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The Fair Trial-Free Press Controversy - Where We Have Been and Where We Should Be Going

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*Paul C. Reardon**

INTRODUCTION

On October 2, 1966, the report of the American Bar Association Advisory Committee on Fair Trial and Free Press[1] was released as a tentative draft. The release culminated twenty months of intensive work by the Committee, its Reporter, and its research staff. Since then, many thousands of copies of the draft in printed form have been distributed to judges, lawyers, schools of law and journalism, and to persons in responsible positions in the press, radio and television whose all important function is to keep the American people informed. The news media and other groups have also completed studies to which I shall refer. A great and entirely desirable debate has now been under way for a number of months. In the remarks which follow, it is my purpose, speaking for myself alone, but reflecting, I hope, the general sentiment of our Committee, to examine the current posture of the Fair Trial-Free Press issue with some preface to indicate the chronology of events which have contributed to the present debate, and with some recommendations for the future.

First, it would be something of an exaggeration to assert that the news media of this country welcomed what we had to say with expressions of unalloyed delight. I have the distinction, and it is probably unique, of having perused well over four thousand news clips relating to the release of the report, as well as large numbers of magazine articles, television station editorials, and public statements by individuals who felt compelled to speak out. I thus harbor a reaction to the reaction. It seems to me that in gross, and with the exception of a number of very inquiring and perceptive editorials,

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This article was adapted from an address delivered by Justice Reardon in connection with the Distinguished Speakers Program at the University of San Diego School of Law, February 14, 1967.

1 STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS—AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (tentative draft December, 1966) recommended by the Advisory Committee on Fair Trial and Free Press (hereinafter cited as THE COMMITTEE REPORT), available at the American Bar Association, 1155 East 60th Street, Chicago, Illinois, at $2.00.

the media have chosen to jump, and jump hard, not only on our proposals but also upon the reasons for our existence and, sadly in some instances, upon our motives. It is possible for me to illustrate this statement with a myriad of references. However, one will suffice and it is representative of many:

> We regard the A.B.A. proposals as inimical to public safety and a denial of the public's right to know. We sometimes wish that committees of busybodies seeking to infringe on the freedom of the press would read the 1st amendment before they leap into action.[2]

The minor depression resulting from reading a plethora of editorials exuding that temper has been counteracted temporarily by certain other editorial comment such as:

> This is a sincere and careful job and individual editors, exercising their individual judgments, unquestionably will give very serious consideration to what the committee says about the responsibility of the press to help protect the fair trial principle.[3]

And thus we members of the Committee find ourselves in somewhat of a maelstrom, waiting and hoping for careful comments, criticisms and suggestions, and reluctant to proceed until we are satisfied that we have garnered as much of all three as may originate from any and all responsible sources.

HISTORICAL BACKGROUND

With that much background, a little reference to history is in order. For many years now the tensions in the area of fair trial-free press have concerned thoughtful people. The impetus to study them has roots in the distant past. The constitutional draftsmen of our states and nation were steeped in the history of the Star Chamber, the Five Knights case,[4] and that of John Lilburn.[5] Colonial endeavors at news suppression as illuminated in the Zenger[6] trial were known to them. In my own state of Massachusetts, John Adams, the principal author of our Constitution of 1780, placed before the State constitutional convention the article which guaranteed to the press in Massachusetts the freedoms which are now classic, and this was eight years before the adoption of the Federal Constitution and eleven years before the adoption of its first ten amendments. In the

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2 Chicago Tribune, Oct. 3, 1966 (editorial).
3 Washington Evening Star, Oct. 5, 1966 (editorial).
4 3 HOWELL'S STATE TRIALS 1 (1627).
5 3 HOWELL'S STATE TRIALS 1315 (1637).
6 17 HOWELL'S STATE TRIALS 675 (1735).

Massachusetts convention which ratified the Federal Constitution it was proposed that such ratification be conditioned upon the addition thereto of a Bill of Rights. Samuel Adams fought for the inclusion in the ratification of a prohibition on the Congress from infringing "the just liberty of the press" and the string on the ratification by Massachusetts did not contain the prohibition simply because the Convention was content that this local liberty was amply provided for in the Massachusetts Constitution, then eight years old, and today the oldest working constitution in the world.

