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ABA Recommendations: A Newspaperman's Critique

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THE ABA RECOMMENDATIONS: A NEWSPAPERMAN'S CRITIQUE

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On February 3, 1965, a special committee of the American Newspaper Publishers Association was appointed to make a thorough study of the relationship between a free press and fair trial. Gene Robb of Albany, New York, then the president of ANPA, announced the appointments to the twelve-man committee and detailed its responsibility:

> The public interest is paramount in any consideration of these two constitutional guarantees — a free press under the First Amendment and a fair trial under the Sixth Amendment. These few instances where they appear to be in conflict should be resolved without any loss of our liberties. Indeed the studies now embarked upon concerning the relationships of a fair trial and free press in the administration of justice ought to help preserve and strengthen both. That is our purpose.[1]

The Committee, headed by D. Tennant Bryan of Richmond, Virginia, and on which I was privileged to serve, took that statement as its charge. For nearly two years it reviewed the continuing dialogue among members of the bench, bar, press, and law enforcement officials. It met with various groups, including the American Bar Association Advisory Committee on Fair Trial and Free Press, directed by Judge Paul C. Reardon of Massachusetts. The ANPA Committee reviewed many documents, speeches, and writings on the subject and commissioned the general counsel of ANPA to make a major legal study, which was to include pertinent case law under American jurisprudence, as well as the historical concepts and background leading to the adoption of the Bill of Rights.

As a result of this study, the Committee reached certain conclusions, which were contained in a report published on January 5, 1967.[2] Ten points emerged:

> 1. There is no real conflict between the First Amendment guaranteeing a free press and the Sixth Amendment which guarantees a speedy and public trial by an impartial jury.
> 2. The presumption of some members of the Bar that pretrial news is intrinsically prejudicial is based on conjecture and not on fact.
> 3. To fulfill its function, a free press requires not only freedom to print without prior restraint but also free and uninhibited access to information that should be public.
> 4. There are grave, inherent dangers to the public in restriction or censorship at the source of news, among them secret arrest and ultimately secret trial.
> 5. The press is a positive influence in assuring fair trial.
> 6. The press has a responsibility to allay public fears and dispel rumors by the disclosure of fact.

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1 ANPA SPECIAL COMM. REPORT — FREE PRESS AND FAIR TRIAL ix (1967) [hereinafter cited as ANPA REP.].

2 *Id.* at 1-10.

> 7. No rare and isolated case should serve as cause for censorship and violation of constitutional guarantees.
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> 8. Rules of court and other orders which restrict the release of information by law enforcement officers are an unwarranted judicial invasion of the executive branch of government.
>
> 9. There can be no codes or covenants which compromise the principles of the Constitution.
>
> 10. The people's right to a free press which inherently embodies the right of the people to know is one of our most fundamental rights, and neither the press nor the Bar has the right to sit down and bargain it away.[3]

The ANPA report was based upon an independent study and was prepared independently of other reports in the free press-fair trial field. Thus, it was not intended to be an answer to the American Bar Association Advisory Committee Report,[4] although it might well serve as one, since it has been endorsed by all of the officers and leaders of the major press organizations, including the ANPA Board of Directors, the American Society of Newspaper Editors, the Associated Press Managing Editors Association, and Sigma Delta Chi journalism fraternity.

Although I commend the purposes and principles enunciated in the ABA Report, as well as the diligence of that committee in its application to the task, there are major areas in its report that cause me concern. One of the disturbing aspects of the ABA Report is the apparent presumption, from the beginning, that pretrial news in criminal matters is inherently prejudicial.[5] This presumption seems to run as a thread throughout the entire report. Despite cases cited by the ABA Committee in which it believes prejudice resulted, it remains still a belief, a theory, and not a fact.[6] There is no clear evidence that news of criminal matters published prior to the trial of a defendant has any detrimental effect on a fair trial. Indeed, in more cases than not, the reverse may be true; for such reporting may well be the best guarantee that a defendant will receive a fair trial. Another concern is that the ABA Committee recommends a course of censorship at the source of information,[7] a prior restraint on a free press that goes counter to the guarantees of the first amendment.

At the time of the creation of the ANPA and ABA committees, there were statements that the first and sixth amendments were on a collision course. Our studies show, and the American historical experience gives ample support,[8] that these amendments are not incompatible, but mutually supportive. Indeed, there can be no fair trial without a free press; and without fair trial, no freedoms can exist. As the ANPA Report states:

> It is obvious that the First and Sixth Amendments are so interrelated and so dependent, one upon the other, that modification or dilution of either on the fallacious premise that such action would strengthen the other

3 *Id.* at 1.

