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COMMENT

TRIAL BY NEWSPAPER

I. INTRODUCTION

"Trial by newspaper," an issue which has plagued the legal profession for decades, again presented itself when President John F. Kennedy was assassinated. A few hours after the crime, Lee Harvey Oswald was arrested and charged with his murder. As could be expected, the assassination generated an enormous amount of news coverage, a portion of which centered around the developments in Oswald's prosecution. Not only were there newspaper reports,¹ but most of the statements of Dallas officials were also reported, live, by radio and television.² Millions of people saw, heard, and read of the case against Oswald.

There is little doubt that one of the major problems the Texas court would have faced, had Oswald been brought to trial, would have been the securing of the impartial jury³ to which every accused is entitled in a criminal prosecution.⁴ Unfortunately, the question of whether twelve impartial individuals could have been impaneled will never be answered. However, the evils created by prejudicial publicity remain an important consideration. It would appear that as long as there are news events which can be sensationally exploited by the mass media, there will always be "trial by newspaper." Unless adequate steps are taken to protect the accused, the minds of potential jurors will be prejudiced as a result of information disseminated to the public by the press.

1. "We're convinced beyond any doubt that he killed the President," said Capt. Will Fritz, chief of the Dallas Police Homicide Bureau, after questioning Oswald and others. "I think the case is clinched." N.Y. Times, Nov. 24, 1963, § 1, p. 1, col. 6. "Dallas County District Attorney . . . said this afternoon: 'I think we have enough evidence to convict him now but we anticipate a lot more evidence in the next few days.'" Id. col. 7. "The [police] chief summed up the day's work thus: 'I thought the case was in good shape this morning. It's even stronger tonight.'" Id. § 1, p. 2, col. 1. "Chief Curry said his department had no record about Oswald up to yesterday, but that the local office of the Federal Bureau of Investigation had a long 'subversive' record on him." Id. col. 2.

2. The three television networks devoted their entire schedule to covering the events in Dallas and Washington.

3. "[N]either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. Undoubtedly the public was interested in these disclosures, but its curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury. The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime." Report of the President's Commission on the Assassination of President John F. Kennedy 240 (1964) (Warren Commission Report).

4. U.S. Const. amend. VI. "[T]he constitutions of thirty-nine states embody a similar guarantee of impartiality and in the remaining eleven it is reasonably inferable from the right to trial by jury." Will, *Free Press vs. Fair Trial*, 12 De Paul L. Rev. 197, 199 n.7 (1962).

II. FUNDAMENTAL CONSIDERATIONS

Whenever the problem of dissemination of prejudicial material is being discussed, it is important to realize that two fundamental rights are in conflict: freedom of the press,⁵ and the right of an accused to an impartial jury trial,⁶ one of which must inevitably weigh more heavily on the scales of justice. The courts apparently place more emphasis on the right to a free press, and this preeminence is, to a certain extent, unfortunate because it is enabling the press which lacks concern for or understanding of the issues, to obstruct the administration of justice.⁷

Press releases concerning confessions⁸ and prior criminal records⁹ of an accused, and statements by the prosecution concerning his defense¹⁰ are, quite obviously, an evil if they produce a prejudice in the minds of potential jurors.

In *Shepherd v. Florida*,¹¹ the newspapers published, as a fact, a confession by the defendants to the crime of rape. The sheriff was named as the news source. The defendants were convicted of the crime although the confessions were never introduced into evidence. The United States Supreme Court reversed the conviction without considering the issue of prejudicial publicity. Mr. Justice Jackson, joined by Mr. Justice Frankfurter, concurred on the ground that the adverse newspaper publicity precluded trial by an impartial jury.¹² The *Shepherd* case is an excellent example of "trial by newspaper," illustrating the objectionable extent to which an unfettered press could operate under the constitutional protection of the first amendment.

III. A TEMPORARY CURTAILMENT OF THE PRACTICE: CONTEMPT PROCEEDINGS

Probably the most effective method presently available to curtail prejudicial publicity is exercise by the courts of their contempt power.

The modern law of contempt by publication, *i.e.*, a court's power to punish summarily out-of-court publications that tend to affect the result in a pending case, goes back to the English case of *The King v. Almond*,¹³ in which Mr.

5. U.S. Const. amend. I.

6. U.S. Const. amend. VI.

7. See *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. 310 (1959); *People v. Hryciuk*, 5 Ill.2d 176, 125 N.E.2d 61 (1954).

8. *Shepherd v. Florida*, 341 U.S. 50 (1951) (per curiam).

9. *United States v. Milanovich*, 303 F.2d 626 (4th Cir.), cert. denied, 371 U.S. 876 (1962); *United States v. Vita*, 294 F.2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823 (1962).

10. *Fouquette v. Bernard*, 198 F.2d 96 (9th Cir. 1952) (prosecuting attorney stated he was convinced that defendant was sane before, during and after the murders).

11. 341 U.S. 50 (1951) (per curiam).

12. "It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed . . ." *Id.* at 52 (concurring opinion).

13. *Wilmot*, Notes and Opinions of Judgments 243 (1802). "The rules for preserving discipline essential to the administration of justice, came into existence with the law itself, and Contempt of Court (*contemptus curiae*) has been a recognized phase in English law from the twelfth century to the present time." Fox, *The History of Contempt of Court* 44 (1927).

