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## THE TRIAL OF "STATE CASES"—A POST-SCRIPT ON THE JACK RUBY TRIAL

ELMER GERTZ\* AND WAYNE B. GIAMPIETRO†

THE appeal from the conviction and death sentence of Jack Ruby was part of that tragic chain of events which began more than three years ago when President Kennedy was shot down as he rode in an open automobile in Dallas. The ensuing events have been such as to tax the ingenuity of the most imaginative writer of fiction. The reversal of the conviction now appears to some persons to have been inevitable. But such was not the feeling at the time. At least one lawyer who briefly played a role in the defense thought only the United States Supreme Court would reverse. No attempt will be made here to indict any of those who participated in the case, although the temptation is great. The pressure of events and the publicity which attended every stage of the proceedings and the aftermath, to this very moment, were such that no man, least of all Jack Ruby, could have been given that fair and impartial hearing which is required by the American Constitution.

The trial itself cannot be looked at in isolation—for it was only one small portion of the fate which engulfed everyone both in and out of Dallas. These things are all of one piece and cannot possibly be separated. It is important that the atmosphere at the time of this trial be fully understood in order to comprehend the ultimate result.

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It is safe to say that no one series of events in the last century has attracted so much instantaneous attention and publicity as did the assassination of President Kennedy and the subsequent shooting of Lee Harvey Oswald while he was in the custody of the police. The communications media were out in full force to record the President's visit to Dallas—would he be booed and degraded as had Adlai Stevenson or Texas' own Lyndon B. Johnson?—and when he was gunned down that great numbers of reporters and cameramen were immediately augmented by yet another contingent of those who were bound and determined to inform America and the world, immediately and "in depth," as to all that was happening. If there is to be any villain in this piece, it must be desire on the part of the public to know. The press, radio and television were aware of one and only one objective, and, in pursuit of that objective, they descended upon Dallas with a force which has seldom been felt anywhere and with which the Dallas authorities were helpless to cope. The result was pandemonium and disaster. It is easy to criticize in retrospect, and this has been done by many. At least two books have been published already about the Ruby trial,<sup>1</sup> at least one other partially written,<sup>2</sup> to say nothing of the countless newspaper and magazine articles and the voluminous discussion which has gone on all over the country. The purpose of this article is not to heap more abuse and blame upon those who were caught up in this press of events, but to do what we can to understand those errors which occurred and make suggestions to preclude their reoccurrence. The appeal itself was concerned with the fate of one inconsequential individual who was caught up in those momentous forces and to grant to him that measure of justice which is due every American accused of a crime, be it heinous or minor, notorious or anonymous.

Immediately after the arrest of Lee Harvey Oswald, generally regarded as the President's assassin, the newsmen descended upon the headquarters of the Dallas police like an irresistible swarm of locusts. The Warren Report catches the atmosphere at the police headquarters while Oswald was being held there:

In the words of an FBI agent who was present, the conditions at the police station were "not too much unlike Grand Central Station at rush hour, maybe

<sup>1</sup> BELLI, *DALLAS JUSTICE* (1964); KAPLAN & WALTZ, *THE TRIAL OF JACK RUBY* (1965).

<sup>2</sup> BROWN, *DALLAS, RUBY AND THE LAW* (unpublished manuscript in office of Mr. Gertz). This book was never published, due largely to the efforts of Jack Ruby's counsel at the habeas corpus hearing.

like the Yankee Stadium during the World Series Games . . ." Two large television cameras were set up. Newsreel cameras, microphones, etc. were also there. It was a "bedlam of confusion."

The corridor became so jammed that policemen and newsmen had to push and shove if they wanted to get through, stepping over cables, wires, and tripods. The crowd in the hallway was so dense that District Attorney Wade found it a 'strain to get the door open' to get into the homicide office. According to [Special Agent Winson G.] Lawson [of the Secret Service], "You had to literally fight your way through the people to get up and down the corridor. . . . Such police efforts as there were to control the newsmen were unavailing. . . ." Forrest V. Sorrels of the Secret Service had the impression that the "press and the television people just . . . took over."

On most occasions, Oswald's escort of three to six detectives and policemen had to push their way through the newsmen who sought to surround them. . . . Generally when Oswald appeared the newsmen turned their cameras on him, thrust microphones at his face, and shouted questions at him.<sup>3</sup>

Captain Fritz of the Dallas Police stated in his report:

[Oswald] was interviewed under the most adverse conditions in my office which is 9 feet 6 inches by 14 feet, and has only one front door, which forced us to move this prisoner through hundreds of people each time he was carried from my office to the jail door, some 20 feet, during each of these transfers. The crowd would attempt to jam around him, shouting questions and many containing slurs. This office is also surrounded by large glass windows, and there were many officers working next to these windows.<sup>4</sup>

The Warren Commission itself stated:

In assessing the causes of the security failure, the Commission has not overlooked the extraordinary circumstances which prevailed during the days that the attention of the world was turned on Dallas. Confronted with a unique situation, the Dallas police took special security measures to ensure Oswald's safety. Unfortunately these did not include adequate control of the great crowd of newsmen that inundated the police department building.<sup>5</sup>

The Warren Commission has concluded that these conditions contributed to the death of Oswald:

(d) The Dallas Police Department's decision to transfer Oswald to the county jail in full public view was unsound. The arrangements made by the police department on Sunday morning, only a few hours before the attempted transfer, were inadequate. Of critical importance was the fact that news media representatives and others were not excluded from the basement even after the police were notified of threats to Oswald's life. These deficiencies contributed to the death of Lee Harvey Oswald.<sup>6</sup>

These pressures hardly abated even when the trial of Jack Ruby had wound tortuously to its drastic end. The newspaper coverage

<sup>3</sup> REPORT OF THE WARREN COMMISSION, 190, 191, 193 (N.Y. Times ed. 1964).

<sup>4</sup> *Id.* at 552.

<sup>5</sup> *Id.* at 207.

<sup>6</sup> *Id.* at 40-41.

was overwhelming. At the hearing for a change of venue, R. S. Walker, news director of station WFAA-TV in Dallas, testified that something about the *Ruby* case was on that station and the others in the area every day, and had been going on with particular thoroughness at least since December 20, the date of the first bond hearing for Jack Ruby.<sup>7</sup> He further testified that his station was carrying what Ruby said in court each day.<sup>8</sup>

Immediately after Ruby was identified as the one who had killed Oswald, the country was flooded with every possible bit of information and misinformation newsmen could dig up about his background, his family and his personality. It is fair to say that absolute accuracy was not the paramount consideration in the minds of newspaper editors as they rushed to print every morsel of any kind connected in any way with him.

