Notre Dame Law Review

Volume 42 | Issue 6 Article 12

1-1-1967

Recent Decisions

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RECENT DECISIONS

FAIR TRIAL AND FREE PRESS — COURT ORDER PROHIBITING NEWSPAPERS FROM PUBLISHING ACCOUNT OF OPEN PRETRIAL HEARING IS VIOLATIVE OF FREE SPEECH AND PRESS PROVISION OF STATE CONSTITUTION. — Donald Chambers was arrested and charged with first degree murder. On the date for which his trial had been set and prior to the empanelling of a jury, Chambers applied for a writ of habeas corpus, alleging that the evidence at the preliminary hearing was insufficient to bind him over for a trial on a charge of murder. The judge of the Superior Court of Maricopa County, Arizona, proceeded to an immediate hearing and denied the application. Chambers' counsel noted that there were newspapermen present at this pretrial hearing and requested an order from the judge enjoining them from publishing what transpired at the hearing. The judge granted the order and warned that any disobedience would be considered contempt of court. When the *Phoenix Gazette*, later the same evening, and the *Arizona Republic*, on the following morning, published factual accounts of the habeas corpus hearing, the judge ordered the papers to show cause why they should not be held in contempt. In an action to prohibit the superior court judge from enforcing his order, the Supreme Court of Arizona *held:* the superior court could not prohibit publication of facts transpiring in a public court hearing, because such an order was in violation of the free speech and press provision of the Arizona Constitution.[1] *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966).

As Mr. Justice Black stated in *Bridges v. California*,[2] "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[3] Both of these precepts are firmly imbedded in the United States Constitution.[4] Occasionally, however, these rights impinge upon one another. Publicity guaranteed by freedom of speech and the press sometimes interferes with an accused's guarantee to an impartial trial by jury. For example, banner-headlined news stories that an accused has confessed cannot help but sow prejudice in the minds of potential jurors for his trial. Thus, conflict between the right of free press and the right to a fair trial, and attempts to choose between these rights, have provoked voluminous and vociferous dis-

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1 ARIZ. CONST. art. 2, § 6 provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

2 314 U.S. 252 (1941).

3 *Id.* at 260.

4 U. S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press;* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Emphasis added.)

U. S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. (Emphasis added.)

cussion.[5] The debate has been revitalized by the Supreme Court's recent decision in *Sheppard v. Maxwell*,[6] in which the Court reversed the second degree murder conviction of Dr. Sam Sheppard because of prejudicial newspaper publicity before and during his trial.

The present law concerning judicial powers over publication of information surrounding criminal trials traces its genesis to the Supreme Court's decision in *Bridges v. California*.[7] In *Bridges*, the Supreme Court reversed the contempt convictions of a newspaper publisher and editor for the publication of statements urging a court to deal harshly with union members convicted of assault. The Court noted that the first amendment guarantees of free press and speech, as applied to the states through the due process clause of the fourteenth amendment, made the state's exercise of its contempt power in this situation unconstitutional. Since *Bridges*, the Supreme Court "has developed a body of law, based upon the free speech and press provision of the United States Constitution, that all but insulates news media from responsibility to the courts."[8]

In *Bridges*, the Supreme Court for the first time applied the "clear and present danger" test of *Schenck v. United States*[9] to publications that allegedly interfered with a fair trial. Thus, courts could not restrict press reports and comments unless they constituted a clear and present danger to the administration of justice. Although the Court in *Bridges* noted that it had "not yet fixed the standard by which to determine when a danger shall be deemed clear; [nor] how remote the danger may be and yet be deemed present,"[10] it went on to explain:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the

5 *Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 290 and the Relationship Between the Constitutional Right of a Free Press and the Constitutional Guarantees of an Impartial Trial*, 89th Cong., 1st Sess., pts. 1 & 2 (1965); Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 IND. L. J. 69 (1965); Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810 (1961); Haimbaugh, *Free Press Versus Fair Trial: The Contribution of Mr. Justice Frankfurter*, 26 U. PITT. L. REV. 491 (1965); Hudon, *Freedom of the Press Versus Fair Trial: The Remedy Lies with the Courts*, 1 VALPARAISO L. REV. 8 (1966); LeWine, *What Constitutes Prejudicial Publicity in Pending Cases?* 51 A.B.A.J. 942 (1965); McCullough, *Trial by Newspapers — Free Press and Fair Trial*, 12 S.D.L. REV. 1 (1967); Mosk, *Free Press and Fair Trial — Placing Responsibility*, 5 SANTA CLARA LAW. 107 (1965); Comment, *Prejudicial Publicity Versus the Rights of the Accused*, 26 LA. L. REV. 818 (1966); Comment, *Publicity and Partial Criminal Trials: Resolving the Constitutional Conflict*, 39 SO. CAL. L. REV. 275 (1966). *E.g.*, AMERICAN NEWSPAPER PUBLISHERS ASSN., FREE PRESS AND FAIR TRIAL (1967); GILLMOR, FREE PRESS AND FAIR TRIAL (1966); LOFTON, JUSTICE AND THE PRESS (1966).

