



NORTH CAROLINA LAW REVIEW

Volume 45 | Number 1

Article 16

12-1-1966

Constitutional Law -- Prejudicial Publicity in Criminal Proceedings

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Recommended Citation

C. B. Gray, *Constitutional Law -- Prejudicial Publicity in Criminal Proceedings*, 45 N.C. L. REV. 183 (1966).

Available at: <http://scholarship.law.unc.edu/nclr/vol45/iss1/16>

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tended that the fifth amendment be applied strictly in line with its historical origins or that it be considered a broad principle designed to take care of unforeseeable judicial abuses is a question that is particularly pertinent to the use of compulsory blood tests. Although blood tests may not be very objectionable in themselves, it is possible that other medical and scientific tests will be developed which might not be as unobjectionable as blood tests. For this reason, it is regrettable that the Court has failed to support its decision with appropriate considerations of the policy and scope of the privilege.

ALBERT VICTOR WRAY

Constitutional Law—Prejudicial Publicity in Criminal Proceedings

The free press-fair trial controversy has occasioned much public discussion on how best to accommodate the conflicting guaranties of the first and sixth amendments in the law enforcement process without making the latter unworkable. In *Sheppard v. Maxwell*,¹ the United States Supreme Court faced the problem squarely for the ninth time in fifteen years, clarifying again the constitutional requirement of jury impartiality, and encouraging for the first time a more vigorous use of existing procedural devices to protect the individual from prejudicial publicity. The murder of Dr. Sheppard's wife "captivated the attention of the news media in an unprecedented manner."² Much of the damaging publicity, both before and during the trial, was the result of leaks to the press by the police, county officials and the district attorney's office. The press aired much of the evidence, some of it "doctored," and some of it never admitted at the trial; publicized petitioner's refusal to take a lie detector test; criticized the "protective ring" thrown up by his family; and, when the police investigation appeared to be uncovering too little, campaigned for an inquest and his eventual arrest. The three-day televised inquest was held in a gymnasium, where the coroner received "cheers, hugs and kisses from ladies" in the audience when he forcibly ejected the petitioner's chief counsel. At the trial itself, held two weeks before both the judge and the prosecutor were up for election, newsmen crowded into the court-

¹ 384 U.S. 333 (1966).

² *Sheppard v. Maxwell*, 231 F. Supp. 37, 40 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965).

room, disrupting the proceedings, hounding the participants, and creating a "carnival atmosphere."³ Twenty reporters even had seats inside the bar. The massive publicity, to which the unsequestered jury was constantly exposed, continued throughout the trial. Motions for change of venue, continuance, and mistrial were denied. The Supreme Court reversed, holding that the trial was unfair on the grounds that the trial judge did not fulfill his duty "to protect Sheppard from the inherently prejudicial publicity which saturated the community," and "to control disruptive influences in the courtroom."⁴

Although "trial by newspaper" has been in controversy at least since the Lindberg kidnapping,⁵ the Supreme Court did not reverse a case on the basis of prejudicial publicity until 1959,⁶ and since then its standards for reversal have never been clear. At the heart of the difficulty is the lack of empirical evidence demonstrating the precise effect of publicity on a jury;⁷ it is thus not surprising that there has never been a consistent, precise legal definition of the impartiality required of a jury,⁸ or, on the other side of the coin, of

³ 384 U.S. at 358.

⁴ *Id.* at 363.

⁵ See Robbins, *The Hauptman Trial in the Light of English Criminal Procedure*, 21 A.B.A.J. 301 (1935).

⁶ *Marshall v. United States*, 360 U.S. 310 (1959).

⁷ Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 831 (1961); Friendly, *The Press, in FAIR TRIAL VS. FREE PRESS* 19 (1965); see generally, Comment, "Free Press-Fair Trial" Revisited: Defendant-Centered Remedies as a Publicity Policy, 33 U. CHI. L. REV. 512 (1966); "[T]here is no scientific method for measuring the effect of propaganda on the subconscious mind." Richardson, *What Constitutes Prejudicial Publicity in Pending Cases*, 54 KY. L.J. 625, 635 (1966); *But see*, ABA Project on Minimum Standards for Criminal Justice, *Fair Trial & Free Press, Tentative Draft of Standards*, Sept. 1966, 80-83 [hereinafter cited as ABA Project]; Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform*, 38 SO. CAL. L. REV. 672 (1965).

⁸ The test is: "[W]hether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . the affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." *Reynolds v. United States*, 98 U.S. 145, 156-57 (1878).

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and the procedure is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-46 (1936).

the prejudice sufficient to defeat that impartiality.⁹ Thus, against the proposition that an accused is innocent until proven guilty by an impartial jury is weighed the possibility of never empanelling a jury because the ideally indifferent juror is nowhere to be found.¹⁰ A generally accepted test¹¹ has been a dictum of the Supreme Court that impartiality is satisfied if a juror says he can put aside his impression or opinion and render a verdict based on the evidence presented in court alone.¹² At the same time, however, such an assertion by a juror is often unreliable where there has been massive publicity,¹³ and the recent case history leading up to *Sheppard* illustrates the Court's somewhat confusing efforts to define the standard more realistically in terms of the prejudice "inherent" in the publicity itself rather than on the basis of actual prejudice as reflected in what a juror says.

⁹ See notes 13-33 *infra* and accompanying text.

¹⁰ "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt v. United States*, 218 U.S. 245, 251 (1910); "Trials cannot be held in a vacuum, hermetically sealed against rumor and report." *Baltimore Radio Show v. State*, 193 Md. 300, 330, 67 A.2d 497, 511 (1949), *cert. denied*, 338 U.S. 912 (1950).

Some courts assert that the jury must be trusted, despite prejudicial publicity:

A juror is selected as such because he has met the statutory standards of intelligence, fairness, and integrity required . . . [i]f we assume that jurors are so quickly forgetful of the duties of censorship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Moe, 56 Wash. 2d 111, 115, 351 P.2d 120, 123 (1960). See also *Sheppard v. Maxwell*, 346 F.2d 707, 714 (6th Cir. 1965).

¹¹ See, *e.g.*, *Sheppard v. Maxwell*, 346 F.2d 707, 719 (6th Cir. 1965); *Hickock v. Crouse*, 334 F.2d 95, 102 (10th Cir. 1964).

¹² It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case . . . to hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961).

¹³ "[P]sychological impact requiring such a declaration [that one could be impartial] before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id.* at 728.

Applying a test of actual prejudice in *Stroble v. California*¹⁴ and *United States ex rel. Darcy v. Handy*,¹⁵ the Supreme Court required that "the burden of showing essential unfairness . . . be sustained not as a matter of speculation but as a demonstrable reality."¹⁶ The Court set aside a conviction for the first time in 1959, in *Marshall v. United States*,¹⁷ even though each juror examined said he felt no prejudice as a result of reading incriminating material; but the Court was exercising its "supervisory power" over the federal courts, and no constitutional guidelines were set down.

