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A Judicial View

William F. Smith

A JUDICIAL VIEW

By WILLIAM F. SMITH†

THE RIGHT to a fair trial by an impartial jury, free from the pressures of outside influences, is inherent in our system of jurisprudence and is guaranteed by the sixth amendment. How to adequately safeguard this right against impairment by news publicity, either in advance of or during trial, and at the same time to preserve the right of a free press, has been a matter of immense concern for more than a quarter of a century. It is my view that these rights are compatible and may exist side by side, each serving its own legitimate function.

Numerous cases have held news publicity immediately in advance of trial so pervasive and prejudicial as to have warranted either a change of venue or a postponement of the trial until after the publicity had subsided.[1] But while these remedies are available under our federal procedural system and are feasible, they are not always adequate, particularly in those situations in which the newspaper publicity is widespread and prolonged. A defendant who is compelled to resort to one of these remedies impliedly waives either his right to trial "by an impartial jury of the State and district wherein the crime . . ." is alleged to have been committed or his right to "a speedy . . . trial."[2] The resort to either remedy necessarily entails waiver of another right which may be of equal importance to a defendant in a particular situation.

The substantive evil which can, and too frequently does, result from news publicity, either in advance of or during trial, is more reprehensible when the source of the published information is the district attorney or his representative, the defendant's counsel or an associate, or the defendant himself. This is especially true in those situations in which the scales of justice may be delicately poised between guilt and innocence.

A case in point is *Irvin v. Dowd*,[3] where the accused was arrested and charged with a series of brutal murders. After his arrest and in advance of trial, he was the subject of widespread news publicity based upon releases issued by the prosecutor and local police authorities. News stories described him as the "confessed slayer of six," a "parole

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1. Irvin v. Dowd, 366 U.S. 717 (1961). See also Rideau v. Louisiana, 373 U.S. 723 (1963); Annot., 10 L. Ed. 2d 1243 (1964).

2. U.S. CONST. amend. VI.

3. 366 U.S. 717 (1961).

violator" and a "fraudulent check artist." In addition, on the day prior to trial, the local news media carried accounts of his alleged confessions. Of the twelve jurors impanelled, eight admitted on voir dire examination that they had read the stories. The Supreme Court reversed the defendant's conviction on the ground that his trial under these circumstances violated his right to due process under the fourteenth amendment.

In a concurring opinion, Mr. Justice Frankfurter made the following pertinent observation:

> How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused? A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.[4]

We should recognize that the exploitation of crime news frequently occurs after the apprehension of the accused, when the crime is under investigation. Too often the source of the news is the investigative agency, the prosecuting official, or defense counsel. These pretrial sources of prejudicial information can be foreclosed by remedial legislation which will in no way adversely affect the right of a free press. Furthermore, a balance between seemingly conflicting constitutional rights may be achieved if we follow the guides established by the Supreme Court in a line of landmark decisions.

In *Toledo Newspaper Co. v. United States,*[5] it was held that a newspaper article having a "reasonable tendency" to influence or obstruct the administration of justice in pending litigation was punishable as a contempt of court. This "reasonable tendency" criterion was unmistakably rejected as inadequate twenty-three years later in *Nye v. United States*[6] and *Bridges v. California.*[7] The Court in *Bridges* concluded that the "reasonable tendency" of published information to interfere with the orderly administration of justice in a pending case would not place the publication beyond the constitutional protection of the first amendment; rather, a "clear and present danger" to the administration of justice was constitutionally necessary to warrant its suppression.

4. *Id.* at 729–30.
5. 247 U.S. 402 (1918).
6. 313 U.S. 33 (1941).
7. 314 U.S. 252 (1941).

Following *Bridges,* there were a series of cases in which the "clear and present danger" doctrine was clarified and its application explained.[8] Under these cases, a "clear and present danger" may be found to exist only where there is a reasonable likelihood that a published article or statement will result in a substantive evil and the threat to the administration of justice is imminent. The issue is always one of proximity and degree. While the standards inherent in the "clear and present danger" rule may seem extreme, they must be followed if remedial legislation is to meet the test of constitutional validity.