6 384 U.S. 333 (1966).

7 314 U.S. 252 (1941).

8 Mosk, *supra* note 5, at 108.

9 249 U.S. 47 (1919).

10 Bridges v. California, 314 U.S. 252, 261 (1941), quoting Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357, 374 (1927).

broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[11]

The clear and present danger test severely restricts judicial use of the contempt power to control publicity surrounding a trial. Mr. Justice Frankfurter, in his dissenting opinion in *Craig v. Harney*,[12] recognized the restrictive nature of the clear and present danger test when he stated: "Hereafter the States cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court, or occurs in its immediate proximity."[13] By adopting the clear and present danger test, however, the Court did not totally exempt publications from the judicial contempt power. It recognized the possibility that some publications might well constitute a clear and present danger to the administration of justice. Nevertheless, the Court has yet to uphold a contempt conviction against a newspaper on the basis that the publication meets the clear and present danger test.

The Supreme Court has reaffirmed and reapplied the clear and present danger test in overturning a number of state court contempt convictions for publication. In *Pennekamp v. Florida*,[14] the Court overturned contempt convictions that a Florida circuit court had imposed against the *Miami Herald* for editorials criticizing the court's actions in dismissing several criminal cases. In *Craig v. Harney*,[15] the Court reversed a contempt finding against the publisher and staff members of a Corpus Christi newspaper that had criticized a judge's alleged improper treatment of a criminal case. Finally, in *Wood v. Georgia*,[16] the Supreme Court overturned a contempt conviction against a sheriff who had issued statements to the press for the alleged purpose of influencing grand jurors during their investigation of a political campaign.

It is interesting to note that none of these cases out of which the contempt proceedings arose involved a trial by jury. This fact received special mention in both *Pennekamp* and *Wood*.[17] It has been suggested that in jury trials a less restrictive test than the clear and present danger requirement should be applied in determining the validity of contempt convictions for prejudicial publication.[18]

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11 Bridges v. California, 314 U.S. 252, 263 (1941).
12 331 U.S. 367 (1947).
13 *Id.* at 391 (dissenting opinion).
14 328 U.S. 331 (1946).
15 331 U.S. 367 (1947).
16 370 U.S. 375 (1962).
17 Pennekamp v. Florida, 328 U.S. 331, 348 (1946):

> The comments were made about judges of courts of general jurisdiction — judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion.

Wood v. Georgia, 370 U.S. 375, 389 (1962):

> First, it is important to emphasize that this case does not represent a situation where an individual is on trial; there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding.

18 See Mr. Justice Harlan's dissenting opinion in Wood v. Georgia, *supra* note 17, at 401-02 (1962); Comment, 26 LA. L. REV. 818, *supra* note 5, at 845.

However, in *Maryland v. Baltimore Radio Show, Inc.*,[19] the Supreme Court refused to grant certiorari where a state appellate court had overturned the trial court's contempt conviction against a radio station that broadcast news of an accused's confession and prior criminal record. Subsequent to the broadcast, the accused was tried by a jury. Mr. Justice Frankfurter, who dissented in *Bridges* and *Craig,* wrote an opinion specifically pointing out that denial of certiorari should not be interpreted as either approval or affirmance of the state decision. Thus, the question of limitations on the contempt power when applied to publicity where a jury trial is involved still remains unsettled.

As explained in a special concurring opinion in *Phoenix Newspapers,* the judicial contempt power over the press is much different in Great Britain. There, publication of any material that tends to interfere with the right to a fair trial or to scandalize the court is summarily punished as contempt of court.[20] The law of contempt in England in regard to free press and fair trial has been summarized by one recent commentator:

> The law is set in motion by out-of-court publications having a "reasonable tendency" to obstruct or impair the proper administration of justice, whether before a judge or a jury, or to influence or prejudice either litigants or witnesses to a cause; by violation of the rules with respect to pendency, which may begin before a suspect is arrested and continue until all possibilities of appeal have been exhausted; by the illegal coverage of preliminary examinations; and by criticism of a judge which may "lower his authority."[21]

Because the discussion of the conflict between free press and fair trial has included the suggestion that the United States adopt the British practice of using more effectively the contempt power to control publication surrounding criminal judicial proceedings,[22] consideration should be given to the history of free press in America.[23] Mr. Justice Black in *Bridges* pointed out that one of the purposes of the American Revolution was to throw off the English practices of restricting the press.

