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A Bar Association View

Robert L. Trescher

A BAR ASSOCIATION VIEW

By ROBERT L. TRESCHER†

THE QUESTION under consideration is as simple of statement as it is difficult of solution — how to reconcile the right of a criminal accused to the "speedy and public trial, by an impartial jury" assured by the sixth amendment[1] with the freedom of speech and of the press guaranteed by the first.[2]

Although the tragic events in Dallas in November of 1963 have appeared to generate the present controversy, these great constitutional principles embodied in the first and sixth amendments have been set on their present collision course for many years. Several celebrated cases have stimulated public discussion of fair trial and free press in bygone decades.[3] The current debate, however, assumes a sense of greater urgency in the accommodation of constitutional principles.

If one can discern a trend in more recent pronouncements of the United States Supreme Court, it points in the direction of surrounding the accused with an expanding range of rights guaranteed by the Constitution. Important among these are the right to counsel[4] and the other rights afforded by the sixth amendment, including the right to trial by an "impartial jury." At the same time, technological advances have enabled television, radio and the press to provide virtually every citizen with detailed news of public concern, including the commission of crime and the arrest and prosecution of the criminal accused.

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† B.S., 1934, LL.B., 1937, University of Pennsylvania; Chancellor, Philadelphia Bar Association.

To the extent that any of the views herein are not expressed in resolutions duly adopted by the Philadelphia Bar Association, they are those of the author and do not reflect the official policy of the Philadelphia Bar Association. The author believes, however, that such views meet with the approval of an overwhelming majority of the members of the Bar Association.

1. The sixth amendment provides:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.
U.S. CONST. amend. VI.

2. The first amendment states:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
U.S. CONST. amend. I.

3. See, *e.g.*, Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A.J. 301 (1935); Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940).

4. See, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

In keeping the public thus informed the media perform a socially important function which is protected by the first amendment.

The constitutional confrontation which we are discussing here today has been long in the making. The events in Dallas have contributed a vehicle for the current debate. The assassination of President Kennedy and the events that followed have furnished a not-to-be-forgotten occasion for the adoption of an unequivocal resolve by the courts, the bar, the police and press alike, that the treatment accorded Oswald and Ruby never shall be repeated.

Chapter five of the *Warren Report* described in detail the circumstances surrounding the detention and death of Oswald.[5] The *Report* criticized public authorities for releasing to the media the evidence against Oswald. It also criticized the news media for exerting immense pressure on the authorities for disclosures. But the *Report* makes clear that the responsibility for what transpired and for the taking of corrective action does not lie with the police and media alone. Thus chapter five of the *Report* concludes:

> The burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne . . . by State and local governments, by the bar, and ultimately by the public. 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.

In the debate which has followed publication of the *Report,* numerous proposals for dealing with the issue raised by the Warren Commission have been exhaustively explored.

Some observers, particularly representatives of the media, have been of the view that existing judicial machinery is adequate to protect the rights of the criminal accused. Changes of venue, continuances, voir dire examinations, sequestration and cautionary instructions are among the principal methods by which courts have sought to protect the defendant from prejudicial pretrial publicity.

Changes of venue, however, are rarely granted, and if the trial involves a particularly noteworthy crime or well-known figure it is apparent that this remedy may not be effective.

The granting of a continuance also may dilute the effect of pretrial publicity, but justice delayed is often justice denied. More importantly, the sixth amendment guarantees the defendant the right to a

5. REPORT OF THE WARREN COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY, ch. V (Bantam Book ed. 1964).

"speedy" trial. He should not be forced to abandon this constitutional right as the condition of securing another right guaranteed by the sixth amendment — a trial by an impartial jury.

Voir dire examination in most cases serves to assure impartiality. But there is substantial reason to believe that even the most conscientious juror who has been exposed to prejudicial pretrial publicity may be unable to exclude such extra judicial statements from his deliberations, despite his protestations on voir dire to the contrary.

