Florida Law Review

Volume 19 | Issue 4 Article 5

March 1967

Free Press and Fair Trial: An Evolving Controversy

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CONSTITUTIONAL LAW:

FREE PRESS AND FAIR TRIAL: AN EVOLVING CONTROVERSY*

BASES AND EVOLUTION

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1] Though the right to a free press has been determined not to be absolute,[2] it is, nevertheless, a right jealously guarded.[3] States as well as the federal government are obliged to protect freedom of the press.[4] The Supreme Court of the United States has said that first amendment rights are preferred and should be the most closely guarded of all our freedoms.[5]

The sixth amendment to the United States Constitution guarantees: "In all criminal prosecutions,[6] the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The right to trial by jury has never been held a *sine qua non* of fourteenth amendment due process,[7] probably because every state guarantees an accused a jury trial.[8] The right of the accused to a fair trial, however, is implicit in the concept of "due process of law."[9] States are required

*This note received the winter 1967 *Gertrude Brick Law Review Apprentice Prize* for the best student work submitted for this issue.

1. U.S. CONST. amend. I.

2. It has been held that freedom of the press is subject to restriction if its exercise would do serious political, economic, or moral injury to the government. *E.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Whitney v. California, 274 U.S. 357 (1927) (criminal syndicalism); Gitlow v. New York, 268 U.S. 652 (1925) (criminal anarchy); Schenck v. United States, 249 U.S. 47 (1919) (espionage). Freedom of the press cannot be used as an excuse to violate a city ordinance that has the valid purpose of restricting purely commercial advertising. Valentine v. Chrestensen, 316 U.S. 52 (1942).

3. See, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

4. "[L]iberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action . . . ." Near v. Minnesota, 283 U.S. 697, 707 (1931).

5. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

6. This note does not consider the problems that arise when a jury in a civil case is exposed to prejudicial publicity.

7. Irvin v. Dowd, 366 U.S. 717, 721 (1961) (dictum); Palko v. Connecticut, 302 U.S. 319, 324 (1937) (dictum).

8. COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 578-79 (1959). "The right of trial by jury shall bee [*sic*] secured to all, and remain inviolate forever." FLA. CONST. Decl. of Rights §3.

9. Irvin v. Dowd, 366 U.S. 717 (1961). Guarantees by states that are analogous to the sixth amendment, such as §11 of the Declaration of Rights to the Florida Constitution, are important only because the state courts may hold their standard to be higher than that which may be required by the federal constitution. How-

to see that criminal proceedings are conducted in an impartial manner whether the trial is by the court or by a jury.[10]

Normally the first and sixth amendment guarantees operate in different spheres, so there is no conflict between them. A problem arises, however, when attention of the press becomes focused on a person accused of criminal conduct. Stated in its simplest terms, the problem is whether a defendant can have an impartial trial when the jury has been exposed to prejudicial publicity.

Arguably, freedom to publish also includes a right of access to sources of information and implies a public "right to know." However, even if these rights are a part of freedom of the press, they are subordinate to the defendant's right to an impartial trial. In *Estes v. Texas*[11] the state argued that courtroom proceedings could be televised, since there was a right of access extended by the first amendment, and that the public has a right to know what goes on in its courts. The Court rejected both arguments because it considered the defendant's right to an impartial trial adversely affected by the presence of television cameras in the courtroom. Whatever support is found for the right of access and the right to know in the first amendment, it is certain that the guarantee of a public trial is not primarily for the benefit of the public.[12] Although an indiscriminate exclusion of the public from judicial proceedings would probably be unconstitutional,[13] state courts have held that only the accused has a basis for complaint when the general public and news media have been excluded from his trial.[14]

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ever, it is not certain exactly what the federal standard is. "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." Irvin v. Dowd, 366 U.S. 717, 724-25 (1961).

10. This note is limited to a discussion of the effect of prejudicial publicity on the jury rather than the effect on the judge. For the idea that comment on pending cases may have less effect on a judge, see Pennekamp v. Florida, 328 U.S. 331, 348 (1946) (dictum). Of course a jury may be prejudiced and therefore unacceptable because of information obtained from sources other than the news media. See Parker v. Gladden, 87 Sup. Ct. 468 (1966) (prejudicial statements made to the jury by the bailiff).

11. 381 U.S. 532 (1965).

12. "The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned." *Id.* at 539-40. See *In re* Oliver, 333 U.S. 257, 270 (1948).

13. See Thompson v. People, 156 Colo. 416, 399 P.2d 776 (1965).

14. United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). The news media brought proceedings to restrain the trial judge from enforcing an order excluding the general public and the press during presentation of the case on grounds of public decency. The trial involved a prosecution for compulsory prostitution. The New York Court of Appeals denied relief because it believed

Rights of the defendant, such as the right to a speedy trial and the right to be tried by a jury, may also be affected by prejudicial publicity.[15] Another consideration is the right of the state to protect its citizenry from crime and criminal influence.[16] Basically, though, the "conflict" between the guarantees of free press and fair trial creates the main problems.

