THE NEWS AND THE ACCUSED

by Lawrence W. Schad*

I. Introduction

Any American accused of a criminal offense is guaranteed by constitutional mandate "the right to a speedy and public trial, by an impartial jury . . . " [Emphasis added]. Yet the maintenance of the requisite impartiality is a difficult task for jurors confronted with newspaper headlines such as "DEATH QUIZ YIELDS BEATING CONFESSION, ADMITS ATTACK ON COED, LINK PAROLEE TO SECOND CRIME." Such sensational news releases underscore the danger of potential interference with the accused's right to a trial by an impartial jury. This type of reporting has stimulated extensive discussion leading to recommendations aimed at protecting the accused from prejudicial news stories. Recent surveys, which show that over one hundred appeals in a two-year span have been based upon such prejudice, not only indicate the enormity of the problem, but also destroy

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1 U.S. Const. Amend. VI.
3 Consider, for example, the indiscretions committed during the trial of Dr. Samuel Sheppard, State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340, 342 (1956), during which the following headlines appeared in Cleveland newspapers, "SAM CALLED A 'JEKYLL-HYDE' BY MARILYN, COUSIN TO TESTIFY" and "WHY ISN'T SAM SHEPPARD IN JAIL" and "QUIT STALLING—BRING HIM IN," As cited in Tentative Draft, supra note 2, at 27-45.

Prejudicial publicity may also deny the prosecution a right to a "fair trial" by slanting public opinion in favor of the defendant or by attacking the motives of the prosecution in bringing the defendant to trial.
the myth that the problem is limited to national *causes celebres*.

Two general approaches have been taken in an attempt to ensure impartiality. The first approach suggests that existing safeguards, when coupled with increasing public concern, will be an adequate remedy for the problem. The other approach consists of two principal viewpoints, each acknowledging that existing measures have proven inadequate and that additional measures are needed. The first view is that the problem would be resolved by creating media codes which would prevent public dissemination of any prejudicial information received by the news media. According to the second viewpoint, the problem could be best resolved by preventing the initial release of prejudicial information to the news media and by improving courtroom procedures to minimize the impact of any such information inadvertently released. This latter view is reflected in the standards formulated by the American Bar Association (ABA) Committee on Fair Trial and Free Press, headed by Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts. The Committee's Standards, approved by the ABA's House of Delegates, are set forth in the Appendix.

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"The threat was not confined merely to a handful of isolated, truly sensational cases—though these do, of course, place the greatest strain on our system of justice. It extended as well to many lesser known cases that attract notoriety in the community or throughout the state." David L. Shapiro, the reporter for the Reardon Committee, Transcript of the House of Delegates Debate at 153 (1968) (hereinafter cited as Transcript).

5 The Committee has issued two sets of standards accompanied by commentary. See note 2 supra.

This Committee is a subcommittee of the Central Committee on Minimum Standards of the Administration of Justice headed by J. Edward Lumbard, Chief Judge of the United States Court of Appeals for the Second Circuit. 11 AM. B. NEWS (Jan. 15, 1966).

Two other studies have developed standards similar to the Reardon Standards. The first study was undertaken by the New York Bar Association. Its conclusions were published in SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS & FAIR TRIAL: FINAL REPORT WITH RECOMMENDATIONS
The author believes that the Reardon Standards, if implemented, would provide an effective solution to the problem of prejudicial information, and that this potential can be best realized through adoption and enforcement of the Standards by the courts. This conclusion is based upon analysis of the following issues:

(1) **The nature of the problem**, including an examination of (a) the nature of prejudicial information, (b) those who create the problem either by initially releasing or subsequently disseminating such information, and (c) the related effect of courtroom procedure upon the impact of such information. An analysis of these issues suggests that a procedure must be developed which can control those persons who either leak or disseminate prejudicial information and which will diminish the deleterious impact of such information.

(2) **The effectiveness of present regulations.** The author con-

The second study was undertaken by the Judicial Conference of the United States through the Committee on the Operation of the Jury System, chaired by Judge Irving Kaufman of the Court of Appeals for the Second Circuit. The conclusions of this committee and its recommendations are contained in the *Report of the Committee on the Operation of the Jury System on the "Fair Trial—Free Press" Issue* (1968, Sept.) [hereinafter cited as the *Kaufman Report*]. This report has been subsequently approved by the Judicial Conference of the United States. Each U.S. District Court may, in the Court's discretion, adopt all or part of the report. For example, the U.S. District Court for Northern Illinois adopted the report's recommendations on Oct. 1, 1969.

The Kaufman Report closely resembles the Reardon Standards. With respect to the provisions governing the conduct of lawyers and of courtroom personnel, the Kaufman Report incorporated the Reardon Standards in toto. The Kaufman Committee stated:

> The Committee is recommending adoption in substance of the proposed Canon as it appears ... in the Reardon Report. In the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both the state and federal courts throughout the country, the Committee feels that there is merit in adopting the substance of the formulation proposed to be included in the American Bar Association's Code of Professional Responsibility.

With respect to procedural recommendations, the Kaufman report differs from the Reardon Standards. The Kaufman Report noted that there are differences in "procedures and experiences in state courts as compared to federal courts." The reports also differed as to recommended restrictions upon police officers.

cludes that existing safeguards do not, in fact, protect the accused’s right to an impartial jury trial.

(3) *The effectiveness of press media codes.* The author concludes that while these codes offer a new approach, they are inherently incapable of providing a feasible solution to the problem.

(4) *The effectiveness of the Reardon Standards.* In examining this issue, the collateral issues of the interpretation of the Standards and their relation to freedom of the press will be analyzed. The author concludes that the Standards, if diligently enforced, offer a solution to the problem that will be both effective and will not violate the constitutional guarantee of freedom of the press.

(5) *The agency which could best adopt and enforce the Reardon Standards.* It is the author’s conclusion that the courts, rather than police departments, bar associations or legislatures would be best suited to implement these Standards. The author suggests that the Standards be adopted through rule of court by the appellate courts in the various jurisdictions.

II. The Nature of the Problem

*A. Prejudicial Information*

An awareness of the nature of the problem of leakage and dissemination of prejudicial information is a prerequisite to a thorough understanding of the potential of the proposed solutions. There are two interrelated categories of prejudicial publicity. The first category consists of that publicity tainted with “editorial prejudice.” The press can influence a trial with such publicity even if there has been no release of official information. The press

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7 The continuous headlines during the Sheppard trial serve as a glaring example of this type of disruptive influence upon the trial process. See note 3 supra. The statements of the Cleveland press during that trial, of course, are but one example of the abuses of the freedom of the press by various newspapers.

It was not only the quantity and prominence of the (Cleveland newspapers') coverage but also the intrusion of the newspapers into the merits of the case and the effect of the (Cleveland) Press's editorial position on the administration of justice that have made the episode the
often creates its own editorial image of the defendant, especially in cases of bizarre or brutal crimes.\textsuperscript{8}

Another category of prejudicial information consists of information, inadmissible as evidence during the trial, which is "leaked" to the press by persons involved in the trial. Such a leakage of information may occur at any time during the trial process. This type of information shall be referred to as "nonjudicial prejudice."

\textbf{B. Sources of Prejudicial Information}

While editorial prejudice has its source in the press, the source of nonjudicial prejudice differs according to the time it is released. During the period between arrest and commencement of the trial, "the overwhelming preponderance of information . . . emanates from police sources."\textsuperscript{9} Information released by police officers usually consists of reports concerning the accused's refusal to take lie detector tests, alleged confessions and prior convictions,\textsuperscript{10} or consists of incriminating information obtained from the ac-

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\textsuperscript{8} See Tentative Draft, supra note 2, at 29-45. Note, for example, the following press release quoted in the dissenting opinion in State v. Williams.

Did you ever see a wild beast at bay—teeth exposed, eyes glaring with fury, claws unsheathed for the savage spring? Williams—William Williams—was the wild beast this morning as he sat on the witness stand, baited, surround, at bay . . . The blood of the murdered lad and his mother called calmly and coldly for vengeance, never ceasing the appeal even when the exulting devil within the man prompted him to cry out. O, if he only held a knife grasped tightly in his right hand . . . Surely he would have sprung from that witness stand screaming his defiance, pale, distorted, to kill once more, with the grin of contempt for the dangling hangman's noose. (19 Minn. 351, 373-74, 105 N.W. 265, 273-74 (1905) dissenting opinion of Lewis, J.)

\textsuperscript{9} Tentative Draft, supra note 2, at 28.

\textsuperscript{10} Id. at 28-30.
cused himself before he had an opportunity to consult a lawyer. Occasionally, prosecutors make public statements concerning information relating to the merits of the case.

During the actual trial, however, the attorneys are generally the main source of leakage. Attorneys often seek to place their case before the press in order to create a “sympathetic audience” within the public. During this period, “leaks” can also emanate from courtroom personnel.

In any case, the central danger posed by these statements is the likelihood that the released information will not be forgotten by the jurors. The adequate control of prejudicial information demands the regulation of attorneys, courtroom personnel, police officers and the press.

C. Utilization of Procedure

Effective use of procedural rules is essential to decreasing the impact of prejudicial information upon a trial; the failure to utilize all available procedural safeguards probably guarantees that prejudicial publicity, once released, will influence the trial process.

