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FAIR TRIAL AND PREJUDICIAL PUBLICITY: A NEED FOR REFORM

By J. Thomas McCarthy*

Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.¹

Prologue: A Case in Point

The murder suspect was arrested at 1:45 Friday afternoon and taken directly to police headquarters. He was questioned intermittently for about twelve hours and continued to deny categorically his guilt. Consistent with its policy of allowing news representatives in the working quarters of the police building, the police made every effort to keep the press informed as to the progress of the investigation. As a result, the press publicized virtually all information about the case as soon as it was uncovered by the police.

Impromptu and clamorous press conferences were held in the corridor at headquarters. The Chief of Police appeared in interviews on television and radio, expressed his opinion, and gave detailed information on the progress of the case.

Could this defendant be given a fair trial by an impartial jury? Would it be possible to find twelve unprejudiced persons after such a barrage of prejudicial publicity? A court was never faced with these questions. The accused was shot and killed less than forty-eight hours later by an aroused citizen.

The facts of this case are now history. The setting: Dallas, Texas, November, 1963. The accused: Lee Harvey Oswald.

For two days Lee Harvey Oswald received more public attention than any other prisoner in history. The sudden murder of a young and popular president shocked the nation. But as emotions cooled, the legal dilemma presented by the assassination became acutely apparent. It is now the general consensus that it would have been almost impossible for Oswald to receive a fair trial anywhere in the

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¹ Bridges v. California, 314 U.S. 252, 271 (1941).
United States. Oswald attracted no one's sympathy. Yet it is for this reason that it was important that he be accorded as fair treatment as anyone else. As the late Justice Frankfurter incisively remarked: "... not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community."

The rule of trial by jury broke down in Oswald's case. The evidence was widely disseminated among the public. The public heard the evidence and judged Oswald guilty. However, the same treatment, in lesser degrees of prejudice, is accorded all newsworthy defendants. The Oswald case is but a spectacular example. The courts are daily presented with the problem of selecting a jury from among a public which has already heard the case presented in the press. The Warren Commission pointed out the problem:

The disclosure of evidence encouraged the public, from which a jury would ultimately be impaneled, to prejudge the very questions that would be raised at trial.

Oswald's case was not unique, but was rather symptomatic of the general policies of American police officials and news media. The notoriety of the case renewed interest in the ancient conflict between a free press and a fair trial.

### The Requirement of an Impartial Jury

... the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....

It is the state of mind of the members of a jury which is primarily critical in determining what kinds of publicity should be classified as "prejudicial." To define terms, it should be said that a juror who...
has been exposed to "prejudicial" publicity cannot be truly "impartial" in the constitutional sense of the word.

"Prejudice" itself is a descriptive term; it implies a "pre-judging" —a judgment or opinion arrived at before evidence has been presented subject to the rules of admissibility. When the jury is not impartial, then it is the accused on trial who is consequently "prejudiced" in the sense that he has been "pre-judged" before he ever enters the courtroom.

The primary source of the basic necessity for an impartial jury is the United States Constitution, which merely restated the basic common law jury requirements which had evolved out of the mists of English jurisprudence. In sparsely populated eleventh-century England, jurors were neighbors who were presumed to be witnesses to the facts. However, as the population increased, the jury knew little or nothing of the facts in dispute. It was then that witnesses who knew the facts were called in to testify. The very thing that previously qualified a man for jury service (knowledge of the facts) now served to disqualify him. By the end of the fifteenth century the jury had shed its old character and was assumed to be unknowing and indifferent to the facts presented by the witnesses.

In addition to the sixth amendment, the guarantee of an impartial jury is embodied in the constitutions of 39 states and can be implied from the guarantee of trial by jury in the other 11 states. The United States Supreme Court now has held that the fourteenth amendment's requirement of due process requires an impartial jury: "In essence the right to jury trial guarantees the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to
accord an accused a fair hearing violates even the minimal standards of due process."

Judicial Safeguards in Pending Cases

The naive assumption that prejudicial effects can be overcome by instructions to the jury; all practicing lawyers know to be unmitigated fiction.\(^\text{14}\)

Procedurally, the problems facing a trial judge can be broken down into two broad categories: (1) publicity which occurs prior to empaneling of the jury, and (2) publicity appearing during the trial itself.

The specter of pre-trial publicity first appears in the courtroom on *voir dire* examination of the veniremen or jury panel. The judge or defense counsel asks the prospective juror whether he has read of the case in the papers or heard of it on radio or television. The answer is yes.\(^\text{15}\) Logically, this is the time for the judge to allow or refuse a challenge for cause, basing his decision on the nature of the publicity to which the panel member has been exposed. However, the traditionally accepted approach is to pose these two loaded questions to the prospective juror: (1) Have you formed an opinion as to the defendant’s guilt? and (2) Will you place your opinion aside and swear to do your duty to render a fair and impartial verdict based on the evidence to be presented?\(^\text{16}\) If the juror is at all

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\(^{15}\) That is, the answer is yes if the panel member is honest about it or if he regards it as important enough to mention. “A half-forgotten headline may seem to a jurymen too trivial to mention, yet it may have planted the seed that changes a vote in the jury room.” Wright, *A Judge’s View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125, 1126 (1964); If the prospective juror has been aroused enough by advance publicity, he may say anything to get a chance to cast a vote for conviction.