Sequestration effectively prevents contamination of the jury from extra judicial publicity during trial, but it is powerless to prevent exposure to pretrial publicity prior to impaneling of the jury. In addition, sequestration tends to be unpopular with the jurors and invariably involves great inconvenience and expense.[6]

Preventative and corrective cautionary instructions by the trial judge not to read or discuss the case outside the courtroom and not to be influenced by prior publicity are commonly utilized in an attempt to insure the jury's continued impartiality. Such instructions, however, are of doubtful effectiveness in neutralizing the effect of prejudicial publicity. As Mr. Justice Jackson aptly stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[7]

Those who favor utilization of existing machinery to insure a fair trial, despite prejudicial pretrial publicity, point out that if the jury is partial in fact, the rights of the defendant can be protected by the granting of a new trial. Entirely apart from the significant drain on judicial resources that multiple trials involve, this remedy is rarely invoked and only when it is proved that the jurors, despite their pledge to render an impartial verdict, were in fact prejudiced.[8]

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6. See, *e.g.*, New Jersey v. Van Duyne, 43 N.J. 369, 388, 204 A.2d 841, 851 (1964), where the New Jersey Supreme Court pertinently observed:

> even though the improper publicity has not resulted in a new trial, it imposed a substantial and otherwise unnecessary expense on the taxpayers of the County of Passaic. As has been indicated above, there was to be no sequestration of the jury until the full complement of 14 had been chosen. But, when the prejudicial matter appeared in the two local papers on successive days, the trial court felt obliged to abandon the plan and to order immediate sequestration as jurors were accepted. Impaneling of the jury took three weeks. Sequestration began on the second day of trial and after only one juror had been sworn. The cost to the public of maintaining the jurors during that long period before a single bit of evidence could be offered in support of the indictment was wholly unnecessary but for the newspaper articles.

7. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion).

8. In Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court established standards for measuring impartiality which have been adhered to ever since. There it was held that a defendant must affirmatively show the existence of a preconceived opinion of sufficient strength that a presumption of partiality is raised. This holding was cited with approval in Irvin v. Dowd, 366 U.S. 717 (1961), in which the Supreme Court granted a new trial where eight of the jurors confessed to an opinion

It is, therefore, apparent that these traditional methods of safeguarding the fair trial guaranteed by the sixth amendment fall far short in actual practice of undoing the harm caused by prejudicial pretrial publicity. Indeed, they are totally impotent in controlling or preventing the cause of partiality in the jury — improper pretrial publicity.

Our English friends deal as a matter of course with the problem in a direct and forthright manner. In England, prejudicial pretrial publicity is largely curbed by the free use of the power of the courts to punish for contempt. Thus English and Commonwealth courts have punished as contempt any statements by the media which are or may be damaging to a person charged with crime, which review his criminal record, or which express opinions as to his guilt or innocence. Indeed, the English rule even makes it contempt for a newspaper to conduct its own investigation as to a crime for which an arrest has been made and to publish the results of that investigation.[9]

Attempts to invoke the English rule in the United States have met with little success. Since 1941 the Supreme Court has reversed contempt convictions by state courts in at least four cases.[10] In each of these cases, the freedom of speech and freedom of the press protected by the first amendment were held to preclude the convictions. The English rule was said not to be controlling. The fact that an out of court publication has an "inherent tendency" or "reasonable tendency" to cause disrespect for the judiciary or to interfere with the orderly administration of justice in a pending case was held not to be sufficient to punish for contempt under applicable Supreme Court cases.[11] Such publications are not the basis for a contempt conviction

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of guilt before trial, the accused's trial had become the cause celebre of the community and almost 90% of the prospective jurors entertained some opinion of guilt. In Rideau v. Louisiana, 373 U.S. 723 (1963), the defendant was granted a new trial where three members of the jury had seen the defendant confess the crime over a televised interview with the sheriff. Although some observers believe that *Irvin* and *Rideau* represent a departure from prior law, they demonstrate the extreme nature of the showing which is required before a new trial will be granted to expunge the prejudicial effects of pretrial publicity.

9. See generally Cowen, *Prejudicial Publicity and Fair Trial: A Comparative Examination of American, English and Commonwealth Law,* 41 IND. L.J. 69 (1965).

