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## Pre-Trial Publicity

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# Comments

## PRE-TRIAL PUBLICITY

### I. INTRODUCTION

One of the most controversial problems in the criminal law field during the 1960's has centered around the apparent contradiction between detailed reporting of events about which there is pending criminal litigation and the sixth amendment right of the criminally accused to a public trial "by an impartial jury."<sup>1</sup> The impartiality of our criminal process is one of the most highly regarded of American legal traditions. The difficulty in maintaining this tradition, in a society permeated with every form of mass information media, of catering to a curious public is one of the vital issues of our time. This comment is an attempt to look at the overall problem and to study in depth the various curative proposals which have been offered.

### II. THE SCOPE OF THE PROBLEM

The problem of bias on the part of jurors as the result of prejudicial publications is not a new one. It was dealt with as early as 1807 by Chief Justice John Marshall in the trial of Aaron Burr, where the chief justice commented:

Light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection.<sup>2</sup>

The probable catalyst for the recent awareness of prejudicial publicity was the *Warren Report*.<sup>3</sup> In its investigation of the assassination of President Kennedy the Warren Commission concluded that:

If Oswald had been tried for his murders of November 22, the effects of news policy pursued by the Dallas authorities would have proven harmful to both the prosecution and the defense.<sup>4</sup>

The Commission also admonished that "[t]he courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man

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1. U.S. CONST. amend. VI.

2. *United States v. Burr*, 25 F. Cas. 49, 51 (No. 14692g) (C.C.D. Va. 1807).

3. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, N.Y. Times Edition, 213-224 (1964).

4. *Id.* at 220.

accused of a crime.”<sup>5</sup> The conclusions that the Warren Commission reached in regard to the prejudicial tenor of the publicity surrounding the assassination of President Kennedy seemed to foster new interest in the question of the effect of publicity on the criminally accused’s right to an impartial trial.

Of course, the assassination of a president is an extremely uncommon crime, and in such a case the public must be informed as much as possible. In fact, the problem of prejudicial publicity does not arise in any but the most unusual cases involving only the most flagrant crimes.<sup>6</sup> But, query, is it not as important that our system of justice be able to deal as equitably with those rare occurrences as with the routine case? Even in the case of the presidential assassination, Oswald’s rights could have been protected to a much greater degree.

We could have had statements that Lee Oswald, age so and so, residence so and so, a white man, had been arrested; that a committing magistrate found probable cause to hold him for his murder; there was no evidence that he was the agent of any conspiracy or organization, foreign or domestic; that the investigation was proceeding; that he would be brought to a speedy trial; counsel had been retained for him; and that because of the requirements of due process of law, items of evidence in the case could, of course, not be disclosed at this time.<sup>7</sup>

Publicity excesses were equally apparent in the case of Richard Speck. News stories printed in the *New York Times* related that the suspect, Speck, “apparently had attempted suicide”, and that Speck had previous felony convictions. A statement of Superintendent of Police, O. W. Wilson, that, “I feel that we have enough information to be absolutely positive that this man is the murderer,”<sup>8</sup> was also reported. Statements by the police included certain facts: that Speck had left thirty-two finger prints at the murder scene, that the survivor, Miss Amurao, had “made a positive identification from a National Maritime Union passport-size picture . . . ,” that Speck had been known to use aliases, that he was wanted in connection with a Dallas assault, and a detailed explanation of how the FBI was able to identify the fingerprints left at the murder scene as Speck’s.<sup>9</sup> One headline relating to Speck read: “Suspect Has a Prison Record And Is Known as a Drifter.”<sup>10</sup> He was reported to be wanted in connection with another murder involving a woman, and his exact movements were reconstructed by the police from the time of the crime until his capture and, then, released to

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5. *Id.* at 222.

6. One survey by the *New York Times* showed that out of 11,724 felonies committed in New York City in January, 1965, only forty-one were reported in the *Daily News*, which published the greatest amount of news concerning crime in the New York area. *Hearings on S. 290 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvement in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., 41 (1965).

7. Pointed out by Mel Wulf, Director, Legal Division, A.C.L.U., in a letter dated February 13, 1964 to the Union’s Due Process Committee.

8. *New York Times*, July 17, 1966, at 1, col. 6.

9. *New York Times*, July 17, 1966, at 54, col. 4.

10. *New York Times*, July 17, 1966, at 54, col. 7.

newsmen.<sup>11</sup> The complaints of Speck's attorney and various legal scholars as to the prejudicial aspects of this publicity went largely unheeded.

Recent years have also witnessed new dimensions of case law on the subject of pre-trial publicity. This indicates an increasing awareness by the courts that the judicial processes are sometimes undermined by out-of-court publicity directed toward pending criminal cases.<sup>12</sup> Indeed, some of the most illustrative examples of the prejudice done to criminal defendants can be taken from the facts of certain Supreme Court cases. The circumstances surrounding the celebrated case of Dr. Sam Sheppard are in point.<sup>13</sup> Three months before the trial Sheppard was examined for more than five hours without counsel in a *televised* three-day inquest held before several hundred people in a high school gymnasium. The jury list was published and, as a result, all prospective jurors received phone calls from persons expressing opinions as to his guilt. The press suggested that it was an admission of guilt on the part of Sheppard when he hired a prominent criminal lawyer. In *Irvin v. Dowd*<sup>14</sup> opinions, not only as to defendant's guilt but even as to what punishment he should receive, were solicited on public streets. Also, *Rideau v. Louisiana*<sup>15</sup> is an excellent example of the prejudice that can be done via the mass media. In that case a motion picture film with sound track was made of an "interview" in the jail between the petitioner and a sheriff the day after arrest. The film consisted of interrogation by the sheriff and admissions by the accused. On three successive days this film was broadcast over the local television station. It is reasonable to conclude that a sizable majority of all potential jurors were, therefore, witnesses to defendant's confession (which would not have been admissible in evidence), and yet the trial court refused a motion for change of venue. The Supreme Court has recognized in these three cases, and others with which they have dealt recently, that certain kinds of pre-trial publicity do endanger the right of the criminally accused to an "impartial jury."

Pre-trial publicity is not an area of the law about which there is no dispute, however. Many members of the mass media would minimize the adverse effects of publicity on pending criminal litigation,<sup>16</sup> and still others would emphasize the beneficial aspect of the crime coverage of the news media. Some would stress the point that the public has a certain right to know about crime and subsequent penalty procedures against those who violate our laws. For example, William B.

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11. New York Times, July 18, 1966, at 16, cols. 4, 5, and 6.

12. See especially *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Turner v. Louisiana*, 379 U.S. 466 (1964); *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *Chapman v. California*, 386 U.S. 18, 44 (1966).

13. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

14. 366 U.S. 717 (1961).

15. 373 U.S. 723 (1963).

