving his right to a public trial. 21 *AM. JUR.* 2d 259.

<sup>65</sup> REARDON REPORT, 143. The proposal provides that a record be kept of all closed proceedings, and, that at the close of the trial, they be made public.

The United Nations through its Human Rights Commission of ECOSOC has proposed the following article for its Draft Covenant on Civil and Political Rights:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and



In answer to the suggestions in *Sheppard* that the trial judge control the dissemination of news by witnesses, parties, lawyers and police officers coming under the jurisdiction of the court, the Reardon Report prohibits extra-judicial statements by lawyers, court officials and police.<sup>66</sup> It does not however extend such treatment to witnesses. In spite of the statement in *Sheppard* that, "the trial court might well have proscribed extra-judicial statements by any . . . witness . . . which divulged prejudicial matters . . .,"<sup>67</sup> the Committee felt that it was not appropriate to propose a rule proscribing extra-judicial statements by a person not participating in the case as counsel or serving in the status of a law enforcement officer.<sup>68</sup> Instead it recommended that the trial judge: "(1) caution the witnesses and the defendant himself against making extra-judicial statements; (2) preclude witnesses from disclosing testimony given at a closed hearing; and (3) isolate witnesses prior to their appearance on the stand if necessary to prevent exposure to the summaries or narratives of others."<sup>69</sup>

The Medina Report is in substantial agreement with the Reardon Committee except for the suggestions regarding closed hearings. In this respect the Medina group cites *Craig v. Harney*<sup>70</sup> for the proposition that what happens in the court room is public property, and further that the trial judge has no power to prohibit the publication of such proceedings by the news media.<sup>71</sup> With respect to the power over the parties, witnesses and police officers, however, the Medina Committee is willing to go as far as the Reardon proposal, if not further. They authorize instructions to the jury not to read any material concerning the case and orders to the parties, police and witnesses in the case not to make

any extra-judicial statements. A violation of either the instructions or the orders would result in a finding of contempt. As a final palliative, both committees endorse a policy of jury sequestration where there is a chance of prejudice. Even this, however, has its defects.<sup>72</sup>

#### CONTROL OF THE NEWS MEDIA

Why, one might ask, is it necessary to go to all of these extraordinary lengths when the problem would be eliminated if restraints were imposed on the news media by court orders and the contempt power? The answer lies in the fact that, in spite of Justice Frankfurter's warning that, "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,"<sup>73</sup> it is generally assumed that three opinions of the Supreme Court,<sup>74</sup> handed down during the 1940's, shield the press from such an application of the contempt power. These cases, while acknowledging the fact that freedom of the press and free speech are not absolute guarantees, extrapolated from the sedition cases the "clear and present danger" test to describe the limits of these freedoms. Thus it was necessary that the substantive evil—the disruption of justice—be extremely serious and the degree of imminence extremely high before utterances could be punished.<sup>75</sup>

There are three aspects of these cases which render their application to cases like *Sheppard* extremely suspect. First, none of those cases involved a jury trial; the Court expressly qualified its decisions to non-jury proceedings.<sup>76</sup> Secondly, the allegedly contemptuous material in those cases was

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impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. (Draft Convention on Civil and Political rights, Art. 14, par. 1, cited in BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS, 277 (2d ed. 1962)).

<sup>66</sup> REARDON REPORT, §1.1-1.3, §2.1-2.3.

<sup>67</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966).

<sup>68</sup> REARDON REPORT, 142.

<sup>69</sup> *Id.*

<sup>70</sup> *Craig v. Harney*, 331 U.S. 367 (1947).

<sup>71</sup> MEDINA REPORT, 46.

<sup>72</sup> James R. Thompson pointed out in his paper on *Prejudicial News Reporting in Criminal Cases*, *supra* note 11, that, while sequestration is good in theory, "defendants are ordinarily reluctant to request that the jury be kept together during the entire trial. There is a fear that jurors who are thus inconvenienced may bear a resentment towards the defendant or may compromise their verdict in order to end the trial quickly. Then too, newspapers sometimes find their way into the jury room even though the jury has been locked up."