A bill now pending in Congress,[9] if modified to meet constitutional standards, will read as follows:

> It shall constitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court *which is reasonably likely to affect the outcome of any pending criminal litigation,* except evidence that has already been admitted at the trial. Such contempt shall be punished by a fine of not more than one thousand dollars. (Emphasis added.)[10]

The proposed legislation was approved by the Judicial Conference of the United States at its session in March of 1965.

This bill will in no way abridge the constitutional right of the news media under the first amendment. It is limited in its application to district attorneys and their assistants, investigative agencies of the government, defense attorneys and their assistants, and the defendant. It prohibits the release, either in advance of or during trial, of information *"which is reasonably likely to affect the outcome"* of the proceeding. Notwithstanding its clear limitations, the proposed legislation has not escaped criticism.

Several critics hold the view that the right of "freedom of the press" is absolute under all circumstances. This view is clearly erroneous.[11] The Supreme Court has repeatedly held that "freedom of the press" must be subordinated to other interests when such subordination is necessary for our protection against a substantive evil which Congress has a right to prevent. For example, in *Dennis v.*

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8. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946). See also Communications Ass'n v. Douds, 339 U.S. 382 (1950).

9. S. 290, 89th Cong., 1st Sess. (1965).

10. *Hearings on S. 290 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee of the Judiciary,* 89th Cong., 1 Sess., pt. 1, at 129 (1965).

11. See Richardson, *Freedom of Expression,* 65 HARV. L. REV. 1 (1951).

United States,[12] the Court held that the guarantee of the first amendment did not protect the right of a person to advocate the overthrow of the government by violence. In *Schenck v. United States*,[13] Mr. Justice Holmes, speaking for a unanimous Court, stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Mr. Justice Frankfurter also stated in his concurring opinion in *Irvin* that: "This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system — freedom of the press, properly conceived."[14]

The same critics appear to equate "freedom of the press" with the "right of the public to know." These concepts are not legally synonymous and cannot be equated on any constitutional basis. The constitutional right to a fair trial is obviously superior to the "right of the public to know," which is clearly lacking in constitutional support. Within the scope of the public's right to know, however, there is a fair area of inquiry open to the news media which cannot be foreclosed or restricted. But neither the press nor the public have a right to be contemporaneously informed by the law enforcement officials of the nature and details of evidence accumulated during the course of investigation. The guarantee of the first amendment cannot be invoked as a basis for compelling disclosure of such information, the publication of which may be reasonably likely to impair the right of an accused to a fair trial.

There are other critics who urge that remedial legislation is neither desirable nor necessary. They argue that the disciplinary powers inherent in the courts are sufficient to enable them to deal with members of the bar who are guilty of flagrant violations of the standards of professional ethics. In the case of *State v. Van Duyne*,[15] the Supreme Court of New Jersey held that a county prosecutor who collaborated in the publication of information likely to influence the outcome of pending criminal litigation was subject to disciplinary action under Canon 20 of the *Canons of Professional Ethics*.[16] We entertain serious doubt as to the efficacy of disciplinary action as a remedy.

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12. 341 U.S. 494 (1951).
13. 249 U.S. 47, 52 (1919).
14. 366 U.S. 723, 730 (1963).
15. 43 N.J. 369, 204 A.2d 841 (1964).
16. The court found that there was no such collaboration in the cited case.

The Canon reads in pertinent part as follows:

> 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. . . . An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.[17]

While this canon provides a standard of professional conduct it contains no prohibition against activities which are reasonably likely to interfere with the fair administration of justice. It is open to a further criticism since it is not enforceable against law enforcement officials, other than members of the bar who may be guilty of flagrant violations of the standard. These officials are frequently the sources of prejudicial information released in advance of trial.

17. AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS.

AN ACADEMIC VIEW

By ROBERT B. MCKAY†

MY ASSIGNMENT is to present an "academic" view. On occasions like this when the world of legal education, which I represent, is brought into confrontation with the "real" world of prosecutors, judges, and members of the news media, I am troubled by the word "academic." Of the two meanings of that word that might apply to my mission, I must reject that which would translate my topic as "A Scholarly View of Free Press and Fair Trials." I do not have any thing particularly scholarly to say because I do not regard this as the kind of problem that yields to an arm-chair philosophy of law. The issue involves a fundamental clash of values for which a practical solution must be found.

I must accordingly speculate that I am asked here in response to the other possibly relevant meaning of "academic." That is, I am expected — or at least permitted — to make observations that are, in the words of my dictionary, "far from immediate reality; not practical enough; too speculative."

Let me say at once that my hosts did not make the invitation explicit in these terms. Probably they had nothing more sinister in mind than the need for what is sometimes beguilingly described as a "balanced view." And it is true my lack of direct experience with either the news media or the prosecutorial function might suggest a "balance" of sorts; but I must at once confess my disqualification in this respect, too. My view is not balanced at all.

The discussion of this subject today, as always, has a wonderfully "on the one hand — on the other hand" quality about it in which all the participants fairly exude fairmindedness. But I refuse to play the role of marshmallow in the middle of that accordion. However wrong my views may seem to some or all of you, at least my convictions are firm.

The starting point for me is fairly clear. Enough of sanctimonious assurances that the news media believe in fair trials. Of course they do. And so do we all believe in motherhood; but the birth control pill is sweeping the country.

My thoughts about prosecutors are scarcely more generous. When district attorneys protest their belief in freedom of the news media, I have no doubt of their sincerity. A better test of their enthusiasm

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for freedom of expression would be to ask their endorsement of a free press that portrayed all criminal defendants as the innocent victims of police vindictiveness.

Even the courts have not helped as much as they should. The Supreme Court of the United States, which has certainly not failed to give firm leadership in other areas of the law, has long been stuck nearly at dead center on this issue. To be sure, there has been a considerable show of judicial activity in recent years. We know that in a few extraordinary cases of prejudicial publicity before or during trial, a conviction may be set aside;[1] and we were advised in 1965 that it may be impermissible to televise certain notorious, heavily publicized, and highly sensational criminal proceedings.[2] But there is not much help in all of this for the not-so-celebrated criminal sentenced to death or an extended prison term following a trial in which jurors read, heard, or saw matter out of court that could not have been disclosed to them in court.

It seems outrageous that the courts in this country are still likely to say blandly that a defendant should not object to a little prejudice where other evidence of guilt is strong. Like the comforting counsel of the doctor who told his patient that she was only a little bit pregnant, this is the doctrine of harmless error carried to its ultimate absurdity.

Despite all the agitation, I fear we must acknowledge that, as in the French proverb, the more things change the more they stay the same. Unhappily, in this instance I am not even sure they are staying the same. I fear the situation worsens with each passing year. There is competent testimony that such is the case;[3] and it is not hard to credit such statements. In a nation where nearly everyone is literate, newspapers reach practically all potential jurors in the urban centers where most criminal actions are tried. Radio and television reach even more. Even actual jurors, who try to be mindful of a judicial caution not to read, see, or hear out-of-court references to a pending case, can scarcely abide those instructions unless put to the personal inconvenience and public expense of sequestration.

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1. Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959).

2. Estes v. Texas, 381 U.S. 532 (1965).

3. The Special Committee on Radio and Television of The Association of the Bar of the City of New York reported "an increasingly large number of instances in recent years when at various stages of prosecution a person in custody of the police is questioned on television and before miscrophones." SPECIAL COMMITTEE ON RADIO AND TELEVISION, RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE (1965).

It is small wonder that a respected English writer, Professor Harry Street, should describe the situation in the United States for his home audience in these words:

> In the United States, the Press is free to assist in detection of crime, to interview witnesses and suspects and report their observations, to comment on trials as they proceed, and to give opinions on the guilt of suspects.[4]

If I were called upon to grade that statement for accuracy in its portrayal of the relevant law on the subject, I confess that I wouldn't quite give it a perfect score. Professor Street paints with somewhat too broad a brush, omitting altogether the little qualifications and the occasional exceptional cases. But is it not also true that the very scarcity of those exceptional cases serves to emphasize the fact that press and prosecution do work hand in hand to ferret out crime (so far so good) *and* to insure conviction of those they consider deserving of punishment?