The constitutional question came up again, however, in the landmark case of *Irvin v. Dowd*,¹⁸ where for the first time a defendant succeeded in proving prejudice as a "demonstrable reality" in a state trial. *Irvin* is primarily important because the Court used an examination of the *voir dire* records for proof of the prejudicial effect of the publicity: almost ninety per cent of the prospective jurors had some opinion of the guilt of the petitioner, and eight out of the final twelve jurors thought he was guilty before trial.¹⁹ Thus, while a juror's asserted ability to be impartial despite an opinion was disregarded,²⁰ almost as unrealistic and unworkable a test of

¹⁴ 343 U.S. 181 (1952). Petitioner, who had murdered a child, alleged, *inter alia*, that his trial was prejudiced by the press which gave his case top billing, printed his confession which was released by the prosecution and later admitted in court, and referred to petitioner in headlines and text as "were-wolf," "fiend," and "sex-mad killer." Court held he had failed to prove prejudice and made note of his failure to seek a change of venue.

¹⁵ 351 U.S. 454 (1956). The court pointed out that failure of petitioner's counsel to make use of all his preemptory challenges, or seek continuance or change of venue, "while not depositive, is significant." *Id.* at 463.

¹⁶ *Id.* at 462.

¹⁷ 360 U.S. 310 (1959). During the trial seven jurors were exposed to publicity concerning defendant's prior criminal record and illegal activities. We have here the exposure of jurors to information of a character . . . so prejudicial it could not be directly offered as evidence. 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 part of the prosecution's evidence. . . . *It may indeed be greater for it is then not tempered by protective procedures.*

Id. at 312-13. (Emphasis added.)

¹⁸ 366 U.S. 717 (1961). Police officials and the prosecution released a highly publicized statement about defendant's confession which was never admitted at the trial. Polls indicated that the blanket of publicity from the press and radio had left a "pattern of deep and bitter prejudice." *Id.* at 725-27.

¹⁹ *Id.* at 727. Some of the jurors also indicated that it would take evidence to remove their opinions, and one said that he could not give the defendant the benefit of a doubt. *Id.* at 728.

²⁰ See notes 11 & 12 *supra* and accompanying text.

actual prejudice—percentages on voir dire—effectively took its place. A year later, in *Beck v. Washington*,²¹ the Court held that the Teamsters' leader had failed to establish prejudice as a demonstrable reality²² partially because the percentages on voir dire were not as high as in *Irvin*.²³ The court abandoned this approach, however, in *Rideau v. Louisiana*,²⁴ where a film of the defendant confessing to the sheriff in jail was broadcast three times on television.²⁵ Without examining the voir dire records,²⁶ the Court said that a trial in the defendant's community "could but be a hollow formality."²⁷ Although it did not articulate a standard of 'probable' or 'inherent' prejudice, the Court had not required proof of actual prejudice by showing—through the voir dire records—any "substantial nexus between the televised 'interview' and petitioner's trial" and for that reason Justices Clark and Harlan dissented.²⁸ In *Turner v. Louisiana*,²⁹ however, the Court found "inherent prejudice" in the continual association during the trial of two principal witnesses with the jury. And in *Estes v. Texas*,³⁰ which raised the question of televising trials, the Court reversed on the grounds that "at times a procedure employed by the State involves such a probability that

²¹ 369 U.S. 541 (1962).

²² *Id.* at 558.

²³ Of fifty-two prospective jurors examined only eight admitted a preconceived notion, and none of the final twelve jurors had any opinion. Other factors distinguishing *Beck* from *Irvin*: long time period between publicity and the trial (nine and one-half months); publicity was not as intensive, extensive, or inflammatory; defendant had not challenged for cause any of the jurors. *Id.* at 556-57.

²⁴ 373 U.S. 723 (1963).

²⁵ The local officials cooperated and participated in the filming of the confession which itself was admitted later at the trial. *Id.* at 725.

²⁶ "But we do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire . . . that due process . . . required a trial before . . . a community of people who had not seen or heard Rideau's televised 'interview.'" *Id.* at 727. Only three of the jurors had seen the film some two months before the trial. *Id.* at 725. But each said he had no opinion, and only five at voir dire felt Rideau could not get a fair trial, while 24 said he could. *Id.* at 732.

²⁷ *Id.* at 726.

²⁸ *Id.* at 729.

²⁹ 379 U.S. 466 (1965). The case did not involve a publicity question. Two principal witnesses—deputy sheriffs—were in charge of the jury during the trial, and the court said "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association," even though there was no proof the trial was ever discussed. *Id.* at 473

³⁰ 381 U.S. 532 (1965).

prejudice will result that it is deemed inherently lacking in due process."³¹

It would seem that *Rideau*, the televised confession case, might adopt as the constitutional standard of impartiality much the same test as that laid down in *Marshall* for federal courts, namely, that exposure of jurors to damaging publicity, whether admissible or not at trial, is sufficient without proving any "nexus"³² through examination of voir dire records as in *Irvin* and *Beck* (the trial of the teamster's leader). But both federal and state courts have gone opposite ways on similar facts, either by distinguishing *Rideau* as a unique case involving a televised confession and proceeding to compare percentages with *Beck* or *Irvin*,³³ or by resting the decision on either *Marshall* or *Rideau* and assuming inherent prejudice.³⁴ Thus, because *Rideau* (the televised confession), *Turner* (the jury-witness association case) and *Estes* (the televised trial) are distinguishable as presenting unusual problems not found in the ordinary criminal trial, there has not been a clear standard of the impartiality required for a fair trial. Although it had the opportunity, the Court in *Sheppard* did not fully resolve the confusion.

While the Court rested its decision on the reasoning in *Rideau*, *Turner* and *Estes*, holding that identifiable prejudice need not be

³¹ *Id.* at 542-43. Among the factors cited as inherently prejudicial: the possible heightened community pressure on the jurors; their distraction; the diminished quality of testimony from witnesses who had seen the trial on television; and finally, the impact on the defendant: "[T]he picture presented was not one of that judicial serenity and calm to which petitioner was entitled." *Id.* at 536.

³² Arguably, *Rideau* stands for more than *Marshall*, for *Rideau* involved pre-trial publicity (perhaps less damaging because of the time factor) of material that was admissible at the trial.

³³ See *Sheppard v. Maxwell*, 346 F.2d 707 (10th Cir. 1965) where the Court rested the decision on *Beck*, and further distinguished *Irvin* by saying that the latter case involved publicity of confession and prior criminal record, while there was only accusation by "innuendo" in *Sheppard*. *Id.* at 719. See also *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963); *United States ex rel. Brown v. Smith*, 306 F.2d 596 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963); *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961), cert. denied, 370 U.S. 903 (1962); and *State v. Van Duyne*, 43 N.J. 369, 204 A.2d 841 (1964). The latter four cases arose before *Rideau*, but the courts could have rested the decisions on *Marshall*, as Massachusetts did. See note 34 *infra*.