10. Woods v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

11. *Cf.*, Bridges v. California, *supra* note 11, at 272-73. The impotency of the contempt power to protect the criminal accused from prejudicial pretrial publicity is illustrated by Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). There, a Maryland trial court had adjudged a radio station in contempt. After advising listeners to "Stand by for a Sensation" the station broadcast to a community already outraged over the recent commission of a similar crime, news of the arrest, confession and criminal record of a Negro charged with the murder of an eleven year old white girl. The broadcast also contained a confession by the accused of the commission of a prior rape of a white woman. Because of the broadcast the defendant felt compelled to waive a jury trial. The Maryland Court of Appeals reversed on the ground that the

unless they fall within the "clear and present danger" test applicable under the first amendment.[12]

Other observers concerned with curbing publicity prejudicial to the accused have advocated statutory solutions. Typical of these is the legislation proposed in Massachusetts[13] imposing criminal sanctions upon the media, the police and court officers for the publication of confessions, criminal records, opinions of guilt and evidence tending to connect the accused with commission of the crime. The Morse Bill,[14] approved by the Judicial Conference upon the recommendation of Judge Smith's committee, makes it contempt of court for any employee of the United States, the defendant or his counsel to disclose information "which might affect the outcome of any pending criminal litigation." Laudable as such legislation appears to be in its purpose of preventing prejudicial pretrial publicity, it is probable that convictions cannot survive the first amendment except to the extent that the publications fall within the "clear and present danger" test. Accordingly, it is doubtful that such legislation would be any more effectual in curbing pretrial publicity than is the existing contempt power.

Still other commentators have favored the voluntary adoption by the media, police and bar of codes regulating or governing pretrial release and publication of information concerning the commission of crime and the arrest and prosecution of the accused.[15] To the extent

broadcast was protected by *Harney, Pennekamp* and *Bridges.* When the Supreme Court denied certiorari, Mr. Justice Frankfurter issued his classic opinion, carefully pointing out that denial of certiorari by the Supreme Court is not equivalent to an implied affirmance. The text and circumstances of the broadcast are reported at Baltimore Radio Show v. Maryland, 193 Md. 300, 67 A.2d 497 (1949).

12. In Schenck v. United States, 249 U.S. 47 (1919), and the cases which followed, the Supreme Court has held that freedom of speech and expression cannot be constitutionally restrained unless there is a "clear and present danger" that the substantive evil sought to be prevented will otherwise result. Such cases involved the constitutionality of convictions under espionage acts. *E.g.,* Abrams v. United States, 250 U.S. 616 (1919). See also Whitney v. California, 274 U.S. 357 (1927) (under a criminal syndicalism act); Herndon v. Lowry, 301 U.S. 242 (1937) (under an "anti-insurrection" act); Cantwell v. Connecticut, 310 U.S. 296 (1940) (for breach of the peace at common law). In Bridges v. California, *supra* note 11, the Supreme Court held that the standards evolved in these earlier cases were applicable even in contempt cases, which unlike *Schenck* and its progeny, involve the preservation of the sixth amendment right to a fair trial as well as first amendment issues. As a result the contempt power cannot be utilized to deter prejudicial pretrial publicity unless there is a "clear and present danger" that such publicity will, in fact, interfere with the administration of justice in a pending case.

13. H.R. Bill 3991, "An Act Protecting a Trial by Jury from Influence by the Divulgence, Broadcast or Publication of Certain Information" (introduced by State Representative Sigourney, 1965).