4 ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft 1966) [hereinafter cited as ABA REP.].

5 See *id.* at 20-25.

6 ANPA REP. 2.

7 See ABA REP. 2-15.

8 See ANPA REP. 19-44.

> would, in itself, represent a betrayal of the intent of the framers of the Constitution.[9]

The American press, of course, must be as steadfastly devoted to the principles of fair trial as it is to the principles of free press, and its insistence that justice be neither clouded nor cloaked in secrecy at any stage in the journey from arrest through trial is to assure the maintenance of these principles.[10] The characteristic that most distinguishes democracy from totalitarianism is the basic presumption that the means are as important as the end. Thus "it is not enough for the people merely to know the end result of a trial, they need to know the means to that end."[11] To drape a cloak of secrecy over actions of police and jurists not only fails to serve the cause of justice, but places it in danger and democracy itself in jeopardy.

During the course of our committee's study, many jurists asserted that pretrial news does not necessarily constitute a danger to a fair trial. Judge W. Orvyl Schalick of the New Jersey Superior Court stated: "The mere fact that people are informed cannot be construed to mean that they cannot make a fair and impartial determination of the guilt or innocence of anyone accused of a crime."[12] Judge Frank W. Wilson of the United States District Court for the Eastern District of Tennessee observed:

> History has taught us that if the public is to know, the press must be free to report. If it is to be free, it must be free to fail as well as to succeed, to err as well as to be correct. Even if the press errs with respect to reporting upon criminal proceedings, that its effect is so prejudicial to the right of a fair trial or that it renders so difficult the job of selecting an impartial jury can be doubted.[13]

Jurors need not be insulated from the world around them. It should not be assumed that an objective juror must be an ignorant juror, and it is dangerous, as well as faulty, reasoning to assume that an overriding prejudice comes from a printed truth. To make such an assumption would be to consign a community to informational sterility. The public must have the right to make informed judgments about crime in its community, about its law enforcement, and about its courts. Such judgments cannot be made if there is censorship at the source of public information.[14]

It is apparent that trial by an impartial jury, called for in the sixth amendment, can be assured only as long as there is a free press. A free press, through its scrutiny, assures that the defendant is properly treated and fairly tried, thus precluding the return of the Star Chamber tactics of earlier times. On innumerable occasions the press has ferreted out the necessary evidence to prove a defendant's innocence. In addition, the rights of citizens often have been protected by newspaper disclosure of improper methods used by police in arrest

9 *Id.* at 2.
10 *Ibid.*
11 *Ibid.*
12 *Id.* at 2-3.
13 *Id.* at 3.
14 *Ibid.*

and investigation. These safeguards for defendants cannot be assured if the freedoms of press and speech established by the Constitution are replaced by censorship or restrictions upon full reporting.[15]

Freedom of the press clearly implies the right to gather, to print, and to distribute information. Any judicial restriction of that right at any point constitutes prior governmental restraint upon publication. When judges by rule of court prohibit public law enforcement officers from providing information to the public, it is censorship at the source of information. In September of 1966, two judges in Wake County, North Carolina, issued just such an order restricting the police from revealing anything more than the name of an accused, his address, and the charge against him.[16] When courts impose such restrictions, they are not only unfair to the police and the accused, but they pose an even greater danger to the public as a whole. For if the police are not required, nor even allowed, by public record and public warrant to give full reason for the arrest of a citizen, the country is well on the road to a police state.[17]

Newspapers, of course, must not abuse their right to publish without prior restraint. Nor should they shirk their responsibilities. In the pursuit of truth, it is well to recall the words of C. P. Scott, an English editor of some years ago. Pointing out that the primary office of a newspaper is the gathering of news, he cautioned that

> at the peril of its soul it must see that the supply is not tainted. Neither in what it gives, nor in what it does not give, nor in the mode of presentation, must the unclouded face of truth suffer wrong. Comment is free but facts are sacred.[18]

Secrecy at the source serves neither justice nor the general welfare of the public, and the press can neither exercise its right to publish nor shoulder its responsibility to publish the truth when there is secrecy at the source of information.

In its report, the ABA Committee paid tribute to the watchdog function of the press, serving as the eyes and ears of the public.[19] To serve that function the press cannot be muzzled or placed on a short leash. Even though the ABA Committee does not recommend direct restrictions on the press, it would in effect muzzle the press by its proposals to eliminate sources of public information and cloak police actions in secrecy.[20] Although the ABA Committee said it did not wish to impair reporting of criminal matters,[21] without question the procedures proposed would constitute a severe impairment of such reporting.