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that

19 338 U.S. 912 (1950).

20 For a list of English decisions dealing with contempt for comments prejudicial to the fair administration of criminal justice, see appendix to opinion of Mr. Justice Frankfurter in Maryland v. Baltimore Radio Show, Inc., *supra* note 19, at 921-36.

21 Gillmor, *Free Press and Fair Trial in English Law,* 22 WASH. & LEE L. REV. 17, 41 (1965).

22 See Donnelly & Goldfarb, *Contempt by Publication in the United States,* 24 MODERN L. REV. 239 (1961). For criticism of the British method, see Cowen, *supra* note 5. For a general discussion of British method, see Goodhart, *Newspapers and Contempt of Court in English Law,* 48 HARV. L. REV. 885 (1935).

23 For a good history on the press in America, see CHAFEE, FREE SPEECH IN THE UNITED STATES (1948); THAYER, LEGAL CONTROL OF THE PRESS (3d ed. 1956).

> the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.[24]

Thus, there are constitutional and historical reasons why the law in the United States dealing with contempt by publication is different from that in Britain.

The specific issue involved in *Phoenix Newspapers* was whether or not a judge could prohibit publication of what transpired at an open pretrial hearing. There are no reported cases which uphold a judicial restriction on the press' factual reporting of what occurred in a public hearing. Indeed, in *Craig*, the Supreme Court emphasized that "a trial is a public event. What transpires in a court room is public property."[25] Although no trial was involved in *Phoenix Newspapers*, the contempt order grew out of a public pretrial hearing.

It is interesting to note that Arizona is one of only six states that retain the Field Code provision providing for a closed preliminary examination.[26] At the accused's request, it is mandatory for the judge to exclude from the courtroom everyone except the attorneys and officers of the court.[27] It has been suggested that Field's proposal for closed preliminary hearings was influenced by his personal antipathy toward newspapers.[28] Thus, an argument could be made that this provision extends to all pretrial hearings, including the habeas corpus hearing in *Phoenix Newspapers*. However, in the absence of a request for a closed hearing, once reporters have been admitted to the hearing, it seems that no censorship can be applied by the court.

Publicity emanating from pretrial hearings has become one of the focal points in the recent debate over free press and fair trial.[29] Preliminary hearings, in particular, present a real problem to the constitutional guarantee of an impartial trial. Usually at these hearings, only the prosecution's side of the case is presented; and quite frequently evidence will be introduced which would be inadmissible at the trial. Furthermore, as stated by the superior court judge who issued the order enjoining publication of any facts of Chamber's pretrial hearing in *Phoenix Newspapers*, an action holding the accused over for trial may appear to the general public as a testament of guilt rather than a mere finding of probable cause.[30]

In 1957, the Home Secretary of England appointed a special committee to

24 Bridges v. California, 314 U.S. 252, 265 (1941).

25 Craig v. Harney, 331 U.S. 367, 374 (1947).

26 For a good discussion of the section of the Field Code providing for closed preliminary hearings and the states which retain it, see Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. REV. 397, 407 (1961).

27 ARIZ. REV. STAT. ANN., RULE 27 (1956) provides:

> During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined. The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court.

28 Geis, *supra* note 26, at 408-09.

29 See generally Geis, *supra* note 26; [July 1958] REPORT OF THE DEPARTMENTAL COMMITTEE ON PROCEEDINGS BEFORE EXAMINING JUSTICES, presented to Parliament by the Secretary of State for the Home Department by Command of her Majesty [hereinafter cited as REPORT TO PARLIAMENT]; ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft 1966) [hereinafter cited as ABA REP.].

30 Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P. 2d 594, 595 (1966).

study the problem of preliminary hearings and their press coverage.[31] After hearing numerous witnesses and analyzing different views, the committee made two major recommendations. First, the committee concluded that the use of closed preliminary hearings should not be increased.[32] These preliminary proceedings should be held in private only when absolutely necessary for the sake of justice.[33] Second, the committee recommended that "unless the accused has been discharged or until the trial had ended, any report of committal proceedings should be restricted to particulars of the name of the accused, the charge, the decision of the court and the like."[34] The committee further recommended that the defense should not have the prerogative of saying whether or not the restrictions would apply. In its general conclusion, the committee stated:

> We realise that any restriction on the reporting of what occurs in court was believed by the representatives of the press who gave evidence before us to infringe that freedom of reporting which they regard as essential to the proper administration of justice. We agree that freedom to report trials is essential, and we re-affirm the right of the press to report proceedings which result in the discharge or conviction of the accused; but we draw a clear distinction between reporting the trial itself and reporting preliminary proceedings. It is in our opinion illogical and wrong to permit such latitude in the reporting of preliminary proceedings that confidence in the fairness of the trial is undermined. That in our view is the crux of the matter.[35]

Recommendations to alleviate harmful publicity of pretrial hearings in the United States have been made by the American Bar Association's Special Committee on Minimum Standards for the Administration of Criminal Justice.[36] In the ABA committee's recent tentative draft of standards relating to fair trial and free press, the committee recommended that the accused be given the privilege of a closed pretrial hearing.[37] The closed hearing would be invoked on

31 The Committee described their task thusly:

> [T]o consider whether proceedings before examining justices should continue to take place in open court, and if so, whether it is necessary or desirable that any restriction should be placed on the publication of reports of such proceedings . . . . REPORT TO PARLIAMENT 1.

32 The Committee gave the following reasons for their conclusion:

> There are weighty objections to committal proceedings being generally held *in camera:*
>
> (*a*) There is a general distaste for the idea of justice being administered in a court of law behind locked doors.
>
> (*b*) If examining justices were to dismiss a charge when sitting *in camera*, it might be suspected that some favouritism had been shown to the accused.
>
> (*c*) There might be suspicion that the conduct of the proceedings did not come up to the normal high standards of magistrates' courts. REPORT TO PARLIAMENT 9.

33 The Committee pointed out instances where the preliminary hearings would have to be closed:

> [F]or example § [*sic*], where there is evidence which in the interests of national security could not be given, where a witness has been put in fear or for some other reason evidence would not be forthcoming, or where evidence must be taken elsewhere than in court (as in the case of illness). REPORT TO PARLIAMENT 23.

34 *Id.* at 24.

35 *Id.* at 25.

36 ABA REP.

37 *Id.* § 3.1 provides:

> Pretrial hearings.
>
> It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:
>
> Motion to exclude public from all or part of pretrial hearing.

the defendant's motion, or on the motion of the court itself; and it would be granted unless there were no likelihood that publicity emanating from the hearing would interfere with the accused's right to a fair trial. The committee commented that there might be a question of the constitutionality of a closed hearing, but it noted that jurisdictions split over this issue.[38] The committee expressed the view that the constitutional right to a public trial does not preclude the adoption of its proposal.[39] An essential aspect of the recommendation provides that a complete record of the closed proceedings must be kept and must be made available at the completion of trial or disposition of the case.

The ABA's committee also recommended limited use of the contempt power against anyone who "knowingly violates a valid judicial order not to make untimely disclosure of matters referred to in a hearing from which the public is excluded . . . ."[40] The committee explained that such an order could apply to one who obtained the information improperly from court officials or one who was admitted to the closed hearings on the condition that he not reveal what went on until the record was made available to the public. The committee expressed the belief that such a contempt power would be constitutionally permissible.[41] However, unless the Supreme Court takes a less restrictive view than its current clear and present danger test, it is questionable whether or not the contempt power could effectively be used to restrict the press from untimely publication of pretrial proceedings.

In the absence of any statutes embodying recommendations similar to those of either the English or ABA committees, the Superior Court of Maricopa County had no effective means to prohibit reporters from printing a factual account of what transpired at an open pretrial hearing. The Arizona Supreme Court in *Phoenix Newspapers* did not have to go beyond the Arizona Constitution to hold that a judge could not prohibit the press from publishing such an account. To be sure, if the Arizona Constitution had not so provided, the decision would have been the same based on the Supreme Court's interpretation of the free press provision of the federal constitution as applied to the states through the fourteenth amendment.

Although proof is lacking as to what effect publicity of a pretrial hearing has

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

38 ABA REP. 115-16.
39 *Ibid.*
40 *Id.* at 152.
41 *Id.* at 153.

on an accused's right to a fair trial, it is generally admitted that publicity can and does interfere with this right. The means of alleviating this interference, however, is not to broaden the use of the contempt power to control press reports of pretrial hearings; for history reveals that the American people are suspicious of broad discretionary powers on the part of the judiciary. Likewise, the answer does not lie in increased use of closed pretrial hearings, for this would encourage suspicion by the public. It is submitted that the best recommendation for controlling the effect of publicity of pretrial hearings on the accused's right to a fair trial is that adopted by the committee that studied the problem in England. A statute stipulating what facts of the hearing could be printed would solve the problems of discretionary judicial power, would allow the press to be present, and at the same time, would help insure against the wrong kind of publicity.