I refer to all of this as an early instance of the concern of lawyers for the problems of free press and fair trial. It was John Adams, a lawyer, who gave us first in Massachusetts from his prodigious knowledge of constitutional concepts and brought to our constitutional convention the writing which resulted in free press guarantees for our Commonwealth. It was also John Adams at an earlier day who acted with enormous courage and at substantial personal risk in undertaking the defense of the soldiers who stood accused following the Boston Massacre simply because of his deep personal view that every man was entitled to a fair trial.

I suggest that there are not lacking in our later history other evidences along the same line. Men of the law have consistently supported a free press when its need was greatest. I would hope, therefore, that however much disagreement there may be with our proposals in part, the suspicion, which has already found voice, that as lawyers and judges we are agents of suppression, muzzling of the press and advocates of the return of the Star Chamber will not continue.

The immediate reasons for the establishment of our Committee lay largely, of course, in the presidential assassination. The Warren Commission had stated that the event was "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 an individual to a fair and impartial trial."[7] The Commission had urged that the bar, law enforcement agencies, and the news media work together "to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."[8] In a sense the Commission report

[7] REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 242 (Doubleday & Company, Inc.) (1964).
[8] *Id.* at 27.

focused on the press-trial problem to the extent that something in the nature of a challenge was thrown out to the proper parties to get on with some resolution of the problems the Commission was talking about. But the Commission was not alone. Those of us who had for some years been engaged in working on judicial seminars around the United States were made acutely aware, even before the Warren Commission reported, that as trial judges, and I was then one of them, we had a very real enigma to fathom. Time and time again it was my personal experience in these meetings to sense the preoccupation of hard-working jury trial judges all over the country with finding some answer to the practical difficulties which seemed to besiege the free course of trial in the face of prejudicial publicity of one kind or another. In states where judges are elected, and that is the vast majority, the dilemma of the dedicated trial judge was hard indeed. We have well over three thousand nisi prius trial judges in this country. I have met hundreds of them and I never returned to my home base after the many meetings with them without a feeling that of all the problems they faced, whether in the field of sentencing, of proper employment of probation, of relief of congested trial dockets on the civil side, or others, the question of how best to handle pre-trial and trial publicity with fairness to the public and the defendant alike was uppermost in their minds. That this still is the case is disclosed in the answers we received on one of a number of questions we addressed to trial judges in one of our Committee surveys when 55 out of 68 voiced support of a rule of court restricting attorneys and law enforcement officials with respect to release of information in criminal matters. The call for an attack on prejudicial publicity, however, was most succinctly phrased, in my opinion, in an address by Dean Griswold of the Harvard Law School which he delivered before the Section of Judicial Administration of the American Bar Association in August of 1964 in New York. As a departure point for a study, nothing that I have heard or read set out the job which lay before the Committee better than this. The Dean stated a view "that the basic problem will be greatly simplified if the legal profession, both individually, through the organized bar, and through the courts, more fully recognizes its basic responsibility in this area, and takes firm and clear steps to meet this responsibility."[9] He then called for some remedial action by way of new ground rules for lawyers and law enforcement agencies with appropriate sanctions to enforce them.

[9] Griswold, *Responsibility of the Legal Profession*, Harvard Today, Jan., 1965.

THE COMMITTEE

At the same meeting at which Dean Griswold spoke, the American Bar Association authorized a three-year broadscale study, financed by grants from three foundations, by the Project on Minimum Standards for Criminal Justice. Chief Judge Lumbard of the Second Circuit undertook to lead the project and our Committee became one of six dealing with various facets of the administration of criminal justice. I pause to note that once we had come together, I took a look around and concluded that the Committee was not heavily laden with bleeding hearts. Our membership comprised two federal judges, one state supreme court justice, one former federal judge and Deputy Attorney General of the United States, two former A.B.A. presidents also members of the President's Commission on Law Enforcement, one greatly experienced New York jury trial judge, the State's Attorney for Cook County, Illinois, the dean of a law school and former prosecutor, a California attorney who was also a former prosecutor and president of the American College of Trial Lawyers, and a Washington attorney of note soon to be a member of the Supreme Court of the United States. It did not seem to me then, nor does it now, that this was an aggregation which would do other than perform the task assigned to it in the fairest manner possible.