\(^{16}\) See, e.g., Geagon v. Gavin, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962); People v. Duncan, 53 Cal. 2d 803, 350 P.2d 103 (1960); People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911 (1953); People v. Schneider, 309 Mich. 159, 14 N.W.2d 819 (1944); State v. Johnson, 362 Mo. 833, 245 S.W.2d 43 (1951); People v. Genovese, 10 N.Y.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962); Klinedinst v. State, 159 Tex. 510, 265 S.W.2d 593 (1953); Hampton v. Commonwealth, 190 Va. 531, 58 S.E.2d 288 (1950).
honest, he will answer the first question in the affirmative, for the vast majority of publicity is of a nature to prompt an opinion on the reader’s part—usually an opinion of guilt. The second question is not really a question at all—it is in effect, a direction to the juror to disregard what he has read or seen. There is tremendous pressure on a panel member to answer such a question in the affirmative: “It is obvious that prejudice may lurk in the unconscious, but even where it is in the conscious the juror is told what his obligation is and then asked whether he can perform his duty. Indeed, the question might well have been asked whether the juror loves his country.”

The juror answers that he will do his duty, and the challenge for cause is denied. It is apparent that this approach does not avoid the effects of prejudicial publicity—it merely ignores them. The problem is side-stepped by assuming that a juror can wipe his mind clear as one would wipe a slate clean. Any amateur psychologist would blanch at so naive an approach to the complicated workings of the human mind. This procedural approach to the problem of prejudicial publicity must be taken for what it is—nothing more than a legal fiction. The juror is assumed to be impartial, when in fact everyone knows he is not. As with most legal fictions, this one was imposed by the pressures of practical judicial administration. In a community where nearly everyone has knowledge of the case, disqualifying those who are actually prejudiced would make it very difficult (and sometimes impossible) to impanel a jury. The problem is that this legal fiction assumes tragic proportions when “life and liberty” are at stake.

This fiction was initially given full blessing by the United States Supreme Court in the leading case of Holt v. United States. There, a number of jurors read publicity of the case both prior to and during the trial. A challenge for cause and a motion for new trial were both denied by the trial judge, relying on the jurors’ promise of impartiality. Mr. Justice Holmes stated that this was a matter of the trial

17 Mr. Chief Justice Waite in Reynolds v. United States, 98 U.S. 145, 155 (1878) points out that “the theory of the law is that a juror who has formed an opinion cannot be impartial.”


19 “The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man,” Irvin v. Dowd, 366 U.S. 717, 727 (1961); see Delaney v. United States, 199 F.2d 107, 113 (1st Cir. 1952); People v. Hryciuk, 5 Ill. 2d 176, 125 N.E.2d 61 (1954).

20 218 U.S. 245 (1910).

21 A challenge for cause was denied for a prospective juror who said that “he had taken the newspaper statements for facts . . . [but] he thought he could try the case
court's discretion and would not be overturned unless there was very clearly an abuse of that discretion:

If the mere opportunity for prejudice or corruption is to raise a presumption that they did exist, it will be hard to maintain jury trial under the conditions of the present day... we do not see in the facts before us any conclusive ground for saying that [the trial judge's] expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong.22

Or, in other words, the trial court has virtually unlimited discretion in ruling on the issue of prejudice. Following this case, almost every jurisdiction in the country has adopted the fiction that prejudice is eliminated if the juror says so.23 As an additional weight on the defendant, it is the settled rule that a prospective juror is presumed to be impartial. The burden is on the defendant to show actual prejudice. The courts have not suggested how this can be accomplished.24

It was not until Marshall v. United States,25 that the Supreme Court cast some doubt on the propriety of the Holt case. In Marshall a federal judge refused to allow into evidence at trial defendant's previous record. Soon thereafter, newspaper accounts appeared which set forth the very facts which the judge had previously ruled inadmissible. When questioned, seven of the jurors admitted reading this material. Each was asked the question as to prejudice and each said that he would not let himself be influenced by the news articles. A motion for mistrial was denied and defendant was convicted. The Supreme Court reversed saying: "The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evi-...solely upon the evidence, fairly and impartially." Id. at 248. Affidavits were submitted showing that jurors had read of the case in the newspapers during trial. Id. at 250-51.

22 Id. at 251.

23 See, e.g., cases cited note 13 supra; Some states have statutes which take the matter out of the judge's discretion; e.g., CAL. PEN. CODE § 1076, states that no person can be disqualified as a juror—by reason of previously formed opinions if the juror states that he can and will act impartially and fairly; this is also the rule where the prospective juror is of the opinion that defendant is guilty and that he would require evidence to overcome this opinion; e.g., People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911 (1953). It is difficult to reconcile this approach with the presumption that an accused is innocent until proven guilty.