Charles Weiss

FAIR TRIAL AND FREE PRESS — ACTIVITIES OF STATE ATTORNEY GENERAL IN INITIATING PUBLICITY CONCERNING OFFENSE WITH WHICH AN ACCUSED WAS CHARGED DID NOT NECESSARILY PRECLUDE FAIR TRIAL. — Neil Woodington, a prominent Madison, Wisconsin, businessman, was an officer of a holding company and of a number of its subsidiary corporations. As such, Woodington was aware of and participated in a "check kiting" scheme by which unauthorized credit was obtained through a system of rapid transfers of funds among banks so as to take advantage of the check clearing delay. This unauthorized credit was shown as cash on a balance sheet submitted to the Wisconsin Department of Securities as part of a prospectus by one of the corporations which Woodington controlled. The submission of such a misleading prospectus was a violation of the Wisconsin blue sky law.[1] The then attorney general of Wisconsin pressed for an investigation of Woodington's activities shortly before the 1964 general election. During the investigation, several state officials exchanged letters and issued press releases. The attorney general made public statements to the effect that there had been complaints as to the activities of the corporations in question but that the insurance commissioner, governor, and district attorney, members of the opposing political party, refused to cooperate in the investigation. The attorney general made other statements referring to Woodington's membership in, and substantial contributions to, the political party of the governor and district attorney; and while there was no specific accusation as to Woodington's guilt, the statements indicated that the investigation should proceed forthwith to determine guilt or innocence. Woodington also participated in the pretrial publicity by issuing news releases and by purchasing full-page newspaper space for his statements. All of the charges, countercharges, and explanations received publicity and comment in the press, radio, and television. Following Woodington's eventual conviction for violation of the blue sky law, he appealed on the ground that pretrial publicity originating from

1 WIS. STAT. ANN. § 189.19(2)(d) (1957) provides for criminal penalties for any "director, officer, agent or employee" of a corporation who shall "file or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading."

state agents, particularly the attorney general, was such that it was not certain whether he did or could have received a fair trial thus depriving him of due process and requiring dismissal of the charges. In affirming Woodington's conviction, the Supreme Court of Wisconsin *held:* a defendant who did not ask for a change of venue or a continuance, or make a record of *voir dire,* or seek a new trial because of adverse publicity, or in any way show or allege that the trial he did receive was unfair, may not obtain a dismissal due to pretrial publicity generated by the state attorney general. *State v. Woodington,* 31 Wis. 2d 151, 142 N.W.2d 810, *rehearing denied,* 143 N.W.2d 753 (1966).

In the usual case alleging prejudicial pretrial publicity, reliance is placed upon the content of the publicity. Woodington, however, did not rely upon the content of the publicity to support his argument seeking a dismissal, but instead, focused upon its source, *i.e.,* agents of the state and particularly the attorney general.[2] His argument might be characterized as suggesting that such pretrial statements by the state attorney general make it per se impossible to obtain a fair trial so that dismissal is the only remedy. Although the Wisconsin Supreme Court rightly rejected this argument, its reasons for doing so are subject to criticism.

Under Wisconsin law[3] it is apparent, as the court stated, "that the attorney general has a legitimate interest in investigating complaints of criminal conduct if, in his opinion, the investigation is warranted."[4] The court went on to say:

> For the courts to interfere with the attorney general's duty to investigate and prosecute crime and make public material he deems in the public interest could be an unwarranted interference with the balance of power. This is pointed out in *Delaney* as to the legislative branch, and is said to apply to the executive branch as well.[5]

Delaney v. United States[6] was a case in which publicity in regard to a collector of Internal Revenue who was under indictment for accepting bribes and partaking in fraud was obviously prejudicial. The source of this prejudicial publicity was a congressional subcommittee hearing. The United States Court of Appeals for the First Circuit said:

> If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of prejudice may reasonably be thought to have been substantially removed.[7]

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2 State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 815-16 (1966).
3 Wis. Stat. Ann. § 14.526(1) (Supp. 1967) provides, "There is created within the office of the attorney general the division of criminal investigation for the purpose of investigating crime which is state-wide in nature, importance or influence."
4 State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 816 (1966).
5 *Id.,* 142 N.W.2d at 818.
6 Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).
7 *Id.* at 114.

Delaney does support the proposition that courts will not interfere with the legislative or executive duty to make public material that it is in the public interest to know. Its major thrust, however, is its holding that courts will not allow a trial to take place when publicity against the defendant is so prejudicial that he could not receive a fair trial.

