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## THE FIRST AMENDMENT UNDER ATTACK: A DEFENSE OF THE PEOPLE'S RIGHT TO KNOW\*

*Elmer W. Lower\*\**

It was just after two in the morning in East New York, a tough part of Brooklyn. Leon Negri, sixty-one-year-old watchman, and his wife had attended a family party and stood waiting on the corner for a homeward-bound bus. As they waited, a group of youths were making a clamor half a block away. One of the youths left the group, walked the half block, and grabbed for Flora Negri's purse. At that moment, the bus pulled up, and as Flora's husband pounded on the door for help, the youth pulled out a 22-caliber revolver and shot him in the back. The husband collapsed on the bus floor, dead. The youth fled. All this was duly reported by the New York news media.<sup>1</sup>

The next day a seventeen-year-old boy was booked on a charge of killing Mr. Negri and held without bail. Police said that the boy admitted being with the youths that night, but they said the boy claimed to remember nothing because he was drunk. The police also alleged that the boy had pitched the revolver into a nearby stream as he fled the crime. All this was also reported, allowing local citizens to draw some comfort since the killer had at least been identified and apprehended. Clearly that was the impression the police sought to convey to a tense local population.<sup>2</sup>

Now this seems like another all-too-typical crime story. But beneath it are serious questions. Should the police have told newsmen about the boy's admission of drunkenness? Should they have stated publicly their belief that the youth was the killer and had deliberately thrown away the murder weapon? Should they have sought to establish the atmosphere of "a murder solved"?

One could answer "yes" to any or all of these questions, but the bar of this country answers with a mighty "no." And they are planning to give muscle to that "no" at a meeting of momentous importance to the news media to be held in Honolulu this August. The Board of Governors and House of Delegates of the American Bar Association will consider whether to adopt the recommendations of the ABA Committee on Fair Trial and Free Press.<sup>3</sup> That Committee, headed by Judge Paul C. Reardon of the Supreme Judicial Court of Massachusetts, has spent two years examining the way the press broadcasters report pre-trial news. It has concluded that it is absolutely necessary to impose stringent limitations on the release to the news media of all information about persons accused of crime.

Naturally, the Reardon Report carries tremendous influence. If its conclusions are endorsed by the ABA in August, the chances are excellent that many, if not most, of the state and local bar associations will quickly follow suit.

\* This paper was originally delivered as a speech to the Pittsburgh Radio and Television Club on Jan. 24, 1967.

\*\* President, News Department, American Broadcasting Company.

1 N.Y. Times, Jan. 10, 1967, p. 84, col. 6.

2 *Ibid.*

3 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.].

It is entirely possible that within a year many in the news media will be faced with a frustrating set of regulations when they set out to cover a crime story. The newsman may find the police unwilling to tell him of a suspect's arrest record or the reasons for his arrest. He may find the prosecutor unwilling to say *anything* about the case. The defense attorney may be unwilling to speak to him, fearing citation for contempt of court or, in an extreme case, disbarment. And the newsman may find himself facing a contempt of court citation if he unearths the facts of a case independently and broadcasts them.

It is sheer understatement to say that this is a disturbing situation. Some think that this is the grossest of violations of the first amendment to the United States Constitution, an outright betrayal of the freedom of the press, which in this electronic age includes the freedom to broadcast. On the other hand, there are thousands of lawyers and jurists across the nation who see these rules as strengthening the sixth amendment to the Constitution, the amendment guaranteeing every man a fair trial.

This controversy is not a new one. There was reaction to the trial of Bruno Hauptmann, who was convicted and executed for kidnapping the Lindbergh baby. Publications of the era deplored the carnival atmosphere in which the trial was conducted: the hundreds of newsmen and photographers; the thousands of stories naming Hauptmann as the killer even before the jury was selected; the high-jinks among the press as newspapers and magazines strove to get exclusives; the constant commotion inside and outside the courthouse; and the crowds through which the jury passed on its way into the smoky, stage-lighted courtroom in Flemington, New Jersey.<sup>4</sup> Lawyers, jurists, and many newsmen of the day denounced the way the Hauptmann trial was conducted, but they did nothing about it.

Today, however, talk has turned into action. In legal circles the names Dr. Samuel Sheppard and Billie Sol Estes are connected with two landmark Supreme Court decisions dealing with prejudicial pretrial publicity and publicity during a trial.<sup>5</sup> In addition, the American Bar Association is considering stringent standards that will be enforced by strict disciplinary action.