Justice Wilmot stated that the practice of exercising summary jurisdiction¹⁴ in contempt cases was established by "immemorial usage." The *Almond* case was followed by *Roach v. Garvan*¹⁵ in which Lord Hardwicke reiterated the importance of the courts' power to punish those who interfered with the administration of justice.¹⁶ These early cases established a pattern for later years, and the principles propounded are still observed in England today.¹⁷

A. *Punishment of Contempt in the Federal Courts*

In 1789, Congress enacted legislation which expressly granted to the courts the power to exact punishment summarily for contemptuous acts.¹⁸ The power of the federal courts to punish an out-of-court publication summarily, remained unchanged until 1831 when a new federal contempt statute was passed¹⁹ as a result of an impeachment proceeding brought against a federal district court judge²⁰ who was charged with abusing his contempt powers.²¹ Although the judge was acquitted, Congress realized that a change in the law was necessary.²² The Act of March 1831 was interpreted by the courts to be a limitation upon their power to punish for contempt.²³ However, in the years following the Civil War, restrictions on the use of the judicial power to punish out-of-court contempts were gradually discarded, and in 1918 the trend was completely reversed.

That year, in *Toledo Newspaper Co. v. United States*,²⁴ the Supreme Court reviewed on certiorari a trial court's summary judgment holding a newspaper guilty of contempt. While litigation between the city of Toledo and a local

14. One of the major criticisms of the law of contempt by publication in the United States is its summary proceeding. For a discussion of the reason why contempt by publication is punished summarily, see Sullivan, *Contempts by Publication* 3-6, 192-94 (3d ed. 1941).

15. 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742).

16. "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard." *Id.* at 469, 26 Eng. Rep. at 683. "There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure . . ." *Id.* at 471, 26 Eng. Rep. at 685.

17. *Regina v. Odhams Press Ltd.*, [1957] 1 Q.B. 73 (1956); *Regina v. Evening Standard Co.*, [1954] 1 Q.B. 578. For an excellent discussion of the English law on the subject of contempt by publication, see Goodhart, *Newspapers and Contempt of Court in English Law*, 48 *Harv. L. Rev.* 885 (1935).

18. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83.

19. Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.

20. Stansbury, *Trial of James H. Peck* (1833).

21. The judge had disbarred and imprisoned an attorney because he published a criticism of one of the judges' opinions which was awaiting appeal.

22. See Nelles & King, *Contempt by Publication in the United States*, 28 *Colum. L. Rev.* 401, 525 (1928).

23. E.g., *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873); *Ex parte Poulson*, 19 Fed. Cas. 1205 (No. 11350) (C.C.E.D. Pa. 1835).

24. 247 U.S. 402 (1918).

corporation was pending in the trial court, the defendant newspaper had published articles that indirectly referred to the duties and powers of that court, and questioned whether the court had any right to afford relief in the matter.

The Toledo Newspaper Company contended that under the contempt statute the court lacked the power to punish its acts as contemptuous, and further, that even if it did have the power, the contempt statute was inapplicable because the publications in question were safeguarded by the first amendment guarantee of freedom of the press. The Supreme Court, affirming the contempt conviction, construed the contempt provision of the Judicial Code²⁵ (formerly the Act of March 2, 1831)²⁶ as giving the judiciary the power to punish summarily for contempt any act which tends to obstruct the administration of justice.²⁷ The Court stated that freedom of the press, like "every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."²⁸ Outlining the test to be used to determine whether an act is contemptuous, the Court stated that it is "not the influence upon the mind of the particular judge [that] is the criterion but the *reasonable tendency* of the acts done to influence or bring about the baleful result . . ."²⁹

Unfortunately *Toledo Newspaper* was expressly overruled in *Nye v. United States*,³⁰ and the trend toward liberalization was abruptly halted. The trial court in *Nye* found the petitioners guilty of contempt for acts³¹ occurring more than 100 miles away. The basic issue was whether the "conduct of petitioners constituted 'misbehavior . . . so near' the presence of the court 'as to obstruct the administration of justice' within the meaning of . . ."³² the contempt statute.³³ The Supreme Court, in reversing the court below,³⁴

25. Judicial Code § 268, 36 Stat. 1163 (1911).

26. Ch. 99, § 17, 4 Stat. 487 (1831).

27. 247 U.S. at 419.

28. *Id.* at 420.

29. *Id.* at 421. (Emphasis added.)

30. 313 U.S. 33, 52 (1941). "If that phrase ['so near thereto'] be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a 'reasonable tendency' to 'obstruct the administration of justice' . . . then the conditions which Congress sought to alleviate in 1831 have largely been restored." *Id.* at 49.

31. The petitioners had used undue influence upon an administrator to get him to terminate a wrongful death action.

32. 313 U.S. at 44-45.

33. Judicial Code § 268, 36 Stat. 1163 (1911). This has been explicitly incorporated into 18 U.S.C. § 401 (1958), which reads as follows: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . ."