³⁴ *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964) (*Rideau*); *Commonwealth v. Crehan*, 345 Mass. 609, 188 N.E.2d 923 (1963) (*Marshall*). See generally, Comment, *The Impartial Jury—Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 CORNELL L.Q. 306, 308-13 (1966).

shown as a demonstrable reality,³⁵ it was referring to the "totality of the circumstances."³⁶ Conceivably the Court could have reversed on the question of prejudicial publicity alone. It then would have enunciated a clear standard of "inherent" prejudice because *Sheppard*, apart from the sheer volume of the publicity, was not an extraordinary case, and not as distinguishable as *Rideau*, *Turner* and *Estes*. But despite its characterization of the publicity as "inherently prejudicial"³⁷ and its disregard of the *voir dire* records, the Court reversed on the basis of both the publicity and the bedlam in the courtroom, and made clear their interdependency:

While we cannot say that Sheppard was denied due process by the Judge's refusal to take precautions against the influence of pre-trial publicity *alone*, the Court's later rulings *must be considered against the setting* in which the trial was held. *In light of this background*, we believe that the arrangements made by the Judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled."³⁸

Finally, the list of protective procedures available to the judge that would have been "sufficient to guarantee Sheppard a fair trial"³⁹ encompassed both the bedlam and the publicity aspects of the trial.⁴⁰ Because of the carnival atmosphere of the trial, probably *Sheppard*, too, can be distinguished from the ordinary case, and there is no indication that either *Irvin* or *Beck*, where the *voir dire* records were examined, has been discredited.

In view of the Court's recent decision in *Miranda v. Arizona*,⁴¹ indeed, in view of all the Court's rulings in the area of criminal procedure in recent years, one might have expected a clear standard in *Sheppard*, particularly since the Court had a model case to decide. The reason for the lack of clarification may be that the publicity, though voluminous, did not involve what in the past has been considered really damaging matter, such as confessions or prior criminal records, but more "surmise, conjecture and accusation."⁴² If

³⁵ 384 U.S. at 352-53.

³⁶ *Id.* at 352.

³⁷ See note 3 *supra* and accompanying text.

³⁸ 384 U.S. at 354-55. (Emphasis added.)

³⁹ *Id.* at 358. These procedures will be analyzed below. See notes 47-61 *infra* and accompanying text.

⁴⁰ 384 U.S. at 358-63.

⁴¹ 384 U.S. 436 (1966).

⁴² *Sheppard v. Maxwell*, 346 F.2d 707, 720 (10th Cir. 1965). It could be argued, however, that refusal to take a lie detector test is as damaging as

the standard were based on the nature of the publicity in *Sheppard*, it might make the administration of criminal justice extremely cumbersome and unwieldy, if not impossible in some cases, because continuance, change of venue, or mistrial would arguably have to be granted at nearly every publicized trial to avoid reversal.⁴³ It might, further, be quite possible for the press alone, without depending on the police, witnesses and counsel for information on confessions or prior records, to trigger almost automatic mistrial or reversal by printing prejudicial matter uncovered by a reporter's own investigation.⁴⁴ Thus, it is clear that for reversal, actual prejudice may not have to be proved, but the Court will require publicity of a more incriminating nature than that found in *Sheppard*. Such a flexible case by case approach is sensible in this area where so little is known about effect of publicity, where other constitutional guarantees are at stake, and where protection of the public as well as fair treatment of the accused is required.

For whatever reason, the number of cases appealed on the basis of prejudicial publicity has increased,⁴⁵ and the Court recognized that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."⁴⁶ The Court's suggested measures encompass both a more liberal use of existing protective procedures, and the use of court power to shut off the sources of prejudicial information to the press. The former requires a brief examination because of its shortcomings; the latter, while potentially far more effective, must be seen in the light of the free speech issue it raises. A completely free press will almost inevitably endanger the ideal impartiality required by the sixth amend-

a confession. For a general analysis of what types of publicity are most damaging, see ABA Project 39-50.

⁴³ See notes 47-61 *infra* and accompanying text.

⁴⁴ See *Sheppard v. Maxwell*, 384 U.S. 333, 359 n.13 (1966).

⁴⁵ *Id.* at 362. The increase can be a result either of more liberal court attitudes, or a more sensational press. For the view that the press is devoting a disproportionate share of coverage to crime, see Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 18 (1961); for a view that the press is becoming more responsible, see Friendly, *supra* note 7, at 20. The American Bar Association's Advisory Committee on Free Press and Fair Trial concluded that though the percentage of cases threatened by publicity is small, the actual number is "undoubtedly very great." ABA Project 33. But the committee also saw an "impressive increase in the exercise of responsible restraint on the part of many news media organizations." *Id.* at 93.

⁴⁶ 384 U.S. at 363.

ment. Those two values must be balanced, with as little sacrifice of either as possible.

The most common of the procedural devices available to counter the effects of pre-trial publicity are *voir dire* examinations, preemptory challenges and challenges for cause, continuance, and change of venue or venire.⁴⁷ Their application, however, has been troublesome and inconsistent⁴⁸ for a number of reasons, the primary one being the uncertain standard of impartiality.⁴⁹ Motions for continuance and venue, for instance, are largely dependent on the *voir dire* examination,⁵⁰ which is "grossly ineffective" as a screening device.⁵¹ Despite the Supreme Court's implicit recognition of this fact since *Rideau*, *voir dire* will continue to serve as a weather vane. Even where prejudice is indicated, venue and continuance are rarely granted,⁵² and since they are within the trial judge's dis-

⁴⁷ N.C. GEN. STAT. § 1-86 (Supp. 1965) provides for choosing jurors from another district.

⁴⁸ Comment, *Free Press-Fair Trial Revisited: Defendant-Centered Remedies as a Publicity Policy*, 33 U. CHI. L. REV. 512, 515 (1966).

⁴⁹ See note 6 *supra* and accompanying text.

⁵⁰ *United States v. Moran*, 194 F.2d 623 (2d Cir. 1952); *State v. Sanders*, 313 S.W.2d 658 (Mo. 1958); *State v. Moe*, 56 Wash. 2d 111, 351 P.2d 120 (1960). The standards for granting applications for these remedies are similar to those for allowing challenges for cause. Note, *Community Hostility and the Right to An Impartial Jury*, 60 COLUM. L. REV. 349, 365 (1960). The ABA, however, has recommended that these remedies "not turn on the results of *voir dire*," but that they be granted as independent remedies on the basis of other factors such as special public opinion surveys, if necessary even before the jury is empaneled. ABA Project 14, 153-54. For recommendations dealing with the procedural problems connected with review of denials of these remedies before trial begins, see *Id.* at 155.

⁵¹ Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503, 505 (1965). Among the reason for *voir dire's* ineffectiveness: jurors often lie, consciously or unconsciously; lawyers often use *voir dire* more for purposes of indoctrination than examination. *Id.* at 528; and lawyers feel that challenging veniremen would irritate those finally selected to serve as an attack on their integrity. *Id.* at 505.

