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Fair Trial - Free Press: Problems and Progress

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FAIR TRIAL — FREE PRESS: PROBLEMS AND PROGRESS

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The Hauptmann kidnapping case in the 30's started a gradually mounting crescendo of concern over prejudicial publicity in criminal proceedings. The decade of the 60's saw appellate courts flooded with appeals grounded on press-generated prejudice. Trial courts became burdened with ever-growing numbers of motions for change of venue, for mistrial and for new trial based upon similar grounds.

The Lee Harvey Oswald and Jack Ruby fiascoes in Dallas and the celebrated Dr. Sam Shepherd and Billy Sol Estes cases gave further impetus to the conviction that lack of discretion in news media reporting of crime news was dangerous; that it can operate in many cases to deprive the accused of an impartial trial. Measures were deemed not only desirable but essential to correct the inequities that prejudicial publicity can create in important or lurid criminal cases.

The problem is not an easy one for solution. For one thing it involves grave issues of constitutional law. The basic difficulty is seated in the unhappy collision of the 1st and 6th amendments of the United States Constitution. The 1st Amendment guarantees the right to speak and print freely. The 6th Amendment guarantees one accused of crime of a fair and impartial trial. But experience has shown that unlimited press freedom has often gained the ascendant over the right to an accused to be tried unaffected by public indignation that has been animated by prejudicial publicity.

The problem is not easy for another reason. It involves seeking an accommodation between the contrary interests of two stubborn and often mutually abrasive factions. On the one side are the stolid forces of the bar and judicature which would restrict news media reporting to the extent deemed necessary for impartial fairness in criminal trials. On the other side are ranged the formidable

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and more flamboyant press interests, hostile to any hint of censorship, wary of any intusion upon jealously guarded 1st Amendment prerogatives.

WHAT HAS BEEN DONE?

The American Bar Association started looking at the problem in connection with its cyclopean project to create minimum standards for criminal justice. The bar is now generally familiar with the scope of the ABA project. Tentative drafts, and later approved drafts have been circulated on standards relating to postconviction remedies, appellate review of sentences, sentencing alternatives and procedures, probation, and others. But exciting the most apparent interest so far is the one establishing fair trial and free press standards.

The ABA committee in charge of drafting such standards saw its function to be:

> ". . . (T)o consider the impact of news reporting on the administration of criminal justice and to seek methods of preserving and strengthening the right to fair trial without abridging freedom of speech and of the press." Preamble, *Standards Relating to Fair Trial and Free Press* (Tentative draft)

It should be made clear that the ABA standards of conduct do not purport to control the news media. Neither the bar nor the judiciary have direct means of controlling the members of the Fourth Estate. However, one of the first truths that the deliberations of the ABA committee disclosed was that the news media were not solely to blame for prejudicial publicity. It is an easy and comfortable thing for lawyers to point the accusing finger of blame at the press. But the naked fact is that the bar shares in large measure the condemnatory weight of responsibility. The legal profession has often fed the flames of injustice by giving reporters hurtful extra-judicial information and statements that would be wholly inadmissible at the trial. The ABA standards were primarily designed to dry up this offensive source of supply.

ABA APPROVED STANDARDS

What do the ABA approved fair trial-free press standards do? Summarized briefly, they are accommodated to four stages of the criminal case.

1. The first stage relates to the time prior to an arrest. The standards contemplate prompt release of information that a crime has been committed, facts of the crime and that an investigation

is under way. They admonish lawyers and law enforcement officials to refrain from identifications of suspects before arrest except to assist in apprehension, warn the public or aid in the investigation.

2. The second phase prescribes conduct at the time of arrest. The standards here provide for release of information on the identity of the accused, and circumstances of the arrest, including time, place, resistance, pursuit, use of weapons and physical evidence seized. Also release of information is authorized relating to the offense charged, the identities of any victims, and the fact that the accused denies the charge if that is the case. Lawyers and law enforcement officials may announce that investigative examinations are planned, but not the results. It is deemed improper to announce existence or contents of an accused's confession, his refusal to make a statement, his prior criminal record, or to express opinions on his guilt.