THE RESEARCH PROGRAM

At the threshold, the Committee was met with strong suggestions from some quarters that it was time to lower the boom by means of direct restrictions on the press. "It's time to give them the English treatment," we were advised. What was urged upon us was amply described in the Sherrill lectures given some years ago at Yale by Sir Patrick Devlin, then Justice of the High Court of England. He said that the process of contempt was a weapon used "in a manner which I am sure would startle most pressmen in the United States. Any comment on a matter that is sub judice and the publication of any facts, not part of the evidence, that might influence a jury one way or the other is capable of being contempt of court, even though it is done innocently or by an error of judgment or under an honest mistake."[10] Though there has been some slight amendment of that regimen since he gave the lectures, he stated what is essentially the

[10] THE CRIMINAL PROSECUTION IN ENGLAND 119 (Yale University Press, New Haven, 1958).

English rule today. Now, notwithstanding some press comment to the contrary, we refrained from adopting the English views and no fair reading of our recommendations can lead to an opposite conclusion. I must say we were impressed by the vigor with which our English brothers enforced their restrictions—a complete contrast to our own experiences under Canon 20 which has never to our knowledge, with one minor recent exception, been enforced in any court at all. Yet it should be made clear that we did not recommend any statutory restrictions on the press—and there have been legislative proposals to this end in this country lately—nor did we recommend any expanded use of the contempt power. We refrained in the interests of free public discussion of issues which might be stifled under British rules and also because of our own constitutional history. We were further convinced of the wisdom of this course from consideration of the difficulties attendant upon the drafting of restrictive statutes and because of the growth of restraint in reporting which has recently marked a segment of the American press and which springs from sober policy-making in this field in the central management of the newspapers concerned. It also seemed to us that, as Ronald Goldfarb has said, "the greatest failure of English contempt law is its disrelation with its most valuable object—protection of fair trials. It is of little service to an accused person who is written into jail by a prejudiced press that the publisher or editor is fined or imprisoned. . . ."[11] We thought also of our American paradox where a reversal on the ground of prejudicial publicity, as Zelmam Cowen once put it, "may well produce the result that guilty men will go free because the courts deny to themselves the power to control publicity which tends to prejudice the conduct of trials, the verdict in which they will subsequently nullify because, *and only because*, of that prejudicial publicity."[12] In sum, therefore, the Committee veered away from English practice. I reiterate that one would hardly think so in the face of some of the comment I have read.

Having defined an avenue down which we did not go, I should like to discuss the method of our research and the net effect of what we did recommend. First we were joined by a Reporter, David L. Shapiro, Professor at the Harvard Law School with experience as a

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[11] *Fair Trial vs. A Free Press* 14 (1965) (An occasional paper on the Free Society published by the Center for the Study of Democratic Institutions of the Fund for the Republic).

[12] *Id.* at 12.

practicing lawyer. Under him a team was put together which undertook, and I can most quickly quote the report, " a broad program of library and field research, including a full review of the literature and reported decisions in a number of areas, a first-hand appraisal of the approach adopted in the United Kingdom, and a concentrated study of the practices and attitudes prevailing in three American cities. . . ."[13] A one-month content analysis was made of the newspaper of greatest circulation in twenty American cities and questionnaires were dispatched to police officials, prosecutors, defense counsel, judges and editors in those cities. In the meantime the Committee came together from time to time and met also on three occasions with designated national representatives of the news media and also with nationally known high police officials. I wish to make it clear that the report, which reflects the collection of a sizable amount of information procured through these means, makes no claim that it is exhaustive. It is easy to visualize a pattern of research that could consume years. Such research, including an elaborate empirical study of juror behavior and the forces that affect that behavior, may be feasible and desirable but I am inclined to doubt that the net result of such an effort would lead to conclusions differing in essence from those which we have reached. I make, therefore, no apology whatever for the method and extent of our survey. It was sufficient to enable us to conclude as we did—that there is a large number of cases in which a substantial danger of an unfair trial is created because potentially prejudiced information has reached the eyes and ears of the triers of fact.

RECOMMENDATIONS OF THE REPORT

The Committee's recommendations are simply stated and are directed almost exclusively to courts, to lawyers, and to law enforcement agencies. They revolve around the strengthening of present Canon 20 of the Canons of Ethics. As you are no doubt aware, Canon 20 in its present form is framed in the most informal terms, and without detail condemns in general "newspaper publications by a lawyer as to pending or anticipated litigation." There are more escape hatches than working space on that particular ship. We recommend the adoption of restrictions carefully limited as to time on the release of certain types of prejudicial information by lawyers and law enforcement officers. We seek appropriate rules of court

[13] THE COMMITTEE REPORT at 19.