<sup>73</sup> *Irwin v. Dowd*, 366 U.S. 717 (1961) (concurring opinion).

<sup>74</sup> *Bridges v. California*, 314 U.S. 252 (1941); *Pennkamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).

<sup>75</sup> *Bridges v. California*, 314 U.S. 252, 263 (1941).  
<sup>76</sup> See *Wood v. Georgia*, 370 U.S. 375 (1962), where the Court said, at 389-390, "Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither *Bridges*, *Pennkamp*, nor *Harney* involved a trial by jury."

a criticism of the decision, and not, as in a jury case, a violation of a preexisting rule of court. And thirdly, the contempt proceedings in those cases were basically summary in nature.

If the suggestion of the Reardon Committee is followed, a rule of court would first issue proscribing the publication of material presented out of the hearing of the jury. The specificity of this prior notice should satisfy the objection in *Bridges* that the vagueness and generality of the contempt power requires a restricted usage. Secondly, the proposal of the Reardon Committee would require that a contempt case be tried to a jury and before a different judge than the one who issued the contempt citation. Since all of the rights and remedies of a normal criminal trial would be available to the defendant in such contempt proceedings, an objection to the summary nature would have no merit.

An alternative argument in favor of the exercise of the contempt power over a "recalcitrant press" is that, even if the clear and present danger test applies in a jury trial, a clear and present danger exists where material which would result in a mistrial or reversal—if admitted into evidence—is presented to the jury or potential jury by the news media. The Supreme Court has held that the prejudice resulting from the dissemination of inadmissible evidence "may indeed be greater than when it is part of the prosecution's case for it is then not tempered by protective procedures."<sup>77</sup> The logical conclusion of this argument is that a clear and present danger exists wherever circumstances are such that reversal on the grounds of prejudice to the defendant would result, as in *Rideau*, *Sheppard* and *Irwin*.<sup>78</sup>

State courts that have considered the propriety of judicial restrictions on the dissemination of news by the news media are about evenly divided in the result they reach. In the case of *Florida v. Mitchell*,<sup>79</sup> the trial judge, while refusing to grant an order prohibiting the dissemination of background information relating to any witness and the names of the jury, did prohibit the publishing of any "testimony heard by the court outside the presence of the jury and which is excluded from the evidence presented."<sup>80</sup> Two days later the same judge issued an order in the case of *Florida v.*

*Carlton*,<sup>81</sup> substantially the same in its restriction of the news media. This order was challenged in the state appellate courts and upheld.<sup>82</sup>

A contrary result was reached in Arizona. There in *Phoenix Newspapers Inc. v. Superior Court of Maricopa County*,<sup>83</sup> the state supreme court not only reversed the contempt citation of a newspa-

<sup>81</sup> No. 98731 (Crim. Ct. of Orange County, Nov. 10, 1966).

<sup>82</sup> *Florida ex rel. Sentinel Star Co. v. Hon. D.S. Lambeth*, No. 1141 (Dist. Ct. of App. for the 4th Dist. of Fla., Dec. 3, 1966) (*dismissed for lack of jurisdiction*). No. C.L. 66-5014 (Cir. Ct. of the 9th Jud. Dist., Dec. 23, 1966) (*petition for mandamus dismissed*).