24 Irvin v. Dowd, 366 U.S. 717, 724 (1961); Reynolds v. United States, 98 U.S. 145, 157 (1878); attempts to introduce evidence as to community prejudice have been thwarted, United States v. Rosenberg, 200 F.2d 666, 669 (2d Cir. 1952); Irvin v. State, 66 So. 2d 288 (Fla. 1953), cert. denied, 346 U.S. 927 (1954).

It may indeed be greater for it is then not tempered by protective measures.\textsuperscript{26}

The \textit{Marshall} case defined a new and refreshingly honest approach to the problem. It was the first time that the \textit{nature and quality} of the publicity in question was emphasized. When the publicity to which the jurors have been exposed is so obviously "prejudicial," then their promises of impartiality must be disregarded. The mere \textit{reading} of prejudicial material was enough to cause the court to hold, as a matter of law, that the jurors themselves had been prejudiced. For the first time, a rule was established by which publicity could be judged. \textit{Marshall} held that publicity which reports \textit{inadmissible evidence} is inherently prejudicial. "Inadmissible evidence" as used here means evidence, the admission of which at trial would be reversible error. Anyone who reads such material cannot be an impartial juror, his promises to the contrary notwithstanding.\textsuperscript{27}

The next such case was \textit{Irvin v. Dowd},\textsuperscript{28} where the Court recited the old \textit{Holt} rule but went on to reverse the case. In \textit{Irvin}, six murders were committed within three months near Evansville, Indiana. The crimes were extensively covered by news media in the locality and "aroused great excitement and indignation" throughout the area.\textsuperscript{29} The Court paid lip service to the \textit{Holt} rule: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."\textsuperscript{30} But the Court then went on to examine the quantity and quality of the publicity disseminated to find that no juror could be believed when he said he could disregard the kind of abusive and sensational publicity found in the case.\textsuperscript{31} Rather than use the "inadmissible evidence" approach of the \textit{Marshall} case,\textsuperscript{22} the Court in \textit{Irvin} looked at the publicity as a whole and its effect on those in the jury panel. Of a jury panel of 430 persons, 268 were excused because they were convinced that Irvin was guilty.

\textsuperscript{26} Id. at 312.

\textsuperscript{27} However, the Court in \textit{Marshall} was careful to leave a large loophole by cautioning that "each case must turn on its special facts." 360 U.S. at 312. Later cases have used this to avoid the reasoning of \textit{Marshall}; e.g., \textit{People v. Genovese}, 10 N.Y.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962), note 13 \textit{SYRACUSE L. REV. 601}.

\textsuperscript{28} 366 U.S. 717 (1961).

\textsuperscript{29} Id. at 719.

\textsuperscript{30} Id. at 723.

\textsuperscript{31} See authorities cited note 19 \textit{supra}.

\textsuperscript{22} As a matter of fact, the great bulk of publicity involved in \textit{Irvin} would have been inadmissible if presented at trial and, if admitted, would have produced reversible error.
Eight of those finally selected admitted that they felt defendant was guilty but each stated that he could render an “impartial” verdict.

One of the last such cases to come before the Supreme Court was *Beck v. Washington*, where David Beck, then president of the Teamster’s Union, was convicted of embezzlement of union funds. The Supreme Court affirmed, holding that the news coverage was “neither intensive nor extensive” and that “although most of the persons thus selected for the trial jury had been exposed to some of the publicity,” each one indicated that “he would enter the trial with an open mind disregarding anything he had read on the case.”

Thus, it seems that the Supreme Court never really meant to abandon the old legal fiction approved in the *Holt* case at all. The publicity involved in the *Beck* case was not distinguishable in kind from that which appeared in the *Marshall* and *Irvin* cases. Later cases finding the jury impartial in the fact of prejudicial news coverage rely heavily on the dictum of *Irvin* and the decision in the *Beck* case.

The most recent Supreme Court decision in this area is *Rideau v. Louisiana*, where two weeks prior to his arraignment for armed robbery, kidnapping and murder in Lake Charles, Louisiana, the defendant appeared in a film on television. The filmed “interview” was conducted by the sheriff and consisted of interrogation by the sheriff and a confession by Rideau. The film was eventually seen by about 29,000 people in the immediate area. Three members of the empaneled jury had seen the televised film. The trial judge denied a motion for change of venue and Rideau was convicted and sentenced to death. In a short opinion by Mr. Justice Stewart, the Supreme Court reversed the conviction, saying that “It was a denial of due process of law to refuse the request for a change of venue . . .” when so many people had seen and heard Rideau plead guilty to murder on television and “. . . that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau’s televised ‘interview’ . . .”. None of the Court’s previous decisions in this area were cited in the majority opinion. Justices Clark and Harlan dissented, citing *Irvin*

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33 369 U.S. 541 (1962).
34 Id. at 556-57.
35 Id. at 557.
36 In *Beck*, a Senate Committee released many prejudicial remarks to the press, creating the impression among the general public that Beck had been found guilty of a crime. *State v. Beck*, 56 Wash. 2d 474, 512, 349 P.2d 387, 408 (1960).
38 Id. at 726.
39 Id. at 727.
to the effect that the majority never showed any "substantial nexus between the televised interview and petitioner's trial." 40 Mr. Justice Clark pointed out that he dissented not only because the majority deviated from the principles of Irvin v. Dowd, but because the majority opinion "applies no principles at all." 41 This is substantially the problem with fitting the Rideau case into any set of constitutional rules, for the majority seems to rest its decision on a general feeling that the treatment of Rideau was unfair and shocking, without considering any connection between the televised interview and the state of mind of the jurors who found Rideau guilty. For this reason the Rideau decision is anomalous and only serves to cloud the problem of determining what is and what is not prejudicial publicity. Where the Supreme Court now stands on the issue is open to conjecture.