It is entirely understandable that police and prosecutors should support press freedom as stoutly as do the news media. All agree that maximum freedom must be preserved. The news media, paying court to that shining shibboleth, "the people's right to know," argue for their right to search out and report the news, defined as anything that someone more or less responsibly asserts as fact or colorful opinion. The Supreme Court of the United States has confirmed that view; we are told that this is what freedom of expression is all about. The first amendment protects the right to say foolish things as well as important; the false as well as the true; in many cases the defamatory as well as the laudatory; and, except perhaps in the area of obscenity, things that are utterly without redeeming social importance as well as the most profound thoughts concerning religion, literature, and science.

Those who argue for significant judicial restriction on the press are simply whistling in the dark. It is not about to happen, and I for one am glad. Our society has expressed a preference for freedom of expression, recognizing that other sacrifices may be required. This does not mean, however, that a dramatic clash between two constitutional principles is inevitable. It does mean that we must acknowledge the constitutional realities and the practical consequences. High-principled talk about accommodation between two great constitutional imperatives is cheap. But, like the emperor's new clothes, the failure to recognize reality has continued too long.

4. STREET, FREEDOM, THE INDIVIDUAL, AND THE LAW 156 (Pelican paperback 1963).

My basic position is very simple, which probably means that it will be regarded with some suspicion. Let me put it to you in the form of a few unadorned propositions, then seek at least partial recovery of my original billing as an academic by providing a modest amount of legal embroidery.

(1) Fair trial rights are not at present adequately protected against prejudicial publicity.

(2) Fair trial rights cannot be secured at the price of limitations on free expression.

(3) Fair trial rights can be protected in part by judicial sanctions against lawyers, executive sanctions against police officers, and sanctions imposed by news media organizations against their members.

(4) Fair trial rights must depend for their ultimate protection upon effective judicial control over the trial process, including occasional reversal of convictions.

FIRST

Despite a few relatively recent reversals of criminal convictions where publicity before or during trial made fair trial almost certainly unattainable, most courts, federal and state alike, still reject such claims on one of two comforting grounds: (1) that the prejudice was not substantial; or (2) that jurors exposed even to the most virulently prejudicial material had stated their ability to give a fair decision.

These are strange arguments for lawyers to make. We take great pride in our Anglo-American tradition that demands fair trials, including the elaborate rules of evidence designed to assure as nearly as possible that everything presented to the trier of fact is relevant, probative, and trustworthy. In recent decades the Supreme Court of the United States has formulated an impressive array of constitutional guarantees to prevent a jury from learning about involuntary confessions, to exclude the products of unreasonable search and seizure, and to prevent the use of statements not made in the presence of a lawyer or secured without proper deference to the privilege against self-incrimination.

It is accordingly all the more remarkable that the vital reasons behind these rules should be utterly disregarded when evidence that is incompetent, irrelevant, immaterial — and prejudicial — becomes available to jurors absent these carefully constructed judicial controls.

We are assured that there is no empirical demonstration that jurors are in fact prejudiced by what they see, hear, or read outside

the courtroom. Even if true, which I doubt, how can we possibly accept that proposition unless we are also willing to relax our exclusionary rules to permit admissibility in court of false statements of fact, free-swinging opinions of interested parties, and prejudicial characterizations of persons and events not subject to cross-examination. Lawyers instinctively recoil from such suggestions because they are alien to the refined due process concepts painstakingly developed over the centuries.

I submit that it is not open to serious doubt that a potential juror will be more impressed with what he sees, hears, or reads when an accused is first apprehended than with the more rehearsed quality of the courtroom presentation. Yet it is only very recently that this fundamental truth has been at all recognized by courts in the United States. The first case of any significance did not occur until 1954 when, in *Juelich v. United States,*[5] the Fifth Circuit reversed a conviction in which all twelve jurors had conceded before trial that they had an opinion as to the guilt of the accused. Surely the court was right in reversing the conviction in the confident belief that the jurors' assertions of ability to limit their determination to the evidence presented in court was more a statement of hope than of probable reality.