In the *Speck* case, *supra* note 6, trial Judge Herbert C. Paschen issued orders which, among other things, prohibited the sale or release of transcripts until the conclusion of trial, and further prohibited sketches or drawings to be made in the court house. Finally, the order prohibited the release or publication of the names of prospective, selected or released jurors until the completion of trial, and placed the news media on notice as to the "impropriety of publishing material not introduced in the proceedings." It also contained a prohibition on the publication of anything occurring out of the hearing of the jury. Order Nos. VII, X, III, IX (Cir. Ct. of the 10th Jud. of Ill., Feb. 14, 1967). These restrictions were challenged in a mandamus proceeding in the Supreme Court of Illinois, *People ex rel. Tribune Co. v. Hon. H. C. Paschen*, No. 40507 (Feb. 24, 1967), by the *Chicago Tribune* which heralded the event with the banner headline: "*Tribune Fights Trial Gag*." Immediately the American Association of Newspaper Publishers as well as newspapermen all over the country lauded the efforts of the *Tribune* in fighting these "gags". *Chicago Tribune*, Feb. 28, 1967, at 1,2. Judge Paschen's guidelines were attacked in both the Illinois legislature, *Tribune*, Feb. 22, 1967, at 1, and in Congress, *Tribune*, Feb. 22, 1967, at 3, as an unwarranted restriction on the cherished right of freedom of speech and press. Even Judge Harold R. Medina, whose committee saw no constitutional way that a court could restrict publication of material not heard *in camera*, voiced the opinion the Judge Paschen was "probably overdoing it." *Tribune*, Feb. 27, 1967, at 1. In the midst of this furor, the Supreme Court of Illinois agreed to entertain the suit. Finally, before argument, the court issued a preliminary order directing Judge Paschen to: (1) allow the sale of transcripts; and (2) to allow the names of sworn or excused jurors to be published. *Tribune*, March 2, 1967, at 1. Even though the court had specifically reserved judgment of the merits of the other restrictions (such as that on publication of material not heard by the jury), until a full hearing was held, the *Tribune* claimed victory with the March 2nd headline: "*High Court Backs open Trials*," and dismissed the suit without prejudice. Obviously the victory, if any, for the press, is somewhat incomplete since the real issue—whether the trial court could control the publication of material not heard by the jury—was never decided. In fact it seems that in holding that the names of prospective jurors should not be published until their selection or dismissal, the court actually allowed restrictions on freedom of the press. When asked to make a statement on this turn of events, Judge Paschen appropriately notified reporters: "The judge said he is a litigant in a law suit and therefore has no comment." *Tribune*, March 2, 1967, at 1.

<sup>83</sup> 418 P.2d 594 (Ariz. 1966).

<sup>77</sup> *Marshall v. United States*, 360 U.S. 310, 313 (1959).

<sup>78</sup> Thompson, *Prejudicial News Reporting in Criminal Cases*, *supra* note 11 at 25.

<sup>79</sup> No. 66-9439 (Crim. Ct. of Broward County, Nov. 8, 1966).

<sup>80</sup> *Id.* at 10.

per company which had published an account of pre-trial hearings, but also voided the order of the trial judge which prohibited the publication of such proceedings. In so doing the court said:

The restraint imposed by the trial court in this case strikes at the very foundation of freedom of the press by subjecting it to censorship by the judiciary.<sup>84</sup>

#### CONCLUSION

Of all of the proposed solutions in the free press—fair trial debate, the one that seems best suited for countering the constitutional arguments of the free press advocates while at the same time insuring fair trials is the statutory scheme. It is worthy of mention that Mr. Justice Black, in *Bridges v. California*, said:

It is to be noted at once that we have no direction by the legislature of California that publicity outside the court room which comments upon a pending case in a specified manner should be punishable . . . [S]uch a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . . For here the legislature of California has not appraised a particular kind of situation and found specific danger.<sup>85</sup>

As is pointed out by Louis L. Jaffe<sup>86</sup> and Ronald L. Goldfarb,<sup>87</sup> much of the emphasis of *Bridges* and its progeny is on the illegitimacy of the contempt power as a vehicle for the regulation of speech and press. The chief complaints regarding the use of contempt in this area are that too much discretionary power is placed in the hands of one person,<sup>88</sup> and that the safeguards of a trial by jury are not observed.<sup>89</sup> If a statute were adopted proscribing the dissemination or publication of certain material, not only would its specificity eliminate discretionary enforcement, but the protections normally afforded an accused in criminal litigation would be available to a violator. Thirdly, such a statute would not constitute prior restraint on free speech and press since the violator would not be subject to punishment until he had breached its provisions. Finally, a statute would be a formulation by the duly elected representatives of the

people that a specific clear and present danger exists—such determination would no longer be in the hands of one man. That this last element is important is illustrated by an excerpt from one of the sedition cases, *Gillow v. New York*:

In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration . . . [Such question is closed] where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.<sup>90</sup>