⁵² See, e.g., *Sheppard v. Maxwell*, 346 F.2d 707 (6th Cir. 1965); *Wetzel v. Mississippi*, 225 Miss. 450, 76 So. 2d 188 (1954). A number of other factors help explain their rare use: a judge's confidence in his own ability to conduct a fair trial, Comment, 33 U. CHI. L. REV. 512, 515 n.23 (1966); expense, and inconvenience to jurors and witnesses, 44 NEB. L. REV. 614, 616 (1965); delay in already congested dockets, Gelb, *Fair Trial and Free Speech*, 31 GEO. WASH. L. REV. 607, 613 (1963); and failure to seek other remedies, see *Beck v. Washington*, 369 U.S. 541 (1962) and *United States v. Moran*, 194 F.2d 623 (2d Cir. 1952). *Contra*, *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952), where court said failure to seek change of venue or exhaust all challenges did not weaken an appeal based on denial of continuance.

cretion, rulings are rarely reversed on appeal.⁵³ Nor are they always effective if granted. Venue is no remedy where the publicity is nationwide or statewide;⁵⁴ continuance is often for too short a period,⁵⁵ and if long enough to let publicity be forgotten by jurors, memories of witnesses may fade as much. At least one court has said failure to seek these remedies did not prejudice an appeal precisely because they would not have helped in the particular circumstances of that case.⁵⁶ One court even approved the denial of continuance partially because the "publicity was of the defendant's own making" and he was "in no position to complain."⁵⁷

The Supreme Court in *Sheppard* urged use of continuance and change of venue "where there is a reasonable likelihood" a trial will be endangered, curtailing at the same time the deference to trial judge discretion by ordering appellate tribunals to make an "independent evaluation of the circumstances."⁵⁸ But aside from their shortcomings, there are other considerations militating against their more liberal use. If the prisoner cannot afford bail, he will remain in jail throughout the postponement.⁵⁹ There is in addition, a certain public interest in having a speedy trial: for effective law enforcement, as a means of "social control," to allay community anxiety, and, if memories fade, not to deprive the state of its chance to con-

⁵³ *United States v. Moran*, *supra* note 52; *Hart v. United States*, 112 F.2d 128 (5th Cir. 1940); *State v. Moe*, 56 Wash. 2d 111, 351 P.2d 120 (1960).

⁵⁴ Venue can be effective when the publicity is local, however, and it has been called "change of venom." Richardson, *What constitutes Pre-trial Publicity in Pending Cases*, 54 Ky. L.J. 625, 634 (1966). The difficulty in gauging publicity's impact in order to apply these remedies is illustrated by a poll taken when Alger Hiss sought to remove his trial from New York to Vermont, which showed feeling running higher against him in Vermont than in New York where the bulk of the publicity was. Note, 59 YALE L.J. 534, 543 n.48 (1950).

⁵⁵ Meyer, *Free Press v. Fair Trial: The Judge's View*, 41 N.D.L. REV. 14, 17 (1964). *But see* *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952), where the court ruled that continuance should have been granted by the court below until after an election, even though it meant a delay of several months.

⁵⁶ *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961) (dictum).

⁵⁷ *State v. Sanders*, 313 S.W.2d 658 (Mo. 1958) (Defendant stirred publicity by escaping from jail while his trial for burglary was pending).

⁵⁸ 384 U.S. at 362-63. The ABA has recommended a similar "reasonable likelihood" standard, ABA Project 13; a showing of "actual prejudice is not required." *Id.* at 152.

⁵⁹ Comment, *Prejudicial Publicity Versus the Rights of the Accused*, 26 LA. L. REV. 818, 826 (1966).

vict.⁶⁰ Finally, can a defendant be forced to forego his sixth amendment right to a speedy trial in his own community by a trial judge's decision *sua sponte* to postpone or move the trial, or by losing a chance for reversal because of failure to ask for these remedies?⁶¹

For publicity during the trial, cautionary instructions have long been recognized as virtually useless,⁶² yet courts have held them sufficient protection, even in denying continuance and venue.⁶³ The Supreme Court criticized the general instructions and warnings in *Sheppard*,⁶⁴ and held it a "fundamental error" to deny most of defense counsel's requests for specific questioning of the jury on what they had read as the trial progressed.⁶⁵ The desirability of such specificity is open to doubt, for it may serve only to remind, or arouse curiosity;⁶⁶ and the use of *in camera* questioning, lest a juror be ashamed to admit anything in open court, is disliked by the jury.⁶⁷ The Supreme Court's observation that the trial judge should have raised the possibility of sequestration *sua sponte* with counsel,⁶⁸ however, suggests the Court has little faith in any kind of warning procedure. Sequestration, on the other hand, would seem to be a very effective method of isolating the jury; and its use has

⁶⁰ Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 375 (1960).

⁶¹ Cf. *Delaney v. United States*, 199 F.2d 107, 116 (1st Cir. 1952), where the court said that failure to seek venue—to have the trial removed from the vicinity of the crime—did not prejudice his appeal. See generally, Comment, *The Impartial Jury—Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 CORNELL L.Q. 306, 315 (1966).

⁶² "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction." J. Jackson, concurring in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949), as quoted in *Delaney v. United States*, 199 F.2d 107, 112 (1st Cir. 1952).

⁶³ E.g., *State v. Moe*, 56 Wash. 2d 111, 351 P.2d 120 (1960). This instruction of the lower court was approved: "Keep open minds throughout the trial, and, if anything appears in the newspapers regarding this case or any of the participants do not read it." *Id.* at 112, 351 P.2d at 121 (Emphasis added.)

⁶⁴ 384 U.S. at 353.

⁶⁵ *Id.* at 357.

⁶⁶ Cf. *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950), "[E]very time Defense Counsel asked a prospective juror whether he had heard a radio broadcast to the effect that his client has confessed to this crime or that he had been guilty of similar crimes, he would by that act be driving just one more nail into James' coffin." *Id.* at 916.

⁶⁷ Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503, 528 (1965). The ABA, however, has recommended examining each individual juror privately. ABA Project 20.

⁶⁸ 384 U.S. at 363.

been held not an abuse of discretion, where it seemed necessary, despite the objections of the defense that it had a coercive effect on the jury.⁶⁹ But it has drawbacks: it is expensive, and its use would seem unwarranted where the trial is proceeding without publicity. If an unsequestered jury were suddenly exposed to unexpected publicity, sequestration would then be somewhat useless. There is always the remedy of mistrial⁷⁰ for such a situation, but that seems much like reversal—more a “palliative” than a “cure.”

Because these procedures can be inconvenient, time-consuming, expensive and ineffective in many circumstances, it is not surprising that the Court in Sheppard made further suggestions for controlling “the release of leads, information, and gossip to the press by police officers, witnesses, and counsel for both sides.”⁷¹ While control of this kind may involve a limitation on the freedom of speech, there have been many other proposals,⁷² some far less sensitive to First Amendment rights. In North Carolina, for instance, the recent ruling set down by the Wake County Superior Court restricts the sources of information to the press much more severely than *Shep-*

⁶⁹ United States v. Holavachka, 314 F.2d 345 (7th Cir. 1963). See also *Coopedge v. United States*, 272 F.2d 504, 507 (D.C. Cir. 1959), for view that sequestration should not be utilized unless there are exceptional circumstances. The ABA has recommended that the trial judge in explaining the use of sequestration not disclose to the jury who requested it, so that neither side will be disadvantaged. ABA Project 168.

⁷⁰ This remedy was also suggested by the Court, 384 U.S. at 363.

⁷¹ *Id.* at 359.