Stories, often absurd ones, flooded the world: He was born in Chicago's Maxwell Street ghetto of Russian immigrants, one of eight children. His father was an alcoholic who abandoned his family while Jack was still young. His mother shortly thereafter developed delusions of paranoid schizophrenia and was committed to a mental institution. Jack left home at twelve and lived in foster homes for the next two years.

Prejudicial and often untrue reports said he had lived on the borderline between sharp practices and petty crime, making his living as a ticket scalper and small-time gambler—"a youthful floater in the disreputable environs of Chicago's Halsted Street." He was reported to have peddled "fire sale" merchandise and illegal punch boards. He helped an attorney organize the scrap-iron and junk-handler's union and became an adept gate-crasher.

Because of his volatile temper he went to the West Coast after being forced out of the union, and there he sold newspaper subscriptions door to door. He was drafted and served three years, advancing to the not remarkable rank of Private First Class, and obtaining only a Good Conduct Medal, his only known ability being to "wangle three-day passes." He was honorably discharged and worked with his brother Earl, selling salt and pepper shakers. He managed a twelve-year-old Negro dancer known as "Little Daddy."

<sup>7</sup> Transcript of Venue Hearing, 607. (Criminal District Court No. 3, Dallas County, Texas, Jan. term, 1964).

<sup>8</sup> *Id.* at 600-01.

He moved to Dallas where he had his name changed to Jack Leon Ruby. His first business venture, a night club, failed. He acquired a minor police record which included two convictions for carrying concealed weapons. In 1959 he tried to export jeeps but was turned down by the Cuban government. About this time he went to Cuba for a vacation, his expenses being paid by a Las Vegas gambler friend. This preyed upon him to the last day of his life. In the late '50's he opened a rock-and-roll dance hall, known as the Vegas Club, and a striptease parlor, the now immortal Carousel Club.

He was dubbed as a loud, pushy, name-dropper who cultivated policemen, city officials and reporters. He was described as constantly seeking "class." He worked out daily at the YMCA and served as his own bouncer at the Carousel Club, where he employed his fists freely, and, some acquaintances felt, more often than was strictly necessary.<sup>9</sup> The picture of Jack Ruby which was presented to the world was far from flattering.

At the ensuing trial, the demands of the press were so great that Judge Joe B. Brown thought it desirable to hire someone to handle the press accommodations. Judge Brown wrote, in the unpublished manuscript of his book, *Dallas, Ruby and the Law*, that there were 568 members of the press in Dallas.<sup>10</sup> There were so many that they could not all be accommodated at the trial and a pooling arrangement had to be devised. The Judge has also said that the streets outside the courthouse "often resembled a circus."<sup>11</sup>

Judge Brown has written about the effect of the press during the trial:

It was this kind of relationship between press and police that led poor Jesse Curry, our police chief, to make his great mistake. He was trying to be decent. I was to understand it all too well by the time the Ruby trial was over. The power of the press is subtle and insidious, but when it is directed against you day after day, it can be almost overpowering. It causes you to lose your sense of values and seriously to consider doing things that you would normally instantly reject. Some of it is conscienceless. . . . I finally bent under this pressure and agreed to allow a pool TV camera into the courtroom for the reading of the Ruby verdict. The trial would be over. It seemed harmless enough. I will eternally regret it. . . .

I would like to say that we had very little trouble with the newspapermen. Most of the commotion and noise that some of the [*sic*] complained about in the courtroom, and there was very little, they caused themselves in their going

<sup>9</sup> See KAPLAN & WALTZ, *op. cit. supra* note 1.

<sup>10</sup> BROWN, *op. cit. supra* note 2, at 150.

<sup>11</sup> BROWN, *op. cit. supra* note 2, at 6.

and coming. I tried to remind myself that they had deadlines to meet. (Yet, I don't know whether it was a wise idea to have them in the courtroom in mass. I think they undoubtedly had an effect on the jury. I don't think anybody on earth could tell you what the effect was, but the jurors were bound from the sheer numbers of the press to have been impressed by the importance of the trial).

At times, many of these newspapermen asked to see me in my chambers, and I tried when I could to accommodate . . . I peddled no inside information or worldshaking comments.<sup>12</sup>

This is a clear recognition of the fact that no matter what is actually said in the newspapers before and during a trial, the notoriety of the case itself is bound to affect those directly involved in it. All of the extraneous matter which appears in the newspapers must have some effect upon the jurors even though they make a conscientious attempt to put it out of their minds. In *Patterson v. Colorado*,<sup>13</sup> Mr. Justice Holmes said: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influences, whether of private talk or public print."<sup>14</sup>

In *Irvin v. Dowd*,<sup>15</sup> it was said: "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."<sup>16</sup> In as greatly publicized a case as this there could not be many "indifferent" jurors. This was brought out forcefully at the venue hearings had during this case, of which more will be said later.

In *Estes v. Texas*,<sup>17</sup> the Supreme Court held that "The heightened public clamor resulting from radio and television coverage [of a trial] will inevitably result in prejudice."<sup>18</sup> The Court specifically held there that "this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case."<sup>19</sup>

From the very beginning, the press placed a great amount of pressure upon anyone who was connected in any fashion with the case, especially the authorities in charge of the investigation. Public officials were not averse to giving out such information as they had, as well as their opinions. This is what the Warren Commission has found:

<sup>12</sup> BROWN, *op. cit. supra* note 2, at 150, 159. Words in parentheses have been crossed out in the manuscript.

<sup>13</sup> 205 U.S. 454 (1907).

<sup>16</sup> *Id.* at 722.

<sup>14</sup> *Id.* at 462.

<sup>17</sup> 381 U.S. 532 (1965).

<sup>15</sup> 366 U.S. 717 (1961).

<sup>18</sup> *Id.* at 549.

<sup>19</sup> *Id.* at 542.

[T]he press was able to publicize virtually all of the information about the case which had been gathered until that time. In the process, a great deal of misinformation was disseminated to a worldwide audience. . . .