The logic of the Marshall case is the only honest approach to the problem. If it is reversible error to expose a juror to inadmissible matter in court, then it should be equally erroneous to seat as a juror a person who has been exposed to this same matter outside of court.

Since the overwhelming bulk of publicity about pending cases involves such inadmissible matter, an application of the Marshall reasoning as a constitutional rule would make it extremely difficult to empanel a jury in a locality which has been saturated by news of the case. One's first impression is that this puts a "premium upon ignorance," since usually the most desirable jurors will be those intelligent and well-informed persons who follow the news and consequently would have to be disqualified. 42 However, other procedural remedies are available, namely motions for a continuance 43 or change of venue. 44 A hard-pressed defense counsel may be forced to waive

40 Id. at 729.
41 Ibid.
42 "If intelligent jurors are to be secured, then there must be some relaxation of rules as to their competency. Most intelligent men and all educated men read newspapers, and they would have to be more than human if they did not form some opinion. . . . To reject them for this reason is to put a premium upon ignorance." Ballard v. Commonwealth, 159 Va. 980, 159 S.E. 222, 229 (1931).
43 Delay may cool public outrage, but "the influence that lurks in an opinion once formed" remains; see note 19 supra.
44 "But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence." Shepherd v. Florida, 341 U.S. 50, 52 (1950); "But modern news media are set up on a national scale. In a newsworthy case, participants who make news cannot escape publicity merely by skipping across county lines." Goldfarb, Public Information, Criminal Trials, and the Cause Célèbre, 36 N.Y.U.L. Rev. 810, 821 (1961).
the right to jury trial. But in many courts even this will not be permitted.\textsuperscript{45}

The problems of publicity appearing during the trial can usually be adequately handled by an alert defense counsel and a conscientious trial judge. When it appears that the trial is going to receive extensive press coverage, then special precautions should be taken.\textsuperscript{46}

Of course, only total confinement of the jury will ensure insulation of jurors from the press. When the jurors are allowed to disperse, then the risk of a mistrial hangs on their fidelity to the judge's instruction not to read of the case. When publicity appears, the judge should question each juror separately in his chambers.

Some cases have been reversed because the trial judge refused to question jurors as to whether they had read accounts of the case.\textsuperscript{47} In another case, the trial judge did ask the jury if they had read the newspaper accounts in question and no less than nine jurors and two alternates raised their hands in the affirmative.\textsuperscript{48} Such trials are usually allowed to proceed after the jurors have been prompted to state that they are not prejudiced.\textsuperscript{49} Trial judges and counsel should be prepared to handle sensational trials with kid gloves rather than try to gloss over the existence and effect of publicity appearing during trial.\textsuperscript{50}

\textsuperscript{45} A criminal defendant has no right to waive a jury without the consent of the prosecution and the trial judge. Singer v. United States, 380 U.S. 24 (1965).


\textsuperscript{47} E.g., United States v. Accardo, 298 F.2d 133 (7th Cir. 1962). Note, 12 AM. U.L. REV. 90. The trial judge felt that the integrity of the jury would be assailed if he admitted the possibility that the jurors had not followed his instructions; see Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), which reversed a conviction because the inquiry of the jurors was not adequate; see also Janko v. United States, 281 F.2d 158 (8th Cir. 1960), rev'd \textit{per curiam}, 366 U.S. 716 (1961); United States v. Alker, 180 F. Supp. 681 (E.D. Pa. 1960); contra, 53 Am. Jur. Trial § 885 (1945, Supp. 1962), stating that it is within the judge's discretion whether or not to poll the jury as to whether they have read of the trial.

\textsuperscript{48} United States v. Carlucci, 288 F.2d 691 (3d Cir. 1961).

\textsuperscript{49} Ibid., where all of the eleven jurors qualified their answer to conform with the one juror who said that he had only read the headlines and "scanned" the articles. The conviction was affirmed. See generally, People v. Genovese, 10 N.Y.2d 461, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962); it has been correctly pointed out that no juror will admit in front of his fellow-jurors that he would be influenced in his verdict by having read a newspaper story, Coppedge v. United States, 272 F.2d 504, 508 (D.C. Cir. 1959), especially where to do so would make him appear to be responsible for the mistrial of a notorious defendant. Comment, 12 AM. U.L. REV. 90 (1963).