34. 313 U.S. 33 (1941). The Court reversed even though they felt the petitioners' acts were reprehensible. If their acts were to be punished, the petitioners were entitled to the "normal safeguards surrounding criminal prosecutions." *Id.* at 53. In *Green v. United States*, 356 U.S. 165, 194 (1958), Mr. Justice Black, in a dissenting opinion in which two other Justices joined, stated that he "would reject those precedents which have held that the federal courts can punish [those defendants charged with criminal contempt] . . . by means of a summary trial . . ."

reviewed the history of the contempt statute,³⁵ and concluded that the phrase "so near thereto" has a geographical connotation, suggesting "proximity not relevancy."³⁶

The result is that the federal courts, under *Nye*, cannot punish the press by means of contempt proceedings unless the contempt is either committed in the courtroom or in the vicinity of the court itself, and therefore cannot punish an out-of-court publication. If *Toledo Newspaper* were still good law, however, there would probably be fewer instances of "trial by newspaper." The risk of being held in contempt and subjected to either fine or imprisonment as a result of a publication having a *reasonable tendency* to obstruct the administration of justice would be a satisfactory deterrent.

B. Punishment for Contempt in the State Courts

Today, the power of the state courts to punish out-of-court publications for contempt is restricted to those instances where the publication constitutes a "clear and present danger" to the administration of justice. This was not always the situation. The state courts almost invariably accepted and followed,³⁷ *The King v. Almond*³⁸ and *Roach v. Garvan*.³⁹ Because of the protest against the courts' summary exercise of the contempt power, however, Pennsylvania, and later New York, adopted legislation⁴⁰ that greatly confined the contempt jurisdiction of courts in those states. Other states followed suit,⁴¹ patterning their contempt statutes after the New York and federal⁴² statutes. This legislation did not, however, prevent the state courts from exercising that power. They circumscribed the statutes by concluding that their inherent power extended to the infliction of summary punishment⁴³ or that the restrictive statutes were merely declaratory and could not be construed as curtailing their inherent power.⁴⁴ At the turn of the nineteenth century, approximately seventeen state courts had reasserted their contempt power with respect to out-of-court publications.⁴⁵

This trend toward liberality was reversed and the contempt power was dealt

35. The Court construed the Act of March 1831 as narrowly confining that category of criminal cases that could be tried without a jury. 313 U.S. at 47.

36. *Id.* at 49.

37. *Republica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788); *Bayard & Petit v. Passmore*, 3 Yeates 438 (Pa. 1802).

38. See notes 13 & 14 *supra* and accompanying text.

39. See notes 15 & 16 *supra* and accompanying text.

40. Pa. Acts 1808-1809, ch. 78, at 146 (now Pa. Stat. Ann. tit. 17, § 2044 (1962)); 2 N.Y. Rev. Stat. 288, § 10 (1829) (now N.Y. Judiciary Law § 750).

41. See *Nelles & King*, *supra* note 22, at 554-62.

42. Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.

43. See, e.g., *Bradley v. State*, 111 Ga. 168, 36 S.E. 630 (1900); *Carter v. Commonwealth*, 96 Va. 791, 32 S.E. 780 (1899).

44. See, e.g., *Cheadle v. State*, 110 Ind. 301, 11 N.E. 426 (1887); *Middlebrook v. State*, 43 Conn. 257 (1876).

45. See *Nelles & King*, *supra* note 22, at 537-38.

a fatal blow by the United States Supreme Court in a trilogy of cases.⁴⁶ In *Bridges v. California*,⁴⁷ the Court held that the first amendment, made applicable to the states by the fourteenth amendment, forbade punishment by contempt for comment on any pending case, in the absence of a showing that the statements created a "clear and present danger"⁴⁸ to the administration of justice. Mr. Justice Frankfurter, dissenting, contended that the majority's test sanctioned, in effect, "trial by newspaper,"⁴⁹ and enabled first amendment guarantees to nullify the right to an impartial trial.⁵⁰ In a later case, Mr. Justice Frankfurter, again departing from the majority, interpreted the Court's decisions as limiting the contempt power of the state court to instances "when the misbehavior physically prevents proceedings from going on in court, or occurs in its immediate proximity."⁵¹

The Supreme Court reaffirmed the "clear and present danger" test in *Pennekamp v. Florida*,⁵² *Craig v. Harney*,⁵³ and more recently in *Wood v. Georgia*.⁵⁴ In all of these cases the Court reversed a state court's conviction of contempt. An important factor to note, however, is that *Bridges*, *Pennekamp*, and *Craig* involved publications concerning matters that were tried without a jury.⁵⁵

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

47. *Supra* note 46. The Court reviewed two state court convictions for contempt by publication. One of the cases concerned an editor and publisher who published editorials and comments about pending cases while the defendants were awaiting sentence. The other case involved the conviction of a labor leader for the publication of a telegram that he sent to the Secretary of Labor, which criticized the decision of a state judge in a labor case and indicated that a strike would follow the enforcement of the court's decree.

48. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263.

49. *Id.* at 279, 280 (dissenting opinion).

50. *Id.* at 284 (dissenting opinion).

51. *Craig v. Harney*, 331 U.S. 367, 391 (1947) (dissenting opinion).

52. 328 U.S. 331 (1946). Petitioners were responsible for the publication of two editorials and a cartoon criticizing actions previously taken by a Florida court in non-jury proceedings.

53. 331 U.S. 367 (1947). Petitioner criticized a judge, who was a layman, for taking a case from the jury, and characterized the judge's decision as "arbitrary" and "a travesty on justice."