Although the "conflict" between free press and fair trial is not new,[17] it is one toward which the attitude of the United States Supreme Court has changed in the past few years. Beginning with *Irvin v. Dowd*[18] and culminating in *Rideau v. Louisiana*,[19] *Estes v. Texas*,[20] and *Sheppard v. Maxwell*,[21] the Court has departed from the old rules concerning prejudicial publicity. In *Stroble v. California*[22] and in *Irvin*, two of the more notorious prejudicial publicity cases to reach the Court before *Rideau*, alleged confessions of the accused individuals were widely circulated by the press before trial. Both cases involved crimes that were of such a nature as to become *causes célèbres*. In *Stroble*, the defendant was convicted for the sexually motivated murder of a small child. The Supreme Court granted certiorari and the defendant asked the Court to reverse his conviction because of, among other reasons, the inflamatory newspaper reports encouraged by the district attorney. Though it disapproved of the actions of the district attorney, the Court upheld the conviction on the ground that the petitioner "failed to show that the newspaper accounts aroused

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the right to a public trial was a right peculiar to the defendant. It should be noted that the defendant secured a reversal because of the trial judge's exclusion order. People v. Jelke, 284 App. Div. 211, 130 N.Y.S.2d 622, *aff'd*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

15. The right to a speedy trial is in effect waived by the defendant when he is forced to ask for a continuance because of adverse publicity. The defendant may also feel that he cannot risk a jury trial and will therefore waive trial by jury. In Florida an accused has this option in all noncapital cases. FLA. STAT. §912.01 (1965). See Baltimore Radio Show v. State, 193 Md. 300, 316, 67 A.2d 497, 504 (1949). However, a recent report indicates that only 12½% of federal defendants were tried in fiscal 1964 and of these only 8% were tried by juries. Address by Attorney General Katzenbach, American Society of Newspaper Editors, April 16, 1965, in 31 VITAL SPEECHES 518 (1965).

16. Note, *The Case Against Trial by Newspaper: Analysis and Proposal*, 57 NW. U.L. REV. 217, 226 (1962).

17. *E.g.*, United States v. Burr, 25 Fed. Cas. 49 (No. 14692g) (C.C. Va. 1807). Of course pretrial publicity would not have been a very important factor when juries were composed of witnesses. For a short history of the development of trial by jury see 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-50 (7th ed., rev. 1956).

18. 366 U.S. 717 (1961).

19. 373 U.S. 723 (1963).

20. 381 U.S. 532 (1965).

21. 86 Sup. Ct. 1507 (1966).

22. 343 U.S. 181 (1952).

against him such prejudice in the community as to necessarily prevent a fair trial . . . ."[23] By applying this language, the Court was following a rule formulated over eighty years earlier in *Reynolds v. United States.*[24]

In *Irvin v. Dowd*[25] the defendant had been convicted of murder by an Indiana court. The arrest of the defendant had aroused unusual interest because six murders had been committed in the vicinity shortly before the defendant was apprehended. The prosecutor and police officials disclosed to the press that the defendant had confessed to all six of the prior murders. The panel at trial consisted of 430 persons; 268 of these were challenged for cause and excused for having fixed opinions as to the guilt of the accused. Most of the remaining panel had similar feelings but with a lesser degree of certainty. Eight of the twelve jurors who tried the case admitted to having an opinion concerning the guilt of the accused, but believed that they could reach a verdict based on the evidence presented in court.

In a habeas corpus proceeding the Supreme Court reversed the conviction, holding that the defendant had not been given a fair trial. Although the Court gave lip service to the rule of *Reynolds,* the petitioner was allowed to prove a prejudiced trial merely by showing that on questioning by counsel a high percentage of the panel had expressed some opinion regarding the defendant's guilt.[26] The *Irvin* Court made it clear that a juror's opinion as to his impartiality is not always enough to guarantee that the juror would in fact be impartial.[27]

In *Irvin* the Court placed more emphasis on the extent of the publicity involved than it did in *Stroble,* but it did not completely break with the earlier rule of *Reynolds. Irvin* set the stage for *Rideau v. Louisiana.*[28] *Rideau* involved a trial on charges of armed robbery, kidnapping, and murder. The defendant's confession was filmed and

23. *Id.* at 193.

24. 98 U.S. 145 (1878). "[A defendant must prove] the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality . . . ." *Id.* at 157. In *Stroble* the defendant did not even offer an affidavit to prove that a single juror was in fact prejudiced by the newspaper stories. He instead asked for a finding of prejudice per se.

25. 366 U.S. 717 (1961).

26. Although only 268 of the 430 members of the panel were removed for cause, almost 90% believed with varying degrees of certainty that the defendant was guilty. *Id.* at 727.

27. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id.* at 728.

28. 373 U.S. 723 (1963).

recorded during an interview with the sheriff; the confession was later telecast by a local station. *Voir dire* examination revealed that three of the jurymen had seen the telecast, but each of the three asserted that he could render a fair and impartial verdict. A motion for change of venue was, therefore, denied by the trial court.

On certiorari the United States Supreme Court held that denial of the motion for change of venue constituted a violation of due process of law, and consequently reversed the conviction. The Court stated: "without pausing to examine a particularized transcript of the *voir dire* examination . . . due process of law . . . required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' "[29] Since the jury had not been selected from such a community, the defendant had not been afforded the fair and impartial trial required by the sixth amendment.

Mr. Justice Clark's dissent emphasized that the Court had gone beyond the holding of *Irvin*, because there was no substantial nexus between the televised interview and the trial which occurred two months later.[30] The majority of the Court, however, held that the direct effect of prejudicial publicity on the trial does not have to be proved to warrant a reversal. Prior saturation of the community with prejudicial publicity establishes a presumption of partiality.

In *Estes v. Texas*[31] pretrial and trial proceedings were televised. The Supreme Court reversed the conviction because the effects of televising the courtroom activity created a high probability of an unfair trial.[32] It made no difference to the Court that the defendant failed to prove any particular instance of prejudice. The combined effect of the television cameras on the jury, the witnesses, the judge, and the defendant produced an inherent lack of due process.