Critics<sup>91</sup> and advocates<sup>92</sup> of the use of the contempt power over the news media, both recognize the statutory scheme as a more desirable vehicle for the resolution of these conflicting rights. Thus it is suggested that the following statute be enacted:

1.1 It shall be unlawful for anyone, from the time of arrest, issuance of an arrest warrant, or filing of a complaint, until completion of trial or final disposition without trial, to release or disseminate the following, knowing or having reasonable grounds to know that such will be published in any manner other than in the official reports of a court or legislative investigation:

- a) Prior record of the accused. It shall be a defense to any charge brought under this section that, prior to arrest of a suspect, the chief of police or his immediate assistants had, in the interest of apprehending such suspect, authorized the release of such information.
- b) The existence or contents of any confession or statement of the accused.
- c) The fact of performance or non-performance of any tests relative to the accused, or the results therefrom.
- d) The possibility of a plea of guilty by the accused to this or any lesser charge.
- e) The identity, testimony or credibility of prospective witnesses other than the victim or eyewitness.

<sup>84</sup> *Id.* at 596.

<sup>85</sup> 314 U.S. 252, 260 (1941).

<sup>86</sup> Jaffe, *supra* note 25, at 506.

<sup>87</sup> GOLDFARB, *THE CONTEMPT POWER*, 170 (1963).

<sup>88</sup> MEDINA REPORT, 39: "The prospect of judges . . . sitting as petty tyrants handing down sentences for contempt is not pleasant."

<sup>89</sup> *Green v. United States*, 356 U.S. 165, 219 (1957) (dissenting opinion of Mr. Justice Black).

<sup>90</sup> *Gitlow v. New York*, 268 U.S. 652, 670 (1925).

<sup>91</sup> GOLDFARB, *supra* note 87, at 302.

<sup>92</sup> Jaffe, *The Press and the Oppressed—A Study of Prejudicial Reporting in Criminal Cases* (Part II), 56 J. CRIM. L.C. & P.S. 166 (1965).

- f) Any evidence seized before, after or at the time of the arrest. However, it shall be permissible for the arresting officer to relate the circumstances of the arrest including the fact that accused was armed, or resisted, or had in his possession any "loot" of the alleged crime.
- 1.2 It shall be a defense to any charge brought under this section that the dissemination of any of the above occurred after its reception in evidence in open court.
- 2.1 It shall be unlawful for any news disseminating agency, company, or reporter to publish any material proscribed above until the same shall be admitted as evidence in open court.
- 3.1 It shall be a defense to a charge brought under this statute that:
- a) The publication of the prior record was authorized by the appropriate police authority. However, this defense shall not be valid if the publication occurred more than one day after the arrest of the accused.
- b) The publication of evidence seized and circumstances of the arrest was based on the account of the arresting officer. However, this defense will not extend to any publication made more than two days after the arrest of the accused.
- 4.1 A violation of any section of this statute is punishable by imprisonment in the county jail for not more than six months or a fine not exceeding \$10,000.00 or both.<sup>93</sup>

The above statute incorporates the substance of many of the rules of court recommended by the Reardon Committee. It seems, however, that using them in a statutory scheme is preferable to a rule of court in that: (a) it is on better constitutional footing since it is a "direction by the legislature . . . that publicity outside the the court room which comments on a pending case in a specified manner should be punishable." According to Mr. Justice Black in *Bridges*, "such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional

<sup>93</sup> The period during which dissemination and publication of prejudicial material is prohibited by the statute, is not extended beyond the trial stage. It has been argued that the proscriptions should remain in effect during the appeals and, in the event of a reversal, the new trial. It seems, however, that since the purpose of the statute is to insulate the jury, not the judges who have access to the proscribed material anyway, this policy will not be effectuated by such extension. Obviously once a new trial is ordered, the restrictions should be reinstated.

limitations;"<sup>94</sup> (b) constitutional problems of separation of powers when courts assume jurisdiction over police are avoided; (c) use of the contempt power, which relies on judicial discretion and does not provide for the safeguards of ordinary criminal trials, is avoided; and (d) constitutional problems involved in holding non-public proceedings are eliminated. It is also recommended that the Medina Committee's New Canon 20 and Police Code (reprinted in *The Appendix*), be adopted by the bar and law enforcement officials respectively. Finally, these suggestions are not intended to replace the control the court presently has over its employees and participants in a trial through the valid exercise of the contempt power.