54. 370 U.S. 375 (1962). Sheriff-petitioner issued a press statement criticizing a judge's charge to a grand jury, and urged that the citizens take note that a judge threatened political intimidation and persecution of voters under the guise of law enforcement. The Court stated: "[W]e need not pause here to consider the variant factors that would be present in a case involving a petit jury." *Id.* at 389.

55. 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). However, it was Mr. Justice Frankfurter's belief that prejudicial or poisonous comment can also have an effect on the judges, as well as the jurors. *Id.* at 359 (concurring opinion). Mr. Justice Jackson, dissenting in *Craig v. Harney*, 331 U.S. 367, 396 (1947), stated: "I do not know whether it is the view of the Court that a

In *Baltimore Radio Show v. State*,⁵⁶ however, the Maryland Court of Appeals reversed a trial court conviction of contempt by publication on the ground that the broadcast did not constitute a "clear and present danger." The majority suggested that the Supreme Court decisions should be extended to cases in which jurors or potential jurors are to decide a case.⁵⁷ The effect, if this dictum is followed, would be to severely limit the power of the states to effectively control the publication of prejudicial matter.

IV. RELIEF AVAILABLE TO THE ACCUSED

If the courts are unable to control the promulgation of prejudicial material, the criminal defendant has to rely on the procedural safeguards designed to protect him against adverse publicity.

A. Change of Venue

The most frequently used device for avoiding the effect of community hostility is the motion for change of venue. Federal procedure,⁵⁸ and that of many states,⁵⁹ provide for a change of venue in criminal proceedings when the defendant is unable to obtain a fair and impartial trial in the jurisdiction where the crime has been committed. In both the federal and state courts, the motion is addressed to the sound discretion of the trial court⁶⁰ and the defendant must show that local prejudice is such as to prevent him from obtaining a fair trial by an impartial jury.⁶¹ In many cases, decision upon the defendant's motion for

judge must be thickskinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity."

56. 193 Md. 300, 67 A.2d 497 (1949), cert. denied, 338 U.S. 912 (1950). This was an appeal from a lower court ruling which found the defendant guilty of contempt. The charge came about as a result of a broadcast over local radio stations concerning news reports relating to the defendant, who was then in the custody of the police on a charge of murder. The news reports consisted of statements that he had confessed to the commission of a rape and assault on another woman prior to the commission of the murder. The news reporter also informed the public of defendant's prior criminal record. Because of the adverse publicity, defendant waived his right to a jury trial. See notes 91-93 *infra* and accompanying text.

57. *Id.* at 508 (dictum).

58. Fed. R. Crim. P. 21(a).

59. See, e.g., Cal. Pen. Code § 1033; Conn. Gen. Stat. Ann. § 54-78 (1958); Ind. Ann. Stat. § 9-1301 (1956); N.Y. Code Crim. Proc. § 344(2); Ohio Rev. Code Ann. § 2931. 29 (Page 1953); Pa. Stat. Ann. tit. 19, § 551 (1964); N.J. Rules 3:6-2.

60. *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), cert. denied, 375 U.S. 907 (1963); *Shockley v. United States*, 166 F.2d 704 (9th Cir.), cert. denied, 334 U.S. 850 (1948); *United States v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959), rev'd on other grounds sub nom. *United States v. Bufalino*, 285 F.2d 403 (2d Cir. 1960); *State v. Taborsky*, 20 Conn. Supp. 242, 131 A.2d 337 (Super. Ct. 1957), aff'd, 147 Conn. 194, 158 A.2d 239 (1960); *State v. Wise*, 19 N.J. 59, 115 A.2d 62 (1955); *People v. Buchalter*, 289 N.Y. 131, 45 N.E.2d 225 (1942), aff'd, 319 U.S. 427 (1943); *Commonwealth v. Spallone*, 154 Pa. Super. 282, 35 A.2d 727 (1944).

61. *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952); *State v. Taborsky*, supra note 60; *State v. Wise*, supra note 60; *People v. Grennan*, 284 App. Div. 657, 134 N.Y.S.2d 676 (3d Dep't 1954) (per curiam).

a change of venue has been postponed until after the *voir dire*, *i.e.*, examination of the prospective jurors.⁶²

Change of venue, however, does not always accomplish its purpose. Aside from the fact that the relief is sparingly granted,⁶³ the defendant can never be sure that the adverse publicity has not preceeded him into the jurisdiction to which the trial has been moved.⁶⁴ Would it not be futile to transfer a case that has received widespread publicity to another jurisdiction, merely because the two places are separated by distance?⁶⁵ It should also be noted that whenever a defendant in a federal prosecution is put in the position of seeking a change of venue, he is giving up his constitutional right to be tried by "an impartial jury of the State and district wherein the crime shall have been committed"⁶⁶

B. Motion for Continuance

Decision on a motion for continuance or postponement of trial until the publicity abates in both federal and state courts, is within the sound discretion of the trial court⁶⁷ and is not reversible except when there has been an abuse of

62. E.g., *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), cert. denied, 375 U.S. 907 (1963); *United States v. Dioguardi*, 147 F. Supp. 421 (S.D.N.Y. 1956). The *voir dire* is a device used to determine whether it is possible to secure an impartial jury. It is felt that by questioning the prospective veniremen the court and the attorneys can determine which jurors have formed fixed opinions as to the guilt or innocence of the accused.