Perhaps the unanimity of the jurors' bias made that an easy decision; but it is distressing that it was necessary to wait until 1954 for the revelation of this simple truth. Moreover, the *Juelich* case was routinely considered not controlling where less than all, even though a majority, of the jurors admitted fixed opinions in advance of trial. Not until 1961 did the Supreme Court reverse any state court conviction on the ground of possible jury prejudice resulting from newspaper publicity, and that was in the startlingly clear case of *Irvin v. Dowd*[6] where 268 of the 430 persons on the jury panel were excused for cause because of fixed opinions. Eight of the twelve who did serve admitted that they believed the accused to be guilty. Even that decision, however, was not a fundamental rejection of the past. The Court observed:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an 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 evidence presented in court.[7]

5. 214 F.2d 950 (5th Cir. 1954).

6. 366 U.S. 717 (1961).

7. *Id.* at 723.

In view of that partial retraction of the announced principle, it is not surprising that state courts and lower federal courts continue to find that a defendant's failure to demonstrate actual prejudice (an impossible burden) plus judicial words of caution are enough to protect the rights of the accused. For example, in the first six months of the 1965 Term of the Supreme Court, I find nine cases filed with the Court in which it was asked to review claims of due process denial because of inflammatory publicity.[8] In every instance the lower court had ruled that there had been a failure to show prejudice or that all problems were solved by a judicial caution to the jurors against voting their bias. The Court denied review in seven of those nine cases, taking only *Sheppard v. Maxwell,*[9] which is pretty strong stuff, and *Hoffa v. United States,*[10] where the Court excluded that issue from its grant of review.

One cannot help recalling Mr. Justice Jackson's admonition: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[11] Even in the generally admirable opinion of the New Jersey Supreme Court in *State v. Van Duyne,*[12] which I want to commend in a moment, the court concluded that, *in the circumstances,* and *in view of independent evidence of guilt,* the newspaper publicity did not interfere with fair trial. The trouble is that the courts can nearly always reassure themselves, particularly where the evidence of guilt is strong, that the jurors could arrive at a fair verdict. How many times must we be reminded that the due process guarantees are not limited to the innocent?

SECOND

The first amendment does not permit temporizing with freedom of the press. Whether the charge of interference with fair trial arises in the context of a trial by judge without jury, a grand jury proceeding, or a trial to a petit jury, the Supreme Court of the United States

8. Stupak v. United States, 345 F.2d 532 (3d Cir.), *cert. denied,* 382 U.S. 829 (1965); United States v. Andrews, 347 F.2d 207 (6th Cir.), *cert. denied,* 382 U.S. 956 (1965); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), *cert. granted,* 382 U.S. 1024 (1966); United States v. Conte, 349 F.2d 304 (6th Cir.), *cert. denied,* 382 U.S. 926 (1965); Sheppard v. Maxwell, 346 F.2d 707 (6th Cir.), *cert. granted,* 382 U.S. 916 (1965); United States v. Largo, 346 F.2d 253 (7th Cir.), *cert. denied,* 382 U.S. 904 (1965); Butler v. United States, 351 F.2d 14 (8th Cir. 1965), *cert. denied,* 283 U.S. 309 (1966); Illinois v. Clements, 32 Ill. 2d 232, 204 N.E.2d 724, *cert. denied,* 382 U.S. 827 (1965); Illinois v. Hagel, 32 Ill. 2d 413, 206 N.E.2d 699, *cert. denied,* 382 U.S. 942 (1965).

9. 231 F. Supp. 37 (S.D. Ohio 1964), *rev'd,* 346 F.2d 707 (6th Cir. 1965), *cert. granted,* 382 U.S. 916 (1965).

10. 349 F.2d 20 (6th Cir. 1965), *cert. granted,* 382 U.S. 1024 (1966).