For example, the Court’s failure to question the jurors and to grant a motion for continuance was noted by the United States Supreme Court in its dramatic description of the events that occurred during the first trial of Dr. Samuel Sheppard:

In a broadcast... in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss’ confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continu-

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11 Id. at 30.
12 Id. at 33.
13 Id. at 37.
14 Id. at 40.
15 Important procedural tools generally available, include: exclusion of the public from all or part of certain pre-trial conferences held in the absence of the jury; motions for continuance; change of venue and waiver of jury trial; examination of prospective jurors on voir dire to ascertain the existence of possible prejudice; cautioning the jury and media representatives about the reporting of certain matters; sequestration of the jury; and ultimately, setting aside a conviction for the failure of the trial court to take such steps as conditions demand.
ance based on the same ground, saying: "Well, I don't know, we can't stop people, in any event, listening to it... We are not going to harass the jury every morning... It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury."16

That "confidence" would no doubt have been shaken by a proper appreciation of what Judge Bell of the Ohio Supreme Court called "an atmosphere of a Roman Holiday for the News Media."17

Other examples of the impact upon the trial process of a failure to employ available procedural tools do not seem necessary to underscore the necessity of viable standards to guide the court in using these tools to ameliorate the effects of both editorial and nonjudicial prejudice.18

D. Inadequacy of Current Regulatory Devices

The present application of procedural rules and the existing penalties for the leaking of prejudicial information do not deter the injection of prejudicial information into the trial nor do they significantly reduce its impact.

Some jurisdictions currently have no effective standards to govern the application of available procedural tools.19 In those jurisdictions that do, the standards have not been heeded, often because of reluctance of trial courts to grant relief or the reluctance of appellate courts to alter a trial judge's decision considered to be within his discretion.20

Continued reliance on present standards seems futile. Moreover, even if these procedural tools were utilized, they would not eliminate the dissemination of prejudicial information because

17 State v. Sheppard, supra note 3 at 294.
18 This failure of trial courts to utilize procedure is indicated by the 421 appeals based on prejudice in state and federal appellate courts over the last two decades. A.B.A. LEGAL ADVISORY COMMITTEE ON FAIR TRIAL & FREE PRESS, RIGHTS OF FAIR TRIAL AND FREE PRESS (1969) 7 (hereinafter cited as ADVISORY MANUAL). See also text accompanying note 4 supra.
19 TENTATIVE DRAFT, supra note 2 at 113. The term "standards" used in the text, refers to those tests, established either through precedent or through rule of court which guide a judge in his application of various procedural rules.
20 Id. at 74.
they are designed to ameliorate the effects of such information and not to control the sources of such information. Successful solution to the problem is contingent upon the effect of deterrent regulation aimed directly at the person who leaks or disseminates information.\textsuperscript{21} Thus, while standards to provide guidance in the use of available procedural tools are necessary, they must be accompanied by regulations of a deterrent rather than a corrective nature. Unfortunately, deterrent regulation sufficient to meet the problem does not currently exist.\textsuperscript{22} For example, the out-of-court statements of attorneys have been heretofore regulated by Canon 20\textsuperscript{23} of the ABA Canons of Ethics. This provision, however, proved to be wholly inadequate as a deterrent to irresponsible statements by attorneys.\textsuperscript{24} It has been recently replaced by sec-

\textsuperscript{21} Sole reliance on procedural tools, even if quite effective in reducing the damage wrought by prejudicial information, would result in costly retrials and delay. Without reducing either the leakage or dissemination of such information, the value of certain procedural tools would be greatly reduced.

Moreover, the wider distribution of information, which now quite commonly occurs on a statewide or nationwide basis, may often serve to render useless one of the principal remedies—change of venue—designed to protect an accused who has been the subject of potentially prejudicial new coverage. Tentative Draft, supra note 2 at 21-22.

\textsuperscript{22} The current regulations which are deterrent in focus include bar canons, internal regulations of police departments, and court restrictions on court personnel.

\textsuperscript{23} ABA CANONS OF PROFESSIONAL ETHICS No. 20, Newspaper Discussion of Pending Litigation, [hereinafter cited as CANON 20].

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 an ex parte statement.

\textsuperscript{24} What makes the ABA Canon 20 of dubious value in curbing this abuse is that it is only applicable to newspaper discussion of pending litigation "generally," and publicity is allowed "in extreme circumstances." Thus these are exceptions, but what the exceptions mean would seem to be left to the imagination or judgment of the lawyer who resorts to the public forum. Moreover, violations of the spirit of Canon 20 have continued unpunished for so many years as to make court proceedings of questionable effect unless Canon 20 is drastically amended. (Medina Report, supra note 5 at 18.)

In the Approved Draft, supra note 2 at 36, the Committee stated that it had uncovered only one case during Canon 20's sixty-two year existence where a viola-
Section 1.1 of the Reardon Standards.\textsuperscript{25} Section 1.1, which set standards for the release by attorneys of information prior to or during criminal litigation, is part of the ABA's new Code of Professional Responsibility adopted August 11, 1969.\textsuperscript{26} This section, in contrast to Canon 20, contains explicit standards as to that information which can and cannot be released by attorneys in a criminal litigation and contains penalties for violation of those standards.\textsuperscript{27} Accordingly, section 1.1 holds forth greater promise of deterring attorneys from releasing potentially prejudicial information.

However, section 1.1 will not affect the release of prejudicial information by those not within the scope of the bar's control; not all "intentional disseminators"\textsuperscript{28} are bound by the ABA canons.\textsuperscript{29}

A belief that an increase of public concern will deter the release of prejudicial information runs contrary to actual ex-

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\textsuperscript{25} See Section 1.1, App.

\textsuperscript{26} The Code of Professional Responsibility is the revised version of the former ABA Code of Ethics. Of course, ABA adoption of Section 1.1, even coupled with increased pressure for voluntary compliance, may not in and of itself eliminate prejudicial activities by all lawyers. Adoption by state and local bar associations, which promulgate their own canons, is necessary as well. The majority of hearings on canon violations seem to occur at the state and local bar level. Thus, it appears as though most violations are treated as violations of state or local bar canons and are dealt with on that level.

\textsuperscript{27} Judge Reardon remarked that:

\begin{quote}
There has been complaint about (Canon 20) from many sources on grounds that (1) it has never been freighted with definite meaning, and (2) it has never been enforced. . . . In our judgment, the canon was not sufficiently explicit and lacked muscle. (Emphasis added)
\end{quote}

\textsuperscript{28} An "intentional disseminator" for the purpose of this paper is one who violates the prohibitions contained within section 4 of the Standards. See App. Part IV.

\textsuperscript{29} For example, individual police officers are unlikely to abide voluntarily by the mandate of the ABA.
experience. General principles of decency and respect for the judicial process have failed to motivate self-restraint in the past, and there is little reason to believe they will do so in the future.

It seems fair to conclude that present regulations are neither of sufficient deterrent nor curative effect to alleviate the problem of prejudicial information. Other efforts have similarly fallen short of the goal.

E. Inadequacy of Proposed Regulatory Devices: Media Codes

Existing media codes are the product of state or local news media organizations or of professional associations within the state (Media Codes). Occasionally, a state or local bar group and a media group will co-author the code after joint discussion (Bar-Media Codes).30 Not until recently, however, has it been seriously contended that media codes in and of themselves could solve the problem. Indeed, the press at one time contended that the codes would do more harm than good.31 Whether or not

30 These groups could include such organizations as N.B.C. and C.B.S. and such associations as Newspaper Publishers Associates and State Association of Broadcasters. Bar—Media Codes have been established in Oklahoma, Oregon, Massachusetts, Washington and Colorado. ADVISORY MANUAL, supra note 18 at 22.

Voluntary agreements on press guidelines have been established in Arizona, Colorado, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin as well as the cities of Toledo and Cleveland. Id., New York State Fair Trial—Free Press Conference has recently created voluntary guidelines for criminal reporting. A number of both media and media-bar codes are quite comprehensive. For example, “The Compact of Understanding” adopted by the Oklahoma Bar-Media Relations Committee in 1968 includes a preamble, a statement of principles, and a detailed index expurgatorius delineating information that “may jeopardize the rights of the defendant.” Id. at 25, codes such as that of the State of Washington, contain shorter statements in which all signators take notice of the great danger that prejudicial information poses to a juror’s impartiality. See for example, STATEMENT OF PRINCIPLES OF THE BENCH-BAR-PRESS OF THE STATE OF WASHINGTON, cited in APPROVED DRAFT, supra note 18, App. D. at 22.

31 The media’s belief in the efficacy of press codes is a recent development. In 1965, the Press-Bar Committee of the American Society of Newspaper Editors issued a report stating:

We are persuaded that no set of specific rules can be written into a code of press conduct that will not do more harm than good. We are convinced that the solution to whatever problems of FREE (sic) Press-Fair-Trial that may exist will not be solved by such codes.

As quoted by Judge Reardon during the ABA Debate, Feb. 1968: Transcript supra note 4 at 147.
harmful, however, media codes will not solve the problem.32

Media codes are inherently inadequate devices to curb dissemination of prejudicial information. First, where state-wide or city-wide voluntary codes have been established, there is no guarantee that all major communications media organizations will join; some publications will remain free to print whatever they like.33

Second, even should all media organizations in a given area bind themselves to a code, cessation of prejudicial dissemination is not assured. These voluntary codes often consist of little more than general substantive principles of free speech and fair trial interlaced with vague regulatory guidelines.34 Even where a detailed index expurgatorius is included, there is frequently a clause stating, for example, that:

An editor, who must ultimately make the decision whether to publish or broadcast, should weigh these varying responsibilities.35

32 The ABA Legal Advisory Committee on Fair Trial and Free Press, headed by Chief Justice Edward Devitt of the U.S. District Court of Minnesota (the Devitt Committee), was charged with the task of assisting "effectuating the (Reardon) recommendations..." and "encouraging cooperation of the bar and media in voluntary measure to protect the rights of Fair Trial and Free Press." 16 COORDINATOR & PUBL. RELATION BULL. I (April, 1968). The Devitt Committee felt that the press codes may be viewed as possible alternatives to the standards:

Ultimately, the decision will rest with the courts in each jurisdiction to decide, in light of experience with the codes, whether or not it is necessary to apply the standards by rules of court. [Emphasis added]

ADVISORY MANUAL, supra note 18 at 30.