It is not anticipated that the above suggestions will be welcomed with open arms by the news media. In spite of the fact that that certain members of that profession have seen fit to enact a voluntary code of self-restraint,<sup>95</sup> such codes not only are more replete with loopholes than the present Canon 20, but are the exception and not the rule. That it is unlikely any solution short of absolute freedom of the press will satisfy most newsmen is evidenced by the fact that in a Northwestern University conference of lawyers and newsmen, the latter group was unwilling to admit, in the absence of empirical data, that there was indeed such a thing as news coverage prejudicial to the accused.<sup>96</sup> Empirical data would indeed be helpful in resolving this situation. But the reversal of cases where courts believe there is inherent prejudice to the defendant makes it obvious that something must be done. Where there is a conflict between two provisions of the constitution, a balancing must take place. However, the balance must never be tipped away from the absolute right of the defendant to a fair and impartial jury. The statute above and the other regulations suggested are an attempt to protect this right. Indeed such would not be necessary if the Medina suggestions were followed and meaningful voluntary codes were adopted by the press, police and bar. However, the fact that the American Society of Newspaper Editors has recently condemned even the liberal Medina Report, emphasizes the fact that the press is not willing

<sup>94</sup> *Bridges v. California*, 314 U.S. 252, 260 (1941).

<sup>95</sup> Voluntary Code of the *Toledo Blade*, printed in *MEDINA REPORT*, 64-67.

<sup>96</sup> Conference on Prejudicial News Reporting in Criminal Cases, 186-201 (Inbau ed. 1964).

to budge an inch, and that as Judge Medina points out:

Frankly, I think those people don't know who their friends are.<sup>97</sup>

## APPENDIX

### A.

#### The Medina Committee

*Special Committee on Radio, T.V. and Administration of Justice of the Bar Association of the City of New York.*

#### RECOMMENDED NEW CANON 20

A. It is unprofessional for a lawyer publicly to make, or sanction the publication or broadcast of, an out-of-court statement or disclosure of fact or opinion regarding a pending or anticipated civil action or proceeding or criminal prosecution. It is therefore the ethical responsibility of lawyers to refrain from the public issuance of statements or other disclosures relating to such action, proceeding, or prosecution, which concern:

1. The merits of the claims of a plaintiff or defendant in a civil action or proceeding, or guilt or innocence of a defendant in a criminal prosecution;
2. The existence or contents of a party's confession, admission, or other pre-trial declaration;
3. Testimony or other evidence to be offered at trial;
4. Matters of fact bearing upon the cause, which will not be offered in evidence at trial;
5. The credibility or reliability of witnesses, or the probative force of other evidence offered or to be offered at trial;
6. Testimony or other evidence which has been excluded by the court;
7. The conduct, reputation or criminal record of any party or witness;
8. The rulings or decisions of the court during the litigation;
9. Any other matter which may tend to interfere with a fair trial, or may otherwise tend to prejudice the due administration of justice.

B. It is the duty of a lawyer engaged in a civil action or proceeding or a criminal prosecution to attempt to restrain his client and witnesses from

making any out-of-court statement or disclosure of fact or opinion proscribed by this canon.

C. The foregoing, however, shall not be deemed to restrict the issuance of a brief statement by a lawyer concerning:

1. His client's intention to plead not guilty in a pending criminal prosecution, or to defend a pending civil action or proceeding;
2. The identity of the defendant in a pending criminal prosecution or the fact, the time and the place of his arrest, or the charge or charges against him;
3. The identity of the parties to a pending civil action or proceeding, the claim asserted and the amount in controversy.

#### RECOMMENDED CODE FOR POLICE AND LAW ENFORCEMENT AGENCIES

##### A. Concerning the Defendant

1. The release of information concerning the defendant shall be limited to his name, age, occupation, marital status, and personal data not related to the crime or the character of the defendant. His criminal record, prior medical and psychiatric history, or military disciplinary record, if any, shall not be released. No other information that is clearly prejudicial to the defendant shall be released.