As the Wisconsin court noted, although the attorney general, as attorney for the body politic, should be allowed sufficient latitude to inform the public as to his activities in matters of great public concern, this right should not be exercised so as to prejudice rights of a defendant in pending litigation.[8] The American Bar Association Committee on Professional Ethics and Grievances incorporated this suggestion into its recommendations when it said:

> In a broad aspect the Attorney General is attorney for the body politic. Therefore, in publishing his reports and in issuing public statements for dissemination through ordinary news channels, he is reporting to the public. Herein lies a material difference between a report or a press release issued by the Attorney General and one given out by an attorney for a private client. Notwithstanding this difference, certain limitations should be regarded in giving out press releases by the Attorney General respecting pending or prospective litigation in order that the rights of the defendants, both in criminal and civil prosecutions, be neither impaired nor prejudiced.[9]

Canon 20 of the American Bar Association's Canons of Professional Ethics, as established in Wisconsin,[10] reads in part: "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."[11] Although an attorney general is part of the executive branch of government, as an attorney he is also an officer of the court[12] and is thus bound by the canons of judicial ethics.[13] As an officer of the court,

8 State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 818 (1966).

9 ABA, Opinions of Committee on Professional Ethics and Grievances, Opinion 199, pp. 400-01, concerning Canon 20 (1957). Cited at State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 818 n.1 (1966).

10 Rule 9 of the Wisconsin State Bar Rules makes the rules of professional conduct set forth by the ABA's Canons of Professional Ethics, as supplemented or modified by pronouncements of the court, the standards governing the practice of law in Wisconsin. WIS. STAT. ANN., App. to ch. 256, at 128 (Cumm. Supp. 1967).

11 *Id.* at 156. The American Bar Association Advisory Committee on Fair Trial and Free Press recommendations for revision of the canons go even further.

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.
>
> With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 1.1 (Tent. Draft 1966).

12 *In re* Lord, 255 Minn. 370, 372, 97 N.W.2d 287, 289 (1959).

13 *In re* Ridgely, 48 Del. 464, 106 A.2d 527 (1954); State v. City of Kansas City, 186 Kan. 190, 350 P.2d 37 (1960).

it is always improper and unethical for an attorney general to discuss a case which is pending when the full facts are not accurately given, or to give the public opinions concerning the facts and law which he knows to be wrong.[14]

While the attorney general was not on trial in *Woodington*, it is obvious that his statements could have created sufficient prejudice as to deprive Woodington of a fair trial. Statements of this nature cannot be condoned because of the attorney general's position as attorney for the body politic nor on any theory of separation of powers. As seen above, the attorney general retains the responsibilities of a lawyer despite his executive position. Likewise, the court retains its responsibility of providing a fair trial and of granting a remedy if prejudice in fact creeps into a trial.

A further ground for criticizing the court's opinion in *Woodington* is its requirement that there be a showing of actual prejudice before any relief can be granted. The court stated that "a perusal of the various due process cases indicates that the law is concerned with the actual effect ill-advised pre-trial publicity produces at the trial."[15] It made much of the fact that Woodington did not categorically claim he did not receive a fair trial, but rather only that the pretrial publicity was such that it is not certain whether he did or could have received a fair trial anywhere in the state.

A long string of cases have considered the problem of whether the mere possibility or probability of prejudice, or only actual prejudice, pleaded and proven, vitiates a fair trial.[16] As early as 1878, in *Reynolds v. United States*,[17] the Supreme Court of the United States held that for an appellate court to grant relief from a trial court's refusal to allow a challenge for cause against a juror who had formed an opinion as to guilt due to pretrial publicity, there had to be a showing of the actual existence of such an opinion as would raise a presumption of partiality.[18] This stringent requirement of the showing of the actual existence of such prejudice as would raise a presumption of partiality lasted well into this century and is probably what the Wisconsin court was referring to. The Supreme Court followed this rule as recently as 1952 in *Stroble v. California*.[19] In that case, although there had been highly inflammatory newspaper publicity, the Court refused to grant relief as there had been "no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury,"[20] since petitioner "failed to show that the newspaper accounts aroused against him such prejudice in the community as to 'necessarily prevent a fair trial' . . . ."[21]

The movement away from the restrictive *Reynolds* formula began in *Marshall v. United States*,[22] a federal prosecution during which evidence ruled inadmissible at the trial reached the jury through newspaper accounts. Despite

14 *In re* Lord, 255 Minn. 370, 380, 97 N.W.2d 287, 294 (1959).
15 State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 816 (1966).
16 See generally Hudon, *Freedom of the Press Versus Fair Trial: The Remedy Lies with the Courts*, 1 VALPARAISO L. REV. 8 (1966).
17 98 U.S. 145 (1878).
18 *Id.* at 157.
19 343 U.S. 181 (1952).
20 *Id.* at 195.
21 *Id.* at 193.
22 360 U.S. 310 (1959).

the fact each juror swore he would not be influenced by the newspaper reports and felt no prejudice, the Supreme Court reversed the conviction and called for a new trial. It stated:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures.[23]

Thus, the Court granted relief even though there had been no showing of actual prejudice. In so doing, the Court held that the jury's learning of prohibited evidence through newspaper articles was prejudicial per se.