Most of the information was disclosed through informal oral statements or answers to questions at impromptu and clamorous press conferences in the third floor corridor. Written press releases were not employed. The ambulatory press conference became a familiar sight during these days. Whenever Curry or other officials appeared in the hallway, newsmen surrounded them, asking questions and requesting statements. Usually the officials complied. . . .

Wade himself also made several statements to the press. . . . Wade told the press on Saturday that he would not reveal any evidence because it might prejudice the selection of a jury. On other occasions, however, he mentioned some items of evidence and expressed his opinions regarding Oswald's guilt. He told the press on Friday night that Oswald's wife had told the police that her husband had a rifle in the garage at the house in Irving and that it was missing in the morning of the assassination. On one occasion he repeated the error that the murder rifle had been a Mauser. Another time, he stated his belief that Oswald had prepared for the assassination months in advance, including what he would tell the police. He also said that Oswald had practiced with the rifle to improve his marksmanship. . . .

Concern about the effects of the unlimited disclosures was being voiced by Saturday morning. According to District Attorney Wade, he received calls from lawyers in Dallas and elsewhere expressing concern about providing an attorney for Oswald and about the amount of information being given to the press by the police and the district attorney. Curry continued to answer questions on television and radio during the remainder of the day and Sunday morning.

FBI director Hoover requested Curry "not to go on the air any more until this case . . . [is] resolved. . . ."

[T]he publicizing of unchecked information [by the police] provided much of the basis for the myths and rumors that came into being soon after the President's death. The erroneous disclosures became the basis for distorted reconstructions and interpretations of the assassination. The necessity for the Dallas authorities to correct themselves or to be corrected by other sources gave rise not only to criticism of the police department's competence but also to doubts regarding the veracity of the police. . . .

The immediate disclosure of information by the police created a further risk of injuring innocent citizens by unfavorable publicity.<sup>20</sup>

This flow of information did not stop with the silencing of Oswald. District Attorney Henry Wade was quoted as saying that he would ask for the death penalty with full confidence a Dallas County jury would return the correct verdict in the case.<sup>21</sup> Another of the prosecutors, the relentless Bill Alexander, was quoted as saying: "[T]he shooting of a manacled man down in cold blood, and this is a death penalty case." Sheriff Bill Decker said that "it is not inconceivable

<sup>20</sup> *Supra* note 3, at 214, 216, 217, 219.

<sup>21</sup> *Supra* note 7, at 10.



that the whole plot could have been hatched in Russia."<sup>22</sup> Prosecutor Wade emphasized:

Nobody deplored the assassination of President Kennedy and the murder of officer J. D. Tippit more than I. They were cold-blooded crimes, but this was also a cold-blooded murder and an assassination. I think this kind of pre-meditated murder calls for the death penalty and I intend to ask it.<sup>23</sup>

Wade further stated that he intended to fill the gap on the trial calendar caused by Oswald's death with the trial of Jack Ruby.<sup>24</sup>

The most important consideration, however, is the content of the publicity which the case received. Immediately after Oswald's death, the newspaper reporters began to seek a connection between Ruby and Oswald.

*The Dallas Morning News* stated that a former roommate of Jack Ruby had at one time been active in communist front groups. One story said that the FBI and the Secret Service believed that Ruby and Oswald had been neighbors, with one officer quoted as saying "this could be the key we have been seeking." He also said: "Ruby said he fired the shot because he wanted to avenge the murder of President Kennedy, but investigators were never convinced this was his true motive."<sup>25</sup>

The prejudicial statements were not limited toward Jack Ruby himself. They were directed as well toward his counsel. This publicity was not confined to the local papers. An article on Melvin Belli, at that time chief counsel for Ruby, appeared in the February 8, 1964, issue of the *Saturday Evening Post*. This article detailed a banquet Mr. Belli had given, stating that the dinner music was provided by a naked harpist playing "Nearer My God To Thee." Immediately upon Mr. Belli's arrival in Dallas, a newspaper printed a picture of Mr. Belli in the company of another gentleman, stating that Belli was accompanied by a bodyguard.<sup>26</sup> There were many more of these stories:

(a) Reference that the State Bar's Code of Ethics was violated by Ruby's attorneys by discussing the case with newsmen. One usually reliable source said that both District Attorney Wade and Mr.

<sup>22</sup> *Supra* note 7, at 133.

<sup>23</sup> KAPLAN & WALTZ, *op. cit. supra* note 1, at 8.

<sup>24</sup> *Ibid.*

<sup>25</sup> KAPLAN & WALTZ, *op. cit. supra* note 1, at 13-14.

<sup>26</sup> *Supra* note 7, at 732.

Howard had been notified by a letter Monday that the grievance committee was looking into their actions.<sup>27</sup>

(b) Wayne Woodruff, Grievance Committee Chairman, denied being the source of published reports which indicated that Mr. Howard and Mr. Wade would be called on the carpet because of statements made to the press. "It must be a figment of his (the reporter's) imagination to specify what the committee will discuss at its regular monthly meeting tonight," fumed Mr. Woodruff.<sup>28</sup>

(c) "BAR WARNED ATTORNEYS ON CONDUCT." "Grievance panel says no charge leveled at Wade." "Tom Howard, Chief Defense Counsel for Ruby, and Jim Martin, another Ruby attorney, left the hearing and declined to comment to newsmen. Both men were grim." ". . . three hours behind closed doors."<sup>29</sup>

(d) "Belli said he probably is more noted for the whopping judgments he has won in damage suits than for his practice in criminal law." Then it refers to who else he represented including Errol Flynn, Mae West and Perry Mason. "Mr. Belli and Paramount Studios currently is basing a film on his life under the working title of 'King of Torts,' and Bobbs-Merrill Publishing Co. is bringing out his latest book, *Russian Life and Law*."

"The attorney visited Russia two years ago."<sup>30</sup>

(e) "Ruby's flamboyant attorney, Melvin Belli."<sup>31</sup>

(f) "Edward W. Kuhn of Memphis, Tennessee, a candidate for President of the American Bar Association, accused Belli of accepting the Ruby case, 'just for the publicity.'"<sup>32</sup>

(g) "The exotic Mr. Belli didn't get his man out of jail," Alexander's comment.<sup>33</sup>

(h) "ATTORNEY HOWARD LAUDS D.A.'s HANDLING OF RUBY HEARING WHILE TWITTING BELLI." "Attorney Tom Howard Wednesday lauded the District Attorney's handling of Monday's Jack Ruby bond hearing while twitting Melvin

<sup>27</sup> Dallas Times Herald, Dec. 4, 1963, A-12. Hereinafter, DTH refers to the Dallas Times Herald.