In the past many a law school forum or a convention of journalists or lawyers has searched for a good topic for study, and the subject of "free press and fair trial" has been invariably high on the list. But now it is no longer a matter for academic debate. What has so long been discussed in theory is about to be put into practice.

This article reviews the key arguments on both sides and tries, if possible, to find some ground rules on which the news media and the bar can agree. I want to make it clear that I am thoroughly alarmed at the prospect of one group; the bar, making unilateral declarations of policy that intimately affect newsmen and, in turn, the general public.

Despite all the panels, debates, and reports, there has been no attempt on a national level to sit bar and news representatives down at the same table

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<sup>4</sup> *E.g.*, Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940).

<sup>5</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965).

to hammer out a code for the coverage of crime stories. Newsmen have been consulted, but they have never been asked to participate in the code-writing process. I think they should and must be consulted in this process.

To appreciate why the bar has ignored the press — at least as coadjudicators — it is necessary to view the press as the bar sees it. And this can best be done by turning to the ABA Report, and the reasons it came about. The Report is admittedly a direct outgrowth of the Warren Commission's study of the Kennedy assassination.<sup>6</sup> Reviewing the way news media covered the arrest and death of Lee Harvey Oswald, the Commission said:

The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial.<sup>7</sup>

The ABA Committee sought to find a formula for that proper balance. Its members—lawyers and judges—and its staff met with local and state bar groups, spokesmen for law enforcement agencies, and, in the Committee's words, "representatives of the news media."<sup>8</sup> After surveying the press, the Committee admitted that crime news is not the be-all and end-all of journalism's existence. There are other concerns on a national and international level that take precedence. So, indirectly, the Committee admitted that pretrial crime news is not always the number-one story and does not always tend to saturate a community. Still, the Reardon group holds to an ideal — that any pretrial news spills poisons of prejudice into the reservoir of potential jurors, damaging chances of an eventual fair trial.

Clifton Daniel, Managing Editor of the *New York Times*, conducted a study for the month of January 1965, showing that of the 11,724 felonies committed in New York City only 41 were mentioned in the *New York Daily News*, a paper that tends to give more attention to crime than any other journal in town.<sup>9</sup> But the ABA Committee looked beyond New York and found that the chances were excellent that "ill-timed public statements"<sup>10</sup> could convey information to potential jurors that might preclude the possibility of a fair trial. The Committee rejected the contention of Mr. Daniel and other distinguished journalists that the problem of prejudicial pretrial publicity involves a microscopically small number of cases. The Reardon group claims that from January 1963 to March 1965 the question of prejudicial pretrial publicity was raised in approximately one hundred reported decisions.<sup>11</sup> As far as they are concerned, this is one hundred decisions too many.

Prejudicial pretrial publicity is a complex term. One might think it involves stating or implying that a man is guilty before he has had a trial, as in the cases

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6 See Cooper, *The Rationale for the ABA Recommendations*, 42 NOTRE DAME LAWYER 857 (1967).

7 REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 242 (1964).

8 ABA REP. 19.

9 Daniel, *Pre-trial Publicity*, *Nieman Reports*, Sept. 1965, pp. 2, 20.

10 ABA REP. 21.

11 *Id.* at 23.

of Lee Harvey Oswald, Dr. Sam Sheppard, or Richard Speck, the last convicted of murdering eight nurses in Chicago and publicly fingered by the police before his trial as "the killer." This is a definition of pretrial publicity, but it is only a partial one. To the ABA it involves far more than that. To insure a simon-pure reservoir of jurors, the Committee recommended that the following be withheld from public knowledge:

1. The prior criminal record of an accused person, or any statements as to his character or reputation.<sup>12</sup>

2. The existence or contents of any confession or statement by a defendant, or his refusal to make a statement.<sup>13</sup>

3. The performance or results of any tests, or the refusal of the accused to take any tests.<sup>14</sup>

4. The identity, testimony, or credibility of any witnesses.<sup>15</sup>

5. The possibility that the accused might plead guilty to the offense charged, or to a lesser offense.<sup>16</sup>

6. Any other statements relating to the merits in the case, or the evidence.<sup>17</sup>

The Committee made these additional recommendations:

7. Every police and law enforcement agency should be prohibited from deliberately posing persons in custody for photographers, or allowing them to be interviewed, unless the accused, after being informed of his right to consult a lawyer, requests this in writing.<sup>18</sup>

8. Every attorney should be prohibited by the Canons of Professional Ethics from making any public statements about "pending or imminent criminal litigation" with which he is associated.<sup>19</sup> In effect, this is an effort to shut the mouth of every defense attorney until a trial begins.