and police departmental rules to carry out the provisions of the recommendations. We do this for our researches tell us that members of the bar and law enforcement officers are the source of most of the prejudicial news coverage. The recommendations would restrict lawyers and the police from disclosure of an accused's prior cirminal record, the existence or contents of any confession, or an accused's failure to make any statement, the performance of any tests or examinations, information surrounding prospective witnesses, the possibility of a guilty plea by the accused, and the defendant's guilt or innocence, or other matters relating to the merits of the case or the evidence in the case. These are the heart of the recommendations although we have made certain suggestions relative to the conduct of judicial proceedings in criminal cases with which I think few will disagree. We have also recommended a limited use of the contempt power against: (1) a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected, disseminates information relative to the defendant or the issues of the case that goes beyond the public record of the court if the statement is wilfully designed to effect the outcome of the trial and seriously threatens to have such an effect, (2) a person who makes such a statement with the expectation that it will be so disseminated, and (3) a person who knowingly violates a valid judicial order not to disseminate certain specified information until the completion of the trial or other disposition of the case. I emphasize that this is a very narrow use of the power of contempt.

I also emphasize that provisions were made for eventual publication of a complete record of any proceedings taken in any preliminary hearing, bail hearing, or any other pretrial hearing in a criminal case where the hearing is held in chambers or otherwise closed to the public. I emphasize, too, that under our recommendations there would be no evidence taken at any time during the course of a trial which would not be eventually fully open to public inspection, and I make particular reference to that evidence taken outside the hearing of a jury. In a speech in New York on January 27, 1967, President Marden of the American Bar Association highlighted what our report did not recommend, and, subject to what I have already said, let me quote to you the effect of the report as he properly stated it:

> It would NOT restrict the public release by prosecutors or police of the full facts and circumstances of an arrest at the time it was made, together with information as to evidence seized.

> It would NOT proscribe official disclosure of the fact that an investigation was under way in any area of criminal conduct.
>
> It would NOT restrict the press or other news media from disseminating publicly any information the media could develop through their own initiative or resources about crimes committed or about the administration of justice.
>
> It does NOT advocate legislative restraints against the news media, or any impairment of their freedom to criticize the courts or any aspect of the administration of justice. It specifically rejects that approach.

I might also add that the report did not recommend restrictions on a description of the offense charged, a request for evidence, or the release of any information needed in aid of the apprehension of a suspect or to warn the public of any dangers he may present.

Let us now turn from the contents of the report to the reception of the report by the public.

PUBLIC REACTION TO THE REPORT

As I have previously stated, the publication of the report has produced repercussions. I should like to look with you at some of these.

First, there was immediate reaction from the American Society of Newspaper Editors through its committee which works on this subject. A lengthy release[14] from the Editors applauded us for our efforts and promised a continuation of the cooperation which we have enjoyed with them. The Editors took a very dim view, however, of our recommendations relative to strengthening Canon 20 and inhibiting releases by law enforcement agencies. They said, "Putting prior restraint on news sources is equivalent to putting prior restraint on the press." Our Committee is of the opinion that proper disciplines exerted to produce a fair trial cannot be so characterized, particularly when all information withheld for a time under our recommendations will eventually be out in the public domain. We are convinced that the years have proven that it is not the press, and the press alone, that can be the judge of what public statements should be made by lawers and law enforcement officials.

The Editors in setting up their guidelines said, "What is published is, and under the American constitutional system must remain, the

[14] The Bulletin of the American Society of Newspaper Editors, No. 502, Nov. 1, 1966, at 1.

responsibility of the individual editor." Assume gross infractions by the press the vice of which anyone would admit, and I might note that some have occurred since our report came out; is it to be argued that there should be no endeavor to correct such abuse at the source? The Editors' comment and proposals in essence hold that conditions are all right as they are. They alluded to an alleged paucity of cases in which prejudice resulted in a mistrial or a conviction that was reversed. But, as we have pointed out in our report, in a recent period of but little over two years ending in March, 1965, there were approximately one hundred reported decisions in cases where the issue of prejudicial publicity was raised, and in a great many of these the claim was plainly substantial.