63. The fact that the defendant has been the subject of substantial prejudicial publicity is not sufficient grounds for a change of venue. See *United States v. Dioguardi*, 20 F.R.D. 33 (S.D.N.Y. 1956); *State v. Taborsky*, 20 Conn. Supp. 242, 131 A.2d 337 (Super. Ct. 1957), aff'd, 147 Conn. 194, 158 A.2d 239 (1960); *State v. Collins*, 2 N.J. 406, 67 A.2d 158 (1949); *People v. Sandgren*, 190 Misc. 810, 75 N.Y.S.2d 753 (Sup. Ct. 1947); *Commonwealth v. Richardson*, 392 Pa. 528, 140 A.2d 828 (1958). This has been justified on the ground that if newspaper articles furnished ground for removal, no defendant could ever be tried in a celebrated case in the jurisdiction in which the crime was committed. *People v. Brindell*, 194 App. Div. 776, 781, 185 N.Y. Supp. 533, 536 (1st Dep't 1921).

64. See, e.g., *Irvin v. Dowd*, 366 U.S. 717 (1961). The petitioner was arrested for murder in Vandenburg County, Indiana. As a result of prejudicial publicity, defendant's counsel moved for a change of venue, which was granted. The trial was moved to a nearby county which had also been subjected to the adverse publicity. The Indiana statute provided for only one change of venue. The defendant was tried and convicted, but, on appeal, the Supreme Court reversed.

65. See *Shockley v. United States*, 166 F.2d 704 (9th Cir.), cert. denied, 334 U.S. 850 (1948). The defendants were convicted of murdering a prison guard while attempting to make an escape from Alcatraz. The court stated: "Newspapers and radio carried to the entire country frequent and detailed descriptions of the progress and results of the 'Alcatraz affair,' and it does no violence to logic or reason to assume that the effect on readers and radio listeners in other sections would not be perceptibly diminished by the one element of distance from San Francisco." *Id.* at 709-10.

66. U.S. Const. amend. VI.

67. *Frohwerk v. United States*, 249 U.S. 204 (1919); *Hardy v. United States*, 186 U.S. 224 (1902); *State v. Ovecchio*, 27 N.J. Super. 484, 99 A.2d 595 (Super. Ct. 1953), aff'd, 16 N.J. 125, 106 A.2d 541 (1954); *People v. Jackson*, 111 N.Y. 362, 19 N.E. 54 (1888); *Commonwealth v. Speroff*, 169 Pa. Super. 197, 82 A.2d 569 (1951).

that discretion.⁶⁸ That there has been widespread adverse publicity concerning the defendant is, by itself, not a sufficient ground for granting such a motion,⁶⁹ and, as on motions for change of venue, the court looks to the *voir dire* to determine whether an impartial jury trial is available to the defendant.⁷⁰ In only a few instances have convictions been reversed because of the lower court's failure to grant the defendant's motion for continuance.⁷¹ In one of these, *Delaney v. United States*,⁷² a Collector of Internal Revenue was indicted for taking payments proffered to influence him on pending matter. Prior to the trial, a congressional subcommittee held a hearing which focused upon defendant. The defendant's motion for continuance was denied by the trial court. The court of appeals reversed and ordered a new trial. It stated that the publicity given to the hearing afforded the public a preview of the prosecution's case against the defendant without the safeguards that would attend a criminal trial. The court went on to say: "[I]t seems to us neither right, nor in harmony with the spirit of the Sixth Amendment for the United States to make him stand trial while the damaging effect of all that hostile publicity may reasonably be thought not to have been erased from the public mind."⁷³

Even though the court reversed the conviction in *Delaney*, it is doubtful whether a postponement would have been of any advantage to the defendant. There was nothing to prevent the press from disseminating similar prejudicial information at a later date. Furthermore, would not the defendant's right to a "speedy trial" under the sixth amendment be infringed?

C. *Voir Dire*

The method of conducting the *voir dire* is generally governed by statute.⁷⁴ As was previously stated, many courts will postpone a decision on a motion for a change of venue and motion for continuance until after the *voir dire*.⁷⁵

A prospective juror who states upon examination that he can set aside an opinion already formed, may be accepted; but it appears highly likely that his opinion, previously formed, will remain in his subconscious.⁷⁶

68. *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *State v. Orecchio*, supra note 67; *People v. Jackson*, supra note 67; *Commonwealth v. Speroff*, supra note 67.

69. *Finnegan v. United States*, 204 F.2d 105, 110 (8th Cir.), cert. denied, 346 U.S. 821 (1953); *United States v. Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962); *United States v. Hoffa*, 156 F. Supp. 495, 499 (S.D.N.Y. 1957); *State v. Orecchio*, supra note 67; *People v. Del Rio*, 215 N.Y.S.2d 369 (Ct. Gen. Sess. 1961); *Commonwealth v. Spallone*, 154 Pa. Super. 282, 35 A.2d 727 (1944).

70. *United States v. Kahaner*, supra note 69; *United States v. Hoffa*, supra note 69; *People v. Del Rio*, 215 N.Y.S.2d 369 (Ct. Gen. Sess. 1961); *Commonwealth v. Niemi*, 365 Pa. 105, 73 A.2d 713 (1950).