\textsuperscript{50} "[C]autious judges and counsel will lay the groundwork for assuring fair trials
The Nature of Publicity

... neither the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. 51

In the recent cases the Supreme Court has heard on prejudicial publicity, the Court adopted the new approach of looking to the nature of the publicity which the panel members or jurors had read. If that publicity was obviously "prejudicial," then the statements of the jurors as to impartiality must be disregarded. However, only the Marshall case gave an indication as to a fixed standard by which publicity could be judged. That is, "prejudicial publicity" is information, the introduction of which at trial would produce reversible error. It should make no difference whether the juror is exposed to prejudicial matter in or out of the courtroom. The effect on the juror's mind is the same. In fact, most jurors will be more deeply affected by information appearing in the familiar guise of the newspaper and television set, than they are by the unfamiliar question and answer method used in the courtroom. Publicity appearing in news media is simple and direct; it appeals primarily to the emotions and is therefore hard to detect or to ignore.

What kinds of publicity commonly appear in modern news media? A goodly percentage can be lumped under one or both of these two categories of information: (1) that which sets forth the past record, usually a criminal record, of the accused, 52 and (2) that which reports the fact of a confession or the confession itself. 53 There are many other types remaining, e.g., independent "investigations" by the press; 54 photographs of the defendant or the victim, 55 and evidence uncovered by taking certain steps as a matter of course when prejudicial publicity is present ....

Kutner, supra note 46, at 54.

51 Warren Report 240.

52 Evidence of the accused's evil character is commonly inadmissible to establish a probability of guilt. Michelson v. United States, 335 U.S. 469, 475 (1948); United States v. Milanovich, 303 F.2d 628 (4th Cir. 1962); United States v. Alker, 180 F. Supp. 661 (E.D. Pa. 1959); see 1 Wigmore, Evidence § 57 (3d ed. 1940); 1 Wharton, Criminal Evidence § 330 (11th ed. 1935).

53 Confessions are reported as a matter of course. The press seldom bothers to see if there are any questionable angles. Lofton, Justice and the Press, 6 St. Louis U.L.J. 449, 461 (1961); see generally Escobedo v. Illinois, 378 U.S. 478 (1964), criticizing police dependence on confessions as a means of proving guilt; a person who has read of a confession and is later called as a juror is understandably confused.

54 Lofton, supra note 53, at 465. The press often solicits the "testimony" of potential witnesses; e.g., see Burton W. Abbott case, San Francisco Examiner, July 21, 1955, p. 2.

55 Lofton, supra note 53, at 467; photographs of the defendant may help or hinder him (or her), depending on physical appearance and when the picture was taken. See, e.g., Hays, Trial by Prejudice 37 (1933).
at the scene of the crime which may later become inadmissible.\textsuperscript{55} This is all in addition to sensationally slanted opinions and comments on the basic facts.\textsuperscript{57} Most publicity is obtained directly from the police or prosecutor and consequently is hardly of the type that breaks favorably for the suspect.

It is seen that the great bulk of crime reporting conveys information which would be inadmissible at the trial. Even if admissible evidence is reported, it has been conveyed to the reader without being subject to the extensive rules of evidence which the law has evolved to protect the accused.

Chief Judge Desmond of the New York Court of Appeals criticized the present procedural approach in these words: "I refuse to concede . . . that we must be satisfied by the incredible statements of jurors that they can read such stuff and then wipe it off their minds."\textsuperscript{58}

It is demeaning for the bench and bar to continue to give official sanction to this fallacy. Persons who read obviously inadmissible or sensational reports must be disqualified if "impartial" trials are to be held. However, the present price of such honesty is the extreme difficulty of finding truly impartial jurors. For this reason, serious consideration must be given to controlling the nature and quantity of publicity which is disseminated among the public.

Controlling the Source of Prejudicial Publicity

The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.\textsuperscript{59}

\ldots we are hearing again the ancient cry that the free press is the enemy of fair trial.\textsuperscript{60}

\textsuperscript{55} E.g., a number of erroneous details were released and publicized in the Oswald case, \textsc{Warren Report}, 238-40.

\textsuperscript{57} E.g., in the Oswald case Captain Will Fritz (Chief of the Dallas Police Homicide Bureau) said that the case against Oswald was "cinched" and "we're convinced beyond any doubt that he killed the President." \textsc{N.Y. Times}, Nov. 24, 1963, p. 1. Chief of Police Curry reported that "we are sure of our case," \textsc{Warren Report} 239. District Attorney Wade said, "I think that we have enough evidence to convict him now." \textsc{N.Y. Times}, Nov. 24, 1963, p. 1. See Comment, \textit{Trial by Newspaper}, 33 \textsc{Fordham L. Rev.} 61 (1964).


\textsuperscript{59} \textsc{Irvin v. Dowd}, 336 U.S. 717, 730 (1961) (concurring opinion of Frankfurter, J.).

\textsuperscript{60} Mr. Sam Ragan, President Associated Press Managing Editors Ass'n, \textsc{Time}, Nov. 27, 1964, p. 52.
The great bulk of published material prejudicial to prospective jurors is released by the prosecution or the police. Therefore, it can accurately be said that the source of prejudicial publicity is two-fold: (1) news media itself—press, radio, and television, and (2) the original source—prosecuting attorneys and the police.