The Supreme Court's latest pronouncement concerning free press-fair trial has refuted the belief that the rule formulated in *Rideau* and *Estes* resulted because television, rather than the press, was involved in those cases.[33] In *Sheppard v. Maxwell*[34] the Court reversed a 1954 murder conviction because the trial judge did not fulfill his

29. *Id.* at 727.

30. *Id.* at 729.

31. 381 U.S. 532 (1965).

32. For an account of Florida trial court practices concerning televised courtroom proceedings prior to *Estes*, see Note, *Broadcasting and Televising Trials: Fair Trial Versus Free Press*, 11 U. FLA. L. REV. 87 (1958).

33. "It may be argued that the approach used in *Rideau* and *Estes* was adopted only because of the visual nature of television and the assumption that individuals rely more on what they see than on what they read or hear." Note, *Publicity and Partial Criminal Trials: Resolving the Constitutional Conflict*, 39 SO. CAL. L. REV. 275, 282 (1966).

34. 86 Sup. Ct. 1507 (1966).

duty to protect the defendant from prejudicial publicity which saturated the community. The publicity was contained in newspapers as well as in radio and television broadcasts. Statements by the jurors that they would not be influenced by what they had read or seen were rejected by the court as an inadequate demonstration that the proceedings were impartial. In effect, the *Sheppard* conclusion was a combination of the *Rideau* and *Estes* holdings. There was a violation of due process in *Sheppard* because of the prejudicial publicity before trial. The pervasive presence of the news media in the courtroom also produced an inherently prejudicial atmosphere, which influenced the participants in the trial.

This brief analysis of the Supreme Court's opinions concerning free press-fair trial indicates that the Court has placed a premium on the rights of the defendant, as it has in confession and right-to-counsel cases. The jury is no longer always presumed to be impartial. When an atmosphere of prejudicial publicity surrounds a trial, the defendant will not have to show specific instances of prejudice to show a violation of due process. Statements of jurors that they can render fair verdicts, regardless of what they have heard or seen, will not preclude a finding of unconscious bias against the accused. Under the rule of *Rideau, Estes,* and *Sheppard,* reversals of criminal convictions will continue, unless steps are taken to prevent the occurrence of prejudicial publicity or at least to prevent its reaching the jury.

Extent and Effect of Prejudicial Publicity

> The theory of our system [of determining the guilt or innocence of the accused] 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 influence, whether of private talk or public print.[35]

In order to determine the extent of the "conflict" between free press and fair trial, it must be determined what kind of information tends to be prejudicial to the defendant when jurors have knowledge of the information prior to determining the verdict. An example of such information is knowledge of a confession by the accused. A defendant cannot be convicted on the basis of a confession if the confession was coerced.[36] It does not matter that the defendant is guilty; nor does it matter that evidence other than the confession may be sufficient to obtain a conviction.[37] If the illegally obtained confession is improperly admitted into evidence, any resulting conviction will prob-

35. Patterson v. Colorado, 205 U.S. 454, 462 (1907).
36. Rogers v. Richmond, 365 U.S. 534 (1961).
37. Spano v. New York, 360 U.S. 315 (1959).

ably be overturned.[38] In light of *Miranda v. Arizona*[39] the probability is that many confessions will be inadmissible.[40] Therefore any publication of a confession prior to its admission into evidence would run a high risk of prejudicing the defendant's case. Even if the publicized confession is later admitted at trial, the prior publication may, nevertheless, deprive the defendant of his right to a fair hearing. The publicized confession may well become fixed in the minds of the jurors, since information read in a newspaper is not subject to cross-examination or other protective procedures.[41]

The same reasoning applies to publications that describe tangible evidence seized as a result of an unlawful search and seizure.[42] It is possible that a search and seizure may, if challenged at a pretrial hearing, prove to be unlawful. Consequently, any premature mention in the press of evidence obtained from the residence or the person of the accused may be prejudicial. Other examples of prejudicial information are information concerning defendant's criminal record,[43] opinions given by the prosecutor outside court about the merits of the case,[44] testimony of unsworn witnesses,[45] trial proceedings from which the jury has been excluded,[46] and information about inadmissible evidence generally, such as a claim of privilege against self-incrimination by the accused.

The publication of prejudicial information does not mean that any trial of the accused will necessarily be unfair. Even though in

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38. *E.g., ibid.*

39. 86 Sup. Ct. 1602 (1966).

40. Before an accused can be questioned he must be warned that he has a right to remain silent, that he has the right to the presence of an attorney, and that any statement he makes may be used against him. *Id.* at 1612.

41. "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." Marshall v. United States, 360 U.S. 310, 312-13 (1959).

42. Evidence seized as a result of an unlawful search is inadmissible in state and federal trials. Mapp v. Ohio, 367 U.S. 643 (1961).

43. Generally prior convictions are admissible only for purposes of impeachment. McCORMICK, EVIDENCE §43 (1954). See Marshall v. United States, 360 U.S. 310 (1959).

44. In Stroble v. California, 343 U.S. 181, 192 (1952), the district attorney expressed to the press his belief that the defendant was guilty and sane. See ABA CANONS OF PROFESSIONAL ETHICS No. 20.

45. In Sheppard v. Maxwell, 86 Sup. Ct. 1507, 1515 (1966), a police officer issued to the press a statement in which he called the defendant a "bare-faced liar." The police officer never appeared as a trial witness. The defendant has the right to be confronted with the witnesses against him. U.S. CONST. amend. VI; Turner v. Louisiana, 379 U.S. 466, 472-73 (1965).