⁷² Some of these proposals include: (1) use of blue ribbon juries, or propaganda or psychological testing of jurors (*E.g.*, Comment, *The Conflict Between Free Press and Fair Trial*, 51 CORNELL L. Q. 306, 325, (1966)); (2) waiver of jury trial (*E.g.*, Gofarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 831-32 (1961); see also *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950)); (3) broad regulations similar to the English contempt power. (*E.g.*, C. Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting in Criminal Cases*, 56 P. CRIM. L., C. & P.S. 158 (1965); McCarthy, *Fair Trial and Prejudicial Publicity: A Need for Reform*, 17 HASTING L.J. 79 (1965); Comment, *Contempt by Publication*, 60 Nw. U.L. REV. 531 (1965)); (4) automatic use of continuance, venue, mistrial and other remedies when certain levels of publicity, both qualitative and quantitative, have been reached. (Comment, *“Free Press-Fair Trial” Revisited: Defendant-Centered Remedies as a Publicity Policy*, 33 U. CHI. L. REV. 512, 523 (1966)); (5) statutes making it a criminal offense to publish certain material at certain times, a proposal that would avoid the summary nature of contempt. (*E.g.*, L. Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504, 522 (1965); see Comment, 33 U. CHI. L. REV. 512 (1966) for criticism); (6) voluntary cooperation between bar and press. (*E.g.*, Richardson, *What Constitutes Prejudicial Publicity in Pending Cases*, 54 Kx. L.J. 625, 640-41 (1966)).

pard contemplated.⁷³ It will perhaps be easier to evaluate the Supreme Court's reasoning, the Wake Court ruling and the other constitutional questions involved in light of the most extreme proposal, that of adoption of the English use of contempt of court against the press, particularly since the Court expressly leaves the contempt possibility open in *Shepard*.⁷⁴

Briefly, an article cited for contempt in England need not have actually perverted the administration of justice; "it is sufficient if it is proved that the article has a tendency to do so,"⁷⁵ in relation to any case pending. Examples of material cited for contempt include publicity relating to the conduct and character of the defendant which would be inadmissible at the trial; confessions, whether admitted or not; prior convictions; characterization of the accused as a "vampire"; evidence independently uncovered by a newspaper bearing on the guilt of the accused; the photograph of a person charged with a criminal offense where identity was a crucial issue; comment or opinion concluding guilt; and even the mere arrangement of news which implies guilt.⁷⁶ The result is a "wall of silence around the accused,"⁷⁷ to preclude prejudicing the public and jury or adversely affecting the testimony of witnesses,⁷⁸ and to protect the "exclusive sovereignty of the judicial trial itself" from any competing effort to "canvass the merits in another forum."⁷⁹ Yet breaches of the rule do occur, and one of the anomalies of the system is that even where contempt is found, the material cited does not provide ground for reversal.⁸⁰ Recent cases have used the power

⁷³ Raleigh News and Observer, Sept. 13, 1966 p. 1, col. 1.

⁷⁴ "We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press . . ." 384 U.S. at 358.

⁷⁵ Goodhart, *Newspapers and Contempt of Court In English Law*, 48 HARV. L. REV. 885, 890 (1935). See generally, Cowen, *The Law: British and American*, in FAIR TRIAL VS. A FREE PRESS 9 (1965); see also Laski, *Procedure for Constructive Contempt in England*, 41 HARV. L. REV. 1031 (1928), for criticism of the system from an Englishman's point of view.

⁷⁶ See cases collected in appendix of dissent of Frankfurter, J., in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 921 (1950).

⁷⁷ L. Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504, 505 (1965) [hereinafter cited as L. Jaffe].

⁷⁸ Comment, *Free Speech vs. the Fair Trial in the English and American Law of Contempt by Publication*, 17 U. CHI. L. REV. 540, 548 (1950).

⁷⁹ L. Jaffe 505.

⁸⁰ Cowen, *supra* note 75, at 15.

so broadly and drastically that legislation has been passed to make available certain statutory defenses.⁸¹

Such a use of the contempt power will probably never be allowed here, nor should it be. While the first amendment guarantee of free speech is not absolute, the Supreme Court in a line of cases beginning with *Bridges v. California*⁸² has evolved a test requiring a "clear and present danger" to the administration of justice before a state can punish for contempt.⁸³ In addition, use of the contempt power, though technically a corrective action, would be similar to censorship,⁸⁴ and as such could be considered prior restraint where the constitutional standards are stricter.⁸⁵ All of the cases decided, however, involved only a judge, and the Court has explicitly left the door open for the use of contempt where there is a jury trial.⁸⁶

⁸¹ See Administration of Justice Act, 1960, 8 & 9 Eliz. 2, C. 65, § 11; see generally, Cowen, *supra* note 15, at 14.

⁸² 314 U.S. 252 (1941). See also *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946). "[T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U.S. 252, 265 (1941).

⁸³ *Id.* at 261. "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263.

The Federal Courts are similarly restrained. *Nye v. United States*, 313 U.S. 33 (1941), overruling interpretation of Act of March 2, 1831, 4 Stat. 487, from which 18 U.S.C. § 401 (1964) is derived, in *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). See generally Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J. 800 (1953); Nelles & King, *Contempt by Publication in the United States* (pts. 1-2), 28 COLUM. L. REV. 401, 525 (1928).

⁸⁴ "[A]nyone . . . would be as effectively discouraged [if court could cite for contempt in absence of clear and present danger] as if a deliberate statutory scheme of censorship had been adopted." *Bridges v. California*, 314 U.S. 252, 269 (1941).

⁸⁵ *Near v. Minnesota*, 283 U.S. 697 (1931); see generally Comment, *The Case Against Trial by Newspaper: Analysis and Proposals*, 57 Nw. U. L. REV. 217, 228-29 (1962).

⁸⁶ *Wood v. Georgia*, 370 U.S. 375 (1962). "[W]e need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither *Bridges*, *Pennekamp*, nor *Harney* involved a trial by jury. . . . [T]he limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation." *Id.* at 389-90.

Implicit here is the assumption that judges are less affected by publicity: "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947). But there is some disagreement on this point. *Compare*

Even though the Court left an opening again in *Sheppard*,⁸⁷ it seems unlikely, in view of *New York Times Co. v. Sullivan*,⁸⁸ that the Court will ever resort to such action.⁸⁹

Nor should the contempt power, or any variation of it, be used in the United States. The need for an active, critical press becomes clear when English circumstances are contrasted with ours. Perhaps the overriding difference, historical in origin, turns on the diverging concepts of the judiciary. In one view, the Supreme Court since *Bridges* is saying that the English concept of the judiciary as "untouchable by public opinion," is "inapplicable to our politically oriented judiciary,"⁹⁰ in which, far from always representing the top of their profession, judges are sometimes not even lawyers,⁹¹ and where they may take a more "activist," "progressive" role in the community.⁹² To hazard a broad statement, England's society, as more orderly and homogenous and served perhaps by a better trained and paid police force, has less of a need for the press to both criticize and aid the law enforcement process.⁹³ Finally, England's speedy criminal trials contrast sharply with ours, where waiting months for trial in total silence would be intolerable,⁹⁴ particularly if the crime charged has political overtones.

Nelles & King, *supra* note 83, at 551 (newspaper clamor one of the influences "least likely to operate upon judges") with *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497 (1949) (Judges are no more immune than juries) and the Supreme Court in 1965: "Judges are human beings also and are subject to the same psychological reaction as laymen. . . . Our Judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion." *Estes v. Texas*, 381 U.S. 532, 548-49 (1965).