9. The Reardon Committee feels that no lawyer or prosecutor should be allowed to make any public statement on a case while it is pending in the courts—even after a jury decision.<sup>20</sup> This is to keep that pure reservoir of jurors in case of a mistrial, or the reversal of a decision.<sup>21</sup> Under this ruling, for example; no one would have been allowed to discuss the case of Jack Ruby until after he died.

10. As to pretrial, preliminary, or bail hearings, the Committee believes that for the most part they should be closed to the public, so that it is absolutely impossible for the public to learn of any potential evidence against a person.<sup>22</sup>

11. Inside courtrooms, prospective jurors should be examined alone, so that none can know the reasons for accepting or rejecting other talesmen.<sup>23</sup> The Reardon Committee had a wide range of practical proposals for the selec-

12 *Id.* at 3, § 1.1(1); 5, § 2.1(1).

13 *Id.* at 3, § 1.1(2); 5, § 2.1(2).

14 *Id.* at 3, § 1.1(3); 5, § 2.1(3).

15 *Id.* at 3, § 1.1(4); 6, § 2.1(4).

16 *Id.* at 3, § 1.1(5); 6, § 2.1(5).

17 *Id.* at 3, § 1.1(6); 6, § 2.1(6).

18 *Id.* at 7, § 2.2(b).

19 *Id.* at 2, § 1.1.

20 *Id.* at 4, § 1.1.

21 See *id.* at 93.

22 *Id.* at 8, § 3.1. See *id.* at 113-18.

23 *Id.* at 10, § 3.4(a).

tion of juries, including empowering the court to draw jurors from other areas of a state if local people are believed to be prejudiced.<sup>24</sup>

12. The committee recommends a ban on extrajudicial statements by witnesses before and during a trial.<sup>25</sup> It is this recommendation that arouses so much anguish among the nation's newsmen. They cite examples like New York City's *Gallashaw* trial to point to the rule's inherent dangers. The *Gallashaw* case revolved around a teen-age Negro boy who was accused of shooting another Negro boy during a racial disturbance. The prosecutor gave news media the impression that the case against the boy was an open-and-shut affair. But *New York Times* reporters took to the streets and found two key prosecution witnesses who repudiated major parts of their testimony. As a result, the *Gallashaw* boy was acquitted. But things might have turned out differently had there been a ban on publicizing pretrial information or, for that matter, on preventing witnesses from talking to news media before the trial started.<sup>26</sup>

These are suggestions for revamping courtroom procedures and pretrial practices. Some of them are welcomed by newsmen; others are viewed with suspicion and downright anger. The one ABA recommendation that has stirred newsmen into the greatest outpouring of concentrated fury deals with using contempt of court proceedings to silence journalists.<sup>27</sup> Specifically, the Committee feels that any newsman should be hauled into court for knowingly violating a judicial order not to distribute information developed in a pretrial hearing.<sup>28</sup> This is a power that appeals to the judiciary, as is already evident in at least one community. An ABC affiliate in Orlando, Florida, WFTV, has so far been unsuccessful in appealing an order by a Florida judge prohibiting any news coverage of a case involving a local woman charged with a misdemeanor — running a house of prostitution. The judge's order allowed news media to report only that the woman had been arrested and charged. No pretrial coverage was permitted. Further, during her trial the judge permitted newsmen to print or broadcast only evidence presented to the jury.<sup>29</sup> WFTV did not deliberately violate this order at any stage in the proceedings. Had it, the station probably would have been found guilty of contempt of court.

These are only the major ABA Report proposals, but they give an idea of the report's scope and import. The Orlando case is evidence that some judicial authorities cannot wait for the report to be approved by the ABA.

The legal profession is not unanimous in its support of the Reardon Report. Certainly, there is satisfaction that the bar is proposing some long-needed reforms, such as the way jurors are drawn. But there is equal concern that in its zeal, the ABA could be trampling upon other constitutional rights and in the long run do more harm than good. This concern is shared by a growing number

24 *Id.* at 11, § 3.4(c).