33 One of the best-known examples of a voluntary code is the Massachusetts Guide for the Bar and News Media. . . . It was approved . . . by the Massachusetts and Boston Bar Associations, and was adopted in 1963 by the Massachusetts Broadcasters' Association and by twenty-six daily newspapers and thirty-six weeklies in the state, (the major big-city dailies, with one exception, refused to join). FRIENDLY & GOLDFARB, supra note 7 at 123. Judge Reardon stated during the debate in the ABA's House of Delegates at Transcript, supra note 4 at 148, "We have evidences in writing of the policy of refusal of certain newspapers ever to bind themselves to a code."

34 A reading of the [Massachusetts] Guide [for the Bar and News Media] leads to the assumption . . . that its drafters wrestled with the problem but could not pin its shoulders to the mat. The categories of tabooed publications and utterances are so loosely worded as to serve only as broad indicators rather than as operable definitions of what may be inimical to fair trial. But the instruction that these categories should be "avoided" rather than prohibited evidences a conclusion that a tight and enforceable rule is impossible. FRIENDLY & GOLDFARB, supra note 7 at 124.

Leaving the power to decide whether certain information is or is not prejudicial with the person to be regulated is hardly an adequate means of control. It accomplishes little if any editor decides to publish potentially prejudicial information. And there is clearly no guarantee that all editors will agree in their decisions. Therefore information which is in fact prejudicial may still be released.

Third, since such codes are voluntary, they may be ignored entirely. Voluntary adherence to the code may well be replaced by a desire to sell more newspapers. There is, after all, no sanction for breach of a media code; and sensationalism in criminal reporting sells newspapers.

Day in and day out, as readership surveys make brutally clear and as common knowledge confirms, the best read items in a newspaper are those about crime. It is a fact.

Every editor knows it. With or without readership surveys, he knows that crime news is the hottest article on his counter. Within limits—within rather far extended limits, to be honest about it—the publication of criminal news bolsters readership and circulation. It is safe to say that no general-circulation newspaper can survive without rather abundant news about crime, even though this cannot be proved.

If one newspaper releases information about criminal events, it is realistic to assume that others will print similar stories, especially when such information is readily available.

The press cannot be expected to refrain from printing statements issued by public officials, as for example the United States Attorney, even though such statements may be pre-
judicial to a fair trial. The only way to stop this abuse is to stop it at the source.\textsuperscript{38}

In summary, media codes will not eliminate the problem since there is no assurance that all will join, agree on interpretation of code restrictions or ultimately obey the codes they have signed.

III. The Reardon Standards: An Effective Approach

A. Introductory Remarks

The Reardon Standards focus upon the prevention of release of certain information by individual police officers,\textsuperscript{39} court personnel,\textsuperscript{40} lawyers,\textsuperscript{41} and "intentional disseminators."\textsuperscript{42} The Standards also set up uniform guidelines to govern the application of courtroom procedure.\textsuperscript{43} The Standards are not self-executing. They are merely a report, and they therefore lack the authority to demand compliance. The Standards are without effect unless adopted and enforced by the control agencies, that is, police departments, bar associations, courts and legislatures. If so implemented, the Reardon Standards, interpreted as \textit{minimum} standards, will offer a viable solution to the problem of prejudice.

B. Reardon Standards: Effective Minimum Standards

The Reardon Standards attempt to prevent the initial release of information by penalizing violators; that is, the Standards attempt to control the sources of prejudicial information. They also contain realistic provisions to guide the court in applying the general procedural rules designed to minimize the effect of prejudicial information on the trial.

Part III of the Standards contains provisions governing the use of motions to exclude the public from pre-trial hearings,\textsuperscript{44} for

\textsuperscript{39} See Section 2.1, App.
\textsuperscript{40} See Section 2.3, App.
\textsuperscript{41} See Section 1.1, App.
\textsuperscript{42} See Part IV, App. and note 28, \textit{supra}.
\textsuperscript{43} See Part III, App.
\textsuperscript{44} See Section 3.1, App.
change of venue, continuance, or waiver of jury, and for setting aside a verdict. Part III also contains the standards for selection of jurors and for conducting the trial including sequestration of the jurors. These provisions were designed to make such motions effective in protecting the trial from prejudicial publicity that may have already saturated the local community.

The Reardon Committee recognized that the potential of available procedural tools would be realized only if trial judges followed the standards set out in the Report. The Committee emphasized recent court decisions holding that "failure to utilize these techniques may constitute a denial of due process invalidating a conviction." The Committee felt that appellate courts have a duty to ensure that the Standards, once adopted in a jurisdiction, are properly employed by the trial judge.

Closer appellate review would place a duty on trial judges to follow the Standards. For example, whenever there is a "substantial likelihood" that a jury has been influenced by "exposure to extra-judicial communication," the trial judge would be compelled to set aside the verdict under section 3.6. The Committee suggests that failure of the trial judge to apply the standard would be an abuse of discretion subject to reversal on appeal. The Reardon Standards, if implemented, would, in effect, impose a duty on the trial judge to use available procedural techniques in accordance with these Standards, thereby ensuring that the impact of prejudicial information would be minimal.

The Standards provide that those who violate the provisions regulating the release of information will be punished. One who

45 See Section 3.2, App.
46 See Section 3.3, App.
47 See Section 3.6, App.
48 See Section 3.4, App.
49 See Section 3.5, App.
50 As the committee noted in Tentative Draft, supra note 2, at 74:

Study of the reported decisions, together with field research, indicates that the potential effectiveness of these devices is substantially greater than their present value. This gap is due principally to the present reluctance of the trial courts to grant relief and to the unwillingness of appellate courts to interfere with the trial judges discretion. [Emphasis added].

51 Tentative Draft, supra note 2 at 112. For a detailed discussion of case law see note 108, infra.
52 Id. at 74.
53 Id. at 74.
Reardon Standards

releases information intended to influence a trial (intentional disseminator) would risk a contempt of court citation.\(^5\)\(^4\) Police officers, courtroom employees, and lawyers would face suspension or disciplinary action by the police department, court, or the bar, respectively.\(^5\)\(^5\) The threat of discipline by the organized bar, and the police department supplemented by judicial or legislative enforcement of the Standards should deter such disclosures.

Only in the case of editorial prejudice did the Committee fail to recommend sanctions, although existing procedural tools, if properly utilized, might serve to reduce the damaging impact of such publicity. The Committee refused to make such recommendations because (1) direct restraints on the press would probably be unconstitutional,\(^5\)\(^6\) (2) the Committee concluded that editorial prejudice was a minor aspect of the total problem,\(^5\)\(^7\) and (3) the Committee felt that the media were becoming increasingly aware of the danger of prejudicial information.

...[T]here has been in recent years...an impressive increase in the exercise of responsible restraint on the part of many news media organizations...Certainly these encouraging signs militate against present adoption of sweeping restrictions against the media themselves.\(^5\)\(^8\)

As a result, the Reardon Committee viewed media codes as a sufficient means of restricting editorial prejudice, and did not feel compelled to suggest regulations to govern this aspect of the problem. This, in effect, leaves a loophole in the otherwise pervasive regulations proposed in the Standards. The existence of this loophole, probably motivated by constitutional considerations, necessitates a reliance on a continuing evolution of the media's efforts to regulate itself.

The Reardon Standards should, for the large part, deter dis-

\(^{54}\) Part IV, App.

\(^{55}\) Parts I, II, App.

\(^{56}\) See Tentative Draft, supra note 2, at 71.

\(^{57}\) It bears underscoring that of all the instances discussed...which suggest the possibility of serious prejudice, the overwhelming majority involve information released by official sources or obtained in the course of public proceedings. Exceedingly few stem from independent investigations by the news media or from the taking of a strong editorial position in a particular criminal case while it is pending. Id. at 39.

\(^{58}\) Id. at 71-72.
semination of prejudicial information and minimize the impact of any such dissemination which does occur.

C. The Reardon Standards, Mass Media, and the First Amendment

1. The Free Press Issue

The freedom of the press issue has been debated with considerable emotion since the Standards were released. During debate over adoption in the ABA’s House of Delegates, members of the press argued that the Standards went too far. The press felt that the Standards would not allow the media to warn the community of imminent danger.

[And further, . . . your committee’s recommendations would in effect deny the law abiding citizens of this country information that may be vitally important to them in their desperate struggle to protect themselves from the criminal element of society which today is a pervading evil force in our communities.]

An example of the emotional responses to the Reardon Report is seen in the following excerpt from a Chicago Tribune editorial which was reprinted in 54 A.B.A.J. 368 (1968):

What gives the “A.B.A.” its belief that it is somehow empowered to legislate regulations on another profession, which certainly, in view of the behavior of some lawyers and some jurists, has a reputation for fairness and honesty at least equal to its own?]

But the idea that an absolutely antiseptic atmosphere can be created around said jurors by restricting the publication of crime news does not appeal to us as the practical solution to the problem. Our principal points of disagreement with your (Reardon) committee are as to the magnitude of the fair trial problem and as to the over-kill effect of the measures which your committee proposes as the means for solving the problem. Mr. Tenant Bryan, representative of the American Newspaper Publishers’ Association. Transcript, supra note 4 at 176.

Transcript, supra note 4 at 177. See § 1.1, § 2.1, App. For example certain members of the press have argued that the media should be allowed to release more information about the accused.

(The public) need(s) to know the nature, the extent, the causes of crime and the way their police, their prosecutors, and their courts are handling it. They need to know about the character of persons arrested. Are they chiefly teenagers in trouble for the first time, or are they hardened repeaters? (the public) are frightened and con-
The standards do not prevent the immediate release of information necessary to warn the public of “danger.” As the Reporter to the Reardon Committee stated during the debates:

At the same time, the Committee has recognized the need for immediate disclosure of such matters as the fact and circumstances of arrest, a description of the offense charged, a description of the physical evidence seized, and any information needed to aid in apprehension or to warn the public of danger. Though there are potential hazards to fair trial in the release of this information, they are outweighed by such factors as the need to guard against secret arrest and secret law enforcement and the need to protect the public by securing the apprehension of suspected criminals.  