<sup>28</sup> DTH, Dec. 5, 1963, A-28.

<sup>30</sup> DTH, Dec. 11, 1963, A-39.

<sup>29</sup> DTH, Dec. 6, 1963, A-25.

<sup>31</sup> *Ibid.*

<sup>32</sup> Dallas Morning News, Dec. 14, 1963, § 4, p. 1. Hereinafter, DMN refers to the Dallas Morning News.

<sup>33</sup> DMN, Dec. 24, 1963, § 6, p. 1.

Belli, who had supplanted him as Ruby's chief defense counsel."

"I think the big-city lawyer from out of state [Belli] found out that Texas District Attorneys can hold their own in a court room." Howard said, "and I think it came as quite a shock to him, too."<sup>34</sup>

The trial of Ruby is being called a \$500,000 venture with some of the fanciest attorneys, investigators and psychiatrists in the land being hired by the Defense.

Another interesting fact of the Defense is the intriguing background of Chief Defense Counsel Melvin Belli, the King of Torts from California. This lawyer has exhibited an unusual interest in Russia and has only recently returned from a trip there.<sup>35</sup>

We now come to the question as to whether Judge Brown erred under Texas law in refusing to grant Jack Ruby a requested change of venue.

The Texas Code of Criminal Procedure provides:

A change of venue may be granted . . . on the written motion of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:

1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he can not obtain a fair and impartial trial.
2. That there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial.<sup>36</sup>

An extended venue hearing was held in this case, the record running to 788 pages in addition to the vast documentation. The defense put on the only live witnesses, while the prosecution contented itself with placing into the record several affidavits to the effect that Ruby could in fact obtain a fair trial in Dallas.

The source of the prejudice necessary for a change of venue is immaterial.<sup>37</sup> The prejudice need not be against the accused personally, but may be against his case.<sup>38</sup> Here are just a few examples of newspaper stories which appeared at the time tending to show that the people in Dallas were prejudiced against Jack Ruby's case, if not against him personally:

<sup>34</sup> DMN, Dec. 26, 1963, § 4, p. 1.

<sup>35</sup> *Supra* note 7, at 151.

<sup>36</sup> TEX. CODE CRIM. PROC. ANN. art. 31.03 (Vernon's 1966).

<sup>37</sup> *Grace v. State*, 90 Tex. Crim. 329, 234 S.W. 541 (1921); *Randle v. State*, 34 Tex. Crim. 43, 28 S.W. 953 (1894).

<sup>38</sup> *Sorrell v. State*, 74 Tex. Crim. 505, 169 S.W. 299 (1914); *Randle v. State*, *supra* note 37.

"Let us Search Our Hearts, . . . Terrible history has been made in Dallas, and the magnitude of our city sorrow can only be measured against the enormity of the deed."<sup>39</sup>

"DALLASITES FLOOD CHURCHES IN SEARCH OF ANSWERS," "The ministers told the Times Herald that the sermons were equally applicable to the latest death still another renunciation of the principles of orderly government and God's laws."<sup>40</sup>

PRESS RAPS DALLAS POLICE, . . . "The misguided, degraded citizen who fired the shot that killed Oswald . . . has placed a serious blotch on the record of American justice," said the editorial in a special edition of the Las Vegas, Nev., Review-Journal.

DALLAS HAS A CONSCIENCE, . . . Right now, there is urgent need for the whole community to settle down to the business of normal living, to relieve its tensions and to banish any dwellings of guilt.<sup>41</sup>

"The city has sired a terrible offspring and like Frankenstein, has lost control over the monster," "Dallas is a 'sick' city," Maley said, he is Secretary-Treasurer of the Dallas AFL-CIO Council, "I speak for all of Dallas' organized labor when I say we are ready to work with anyone in an effort to lift Dallas from the ashes of a great City to restore a little sanity to make Dallas once again a great place where people can disagree agreeably."<sup>42</sup>

Wade says: "Our whole judicial system will be on trial. This trial will determine whether Dallas has a government based on the orderly process of law or a government in which an individual can take the law into his own hands."<sup>43</sup>

"I've lived here three months, but I'm going to look for a job some place else. . . ." "I never thought we had those kind of nuts in Texas," said another person. At Love Field, an angry grim faced person boarding a plane had said: "They ought to take a regiment down there to Dallas and wipe those idiots out."<sup>44</sup>

"The radio said that Texans in the service over in Frankfurt, Germany, were catching it on the account of what happened to the President. Every city has some screwballs. . . ."<sup>45</sup>

That this is a proper source from which prejudice sufficient to warrant a change of venue may spring has been amply recognized in Texas.<sup>46</sup>

The matter of paramount importance is not that it be proved beyond a reasonable doubt, or even by the preponderance of the evi-

<sup>39</sup> DTH, Nov. 23, 1963, p. 1.

<sup>40</sup> DTH, Nov. 25, 1963, A-40.

<sup>41</sup> DMN, Nov. 25, 1963, § 4, p. 2.

<sup>42</sup> DMN, Nov. 24, 1963, § 1, p. 6.

<sup>43</sup> DMN, Nov. 27, 1963, p. 1.

<sup>44</sup> DMN, Nov. 27, 1963, p. 9.

<sup>45</sup> DMN, Nov. 24, 1963, § 1, p. 6.

<sup>46</sup> Handy v. State, 139 Tex. Crim. 3, 138 S.W.2d 541 (1940); Fulton v. State, 132 Tex. Crim. 192, 103 S.W.2d 755 (1937); Fleming v. State, 62 Tex. Crim. 653, 139 S.W. 598 (1911); Gallaher v. State, 40 Tex. Crim. 296, 50 S.W. 388 (1899).

dence, but that any chance that prejudice exists is the controlling factor.