25 *Id.* at 12, § 3.5(c).

26 See *N.Y. Times*, Oct. 4, 1966, p. 27, col. 2; *id.*, Oct. 5, 1966, p. 43, col. 3; *id.*, Oct. 6, 1966, p. 50, col. 1; *id.*, Oct. 7, 1966, p. 1, col. 3; *id.*, Oct. 8, 1966, p. 19, col. 1; *id.*, Oct. 11, 1966, p. 40, col. 7; *id.*, Oct. 12, 1966, p. 33, col. 1; *id.*, Oct. 14, 1966, p. 1, col. 1.

27 ABA REP. 14-15, § 4.1.

28 *Ibid.*

29 Trial court order, Orange County, Fla., Sept. 7, 1966; *petition for mandamus and prohibition denied*, Orange County Circuit Ct., Dec. 13, 1966. See *N.Y. Times*, Nov. 17, 1966, p. 34, col. 4.

of criminal lawyers. This may seem surprising, because for years criminal lawyers led the clamor for press restrictions, claiming that pretrial publicity was damaging their chances of acquitting their clients before a jury. But now, according to a survey admittedly not taken by the bar, but by the *New York Times*,<sup>30</sup> the lawyers are having second thoughts. Specifically, they are worried about the Committee's recommendation that sanctions be placed on defense attorneys and prosecutors.<sup>31</sup>

The criminal lawyers contend that district attorneys have rarely, if ever, been disciplined for suppressing evidence. They also say that police officials have seldom been punished for physically beating suspects or psychologically coercing them to confess. The criminal lawyers see a whole new world created by the ABA Report, a world where sanctions can be applied against the defense for taking a case to the newspapers or broadcasters, while the prosecution is left virtually insulated from the rules. Even the American Civil Liberties Union, which generally supports curbs on publicity during the pretrial phase, recently said it feared that "sanctions on both prosecution and defense counsel would be used to harass the defense, especially in civil rights where pretrial publicity is often used as a precaution against kangaroo courts."<sup>32</sup>

Even the attorney for Dr. Samuel Sheppard, F. Lee Bailey, who won a new trial for his client on the ground that he had been denied a fair trial because of prejudicial pretrial publicity,<sup>33</sup> believes that any conflict between press and courts should be settled by common sense and not by common law. "Muzzling the press is a very bad idea," he said recently. "The defense needs the press."<sup>34</sup>

Not all the judges in this country view the Report with satisfaction either. One of the most outspoken is Judge George C. Edwards, Jr., a member of the United States Court of Appeals for the Sixth Circuit. In a recent speech at Hartford, Connecticut, Judge Edwards called the Report "the most dangerous threat to the American ideal of free speech since the days of Joe McCarthy."<sup>35</sup>

Judge Edwards has his own set of rules for press and bar, and they bear repetition in the light of the ABA proposals.

1) Let us insist that our trial judges make full use of the tools which legal tradition has given them to guarantee a fair trial.

2) When these are inadequately employed, let us accept the fact that due process may require an occasional retrial of a highly newsworthy case because of prejudicial influences.

3) Let us seek the voluntary cooperation of the press in withholding publication of material directly related to a criminal trial in progress which is not offered or admitted in the trial until after the verdict has been rendered.

4) Let us use the administrative sanctions advocated by the American Bar Association to control press statements by lawyers, prosecutors or law enforcement officials *during the trial period*. . . .

30 *N.Y. Times*, Dec. 14, 1966, p. 52, col. 3.

31 *Ibid.*

32 *Ibid.*

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

34 *N.Y. Times*, Dec. 4, 1966, p. 79, col. 3.

35 Edwards, *A Ranking U.S. Judge: "Greatest Threat Since McCarthy,"* ASNE BULL.,

5) Let us not attempt to muzzle prosecutors, defense lawyers or police by amending current law or Canons of Ethics as to any time prior to the trial period.