Motivation of the Fourth Estate

Aside from merely being an exercise of the First Amendment’s right of free speech, press coverage of crime news produces a number of concrete benefits to society. This coverage prevents the police from relaxing their battles against crime and exposes to public criticism questionable police tactics. In general, the press acts as a watchdog for the people and opens police and court procedures to the scrutiny of the citizens. By its very existence the press acts as a restraint on abuse and corruption in law enforcement and judicial administration. But, in the main, these beneficial aspects of the press do not depend for their effectiveness on contemporaneous commentary on only the most notorious cases. As the Warren Report commented, the public does not have a right to be kept abreast of all the evidence as it is accumulated. The morbid curiosity of the public should not be satisfied at the expense of an accused’s right to trial by an impartial jury.

It seems safe to assume that the press, in taking a hostile view of all criminal suspects, either accentuates an already existing outlook or at least urges the public in that direction. In crime news a basic emotional need is satisfied by providing a vicarious outlet for suppressed antagonism. News media are run on a severely competitive basis. The “press” does not exist solely for the public good, but is a business which depends for its existence on profits. It was learned early that sensational crime stories sell newspapers. The fact is that adultery, butchery, insanity and passion are best sellers. The rea-

62 E.g., the controversy and debate created by publicity in Chicago, where Judge George Leighton set free the attackers of two policemen. Time, March 19, 1965, p. 56.
63 WARREN REPORT 240.
64 “The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime.” Ibid.
65 Lofton, supra note 53, at 472. “[T]he public can be expected to . . . remain completely at the mercy of their emotions in dealing with the more ‘extreme’ forms of aberrant behavior.” Shindell, The Public and the Criminal, 50 A.B.A.J. 545, 549 (1964).
son for the continued existence of prejudicial publicity is just that simple.\textsuperscript{66} The man in the street is not concerned with the problems of ensuring a fair trial. Mr. Justice Douglas has remarked that, "A man on trial for his life or liberty needs protection from the mob. Mobs are not interested in the administration of justice. They have basic appetites to satisfy."\textsuperscript{67} Reports of inadmissible evidence and sensational commentaries cannot be justified by the "right of the public to know." From an informative standpoint, the most balanced picture which the press could convey of judicial proceedings would come from a comprehensive summary \textit{after} trial, not from the bits and pieces from which the public must now try to glean anything at all of value.\textsuperscript{68}

\textbf{The Contempt Power and the English Experience}

As a matter of logic it would seem that the press could be cited for contempt where published articles interfere with the empaneling of an impartial jury. However, a consistent line of U.S. Supreme Court cases has, as a practical matter, made contempt by publication a dead letter.

The power of state courts to punish news publications for contempt is now restricted to those instances where the publication constitutes a "clear and present danger" to the administration of justice. Starting in 1941 with \textit{Bridges} v. \textit{California},\textsuperscript{69} and continuing in \textit{Pennekamp} v. \textit{Florida},\textsuperscript{70} and \textit{Craig} v. \textit{Harney},\textsuperscript{71} the Supreme Court reversed holdings in which state court judges had held the press in contempt of court.\textsuperscript{72} In elaborating on the "clear and present danger" test, the Supreme Court said that the imposition of contempt is not justified if the published matter has only a "reasonable tendency"\textsuperscript{73} to obstruct the legal process and that to justify contempt the publication must make it "impossible in a very real sense for a court to carry on the administration of

\textsuperscript{66} "It is idle for such newspapers to claim that they adopt such practices in the public interest. Their motive is the sordid one of increasing their profits, unmindful of the result to the unfortunate wretch who may ultimately have to stand his trial for murder." Justice Blair, Attorney General v. Tonks [1934] N.Z.L.R. 141, 150; quoted in \textit{Pennekamp} v. \textit{Florida}, 328 U.S. 331, 363 (1946); see Gilman, \textit{The Truth Behind the News}, 29 Amer. Mercury 139 (1933); See Daly, \textit{Ensuring Fair Trials and a Free Press}, 50 A.B.A.J. 1037, 1038 (1964).


\textsuperscript{69} 314 U.S. 252 (1941).

\textsuperscript{70} 328 U.S. 331 (1946).

\textsuperscript{71} 331 U.S. 367 (1947).

\textsuperscript{72} See Wood v. Georgia, 370 U.S. 375 (1962).

\textsuperscript{73} Bridges v. California, 314 U.S. 252, 273 (1941).
However, it is most important to note that these cases did not involve jury proceedings, but only pending cases which were being heard by a judge.

But the Supreme Court's decisions cited above, and obvious political pressures, seem to have effectively discouraged judges from using the contempt power in jury cases which have been prejudiced by the press. The Supreme Court has never faced the issue. The closest it came was in *Maryland v. Baltimore Radio Show*, where the Court denied certiorari over Justice Frankfurter's vigorous dissent, expressed in a twenty-page opinion.