Indeed, by clearly delineating the kind of information which both the police and lawyers can release without fear of penalty, the Standards encourage the release of that information necessary to inform the public of any immediate danger.

The press also expressed a fear that the Standards would weaken the ability of the press to expose governmental corruption and graft that occasionally runs “rampant in many jurisdictions of the nation.” This fear is unfounded:

fused. If fears ... and even panic are to be allayed, police must be able to disclose more than just the names, ages, residences and occupation of persons under arrest. ... (Mr. Theodore Koop, Vice President, Columbia Broadcasting System) Transcript, supra note 4, at 196-197.

Id. at 156: The Reardon Committee stated:

A vital factor in the Committee’s consideration has been its desire not to recommend any steps that would impair the benefits derived from criminal news coverage or abridge the constitutional freedoms of speech and of the press. Tentative Draft, supra note 2 at 68.

The Committee noted several beneficial aspects of reporting criminal news during different stages of the trial. The Committee stated:

... Perhaps most important, reports of the arrest and of the nature of the charge ... can serve to assure the community that law enforcement officers have been doing their job and that there is probable cause to believe that the man apprehended did commit the offense. Id. at 48.

Transcript, supra note 4, at 181.
The restrictions, it must be remembered, would apply only to those who by virtue of their profession or position in government have a fiduciary obligation to support the system they help to administer. The media would not be precluded from exposing what they regarded as improper conduct by such persons, and the Committee therefore does not believe that the restrictions would make it easier to "frame" a defendant or to "fix" a case. Moreover, it is especially significant that the restrictions would apply only to a given period in the criminal process; the question, then, is not whether certain disclosures may be made, but when. [Emphasis original]64

The Committee recognized the value of editorial criticism of the judicial process.

During the trial... reporting can help to ensure that the conduct of those who participate in the trial—judges, lawyers, and witnesses—live up to the standards that our system of justice demands.65

The Committee was therefore opposed to adoption of the British system which allows a judge to punish the press by contempt for "improper criticism of the court or of himself."66

Concern of the press that the Reardon Standards would "silence" the media is unfounded. The Standards achieve an equitable balance between fair trial and free press.67

64 Transcript, Tentative Draft, supra note 2 at 78.
65 Id. at 50.
66 Id. at 68. See Friendly & Goldfarb, supra note 7, at 141-157.

The only evidence that would support the press accusation that they would be restricted by the standards is the recommendations for use of contempt and standards for excluding the public from certain pre-trial conferences. However, the Standards' use of contempt is presently restricted so as not to apply to press releases unless the press intentionally seeks to influence the outcome of a jury trial. When the press is excluded from portions of pre-trial, the standards demand that complete records be kept of the proceedings and that they be publicly released after the trial. The recommendations of the committee therefore do not significantly interfere with the press's ability to expose corruption.

67 The attempts being made by Judge Devitt's Committee to encourage discussion between the bar and the press can only help to clarify the nature of the Reardon Standards. Judge Devitt has publicly commented that he favors more cooperative effort between the two professions on the local level in seeking to achieve a better appreciation of our mutual problems and joint action. The Advisory Committee on Fair Trial and Free Press stated in the preface to its recently released information manual:
2. The Free Speech Issue

The Reardon Standards would not violate freedom of speech. The United States Supreme Court in Bridges v. California described the test for determining whether a court could constitutionally restrict the dissemination of a statement because of its prejudicial effect. That test is whether the statement created a "clear and present danger" to the enforcement of justice. To establish the constitutionality of the Reardon Standards, it must be determined whether the Standards prohibit statements other than those which, if permitted, would create a "clear and present danger" to the defendant's rights to a fair trial by an impartial jury.

Any member of the bar or of an enforcement agency may be subject to sanctions for violation of Parts I and II of the Reardon Standards, which apply specifically to these groups. The Reardon Standards also contain a specific contempt provision. Section 4.1 of the Reardon Standards permits contempt sanctions in two situations, both carefully designed to ensure the Standards' constitutionality under the "clear and present danger" test.

There need be no basic incompatibility in the application of the First and Sixth Amendments separately or in tandem. It remains for all concerned to make a sincere effort to prove that fact—an effort which will require sustained cooperation and interchange. For that price, all our rights and liberties can be made the more secure. . . . (vii)

That this cooperation is increasing is verified by the increasing number of press codes that have been recently created.

68 It is clear that the standard governing removal of the public from a pre-trial hearing does not violate the Sixth Amendment right to a public trial. The action is taken only where the prosecution has failed to prove there is no substantial likelihood of prejudicial interference or the dissemination of material not qualified under the rules of evidence. Even when the proceedings are closed, a complete record must be kept and must be later made public. With respect to this provision, the committee stated:

The committee believes that the proposed rule is plainly desirable, that it strikes a fair balance between the interests of the parties and those of the general public, and that it does not violate the constitutional guarantees of public trial. TENTATIVE DRAFT, supra note 2, at 114.


70 86 L.Ed. at 203.

71 See Parts I and II, App.

72 See Part IV, App.
First, the contempt sanction may be used against a person who, knowing that a criminal trial by jury is in progress, or that a jury is being selected for such a trial, disseminates information that is willfully designed to effect the outcome of the trial and that "seriously threatens" to have that effect. By requiring that a statement seriously threaten the outcome of a trial, the Standards ensure that the contempt sanction will not be used unless there is a clear and present danger. The Standards require that the dissemination be intended to affect the outcome of the trial. The Supreme Judicial Court of Massachusetts in *Worcester Telegram & Gazette, Inc. v. Commonwealth* reversed the trial court's application of contempt sanctions against a newspaper editor-publisher who had printed an article mentioning that the accused was presently serving a prison term. Noting that it was the newspaper's policy not to print criminal records until they are accepted as part of the court records, the court held that the defendants did not willfully intend to affect the outcome of the trial. To avoid interference with First Amendment rights, the court suggested that contempt be limited to intentional violation:

... [A] working principle ... must be extremely serious and the degree [of] imminence extremely high before such utterances can be punished. *(Bridges v. California* 314 U.S. 252) ... Where a grand jury is involved, in the absence of some ... showing of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are to be protected. [Emphasis added]

The *mens rea* requirement of the contempt sanction in Section 4.1 diminishes the possible application of this sanction and accordingly, may limit its effectiveness.

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73 *Id.*

74 Though the Standards use the words "seriously threatens" rather than "clear and present danger," as pointed out during the House of Delegates Debate, the tests seem identical. The committee indicated in the commentary that the statement must be one that "seriously threatens to affect the outcome of the trial." Thus there must be a clear and present danger that the evil would occur. Transcript, *supra* note 4, at 166.

75 238 N.E.2d 861 (1968).

76 238 N.E.2d at 864.

77 *Id.*
Second, Section 4.1 of the Standards also provides that the contempt power may be used when a person contravenes a valid judicial order restricting the dissemination of information that is revealed during a judicial hearing closed to the jury.\textsuperscript{78} The action taken by the judge to prevent the jury from hearing this potentially prejudicial information suggests that its disclosure would otherwise create a clear and present danger. In this situation, the use of the contempt sanction appears to be within the constitutional limitations of the clear and present danger test.\textsuperscript{79}

Persuasive arguments can be made that statements of enforcement officers may create a clear and present danger. However, dictum in \textit{County of Los Angeles v. Superior Court}\textsuperscript{80} suggests that restriction of such statements would be unconstitutional:

\[\ldots\text{with respect to the police and the press in the entire pretrial period we think it unwise and detrimental to the public interest to give such contempt powers to the courts and the judges. Moreover, we think that such proceedings and the court rules, legislation or what not else authorizing such contempt proceedings might well be held to be a violation of the First Amendment guarantees of free press and free speech.}\textsuperscript{81}\]

Nevertheless, a more comprehensive examination suggests that there are sufficient dangers to justify the limited restraints that the Reardon committee has recommended.

Any remarks that an enforcement officer makes early in the post-arrest period set the pattern for future publicity and tend to serve as a catalyst for subsequent prejudicial dissemination. The resulting possibility of spiraling prejudicial dissemination could be

\textsuperscript{78}See Section 4.1(b) App.

\textsuperscript{79}Even if there is no clear and present danger, this section is constitutional:

One who procures or suborns a contempt with knowledge that so doing is in violation of a valid court order has always been punishable as a contemtor. What is punished in such a case is the subornation of the contempt, not the publication of the data obtained, through the subornation.

\textit{Transcript, supra} note 4 at 167.


\textsuperscript{81}\textit{Id.} at 690.
a basis for finding a clear and present danger. Furthermore, once the seeds of prejudice have been sown, they may linger in a prospective juror's mind.\footnote{82}{"First, the processes by which beliefs are formed and adhered to, and their effect on perception, appear to take place to a large extent below the level of consciousness." TENTATIVE DRAFT, supra note 2 at 64.}

Statements by the police immediately prior to and during a trial are likely to be more extensively covered by the media. "Further [the juror] may be more inclined to seek out this information when he is personally involved in the case."\footnote{83}{Id. at 40.} As a result, the possibility that jurors will come into contact with such statements and that such statements will have a serious influence on their deliberations is increased. These prejudicial statements are therefore likely to create a "clear and present danger" that the verdict will be tainted. Carefully defined court restrictions on police remarks between completion of formal investigation and the trial itself seem therefore justified.