16. The American Society of Newspaper Editors Bar-Press Committee claims that there has been no competent demonstration of the effect of pre-trial publicity on the minds of jurors. See No. 18 in a series of periodic publications by the Freedom of Information Center, School of Journalism, University of Missouri.

Monroe of N.B.C.<sup>17</sup> would rebut some of the conclusions of the Warren Commission:

The Warren Commission to the contrary, I will argue for the fastest, widest dissemination all possible facts on any assassination of a President of the United States. The need to know on the part of 190 million people, the crucial importance of spreading assurance and preventing alarm, require it. This nation, or any other, cannot be kept waiting for two, six or ten months, until a trial is held, to find out for sure that the President was not shot by an organized group whose plan might not yet be complete. The people need to know immediately. They found out immediately after the Kennedy assassination, and they weathered the shock without panic.<sup>18</sup>

Some newsmen would argue news coverage is a benefit to the criminal defendant in that violations of his rights might be discovered, thus leading to remedial action. In the same law review article quoted above, Mr. Monroe quotes from James Russell Wiggins, editor of the *Washington Post*, who wrote in *Quill*:

There is hardly a jurisdiction in this country in which newspapers in the last fifty years have not discovered violations of the rights of accused persons in the period preceding trial. Accused persons have been kept secretly arrested, held without access to counsel or family, kept in the custody of police without proper arraignment, solicited for confessions without any warning as to their rights under the Fifth Amendment, searched without warrant, questioned improperly and otherwise maltreated. These conditions much more menace the rights of accused persons than pre-trial disclosures in the press. . . . Newspaper publicity is the best way of treating these abuses in order to keep them at a minimum.<sup>19</sup>

A specific example of the positive good done an accused by pre-trial investigation and publicity by members of the press can be found in the circumstances of the *Gallashaw* case in New York City. A young Negro boy was accused of shooting another Negro boy during a racial disturbance. The prosecutor gave news media an impression of an open and shut case. *New York Times* reporters, on their own, found two prosecution witnesses who, upon questioning, substantially changed their stories. As a result the boy was acquitted.<sup>20</sup>

In the discussion which follows concerning possible remedial action to protect the impartiality of the criminal process from the effects of pre-trial publicity, the assumption will be that such publicity can in fact prejudice the minds of prospective jurors. Many psychologists would agree that the prospective juror, as a result of dissemination of information by the press, enters the courtroom with an unshakeable image of the defendant.<sup>21</sup> Throughout the discussion

17. Director of News, NBC Washington; Past President, Radio and Television News Director Association.

18. Monroe, *A Radio and Television Newsmen's View*, 11 VILL. L. REV. 687, 688 (1966).

19. *Id.* at 689.

20. Lower, *The First Amendment Under Attack: A Defense of the People's Right to Know*, 42 NOTRE DAME LAW, 896, 900 (1967). The case is not reported.

21. See generally WICKENS & MAYER, *PSYCHOLOGY*, 276-285 (1961). For an excellent discussion of the effects of pre-trial publicity on the impartiality of the

which is to follow, however, the reader should remain cognizant of the position of the news media and of the interest of the public in being informed.

### III. PROCEDURAL REMEDIES

#### A. Generally

There are certain things which a trial judge can, at his discretion, do to alleviate possible prejudice as the result of publicity preceding criminal litigation. These are often classified as procedural remedies.<sup>22</sup> Most of these are easy to understand, do not involve constitutional questions, and do not raise great first amendment controversies. Unfortunately, they are also ineffectual to a certain extent. These procedural devices are important prospective remedies, and, indeed, in the view of the absolutists on the Supreme Court, are the only remedies because of the first amendment protection of the press. Justice Douglas, for example, has said "the point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."<sup>23</sup>

#### B. Change of Venue

Probably the most noted means of dealing with prejudice is to change the location of the trial to a different venue, thereby allowing the criminal defendant to have a trial in an area which has not been suffused with pre-trial publicity. Ordinarily, the motion for change of venue must be accompanied by affidavits of disinterested witnesses attesting to the community prejudice against the defendant. This is true in Missouri.<sup>24</sup> Under Rule 21 of the Federal Rules of Criminal Procedure, the defendant is entitled to a change in venue

if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.<sup>25</sup>

A change of venue can be an important tool to forestall the effects of prejudice. However, this remedy has severe limitations. One problem which arises is how many venue changes is the defendant to be entitled. This problem occurs because the adverse publicity often follows the defendant to the new trial location. One Supreme Court opinion has said the defendant is entitled to at least two such changes and probably more.<sup>26</sup> Also, these venue changes often cause delay in the

public, see Lofton, *Justice and the Press: Communication Inside and Outside the Courtroom*, 6 St. Louis U.L.J. 449 (1961).

22. See generally Goldfarb, *Public Information, Criminal Trial and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 819-824 (1961).

23. *The Public Trial and Free Press*, 33 ROCKY MT. L. REV. 1 (1960). See also Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

24. § 545.490, RSMo 1959.

25. FED. R. CRIM. P. 21(a). Compare § 545.430, RSMo 1959, and Mo. Sup. Ct. Rule 25.08.

26. *Irvin v. Dowd*, 366 U.S. 717 (1961).

criminal litigation. The sixth amendment entitles the criminal defendant to a "speedy trial" as well as to an "impartial jury." In addition, problems with sensational and prejudicial pre-trial publicity generally arise in the exceptional, controversial, and exciting cases. In cases dealing with such persons as Oswald, Ruby, Speck, Hoffa, Sheppard, Sirhan, Ray, and others like them there could be no location found within the United States where the damaging publicity had had no effect. This has led one federal court to find that a lower court did not err in refusing to change the venue because the nationwide publicity involved precluded the defendant from obtaining a fairer trial elsewhere.<sup>27</sup> The question also arises as to how much proof the defendant must present to convince the court that a change of venue is proper. The trend, as enunciated in *Rideau v. Louisiana*, seems to be to allow a new trial location where there has been a large amount of adverse publicity without the requirement of proof of actual prejudice.<sup>28</sup>

### C. Continuance

The technique of dealing with prejudice by postponing the trial until the effects of publicity have diminished is perhaps less effective than change of venue. It deprives the defendant of his right to a "speedy trial" and places a burden on court dockets. It is also reasonable to suspect that time does not totally erase from the memory of the prospective juror the publicity surrounding the crime, or if it did, that the news media would not fail to remind him when the new trial time approached.<sup>29</sup>

Despite the doubtful effectiveness of either change of venue or continuance as a means to deal with prejudicial publicity, the courts speak of these remedies more often than any other. For instance, in *State v. Crawford*, a Missouri case, the defendant's request for dismissal based on a claim of prejudice was refused. The court held that the proper remedies were continuance and change of venue.<sup>30</sup>

### D. Voir Dire Examination

Another procedural remedy is to allow the attorneys to question the jury panel as to knowledge of news coverage concerning the defendant and as to

27. *United States v. Lattimore*, 112 F. Supp. 507 (D.D.C. 1953).