46. See, *e.g.*, Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959). *cert. denied*, 368 U.S. 855 (1961).

Rideau v. Louisiana[47] the nexus between the trial and the telecast of the confession was only slight, *Rideau* does not stand for the proposition that publication of prejudicial information will *always* result in depriving the defendant of a fair trial. The Supreme Court in *Rideau* emphasized that a large portion of the community in which the trial was held had seen the telecast. This fact was sufficient to establish the required nexus between the prejudicial publicity and the later trial. The court's decision would have been different had the confession been printed in a publication of limited circulation.

The extent of the dissemination of prejudicial information is just one of the factors that determine such information's effect on the trial. The source of the information is also important. When the information's genesis is the prosecutor or the police, courts have more readily found that the proceedings have been tainted by the publicity.[48] The time of publication[49] and the nature of its presentation are also important.[50] In short, before a trial is determined to be inherently unfair because of prejudicial publicity (which relieves the defendant from having to prove any specific instance of partiality) two criteria must be met: First, the information has to be prejudicial. Second, other factors, such as wide dissemination of the information, the fact that the police or prosecution supplied the material, or a recent publication, must be present.

Members of the press have often questioned the detrimental effect of prejudicial publicity on the ability of jurors to make an impartial decision.[51] Since there is a dearth of empirical proof of the relationship between what a juror reads and how he reaches a decision, they assert that the courts and the bar may be "using a sledgehammer to

47. 373 U.S. 723 (1963).

48. See, *e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961). The county prosecutor issued press releases stating that the defendant had admitted six murders. See Stroble v. California, 343 U.S. 181, 201 (1952) (dissenting opinion).

49. See, *e.g.*, Beck v. Washington, 369 U.S. 541 (1962). Trial was held almost five months after indictment. The Court noted that each juror's qualifications as to impartiality exceeded the minimum standards despite earlier widespread prejudicial publicity.

50. *Id.* at 556. "Even the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness."

51. "'Convincing or even credible evidence on the degree to which press coverage of criminal proceedings injures the chances of fair trials for defendants is almost totally lacking. In argument on the issue, the standard pattern has been a deriving of sweeping conclusions from the most incomplete, fragmentary and isolated sets of facts.'" BRAITHWAITE, FAIR TRIAL—FREE PRESS (American Bar Foundation Research Memorandum Series No. 38, 1966) (quoting a report of the Press-Bar Committee of the American Society of Newspaper Editors).

kill a gnat."[52] Granted there is an insufficiency of empirical data,[53] common sense and intuition point to the conclusion that prejudicial information does play a part in the decision-making process of jurors. In any event, because courts have now presumed that prejudicial publicity destroys a juror's impartiality, questions concerning lack of proof have become moot.

In the past decade the Supreme Court has reversed six convictions because of prejudicial publicity.[54] Extensive pretrial publicity has also been a factor in the reversal by the Florida Supreme Court of at least one conviction during this time.[55] Notwithstanding the reversals, it is impossible to determine the extent of the problem by merely showing the number of convictions that have been overturned. There is no way of knowing the number of convictions that were not appealed for one reason or another. Nor is it known how many times an accused was denied his right to trial by jury because of prejudicial publicity.[56] Similarly, it is impossible to determine how often the state's case has been harmed by publicity, since there is no appeal from an acquittal.

Personal liberty is involved in every criminal trial. The mere possibility of an erroneous conviction due to prejudicial publicity cannot be tolerated. The difficulty, however, is finding a solution which will not unduly infringe upon either freedom of the press or an accused's right to a fair trial.

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52. See address by Mr. Clifton Daniel, Managing Editor, The New York Times, Houston Conference of the National District Attorneys Association, in 1 NATIONAL DISTRICT ATTORNEYS' A. 36 (1965).

53. For a summary of results of experiments concerning the introduction of modifying factors, such as propaganda, on the formation of attitudes see MURPHY, MURPHY & NEWCOMB, EXPERIMENTAL SOCIAL PSYCHOLOGY 946-80 (rev. ed. 1937). For a brief report concerning the decision-making process of jurors see Weld & Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 53 AMERICAN J. PSYCHOLOGY 518 (1940).

54. Sheppard v. Maxwell, 86 Sup. Ct. 1507 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Janko v. United States, 366 U.S. 716 (1961). (The per curiam opinion does not state the ground of decision. However, Mr. Justice Frankfurter mentions in Irvin v. Dowd, *supra* at 730 (concurring opinion), that the conviction was reversed because "prejudicial newspaper intrusion . . . poisoned the outcome."); Marshall v. United States, 360 U.S. 310 (1959). Numerous other cases involving the "conflict" between free press and fair trial have come to the attention of the Court. "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflamatory newspaper accounts . . . ." Irvin v. Dowd, *supra* at 730.

55. Singer v. State, 109 So. 2d 7 (Fla. 1959).

56. See note 15 *supra*.

PRESENT REMEDIES

Contempt Citations. By the exercise of their contempt power, courts may punish actions that interfere with the efficient administration of justice.[57] When the contempt power of the court is directed against the news media, freedom of the press must be considered. In *Bridges v. California,*[58] the Supreme Court enunciated the familiar rule that the news media are free to comment on a criminal case as long as publication of the information does not create a "clear and present danger" to the administration of justice. Before *Bridges,* any publication that was calculated to obstruct justice, or even had such a tendency, could be punished as an action in contempt of court.[59] The clear and present danger test was reaffirmed in *Pennekamp v. Florida,*[60] *Craig v. Harney,*[61] and, most recently, in *Wood v. Georgia.*[62] In each of these cases the Court held that the publications involved did not constitute a "clear and present danger" to the administration of justice. The decisions indicate the Court's reluctance to interfere with the news media.