The constitutional questions with respect to attorneys and court employees are somewhat less uncertain. The activities of lawyers and courtroom personnel are more closely linked to the judicial process and to individual jurors. Consequently, that information which would create a clear and present danger if released by police would be more dangerous if released by members of these groups. The few cases decided under Canon 20 and the Sheppard decision assume the the constitutionality of the courts' power to restrict the release of such information by attorneys. This assumption points to the constitutionality of the Reardon Standards' provisions setting restrictions upon attorneys\footnote{84}{See note 24 supra for listing of cases dealing with Canon 20 and Sheppard v. Maxwell, supra note 16, at 333. The Reardon Committee's commentary in the TENTATIVE DRAFT contain a thorough discussion of the constitutionality of those provisions pertinent to lawyers and courtroom personnel. The discussion of the constitutionality of a provision is included in the comment upon that provision TENTATIVE DRAFT, supra note 2, at 84-94 and 110-111.} and the rationale underlying this assumption is arguably applicable to other courtroom personnel.

\textbf{D. The Problems of Interpretation and Enforcement}

The Reardon Standards offer a viable approach to ensuring the defendant's rights to a fair trial. However, their potential would
be severely restricted if a "voluntary interpretation" approach were adopted.\(^8\) "Voluntary interpretation" means that individual lawyers, police officers, and courtroom personnel could view the standards as mere voluntary guidelines. Moreover, under this interpretation, judges in those jurisdictions in which the Standards are adopted may determine that it is within their discretion to refuse to apply the Standards.\(^8\) Thus, voluntary interpretation of the Standards after adoption would be no more effective than voluntary adherence to their fundamental principles without actual adoption. If the Standards were adopted and applied as guidelines only, some individuals might feel a greater moral obligation to obey the Standards than if no action at all were taken. However, the danger would still exist that an individual's reasons for leaking prejudicial information in a given case may outweigh any increased sense of moral obligation. Therefore voluntary interpretation of the Standards would be inadequate to the task of eliminating the leakage and dissemination of prejudicial information.

Unless implemented in toto, the Standards will not solve the problem. As indicated above, adoption by the ABA of section 1.1 of the Reardon Standards will not in and of itself bind all lawyers.\(^8\) Furthermore, police officers and intentional disseminators, as previously noted, are not likely to voluntarily obey a non-enforceable code.

Without complete adherence to the Standards by all who are in a position to leak information, the impact of prejudicial publicity would be severely restricted if a "voluntary interpretation" approach were adopted.\(^8\) "Voluntary interpretation" means that individual lawyers, police officers, and courtroom personnel could view the standards as mere voluntary guidelines. Moreover, under this interpretation, judges in those jurisdictions in which the Standards are adopted may determine that it is within their discretion to refuse to apply the Standards.\(^8\) Thus, voluntary interpretation of the Standards after adoption would be no more effective than voluntary adherence to their fundamental principles without actual adoption. If the Standards were adopted and applied as guidelines only, some individuals might feel a greater moral obligation to obey the Standards than if no action at all were taken. However, the danger would still exist that an individual's reasons for leaking prejudicial information in a given case may outweigh any increased sense of moral obligation. Therefore voluntary interpretation of the Standards would be inadequate to the task of eliminating the leakage and dissemination of prejudicial information.

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Without complete adherence to the Standards by all who are in a position to leak information, the impact of prejudicial publicity

\(^8\) Unfortunately, the Devitt Committee still feels a voluntary interpretation of the Standards would be adequate:

The standards complement rather than supersede the voluntary codes already adopted in some states and under consideration in others. They are guidelines through which the bar and media jointly can protect the fairness of trials and prevent miscarriages of justice resulting from prejudicial publicity, without impeding the right and duty of the press to inform the public about crime and law enforcement. [Emphasis added]

Advisory Manual, supra note 18 at 29.

\(^8\) It has been argued by some that the failure to enforce Canon 20 resulted from its vagueness. See note 27, supra. Nevertheless, the ease in which the New Jersey Supreme Court applied the canon in the Van Duyne case, supra note 22, suggests that it was not the vagueness but rather the absence of any duty on the part of the courts to enforce the canon which led to its disuse. A similar fate might face the Reardon Standards unless they are adopted and enforced by the appellate courts.

\(^8\) See note 26 supra.
will not be significantly decreased. Partial adherence to the Rear-ndon Standards by lawyers, courtroom personnel, and police officers would not be a significant improvement over the present state of affairs. Partial elimination of the sources of prejudicial statements merely changes the composition of the pool from which the mass media can draw. Therefore all the Standards must be binding and be vigorously enforced.

V. Alternative Avenues of Adoption and Enforcement

A. Introductory Remarks

Since the Reardon Standards are not self-executing, the most effective means of implementation must be determined. In determining which enforcement agency (police departments, courts, legislatures, or bar associations) is best suited to adopt and enforce the Standards, two factors and must be analyzed. First, it must be determined which agency has the power to enforce restrictions on those whose activities the Standards are intended to curtail. Second, it must be determined which agency might actually be persuaded to adopt the Standards and enforce them.

An analysis of these questions with respect to bar associations, legislatures and police departments leads to the conclusion that these agencies could not adequately fill this role. Rather, implementation can be best effected by the courts.

B. Bar Associations

Section 1.1 of the Standards governing the release of information by lawyers has been recently incorporated into the new ABA Code of Professional Responsibility. This action alone, however, does not guarantee adherence by all attorneys; adoption by state and local bar associations is also necessary. Yet the Reardon Committee was not satisfied with voluntary adoption of this section by bar associations alone. It urged that section 1.1 be adopted by rule of court or statute in the various jurisdictions. The Committee felt that judicial recognition of section 1.1 would
provide double protection against prejudicial dissemination by attorneys.\textsuperscript{88}

In any case, it is clear that further action by the other enforcement agencies is required if the remaining Standards are to be fully implemented.\textsuperscript{89}

\textbf{C. Police Departments}

Section 2.2 of the Standards suggests that police departments should be granted "reasonable time" to achieve effective self-regulation. However, many police departments have not adequately regulated release of trial-related information by their officers in the past.\textsuperscript{90} Moreover, the present extent of police disclosure makes obvious the failure of many police departments to enforce effective news restrictions against individual officers.\textsuperscript{91} The long history of inadequate self-regulation suggests that the police departments have already had a "reasonable time" to achieve internal regulation.

Yet, despite this history of inaction, the Reardon Committee in the Approved Draft argued that a greater degree of cooperation by the police departments might be expected within a "reasonable time," and that the courts would not therefore have to adopt by rule of court the internal regulations governing release of information by police departments set forth in section 2.1. The Justice Department had already imposed the Katzenbach Rules governing the release of information by its own officers,\textsuperscript{92} and the Rear-

\begin{footnotesize}
\textsuperscript{88} Tentative Draft, supra note 2 at 95.
\textsuperscript{89} See text accompanying notes 26-29.
\textsuperscript{90} See note 9 supra.
\textsuperscript{91} Indeed, as the Medina Report states:

We have documented in our Interim Report at pages 117-43 the remarkably divergent policies followed by police organizations throughout the country. Some departments have little or no formal criteria governing the dissemination of information to news media. Others, while professing to maintain standards, have promulgated regulations too broad and too general to be of concrete value. Medina Report, supra note 5 at 31.

\textsuperscript{92} Office of the Attorney General, 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, reprinted in Tentative Draft, supra note 2 at 259 et seq. Apparently all major federal agencies involved in criminal law enforcement have adopted these rules.
\end{footnotesize}
The Committee hoped that this example would be followed on the state and local level. However, since 1966, there appears to have been no noticeable surge of self-regulation among local and state enforcement agencies.

The Approved Draft, strangely enough, continues to sound the trumpet of hope for self-regulation and the Committee claims that there have been several noteworthy developments. The Committee points out that certain nonpolice groups have become cognizant of the need for police restrictions, and that "a number of law enforcement agencies have indicated a willingness to take steps toward self-regulation...." However, the only evidence of this new willingness that the Committee presented was the "Statement of Principles of the Bench-Bar-Press of the State of Washington," which was signed by the Washington Association of Sheriffs and Chiefs of Police. Although such action may indicate a willingness by that Police Association to sign a voluntary code, it does not guarantee that the Association will actively bind individual police officers to restrictions on the release of news contained therein. The Reardon Report's use of the Medina Report as evidence that self-regulation is occurring is not justified. Indeed, the Medina Report in fact contains compelling reasons why police departments are not likely to restrict press releases by their personnel.

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93 Since the issuance of the report in October 1966, there have been a number of noteworthy developments. First, the need for limited restrictions on the release of information by law enforcement officers has received support from several sources, including the President's Commission on Law Enforcement and Administration of Justice, the Special Committee of the Bar Association of the City of New York [Medina Report], and the American Civil Liberties Union, APPROVED DRAFT, supra note 2 at 22.

However noteworthy these groups are, their support for restrictions on law enforcement officers does not in any way prove that these officers are beginning to regulate the release of information.

94 Id. at 29-30.
95 The Medina Report cites only one instance of possible self regulation. However, it is unclear from the text of the Report whether the police department involved actually did adopt and enforce the restrictions. MEDINA REPORT, supra note 5 at 35.

One reason for the Reardon Report's use of the Medina Report is that the Reardon Committee may be uncertain whether courts do have the power to regulate disclosures by police officers during the pretrial period. The Medina Report was of the opinion that courts do not possess this power. See text at 127 infra. Perhaps the Reardon Committee was willing to allow the police departments a "reasonable time"
The Committee is well aware of the forces which lead police agencies into patterns of full disclosure to news media. . . . Pressures begin to build up for concrete indications that the case is nearing solution and that the perpetrator [of crimes] will soon be in custody. . . . The news media . . . press a relentless search for full details, . . . and the police, anxious to avoid a running battle with newspapermen, unfair critical editorial comment, and general ill-will, are tempted into premature and prejudicial releases. To avoid the accusation of suppressing information which might tend to cast the police in an unfavorable light, some departments have adopted an "open door" policy to news media and permit them wide access to reports and personnel.97

These reasons not only explain prior failures by police departments to regulate themselves, but also suggest why many departments will be slow to adopt the Standards.