28. 373 U.S. 723, 726 (1963).

29. *United States v. Delaney*, 199 F.2d 107, 114 (1st Cir. 1952), which states:

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 the prejudice may reasonably be thought to have been substantially removed.

See §§ 545.710-730, RSMo 1959, and Mo. Sup. Ct. Rule 25.08.

<sup>30</sup>. 416 S.W.2d 178, 184 (1967). See also *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

present opinions of guilt. In theory, this would seem an excellent solution. All those who had been prejudiced by the publicity would disqualify themselves by so indicating, and those remaining would compose an "impartial jury." However, theory and practice are not always consistent. It is human nature that men do not like to admit to an inability to be fair, and, indeed, they may often feel unbiased having already reached certain conclusions about the evidence. Also, how are challenges applied to remove prejudiced jurors? Should the defendant have a challenge of right against all who admit to having read or heard certain news stories? If so, it might be impossible to get a jury. Or should we disqualify only those who admit to a preconceived opinion as to guilt? Again, it would be difficult to qualify a jury.<sup>31</sup> The early standard, as pronounced in *Reynolds v. United States*,<sup>32</sup> was that a venireman need not be dismissed for cause even if admitting a preconceived opinion as to the guilt of the accused if he can convince the court that he will be able to disregard his opinion and render a verdict based on the evidence presented to him. This standard is apparently still accepted by the United States Supreme Court:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impressions or opinions and render a verdict based on the evidence presented in court.<sup>33</sup>

This is, however, only a minimum standard, and the trial court does often excuse those admitting preconceived opinions.<sup>34</sup>

Another reason why the effectiveness of voir dire examination must be questioned is that recognized by Mr. Justice Frankfurter in an opinion respecting the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.* If the defense attorney exercises his right to examine jurors by asking if they have knowledge of certain prejudicial news stories, "he would by that act be driving just one more nail into James' coffin. We think, therefore, that remedy useless."<sup>35</sup>

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31. In *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir. 1963), *cert. denied*, 368 U.S. 868 (1963), a reversal was granted when of thirty-nine veniremen questioned, thirty-one admitted having preconceptions, and fifty percent of those jurors seated were of the initial opinion that the accused was guilty. In *Geagar v. Gavin*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1963), a conviction was affirmed where more than 68 percent of 965 prospective jurors questioned on their opinions as to the defendant's guilt admitted preconceived inclinations as to his culpability, including two persons who actually served. In *Irvin v. Dowd*, 366 U.S. 717 (1961), 90 percent of 370 prospective jurors and two-thirds of those seated on the jury had an opinion as to guilt and the accused was unsuccessful in challenging for cause several of the persons so selected for the jury. The Supreme Court reversed the conviction.

32. 98 U.S. 145, 155-156 (1878).

33. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

34. *See Beck v. Washington*, 369 U.S. 541, 556-557 (1961).

35. 338 U.S. 912, 916 (1950). Opinion respecting the denial of petitioner's writ for certiorari.



### E. Sequestration of the Jury

Another procedural means of obtaining an impartial jury, aimed at possible prejudice immediately before and during trial, is physically to shut off the jury from the outside world so that it has no outlet to publicity sources. It is obvious that this process is completely ineffective as a way to deal with opinions formed long before trial by news stories close in time to the crime charged. In other words, the harm has been done far prior to the time this cure would be administered.

There is also some evidence that sequestration itself can do prejudice to a defendant's case. This was an argument made in *United States v. Hoffa*,<sup>36</sup> where the jury was quartered at Great Lakes Naval Station, at the discretion of the trial judge, because of "recent charges of alleged jury tampering." This argument by the defendants in that case was rejected, however.

### F. Closed Preliminary Hearings

One of the recommendations of the American Bar Association Committee on Fair Trial and Free Press would give the defendant the right to request that all or part of any preliminary hearing be closed to the public.<sup>37</sup> The grounds for such motion would be "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."<sup>38</sup> It is unclear whether this recommendation would place the burden of proof for this claim on the defendant.

Closing preliminary hearings is one procedural technique of dealing with

36. 367 F.2d 698, 711-712 (7th Cir. 1966).

37. A.B.A. Advisory Comm. on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press*, (Tent. Draft 1966). These recommendations were adopted by the House of Delegates of the American Bar Association in February, 1968. The actual substantive proposals as adopted, minus text, may be found at 54 A.B.A.J. 347-351 (1968). See also from the tentative draft recommendations on change of venue and continuance at pp. 8-10, sequestration at pp. 11-12, voir dire at pp. 10-11, instructions at pp. 12-13, and mistrial at p. 14.

The standards relating to fair trial and free press, which are not self-executing, consist of four sections. Part I relates to the conduct of lawyers and proposes a new and enforceable canon of ethics relating to the release of information to the news media. This recommendation will go to the Association's Special Committee on Evaluation of Ethical Standards for inclusion in the new Code of Professional Responsibility now under preparation. It is recommended also to states and other jurisdictions having canons of ethics. Part II proposes standards for law enforcement officers, judges and judicial employees. These standards would be implemented by departmental rules or regulations, rules of court, legislation or canons of judicial ethics. Part III, recommendations relating to the conduct of judicial proceedings in criminal cases, and Part IV, relating to the contempt power, would be put into force through court rules, statutes or judicial decision.

Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343, 344 (1968). Hereafter this draft will be cited as A.B.A. REP.

38. *Id.* at 8.

pre-trial publicity which would appear effective to a limited degree, *i.e.*, to dispose of prejudicial news stories arising out of the conduct of preliminary hearings. There are inherent dangers, however. For one, the public should be told about the conduct of our judicial system as it seeks to deal with crime. This is a function of the "public trial" aspects of the sixth amendment just as protection of the defendant is. Also, once an accused person has moved for a closed hearing, he might fall prey to his own initiative and suffer wrongs of which the public and press have no knowledge and, therefore, cannot move to redress. The right of "public trial" is to insure fairness; once the public is closed off from a segment of the judicial process, the rights of the defendant might be put in jeopardy. Despite these dangers, however, this proposal merits future judicial consideration.

### G. Waiver of Jury

*The ABA Standards Relating to a Fair Trial and Free Press* (better known as the Reardon Report)<sup>39</sup> also suggests that:

In those jurisdictions in which the defendant does not have an absolute right to waive a jury in a criminal case, it is recommended that the defendant be permitted to waive whenever it is determined that (1) the waiver has been knowingly and voluntarily made, and (2) there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial.<sup>40</sup>

We are constitutionally guaranteed a right to a trial by an "impartial jury." To say that this is impossible because of publicity before the trial and to substitute a judge or judges is to demonstrate the adverse effect of pre-trial publicity. Waiver of a jury is not a remedy for, but rather a manifestation of, the defects in our system. To this writer, it seems pointless to enumerate a trial without a jury as a cure for prejudiced jurors.