In *Wood,* the contempt citation was issued because a local sheriff made statements to the press regarding matters being presented before a grand jury. In other cases, the publications contained comments about litigation being tried by the court without a jury. In these cases the Court was not faced with the question of whether such news releases affected a jury charged with the task of impartially determining guilt or innocence.[63]

In *Baltimore Radio Show v. State,*[64] a contempt citation was issued because prejudicial information was broadcast about an accused murderer. The lower court asserted that the broadcast interfered with the administration of justice because of its effect on potential jurors.[65] The Maryland Court of Appeals reluctantly reversed the contempt

57. State *ex rel.* Hill v. Hearn, 99 So. 2d 231 (Fla. 1957). In some states and in federal courts the contempt power can only be used to punish acts that occur in or in close proximity to the courtroom. *E.g.,* 18 U.S.C. §401 (1964); PA. STAT. tit. 17, §2044 (1936). See Nye v. United States, 313 U.S. 33 (1940).

58. 314 U.S. 252 (1941).

59. *Id.* at 267-68. See Patterson v. Colorado, 205 U.S. 454, 462 (1907).

60. 328 U.S. 331 (1946).

61. 331 U.S. 367 (1947).

62. 370 U.S. 375 (1962).

63. "[The comments] 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 . . . is too remote for discussion." Pennekamp v. Florida, 328 U.S. 331, 348 (1946).

64. 193 Md. 300, 67 A.2d 497 (1949).

65. The defendant's attorney elected to have a court trial because, in part, of the publicity. *Id.* at 316, 67 A.2d at 504.

conviction on the basis of *Bridges, Pennekamp,* and *Craig.* The Supreme Court declined the opportunity to clarify or expand upon its earlier decisions.[66]

When the contempt power is used to punish the courtroom conduct of the press, the clear and present danger rule may not be applicable. In *Brumfield v. State,*[67] the trial judge issued an order prohibiting photographs of an accused who was in jail pending his arraignment on a charge of rape. The judge issued the order in an attempt to mitigate possible prejudicial effects of extensive local publicity. A television photographer took pictures of the accused while he was being transferred to the courtroom (in the same building as the jail) for arraignment. The photographer was immediately cited for contempt. The Florida Supreme Court in accord with an earlier federal case,[68] upheld the contempt conviction on the ground that the order by the trial judge was a proper exercise of his duty to insure a fair trial. The court held that the case did not involve a denial of freedom of expression. The issue was whether the trial court could deny the press access to certain information. Therefore, the clear and present danger test was not applicable.

The power to cite for contempt in this context, although frequently used by other common-law nations,[69] has been suspiciously regarded by the American public.[70] Besides being unpopular, the contempt power is an ineffective means of preventing prejudicial publicity. This is so because of the difficulty in proving that the publication constitutes a clear and present danger to the administration of justice.

Miscellaneous Remedies Available at the Trial Level. Pretrial devices commonly used in an attempt to negate the effects of prejudicial publicity at trial are *voir dire* examination,[71] continuance,[72] and change of venue.[73] During *voir dire* examination prospective jurors are questioned by the court and counsel in order to learn, among other things, the jurors' opinions about the defendant's guilt

66. State v. Baltimore Radio Show, 338 U.S. 912 (1950).
67. 108 So. 2d 33 (Fla. 1958).
68. Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958).
69. See generally Cowen, *Prejudicial Publicity and The Fair Trial: A Comparative Examination of American, English and Commonwealth Law,* 41 IND. L.J. 69 (1965).
70. See Bridges v. California, 314 U.S. 252, 266 (1941).
71. See FLA. STAT. §913.02 (1965).
72. See FLA. STAT. ch. 916 (1965).
73. See FLA. STAT. ch. 53 (1965).

or innocence. Section 913.03 (10) of the Florida Statutes permits challenge for cause:[74]

> [If] the juror has a state of mind in reference to . . . the defendant . . . which will prevent him from acting with impartiality; but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror if he declares, and the court is satisfied, that he can render an impartial verdict according to the evidence. . . .

In *Singer v. State*,[75] the Florida Supreme Court reversed a conviction of first degree murder because the trial judge improperly denied the defendant's motion to remove a particular juror for cause where the defendant had used all his peremptory challenges. Usually, however, an appellate court will not reverse a conviction on the claim of improper *voir dire* examination. The trial judge's decisions will be upheld unless he has exhibited a clear abuse of discretion.[76]

The defendant is allowed a limited number of peremptory challenges.[77] Once these are used, the defendant can have a venireman removed only by convincing the court that there is cause for such removal. Since the juror will frequently be allowed to serve even though he had a previous opinion concerning the guilt or innocence of the defendant,[78] *voir dire* examination, as it presently exists, is an ineffective means of guaranteeing an impartial trial. A recently published study of civil jury cases confirms this observation.[79]

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74. In light of the United States Supreme Court holdings in Sheppard v. Maxwell, 86 Sup. Ct. 1507 (1966), and Irvin v. Dowd, 366 U.S. 717 (1961), it would seem that trial courts should not always be satisfied by the jurors' declarations of impartiality. *Cf.* Singer v. State, 109 So. 2d 7, 24 (Fla. 1959).

75. 109 So. 2d 7 (Fla. 1959).

76. Jeffcoat v. State, 103 Fla. 466, 138 So. 385 (1931).

77. In Florida the defendant is allowed ten peremptory challenges if the offense charged is punishable by death or life imprisonment, six for any other felony, and three if the crime charged is a misdemeanor. FLA. STAT. §913.08 (1965).