6) Let us leave the First Amendment unabridged.<sup>36</sup>

On the final point, Judge Edwards's attitudes are shared by a distinguished panel of New York judges and lawyers, chaired by Judge Harold Medina of the United States Court of Appeals for the Second Circuit. Judge Medina and his colleagues, under the auspices of the New York Bar Association, have prepared a report covering the same ground as the Reardon Committee, but with slightly different conclusions.<sup>37</sup>

The members of the Medina Committee, one of whom is a lawyer for CBS, feel that the first amendment definitely precludes any direct controls on news media, even where the impartiality of the jury is threatened. Judges, says the Medina Report, must first put their own houses in order.<sup>38</sup> For example, it is up to a judge to maintain decorum inside and outside of his courtroom.<sup>39</sup> The Medina group notes with displeasure the handling of the Candace Mossler-Melvin Lane Powers murder trial, especially the failure by the judge to stop defendants from talking to news media during the trial itself.<sup>40</sup> The Medina Report joins the Reardon Report in urging that the police not release the full details of a case against a defendant.<sup>41</sup> They believe the public must be educated to accept official police silence. As an example of a flagrant violation of this principle, the Medina Committee cites the Chicago Police Department for announcing that with the apprehension of Richard Speck, the killer of those eight nurses had definitely been found.<sup>42</sup>

In brief, the Medina panel feels that the news media should be left alone, but that the courts, attorneys, and police should be carefully and circumspectly muzzled. During the pretrial stage, the Medina group wants that muzzling handled on a voluntary basis, with each group writing its own code. But when the trial is on, they feel the judge should have complete control. However, at no time, in the view of the Medina group, do the courts have the power to issue contempt citations against news media. This, they say, is unconstitutional and a clear violation of the first amendment.<sup>43</sup>

This is a sampling of opinion in the legal community. Clearly, we are moving toward a new set of rules covering criminal court procedures, and it is only a matter of time before they are formally sanctioned. And as I noted, they are already being implemented in some areas. Judge Reardon, for one, called his recommendations "moderate and digestible,"<sup>44</sup> and there are many who

Nov. 1, 1966, p. 14.

36 *Id.* at 15-16.

37 SPECIAL COMM. ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL (1967) [hereinafter cited as MEDINA REP.].

38 *Id.* at vii.

39 *Id.* at 47-49.

40 *Id.* at 55, 63-64.

41 *Id.* at 27-35.

42 *Id.* at 59-60.

43 *Id.* at 1-13.

44 N.Y. Times, Dec. 1, 1966, p. 27, col. 1.

agree. Since lawyers, prosecutors, and judges are all involved in the monolithic American Bar Association, a national organization with immense power, the chances are excellent that their recommendations, once approved, will be enforced.

The other party to this problem, the news media, compared with the ABA appears thoroughly disorganized and at loose ends. A plethora of groups, each speaking for a particular segment of the news world, is shouting dangers to free press. To name a few, there are Sigma Delta Chi, the national journalistic fraternity; the American Newspaper Publishers Association; the Radio-Television News Directors Association; the American Society of Newspaper Editors; and the National Association of Broadcasters. Then of course, there are individual newsmen in broadcasting and publishing sounding off. Unfortunately, all these groups and all these men seem to be talking to each other, for if the lawyers and judges of the country have been listening, they have not let on!

Recently, an associate of mine called the American Bar Association's offices in Chicago and asked one of their executives if any newsmen had been invited to Honolulu to discuss the Reardon recommendations from our point of view. The reply was that the ABA expected plenty of newsmen to be around, but simply to cover their activities, not to take part in any way. That is an attitude I find discouraging. If they had been listening, they would have heard a great many responsible men and organizations in American life speaking with alarm.

The *New York Times*, for one, feels some of the ABA proposals "could result in severe curtailment of a defendant's rights. Others could trammel the press in efforts to uncover corruption."<sup>45</sup> The President of the National Association of Broadcasters, Vincent Wasilewski, calls the ABA Report a "booby trap" and adds that its effect "would be to insulate much of the judicial process from public scrutiny."<sup>46</sup> Quentin Gore, Managing Editor of the *Chicago Sun-Times*, writes:

The proposal to close pre-trial hearings is particularly ominous. A weak government case could go unexposed for months. Consider how this secrecy might be used in the South when Negroes were accused on trumped-up charges. Or anywhere if officials needed a scapegoat.<sup>47</sup>

Ben Gilbert, Deputy Managing Editor of the *Washington Post*, after noting that police officers in the Washington area are already implementing the proposed new guidelines, says:

The rules would make it possible to place a lid of secrecy over official ineptness, indolence, and even corruption. Defendants who may be falsely accused and badly represented would lose the recourse to the evidence that open disclosure sometimes produces.<sup>48</sup>

<sup>45</sup> *Id.*, Oct. 16, 1966, § 4, p. 12, col. 1.