As the Reardon Committee notes, "[t]here is, of course, no unanimity of view [regarding regulation], and some important law enforcement officials are steadfastly opposed to any restrictions, at least in the absence of corresponding limitations on the media."98 It is not unreasonable to assume that only external pressure will cause these police departments to regulate their news releases.99 This pressure must be supplied by the courts or the legislatures through the adoption of section 2.1 by rule of court or by statute.100

97 MEDINA REPORT, supra note 5 at 28-29.
98 TENTATIVE DRAFT, supra note 18 at 98.
99 The author has argued that the "reasonable time" qualification of the Reardon Committee has expired. The Devitt Committee, however, stated that one of its future tasks is:

[Voluntary action by law enforcement agencies to acquaint their personnel with the limitations of the standards. . . [emphasis added]

(ADVISORY MANUAL, supra note 18 at 33) The Devitt Committee has recommended that the trial adopt only those rules "applying to lawyers and court personnel." This approach will eliminate any possible impact that the Reardon Standards might have on police departments, removing the only pressure to act that could be placed on these departments.

100 The courts might possibly induce cooperation of law enforcement officials by merely declaring a mistrial whenever an enforcement official made a statement in violation of the Approved Draft standards. Nonetheless, the Reardon Committee felt that the only way to ensure effectively that police would withhold potentially prejudicial statements was to use the enforcement power of the courts. See Section 2.2, App.
D. Legislative Implementation of Reardon Standards

Only two bills regulating prejudicial dissemination appear to have been introduced into either the federal or state legislatures. Both were less extensive than the Reardon Standards and both were rejected. The first was a Massachusetts House bill restricting statements by court officers and certain statements by the news media.\(^{101}\) The other was a bill offered in the U.S. Senate by former Senator Wayne Morse in 1965.\(^{102}\) Although the federal bill had the support of the Judicial Conference of the United States, it was shelved in committee and died an unnoticed death.

Public apathy toward criminal reform suggests that there will be little effective pressure for legislative reform in this area. Only the judiciary, which must deal with the problems of prejudice, is likely to argue for enactment of the Standards, be it by statute or by rule of court. On the other hand, the press could create immediate and heated opposition to any attempt to legislatively enact the Standards. The news media are suspicious of any legislation in this area, and their probable opposition would perhaps make it impolitic for legislators to take action. Indeed, media opposition is likely to outweigh any demand for implementation at the legislative level.

The failure of the above bills, the absence of other attempts, and the probability of opposition by the media suggest that neither the federal nor the state legislatures will be willing to adopt the Reardon Standards.

Court adoption of the Reardon Standards is more likely. Recent cases have indicated a growing judicial concern with protection of the integrity of the jury process and have indicated that the courts must do more to ensure this integrity. As the Supreme Court said in *Sheppard v. Maxwell*:

\(^{101}\) House Bill No. 3991 (Mass., 1965). This proposed bill was the subject of an advisory opinion by the Supreme Judicial Court of Massachusetts. Opinion of the Justices, 349 Mass. 786 at 788, 208 N.E.2d. 240 (1965). The court held that the bill was within legislative power; stating at 241-242:

Undoubtedly, the Legislature can provide safeguards to ensure defendants in criminal cases the right to a fair and impartial trial by jury.


Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is not weighed against the accused. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.108 (Emphasis added)

Even if legislative action were likely, it is ultimately less desirable than court adoption. The courts could make necessary modifications more quickly by rule of court than legislatures could by statute. Nor are courts subject to the pressures of lobbyists urging alteration of the Standards. Moreover, the courts have been traditionally responsible for the protection of constitutionally guaranteed rights. They should, therefore, be primarily responsible for enforcement measures that directly affect the vitality of the Sixth Amendment.

Finally, any legislative enactment would be a needless expenditure of energy since the courts would ultimately have to interpret and enforce the Reardon Standards. Adoption and enforcement of the Reardon Standards should be therefore left primarily to the courts.104

VI. Court Adoption and Enforcement of the Standards

A. Power to Adopt Procedural Standards

The courts clearly have the power to adopt and to utilize those Reardon Standards which govern the application of procedural remedies.105 Recently, the First Circuit Court of Appeals in Patriarca v. United States106 and the Supreme Court of California in Maine v. Superior Court of Mendocino County107 adopted section

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104 The Devitt Committee also recommended that courts adopt and enforce the Standards. The ADVISORY MANUAL, supra note 18, at 33.
105 These Standards are contained in Part III of the Reardon Standards, App. KAUFMANN REPORT, supra note 5 stated at 17, “Finally it is clear that the court has the power and the duty to regulate the conduct of a trial so as to insulate the proceedings from prejudicial influences.
106 Patriarca v. United States, 402 F.2d 308 (1st Cir. 1968).
3.4 and section 3.2, respectively, of the Reardon Standards. These courts assumed, without discussion, that they had power to adopt these rules of procedure. Section 3.6, requiring a new trial whenever there is a "substantial likelihood" of outside influence, also seems to be within the ambit of the court's power. Indeed, the Supreme Court of the United States has suggested that when a massive and pervasive prejudicial publicity surrounds a trial, no showing of actual prejudice is necessary to invalidate a conviction of jurors drawn from a community exposed to such publicity.

B. Power to Regulate Release of Information

The extent to which a court may regulate the conduct of individuals involved in the process of criminal prosecution is not as clear. While the Supreme Court in Sheppard did say that the trial court's power extended to "[lawyers], witnesses, court staff [and] law enforcement officers coming under the jurisdiction of the court," it did not specify the extent of this power. However, case analysis reveals that courts have considerable power to regulate the activities of participants in the administration of criminal justice.

1. Attorneys

Attorneys are clearly within the ambit of the court's power. Court regulation of their conduct under Canon 20 has expressly

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108 The test of "substantial likelihood" is in accord with case law. Recent cases have affirmed the lower court's power to grant new trials without the showing of actual prejudice. The Supreme Court has held that a denial of fair trial results: (1) where inherently prejudicial publicity saturated the community and controlled the courtroom, Sheppard v. Maxwell, supra note 16; (2) where the proceedings were televised, even though actual prejudice was not shown, Estes v. Louisiana, 381 U.S. 532 (1965); (3) where a change of venue was denied despite a locally televised confession, Rideau v. Louisiana, 373 U.S. 723 (1963); (4) where jurors have read prejudicial news accounts, Marshall v. United States, 360 U.S. 310 (1959). The Tenth Circuit has recently held that a new trial must be granted where a trial judge failed to ascertain whether any jurors had been exposed to prejudicial newspaper publicity. Mares v. United States, 383 F.2d 805 (10th Cir. 1967).

109 Id. Moreover, the failure to utilize court procedure to full advantage may constitute a denial of due process, thereby giving the courts power to invalidate a conviction.

been approved by some state courts, and implicitly approved by the Supreme Court in *Sheppard.*\(^{111}\) The Kaufman Report stated:

> First, it (the committee) feels that each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court.\(^{112}\)

A U.S. District Court in New Jersey recently announced a six-fold prohibition which banned the release of public statements by lawyers concerning the prior record of the accused, the existence or content of confessions, tests taken, the identity of witnesses, pleas of guilty, and opinions of guilt.\(^{113}\) This is the most detailed judicial categorization to date of the kind of restrictions falling within the permissible scope of the "take steps" mandate of the Supreme Court in *Sheppard.*\(^{114}\)

### 2. Court officers

The Court in *Sheppard* assumed that a court's power to restrict disclosure extends to court officers.\(^{115}\) As mentioned above, however, the extent of this regulation was not made explicit.

The Kaufman Report stated:

> ... the committee believes that the court has

\(^{111}\) The Supreme Court of Minnesota in *State v. Thompson*, 139 N.W.2d 490 at 514, 273 Minn. 1 at 34-5, and a California Court of Appeals in *County of Los Angeles v. Superior Court*, 253 Cal. App.3d 570, 687, 62 Cal. Rptr. 435, 446 (1967), have explicitly approved this interpretation. The Supreme Court of New Jersey in *State v. Van Duyne*, supra note 24 at 389, stated that *Canon 20* was intended to:

> ban all statements to news media by 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, 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. ... the ban ... applies as well to defense attorneys."

\(^{112}\) *Kaufman Report*, supra note 2 at 17.

\(^{113}\) See text accompanying note supra 103.

\(^{114}\) More specifically, the trial court might well have prescribed extrajudicial statements by a lawyer, party, witness, or *court official*, which divulged prejudicial matters ... [Emphasis added]. 384 U.S. at 361.

43 N.J. at 389, 204 A.2d at 852. This holding has been approved in *Sheppard v. Maxwell*, supra note 16, at 333.
a similar power and duty to prohibit prejudicial disclosures by courtroom personnel, such as bailiffs, clerks, marshals and court reporters.\textsuperscript{116} [Emphasis added]

Thus, it seems reasonable to conclude that the courts may restrict statements of court employees to the same extent as those of attorneys.

3. Police officers

There are compelling arguments for the proposition that the court has the power to control statements of police officers connected with the trial process. However, what little authority exists seems to suggest the contrary. In sustaining a first degree murder conviction, the Supreme Court of Minnesota,\textsuperscript{117} relying on \textit{State v. Van Duyne},\textsuperscript{118} said that:

\begin{quote}
Police officers, over whom we have no ... disciplinary power, ought likewise to be dealt with by their superior officers to the end that criminal cases may be fairly tried in court and not in the news media.\textsuperscript{119}
\end{quote}

Though the Minnesota court suggested that it had no power to regulate police, that is not exactly what was stated in the \textit{Van Duyne} decision. In reference to improper pre-trial releases by police officers, the \textit{Van Duyne} court stated that: "control of the matter is largely in the hands of the prosecutor and local police authorities."\textsuperscript{120} [Emphasis added] This statement seems to be a mere suggestion that the logical department to regulate the police is the police department. Moreover, since the \textit{Van Duyne} court was applying Canon 20, which was applicable solely to lawyers, its failure to bind the police officers under that Canon was understandable.