14. S. 290, 89th Cong., 1st Sess. (introduced by Senator Wayne Morse on January 6, 1965).

15. OREGON BAR–PRESS–BROADCASTERS JOINT STATEMENTS OF PRINCIPLES (1962); MASSACHUSETTS GUIDE FOR THE BAR AND NEWS MEDIA (1963). The text of these and other codes are reproduced in *Hearings on S. 290 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess., 1965 (hereinafter cited as *Hearings*).

that such voluntary codes curb pretrial publicity prejudicial to the accused they are commendable. But such codes contain no machinery for enforcement. Indeed, less responsible representatives of the news media may choose not to adhere to such codes. Our experience in Philadelphia is instructive in this regard. A joint committee comprised of members of the Philadelphia Bar Association and representatives of the media other than the newspapers (which declined to participate) recently adopted recommendations concerning fair trial and free press in a voluntary effort to safeguard the socially necessary function of free press to inform the public and the right of individuals to a fair trial. Among other recommendations, the joint committee suggested that in the absence of overriding considerations of public policy, "the news media [should] not publish the prior criminal history of the accused, purported admissions or confessions made by the accused in the absence of his counsel or expressions of the guilt or innocence of the accused." The recommendations of the joint committee were adopted at a special meeting of the Philadelphia Bar Association on November 9, 1965. Although the character of the information which has since been published has been generally less prejudicial, we believe that there is still room for substantial improvement, and Philadelphia's leading newspapers continued, and still continue, to publish confessions, admissions and prior criminal records despite the recommendations of the joint committee to the contrary.

Self-restraint and legislative solutions to the fair trial-free press controversy deserve careful consideration. However, the bar associations, if the Philadelphia Bar Association is typical, believe that the first responsibility of members of the bar lies in putting their own house in order. Although an effective code self-imposed by the news media is largely illusory, the legal profession possesses the machinery to insure compliance with its own standards of professional conduct which are codified in our *Canons of Professional Ethics.* If an attorney practices in a state with an integrated bar, he will be automatically subject to the disciplinary action of the bar association, which exercises quasi-judicial disciplinary power over its members in the event they fail to comply with the *Canons.* If he practices in a state in which association membership is noncompulsory, as is the case in Pennsylvania, the bar associations are authorized to commence disciplinary proceedings for violations of the *Canons.*

We believe that the principal responsibility for the protection of the rights of the criminal accused rests upon the members of the bar. The temptation to cast stones against the press and news media is strong. But news is properly the business of the newspapers. It is not

incumbent upon us as members of the bar to lecture the press as to how it should fulfill its own responsibilities. We are, however, dedicated to the proposition that every defendant in every criminal prosecution shall be accorded his constitutional right to a trial by the "impartial jury" guaranteed him by the sixth amendment. As members of the bar, we are convinced that criminal defendants have been, and continue to be, deprived of that right in all too many cases by reason of improper pretrial publicity.

The Philadelphia Bar Association was among the first to recognize the profession's heavy burden of responsibility for the shocking deprivation of the constitutional right of the accused assassin of President Kennedy. On December 4, 1963, less than two weeks after the assassination, the then incoming Chancellor of the Philadelphia Bar Association told us at our annual meeting held on December 4, 1963:

> Lee Harvey Oswald was arrested and charged with the crime. The television, radio and press immediately spread forth a universal conviction of his guilt beyond a shadow of reasonable doubt, thereby making it humanly impossible for the American system of justice to function with respect to his crime. Where could a juror be found who had not been exposed to television and the press? The chances of Oswald's trial by an impartial jury and his conviction on the basis of evidence purported were wholly and unmistakeably destroyed.
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> In these days of instantaneous communication, the rights of the accused need protection more than ever. The prosecutor and the law enforcement officers must assure that no violation of these rights occurs. There was, it is true, some concern that Oswald be provided counsel. But no one at that time — not the district attorney, no judge, no lawyer, no bar association — protested the publication of the evidence, the twenty-four hour interrogations, the violation of the prisoner's rights. It is against the legal profession — not the TV or the press — that the heavy indictment must lie. It is to be hoped that the Presidential Commission will not confine its attention to responsibility for the crime but will also study the failure of the processes of the law.