It is the duty of the press to see that a defendant is properly treated and fairly tried. To assume, however, that alleged abuses in the treatment of crime news is always to the detriment of the accused is a false assumption, and history

15 *Ibid.*
16 *Id.* at 4.
17 *Ibid.*
18 *Ibid.*
19 ABA REP. 47-51.
20 See *id.* at 2-15.
21 *Id.* at 47.

proves as much.[22] Such news may be his best protection against secret arrest and trial. In this regard, the words of the third man in the free press-fair trial discussion, the defendant himself, are enlightening. "As distasteful as adverse publicity may be," wrote convict Hugh Dillon, "it is better to be spotlighted momentarily than abused in darkness."[23]

When the press dutifully gathers and reports crime news, public order and protection of the accused are both served. However, when the public is denied information about criminal charges, the denial provides a prolific breeding ground for rumor. For while newspapers may be denied access to information of public concern, the word of crime will circulate. With no reliable source of information, such as an authenticated news story, rumor and exaggeration can unduly excite and arouse the public. In the absence of a calm appraisal of the truth, the public might well react in fear and terror, with a consequent breakdown of law and order. Rumor that promotes exaggeration and distortion is unjust to the accused because it may portray him unfairly, and it is dangerous to public safety because it could easily encourage a fear-inflamed people to take the law into their own hands.[24]

In addition, denial of crime information to the people also promotes public distrust toward law enforcement agencies and the courts. If law enforcement agencies and the courts are to enjoy the public's confidence and respect, the public must be informed of facts about crime. The proper administration of justice is ultimately up to the people, and it is the responsible press that provides the facts on which an informed public can act and judge intelligently.[25]

In a day when crime is increasing by alarming proportions, more, rather than less, crime news reporting is needed. A study covering the ten-year period from 1955 to 1965 revealed that American newspapers devote only three percent of their space to crime news. In that same period of time, however, the crime rate in America increased by seventy-three percent.[26] To the American public, this increase in crime is of vital concern, which cannot be eased by concealment, but only by the bright glare of truth in reporting. Furthermore, while concealment fosters the growth of crime, there is ample evidence that publicity serves as a deterrent.[27]

Although a small number of criminal cases, less than ten percent, ever reach the jury stage, an even smaller number of crime reports reach public print. A New York City survey in January 1965 showed that of 11,724 felonies committed only 41 were even mentioned in the newspaper that pays most attention to crime news.[28]

On the effect of pretrial crime news reporting, a study covering the period from January 25, 1963, to February 11, 1965, is most revealing. It was estimated that during that period there were slightly more than 40,000 jury trials of felony cases in the entire country. In only 101 of these 40,000 cases was

22 ANPA REP. 4. See *id.*, apps. A, B, D & E.
23 ANPA REP. 5.
24 *Ibid.*
25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *Id.* at 6.

there a question of prejudice, and in only 51 cases did attorneys for either side raise the question of prejudice resulting from news reports. Relief was granted, however, in only 5 of these 51 cases. In one of these five cases, a new trial was ordered, but the writ of relief was not granted because the publication of news had made a fair trial *impossible*. In three of the five cases relief was granted due to error by the trial judge in permitting jurors to read newspapers during the trial, failure of another judge to act on expressions of prior prejudice of jurors, and denial of a motion by a third judge to order a change of venue for presumed prejudice in the community. In only two of the cases — two of over 40,000 — were the grounds for reversal based on presumed juror prejudice because of crime news reporting.[29]

Even if it were granted that in rare cases pretrial reporting may contribute to an overriding prejudice in potential jurors — and such is still an assumption rather than a fact — there are procedural remedies available to provide effective safeguards. Among these remedies are "change of venue, change of venire, continuance, severance, voir dire, blue ribbon juries, isolation of the jury, instructions, retrial, appeal, and habeas corpus."[30]

All of these remedies for the rare and isolated case of prejudice from publicity were advanced by the United States Supreme Court in *Sheppard v. Maxwell*.[31] It should be noted, however, that the Court was dealing with an unusual case, and the majority made it clear that its words were meant to apply to what the trial judge in *Sheppard* should have done and not to what every judge should do in every case. It is therefore obvious that *Sheppard* was not intended to be a mandate for judges throughout the land.[32] It should be further noted that the Court's opinion recognized the right of the press to report and the right of the public to know. The Court's opinion did not lay the groundwork for any view that the press should be denied access to information relative to a defendant, nor is it a basis for giving the judiciary the power or right to order public officials in their conduct with the press.[33]