\textsuperscript{116} \textbf{Kaufman Report, supra} note 5, at 17. . . . [E]ven within the most restrictive statute [court employees] are plainly "officers of the court," and unauthorized disclosures of information threatening the fairness of an impending or ongoing criminal trial would certainly appear to constitute "misbehavior" in the performance of an official function. \textbf{Tentative Draft, supra} note 2, at 110-11.

\textsuperscript{117} \textit{State v. Thompson}, 139 N.W.2d 490, 273 Minn. 1 (1966).

\textsuperscript{118} \textit{State v. Van Duyne}, supra note 24, (43 N.J. 369, 204 A.2d 841) (1964).

\textsuperscript{119} \textit{State v. Thompson, supra} note 24 (273 139 N.W.2d at 514, Minn. at 35) (1966).

\textsuperscript{120} \textit{State v. Van Duyne, supra} note 24 (43 N.J. at 389, 204 A.2d at 852) (1964).
It was held in *County of Los Angeles v. Superior Court for County of Los Angeles*\(^{121}\) that a lower court did not have power to enjoin the release of information by police officers during the pre-arraignment period. The appellate court was not convinced that such an injunction was always necessary to protect the rights of a defendant:

...we cannot say that it is necessary to silence the sources of pretrial publicity during the prearraignment period in order to protect the right of every defendant to a fair trial by an impartial jury. Nor can we say that the unrestricted release of information by ...any... peace officer during that period about any person under arrest, standing alone, will *always* result in a denial of constitutional due process to any such person and that all such conduct is therefore illegal.\(^{122}\) [Emphasis added]

The court relied heavily on the policy arguments of the Medina Committee which suggested that no power existed to regulate police in the pretrial period.

The prospect, in this pretrial period, of judges of various criminal courts of high and low degree sitting as petty tyrants, handing down sentences of fine and imprisonment for contempt of court against lawyers, policemen, and reporters and editors, is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what a price!\(^{123}\)

The *Los Angeles* court's denial of the trial court's jurisdiction over police may rest on the appellate court's implicit distaste for the breadth of the lower court's order which was identical to a substantial portion of section 2.1 of the Reardon Standards.\(^{124}\)

There are strong arguments in favor of the validity of the exercise of power by the court over officers involved in matters relating to the trial process. If the courts, by reversals, have the power to indirectly oversee police treatment of the defendant in

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\(^{122}\) *Id.*, at 445-446.

\(^{123}\) *Id.*, at 448, quoting from the *Medina Report supra* note 2, at 39-40.

\(^{124}\) 62 Cal. Rptr. at 438-439.
order to protect his Fifth Amendment rights, they should also have the power to supervise statements made by enforcement officers to ensure the defendant's right to a fair trial under the Sixth Amendment. The need for the courts to ensure the defendant's rights is greater under the Sixth Amendment. A defendant can always attempt to remain silent; but the defendant can never prevent the police from publicly releasing information prejudicial to his interests.

Moreover, the Los Angeles decision's "departmentalized" view seems to be too rigid. The "separation of powers" doctrine does not preclude the court from restricting enforcement officers:

The concept of separation of powers is not one that necessitates rigid and simplistic categorization of every aspect of government; rather it is one that reflects concern over the assumption by one arm of government of the whole function of another branch. Within the basic framework of checks and balances, it permits areas of overlap and concurrent authority.\textsuperscript{125}

The author therefore suggests that the police be deemed "officers of the court" during the course of formal investigation. The court would then have the power, subject to precisely defined rules, to regulate news disclosures by these policemen. The authority of Los Angeles and Thompson is therefore of little practical effect, especially since Los Angeles seems to have misinterpreted the Reardon Standards.\textsuperscript{126}

If the intentional disseminator is a lawyer or courtroom employee, he will clearly fall within the court's regulatory power.\textsuperscript{127}

\textsuperscript{125} Tentative Draft, supra note 2, at 102.
\textsuperscript{126} The court in Los Angeles stated that the position of Reardon Committee was:

that effective measures to control the release of such information by law enforcement officers can and should only come through the adoption and enforcement of appropriate regulations by such agencies. County of Los Angeles v. Superior Court, supra note 80 (62 Cal. Rptr. at 448).

This interpretation is erroneous in an important respect. The committee concedes the enforcement agencies a "reasonable time" in which to adopt regulations themselves. The committee is ready, nevertheless, to urge court regulation in the event that the agencies do not take voluntary action within that time period. See section 2.2, App. As the author has suggested, this period has elapsed. See text accompanying notes 92-99 supra.

\textsuperscript{127} See discussion in text, accompanying notes 110-117, supra.
However, the individual may be a newspaper editor, reporter, or even the mayor of a large city. In these situations, the power of the court is again unclear. The impact of the intentional disseminator's conduct on the processes of the court, however, can be so severe that the use of the contempt power as described in the Reardon standards would be justified.\footnote{The very nature of section 4 indicates that contempt sanctions would be applied in only the most egregious circumstances. There must be a jury trial in progress and the person must know that it is in progress. The person must disseminate the statement or know that it will be publically disseminated. Finally, the statement must be "reasonably calculated," to affect the outcome of the trial. "It must, in other words, have been a statement that was actually intended to affect the outcome or that was so likely to have such an effect that the person making it could only have acted in reckless disregard of the consequences." And there must be a clear and present danger that would occur. \textit{Tentative Draft, supra} note 2, at 152. It must be realized that in some jurisdictions the power of contempt is limited by statute. As the \textit{Kaufman Report, supra note} 2 at 19, states, "Apart from constitutional inhibitions, the power of a federal court to punish for contempt by publication is presently limited by federal criminal contempt statute to misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice, (18 U.S.C. 401(1) (1964) and to disobedience or resistance to its lawful writ, process, order, rule, degree or command. 18 U.S.C. 401(3) (1964). In Nye v. United States, 313 U.S. 33 (1941), the Supreme Court ruled that the power conferred by the first portion of this statute is restricted to the immediate geographical vicinity of the courtroom. 18 U.S.C. 401 (2) authorizes federal courts to punish by contempt misbehavior of its officers in the course of their official functions. Even in the absence of this statute, the Reardon Committee has pointed out that use of contempt against courtroom employees has generally been upheld." \textit{See Tentative Draft, supra note} 2, at 110.}

\textit{C. Implementation of the Reardon Standards}

Although the courts can adopt the Standards by either the case method or by rule of court, the latter method seems to be more appropriate. The Reardon Committee stressed the need for a total approach, encompassing all participants in the process of criminal prosecution. The Committee argued that to bind only one group is worse than to do nothing.\footnote{Transcript, \textit{supra} note 4, at 157.} Accordingly, use of the case method, with its inherently limited approach, would not assure the total solution that the Committee believed necessary. Only by using the rule of court method can the total approach be achieved with the requisite swiftness to assure full compliance by all affected individuals. Yet the Standards would nevertheless retain that flexibility necessary to ensure equitable application on a case-by-case basis.

The Standards must be adopted by appellate courts. Although,
as a policy matter, all courts should adopt and enforce the Standards, there are several reasons for emphasizing adoption at the appellate level. First, the trial courts may feel that they lack the power to regulate certain groups to which the Standards are addressed. As a result, such courts will be reluctant to enforce those Standards. This would be especially true in those jurisdictions in which the Standards go beyond the restrictions already established by case law, or where the courts feel that the Standards raise serious constitutional questions. Second, even if the trial courts should feel that they do have the power to enforce the Standards against the persons in question, it seems likely that there would be those trial judges who would nonetheless be reluctant to so enforce them. This seems particularly true in light of the past failure of many trial judges to enforce Canon 20.

Moreover, there are several reasons why adoption by an appellate court is easier, and therefore more desirable, than adoption by the trial courts. Adoption on the appellate level would increase pressure on the trial judge to enforce the Standards. Failure to apply them might be viewed as a denial of due process invalidating a conviction. The threat of reversal would, in most cases, help ensure compliance with the Standards. In those cases where compliance was not found, such failure could provide sufficient grounds for reversal without the need for any finding of actual prejudice.

Of course, the trial courts and the various groups involved should nonetheless act on their own initiative. There is a very real need for the combined efforts of all courts to ensure effective application of the Reardon Standards. But the significant substantive safeguards of the Reardon Standards will not prove effective unless the courts, particularly the appellate courts, adopt and enforce them.

VII. Conclusion

The Reardon Standards offer a viable approach to protection of
the defendant's guarantee of a trial by an "impartial jury." The Standards ensure that the defendant will be tried in the courtroom, and not "condemned in the market place of public opinion." Interpreted as *minimum* standards, and implemented *in toto* by appellate courts, the Standards will reduce leakage and dissemination of prejudicial publicity and will minimize its influence on the trial process. At the same time, the Standards will not abridge freedom of speech; they will not prevent the media from exposing judicial corruption or issuing timely public warnings. The standards both balance and preserve the right to a fair trial and the right of free press.

With the enormous growth of the mass media, the problem of guaranteeing the defendant a fair trial in the face of prejudicial publicity is of increasing concern. Time dictates immediate implementation of the Reardon Standards. "We tend to agree with the Bard who in *Henry VI* observed, 'Delays have dangerous ends.'"134

134 Judge Reardon closing remarks to A.B.A. House of Delegates arguing for adoption of his report Transcript, *supra* note 4, at 146.
1.1 Revision of the Canons of Professional Ethics.