71. *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *Commonwealth v. Balles*, 160 Pa. Super. 148, 50 A.2d 729 (1947).

72. Supra note 71.

73. *Id.* at 114.

74. See, e.g., Conn. Gen. Stat. Rev. § 51-240 (1958); Fed. R. Crim. P. 24(a); N.J. Rules 3:7-2.

75. See notes 62 & 70 and accompanying text.

76. See note 83 *infra*. In *Crawford v. United States*, 212 U.S. 183, 196 (1909), the Court,

A prospective juror may, however, be eliminated upon a challenge for cause. The test for determining whether the challenge will be sustained is found in *Reynolds v. United States*.⁷⁷ On *voir dire*, two jurors stated that they had formed an opinion prior to being called as jurors. The defendant's counsel challenged the prospective veniremen for cause, but the trial court overruled the challenge. The Supreme Court, affirming the lower court, stated:

"[L]ight impressions which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which 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 to him."⁷⁸

The Court went on to say that:

The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. . . . It is clear . . . that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine *whether the nature and strength of the opinions formed are such as in law necessarily to raise the presumption of partiality*. The question thus presented is one of mixed law and fact The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.⁷⁹

In *Irvin v. Dowd*,⁸⁰ the issue before the Supreme Court was whether the petitioner was tried by an impartial jury. After the petitioner was taken into custody, the prosecutor and police officials issued press releases, stating that the defendant had confessed to six murders. These statements were given extensive publicity. At the indictment the petitioner was granted a change of venue. The trial was moved to a neighboring county which had also been subjected to the inflammatory publicity. The petitioner moved for another change of venue, but it was denied.⁸¹ The jury panel consisted of 430 persons of which 268 were excused at *voir dire* because they were convinced that the petitioner was guilty. Of the twelve persons selected as jurors, eight admitted that they felt the petitioner was guilty, but each stated that, notwithstanding his preconceived opinion, he could render an impartial verdict. The Supreme Court reversed the con-

discussing the qualifications of a juror, stated: "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."

77. 98 U.S. (8 Otto) 145 (1878). See *State v. Klein*, 97 Conn. 321, 116 Atl. 596 (1922); *State v. Grillo*, 16 N.J. 103, 106 A.2d 294 (1954) *Commonwealth v. Richardson*, 392 Pa. 528, 140 A.2d 828 (1958); N.Y. Code Crim. Proc. § 376(2).

78. 98 U.S. (8 Otto) at 155.

79. *Id.* at 155-56. (Emphasis added.)

80. 366 U.S. 717 (1961).

81. The motion was denied because it was statutorily provided that a defendant was entitled to only one change of venue. Ind. Ann. Stat. § 9-1305 (1956).

viction on the ground that the petitioner was denied a fair trial.⁸² Mr. Justice Clark, writing for the majority, recognized that partiality is difficult to set aside,⁸³ but that: "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."⁸⁴

In *Beck v. Washington*,⁸⁵ the Court, determining whether jurors met the requirement of impartiality, quoted favorably the dictum in the *Irvin* case and held that there was no denial of due process.⁸⁶ Thus, it is still possible under present law for an accused to be tried before twelve individuals who admittedly have been exposed to prejudicial material. This is, of course, limited by the *Irvin* case; but should the standard in *Irvin* be applied only when ninety per cent of the prospective jurors, and two-thirds of those seated on the jury, have an opinion as to guilt of the accused?⁸⁷ The federal courts have afforded greater protection to the accused against the effects of adverse publicity. In *Marshall v. United States*,⁸⁸ some of the jurors, during the trial,⁸⁹ saw and read newspaper articles alleging that the petitioner had been convicted of two prior felonies. The trial judge, prior to the publication of the accused's record, had refused to allow the prosecution to introduce into evidence the fact that petitioner had previously practiced medicine without a license. When the judge learned that the news accounts reached the jurors he summoned them, individ-

82. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." 366 U.S. at 722.

83. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Id.* at 727.

84. *Id.* at 723 (dictum).

85. 369 U.S. 541 (1962).

86. *Id.* at 557.

87. For a negative answer, see *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir.), cert. denied, 372 U.S. 978 (1963). However, the fact situation was very similar to *Irvin*. "Of the 16 jurors seated in the case as regular and alternate jurors, only one had not read of the case. Of the 16, eight stated that they had formed no opinion of guilt or innocence, the other eight stated that they had formed an opinion of guilt, but expressed themselves in various terms as being able to change the opinion or to render an impartial verdict." *Id.* at 367-68.

88. 360 U.S. 310 (1959).