In authorizing the change of venue, the law proceeds on the assumption that notwithstanding the fact that the required tests seek to determine the impartiality of individual jurors on *voir dire* examination, there may be such a prejudice in the community that improper jurors may be obtained.<sup>47</sup> A person may be prejudiced without being aware of it, or he may purposely conceal his prejudice in order that he may vent his malice on the accused.<sup>48</sup>

The Texas Constitution, Article 1, Section 10, guarantees an accused a speedy public trial by an impartial jury and this means that the trial judge shall not put an accused to trial in a county unless the circumstances and conditions of public sentiment are such that the judge feels able to give an absolute assurance that neither by accident nor design will any sentiment against the accused creep into the jury box except such as is alone raised by the testimony introduced at the trial.<sup>49</sup>

The enormity of the offense with which the defendant is charged is material to the determination of whether the degree of prejudice is such that a change of venue should be granted.<sup>50</sup> The greater and more horrible the crime charged, the more imperative the necessity to safeguard the rights of the accused and the more closely should the trial court scan evidence of prejudice.<sup>51</sup>

The fact that the case has received general discussion and awakened a wide interest tends to prove prejudgment of the case.<sup>52</sup> It is also permissible to have witnesses testify as to having heard the case discussed and to allow them to express their own opinion that as a result

<sup>47</sup> *Meyers v. State*, 39 Tex. Crim. 500, 46 S.W. 817 (1898); *Randle v. State*, *supra* note 37.

<sup>48</sup> *Sorrell v. State*, *supra* note 38; *Coffman v. State*, 62 Tex. Crim. 88, 136 S.W. 779 (1911); *Faulkner v. State*, 43 Tex. Crim. 311, 65 S.W. 1093 (1901).

<sup>49</sup> *Sorrell v. State*, *supra* note 38. See also *Moon v. State*, 169 Tex. Crim. 14, 331 S.W.2d 312 (1959); *McCarley v. State*, 161 Tex. Crim. 263, 276, S.W.2d 300 (1955).

<sup>50</sup> *McNeal v. State*, 105 Tex. Crim. 262, 288 S.W. 201 (1926); *Parker v. State*, 81 Tex. Crim. 397, 196 S.W. 537 (1917); *Faulkner v. State*, *supra* note 48; *Gallaher v. State*, *supra* note 46.

<sup>51</sup> *Streight v. State*, 62 Tex. Crim. 453, 138 S.W. 742 (1911); *Coffman v. State*, *supra* note 48; *Stegald v. State*, 22 Tex. Crim. 464, 3 S.W. 771 (1886).

<sup>52</sup> *Parker v. State*, *supra* note 50; *Gallaher v. State*, *supra* note 46.

of the prejudice existing in the county the defendant could not receive a fair and impartial trial.<sup>53</sup>

Testimony by a number of witnesses residing in the county, that, in their opinion, the defendant could obtain an impartial trial is not in and of itself ground for denying the application.<sup>54</sup> The fact that the witnesses for the defendant's theory of the case outnumber the State's witnesses does not require a change of venue.<sup>55</sup> And testimony of witnesses, that in their opinion a fair trial can be had, loses much of its force where it appears that they themselves discussed the case freely, and are familiar with the facts and have formed an opinion.<sup>56</sup>

As stated in *Davis v. State*,<sup>57</sup> "The true test, however, is not the possibility that twelve such men might be found but the probability, through the methods provided by law, that such a jury would be impaneled."<sup>58</sup>

That this case was known to almost everyone in Dallas County cannot be denied. Just about every witness in the venue hearing testified that he himself had discussed the case at length, not a few, but many times. Even those who testified that they thought that Ruby could get a fair trial admitted that the case was one of wide discussion and that everyone was familiar with it.

Clayton Fowler, president of the Dallas County Criminal Bar Association, testified that most of the people he talked to were highly opinionated, that it would be most difficult to find a fair jury in Dallas.<sup>59</sup> Costine A. Droby, a Dallas attorney, testified that he thought the concensus to be that the only way Dallas could vindicate itself was to convict Jack Ruby.<sup>60</sup> Earle Cabell, a former Mayor of Dallas, testified that there could be civic resentment against Ruby which might make a difference with reference to his getting a fair trial.<sup>61</sup> Barefoot Sanders, United States Attorney for the Northern District

<sup>53</sup> *McNeal v. State*, *supra* note 50; *McNelley v. State*, 104 Tex. Crim. 263, 283 S.W. 522 (1925); *Tanner v. State*, 96 Tex. Crim. 380, 262 S.W. 89 (1924); *Stepp v. State*, 92 Tex. Crim. 325, 244 S.W. 141 (1922).

<sup>54</sup> *Anschicks v. State*, 45 Tex. 148 (1876).

<sup>55</sup> *Murray v. State*, 137 Tex. Crim. 389, 129 S.W.2d 678 (1939); *Connell v. State*, 45 Tex. Crim. 142, 75 S.W. 512 (1903).

<sup>56</sup> *Sorell v. State*, *supra* note 38.

<sup>57</sup> 101 Tex. Crim. 352, 275 S.W. 1029 (1925).

<sup>58</sup> *Id.* at 364, 272 S.W. at 1035. See also *Carlile v. State*, 96 Tex. Crim. 37, 255 S.W. 990 (1923).

<sup>59</sup> *Supra* note 7, at 229-31.

<sup>60</sup> *Id.* at 255.

<sup>61</sup> *Id.* at 295.

of Texas, said that he felt it would take more time and effort to get a jury in Dallas than elsewhere.<sup>62</sup> R. S. Walker, news director for WFAA-TV in Dallas, declared that the people in Dallas had been "saturated with information on our part."<sup>63</sup> Stanley Kaufman, another Dallas attorney, testified that there was a better chance of getting a fair jury where there was less consciousness about the event and that the further the trial was had from Dallas the better for Jack Ruby.<sup>64</sup> Robert O'Donnell, yet another Dallas attorney, said that almost everyone he had spoken to about the case had an opinion on it.<sup>65</sup> Mr. A. C. Green, editorial page editor of the *Dallas Times Herald*, while of the opinion that Ruby could get a fair trial in Dallas, stated that it would be impossible to say that the case was not on their minds, as it was one of the most talked about subjects in the community. One of the most respected members of the Dallas community, the merchant Stanley Marcus, stated that he had great reservations as to whether a fair trial could be had in Dallas.<sup>66</sup>

Judge Brown, in his unpublished book, states that when Mr. Belli first informed him that he was going to ask for a change of venue he did not know whether or not Ruby could get a fair trial in Dallas.<sup>67</sup> Judge Brown writes that after spending three days on the change of venue hearing "the results of Mr. Belli's cross-section of Dallas opinion, were simply inconclusive."<sup>68</sup> He writes, when speaking of the earlier bond hearing: "Nobody wanted Ruby to get out on bond, least of all the defense. He probably couldn't have got six blocks from the courthouse alive. . . ." <sup>69</sup> How the judge could feel that Ruby could not walk the streets of Dallas safely, but could get a fair trial there is somewhat incomprehensible.