Early in 1964, the Philadelphia Bar Association's Committee on Criminal Law undertook to make a study of the relationship between fair trial and free press and to draft guide lines that would minimize the danger of serious conflict between the two. The Committee's proposals were set forth in a statement of policy which was approved

at a special meeting of the Association on December 29, 1964.[16] The proposals barred three specific activities on the part of the members of our bar, the prosecuting attorneys and defense counsel alike: first they forbade the release of any statement that an accused had made a confession; secondly, they prohibited disclosure to the media of the past record of the accused; and thirdly, they ruled out release by a lawyer to the media of evidence indicating the lawyer's belief in the guilt or innocence of anyone charged with the crime. In addition, the statement suggested that the police and the news media should refrain from releasing or publicizing any evidence falling within the foregoing categories. We were careful to point out, however, that any restraints with respect to the news media must be self-imposed.

Thereafter, the Bar Association appointed a Special Committee on Fair Trial and Free Press to consider methods of implementing the Bar Association guide lines. The Committee concluded that the Bar Association should take steps to compel compliance with the highest degree of professional responsibility of all members of the bar engaged in the administration of justice in the trial of criminal cases. Accordingly, the Committee recommended the amendment of the *Canons* in such a way as to proscribe the issuance of statements by counsel for either side which would disclose prejudicial information about any case before or during trial. It was concluded that Canon 5, which relates to the responsibilities of counsel engaged in the prosecution or defense of criminal cases,[17] and Canon 20, which relates to newspaper discussion of pending litigation,[18] be amended to insure a fair trial to persons accused of crime.

At a special meeting of the Philadelphia Bar Association on November 9, 1965, the report of the Committee was adopted and it was

16. See *Statement of Policy of Philadelphia Bar Association Regarding Release and Publication of Information in connection with Criminal Proceedings,* reproduced at *Hearings,* pp. 108–11.

17. Canon V in its present form provides:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.
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> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

18. Canon XX now reads:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

resolved that Canons 5 and 20 be amended by the addition of the following paragraphs:

Amendment to Canon 5

It is the duty of a lawyer engaged either in the prosecution or the defense of a person accused of a crime to refrain from any action which might interfere with the right of either the accused or the prosecuting governmental entity to a fair trial. To that end it is improper and professionally reprehensible for a lawyer so engaged to express to the public or in any manner extrajudicially any opinion or prediction as to guilt or innocence of the accused, the weight of the evidence against him or the likelihood that he will be either convicted or acquitted.[19]

Amendment to Canon 20

Lawyers, both for the prosecution and defense, must completely refrain from making any statement or giving any release with respect to pending criminal cases from the time of the arrest until the final determination; except as to identity of defendant, nature of charge, and time, place and circumstances of arrest.

Disclosures should include only incontrovertible factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest would be highly prejudicial and where the release thereof would serve no law enforcement function, such information should not be made public.[20]

At the present time the Professional Ethics Committee of the American Bar Association has under consideration these proposed amendments to the *Canons of Professional Ethics.*

In the event that the *Canons* are appropriately amended, we believe that the source of much prejudicial pretrial publicity will be curbed. Vigorous enforcement of the *Canons* by the bar associations will, of course, be required in the event that the amendments are to have the desired effect.[21]

19. The standing committee of Professional Ethics of the American Bar Association previously had recommended the amendment to Canon V set forth in the text. As a result, the Philadelphia Bar Association's resolution authorized its joinder in the amendment to Canon V which had been previously proposed.

20. The proposed amendment to Canon XX is believed to have originated with the Philadelphia Bar Association. Accordingly, the resolution authorized the Bar Association to recommend adoption of amendment to the Professional Ethics Committee of the American Bar Association.

21. Compare New Jersey v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), where it was stated:

> In our view Canons 5 and 20 of the Canons of Professional Ethics require a broader and more stringent rule. We interpret these canons, particularly Canon 20, to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant,

To the extent that the police are not subject to the control of the prosecuting authorities, and often they are not, vigorous enforcement of the recommended amendments may not be effective to prevent all disclosures of the type likely to result in prejudicial pretrial publicity. In such cases we favor adoption by law enforcement agencies of statements of policy similar to the one promulgated by Attorney General Katzenbach.[22] This statement of policy precludes public disclosure by Department of Justice personnel of certain types of information tending to create dangers of prejudice without serving significant law enforcement functions. Under this policy, Justice Department personnel are precluded from releasing information such as statements, admissions, confessions or alibis attributable to a defendant, references to investigative procedures, statements concerning the identity, credibility or testimony of prospective witnesses and statements concerning evidence or arguments in the case.