11. Krulewitch v. United States, 336 U.S. 440, 453 (1949).

12. 43 N.J. 369, 204 A.2d 841 (1964).

is not about to approve the English pattern of contempt citations directly against the news media, against others who criticize judge or jury, or even against those whose out-of-court statements might prejudice the fairness of a prospective or present judicial proceeding.

Mr. Justice Frankfurter has regularly been quoted by those who would limit the press when he said:

> This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system — freedom of the press, properly conceived. 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.[13]

But it must be remembered that this was said in a concurring opinion where the possibility of a sanction against the press was not involved at all. The issue was whether the notion of fair trial required the reversal of a conviction in which eight of the jurors had stated on voir dire that they thought the defendant was guilty. The Court unanimously reversed the conviction, and no one joined Frankfurter's separate opinion.

It is worth remembering that the Supreme Court of the United States has never reviewed a contempt citation against a newspaper, radio, or television station in a jury case. Every contempt case in any way suggesting interference with the administration of justice by the press has involved criticism of a court or grand jury;[14] and no contempt citation has been sustained by the Supreme Court since 1918, in *Toledo Newspaper Co. v. United States,*[15] which was in turn overruled by *Nye v. United States*[16] in 1941.

The only case in which there is an opinion by any member of the Supreme Court in a case in which contempt had been sought against the press (here a radio station) was *Maryland v. Baltimore Radio Show, Inc.*[17] in which the Court declined to review a state court judgment refusing to find contempt. In that case, Mr. Justice Frankfurter, again speaking only for himself, raised a question whether some restriction might be imposed on the press. All else is silence.

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13. Irvin v. Dowd, 366 U.S. 717, 730 (1961).

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

15. 247 U.S. 402 (1918).

16. 313 U.S. 33 (1941).

17. 338 U.S. 912 (1950).

If the question of sanctions against the press for prejudicial publicity is open, it is only so in the most technical sense.

Those who accept the first amendment freedoms begrudgingly may be inclined to view this result as a victory for the news media and a defeat for fair trial. But surely that is too narrow a view. While the sensationalism that characterizes much reporting of criminal proceedings may not represent the most socially useful disposition of available newsprint and air time, this almost wanton freedom finds its support in the premises behind the first amendment. It was the judgment of the authors of the first amendment that nearly all expression must be permitted because no one, including the judiciary, is wise enough to sort out the true, the relevant and the useful from the false, the immaterial, and, to borrow a phrase from the troubled area of obscenity regulation, that which is "utterly without redeeming social value."[18]

It *is* important that police action be subject to public scrutiny; it *is* vital that the conduct of judicial proceedings not be isolated from examination. It is regrettable that in the process we must expect some breaches of good taste — and worse; but that fact does not justify burning the house of freedom to roast the press. As I shall suggest in a moment, relief can be had against the worst abuses. Cautious progress is already being made, and I believe the time is now appropriate for acceleration of current experiments.

Meanwhile, it may be appropriate before I criticize the news media, as I am about to do, to put in a good word in their behalf. Let me paraphrase slightly what Lois Forer said in her 1953 prize-winning Ross essay:

> In a single society encompassing [nearly two hundred million] people and stretching [beyond] the width of a continent, the media of mass communication assume great significance. . . . The New England town meeting could draw into the democratic process the entire community. Such personal participation is no longer possible. The media of mass communication must be the vital link between the people and the government. This is recognized in the elective process, both in the initial choice of executives and legislators and in the correlative watchful eye which the electorate of a healthy democracy must keep upon the elected. The same problems and the same considerations apply to the relations between the people and the judiciary.[19]

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18. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 418 (1966).

19. Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J. 800, 803 (1953); AALS, SELECTED ESSAYS ON CONSTITUTIONAL LAW 637, 642 (1963).