### H. Mistrial<sup>41</sup>

To grant a new trial where it appears that the jury was affected by out-of-court news releases protects the defendant where he has already been tried by a biased jury. However, this device delays his right to a "speedy trial," and does not insure that a subsequent trial with a different jury will result in a fair verdict. Indeed, at a later date prospective jurors might have been subjected to even more extensive adverse publicity.

39. After the name of the Chairman of the reporting committee and Massachusetts Judge, Paul C. Reardon.

40. A.B.A. REP. 10.

41. In *Marshall v. United States*, 360 U.S. 310 (1959), the Supreme Court held that a mistrial should have been granted where information that the defendant had previously been convicted of practicing medicine without a license reached the jury via the newspapers, where defendant was convicted of unlawfully dispensing certain drugs without a prescription from a licensed physician, and where the trial judge had excluded evidence of the prior conviction.

### I. *Instructions to the Jury*

Yet another possible procedural method of dealing with prejudice would call upon the trial judge to admonish the jury to disregard all things pertaining to the case at hand except those things actually presented during the trial proceedings. Such admonitions often instruct the juror "not to read, listen to, or watch any news reports concerning this case while you are serving on this jury."<sup>42</sup> Taking such form, instructions closely parallel, in effect, sequestration and are subject to the same limitations as discussed under that topic. Instructions can also be constructed to deal with prior prejudicial effect caused by reports on the part of the news media. Failure to give such instructions can be held to constitute reversible error.<sup>43</sup> The assumption that prejudicial effects created by a deluge of newscasting and sensational news coverage automatically can be placed aside and forgotten at the suggestion of the judge is naive. Such instructions should be given in order to appeal to the juror's conscience, but are unlikely to have any momentous curative effect.

### J. *Habeas Corpus*

Dr. Sam Sheppard first brought the prejudicial pre-trial publicity aspects of his case before the courts by a writ of habeas corpus. For two reasons habeas corpus is a very time consuming and expensive process. First, before habeas corpus can be relied upon, every available direct state remedy must have been exhausted. Second, every collateral attack possible under law must have been attempted.<sup>44</sup> For these reasons, it would appear to be unfair to expect a defendant who has been wrongfully denied a fair trial as the result of publicity to rely upon a writ of habeas corpus; many can afford neither the time nor the money.

### K. *Appellate Review*

The most complex and probably the most effective of all procedural devices in this area involves review of the trial court decision and the circumstances surrounding it by courts of appellate jurisdiction. Appellate courts often consider the presence or absence of all of the foregoing devices to determine whether the jury was impartial. Earlier cases held that the appealing defendant must prove that prejudice did exist at the time of trial.<sup>45</sup> As a result, most of the cases reversed have involved extreme prejudice that is obvious to the reviewing court.<sup>46</sup> Courts no longer need to find actual prejudice to have resulted from the pre-trial publicity in order to reverse, however. In *Rideau v. Louisiana*<sup>47</sup> the Supreme

42. A.B.A. REP. 13.

43. *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952).

44. See Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 823 (1961).

45. See *Stroble v. California*, 343 U.S. 181, 198 (1952).

46. See *Rideau v. Louisiana*, 373 U.S. 723 (1962), and *Irvin v. Dowd*, 366 U.S. 717 (1961), discussed *supra*.

47. *Ibid.*

Court did not even examine the voir dire to determine if there had been actual prejudice, while in *Estes v. Texas*<sup>48</sup> and *Turner v. Louisiana*,<sup>49</sup> the Court cited the "probability" and the "potentiality" of prejudice as grounds for reversal. It seems to this writer that the following appraisal of the defects of appellate review as a proper remedy for prejudicial pre-trial publicity is symbolic of the whole area of procedural curative devices:

But we must remember that reversals are but palliative; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interference.<sup>50</sup>

All the procedural measures alluded to come into play only *after* the publicity adverse to the defendant has come into existence. None attack the source of the information or attempt to deter the publisher. The next two sections of this article will attempt to deal with recommendations so aimed.

#### IV. CONSTRUCTIVE CONTEMPT<sup>51</sup>

##### A. Introduction

The most fascinating and most controversial subject in the entire area of pre-trial publicity concerns possible sanctions to be placed directly against the news media to control the dissemination of pre-trial publicity. The discussion herein shall treat the practice of contempt by publication as it has evolved and exists in England, the history of constructive contempt in the United States,<sup>52</sup> and the potentialities of contempt by publication as a useful remedy against prejudicial pre-trial publicity in the United States today.

##### B. In England<sup>53</sup>

The 1756 case of *King v. Almon*<sup>54</sup> seems to be the chief judicial precedent for constructive contempt in England. The action in that case was against a bookseller who published a libel of Chief Justice Mansfield. It was also at about the time

48. 381 U.S. 532 (1965).

49. 379 U.S. 466 (1965).

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

51. This section is concerned with the possibility of putting sanctions directly upon the news media to control prejudicial publicity. But note that citations for contempt may also be issued against defense attorneys, prosecuting authorities, and the police to control the sources of information. The succeeding section will deal with that remedial problem.

52. Constructive contempt means that statements occurring outside the courtroom are being punished. Direct contempt deals with statements made before the court.

53. For an extended discussion of constructive contempt in England, see Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17 (1965).

54. *King v. Almon* is an unpublished case whose facts are found in J. WILMOTT, NOTE OF OPINION AND JUDGMENT 247 (1802). Wilmott was the presiding judge in that case.

of the *Almon* case that Blackstone justified the power of the courts to punish for constructive contempt as one of those summary proceedings necessary to punish those who would insult or resist the powers of courts.<sup>55</sup>

Therefore, as early as the eighteenth century, there was judicial precedent in England allowing direct sanction against the news media when it interfered with judicial processes. Since that time newspapers and other segments of the news media in England have refrained from pre-trial comment. It is the aggrieved party who initiates the contempt proceeding in England, and not the court. In determining whether to cite a member of the news media for contempt, the English courts use a "reasonable tendency test" analogous to the United States treatment of freedom of expression before the advent of the "clear and present danger" test. The question is whether the publication "tended to prejudice either the mind of the judge or any other person who would have to consider the case," and, if so, "then it is a publication that ought not to be allowed."<sup>56</sup> Traditionally, intent to do prejudice has also been a requirement.<sup>57</sup> However, contempt citations have often been upheld in the apparent absence of intent, so that in 1960 the Administration of Justice Act<sup>58</sup> provided that a reporter was safe who took reasonable care to assure that no criminal litigation is pending against a person before causing his comments on said person to be published or broadcast.