78. See, *e.g.*, Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Powell v. State, 131 Fla. 254, 175 So. 213 (1937). "We think the true test to be applied should be . . . that whether he is free of . . . opinion, prejudice or bias or, *whether he is infected* by opinion, bias or prejudice, he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon evidence given at the trial." Singer v. State, 109 So. 2d 7, 24 (Fla. 1959). (Emphasis added.)

79. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503 (1965). Factors which contribute to the lack of effectiveness of the *voir dire* examination include the reluctance of counsel to pose questions that might offend potential jurors and a general lack of candor on the part of the jurors. There is also the possibility that the examination of the jury is self-defeating in a publicized case because, in order to determine whether a prospective juror has been exposed to certain information, counsel must often come

A continuance may be granted in order to provide time for hostile publicity to subside.[80] There is, however, no assurance that prejudicial publicity will not resume when the case does come to trial. Moreover, judges usually scrutinize motions for continuances carefully since there is always a temptation on the part of the defendant to seek a delay in a criminal case.[81] On the other hand, the accused has the right to a speedy trial. When forced to ask for a continuance because of publicity he is arguably deprived of that right. A continuance may also adversely affect the public's interest in speedy trials. The state may have a more difficult time proving its case, since the accuracy of testimony suffers with the passage of time.

A motion for change of venue should be liberally resolved in favor of the accused if there is any doubt of his receiving a fair and impartial trial in the initial jurisdiction.[82] However, when prejudicial publicity requires a change of venue, the defendant is forced to relinquish his right to trial in the district or county where the crime was committed.[83] It hardly seems fair that an accused should be forced to give up one right to secure another. Extensive press coverage of a notorious case may make it impossible to find *any* place in the state that has not been saturated by the adverse publicity. At any rate, change of venue, as a means of securing the defendant's right to a fair trial, is no longer as effective as it once was.

Subsequent to trial, courts often attempt to obviate the ill effects of extensive publicity by (1) sequestering the jury, (2) instructing the jurors to avoid contact with outside material relating to the case, and (3) ordering jurors to disregard all that they have heard about the case outside the courtroom.

Seven states require that the jury be sequestered during felony trials, thereby physically preventing their learning of publicity concerning the trial.[84] In federal courts, as in most states, the decision to isolate the jury rests in the discretion of the trial judge.[85]. Jury sequestration is rarely ordered, however, because of the inconvenience and expense involved.[86] Moreover, it is possible that this inconvenience to the jurors may result in resentment against the defendant.[87]

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close to telling the jury precisely that information. See Goldfarb, *Public Information, Criminal Trials and the Cause Célèbre*, 36 N.Y.U.L. REV. 810, 821 (1961).

80. Reed v. State, 94 Fla. 32, 113 So. 630 (1927).

81. See John v. State, 157 Fla. 18, 24 So. 2d 708 (1946).

82. Singer v. State, 109 So. 2d 7 (Fla. 1959).

83. U.S. CONST. amend. VI; FLA. CONST. Decl. of Rights §11.

84. Estes v. Texas, 381 U.S. 532, 546 n.3 (1965).

85. Holt v. United States, 218 U.S. 245, 250-51 (1910); United States v. Holovachka, 314 F.2d 345, 352 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963).

86. Comment, 51 CORNELL L.Q. 306, 316 (1966).

87. Will, *Free Press v. Fair Trial*, 12 DE PAUL L. REV. 197, 209 n.39 (1963).

Sequestering a jury, therefore, may cause the unfair trial that isolation was designed to prevent.

There is general agreement among legal writers that cautionary instructions by the judge are inadequate to prevent jurors from being influenced by prejudicial publicity.[88] Mr. Justice Jackson stated the obvious in *Krulewitch v. United States*: [89] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Cautionary instructions, instead of preventing jurors from learning about or paying attention to prejudicial publicity, may instead direct their attention to the extraneous material.

A major criticism of trial level procedures designed to prevent the damaging effects of prejudicial publicity is that the safeguards are seldom utilized.[90] Furthermore, there is no means of determining the effectiveness of these procedures. Trial level remedies are essentially afterthoughts designed to protect the rights of the accused *after* the prejudicial information has been publicized.[91] It is doubtful that they can alone insure a fair trial. Control over the sources of the prejudicial information is necessary.

Voluntary Controls. A recent survey of Florida's daily newspapers indicates that many of them rely on information supplied by the police, prosecution, and defense attorneys when reporting news concerning criminal proceedings.[92] Rule 20 of the Code of Ethics of the

88. See Goldfarb, *supra* note 79, at 822.

89. 336 U.S. 440, 453 (1949) (concurring opinion).

90. See Note, *"Free Press—Fair Trial" Revisited: Defendant Centered Remedies as a Publicity Policy*, 33 U. CHI. L. REV. 512, 515 (1966).

91. See Will, *supra* note 87, at 209.

92. In October 1966, a questionnaire inquiring about policies of publication of information pertaining to criminal proceedings was sent to forty-five of Florida's daily newspapers. Nineteen replies were received. Four of the nineteen replies revealed no fixed policy. The questions asked and the answers received follow:

1. Has your policy been to publish the contents of a confession given by an accused prior to the admission of the confession into evidence at trial? Yes: 3; No: 12. The bare fact that a confession has been given by an accused prior to to the admission of the confession into evidence at trial? Yes: 12; No: 3.

2. Has your policy been to publish accounts of the prior criminal activity of suspects before such prior criminal activity has been admitted at trial? Yes: 11; No. 4.