The contempt power of the federal courts is even more limited. Federal courts under *Nye v. United States* and 18 U.S.C. 401 cannot punish by contempt acts which occur outside the courtroom.

In England only the fact of arrest and certain matters occurring in the pretrial stage can be published before the trial is concluded. If this is violated, and the paper is convicted of contempt, then heavy fines and jail sentences are imposed. The English courts early recog-


75 Clarence Darrow commented that, "as the law stands today there is no important criminal case where the newspapers are not guilty of contempt day after day. . . . But nothing is done about it. No new laws are necessary. The court has full jurisdiction to see that no one influences a verdict or decision. But everyone is afraid to act." Quoted by Perry, *Trial by Newspapers*, 30 MICH. L. REV. 228, 234 (1931); see 66 U.S.L. REV. 374, 379 (1932); 11 PENN. L.J. 277, 282 (1932); and in Pennekamp v. Florida, 328 U.S. 331, 363 (1946).

76 338 U.S. 912 (1949).

77 Defense counsel was forced to waive a jury trial because of prejudicial broadcasts over a Baltimore station. The Maryland Court of Appeals reversed a contempt conviction, *Maryland v. Baltimore Radio Show*, 193 Md. 300, 67 A.2d 497 (1949), and the reversal was left standing by the Supreme Court's refusal to grant certiorari. Justice Frankfurter's dissent was obviously intended to keep the door open for future determination of prejudice to a jury. No such cases have appeared to date. But the possibility remains that the Supreme Court may uphold a contempt conviction for publicity which prejudices a jury trial.

78 313 U.S. 33 (1941).

79 Shepherd v. Florida, 341 U.S. 50, 52 (1951), where Jackson, J., concurring, remarked that the locality of the courtroom is "the last place where a well-calculated obstruction of justice would be attempted." See Goss v. Illinois, 204 F. Supp. 268, 274 (N.D. Ill. 1962), *rev'd on other grounds*, 312 F.2d 257 (7th Cir. 1963).


81 E.g., reporter and editor sentenced to six weeks imprisonment for publishing material which would have been inadmissible in evidence, Rex v. Tibbits & Windust, (1902) 1 K.B. 77; editor imprisoned for three months and 10,000 pound fine, The Times (London), March 26, 1949, p. 4.
nized the problem and utilized the existing contempt power to combat it.\textsuperscript{82}

There is nothing to indicate that English readers have lost interest in criminal trials and the workings of their courts because of the enforced delay of publication. In England, the strict use of contempt has elevated press manners and decorum and consequently an accused has an even chance of receiving a trial free from press interference.\textsuperscript{83}

\textbf{Voluntary Improvements by the Press and the Bar}

For over thirty years the American Bar Association has attempted to encourage the press to establish and live by its own codes of ethics.\textsuperscript{84} In 1923 the American Society of Newspaper Editors adopted seven Canons of Journalism.\textsuperscript{85} However, those publishers most in need of restraint are those least likely to undertake it voluntarily. In his usual laconic style, H. L. Mencken said:

Journalistic codes of ethics are all moonshine. . . . If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished . . . by external forces, and through the medium of penalties, exteriorly inflicted.\textsuperscript{86}

Very little change in either the quantity or quality of prejudicial publicity can be noted since efforts at press and bar cooperation were

\textsuperscript{82} In \textit{Rex v. Fisher}, 11 Rev. R. 799 (1811), Lord Ellenborough pointed out that "If anything is more important than another in the administration of justice, it is that jurymen should come to the trial . . . with minds free and unprejudiced. It is possible they should do so, after having read for weeks and months before ex parte statements of the evidence against the accused. . . .?"

\textsuperscript{83} In a number of cases, Mr. Justice Frankfurter advocated the merits of the English system and stated that "it will hardly be claimed that the press is less free in England than in the United States." Pennekamp v. Florida, 328 U.S. 331, 359 (1946). See Goldfarb, \textit{Public Information, Criminal Trials and the Cause Célèbre}, 36 N.Y.U.L. Rev. 810, 827 (1961). The English labor government has announced its intentions to make press restrictions more rigid than ever, Time, Feb. 12, 1965, p. 71.


\textsuperscript{85} "Unfortunately, nothing further was done about these Canons officially," Otterbourg, \textit{Fair Trial and Free Press}, 39 A.B.A.J. 978 (1953); The Warren Commission said: "The promulgation of a code of professional conduct governing representatives of all news media would be welcome evidence that the press had profited by the lesson of Dallas.," \textit{Warren Report} 242.

started thirty years ago. The Warren Report has brought about new efforts at remedial action by the American Bar Association. There is no indication yet as to the direction these new efforts and recommendations will take.87 Experience has shown that the realization of self-restraint by news media is very unlikely.

The Prosecution as a Source of Prejudicial Publicity

For the press the prosecutor provides a source of highly dramatic and readable news. For the prosecutor, the press provides a means of publicizing his office and obtaining the public approval necessary to the health of his political life.88 A close rapport usually exists between the prosecuting attorney’s office and newsmen on the crime beat.