89. Note that previously the discussion concerned only pretrial publicity. In *United States ex rel. Brown v. Smith*, 306 F.2d 596 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963), petitioner's prior criminal record was reported in the town newspaper three months before trial. A petition for a writ of habeas corpus was granted by the district court on the ground that petitioner was tried by a prejudicial jury in violation of his rights under the fourteenth amendment. The court of appeals, reversing, stated: "If this had been a federal trial and jurors had admitted to reading contemporaneous reports of a defendant's criminal record, our supervisory power over the administration of federal justice would compel us to reverse." *Id.* at 603. This may be an indication of the willingness of a federal court to reverse a conviction based on a federal offense, given the same facts as those presented in the *Brown* case.

ually, into his chambers and inquired if they had seen the articles. Each of the jurors who had seen or read the articles assured the trial judge that he would not be influenced by them and that he could decide the case solely on the evidence presented in court. The Supreme Court, invoking its supervisory power over the administration of criminal justice in the federal courts, reversed the lower court conviction, stating:

We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence.⁹⁰

Surely, the application of different standards in the state and federal courts, to determine the extent of a juror's impartiality violates the ideal of equal justice for all.

D. *Waiving a Jury Trial*

The most drastic method to avoid trial by a jury subjected to prejudicial publicity is to waive a jury trial.⁹¹ Under the federal rules, a defendant cannot waive this right unless he does so "in writing with the approval of the court and the consent of the government."⁹² Although the purpose of the statute is primarily remedial, its effectiveness is highly questionable. In certain instances, the statute may even have the effect of compelling the accused to proceed to trial before a prejudiced jury.⁹³

Thus, the problem is clearly presented: the defendant is arrested, the press receives or discovers information prejudicial to the defendant, the information is disseminated to the public, and relief available to defendant to counteract the effects of "trial by newspaper" is inadequate. The situation has reached a point where the accused may even consider giving up the fundamental right of trial by jury.

V. PROPOSED SOLUTIONS

Until this point, it would appear as if only the press bore responsibility for the result of prejudicial publicity. This, of course, is not the case. It is obvious that without dissemination of the harmful material the practice could not continue, but one must consider the problem of how the press obtains its information. Prejudicial material published by the press is not acquired solely by prodigious work on the part of its investigative staff. Surely, were it not for in-

90. 360 U.S. at 312-13.

91. See generally Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. Fla. L. Rev. 247 (1956).

92. Fed. R. Crim. P. 23(a). Many states also provide for waiver. E.g., N.Y. Const. art. 1, § 2; Conn. Gen. Stat. Rev. § 54-82 (1958); Pa. Stat. Ann. tit. 19, § 786 (1964); N.J. Rules 3:7-1(a).

93. See Donnelly, *supra* note 91, at 254. The state provisions in note 92 *supra*, with the exception of Connecticut's, would have the same effect with respect to the crimes of murder and treason.

formation "leaked" to the press by the prosecuting attorneys,⁹⁴ defense attorneys⁹⁵ and members of law enforcement agencies⁹⁶ prior to trial, the press would have no access to prejudicial material: *e.g.*, prior criminal records, confessions and other evidence that may be declared inadmissible at trial. Any proposal that is to be effective must include provisions that would deter the above groups from issuing statements to the press that include material which may preclude trial of the defendant by an impartial jury.

The American Bar Association at its August 1964 meeting referred to committee a proposed amendment to its canons of ethics which would forbid prosecution and defense lawyers from trying their cases in the press. The amendment read as follows:

It is the duty of a lawyer engaged either in the prosecution or the defense of a person accused of a crime to refrain from any action which might interfere with the right of either the accused or the prosecuting governmental entity to a fair trial. To that end it is improper and professionally reprehensible for a lawyer so engaged to express to the public or in any manner extrajudicially any opinion or prediction as to the guilt or innocence of the accused, the weight of the evidence against him or the likelihood that he will be either convicted or acquitted.⁹⁷

How effective this amendment will be, if adopted, cannot be determined at the present time; but it is hoped that it will make a deeper impression on the members of the bar and have a greater influence than did its predecessor, Canon 20.⁹⁸ Although Canon 20 was adopted by the association in 1908, there has not been a single case of enforcement under it.⁹⁹ Does this mean that since 1908 there has not been a single incident of "newspaper publication by a lawyer as to pending or anticipated litigation" which interfered "with a fair trial in the Courts and otherwise prejudice the due administration of justice"? Obviously such incidents have occurred, and if the enforcement of Canon 20 is any in-

94. For an example of material given to the press by a prosecuting attorney, see *Stroble v. California*, 343 U.S. 181 (1952). Mr. Justice Frankfurter, dissenting, stated: "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper . . ." *Id.* at 201.

95. For an example of defense counsel trying his case in the press, recall the trial of Jack Ruby.

96. See remarks made by police authorities after the assassination of President Kennedy, *N.Y. Times*, Nov. 24, 1963, § 1, p. 1, col. 6, and p. 2, col. 2.

97. *N.Y. Times*, Aug. 5, 1964, p. 34, col. 2. The amendment is scheduled to be reported out of committee in 1965.

98. ABA, *Canons of Professional Ethics*, Canon 20, reads as follows: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. 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." (*Italics omitted.*)

99. *N.Y.L.J.*, May 8, 1964, p. 1, col. 5. Canon 20 is effective in practically every state in the form of either a statute, court rule or state bar canon. *Ibid.*

dication of how the proposed amendment will be enforced then something more than an amendment to the canons of ethics is required. Of course the American Bar Association has taken a step in the right direction; but without a conscientious effort on the part of the bar and the bench to enforce the proposed amendment, its adoption is meaningless.

While considering the association's new amendment, note should be taken of the omission, and rightly so, of any provision concerning the conduct of law enforcement officers with respect to the issuing of press releases. The disclosure of prejudicial material by police officers should be the concern of local law enforcement agencies,¹⁰⁰ and state and federal legislatures.