3. Has your policy been to publish the comments of unsworn witnesses? Yes: 6; No: 9.

4. Has your policy been to publish accounts of the proceedings from which the jury has been excluded? Yes: 8; No: 7.

5. Has your policy been to rely primarily on: (a) independent investigation of the circumstances surrounding criminal activities; (b) information supplied by the prosecuting or defense attorney or the police; (c) both? (a) 1; (b) 7; (c) 7.

Florida Bar, as well as Canon 20 of the American Bar Association's Canons of Professional Ethics, provides:[93]

> 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. . . .

The Supreme Court of New Jersey has said:[94]

> We interpret . . . Canon 20, to ban statements to news media by prosecutors . . . as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is "open and shut" against the defendant . . . or with reference to the defendant's prior criminal record . . . .

Nevertheless, there is no recorded enforcement of Canon 20[95] or Rule 20 of the Florida Bar's Code of Ethics.[96]

The American Bar Association advisory committee on free press and fair trial has recommended that explicit rules concerning the release of information to news media be incorporated into the Canons of Professional Ethics.[97] The benefit of such addition is doubtful, however, as long as the legal profession remains reluctant to discipline itself.

The United States Department of Justice has issued to employees nonaccess guidelines concerning release of information relating to criminal proceedings.[98] These guidelines permit only the bare facts concerning an arrest, such as the text of the charges against the accused, his name and address, and the time and place of arrest, to be made public. Similar policies have been adopted by other law enforcement agencies.[99] However, in states which consider sources of news media information privileged,[100] violations of these guidelines

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6. Do you anticipate any changes in policy regarding the above-mentioned areas? Yes: 3; No: 12.

Only one newspaper answered "No" to all of the first five questions. [Hereinafter cited as *Survey*.]

93. This canon was adopted in 1908 and is in effect as a statute, rule of court or by adoption of the state bar association in forty-seven states. BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 822 (Supp. 1959).

94. State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 300 U.S. 987 (1965).

95. BRAITHWAITE, *op. cit. supra* note 51, at 25.

96. 31 F.S.A., *Code of Ethics* rule 20 (1964).

97. Tampa Tribune, Oct. 2, 1966, p. 1A, col. 6.

98. 28 C.F.R. §50.2 (Supp. 1966).

99. Sheppard v. Maxwell, 86 Sup. Ct. 1507, 1522 n.16.

100. Alabama, for example, considers news media sources of information privileged. ALA. CODE tit. 7, §370 (1958).

will be difficult to prove. In any event, it is unlikely that the press will cooperate with an attempt by law enforcement agencies to police themselves, since strict adherence to rules of this kind would eliminate an important source of information.

In several states the news media have subscribed to joint bar-press statements of principles concerning the publication of information about criminal proceedings.[101] The special Bar-News Media Committee of the Florida Bar has adopted the position that the news media industry should be encouraged to develop independent policies and controls in regard to publication of information which affects a defendant's rights.[102] At the present time, though, the Florida press has not adopted any common policy concerning the publication of prejudicial publicity.[103] Even in states where the press and bar have subscribed to joint statements of principles, subscription has not been unanimous.[104] Moreover, there is no effective method (such as disbarment) of sanctioning members of the press who violate the principles contained in the statements.[105]

Reversals. When a defendant can show a specific instance of prejudice, or when circumstances are such that prejudicial publicity prevented a fair trial, a convicted defendant can secure a reversal.

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101. In Oregon and Massachusetts the news media have subscribed to joint bar-press statements of principles. See generally CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, FAIR TRIAL VS. A FREE PRESS 34-36 (1965).

102. Harum, *Free Press-Fair Trial Controversy*, 40 FLA. B.J. 231, 238 (1966).

103. The Florida Press Association has not considered the fair trial-free press controversy to be a serious problem in Florida. Interview with Secretary of the Florida Press Association, in Gainesville, Fla., Oct. 20, 1966. The Associated Press Association of Florida has not taken a stand on the issue. Letter From Mr. Milton Kelly, President of the Associated Press Association of Florida to Robert M. Lloyd, Oct. 31, 1966. The Florida Association of Broadcasters has adopted the following statement: "The Florida Association of Broadcasters supports every reasonable effort to assure a defendant a fair trial, but opposes any efforts to censor the news, or close police records and court trials to the public." Florida Association of Broadcasters Newsletter, Oct. 1966, p. 3.

104. The major Boston daily newspapers have not subscribed to the Massachusetts Bar-Press Relations proposal. Segal, *Fair Trial and Free Press—An Analysis of the Problem*, 51 MASS. L.Q. 101 (1966).

105. For some strong words on the efficacy of journalistic self-restraint, note the remarks of H. L. Mencken: "'Journalistic codes of ethics are all moonshine. Essentially, they are absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted.'" Quoted in Pennekamp v. Florida, 328 U.S. 331, 365 n.13 (1946) (concurring opinion).

Although a reversal is preferable to a conviction tainted by prejudicial publicity, it is a palliative and not a true remedy. The source of the information, which was the indirect cause of the reversal, is not affected by the court's decision. Furthermore, a reversal forces society to bear the expense of a new trial unless consequences of the lapse of time between trial and reversal, such as fading memories and loss of key witnesses, result in abandonment of prosecution. Thus, a reversal caused by prejudicial publicity could result either in unnecessary expense or in the release of a guilty defendant.

Recently Proposed Remedies

The most frequently proposed solutions to the "conflict" between free press and fair trial guarantees have been legislative.[106] Two of the more prominent proposals are Senator Morse's bill[107] and a proposed Massachusetts statute.[108]

The Morse proposal provides:[109]

> It shall constitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial. . . .