At the end of the venue hearing, Judge Brown accepted the proposition of the prosecution that, as they put it, "The proof was in the pudding" and that the only way to determine whether a fair jury could be obtained was to try and pick one.

During the choosing of the jury, a member of the National Epilepsy League appeared on the scene and passed out to the reporters in front of the courthouse a "fact sheet" on epilepsy which informed those who read it that Jack Ruby could not have been in an epileptic seizure

<sup>62</sup> *Id.* at 558.

<sup>63</sup> *Id.* at 594.

<sup>64</sup> *Id.* at 620.

<sup>65</sup> *Id.* at 640.

<sup>66</sup> *Id.* at 218.

<sup>67</sup> BROWN, *op. cit. supra* note 2, at 86.

<sup>68</sup> BROWN, *op. cit. supra* note 2, at 144.

<sup>69</sup> BROWN, *op. cit. supra* note 2, at 60.

when he shot Oswald—the very defense upon which Mr. Belli rested Ruby's case. A mistrial on this ground was immediately requested, but the judge refused to grant one.

In all, 162 prospective jurors were examined. 121 were dismissed for cause, 62 by the prosecution and 58 by the defense, one for illness. The defense used all 18 of its peremptory challenges and the prosecution used 11 of its 15. This alone should have convinced Judge Brown that a change of venue was warranted.

Difficulty experienced in securing a jury should be considered on an application for a change of venue.<sup>70</sup> The fact that most of the special veniremen from which the jury must be selected have been disqualified by being summoned in other cases,<sup>71</sup> or that difficulty in obtaining a jury was experienced at former trials, should also be considered.<sup>72</sup> The fact that many prospective jurors expressed themselves as having an opinion may, in connection with other circumstances, show that a change should be granted. In *Rhodes v. State*,<sup>73</sup> it was held error to overrule defendant's applications when approximately half of the special venire expressed themselves as having an opinion and the prevailing opinion was that defendant was guilty. In *Finks v. State*,<sup>74</sup> the fact that ninety-five per cent of the jurors had prejudged the case, along with other circumstances, required reversal.<sup>75</sup>

If the evidence leads to the conclusion that bias, prejudice, or prejudice of the defendant or his case is such as to render it improbable that a fair and impartial trial can be given him, the court may not refuse the application.<sup>76</sup>

Certainly, the experience in choosing the jury must have made it clear, after all of the testimony at the change of venue hearing, that while it may not have been impossible to select a fair jury, it was certainly improbable. The life of a human being ought not to have depended upon such a gamble.

<sup>70</sup> *Carlile v. State*, *supra* note 58; *Mayhew v. State*, 69 Tex. Crim. 187, 155 S.W. 191 (1913).

<sup>71</sup> *Faulkner v. State*, *supra* note 48.

<sup>72</sup> *Mayhew v. State*, *supra* note 70.

<sup>73</sup> 106 Tex. Crim. 663, 294 S.W. 212 (1927).

<sup>74</sup> 84 Tex. Crim. 536, 209 S.W. 154 (1919).

<sup>75</sup> See also *Lambkin v. State*, 165 Tex. Crim. 11, 301 S.W.2d 922 (1957); *Rogers v. State*, 155 Tex. Crim. 423, 236 S.W.2d 141 (1951).

<sup>76</sup> *Grace v. State*, *supra* note 37; *Randle v. State*, *supra* note 37; *Sorrell v. State*, *supra* note 38.



Another indication that a change of venue should have been granted is shown by *Williams v. State*,<sup>77</sup> and *Mickle v. State*,<sup>78</sup> where it was held that a change of venue was warranted where it was necessary that the defendant be protected by guards. This was the situation here, where everyone that came into the court room was searched and the police felt it was necessary that extensive security measure be taken in the court room.<sup>79</sup> One vital witness, as it turned out, had a gun in her purse.

On appeal any doubt as to whether the trial was affected by prejudice and feeling should be resolved in favor of another trial.<sup>80</sup> Another indication of the existence of prejudice is the severity of the verdict.<sup>81</sup> One very strong indication in this case that the jury was prejudiced was the extremely short time which it took the jury to reach its verdict in so important a case where the trial was very long and the medical testimony extremely complicated. How could a jury have come to agreement so quickly where several medical experts had testified, some of them disagreeing with others, if the jury had not had some predilections in the case?

The most significant precedent, however, is the case of *Sheppard v. Maxwell*,<sup>82</sup> decided after the Ruby verdict. The parallel between that case and this is striking. The main difference is that the publicity in *Sheppard* was not nearly as pervasive. In that case the Supreme Court has given us the clearest guidelines as to what can and must be done by the trial judge to control the trial proceedings:

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of

<sup>77</sup> 145 Tex. Crim. 536, 170 S.W.2d 482 (1943).

<sup>78</sup> 85 Tex. Crim. 560, 213 S.W. 665 (1919).

<sup>79</sup> *Supra* note 7, at 778-79.

<sup>80</sup> *Mickle v. State*, 85 Tex. Crim. 560, 213 S.W. 665 (1919).

<sup>81</sup> *McNeal v. State*, *supra* note 50; *Cox v. State*, 90 Tex. Crim. 106, 234 S.W. 72 (1921); *Barnes v. State*, 42 Tex. Crim. 297, 59 S.W. 882 (1900).

<sup>82</sup> 384 U.S. 333 (1966).

newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits laying on the counsel table during recesses.<sup>83</sup> . . .

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full *verbatim* testimony was available to them in the press. This completely nullified the judge's imposition of the rule.<sup>84</sup>

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion.<sup>85</sup> . . .

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when a news media makes it available to the public.<sup>86</sup> . . .

More specifically, the trial court might well have proscribed extra judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or 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. See *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration

<sup>83</sup> *Id.* at 358.

<sup>85</sup> *Id.* at 359.