### C. *History of Contempt by Publication in the United States*

The utilization of constructive contempt against the news media is not unknown in the United States. To the contrary, contempt by publication was, at one time, practiced according to a "reasonable tendency" test identical to the standard used in Great Britain. These earlier cases are typified by *Patterson v. Colorado*<sup>59</sup> where the United States Supreme Court held that if a publication tended to interfere with the administration of law, the court could punish its publisher via a contempt citation. A contempt citation was upheld in *Toledo Newspaper Co. v. United States*,<sup>60</sup> even though the punishing authority did not consider if the administration of justice was actually hindered. The decision in the *Toledo Newspaper* case did not require any geographical proximity between the court and the offending publication; only a causal relationship was necessary.<sup>61</sup> This portion of that opinion was overruled by *Nye v. United States*<sup>62</sup> which held that geographical proximity was required.<sup>63</sup>

55. 4 BLACKSTONE, COMMENTARIES 280-284 (1765).

56. *In re Pall Mall Gazette* Jones v. Flower Hopkinson, 11 T. L. R. 122 (1894).

57. *Rex v. Payne*, 1 Q.B. 577 (1896).

58. 8 & 9 Eliz. 2, c. 65, §§ 11-13 (1960).

59. 205 U.S. 454 (1906).

60. 247 U.S. 402, 421 (1918).

61. *Id.* at 418-19.

62. 313 U.S. 33 (1941).

63. This issue was raised as the result of the "so near thereto" provision of the certain applicable contempt statutes. See Act of March 2, 1831, 4 Stat. 487. Section 268 of that act provides "that such powers to punish for contempts

The early liberal trend in the allowance of contempt by publication citations was sharply reversed by a line of cases in the 1940's which are still considered controlling.<sup>64</sup> In *Bridges v. California*<sup>65</sup> the Supreme Court reversed the conviction of a labor leader for contempt of a state court based on his publication in the press of a telegram which he had sent to the Secretary of Labor. In this telegram he sharply criticized a judicial decision involving a labor dispute, and warned that enforcement of the decree might result in a strike. The Court held that a constructive contempt conviction, unless the publication acted against created a "clear and present danger" to the administration of justice, violates the constitutional rights of freedom of speech and press.<sup>66</sup>

*Pennekamp v. Florida*<sup>67</sup> also relied on the "clear and present danger" test. There, editorials and cartoons in the *Miami Herald* criticized the local courts in general, and specific trial judges in particular, of being overly lenient to criminals. The general impression conveyed was that the people were not being properly represented because of the courts' sympathy with criminal defendants. The paper was cited for contempt. The Supreme Court held these articles did not present a "clear and present danger" to the administration of justice because they would not tend to influence the result in a particular case.<sup>68</sup> The Court in *Pennekamp* also mentioned the fact that one reason the publications did not create a "clear and present danger" was that the litigation concerned was nonjury.<sup>69</sup>

In both *Bridges* and *Pennekamp*, Justice Frankfurter disagreed with the implementation of such an absolute formula as the "clear and present danger" test. He stated his conviction that a balancing approach should be implemented

to determine whether the State Court went beyond the allowable limits of judgment in holding that conduct which has been punished as a contempt was reasonably calculated to endanger a State's duty to administer impartial justice in a pending controversy.<sup>70</sup>

The next important case in this area was *Craig v. Harney*.<sup>71</sup> In this case a Corpus Christi publication commented on a particular decision by a specific judge stating, as its purpose, to convince the judge to change his mind. Again the Supreme Court implemented the "clear and present danger" rule to reverse a contempt conviction, and took special care to stress the requirement of an immediate danger.<sup>72</sup>

By 1950, the Court seemed set in its position on contempt by publication and

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shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of Justice."

64. *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

65. 314 U.S. 252, 275 (1941).

66. *Id.* at 278.

67. 328 U.S. 331 (1946).

68. *Id.* at 347.

69. *Id.* at 348-49.

70. *Id.* at 354.

71. 331 U.S. 367 (1947).

72. *Id.* at 376.

it refused to review a case presenting the issue of the use of the contempt power to stop the press from disseminating prejudicial pre-trial publicity.<sup>73</sup> In an excellent opinion in opposition to denial of certiorari by the Court, Justice Frankfurter defended the contempt by publication principle. He also stressed that denial of certiorari did not necessarily mean an affirmance of the state supreme court decision reversing the contempt conviction.<sup>74</sup>

The "clear and present danger" test has been partially reaffirmed as applied to a constructive contempt conviction in the 1962 case of *Wood v. Georgia*.<sup>75</sup> There a sheriff issued a written news release to the press sharply criticising the actions of a judge as attempting judicially to intimidate negro voters. The sheriff, rather than the press, was charged with contempt. The Supreme Court reversed his contempt conviction relying, to a certain degree, on the decisions discussed above. However, the court retreated from strict "clear and present danger" language somewhat by holding that the release did not present any danger to the administration of justice.

On their face, then, the decisions of the United States Supreme Court related to contempt by publication would seem to minimize the effectiveness of direct sanctions against the press to relieve prejudicial pre-trial publicity. However, contempt by publication has never been ruled per se unconstitutional. Evidently, if a publication ever involved a "clear and present danger" to the administration of justice, it would be held in contempt. It should be noted, however, that in all the cases decided by the Supreme Court on this subject since 1941, the publications concerned criticisms of past actions by judges, and were not clearly aimed at present or future litigation. A correlating factor is that none have dealt with the prospective contamination of jurors by pre-trial publicity. Perhaps publicity that might not affect a judge could possibly influence a jury, thus constituting a "clear and present danger" to the administration of justice. *Pennekamp v. Florida* might be interpreted to suggest such a conclusion.<sup>76</sup>

#### D. *Constructive Contempt as a Remedy to Pre-trial Publicity in the United States Today*

##### 1. Obstacles

The most obvious obstacle to the use of constructive contempt is the judicial precedent created by the decisions outlined above, which have often struck down contempt convictions. The argument can be made that the validity of these precedents is not impaired as applied to jury proceedings just because they all concerned nonjury litigation. The procedural safeguards such as voir dire, court instructions, change of venue, etc., which have already been considered, are

73. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

74. *Id.* at 917-18.

75. 370 U.S. 375 (1962). The distinguishing aspects of this case are discussed in the text *infra*.

76. 328 U.S. 331, 348-49 (1946). The Court stressed the unlikelihood that judges would be influenced by certain publications and expressly mentioned the lack of a jury.

not present in the case where the judge is the only one whose prejudice could effect the outcome. Accepting this line of reasoning, one could come to the conclusion that publications not presenting a "clear and present danger" to the impartiality of a nonjury trial would be even less likely to do so in the case of a jury trial with the aforementioned procedural safeguards. A refutation to such an argument would be that these procedural safeguards are largely ineffectual devices which really cannot deal with prejudice.