<sup>46</sup> Address by Vincent T. Wasilewski, International Radio & Television Society, Nov. 14, 1966.

<sup>47</sup> *N.Y. Times*, Oct. 9, 1966, p. 89, col. 2.

<sup>48</sup> *Ibid.*

William B. Monroe, Jr., Director of News for NBC in Washington and long a student of press-bar relations, says:

If you attempt to impose restraints on the press, or if you set an official policy for lawyers and the police, a policy they may find it convenient to use for other ends than those of justice, you may wind up rendering negative service to the cause of fair trial.<sup>49</sup>

William Fields, Managing Editor of the *Atlanta Journal*, writes:

Through the years the Bar Association has been noticeably lackadaisical about enforcing a code of conduct among its own members. Yet, in a seemingly sudden surge of conscience, it now seeks to impose, by fiat, its will upon those on the public payroll.<sup>50</sup>

Paul Fisher, Director of the University of Missouri's Freedom of Information Center, says, "Despite the impression of some that the press had widely abused rights of defendants in irresponsible exercise of the guarantees of the first amendment, there is little beyond fiery opinion to back this up."<sup>51</sup>

I could cite hundreds of other responsible, outstanding journalists who view the ABA Report with horror and alarm, including the American Newspaper Publishers Association, whose critique of the proposals reads like a prosecutor's indictment.<sup>52</sup> I have in my files dozens of examples where newsmen have served, not hampered, the cause of justice through the kind of pretrial digging that the ABA Committee so heartily deplors. It is just these instances — a boy accused of murder in New York;<sup>53</sup> a government employee in Washington unjustly accused of indecent exposure;<sup>54</sup> the saving of the life of a Phoenix, Arizona, man awaiting trial for a murder he did not commit;<sup>55</sup> and the list could go on and on. No wonder the journalistic community is up in arms. They feel the ABA Committee has spent two years looking for every bad instance of pretrial reporting it could find, while studiously ignoring the other side.

Almost every regulation suggested by the Committee is a two-edged sword. There are instances where defendants have been helped, and occasionally hurt, when newsmen had complete access to both prosecution and defense arguments in a pretrial situation. In short, there are virtues on the bar side of the argument, and on the news media side. But I see nothing but unmitigated disaster if one side, the bar, tries unilaterally to enforce its own view. Of course, I think it would be equally dangerous if the news media of the country indicted and convicted defendants before a fair trial, as the Supreme Court insists happened to Dr. Sheppard in 1954 and as all of us can see occurred to Bruno Hauptmann more than three decades ago. The point is, however, that news media are bending, learning, changing.

49 Monroe, *Broadcast Views Positive Reporting Results of Good, Fair Work*, RTNDA BULL., June 1966, pp. 6, 7.

50 N.Y. Times, Oct. 9, 1966, p. 89, col. 2.

51 *Id.*, Aug. 20, 1965, p. 26, col. 2.

52 *Id.*, Jan. 5, 1967, p. 1, col. 6. Excerpts at *id.*, Jan. 5, 1967, p. 20, col. 2.

53 N.Y. Times' articles on the Gallashaw trial, *supra* note 26.

54 Folliard, *A Dramatic Case in Point*, ASNE BULL., Feb. 1, 1965.

55 McLain, *And in Phoenix*, ASNE BULL., April 1, 1965.

Judge Harold Medina has said that in recent months there has been a "gradual, perceptible improvement in the elimination of inflammatory and prejudicial publicity."<sup>56</sup> The first thing every newsman learns is what constitutes libel. We are now fully cognizant of what constitutes prejudicial pretrial publicity, and I think the record shows it.

There is not a responsible editor in the country who would like to see a return to the kind of journalism practiced in either the Sheppard or Hauptmann pretrial periods. In short, I firmly believe the journalistic community is peopled with reasonable men, and if the ABA would only sit down and thrash things out with the leaders in that field, I am sure informal ground rules could be agreed upon.