<sup>84</sup> *Id.* at 359.

<sup>86</sup> *Id.* at 360.

of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.<sup>87</sup>

One of the main suggestions made in *Sheppard* is that the trial judge should have postponed the trial date even if he determined that a change of venue was not desirable. This surely is the least that should have been done in the *Ruby* case. Much of the testimony at the venue hearing was to the effect that the prejudicial publicity had saturated the entire State of Texas and that it would serve no purpose to change the venue, as any place in Texas would be similarly infected. If this were actually the case, then the judge should surely have postponed the trial date.

On December 2, 1963, even District Attorney Henry Wade was quoted as saying that "I think it is highly unlikely that the inflamed public feeling will permit such a trial until about mid-February."<sup>88</sup> His feeling was that by then the atmosphere would have become normal enough to permit a fair trial. There is nothing in the transcript of the entire venue hearing which leads to the conclusion that things had in reality returned to normal. In fact, there was evidence given that the newspaper coverage had become even more prejudicial. On about the second of February, 1964, a story appeared stating that tests of Jack Ruby had shown that he had no brain damage. The reporter who wrote the story admitted that when he got the story he went to District Attorney Wade who refused to comment on it because he did not want to do anything that would endanger the chances of getting an impartial jury in Dallas, since this was something the Judge had asked the attorneys not to submit to the newspapers. This was clearly germane to the issues of the trial itself and was highly prejudicial to the defendant's case. Far from things going back to "normal," the public was inculcated with more and more information and misinformation which would make it difficult, if not impossible, to reach a verdict only upon evidence presented in court.

<sup>87</sup> *Id.* at 361.

<sup>88</sup> *Supra* note 7, at 121.

District Attorney Wade was later quoted as saying that "with the tremendous amount of coverage, I think he can get as fair a trial here as anywhere."<sup>89</sup> This being the case, Judge Brown should have clearly waited until the furor had died down. The defendant is not entitled to "as fair a trial as anywhere" but a trial which is fair to him in all respects. If the publicity was so bad, then the only possible thing to do was to wait. Judge Brown, however, "was getting a little impatient to get on with the trial."<sup>90</sup> If the situation as far as publicity was concerned was so bad, how could the defendant be expected to get that "judicial serenity and calm to which he was entitled"? If anything is clear, that is just what he did not get. Everyone in this country is entitled to as exact justice as human fallibility can supply.

Did Jack Ruby get such a trial? Let Judge Brown speak for that: "I do not think he received exact justice . . . . It still bothers me, but I am not losing any sleep over Ruby."<sup>91</sup>

It took the Texas Court of Criminal Appeals less than three pages to reverse the conviction of Jack Ruby.<sup>92</sup> There were two bases in the main opinion of the court for this decision. The first ground was that statements allegedly made by Ruby to Police Sergeant Patrick Dean after his arrest were erroneously admitted as an oral confession in violation of Texas statutes and not, as vigorously contended by the prosecution, a part of the *res gestae*.<sup>93</sup>

An alternative ground for reversal was the failure of Judge Brown to grant the defendant's motion for a change of venue. The court stated that "it is abundantly clear from a careful study of both opinions of the Supreme Court [*Estes v. Texas* and *Sheppard v. Maxwell*] and the record of this case that the trial court reversibly erred in refusing appellant's motion for a change of venue."

In passing, the court noted that Judge Brown had "recused" himself from any further connection with the case, "and, we have concluded, properly so." This remark can only be a reference to the contentions made by defense counsel, in a habeas corpus proceeding

<sup>89</sup> *Supra* note 7, at 127.

<sup>90</sup> BROWN, *op. cit. supra* note 2, at 163.

<sup>91</sup> BROWN, *op. cit. supra* note 2, at 26.

<sup>92</sup> Rubenstein v. State, 407 S.W.2d 793 (Tex. Crim. App. 1966).

<sup>93</sup> While this decision was based upon a Texas statute prohibiting the introduction into evidence of an oral confession made while in police custody, the *Escobedo* and *Miranda* decisions might also have barred the admission of such statements.

brought in the Texas courts after the trial itself, but before the appeal was decided, that the entire trial was void due to the fact that while the proceedings were in progress Judge Brown was secretly engaged in writing a book describing the trial, giving him a pecuniary interest in the case. The Texas Court of Criminal Appeals denied this petition, stating:

This court is and has been since February 24, 1965, ready, able and willing to hear, consider and decide the questions raised in said appeal in Cause No. 37,900, including the question of the claim of denial of due process and the validity of the judgment of conviction.<sup>94</sup>

In his concurring opinion in the death sentence appeal, Judge McDonald devoted much more time to the change of venue motion. He pointed out that the feeling had been generated that Dallas County's deprivation of the opportunity to prosecute Oswald could find atonement in the prosecution of Ruby. He stated that "the Dallas County climate was one of such strong feeling that it was not humanly possible to give Ruby a fair and impartial trial which is the hallmark of the American due process of law."

Another interesting point which was extensively briefed by counsel for both the prosecution and defense and mentioned in the very first paragraph of the majority opinion was that "countless thousands witnessed this shooting on television." Judge McDonald, in a specially concurring opinion, stated that another ground upon which he would reverse was the fact that ten of the actual jurors had witnessed the shooting of Oswald on television. He was of the opinion that this was enough to bring such persons within the provisions of the Texas statute prohibiting a witness from serving as a juror.<sup>95</sup>

Judge Woodley, in his concurring opinion, on the other hand, while not directly stating his views on this subject, pointed out that:

[T]he majority does not hold that a juror who saw the shooting of the deceased on television is, for that reason alone, disqualified or subject to challenge for cause . . . as being "a witness in the case."<sup>96</sup>

While this is a fascinating aspect of the case, and one which is likely to arise in the future, it is only another bizarre circumstance in a completely fantastic chain of events. Certainly, it is unseemly for one who has in fact witnessed a crime and has, therefore, formed impressions,

<sup>94</sup> *Ex parte* Jack Ruby, 403 S.W.2d 129 (Tex. Crim. App. 1966).

<sup>95</sup> TEX. CODE. CRIM. PROC. ANN. art. 35. 16 (Vernon's 1966).

<sup>96</sup> Rubenstein v. State, *supra* note 92, at 802.

if not prejudices, to judge the guilt or innocence of one accused of having committed it. Television viewers saw more of Jack Ruby's act than the police who were actually on hand and helpless to prevent it.