Another interesting argument is that made by the well known lawyer, Percy Foreman:

The English injunctive system is not suitable to either our constitutional or judicial tradition. The Supreme Court consistently has been very sensitive to any attempt through the use of injunctions to muzzle the press. Moreover, there is probably not the faith in the lower judiciary . . . in the United States as in England. We have, for the most part, an elected judiciary, or politically appointed judges for limited terms, and a much wider variety of standards for members of the bench than exist in England. Thus, it would seem most unlikely that we would adopt the English practice.<sup>77</sup>

The scope of this article does not comprehend a discussion of the deficiencies of lower courts in the United States. A possible solution to the kind of problem presented by Mr. Foreman might lie in remedial action similar to the Missouri Proposed Court Plan providing for the nonpartisan election of all state judges.<sup>78</sup>

Many who oppose the use of contempt by publication in the United States point to the extremes produced by the British system. It is true that certain English contempt convictions have appeared overly harsh and apparently unjust. The contempt power has been used in cases after the litigation had been completed, where the publisher was ignorant of pending litigation, and even where a distributor was unaware of the contents of a publication.<sup>79</sup> However, these critics fail to point out that England does not produce the opposite extremes such as can be found in certain American cases such as those discussed above. Also, any use by the United States courts of constructive contempt would be tempered by our first amendment safeguards and most certainly would not be based on the "reasonable tendency" test used by the British.

Of course, the strongest argument against the use of a contempt by publication system in the United States is that direct restraints on the mass media enforced before criminal litigation would violate the first amendment. This view is represented very ably by some members of the Supreme Court, who would place the first amendment in a preferred position, and presume any action which limits it to be invalid.<sup>80</sup> This is also the view espoused by many members of the mass

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77. Foreman, *A Defense Lawyer's View*, 11 VILL. L. REV. 704, 707 (1966).

78. 23 J. MO. BAR 341 (1967).

79. Monroe, *A Radio and Television Newsmen's View*, 11 VILL. L. REV. 687, 691 (1966).

80. Douglas, *The Public Trial and Free Press*, 33 ROCKY MT. L. REV. 1 (1960); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960)



media.<sup>81</sup> This important argument will be discussed further at the end of this section.

Many members of the mass media, and others who oppose the concept of contempt by publication, have argued that the media itself is capable of dealing with the occasional excesses which can occur in news reporting by adopting a system of internal control via self codes and the like. The following statement of H. L. Mencken is probably the best answer to such proposals:

Journalistic codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of streetcar conductors, barbers, or public jobholders. [I]t [ethical control of publication] must be accomplished by external forces, and through the medium of penalties exteriorly inflicted.<sup>82</sup>

## 2. Contempt by Publication Proposals

Some suggestions have been made in the area of contempt by publication. One of the more radical of these was presented to the Supreme Judicial Court of Massachusetts as a proposed statute.<sup>83</sup> This proposal would allow for a prosecution for contempt, by the court having jurisdiction over the criminal proceeding allegedly prejudiced, of any member of the mass media who might "publish or broadcast, or cause to be published or broadcast, any statement or information prejudicial to a defendant's right to a fair and impartial trial by jury in a criminal proceeding." Such a provision leaves a great deal of discretion in the prosecuting agency, and, as such, might very well be stamped by the present United States Supreme Court as "void for vagueness." The Massachusetts court refused to consider if the proposed statute was repugnant to the United States Constitution but held that it would not violate the Massachusetts Declaration of Rights. This writer is of the opinion that the United States Supreme Court would not uphold the validity of this proposed statute. The statute provides that proof that the publication did not prejudice the defendant, that it was issued without intent to do so, or that it is true will, be no defense. Recent Supreme Court decisions dealing with freedom of speech and association, however, have required specific intent.<sup>84</sup>

A better drawn and more limited proposal, and one to which this writer can subscribe, is that by the American Bar Association Advisory Committee on Fair Trial and Free Press. The Committee admonishes that the contempt power should be used cautiously in certain instances:

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

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81. Lower, *The First Amendment Under Attack: A Defense of the People's Right to Know*, 42 NOTRE DAME LAW. 896 (1967). See also number 004 in a series of publications by the Freedom of Information Center, School of Journalism, University of Missouri, June, 1967.

82. Quoted in Le Viness, *Crime News*, 66 U.S.L. REV. 370 (1932).

83. Opinion of the Justices, 208 N.E.2d 240 (1965).

84. *Yates v. United States*, 354 U.S. 298 (1957); *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

- (i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is willfully designed by that person to affect the outcome of the trial and that seriously threatens to have such an effect; or
- (ii) makes such a statement intending that it be disseminated by any means of public communication.<sup>85</sup>

It is obvious that this proposal is much more narrowly drawn than the proposed Massachusetts statute. It requires intent and actual resulting prejudice with knowledge of the pending trial proceeding. It is also less vague as to what kind of statement is to be prohibited.

A number of law review articles have proposed statutes that would make the premature publication of certain kinds of prejudicial information punishable as a contempt.<sup>86</sup> Perhaps the best of these is by Professor Thomas L. Shaffer.<sup>87</sup> He would allow the press access to all levels of the criminal proceeding to a great degree but would request, via the threat of a contempt citation, that no release of certain kinds of materials be made until after the trial. He reasons:

The statute would be much more effective, and much less drastic, than the proposals of the ABA Committee. It should be accompanied by broadened access to records and hearings in criminal cases; by opportunities for the press to observe arrest and interrogation procedures; and by exposure to parties, counsel, and police officers, unfettered by any official rules.<sup>88</sup>

Such a policy would satisfy the general public's right to know, and give added freedom to the mass media to obtain information on crimes. It would require, however, a delay in its dissemination until after pending criminal litigation. One criticism which could be leveled at such a proposal is that it is immediately following the crime when the public most demands knowledge of whether our law enforcement agencies are functioning properly and if they have the criminal under custody. After the public has been denied information during the extended periods usually elapsing between arrest and trial, it may no longer be interested in the details after the litigation is completed.

### 3. Indications from the Supreme Court

The Supreme Court's decision in *Wood v. Georgia*<sup>89</sup> indicates that the Court probably would not deny the validity of a statute imposing direct restraints on the press if that statute were properly drawn. In *Wood*, the last in the line of the

85. This is the form actually adopted by the Board of Governors of the American Bar Association, 54 A.B.A.J. 351 (1968).

86. Sigourney, *Fair Trial and Free Press—A Proposed Solution*, 51 MASS. L. Q. 117 (1966); Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting in Criminal Cases*, 56 J. CRIM. L., 166-69 (1965); Will, *Free Press v. Fair Trial*, 12 DE PAUL L. REV. 197 (1963).