⁸⁷ See note 71 *supra*.

⁸⁸ 376 U.S. 254 (1964).

⁸⁹ Comment, "Free Press-Fair Trial" Revisited: Defendant-Centered Remedies as a Publicity Policy, 33 U. CHI. L. REV. 512, 520 (1966). See also the reasoning of the Court in *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

⁹⁰ L. Jaffe 508.

⁹¹ Such was the case in *Craig v. Harney*, 331 U.S. 367 (1947); see note 86 *supra*.

⁹² L. Jaffe 509.

⁹³ *Id.* at 512. "It is significant that in many of these cases [documented instances where the press served to uncover the existence of crime and to see to it that the wrongdoers were prosecuted], either the crimes were political in nature or there appeared to be political reasons for failure to prosecute. The watchdog function performed by the news media is vital to the health of our society." ABA Project 63.

⁹⁴ Royster, *The Free Press and a Fair Trial*, 43 N.C.L. REV. 364, 369 (1965) [hereinafter cited as Royster].

The need for an unrestrained press in America goes beyond protecting the accused from "secret trials," judicial criticism generally, and aiding law enforcement. It can warn of criminals at large, a function that is crucial where the chase is long, and assure the public when the wrongdoer is caught.⁹⁵ If the investigation and apprehension processes appear too sluggish, the press can goad the police force into greater efficiency, a factor which may somewhat justify the conduct of the newspapers in the Sheppard trial itself.⁹⁶ By dissemination of news, the press might make possible a swifter apprehension of suspects, and draw in voluntary key witnesses as well.⁹⁷ Much of this would not be possible under a contempt rule. Clearly, then, in any balancing of the first and sixth amendments, restraints on the press would cause the public and the news media a definite loss with correspondingly less gain for the accused. But while contempt would go too far, something is needed to right the balance presently weighted against the accused.

As stated above, the Supreme Court in *Sheppard* listed a number of procedures the judge could have used to guarantee a fair trial. The most important of these, and potentially the most effective for "righting the balance," is control over the "release of leads, information, and gossip to the press."⁹⁸ The court here is fairly explicit:

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or to take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.⁹⁹

To carry this out, the Court urged interpreting Canon 20¹⁰⁰ to

⁹⁵ Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 205-06 (1963).

⁹⁶ L. Jaffe 512 & n.27.

⁹⁷ *In re Oliver*, 333 U.S. 257, 270 n.24 (1948).

⁹⁸ 384 U.S. at 359.

⁹⁹ *Id.* at 361.

¹⁰⁰ Canon 20, adopted by the American Bar Association in 1908, reads: *Newspaper Discussion of Pending Litigation*. 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*

prohibit such statements by lawyers.¹⁰¹ To control the police, who disclosed to the press many clues not put into the record, the Court "could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees."¹⁰²

A number of difficulties suggest themselves. The Court may have gone too far in seeking to quiet the accused and witnesses; where the authority to control the defendant comes from, the Court does not say, except that "effective control of these sources" are "concededly within the Court's power."¹⁰³ Prohibiting the accused from protesting his innocence, even in the midst of a highly publicized trial, may be a violation of his first amendment rights. The damage he can do to himself—which he should have the right to do if he desires—does not seem to be enough to deprive him of those rights.¹⁰⁴ As a practical matter his attorney will advise him not to make any statements if prejudice is likely to result.

Disclosure of evidence presents another problem. The Court cites the President's Commission on the Assassination of President Kennedy and its severe criticism of the press in the *Sheppard* case for informing the public of evidence as it was being accumulated.¹⁰⁵ Yet it is precisely the disclosure of evidence which can assure the public that the right man has been found or will be, that the police are doing their best job, and that nothing is being covered up if

reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases, it is better to avoid any *ex parte* statement.

It has never been enforced. Comment, *Trial by Newspaper*, 33 *FORDHAM L. REV.* 61, 73 (1964).

¹⁰¹ Whether this control would ultimately be effected by methods of disbarment or contempt is not clear. But presumably, disbarment or disciplinary proceedings instituted when violations of the Canons of Professional Ethics occurred was the intent of the Court in *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), cited by the Supreme Court in *Sheppard* at 361. See also *Cammer v. United States*, 350 U.S. 399 (1956), where the Court held that a lawyer is not the kind of court "officer" summarily punishable by contempt under 18 U.S.C. § 401 (1964), for conduct not in the presence of the court. *But see* the opinion of the justices, Massachusetts Supreme Judicial Court, note 122 *infra*.

¹⁰² 384 U.S. at 362.

¹⁰³ *Id.* at 361.

¹⁰⁴ "I, for one man, would shudder at the prospect of being charged with some crime, especially one of moral turpitude, and being condemned to suffer silence until some distant day when even an acquittal would not be recompense." Royster 369.

¹⁰⁵ 384 U.S. 333, 361 n.15.

political questions are involved. Certainly the Commission's hint that the public could or should have been kept completely in the dark after the assassination of President Kennedy is unrealistic.¹⁰⁶ The Court in *Sheppard* makes no such assertion, however. Singled out for censure in *Sheppard* were disclosure of Sheppard's refusal to take the lie detector test, dissemination of evidence by the prosecutor that was never offered at the trial, and release of clues by the police that were never put on the record.¹⁰⁷ The Court's suggestions are further limited by the fact that such controls are to be used when the Court is "advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity."¹⁰⁸ This would seem to leave room for disclosure of "legitimate" information. It is questionable whether dry, factual evidence without opinion attached is so much to be feared as incriminating material that goes to a central dimension of an accused's personality or character, for such information apparently tends to form the kind of belief that refuses to yield.¹⁰⁹ Finally, these suggestions are not holding in the case, and are aimed primarily at "collaboration between counsel and press as to information affecting the fairness of a criminal trial" which is "not only subject to regulation, but is highly censurable and worthy of disciplinary measures."¹¹⁰

Subject to the reservations above, quieting the sources of prejudicial information is probably the most reasonable step possible to right the balance as it presently stands. The police and counsel are the source of the bulk of prejudicial news.¹¹¹ The problem of evidence aside, much of such publicity, including confessions and prior criminal records, are of little value either in terms of warning or assuring¹¹² the public, or of goading the police into action, partic-

¹⁰⁶ Royster 370.

¹⁰⁷ 384 U.S. at 360-61.

¹⁰⁸ *Id.* at 362. Justice Clark, who wrote the opinion in *Sheppard*, recently stated in an interview with the Denver Post that the trial judge was to control prejudicial publicity "once the court has jurisdiction," not before arrest. Winston-Salem Journal, Oct. 27, 1966, p. 1, col. 2.

¹⁰⁹ Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform*, 38 So. CAL. L. REV. 672, 678 (1965).

¹¹⁰ 384 U.S. at 363.

¹¹¹ Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125 (1964).