We will never know whether Jack Ruby would have been able to obtain a fair trial anywhere within the State of Texas. His sudden death from cancer cancelled his new trial arranged for Wichita Falls. While the case was unique, the problem still remains. With the dramatic advances in technology, the news media are ever devising more and more sophisticated and pervasive ways in which to cover news events while they are in progress. One case in point is a recent occurrence, again in Texas, where a young man, lodged in a clock tower, terrorized a university community by indiscriminately shooting at anyone who happened to be passing by. The local television stations were there almost immediately to record the proceedings for posterity. The young man was slain by police officers before he could escape, but one cannot help wondering what kind of a trial he could have had when the entire community had been treated to a play-by-play account of his crimes. To say that the man was clearly guilty means little. Our society is irrevocably committed to a system whereby the twelve good men and true who determine the guilt or innocence of those accused of crime obtain the information upon which to make such a determination from the trial and from nowhere else. Who knows what evidence is adduced for the first time in the courtroom?

Another case in point is one proceeding in the State of Illinois at the writing of this article where a young man is accused of murdering eight Chicago nurses in their apartment. The newspaper coverage of this crime was immediate and overwhelming, and was not confined to the Chicago papers. A change of venue was ordered in that case, but the *voir dire* proceeded at a painfully slow rate. The jury took only fifty-four minutes to find him guilty on all eight indictments. What then, is the answer to the two conflicting interests of the public to be informed of "news" and the defendant to a fair trial?

Many have advocated a strict curb upon the news media. The difficulty with such a solution, assuming that this is a desirable manner in which to deal with the problem, is that any such curb must of necessity be too little and too late. All suggestions in this direction have placed the authority to impose restrictions upon a trial judge. But by the time the case comes to trial, or even before the judicial proceedings have begun, the damage has been done. Whatever else

can be said about the news media, they are not lacking in ingenuity, and they will have already informed their readers, listeners and watchers of all the "facts" of the occurrence, the background of all principals and their families, as well as information and misinformation concerning anyone who happens to be within range of a microphone, camera or reporter's eye or ear. Anything a judge might be able to do at this point will serve at best to prevent an aggravation of the situation. The damage will not be undone.

At the trial, even should the presiding judge keep a tight rein upon the proceedings, the realization of the participants that they are involved in a well publicized case may in itself be sufficient to militate against a fair trial for the accused.

If the news media cannot be effectively prevented from saturating the conscious and the subconscious of the general public in a sensational case, perhaps the way to approach the problem is to dry up their prime sources of information. This would mean that police officials, prosecutors and defense counsels, also, might be prohibited from making statements which could be in any way prejudicial to an accused. This, too, would not be a cure-all. It cannot be repeated too often that the news media are extremely inventive and resourceful and there is nothing to prevent a reporter from obtaining background material about a particular individual. This was the type of material which was particularly prejudicial to Jack Ruby.

Until now it may seem that we are placing most, if not all, of the blame for prejudice directly upon the news media. While many believe that this is justified, it must be remembered that these people are in a legitimate business of making money, and nothing sells newspapers quite like a sensational story about a murder or a rape. Much of the blame, if some blame must be assessed, must therefore be placed upon the general public.

What then, is the answer to this conundrum? Clearly, restrictions upon what the press may print are practically unworkable, often ineffective, unwise and constitutionally wrong, for it is the constant surveillance by the press, radio and television which assures us that our public servants, including police and prosecutors, are performing their duties faithfully and effectively. In the *Ruby* case it was determined that a change of venue should have been granted. While this may be sufficient in some instances, in many others, such as the *Ruby* case itself, this will certainly be insufficient, as the case will be almost

as much discussed in all parts of the state, or the country for that matter. The next best remedy, as suggested by the Supreme Court in *Sheppard*, is a postponement of the trial. While this may, in many instances, allow the furor to abate and give the defendant a better chance to be judged by a truly impartial jury, this certainly does not comply with his constitutional right to a speedy trial. If the defendant, as is so often the case, is unable to post a bond, either due to lack of funds or because the offense itself is nonbailable, he must spend a considerable amount of time in jail awaiting his trial. Should he be found innocent of the charges, he has been effectively punished unjustly.

While this conclusion is perhaps unsatisfactory, it appears that the only workable solution is to rely upon the good sense of the newspapers to restrain themselves in printing material regarding such crimes. Then, once a judicial proceeding has in fact commenced, by indictment for example, counsel for both sides, as well as police officials, must be compelled to save their evidence and information concerning the crime for the actual trial and courtroom, and be prohibited from trying their case in the newspapers. Such actions are condemned by all canons of ethics of the legal profession.<sup>97</sup> The trial judge must effectively control the decorum of the proceedings before him as well as refusing to allow any outside influences to intrude upon the proceedings.<sup>98</sup>

Other than these mild solutions, which seem to be the only workable ones, the appellate courts must always be on guard to reverse those cases where there is any substantial possibility that unfairness or prejudice to the accused has deprived him of that judicial serenity and calm to which he is entitled. This includes the absolute necessity that his case has been heard and decided by twelve jurors who have not brought information with them into the courtroom concerning the case and who have based their decision solely upon the evidence presented to them at the trial. While such reliance upon the reviewing courts to correct the wrongs perpetrated in trial courts may not be wholly satisfactory, this is the system which has been adopted in this country and is used to cure other errors occurring in trial courts;

<sup>97</sup> See, e.g., Canon 20 of the Canons of Professional Ethics of the American and Illinois State Bar Associations which states that newspaper publications by a lawyer as to pending or anticipated litigation are to be condemned.

<sup>98</sup> See, e.g., ABA, CANON 35, CANONS OF JUDICIAL ETHICS (1947).



there is no reason why problems of adverse publicity should be treated any differently than other errors at trial, such as perjury or the erroneous admission of evidence.

The Ruby trial will long be studied for the light it casts upon the implementation of the American Constitutional guarantees. We, as participating lawyers, have never encountered a case more replete with constitutional problems, some of them as yet unresolved. One who enters such a case must be prepared for a process of self-inquiry, no less difficult and rewarding than those directly associated with the law and the evidence. What is one personally to do, or not to do, so that the ends of justice will be served? There lies a story that requires a different forum and another time for its proper development.