87. Shaffer, *Direct Restraint on the Press*, 42 NOTRE DAME LAW. 865 (1967).

88. *Id.* at 876.

89. 370 U.S. 375 (1962).

contempt cases, the Supreme Court found that the statements made in a press release, issued by a sheriff, criticizing a judge's charge to a grand jury "did not present a (any) danger (whatsoever) to the administration of justice. . . ."<sup>90</sup> The Court went out of its way to emphasize that neither *Bridges*,<sup>91</sup> *Pennekamp*,<sup>92</sup> nor *Harney*<sup>93</sup> involved a trial by jury, and distinguished an actual trial from the grand jury type proceedings dealt with in *Wood*. This writer is of the opinion that the language of *Wood* typifies a movement by the Supreme Court away from the "clear and present danger" test. Accordingly, a contempt by publication statute could be upheld.

In recent years the Supreme Court has held that certain kinds of expression are not protected by the first amendment. These include obscene utterances or publications,<sup>94</sup> incitement to action for the violent overthrow of our government,<sup>95</sup> libelous statements,<sup>96</sup> and incitement to riot.<sup>97</sup> Is it not possible, then, that the same court would find statements which prejudice the right of a criminally accused to a fair trial also are outside the range of expression protected by the first amendment? In addition, recent years have seen a decline in the use by the Supreme Court of the "clear and present danger" approach. This test was applied to reverse contempt convictions in the 1940's. Beginning with *Dennis v. United States*<sup>98</sup> in 1951, the Court began the modification of the requirement of "immediacy." In that case, the majority adopted the test of Judge Learned Hand: "In each case courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The Court, at present, usually resorts to a balancing type test in cases involving curtailment of expression. That is, the personal freedom of expression is balanced against some legitimate state interest—for example, the interest in fair and impartial criminal trials.

All of this suggests a tendency not to place freedom of expression in a preferred position among those protections conferred upon the individual as against the state. The right to trial by an "impartial jury" guaranteed by the sixth amendment to our Constitution is now less likely to be given a subordinate position to freedom of expression.

This court has not yet decided that the fair administration of justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the prisoner is constitutionally protected in plying his trade.<sup>99</sup>

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90. *Id.* at 395.

91. 314 U.S. 252 (1941).

92. 328 U.S. 331 (1946).

93. 331 U.S. 367 (1947).

94. *Roth v. United States*, 354 U.S. 476 (1957).

95. *Yates v. United States*, 354 U.S. 298 (1957).

96. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

97. *Feiner v. New York*, 340 U.S. 315 (1951).

98. 341 U.S. 494 (1951).

99. J. Frankfurter's concurring opinion in *Irvin v. Dowd*, 366 U.S. 717 (1961).

## V. RESTRICTION OF THE SOURCE

The type of remedy most actively proposed in regard to the problem of prejudicial pre-trial publicity is in regard to the regulation of the kinds of information that defense attorneys, prosecutors, and the police can release to the press. The following quotation from *Sheppard v. Maxwell* is illustrative.

And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the coroner. The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was "a 'bombshell witness' on tap" who would testify as to Sheppard's "fiery" temper could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.<sup>100</sup>

Some recommendations in this area have come in the form of proposed legislation,<sup>101</sup> court rules,<sup>102</sup> and guides or codes.<sup>103</sup>

There has been a proposed standard of conduct in the release of news stories for many years in the form of canon 20 of professional ethics which provides that all public statements of an attorney in regard to pending or anticipated litigation generally "are to be condemned."<sup>104</sup> Unfortunately, the canon has been of little practical effect. An alleged violation of it has been considered only once, and that was in a 1938 case where anti-trust lawyers complained about

100. 384 U.S. 333, 360-361 (1966).

101. S. 290, 89th Cong., 1st Sess. (1965), would have become 18 U.S.C. 1512. Proposal by Senator Wayne Morse.

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

103. A.B.A. Rep., *Statement of Policy Concerning the Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings*, 28 C.F.R. 50.2. In addition, see the recommendations of the Judicial Conference of the United States for federal legislation to make it a criminal contempt, punishable for fines up to \$1,000, for any federal attorneys, FBI agents, or any other employees of the United States, or any defense counsel to make available to the press the outcome of criminal litigation. *Washington Post*, Dec. 23, 1964. The above are only a small example of the proposals in this area.

104. *ABA Canons of Professional Ethics* 20 (rev. ed. 1956-57), the text of which follows:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases, it is better to avoid any *ex parte* statement.

press statements issued by the Attorney General of the United States in connection with the Government's anti-trust activities.<sup>105</sup>

The most publicized, and also the most comprehensive, study in the area of pre-trial publicity is that by the Reardon Committee for the A.B.A. Perhaps the major recommendations of this committee were directed toward a revision of the Canons of Professional Ethics.<sup>106</sup> This proposal specifically sets forth what kinds of information may be properly disseminated to the news media and forbids the release of certain other kinds of information. The Reardon Report also provides for enforcement by "judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment or punish-

105. American Bar Association, *Opinion of Committee on Professional Ethics and Grievances*, 400-403 (1957).

106. From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

1. The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
2. The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure to the accused to make any statement;
3. The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
4. The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;
5. The possibility of a plea of guilty to the offense charged or a lesser offense;
6. Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

54 A.B.A.J. 347 (1968).

ment for contempt of court." The Report also applies similar restrictions to judicial employees and law enforcement officers, and suggests departmental sanctions and controls to be applied where appropriate.

The Reardon recommendations, as adopted by the American Bar Association, have come under fierce attack by members of the news media and some members of the Bar. The following quotation of a past president of the Associated Press Managing Editors Association is one of the more cogent critiques on the restriction of the release of confessions:

Let us suppose that one of the 5,000 persons arrested during the recent Detroit rioting, after having been warned of all his rights, had confessed that he was part of a carefully planned, nationwide conspiracy to start insurrections wherever possible. Should such a confession be withheld for many months until this man came to trial? Should a Detroit policeman decide whether it should be made public?

Suppose that Oswald had confessed, or that Ruby had admitted to being part of a conspiracy. Should these confessions have been withheld?

Occasionally, guilt or innocence is inescapable and so must be reported. In a Phoenix suburb last November one Robert Smith, 18, was seized in a beauty parlor with the bodies of four women and a baby girl. He told police: "I shot some people. The gun is over there. I wanted to get known, to get myself a name."