¹¹² Releasing evidence is one way to assure the public that the "chase" may soon be over, but where there are a number of crimes attributable to

ularly where the police are releasing the material.¹¹³ Their motives, too, spring more from a desire to get favorable publicity or to influence the trial than to serve the public.¹¹⁴ While the public would be deprived of much food for gossip, and the press, some increases in circulation, that is a price than can be paid to guarantee as fair a trial as possible. Problems with enforcement of either Canon 20 or police regulations could arise if a prejudicial story is not attributed to any particular person and the newsman refuses to disclose his source. Some states have statutes giving newsmen an absolute privilege of non-disclosure,¹¹⁵ but otherwise a newsman has no first amendment privilege of non-disclosure, if asked to testify by the Court.¹¹⁶

The substance of these procedures has already been adopted by a number of states, bar associations, governmental agencies and the Department of Justice.¹¹⁷ The rule recently set down by the Wake County Superior Court of North Carolina represents an attempt to follow *Sheppard*, by subjecting to contempt of court any statement after arrest by counsel, police, witnesses, or accused concerning any confession, prior criminal record, results of any tests, evidence, credibility of any witness, or any opinion as to the guilt or innocence of the accused.¹¹⁸ While Judges Mallard and Braswell followed quite closely the wording in *Sheppard* quoted above,¹¹⁹ the one person, as in the Boston stranglings, "publishing information which is most likely to prejudice an accused (*e.g.*, publication of a confession or an official's belief that the accused is guilty) seems to be the most effective way to reduce community anxiety." Comment, 33 U. CHI. L. REV. 512, 521 n.59 (1966). However, if the public has confidence in the police force, knowledge that an arrest has been made can serve the same purpose.

¹¹³ L. Jaffe 521. "The predominant view is that the ends of law enforcement would not be seriously impaired by muzzling the law enforcement authorities." *Ibid.*

¹¹⁴ Herbourg, *Extracts From a Report of the Special Committee of the American Bar Association, 1937*, 39 A.B.A.J. 981, 1021 (1953); Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 10 (1961).

¹¹⁵ See, *e.g.*, *Alabama*: ALA. CODE tit. 7, § 370 (1960); *Arizona*: ARIZ. REV. STAT. ANN. § 12-2237 (1956); *California*: CAL. EVID. CODE § 1070; *Maryland*: MD. ANN. CODE art. 35, § 2 (1965).

¹¹⁶ *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961).

¹¹⁷ *E.g.*, *State v. Van Duyn*, 43 N.J. 369, 204 A.2d 841 (1964); The Philadelphia Bar Association, *Broadcasting*, Jan. 4, 1965, p. 49; Department of Justice, 28 C.F.R. § 50.2 (1966); See generally periodic publications by the Freedom Of Information Center, School of Journalism, University of Missouri.

¹¹⁸ *Raleigh News and Observer*, Sept. 13, 1966, p. 1, col. 1.

¹¹⁹ See note 97 *supra* and accompanying text.

ruling seems to misinterpret the Supreme Court opinion in three respects.

In the first place, the Court in *Sheppard* was not seeking to make a flat prohibition of virtually all information to the press as a general rule, but only when publicity threatens a fair trial. Arguably, the Superior Court ruling is practically an abridgment of free speech and a prior restraint, for it closes off virtually all of the press' sources. The Supreme Court has recognized that the first amendment guarantees encompass the dissemination of news after printing as well as the gathering of it.¹²⁰ In light of the desirability of balancing rights and interests, it is doubtful that a Court, despite its inherent power to regulate the professional conduct of attorneys,¹²¹ could thus interfere with free speech, albeit indirectly by cutting off sources,¹²² when there is no real need¹²³ until the threat

¹²⁰ "[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1 (1945) (Invalidation of a contract under the Sherman Act).

¹²¹ *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

¹²² *Cf.*, *NAACP v. Alabama*, 357 U.S. 449, (1958):

In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of the Court recognize that abridgment of such rights, even though unintended, may invariably follow from varied forms of governmental action . . . the governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of the press. . . ."

Id. at 461.

But see the Opinion of the Justices, Massachusetts Supreme Judicial Court, 34 U.S.L. WEEK 2014, 2015, (June 13, 1965) on proposed Mass. H.B. No. 3991 which would punish either by contempt or as a misdemeanor any leaks by lawyers to the Press:

The first class are officers of the court, a title not otherwise defined. The term clearly applies to members of the Bar . . . including public officeholders and prosecutors . . . as well as . . . court officers and clerks of courts. . . . We deem it to be free from doubt that those we have classified as court officers have no right to divulge to news media information prejudicial to any defendant's right to a fair and impartial trial in a criminal proceeding and the news media have no reasonable excuse for complaint in this limitation on their sources of information.

¹²³ See *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961):

[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or the Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite

of prejudicial matter actually materializes.¹²⁴ It is true that there is no Constitutional 'right to know' as such, but there is perhaps a "government 'no-right' to interference with the acquisition of information."¹²⁵ It was the Court's intention in *Sheppard*, in so carefully framing its holding, to remain as flexible as possible and to balance interests as evenly as possible. It is hardly possible that it also intended a flat prohibition on all release of information; it would then have been somewhat superfluous to urge more liberal use of continuance, change of venue, or mistrial.

Secondly, the Wake Superior Court ruling fails to distinguish between matters that are prejudicial and those that are not, nor can it, if in effect *before* the "great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity"¹²⁶ become apparent. Although the Supreme Court in *Sheppard* did not attempt to define what is prejudicial, it recognized the distinction,¹²⁷ and as we have seen, it would seem to allow disclosure of legitimate information.¹²⁸

Thus, by failing to acknowledge the distinction between prejudicial and non-prejudicial matters and by setting up a flat rule of prohibition, the Wake court order misses the basic premise of flexibility in *Sheppard*. The practical results could be dangerous. Already a new term—"evidentiary"—is being used by the police in refusing to mention skid marks in automobile accidents, type of weapons, existence of powder burns, or autopsy reports in murder cases, and the amount of money involved in burglary cases.¹²⁹ Should the state have a weak case, or should the defendant be falsely accused and poorly represented,¹³⁰ little could be done to correct

to constitutionality which has necessarily involved a weighing of the governmental interest involved.

See also *Barenblatt v. United States*, 360 U.S. 109, 127 (1959): "The 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake."

¹²⁴ See *NAACP v. Button*, 371 U.S. 415, 439 (1963): "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."

¹²⁵ Mueller, *supra* note 114, at 2 n.1.

¹²⁶ *Sheppard v. Maxwell*, 384 U.S. 350, 362 (1966).

¹²⁷ "The trial court might well have proscribed . . . statements . . . which divulged *prejudicial* matters. . . ." *Id.* at 362. (Emphasis added.)

¹²⁸ See notes 104-06 *supra* and accompanying text.

¹²⁹ *Winston-Salem Journal and Sentinel*, Sept. 25, 1966, § c, p. 3.