A conviction for contempt as defined by the bill would result in a fine not to exceed 1,000 dollars. If enacted into law, the Morse proposal would probably eliminate a major source of information upon which the news media rely for reports concerning federal criminal prosecutions. Few Florida newspapers rely solely on independent investigation of the circumstances surrounding criminal activities.[110]

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106. See, *e.g.*, Will, *supra* note 87, at 214; Comment, 57 Nw. U.L. Rev. 217, 250-53 (1962). Until 1965, New York attempted to remedy the consequences of pretrial publicity by altering the jury selection process so that "blue ribbon" jurors heard cases that had received large amounts of publicity. The jurors were chosen on the basis of intelligence. It was assumed that an intelligent juror would be better able to maintain an impartial attitude. The legislation was repealed in 1965. N.Y. Judiciary Law §749aa, repealed by N.Y. Sess. Laws 1965, ch. 778, §3.

107. S. 290, 89th Cong., 1st Sess. (1965). The bill is co-sponsored by fifteen senators.

108. Mass. H.B. 4201 (1965). Reprinted in Sigourney, *Fair Press and Fair Trial—A Proposed Solution*, 51 Mass. L.Q. 117, 129 (1966).

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

110. See *Survey*, note 92 *supra*.

The Massachusetts proposal is more comprehensive than the Morse bill. It provides, in part:[111]

> No officer of the court shall divulge to any publisher . . . and no publisher shall publish or broadcast . . . during any criminal proceeding where the right of trial by jury exists, the following information:
> (a) That a defendant has confessed . . .
> (b) The contents of any such confession . . .
> (c) That a defendant . . . has ever been [involved in criminal activites] . . . unrelated to . . . [the present] criminal proceedings . . .
> (d) [R]eports . . . of occurrences which take place during the [period in which] . . . the jury has been excluded by the presiding justice. . . .

Intent to prejudice the trial is not required for a conviction under the terms of the bill. A violation could carry a fine of up to 500 dollars and imprisonment for thirty days. The Massachusetts proposal incorporates suggestions made by the Supreme Judicial Court of that state when a predecessor of the bill was before the court for an opinion as to its constitutionality.[112] The court found it impossible to foretell if the United States Supreme Court would find the statute as originally proposed to be an unconstitutional infringement of freedom of the press.

Journalists have reacted unfavorably to proposals that restrict either the source or the publication of information pertaining to criminal proceedings.[113] Significantly, no state has yet enacted a general law that prohibits the publication of prejudicial publicity. This indicates the strength of the press in influencing legislation. Elected legislators are unlikely to long oppose an organized attack by the news media.[114] Even if a general statute were enacted—one which would control disclosures as well as publication—a constitutional question would be posed since it would limit freedom of expression.

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111. Mass. H.B. 4201 (1965).

112. Opinion of the Justices, 349 Mass. 786, 208 N.E.2d 240 (1965).

113. Publisher John S. Knight of the *Miami Herald* has stated: "The Bar associations which are presently recommending 'guidelines' for the conduct of the press might better employ their talents to the policing of their own members." Knight, *A Fair Trial? Not With a 'Barred' Press,* The Miami Herald, Jan. 17, 1965, p. 2-H, col. 2.

114. In the 1961 and 1963 sessions of the Florida Legislature a bill that would have prohibited the publication of a confession before its admission into evidence died in committee. The measure was opposed by the organized press. Interview With Secretary of the Florida Press Association, in Gainesville, Fla., Oct. 20, 1966.

The Supreme Court's recent decision in *New York Times Co. v. Sullivan*,[115] reversing a state court libel judgment on first amendment grounds, indicates that the Court has not retreated from its policy of stringent protection of free expression.[116]

CONCLUSION

Changes in attitude and practice by both the bar and press would do much to preserve the right of the accused to an impartial trial, without unduly restricting freedom of the press. Effective machinery already exists to discipline members of the legal profession who release prejudicial information to the news media. All that has been lacking is the will to sanction attorneys who violate Canon 20. Affirmative action by the bar to discipline itself would eliminate a major source of prejudicial publicity.

The press should resist temptation to hide irresponsible criminal news coverage behind the cliché: "The public has a right to know." There is no doubt that the public's right to know is subordinate to the defendant's right to a fair trial. This is not to say, however, that the press should hesitate to expose inefficient or *sub rosa* police methods. Indeed, exposure of such methods is for the benefit of both the public and the accused.[117] The subordination of the public's right to know to the defendant's right to a fair trial means that the press should not print information that might prejudice the outcome of pending litigation.

Legislation that would prohibit the publication of prejudicial information is neither desirable nor practical. The broad sweep of such proposed legislation is likely to be regarded as unconstitutional. On the other hand, regulations that prohibit the police from disseminating information concerning a defendant, other than the basic facts surrounding an arrest, are desirable. The Supreme Court has indicated that regulations of this kind would not encroach upon freedom of the press.[118]

Trial courts can also help reduce the possibility of a prejudiced jury by liberalizing existing trial level remedies. The defendant should always be given benefit of the doubt on challenges for cause.

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115. 376 U.S. 254 (1964).

116. It has been suggested that the issue in *New York Times* is closely related to the problem of contempt by publication. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REV. 191, 214.

117. See Daniel, *Fair Trial and Freedom of the Press*, Case & Com., Sept.-Oct. 1966, pp. 3, 4.

118. Sheppard v. Maxwell, 86 Sup. Ct. 1507, 1522 (1966).