2. No statement of any nature made by the defendant, or the substance thereof, shall be released. No reference shall be made to any test taken by the defendant or that he has refused to take.

3. The announcement of the arrest of the defendant may include, in addition to the information authorized in paragraph A.1, the time, place, and manner of apprehension, as well as the text or summary of the charge, information, or indictment. No comments shall be made relating to his guilt or innocence.

4. News media shall not be permitted to interview the defendant, with or without his attorney's consent, while he is in police custody.

5. News media shall not be permitted to photograph or televise the defendant while he is in police custody and in other than a public place. This prohibition extends to such instances as where he is being interrogated, where he is being processed ("booked") following arrest, where he is in a lockup or detention facility, or where he is at a hospital bedside for identification purposes. The defendant shall be escorted through public

<sup>97</sup>TIME, March 10, 1967, at 97.

places as expeditiously as possible. While the news media shall not be prevented from photographing or televising the defendant in a public place, he shall not be halted or posed for their convenience.

6. Where the defendant is still at large, and it appears that he is a fugitive from justice, additional information that may reasonably and directly aid in effecting his apprehension, including his photograph, may be released.

#### B. Concerning the Crime, the Investigation, and the Arrest

1. A general description of the crime shall be made available to the news media. Gruesome or sordid aspects which tend unduly to inflame public emotions shall not be released. Witnesses shall not be identified by name or otherwise, nor shall any comment be made concerning their credibility, their testimony, or their identification of the defendant.

2. Wherever possible, the taking of photographs of maimed or deceased victims shall not be permitted.

3. No comment on the apparent motivation or character of the perpetrator shall be made.

4. No information concerning scientific evidence such as laboratory or ballistics tests or fingerprints shall be released.

5. At the time of arrest, in addition to the information which may be released concerning the defendant, the announcement may include the identity of the investigating and arresting officers, and the time duration of the investigation.

#### C. General

1. A member of the police agency shall be designated as the Information Officer responsible for the dissemination of all information to the news media. It will be the responsibility of the Information Officer to supervise the enforcement of these regulations and to solicit and encourage full cooperation of news media. No member of a police agency may furnish any information to news media without prior approval by the Information Officer. No interviews shall be permitted with investigating or arresting officers.

2. Wherever feasible, the Information Officer will encourage news media to enter into pool arrangements so as to reduce confusion and interference with the orderly processes of law enforcement. It shall be a prime responsibility of the Information Officer to insure a calm and orderly

atmosphere during the dissemination of information to news media.

3. The above regulations are to be adhered to even in those instances where charges of police inefficiency or misconduct appear in the public press or where the published reports are misleading or inaccurate. It shall be the obligation of the Information Officer to refuse to elaborate on the information previously released under this Code, except in those circumstances where the correction of false publication may serve to assist in the apprehension of the defendant or will not prejudice his right to a fair trial. The failure on the part of others to maintain adequate standards will not justify avoidance by police agencies of their responsibilities to insure the ends of justice.

#### B.

#### A Suggested Code of The Chicago Police Department\*

##### I. Purpose

The purpose of this order is to:

- A. Continue present policy of assisting newspapers, radio, television, and other news media to gather news information until a person is arrested.
- B. Comply with the recent United States Supreme Court decision in *Sheppard vs. Maxwell* regarding the release to newspapers, radio, television, and other news media of prejudicial information regarding persons arrested.

##### II. News Dissemination Regulations

- A. Every effort will be made to release current information without partiality. Information will not be withheld or delayed in order to favor any particular news media representative or agency.
- B. Authorized news media representatives are issued press cards by the Department as provided in the Municipal Code. When not known they will be required to identify themselves by this means.
- C. Except as provided in paragraph II-E, teletype messages, accident and miscellaneous incident exception reports and field case reports will be open for inspection in districts and area headquarters to representatives of the press or other news media

\* Prepared during the administration of Superintendent O. W. Wilson, but without any action being taken thereon.