In 1908 the American Bar Association adopted the Canons of Professional Ethics, of which Canon 20, on “Newspaper Discussion of Pending Litigation” provides that statements to newspapers by an attorney as to pending or anticipated litigation are to be condemned.89 Generally, Canon 20 has been ignored as being too general.90

A few federal cases have developed a rule whereby if publicity was in fact inspired by the prosecution, that in itself may be grounds for a mistrial, regardless of the actual exposure of the jury to the publicity.91 A wider application of such a rule may provide effective judicial means of discouraging prosecutors from releasing such information.

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87 The Warren Commission pointed out “the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial,” Warren Report 242; an A.B.A. eleven-man Advisory Committee on Fair Trial and Free Press has been named to implement the recommendations of the Warren Commission, 9 A.B.A. News, No. 13, Dec. 15, 1964, p. 1; some local bar associations have acted similarly, e.g., see 14 San Francisco B. A. Brief Case, No. 6, Nov., 1964, p. 5.


89 Canon 20 is effective in almost every state in the form of a statute, court rule, or state bar canon. Comment, 20 Wash. & Lee L. Rev. 178, 181 (1963). As the representative of the public, the prosecutor’s words carry great weight with the people. Committee on Professional Ethics and Grievances, Opinion 199, 26 A.B.A.J. 233 (1940).

90 Voluntary compliance with the spirit of Canon 20 by prosecuting attorneys often meets with the concerted opposition of the press. In 1954 New York District Attorney Hogan announced that he had instructed his staff not to make public disclosure of evidence or statements from suspects. N.Y. Times, Feb. 12, 1954, p. 33. This touched off a frenzy of severe journalistic criticism in which Hogan’s statement was characterized as “a grave blunder” and an example of “legalistic fascism.” The Mirror, Feb. 12, 1954, p. 5; See N.Y. Daily News, Feb. 12, 1954, p. 27; Wolfram, Free Press, Fair Trial & the Responsibility of the Bar, 1 Crim. L. Rev. (N.Y.) 3, 14 (1954).

91 Henslee v. United States, 246 F.2d 190 (5th Cir. 1957); Delaney v. United
In general, it would seem easier and perhaps politically wiser to attempt to stem the flow of prejudicial publicity at its usual source—the prosecution and police—than to undertake the unrewarding task of imposing controls on the press itself.

Statutory Proposals

Proponents of statutory reform argue that voluntary compliance with codes of ethics and procedural remedies are unrealistic and inadequate. "They have been before the bench, bar and press for over thirty years, and still the practice continues." These proponents go on to suggest that legislative action would demonstrate to the press that those responsible for the fair administration of criminal justice are wholly disenchanted with the fatalistic notion that "trial by newspaper" is "an unavoidable curse of metropolitan living."

At an A.B.A. meeting in 1962 Justice Bernard S. Meyer of New York suggested a form of uniform statute punishing the release or publication of prejudicial material as a misdemeanor. Senator Wayne Morse has introduced a bill in the U.S. Senate which would enable the federal courts to cite for contempt an employee of the government or defense counsel who divulges information not already made public in court.

In view of the past failure of other remedies, statutory proposals seem to carry the most hope for any kind of meaningful reform.

CONCLUSION

In view of the inseparable three-way linkage of news media, law enforcement agencies and the judiciary, improvement in the quality of justice can hardly be realized without reforms on all sides.

States, 199 F.2d 107 (1st Cir. 1952); Kutner, supra note 46, at 59; but see People v. Stroble, 36 Cal. 2d 615, 226 P.2d 330 (1952), aff'd, 343 U.S. 181 (1951).

Comment, Trial by Newspaper, 33 Fordham L. Rev. 61, 76 (1964); Will, supra note 68, at 216.

Will, supra note 68, at 216; see United States v. Leviton, 193 F.2d 848, 865 (2d Cir. 1951) (dissenting opinion).

The statute would define what facts are per se prejudicial and other items which could also be prejudicial depending on the facts of the case. The statute would apply to news media as well as defense attorneys, prosecutors and police. Address by Justice Bernard S. Meyer, National Conference of State Trial Judges, A.B.A. meeting, Aug. 4, 1962; see Comment, supra note 92, at 75; Will, supra note 68, at 215; Comment, The Case Against Trial by Newspaper, 57 NW. U.L. Rev. 217, 250 (1962).

S.1802, 88th Cong., 1st Sess. (1963), introduced in 109 Cong. Rec. 11880 (1963), the bill died in committee but has been re-introduced in stronger form in the current session of Congress as S. 1802, 89th Cong., 1st Sess. (1965).
If the courts commence to disqualify as jurors all those who have been exposed to inadmissible matter or sensationalized commentary in the press, then the conduct of trials will be seriously impaired unless the press cuts down on the dissemination of such obviously prejudicial material. The press cannot be expected to comply with such a standard unless prosecutors and police take more seriously their duty not to divulge information not yet put into evidence in court. Even if external controls are imposed, they will depend for their effectiveness on the cooperation of everyone involved. Most importantly, the first step is that those concerned on all sides admit that prejudicial publicity presents a serious defect in the present administration of justice.