The recent words of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit sound a warning to those who would react with restrictions in the wake of the Supreme Court's decision in *Sheppard*. Judge Edwards noted:

> [N]o judge who participated in review of that case advocated the strictures which are currently being contemplated. Justice Clark's opinion for the United States Supreme Court did *not* rule that Dr. Sheppard was denied due process because of pretrial publicity. His opinion did *not* call for sanctions against a free press. His opinion did *not* suggest silencing lawyers for months or years prior to a criminal trial.[34]

29 *Ibid.*
30 *Ibid.*
31 384 U.S. 333 (1966).
32 ANPA REP. 6.
33 *Id.* at 136.
34 *Id.* at 7.

Continuing, Judge Edwards observed:

> Our forefathers elected to put freedom of speech and press first among the amendments which constitute the Bill of Rights. From the concept of freedom of speech and press and criticism and debate has come most of the inventiveness, richness and power of our present society. In my judgment, however, we do not have to choose between compulsory limitations on freedom of speech and press and a fair trial. The judiciary of our country can use the well-known tools for protection of fair trials which have been produced by our legal history.[35]

The point that should be emphasized is that the right of the American public to free press and free speech should not be imperiled by judicial imposition of restrictions on all criminal matters because of the rare and isolated case of prejudice.[36]

An additional question dealt with by the ANPA Committee deserves attention. That is the question of judicial invasion of the executive branch of government when rules of court and other orders are issued to restrict the release of information by law enforcement officers. If such an invasion were allowed to occur, judicial domination of the executive branch could easily be the result. Judicial invasion of the executive branch should be avoided, not only because it would endanger the tradition of separation of powers in government, but also because it is inimical to the public interest.[37] The public is entitled by right to know the public's business, and there is no area of public business more vital than the action of the police.[38]

During the early stages of the ANPA study, there were recommendations from certain sectors of the bar that the press of America adopt a code of conduct in the reporting of criminal matters, but these recommendations were rejected. Practically, such a code would be without value because there would be no way to enforce it. Moreover, it became clear that the first amendment would allow only self-imposed codes. The solution lies in the individual newspaper's setting its own policy or guidelines or statements of principles that may be subscribed to by both the press and the bar, as has been done in a number of states.[39] A fine example of such statements is that adopted by the press, bar, and bench in Oregon,[40] a statement that has served as a model for other states. Such an accord of mutual understanding can serve a good and useful purpose.

Admittedly, in trials of great public interest limitations of space and other factors may require certain procedural restrictions on reporters and photographers. In 1964, when I was president of the Associated Press Managing Editors Association, I appointed a committee to work with other news media representatives to draft guidelines for occasions when, for example, a pooling of reporters

35 *Ibid.*
36 *Ibid.*
37 *Id.* at 7-8.
38 *Id.* at 8.
39 See *id.* at 95-119.
40 See *id.* at 100.

and photographers might be necessary. A procedural guide was prepared and is now available for any who may find it useful.[41]

Proposed codes that would restrict public information came under scrutiny by Judge Frank W. Wilson, when he cautioned:

> In the preparation and negotiations for such codes, the participants should always bear in mind that freedom of the press is not their exclusive right to bargain with. Freedom of the press is the right of the public to know, not merely the right of any particular publisher to report as he chooses. No publisher or group of publishers and no members of the bar or bar associations has [*sic*] the prerogative to bargain away the public's right to know.[42]

Thus, the ANPA Committee felt that to subscribe to limitations founded on the forbidden principles of censorship would be to abdicate the trust conferred upon the press by the first amendment, and the abdication of such a trust is neither the duty nor the right of the press.

The Committee, however, affirmed that the press must stand ready at any time to discuss with anyone concerned with justice any questions that might arise in its administration.[43] In my opinion this is a positive course that can serve the cause of justice and the general welfare of the people far better than can the negative force of restrictions on basic freedoms. Hopefully, the dialogue between press and bar, begun more than two years ago, can continue toward a sharpened awareness of the rights of all Americans.

The American press must remain as devoted to the cause of a fair trial as it is to a free press. A free press is not an enemy of a fair trial. As our historical experience bears witness, they are not incompatible, but dependent upon each other.

41 Joint Media Comm. on News Coverage Problems, Orderly Procedures For Mass Coverage of News Events, July 1, 1965.
42 ANPA Rep. at 9.
43 *Id.* at 10.