In the transitional case of *Irvin v. Dowd,*[24] the Supreme Court required a much smaller showing of actual prejudice in granting relief to a petitioner found guilty in a *state* prosecution. After paying lip service to the *Reynolds* formula, the Court vacated and remanded a Seventh Circuit decision on the ground that despite each juror's sincere promise to be fair and impartial, the finding of impartiality did not meet constitutional standards when the petitioner was tried in an atmosphere disturbed by so huge a wave of public passion and by a jury in which two-thirds of the members admitted possessing a belief in his guilt.[25] Again there had been no showing of actual prejudice — each juror had promised to be fair and impartial. The Court, however, did not accept their promises in the light of their preexisting belief of guilt and the strong atmosphere of prejudice created by newspaper publicity. Although the Court still sought some showing of the specific state of mind of the jurors,[26] in effect it again found prejudice per se.

In *Rideau v. Louisiana,*[27] the Supreme Court reversed the conviction of an accused who was seen on a television interview during which he admitted the crime of which he was charged. Without pausing to examine a transcript of the *voir dire,* the Court did not hesitate to hold that due process of law required a trial before a jury drawn from a community of people who had not seen or heard the interview.[28] Once again, the Court viewed the mere fact of the publicity as sufficiently prejudicial to warrant a reversal without any "proof" of actual prejudice arising therefrom. Courts under the *Reynolds* formula would have looked to the transcript of the *voir dire* to see if any of the jurors were actually prejudiced by the interview. The Court in *Rideau,* however, found the mere fact of such a televised interview to be sufficiently prejudicial to prevent a fair trial in that community. In *Turner v. Louisiana*[29] and in *Estes v. Texas,*[30] the Court followed the *Rideau* view and struck down state convic-

23 *Id.* at 312-13.
24 366 U.S. 717 (1961).
25 *Id.* at 728.
26 *Id.* at 723.
27 373 U.S. 723 (1963).
28 *Id.* at 727.
29 379 U.S. 466 (1965).
30 381 U.S. 532 (1965). Here the trial had been televised.

tions because of the probability of prejudice despite the lack of proof of any actual prejudice.

In the now famous case of *Sheppard v. Maxwell*,[31] the Court continued the drift away from the *Reynolds* formula when it stated:

> 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.[32] (Emphasis added.)

In view of these cases, it is evident that a criminal defendant no longer needs to show actual prejudice to obtain relief at the trial or appellate stage from possibly prejudicial publicity. It appears well settled that a prosecution in which there is a "probability that prejudice will result,"[33] or in which there is a "reasonable likelihood"[34] of such prejudice violates due process of law under the fourteenth amendment.

Thus, it is suggested that the Wisconsin court erred in its requirement that Woodington would have had to show that he did not receive a fair trial because the particular jury was prejudiced or unfair, before he could raise the question of whether or not a fair trial could ever be obtained.[35] It would seem that if the statements by the attorney general, which as we have seen are not insulated because of his executive office, created a "reasonable likelihood of prejudice" or a "probability that prejudice would result," then Woodington was denied due process. The Wisconsin court never reached this question because it insisted on a showing of actual prejudice, and herein lay their mistake. Woodington did not claim actual prejudice due to the *content* of the pretrial publicity. Rather, he claimed an uncertainty as to the fairness of his trial or of any trial he could have received due to the *source* of the publicity, *i.e.*, the state attorney general. In other words, he asked if such statements by the attorney general did not pose a "reasonable likelihood" or "probability" of prejudice. This is a question the court might well have answered in the negative, but one which they did not answer at all.

Ultimately, the Wisconsin Supreme Court based its affirmance of the conviction on the ground that dismissal is not the proper remedy in cases involving prejudicial pretrial publicity. The court suggested that the remedies in publicity cases are change of venue, continuance, and careful selection of a jury.[36] The

31 384 U.S. 333 (1966). *Sheppard* was decided one day before *Woodington* so that the Wisconsin court did not have the advantage of the Supreme Court's latest word on this issue. However, in denying Woodington's motion for a rehearing the Wisconsin court found nothing in *Sheppard* that would impel it to review Woodington's claim. State v. Woodington, 31 Wis. 2d 151, 143 N.W.2d 753, 754 (1966).