THIRD

Too much time has already been lost in hopelessly irresolute talk about the conflict between fair trial and free press, as though the issue involved only an intellectual abstraction and not real people. Talk should end and action should no longer be delayed. Factual information is now conveniently available in a number of places, including the notable report by the Special Committee on Radio and Television of the Bar of the City of New York in the 1965 volume entitled *Radio, Television, and the Administration of Justice.* A report is due in the fall of 1966 from the Advisory Committee on Fair Trial and Free Press of the American Bar Association Project on Minimum Standards for Criminal Justice, which is under the chairmanship of Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court. There are also important studies in progress, with reports expected soon from other committees of the American Bar Association on revision of the Canons of Professional Ethics and the Canons of Judicial Ethics.

Especially important is the fact that the courts and the bar associations are at last demonstrating increasing willingness to take specific action to discipline members of the legal profession who violate agreed-upon standards. I particularly applaud the promise of the New Jersey Supreme Court to use the contempt power to discipline members of the bar who make unwarranted statements that might endanger fair trial rights.[20] In addition, the court quite properly recommends disciplinary action against similar conduct by nonlawyer police officers; but the disciplinary authority here resides with their supervisors rather than with the courts.

In April of 1965, Attorney General Katzenbach announced rather detailed rules to govern the disclosure by members of the Department of Justice of material that might be prejudicial.[21] While I predict that experience will show that his rules are not restrictive enough, this is clearly a good beginning; and there is no reason to believe that the Department of Justice will not be willing to tighten the rules upon demonstration of deficiencies revealed in application.

Also encouraging are the codes worked out by local bar associations, often in cooperation with the news media. Particularly notable examples are those in Philadelphia, Louisiana, Massachusetts, and

20. State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964).

21. Statement of Policy Concerning the Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings, 30 Fed. Reg. 5510, 28 C.F.R. § 50.2 (1965).

Oregon. For the moment at least, I am content with development along these lines, encouraging lawyers and lawyer groups to solve these problems in traditional ways. Only if this proves strikingly inadequate would I favor resort to criminal sanctions of the sort contemplated in the Morse bill.[22]

At the same time it scarcely seems unreasonable to ask the news media to do a little house-cleaning too. Surely it is not impossible for television and radio broadcasters and for press associations to formulate a code imposing private sanctions for violation of the terms of that code.

I understand the difficulty in seeking agreement on such a sensitive subject among the proudly individualistic members of the news fraternity; but the cause is important enough to justify the necessary effort. Self-discipline of this kind presents no constitutional problems; other private associations have adopted codes on subjects no less important.

FOURTH

To the extent that professional self-discipline does not prevent all disclosures that might prejudice fair trial, courts should more effectively apply present tools to avoid prejudice, even at the risk of allowing some few guilty persons to go unconvicted or even unprosecuted.

I have already indicated my astonishment that we have so long tolerated procedures that cannot in good conscience be defended as consistent with fair trial, particularly when traditional legal remedies are readily available, as pointed out by other participants in this symposium.[23]

While I do not claim such academic isolation from the real world that I fail to understand the practical reasons for pretending that fair trial is not prejudiced, I do reject those arguments. When I am told that honest application of the standards we purport to believe in would result in the release of guilty defendants, I say only that we must sometimes pay that price in order to preserve our principles. Indeed, I am convinced that the only reason the idle talk of past generations has taken concrete form in recent years is that the Supreme

22. S. 290, 89th Cong., 1st Sess. (1965).

23. I refer, of course, to continuance, change of venue, disqualification of jurors for cause, sequestration of jurors, and finally, in exceptional cases, reversal for new trial. See Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349 (1960). In a few instances, courts have excluded the press from hearings on the admissibility of prejudicial evidence such as confessions or matter alleged to have been the product of an unreasonable search and seizure.

Court has just that recently indicated that there are limits beyond which specious claims of nonprejudice cannot be pushed.

If Lee Oswald had survived to stand trial for the assassination of John Kennedy, it is perfectly apparent that a due process trial of Oswald would not have been possible anywhere in the United States for a generation. When courts of last resort rule that other probably guilty defendants less nationally spectacular, but locally celebrated, are temporarily or permanently beyond the reach of the law, I assure you that better procedures will somehow be found endurable. Our concern for a free press and for fair trial procedures should move us along that road on a voluntary basis before we are pushed, unwittingly and unwillingly, along the same route.