We have said this is but the top of the iceberg for much discretion is vested in these matters in the trial judge. And there is evidence that this discretion is coming under increasing appellate concern. Furthermore, for every reported appellate decision there lie underneath numerous matters handled without review of trial court action. Of these we have catalogued not a few. What one does not find in a central reporting service is an adequate description of the endless days spent on voir dires at great private and public expense prior to the commencement of trial where everyone in attendance from the judge down is wrung dry in interrogations based on possible juror prejudice emanating from dangerous publicity. Any judge who has gone through this either at the nisi prius level or in review of a record containing hundreds and hundreds of pages setting out the process before a jury is finally seated is likely to hold strong views. One English observer of distinction wrote recently: "Having been present for two days at a voir dire in New York I can testify that the questioning of the proposed jurymen was directed almost entirely to what they had been reading, or might have been reading, in the local press about the characters and antecedents of the accused and their prospects of acquittal or conviction. If, as in the United Kingdom, the newsmen were prohibited from discussing these subjects at all, the lengths of the voir dire might diminish almost to vanishing point with a vast saving of time and money."[15] I thus fear the Committee has a rather basic disagreement with the Editors as to whether we have a problem.

Turning to the stand of the American Newspaper Publishers, one discovers that their position is not greatly diverse from that of the

[15] C. P. Harvey, FAIR TRIAL, v. FREE PRESS. A BRITISH LAWYER'S VIEW. Los Angeles Bar Bulletin, Jan., 1967, at 112.

Editors. They have very recently published their study on fair trial and free press.[16] As I have publicly stated, there is much in what they have said with which our Committee is in agreement. We too hold that there is no basic incompatability between the guarantees of the First and Sixth Amendments. The potential of the press in assuring fair trial, which they allege, finds us in hearty sympathy. We agree, with limitations, that "the press has a responsibility to allay public fears and dispel rumors by the disclosure of fact." We agree that "no rare or isolated case should serve as cause for censorship and violation constitutional guarantees." We agree that neither the press nor the bar "has the right to sit down and bargain" away the people's right to a free press. The Committee does not consider itself so engaged. But we emphatically disagree that "the presumption of some members of the bar that pretrial news is intrinsically prejudicial is based on conjecture and not on fact." We disagree, first, because we do not contend that *all* pretrial news is necessarily prejudicial, and we reassert that there exists a history rather fully documented in our Committee report to demonstrate to any impartial observer that *some* publicity is prejudicial and that we are not proceeding on hunches or unjustified assumptions. The marrow of the report of the Publishers is: "Things are all right. Don't rock the boat!" We regret our inability to accede to those gentle persuasions. There is a problem and all of us must face up to it. The underside of the rug is now taxed to capacity. Perhaps the most startling assertion in the Publishers' study is that which interdicts any attempt to establish codes for, say the Publishers, "from our standpoint any such codes would be without value because there is no way to enforce them." In other words, the Publishers are saying that the Committee's recommendations are not worthy of adoption because teeth would be provided in the form of such sanctions as the legal profession utilizes in its own house; at the same time the Publishers opine that codes are worthless for the press because the codes lack a biting edge. This stance completely negatives the moderate proposals of the Warren Commission and must come as a shock indeed to the publishers and editors in those states where there has been press-bar cooperation on codes for some years now. And yet, how true the statement in some states, for in my own Commonwealth we have for some years had a code to which a number of metropolitan dailies have not subscribed. It is only fair to state that many news-

[16] FREE PRESS AND FAIR TRIAL (American Newspaper Publishers Association, 750 Third Avenue, New York, New York 10017) (1967).

papers in Massachusetts have been and are doing their best to abide by it. I submit to you that the position of the Publishers must necessarily undergo some change if the fair trial-free press problem is to be resolved. I cannot forbear, and in good spirit, to quote to them a portion of an editorial from one of their number, in one of the most respected dailies in these United States. In commenting upon our report the writer said, "One can dismiss the protests of the American Newspaper Publishers Association as patently selfish and short-sighted. To argue that 'there is an over-zealous concern for the rights of defendants' shows that the ANPA remains determined to keep well behind the times."[17] I doubt this for I have worked with the Publishers and they are men of principle. But I do look forward to some future meetings which may help untangle some of their thinking as well as assisting ours.

Also issued in December, 1966, was the statement of the directors of the American Civil Liberties Union.[18] Reference was made therein to the concern and action of this body in 1958 and to a belief that no positive corrective action had been taken since. The ACLU thus called upon courts, legislators, bar associations, and mass media to adopt specific standards accompanied by appropriate sanctions. The suggestions of the statement are closely parallel to our own. If we vary, it is in the strictly limited application of contempt to the circumstances which I have described. Interesting to note is the agreement of the ACLU directors with our suggestion on the handling of the criminal records of the accused where we have parted company with the instructions of the Attorney General to the Department of Justice, that being the sole item of divergence between us and the Attorney General.