¹³⁰ See criticism of the American Bar Association's Advisory Committee recommendations by the press, collected in the *New York Times*, Oct. 9, 1966, § 1, p. 89, and compare Daniel, *Fair Trial and Freedom of the Press*,

the situation until the trial, when it might be too late. The accused, of course, could say nothing. Should a prominent citizen be charged with a crime, the police now have a convenient excuse to keep his name out of the news, and even to foreclose any attempt by the press to uncover favored treatment by police or courts.¹³¹ Failure to distinguish between prejudicial and non-prejudicial matter may have its greatest impact, however, on cases dealing with "white collar" crimes in contrast to those involving violence or moral turpitude. There may be a valid distinction here: it is the latter type of crime that typically arouses public passion, rage or hysteria.¹³² White collar crimes, on the other hand, may result in trials like *Estes*, which was characterized as "a most mundane affair, totally lacking in the lurid and completely emotionless."¹³³ Since such cases can often raise political and economic questions of national interest,¹³⁴

71 CASE & COMMENT, no. 5, p. 3 (Sept.-Oct. 1966): "The press in general will interpose no objection to anything the bar, the bench and the police may do in the way of disciplining their own people. . . ."

¹³¹ See Winston-Salem Journal and Sentinel, Sept. 25, 1966, § c, p. 3. See also note 93 *supra*.

¹³² See the reasoning in *Geagan v. Gavin*, 292 F.2d 244, 247 (1st Cir. 1961), where the court distinguished *Stroble v. California*, 341 U.S. 181 (1952) and *Irvin v. Dowd*, 366 U.S. 717 (1962), among others:

It can certainly be said that the Brink's Robbery excited widespread public interest and no little general public amazement at the obvious skill with which it was planned and the dramatically bold and daring way in which a group of armed and masked men invaded supposedly impregnable premises and successfully made off with a million two hundred and nineteen thousand dollars. It cannot be said, however, that the robbery stirred general feelings of rage and revulsion touching off widespread public clamor for vengeance on those accused of perpetrating it, for it was not accompanied by any physical violence except the disarming . . . of the guards on duty.

¹³³ *Estes v. Texas*, 381 U.S. 532, 613-14, (1965) (Dissenting opinion). "The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull." *Id.* at 614. See also note 109 *supra* and accompanying text.

¹³⁴ A further distinction may be possible here, between news comment aimed solely at attacking a judge ("scandalizing the court"), and that which is mere sensationalism and which has only the effect of prejudicing a jury. The English courts punish both. See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1928). The difficulty, of course, is that the two may be quite interwoven, as they were in *Sheppard*, where the papers, in their efforts to goad the police into greater efficiency also screamed for Sheppard's arrest, thereby assuming his guilt. The implication of the Supreme Court's two-legged holding in *Sheppard*, however, is that the publicity in that case, if toned down, would not in itself destroy a fair trial, provided that various protective procedures are used. Thus, left open is the opportunity to comment on such questions as labor in Beck's trial, agricultural regulations in *Estes's* trial, economic policy in the price fixing cases, or organized crime in tax cases like Al Capone's, without

it would seem unwarranted to cut off discussion that may not be prejudicial. By trial time, which may be months after arrest, public interest in the larger questions may very well have waned.¹³⁵

Finally, the Wake court apparently misinterprets the Supreme Court's procedure for effecting a clamp on the sources of information. The Wake court will punish unauthorized disclosure by summary contempt, while it is likely that the Supreme Court intended that disciplinary proceedings be used.¹³⁶ Further the Wake court subjects the police to the contempt power, while *Sheppard* merely suggests that the police officials issue their own regulations when requested to do so by the trial court judge.¹³⁷ The report of the American Bar Association's Advisory Committee on Free Press and Fair Trial has recommended a similar approach, urging adoption of their proposed regulations as rules of court, and endorsing the use of the contempt power in serious cases over lawyers and police as well.¹³⁸ There is even a recommended provision for punishing by contempt a private individual who, knowing a trial by jury is in progress, disseminates information that goes beyond the public record of the court and that is "reasonably calculated" to affect the outcome of a trial.¹³⁹ But the report would allow news releases after arrest of evidence seized and weapons used, quotations without comment from public records of the court on the case, and a statement by defense counsel that his client denies the charges against him,¹⁴⁰ and to that extent avoids one of the major drawbacks of the Wake court ruling.

running the risk of setting the criminals free. This opportunity is destroyed, however, by the Wake Court ruling, and would be seriously reduced if certain provisions of the ABA Advisory Committee's recommendations are adopted.

¹³⁵ Such a flat prohibition of news gathering could result in two further problems: an increase in rumors, fanned by the press that is still free to find out what it can on its own; and the difficulty in deciding whether to grant automatic mistrial whenever there is *any* release prohibited by the court ruling.

¹³⁶ See note 101 *supra*.

¹³⁷ See note 99 *supra* and accompanying text.

¹³⁸ ABA Project 6-9. For discussion on problems of enforcement, and, in relation to contempt power over police, the constitutional question of separation of powers, see *id.* at 121-29.

¹³⁹ *Id.* at 21-22.

¹⁴⁰ *Id.* at 5, 8, 9. But these provisions seem to be aimed only at crimes of violence such as murder or burglary and not white collar crimes because of their reference to evidence *seized*, weapons used, and "pursuit" and "resistance." The police provisions further provide that permitted post arrest releases be *withheld* if public disclosure would serve no significant law en-

If "trial by newspaper" involves not only the conflicting guaranties of the first and sixth amendments, but also the conflict between the right of the public to be informed and the "equally great right to be free from detriment through crime,"¹⁴¹ it requires careful handling indeed. Through its flexible holding the Court in *Sheppard* has not made the administration of a fair trial or the attainment of convictions either extremely difficult, or slow; and it has attempted to preserve as much as possible the traditional freedoms by urging a more liberal use of existing procedures. Hopefully, where judicial or political criticism is unnecessary, and the interests of the public are satisfied, the press will learn "to be content with the task of reporting the case as it unfold[s] in the courtroom"—not "pieced together from extra-judicial statements."¹⁴²

C. B. GRAY

Privilege Against Self-Incrimination—Police Interrogation

*Miranda v. Arizona*¹ applies the exclusionary rule to statements taken during police interrogation without compliance with procedural guarantees designed to implement the fifth amendment² privilege against self-incrimination. The rationale of the decision is that in-

forcement function, and, in the situation where no arrest has been made, the identity of the suspect and details of investigative procedures be withheld except to assist in the "apprehension of the suspect" or to warn the public of any "dangers." *Id.* at 10-11. It is possible to interpret these provisions to allow or actually demand a complete blanket of silence where a white collar crime is involved, because such a crime rarely poses problems of "apprehension," "warning the public of dangers" or investigation generally. See notes 93 & 134 *supra*.

¹⁴¹ *Mueller, supra* note 114.

¹⁴² 384 U.S. at 362. Since mistakes will be made, perhaps waiver of a jury trial could be encouraged to avoid any further restrictions on the free flow of information. A defendant, however, cannot waive a jury trial in a federal court without consent of the government prosecutor and the court under FED. R. CRIM. P. 23(a). *Singer v. United States*, 380 U.S. 24 (1965). But in *Singer*, though prejudicial publicity was not in issue, the Court said in considering that possibility: "We need not determine in this case . . . where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Id.* at 37. For various state provisions, some of which allow for waiver without consent of the government, see *id.* at 36. The ABA recommendations also provide for waiver of jury trial, if knowingly and voluntarily made and if necessary to increase the likelihood of a fair trial. ABA Project 14.

¹ 384 U.S. 436 (1966).

² "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." U.C. Const. amend. V.