The Philadelphia Bar Association believes that the rights of the criminal accused to a fair trial can best be preserved by nondisclosure of prejudicial information by the prosecution, the defense and law enforcement agencies. Nondisclosure generally will prevent exposure of potential jurors to prejudicial pretrial publicity. At the same time the freedom of the press is preserved. Indeed, such a program imposes no restraint whatever upon the news media.

Some have said that nondisclosure to the media impairs the public's so-called "right to know." The public, however, does not possess any such "right to know" or to obtain information as to matters which interfere with the right of a criminal accused to a fair trial. Each of the guarantees set forth in the Bill of Rights are individual rights designed and intended to protect individuals from an overreaching sovereign. Among these rights are the freedom of speech and freedom of the press. But these are individual, not collective, rights. They protect an individual from prosecution for his utterances. They do not license gratification of public curiosity at the expense of an individual's right to a fair trial. They do not substitute trial by press or public opinion, for trial by the impartial jury guaranteed by the sixth amendment.

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and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests. Such statements have the capacity to interfere with a fair trial and cannot be countenanced. With respect to prosecutors' detectives and members of local police departments who are not members of the bar, statements of the type described are an improper interference with the due administration of criminal justice and constitute conduct unbecoming a police officer. As such they warrant discipline at the hands of the proper authorities.

22. "Statement of Policy Concerning the Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings", 28 C.F.R. § 50.2 (1965), reproduced at *Hearings*, pp. 39–40.

Others may say that such nondisclosure muzzles the press by depriving the media of its sources of information. We recognize that the press will be unable to publish that to which it does not have access. But we, as members of the bar whose responsibilities extend to the press, the members of the public and the criminal accused alike, do not believe that the inability of the media to publish before trial the admissions, confessions and criminal record of the accused in any way impairs the historic and constitutional function of the "free press".

The concept of a "free press" in our society is a basic one of long standing. Ever since the early days of Peter Zenger the right of the press to comment and speak out upon matters of public moment, including the operations of government, has been well recognized. A "free press" exposes to public scrutiny all of the relevant affairs of government including the misconduct or misfeasance of public officials. An electorate so informed is able to discriminate intelligently in the voting booths between corrupt or inefficient officials and dedicated and worthy civil servants. In this manner the integrity of our governmental institutions and the democratic process is maintained at a high level.

The freedom of the media to speak out with respect to the judicial functions of government is equally important. The reluctant prosecutor or the incompetent judge, just as the corrupt legislator or the inefficient administrator, should be made to withstand the test of public scrutiny. In this way the public is assured that its judicial institutions function in accordance with the highest of standards.

Thus, the concept of a "free press" requires that the news media have freedom to speak out with respect to the operation of our governmental institutions, including the judiciary, so that an informed public will promote the integrity of government.

It is not, however, the function of the press or the public to determine the guilt or innocence of the criminal accused. This responsibility is entrusted to our judicial institutions to be exercised in strict accordance with well defined constitutional principles. If, however, the prosecutor or the judge fails to fulfill the responsibilities of his office, he is accountable to the public, just as any other governmental official. And a public so enlightened after trial by a "free press" justly can complain of an apparent miscarriage of justice or a misfeasance in office and take whatever steps as are available to prevent their repetition. Nothing contained in the Philadelphia Bar Association proposals in any way interferes with this historic and important function of the press.

It would appear, therefore, that the vitality and function of a "free press" is not eroded by curtailing pretrial publicity of a kind likely to impair the "fair trial" in the manner proposed by the Phila-

delphia Bar Association. So viewed, the apparent collision between a "free press" and a "fair trial" is avoided. The case of free press versus fair trial is not then a real controversy, and so characterizing the issue serves only to promote a dispute between the members of two honorable and distinguished professions. The Philadelphia Bar Association has thus sought to place the issues in what we believe to be their true perspective.