Newsmen and members of the bar are not necessarily born antagonists. There are several areas in our nation where news media and bar have been able to draw upon a set of rules for pretrial coverage protecting the interests of the defendant and the public. Such guidelines have been drawn up by bar and news media in Toledo<sup>57</sup> and the state of Washington.<sup>58</sup>

The situation in Washington is an example of the good that can come when newsmen and representatives of the bar sit down in friendship and understanding and work out their disputes. Washington has a state bar-press-bench committee appointed by the Chief Justice of the Washington Supreme Court. The Committee's statement of principles has been adopted by every broadcaster and publisher and by every lawyer, prosecutor, and judge in the state. They have agreed on a set of specific guidelines concerning the reporting of criminal, civil, and juvenile proceedings. Two of the statements of principle to which our colleagues in Washington adhere bear repetition.

No trial should be influenced by the pressure of publicity from news media nor from public clamor, and lawyers and journalists share the responsibility to prevent the creation of such interest.<sup>59</sup>

The public is entitled to know how justice is being administered. However, no lawyer should exploit any medium of public information to enhance his side of a pending case. It follows that the public prosecutor should avoid taking unfair advantage of his position as an important source of news; this shall not be construed to limit his obligation to make available information to which the public is entitled.<sup>60</sup>

After reading the Reardon and Medina Reports, this comes as soothing music to my ears. Jurists, bar, police, and journalists all agreed to this. Specific rules are now being drawn. The important point I want to emphasize is that all

56 N.Y. Times, Oct. 7, 1966, p. 1, col. 5.

57 *Id.*, Aug. 22, 1966, p. 35, col. 5. See MEDINA REP. 65-67.

58 Statement of Principles of the Bench-Bar-Press of the State of Washington, which was adopted on March 26, 1966, in general session by a joint committee representing the following groups: Washington State Supreme Court; Superior Court Judges' Ass'n; Washington State Magistrates' Ass'n; Washington State Bar Ass'n; Washington Ass'n of Sheriffs & Chiefs of Police; Washington State Prosecuting Attorneys' Ass'n; Allied Daily Newspapers of Washington; Washington Newspaper Publishers Ass'n; Washington State Ass'n of Broadcasters; The Associated Press; United Press-International; School of Communications, University of Washington.

59 *Id.*, principle 3.

60 *Id.*, principle 7.

sides got together, thrashed things out, and found that they were really fighting in principle for the same vital, free society. Howard Cleavinger, Managing Editor of the *Spokane Daily Chronicle*, said of the experience:

We learned to respect the judges and lawyers and recognize their problems in the light of the recent Supreme Court decisions, and they learned that the press is responsible and intent on preserving the public's right to both free press and fair trial.<sup>61</sup>

I think it is imperative to have such a conference and establish such a statement of principles on a national level. I do not want to sound like an alarmist, but the hour is late. The Reardon Report is close to full ABA approval. Already local judges, as in Florida, are using contempt powers against media. Already police departments are getting more secretive. These are the beginnings of secret law enforcement. Combine this with a slightly restricted news media, and you have a very dangerous situation. I do not think we should leave the matter in question until the Supreme Court is forced to settle the dispute.

I appeal to the American Bar Association to turn its Honolulu meeting into a summit conference of news media and bar, where an effort will be made to work out some kind of advisory set of principles and guidelines. I can pledge that as President of ABC News, I would be pleased to lead a delegation to such a meeting. Although I do not speak for the other networks or the various journalistic societies, I feel reasonably certain they would also be interested enough to attend. I reemphasize my contention that for the bar to work in a vacuum in this particular situation is dangerous. It seems to me that both sides have been too long in the habit of sniping at each other from the sidelines. Let this Honolulu meeting be not just another seminar, or round table discussion, but an attempt by leaders in law and journalism to reach an accommodation. Surely this is not an impossibility. The Washington agreements are a model, and there are others, notably the press guidelines prepared by the American Society of Newspaper Editors.<sup>62</sup> If this does not happen, if there is no meeting of interests and minds, then I foresee a bitter feud that can only serve to weaken, not strengthen, our democratic institutions and the public's confidence in them. It is up to the bar to take the next step and make its Honolulu meeting a truly monumental one. I am sure it will find the nation's news executives only too happy to join.

This is a unique situation in our history. Never before have private citizens been in a position to affect so profoundly the administration of the Bill of Rights. As I see it, unilateral bar action weakens those ten amendments. Joint bar-press accommodations strengthen them. For the good of the nation there is only one road to follow.

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<sup>61</sup> Cleavinger, *Surveying Press-Bar-Bench Understandings*, ASNE BULL., Dec. 1, 1966, p. 3.

<sup>62</sup> ASNE BULL., Nov. 1, 1966, p. 12.