3. During the stage of pretrial hearings, the standards would provide for hearing all preliminary matters in chambers if the defendant so requested. The public, including the news media, would be barred.

4. The fourth phase, the trial itself, calls for the exercise of standards making it improper for lawyers to offer any out-of-court statements. It is provided further that the court may issue an order directed to court personnel, parties and witnesses to refrain from extra-judicial statements for publication. Also the court might at its discretion exclude the press and public from motions and other matters heard in chambers.

There is another willing source of supply of prejudicial news: the peace officers. The ABA standards suggest that law enforcement agencies adopt appropriate self-limiting provisions. Just what is in prospect should the law enforcement officers fail in self-regulation is not clear at this time.

COOPERATION OF NEWS MEDIA

In addition to the adoption and implementation of these standards, the bar is courting the cooperation and understanding of the news media. This perhaps is the most important phase of all. In most states invitations have been extended to the press interests urging them to join in the formation of bar-press committees to discuss and study the problem. Here is the area where the ultimate success or failure of this program undoubtedly lies. This, too, is the area where most of the anticipated difficulties lie. Will not the free press, some segments of which have a penchant for cloying the public appetite for anything sensational or bizarre, bristle with indignation at the prospect of limitations? Will not every suggestion

be seen as an insolent move by the lawyers to stifle the newsman's duty to inform the public?

Some answers to these questions are now being provided in sections of the country where the program is advancing. The response from the news media has been most encouraging. Journalism, after all, is a proud and ethical profession. Its high standards and sense of fairness are being confirmed again and again as press and broadcasting associations are acting to adopt self-limiting regulations for handling crime news.

In at least 45 states bar-press dialogues have been actively examining problem areas. In many of these states, voluntary codes, based largely upon the ABA standards, are now in operation. An earnest and ready spirit of cooperation thus far exhibited prompts a most favorable presentiment for the future.

PROGRESS IN NORTH DAKOTA

Significant measures have already been taken in North Dakota. Joint efforts in 1969 of Chief Justice Obert C. Teigen and Russell Nerison, Chairman of the Interprofessional Relations Committee of the North Dakota State Bar Association stimulated a series of bar-press-law enforcement meetings. A note of accord was almost immediately sounded. A Fair Trial-Free Press Council has now been formed and incorporated. Under the by-laws of the organization, provision has been made for wide membership including representatives of press and broadcasters associations, all levels of the judiciary, attorneys, law enforcement groups and educators.

On February 12, 1971, the North Dakota Fair Trial-Free Press Council formally adopted guidelines relating to adult criminal proceedings. Based on standards developed by a similar council in Minnesota, the North Dakota code provides:

> "The following information generally *should* be made public at, or immediately following the time of arrest:
>
> (A) The accused's name, age, residence, employment, marital status and similar background information.
>
> (B) The substance or text of the charge, such as is, or would be contained in a complaint, indictment, or information.
>
> (C) The identity of the investigating and arresting agency and the length of the investigation.
>
> (D) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest."

"The following information generally *should not* be made public at, or immediately following the time of arrest:

(A) Statements as to the character or reputation of an accused person.

(B) Existence or contents of any confession, admission or statement given by the accused, or his refusal to make a statement.

(C) Performance or results of tests, or the refusal of an accused to take such a test.

(D) Expected content of testimony, or credibility of prospective witnesses.

(E) Possibility of a plea of guilty to the offense charged or to a lesser offense, or other disposition.

(F) Other statements relating to the merits, evidence, argument, opinions or theories of the case."

CONCLUSION

In view of the substantial achievements of the last two or three years, the perennial problem of pre-trial publicity in criminal cases should prove less troublesome from now on. Widespread adoption of voluntary standards presage a future of care and discretion in reporting. The day is now foreseeable when an accused may come into court secure in the knowledge that he will be tried by jurors who are entirely free of the influence of harmful extrajudicial information.