32 Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).

33 Estes v. Texas, 381 U.S. 532, 542 (1965).

34 Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

35 State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 816 (1966).

36 *Id.* at 817. These no doubt are the major means of avoiding prejudice due to pretrial publicity, though *Sheppard* suggests numerous others such as careful questioning of the jury to see what material has reached them during trial or before; strict rules of courtroom control; effective control of counsel for both sides, witnesses, accused, court staff, and enforcement officers as to the release of potentially prejudicial material; warnings to the press of the possibility of prejudice certain reports might bring; and of course reversal. Sheppard v. Maxwell, 384 U.S. 333, 357-63 (1966).

court made much of the fact that Woodington did not attempt to employ any of these remedies, nor did he move for a new trial.[37]

There are obvious reasons why courts refuse to grant dismissal as the remedy where the only charge was prejudice due to pretrial publicity. Doing so would be tantamount to saying that the defendant in question could never receive a fair trial despite the proper employment of the remedies of change of venue, continuance, careful jury selection, and alert control of the trial and its participants.[38] To grant a dismissal in such a case would be an abdication of the very task the court is to perform, *i.e.,* the administration of criminal justice for the good of both the criminal and society.

Woodington was not a case where there was so great an amount of pretrial publicity as to make a fair trial impossible, when compared to the excesses seen in such cases as *Sheppard.* Even if it were found that the statements of the attorney general did create the "likelihood" or "probability" of prejudice, the most that could be hoped for would be a reversal with the state being allowed to try the defendant again, as is generally the remedy granted in these cases on appeal.[39]

Finally the Wisconsin court's reliance on the failure of the defendant to seek a change of venue, a continuance, or a new trial, or to make a record of *voir dire* as grounds for saying he had passed up the available remedies is most tenuous. In *Delaney v. United States,*[40] a defendant who had failed to seek a change of venue at trial, later complained of pretrial publicity. The First Circuit stated:

> The right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed; and under the circumstances of this case we do not think that the defendant's appeal stands any worse for failure on his part to apply for a change of venue.[41]

Likewise, in *Geagan v. Gavin,*[42] the defendants had not asked at or before trial for any judicial action to control the pretrial publicity of which they now complained on appeal. Nor had they moved for a change of venue or a continuance. The First Circuit stated:

> Since in the present state of the law it is not clear that any court, state or federal, has any practically effective means at its disposal for preventing

37 State v. Woodington, 31 Wis. 2d 151, 142 N.W.2d 810, 816, 818 (1966). Footnote 2 on page 818 goes so far as to suggest that Woodington "should have made a record of all or a part of *voir dire* to preserve his claim."

38 See Frank v. Mangum 237 U.S. 309, 337 (1915); Delaney v. United States, 199 F.2d 107, 112 (1st Cir. 1952); Commonwealth v. Geagan, 339 Mass. 487, 159 N.E.2d 870, 881 (1959).

39 See, *e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); 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). *Sheppard* and *Irvin* were habeas corpus cases, but the effect of the result is the same.

40 199 F.2d 107 (1st Cir. 1952).

41 *Id.* at 116.

42 292 F.2d 244 (1st Cir. 1961).

> "trial by newspaper," . . . and since there is certainly some basis for counsels' assertion that the prejudicial publicity was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time, it seems to us that for the purposes of this particular appeal the defendants should stand no worse for their counsels' failure to ask for some sort of court order limiting publicity or for a change of venue or a continuance.[43]

In conclusion it would seem that the Wisconsin Supreme Court reached the correct judgment in refusing to grant Woodington a dismissal due to the source of pretrial publicity. However, the court's shielding of the attorney general's statements behind his office is not only legally questionable but is also professionally distasteful. The court's requirement of a showing of actual prejudice seems no longer valid in publicity cases and could, in the context of more shocking publicity, lead to reversal by the United States Supreme Court. Finally the court's reliance on the defendant's failure to assert his rights to a change of venue, continuance, etc., to deny any right to other or further remedies is a dangerous precedent in the area of fair trial or to any other civil liberty to which it might be applied.

The defendant in *Woodington* may well have received a fair trial by an impartial jury. However, the Supreme Court of Wisconsin never really reached this question. Hopefully, when presented with publicity cases in the future, courts will throw aside the excuses for avoiding the issue and seek to determine whether there was a reasonable likelihood that prejudice prevented a fair trial.

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43 *Id.* at 246.