Another proposed solution is the convening of a meeting between bench, bar and press to work out some kind of agreement whereby the press would adopt a code of ethics to govern the publication of material dealing with criminal prosecution.¹⁰¹ At first glance, a voluntary agreement on the part of the press to restrain itself from disseminating prejudicial material appears to be the ideal solution to this perplexing problem. If all the members of the press agreed to abide by a set of standards proposed by a committee made up of representatives of the bench, the bar, and the press, perhaps further action would not be necessary. What is almost equally important, there would be no ill feelings generated as a result of the action taken. Unfortunately, such an agreement probably will never be reached. Since there are those members of the press who are unwilling to exercise any form of self-restraint, "it may be unreasonable to expect others to do so."¹⁰² Without the support of every member of the press, a proposal for cooperation between the three groups is unlikely to have any effect in curtailing the practice of "trial by newspaper."¹⁰³

VI. THE SOLUTION: LEGISLATION

The most effective and realistic approach to the problem is the adoption of legislation that would have the effect of deterring the publication of material deemed prejudicial until there is no longer any possibility of endangering the defendant's right to be tried by an impartial panel of jurors. Justice Meyer of

100. For a suggestion as to what could be done, see *Television and the Accused*, A Report of the Committee on Civil Rights, New York County Lawyers Association 19 (1964).

101. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. Pa. L. Rev. 1, 23 (1961); Otterbourg, *Fair Trial and Free Press: A New Look in 1954*, 40 A.B.A.J. 838 (1954); Rifkind, *When the Press Collides With Justice*, 34 J. Am. Jud. Soc'y 46 (1950).

102. Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution*, 49 A.B.A.J. 840, 844 (1963).

103. See the Report of the President's Commission on the Assassination of President John F. Kennedy 242 (1964) (Warren Commission Report). The Commission went on to state that, "the burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne, however, by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." *Ibid.*

the New York Supreme Court has suggested an outline for such a statute,¹⁰⁴ which if followed would greatly curtail the practice of "trial by newspaper." Such a statute should not include out-of-court publications within the contempt power, but should set up a new misdemeanor for which specific punishment should be provided. The statute should also contain provisions for procedure by information or indictment, trial by jury, and the right of appeal. Attorneys, prosecutors, their employees and employees of police departments and courts should be prohibited from furnishing the news media with information that would not be publishable under the proposed statute.¹⁰⁵ Material that should not be published would be contained in two sections. The first section would contain a list of matter¹⁰⁶ that would constitute, if published, a "clear and present danger" to the administration of justice. The second section would consist of a list of matter¹⁰⁷ that might or might not present a serious and imminent danger of substantial prejudice, depending upon the circumstances surrounding the publication. Such a determination would be made by the jury trying the misdemeanor. Another section should be devoted to the point at which proscription should begin and end.¹⁰⁸

The question of the constitutionality of such a statute will, of course, ultimately depend upon the United States Supreme Court. It would appear, however, that the door has been left open for just such legislation. In *Bridges v. California*,¹⁰⁹ the Court noted that it might have reached a different result had the legislature "appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular

104. Address by Justice Bernard S. Meyer on the topic, "Are Additional Remedies Needed in the United States to Implement the Constitutional Guarantee of Fair Trial?," given before the National Conference of State Trial Judges at the 85th Annual Meeting of the American Bar Association, August 4, 1962.

105. Senator Morse introduced a bill in the Senate which would have enabled the federal courts to cite for contempt those who bear some responsibility for prejudicial publicity. 109 Cong. Rec. 11232 (daily ed. June 27, 1963). The bill, which was never reported out of the Senate Judiciary Committee, read as follows: "It shall constitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to publish 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, and said contempt shall be punished summarily by the court, on the motion of any party to the litigation . . ." Ibid.

106. Such a list should consist of the following: confessions, any prior criminal record of the accused, and expressions of opinion concerning the effect of evidence introduced, guilt of the accused and credibility of witnesses.

107. Such a list should consist of the following: interviews with the victim's family, publication of the names and addresses of the jurors who are to hear the case, and matter which appeals to racial, political, economic or other bias.

108. Proscription should begin the moment the crime is committed and continue until the accused waives his right to a jury trial, or until the material is actually admitted in evidence. If such material is never admitted in evidence publication should be prohibited until the jury reaches a verdict. If a retrial is ordered proscription should be reimposed as soon as it is ordered.

109. See notes 47-51 supra and accompanying text.

kind of utterance."¹¹⁰ A statute drawn up in accord with the outline above would comply with the suggestion made by Mr. Justice Black. The statute would set forth specific acts which in the view of the legislature constituted a "clear and present danger" to the administration of justice, and would provide for prosecution if the statute is violated.

VII. CONCLUSION

The enactment of a statute which would deter all those responsible from continuing to deprive the accused of his right to a fair trial is the only effective answer to the question of what can be done to free the defendant from the prejudicial effects of "trial by newspaper." Other proposals and the procedural remedies available to a victim of the practice are unrealistic and inadequate. They have been before the bench, the bar and the press for over thirty years, and still the practice continues.

110. 314 U.S. 252, 260-61 (1941).