CONCLUSION

In summing up, there are certain facts which I wish to call to your attention. During these months of study and debate, some of the agencies of publicity have made a sterling endeavor to discharge their responsibilities in the fair trial-free press area. One thinks of the guidelines which the Columbia Broadcasting System set for itself,[19] as well as those of the Toledo Blade and Times.[20] There are

17 Louisville Courier Journal, Oct. 2, 1966 (editorial).

18 STATEMENT, BOARD OF DIRECTORS ON FAIR TRIAL AND FREE PRESS (American Civil Liberties Union, 156 Fifth Avenue, New York, New York 10010) (Dec., 1966).

19 *Hearings on S. 290 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., 455-56 (1965).

20 Toledo Blade and Times, Aug. 21, 1966, at 1, col. 8.

many thoughtful editors who are disturbed and concerned. I know this for I have heard from some of them. They at least recognize the problem and heartily wish to work it out. I have in mind, for instance, an editorial in the Patriot-Ledger, a Quincy, Massachusetts newspaper.[21] Let me quote to you a few lines. "No newspaper, radio or television station has the right to disseminate prejudicial information prior to or during a trial that will make it impossible for the accused to secure fair and impartial justice. As a responsible newspaper, we believe the right to an impartial trial must take precedence in any clear-cut issue involving pretrial publicity. . . . The public has the right to know the truth. However, this right does not extend to irresponsible reporting, to prejudicial statements by prosecutors and police, or to hearsay or rumor. There have been too many examples of this type of irresponsible reporting of crime news to ignore the fact that there is a very real problem involving pre-trial publicity. To end these abuses and to protect the rights of the accused, we need explicit guidelines spelling out exactly what kind of information about a defendant can be revealed before his trial and which information should be withheld. These guidelines must apply to lawyers, the police, the judiciary and the news media as to their respective responsibilities in the handling of information relating to persons accused of crimes." Other editorial examples could be cited, as I said initially.

I sense at the same time a concern on the part of the press that this debate will lead to the secrecy which tarnished court procedures in the days of the Stuart kings and which our forefathers strove valiantly to erase. Already, it is said, the recommendations of the Advisory Committee report are being applied throughout the country and news sources are drying up. The carefully phrased order[22] of Judge Talty relative to press conduct when he presided over the second Sheppard trial recently is cited as a portent of further restrictions to come. And yet at least one reporter in that closely supervised trial has written to the effect that what seemed impossible from the press point of view at first, worked out well indeed in practice as the trial proceeded. Some of the most fascinating reactions which have reached me have come from editors and judges in the British Commonwealth who wonder what all the press worry is about. One such letter from an editor in Sydney, Australia remarked that he had read our work, that it was so moderate he could not understand the

21 The Patriot-Ledger, Jan. 7, 1967 (editorial).

22 Order issued on No. 64, 571, Court of Common Pleas, Cuyahoga County, Ohio, Oct. 19, 1966, State of Ohio v. Sam H. Sheppard.

play-back that we were receiving, and concluded in effect that we had launched only a challenge to good reporting. Whether this be so I cannot say.

Finally, I should like to refer you to Mr. Justice Frankfurter, who exhibited great sensitivity in dealing with fair trial and free press. In the dissent in *Stroble v. California*, he said, "The moral health of the community is strengthened by according even the most miserable and pathetic of criminals those rights which the Constitution has designed for us all."[23] Again, concurring in *Irvin v. Dowd*, he said, "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."[24]

The whole task of the Committee has been to alleviate those conditions to which Mr. Justice Frankfurter referred. We have attempted to do this by the imposition of self-disciplines on the agencies and actors over which we believe the courts have control. In so doing we have followed the past press suggestion that we clean our own house. It remains only to say that in this debate, as President Marden of the American Bar Association recently stated, there should be no winners. It is not a question of winning a battle. Rather there is opportunity for all good Americans, be they in the media, on the bench, or among the bar, to go forward together to settle what differences may exist to the end that the administration of criminal justice may be strengthened and to the end that, this question having been resolved, we may in company move on to other spheres. The American news media have the Committee's pledge of further full cooperation, so that in concert we may in free and open discussion find the answer which I firmly believe we all are seeking.

[23] 343 U.S. 181 (1952).
[24] 366 U.S. 717 (1961).