Mr. Reardon's restrictions would have suppressed that statement.<sup>107</sup>

In a preliminary draft to the proposed new *Code of Professional Responsibility*, under the new proposed canon seven of the A.B.A. providing that "[a] lawyer has a duty to represent his client with zeal limited only by his duty to act within the bounds of the law," the problem of pre-trial publicity is treated in a supplementary disciplinary rule. Although the language used is slightly different than that of the final draft of the Reardon Report as quoted previously, the prospective canon would forbid "a lawyer or law firm associated with the case" to "make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication" concerning any of the topics which the Reardon Report would forbid.<sup>108</sup>

A bill has also been introduced in the Senate which has resulted in debates filling volumes of committee hearings:

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

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107. From a speech given by William B. Dickinson to a Third Circuit Judicial Conference and reported at 44 F. R. D. 57, 99 (1968).

108. *ABA Code of Professional Responsibility* (tent. draft 1969).

already been admitted at the trial. Such contempt shall be punishable by a fine of not more than one thousand dollars.<sup>109</sup>

After examining portions of the hearings on the bill, it would appear to this writer, in general, that defense attorneys and judges favor such legislation while prosecutors and police officials, as well as members of the press, tend to disapprove.

The rationale of such proposals is obvious. If responsible members of the various levels of the judicial process refrain from releasing information to the press, then the press will not print or broadcast prejudicial information, and, therefore, the prospective juror will be impartial toward the defendant. In practice, however, it is doubtful that such a remedy would be effective. In all likelihood, what will result is that the material printed will be based upon inferior news sources. Such sources are often inaccurate and more prejudicial than official news releases might be. Such a practice might also encourage individual investigation by members of the news media which is not likely to be as thorough as police investigation, but which will be the basis for similar types of news stories. In addition, much of the harm done in cases such as those concerning Sam Sheppard and Lee Oswald was the result of editorial type comment. Such publications are not as dependent on the facts as straight news reporting, and probably would not be effectively curbed by a lack of official news sources.

How would such restrictions on publication be enforced? It might be relatively easy to trace the statements of defense attorneys and defendants, but the much larger apparatus of prosecuting authorities and police departments would be more difficult to control. A result which could occur is that the defendant loses his right to comment on his innocence or to publicly rebut the evidence while the police and prosecutor can continue to release, albeit indirectly, prejudicial information. Another problem which has been suggested is that police disclosures reported in the press are an important source of pre-trial discovery available to the defense. These disclosures would be curbed by such policies as those proposed in the Reardon Report.<sup>110</sup>

#### VI. SIRHAN BISHARA SIRHAN AND JAMES EARL RAY

The controversy waged over the scope and content of pre-trial publicity has already produced some beneficial results in the treatment of publicity pursuant to the trials of Sirhan Bishara Sirhan for the assassination of Robert F. Kennedy and of James Earl Ray for the assassination of Dr. Martin Luther King, Jr. The trial judges in both cases issued court orders aimed at curbing prejudicial publicity before and during trial. These orders were aimed at attorneys, police officials, etc., and were not drawn to impose sanctions directly against the news media.

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109. See also *Hearings on S. 290 Before the Subcommittee on Constitutional Right and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 41 (1965) (emphasis added).

110. Brown, *Fair Trial and Free Press: The A.B.A. Recommendations—A Defense Lawyer's Viewpoint*, 18 W. RES. L. REV. 1156 (1967).

Judge Alarcon, who presided at the arraignment of Sirhan, issued an order forbidding public officials and others connected with the case from disseminating any information which would tend to impede the right of the accused to a fair trial. "Swift" contempt of court citations were promised violators.<sup>111</sup> Except for improprieties committed by Samuel W. Yorty, Mayor of Los Angeles, in disclosing the contents of the notebook found in Sirhan's room, the press, police, and attorneys involved conducted themselves in the spirit of the Reardon Report and the Warren Commission criticisms of the excessive publicity attendant to the assassination of John F. Kennedy.<sup>112</sup>

The most comprehensive set of orders directed toward curbing pre-trial publicity to date are those of Criminal Court Judge W. Preston Battle, who was chosen by lot to preside over the trial of James Earl Ray. In an order dated July 19, 1968, Judge Battle forbade anyone interested in the case "to take part in interviews for publicity and from making extrajudicial statements about this case from this date until such time as a verdict is returned in this case in open court."<sup>113</sup> In response to a report that there had been violations of his earlier order, Judge Battle handed down more explicit guidelines on July 30, 1968, which forbade statements of personal belief as to the defendant's guilt, plans of declarant relative to trial tactics, names of potential jurors, comments on the merits of the case or evidence and the credibility of any witness or the acts and attitude of the accused.<sup>114</sup> The court went on to cite specific instances of impropriety including: statements by defense attorney Arthur Hanes that the assassination involved a Communist conspiracy and that Ray's rights were being trampled in jail; statements of Sheriff Morris as to Ray's demeanor and attitude while in jail; and, to the extent Attorney General Ramsey Clark was a law enforcement officer participating in the case, his statement "that there was no evidence of a conspiracy in the shooting of Dr. Martin Luther King, Jr."<sup>115</sup> The order intimated actions against the alleged violations and future violations could be forthcoming.

The Chairman of the Fair Trial-Free Press Legal Advisory Committee of the American Bar Association (which succeeded the Reardon committee), Judge Edward J. Devitt, praised the authorities in these two cases as acting "responsibly and with good judgment" in their approach to publicity in comparison "with the Roman circus atmosphere surrounding the apprehension and custody of Lee Harvey Oswald."<sup>116</sup>

## VII. CONCLUSION

The present awareness of the possibility that the right of a criminally accused to a fair trial can be obstructed by the effects of certain kinds of pre-trial

111. *New York Times*, July 11, 1968, at 34, col. 3.

112. For a more complete discussion, see the news analysis article by Sidney E. Zion, *Assassination and Law*, *New York Times*, June 8, 1968, at 13, col. 6.

113. The entire text of this order appears at *New York Times*, July 20, 1968, at 11, col. 2.

114. *New York Times*, July 31, 1968, at 10, col. 1.

115. *Ibid.*

116. In a speech given to the Minnesota State Bar Association convention and reported in *New York Times*, June 8, 1968, at 64, col. 4.



publicity has resulted in a number of remedial proposals. Some of them may be very effective, others relatively useless; but the fact of the controversy itself in this area is likely to produce some limitations on the excesses which occur in crime reporting. The Supreme Court, at present, is less likely to hold the first amendment freedom of the press in a preferred position over the defendant's right to "an impartial jury" than was true during the 1940's and 1950's. The Court has been called upon to reverse too many convictions where publicity was a prejudicial factor to be patient of abuses of freedom of speech in this area. It is likely to enforce and uphold most of the remedial proposals available if used with discretion.

An all-inclusive plan, such as the one represented by the American Bar Association recommendations of the Reardon committee, are needed in the pre-trial publicity area, more as a preventive than as a penalizing force. Hopefully, with the use of such guidelines, our judicial system will be able to deal with the problem without the imposition of external legislative controls.

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