It is recommended that the substance of the following standards, relating to public discussion of pending or imminent criminal litigation, be embodied in the Code of Professional Responsibility:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;
(5) The possibility of a plea of guilty to the offense charged or a lesser offense;
(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence;
or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

1.2 Rule of court.

In any jurisdiction in which Canons of Professional Ethics have not been adopted by statute or court rule, it is recommended that the substance of the foregoing section be adopted as a rule of court governing the conduct of attorneys.

1.3 Enforcement.

It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of disciplinary proceedings, and that the court have discretion to initiate such proceedings, either on the basis of such a petition or on its own motion.

PART II. RECOMMENDATIONS RELATING TO THE CONDUCT OF LAW ENFORCEMENT OFFICERS, JUDGES, AND JUDICIAL EMPLOYEES IN CRIMINAL CASES

2.1 Departmental rules.

It is recommended that law enforcement agencies in each jurisdiction adopt the following internal regulations:

(a) A regulation governing the release of information, relating to the commission of crimes and to their investigation, prior to the making of an arrest, issuance of an arrest warrant, or the filing of formal charges. This regulation should establish appropriate procedures for the release of information. It should further provide that, when a crime is believed to have been committed, pertinent facts relating to the crime itself and to investigative procedures may properly be made available but the identity of a suspect prior to arrest and the results of investigative procedures shall not be disclosed except to the extent necessary to aid in the investigation, to assist in the apprehension of the suspect, or to warn the public of any dangers.

(b) A regulation prohibiting (i) the deliberate posing of a person in custody for photographing or televising by representatives of the news media and (ii) the interviewing by representatives of the news media of a person in custody unless, in writing, he requests or consents to an interview after being adequately informed of his right to consult with counsel and of his right to refuse to grant an interview.

(c) A regulation providing:
From the time of arrest, issuance of an arrest warrant, or the filing of any complaint, information, or indictment in any criminal matter, until the completion of trial or disposition without trial, no law enforcement officer within this agency shall release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

1. The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the officer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
2. The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement, except that the officer may announce without further comment that the accused denies the charges made against him;
3. The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
4. The identity, testimony, or credibility of prospective witnesses, except that the officer may announce the identity of the victim if the announcement is not otherwise prohibited by law;
5. The possibility of a plea of guilty to the offense charged or a lesser offense;
6. Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

It shall be appropriate during this period for a law enforcement officer:

1. to announce the fact and circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons;
2. to announce the identity of the investigating and arresting officer or agency and the length of the investigation;
3. to make an announcement, at the time of seizure of any physical evidence other than a confession, admission, or statement, which is limited to a description of the evidence seized;
4. to disclose the nature, substance, or text of the charge, including a brief description of the offense charged;
5. to quote from or refer without comment to public records of the court in the case;
6. to announce the scheduling or result of any stage in the judicial process;
7. to request assistance in obtaining evidence.

Nothing in this rule precludes any law enforcement officer from replying to charges of misconduct that are publicly made against him, precludes any law enforcement officer from participating in any legislative, administrative, or investigative hearing, or supersedes any more restrictive rule governing the release of information concerning juvenile or other offenders.

(d) A regulation providing for the enforcement of the foregoing by the imposition of appropriate disciplinary sanctions.

2.2 Rule of court or legislation relating to law enforcement agencies.

It is recommended that if within a reasonable time a law enforcement agency in any jurisdiction fails to adopt and adhere to the substance of the regulation recommended in section 2.1(c), as it relates to both proper and improper disclosures, the regulation be made effective with respect to that agency by rule of court or by legislative action, with appropriate sanctions for violation.

2.3 Rule of court relating to disclosures by judicial employees.

It is recommended that a rule of court be adopted in each jurisdiction prohibiting any judicial employee from disclosing, to any unauthorized person, information relating to a pending criminal case that is not part of the public records of the court and that may tend
to interfere with the right of the people or of the defendant to a fair trial. Particular
reference should be made in this rule to the nature and result of any argument or hearing
held in chambers or otherwise outside the presence of the public and not yet available to
the public under the standards in section 3.1 and section 3.5(d) of these recommendations.
Appropriate discipline, including proceedings for contempt, should be provided for in-
fractions of this rule.

2.4 Recommendations relating to judges.

It is recommended that, with respect to pending criminal cases, judges should refrain
from any conduct or the making of any statements that may tend to interfere with the right
of the people or of the defendant to a fair trial.

PART III. RECOMMENDATIONS RELATING TO THE CONDUCT
OF JUDICIAL PROCEEDINGS IN CRIMINAL CASES

3.1 Pretrial hearings.

It is recommended that the following rule be adopted in each jurisdiction by the
appropriate court:

Motion to exclude public from all or part of pretrial hearing.

In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case,
including a motion to suppress evidence, the defendant may move that all or part of the
hearing be held in chambers or otherwise closed to the public, including representatives of
the news media, on the ground that dissemination of evidence or argument adduced at the
hearing may disclose matters that will be inadmissible in evidence at the trial and is
therefore likely to interfere with his right to a fair trial by an impartial jury. The motion
shall be granted unless the presiding officer determines that there is no substantial likeli-
hood of such interference. With the consent of the defendant, the presiding officer may
take such action on his own motion or at the suggestion of the prosecution. Whenever
under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to
the public, a complete record of the proceedings shall be kept and shall be made available
to the public following the completion of trial or disposition of the case without trial.
Nothing in this rule is intended to interfere with the power of the presiding officer in any
pretrial hearing to caution those present that dissemination of certain information by any
means of public communication may jeopardize the right to a fair trial by an impartial jury.

3.2 Changes of venue or continuance.

It is recommended that the following standards be adopted in each jurisdiction to govern
the consideration and disposition of a motion in a criminal case for change of venue or
continuance based on a claim of threatened interference with the right to a fair trial.
(a) Who may request.

Except as federal or state constitutional provisions otherwise require, a change of venue
or continuance may be granted on motion of either the prosecution or the defense.
(b) Methods of proof.

In addition to the testimony of affidavits of individuals in the community, which shall
not be required as a condition of the granting of a motion for change of venue or
continuance, qualified public opinion surveys shall be admissible as well as other materials
having probative value.
(c) Standards for granting motion.

A motion for change of venue or continuance shall be granted whenever it is determined
that because of the dissemination of potentially prejudicial material, there is a reasonable
likelihood that in the absence of such relief, a fair trial cannot be had. This determination
may be based on such evidence as qualified public opinion surveys or opinion testimony
offered by individuals, or on the court's own evaluation of the nature, frequency, and
timing of the material involved. A showing of actual prejudice shall not be required.
3.3 Waiver of jury.

In those jurisdictions in which the defendant does not have an absolute right to waive a jury in a criminal case, it is recommended that the defendant be permitted to waive whenever it is determined that (1) the waiver has been knowingly and voluntarily made, and (2) there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial.

3.4 Selecting the jury.

It is recommended that the following standards be adopted in each jurisdiction to govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) Method of examination.

Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

(b) Standard of acceptability.

Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

(c) Source of the panel.

Whenever it is determined that potentially prejudicial news coverage of a given criminal matter has been intense and has been concentrated primarily in a given locality in a state (or federal district), the court shall have authority to draw jurors from other localities in that state (or district).
3.5 Conduct of the trial.

It is recommended that the following standards be adopted in each jurisdiction to govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial material are raised.

(a) Use of the courtroom.

Whenever appropriate in view of the notoriety of the case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

(b) Sequestration of jury.

Either party shall be permitted to move for sequestration of the jury at the beginning of trial or at any time during the course of the trial, and, in appropriate circumstances, the court shall order sequestration on its own motion. Sequestration shall be ordered if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

(c) Cautioning parties, witnesses, jurors, and judicial employees; insulating witnesses.

Whenever appropriate in light of the issues in the case or the notoriety of the case, the court shall instruct parties, witnesses, jurors, and employees and officers of the court not to make extrajudicial statements, relating to the case or the issues in the case, for dissemination by any means of public communications during the course of the trial. The court may also order sequestration of witnesses, prior to their appearance, when it appears likely that in the absence of sequestration they will be exposed to extrajudicial reports that may influence their testimony.

(d) Exclusion of the public from hearings or arguments outside the presence of the jury.

If the jury is not sequestered, the defendant shall be permitted to move that the public, including representatives of the news media, be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant’s right to a fair trial by an impartial jury. The motion shall be granted unless it is determined that there is no substantial likelihood of such interference. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. Whenever such action is taken, a complete record of the proceedings from which the public has been excluded shall be kept and shall be made available to the public following the completion of the trial. Nothing in this recommendation is intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize the right to a fair trial by an impartial jury.

(e) Cautioning jurors.

In any case that appears likely to be of significant public interest, an admonition in substantially the following form shall be given before the end of the first day if the jury is not sequestered.

During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards—for example, a witness may testify about events he himself has seen or heard but not about matters of which he was told by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to misleading or inaccurate information which unduly favors one side and to which the
other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction.

If the process of selecting a jury is a lengthy one, such an admonition shall also be given to each juror as he is selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form shall be given:

For the reasons stated earlier in the trial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this jury.

(f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.

If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if reference to the material in question at the trial itself would have required a mistrial to be declared.

3.6 Setting aside the verdict.

It is recommended that, on motion of the defendant, a verdict of guilty in any criminal case be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to an extrajudicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Nothing in this recommendation is intended to affect the rule in any jurisdiction as to whether and in what circumstances a juror may impeach his own verdict or as to what other evidence is competent for that purpose.

PART IV. RECOMMENDATIONS RELATING TO THE EXERCISE OF THE CONTEMPT POWER

4.1 Limited use of the contempt power.

It is recommended that the contempt power should be used only with considerable caution but should be exercised under the following circumstances:

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is willfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect; or

(ii) makes such a statement intending that it be disseminated by any means of public communications.

(b) Against a person who knowingly violates a valid judicial order not to disseminate, until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing closed pursuant to sections 3.1 or 3.5(d) of these recommendations.