Prejudicial Publicity Versus the Rights of the Accused

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INTRODUCTION

The perpetration of a serious criminal offense is almost invariably followed by a strong desire on the part of the public to be informed about all known circumstances surrounding the crime and the possible suspects. This desire for information motivates the news media to disseminate all known data and to seek additional information from available sources as the investigation progresses. Few will deny that this zeal of the news media serves many useful purposes. Extensive publicity of a crime and the suspect's description may well be the decisive factor in obtaining prompt apprehension of the fugitive. It has been suggested that, were it not for the pressure brought to bear upon prosecuting authorities by publicity and news commentary, many failures of justice might occur.1 Also, a conscientious free press can serve to better educate the public about the operation of criminal justice and to promote thought and discussion as to the probable causes of crime and the possible solutions thereof.2 Certain kinds of publicity, however, can conflict with the accused's right to due process of law during a criminal proceeding. Paramount among these interferences3 is the effect prejudicial publicity may have upon the accused's right to trial by an impartial jury.4 For purposes of discussion, this prejudicial publicity is classified according to the time at which it occurs. If the publicity arises prior to trial and tends to afford prospec-

1. See Jaffe, Trial by Newspaper, 40 N.Y.U.L. Rev. 504, 512 (1965). The author suggests that the publicity in Pennekamp v. Florida, 328 U.S. 331 (1946) was designed to assure that justice was carried out. The long delay in arresting Dr. Sheppard may also justify some of the publicity in that case. See Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir. 1965), cert. granted, 86 Sup. Ct. 289 (1965). A further illustration pointed out by the author is some publicity of the reluctance of southern authorities to prosecute persons suspected of or held for the killing of civil rights demonstrators.


3. The recent case of Estes v. Texas, 381 U.S. 532 (1965), noted 43 Texas L. Rev. 922, involved a consideration of various other interferences with due process of law which may result from publicity of a criminal proceeding. The Court held that a "notorious" criminal trial could not be televised because of the undesirable effects such action could produce on jurors, witnesses, the judge, and the defendant himself. A discussion of this aspect of the publicity problem is beyond the scope of this Comment.

4. As to the existence of this right see discussion accompanying notes 5-7 infra.
tive jurors an opportunity to form opinions as to the defendant's guilt before his actual trial, it is known as pre-trial prejudicial publicity. If, instead, the publicity occurs during the trial and places before jurors items of information or evidence which should not be available for their deliberation, it is classified as prejudicial publicity during the trial.

The purpose of this Comment is to examine each of these types of prejudicial publicity in detail, considering the effectiveness of various devices presently available to counteract the prejudice, requirements the accused must meet to obtain these remedies, and proposed solutions to the problem of prejudicial publicity.

I. PRE-TRIAL PUBLICITY

A. The Problem

The sixth amendment to the Federal Constitution guarantees that "in all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury." Likewise, in every state the right to be tried by an impartial jury is expressly or implicitly guaranteed to an accused in most criminal cases. "The failure to accord an accused a fair hearing violates even the minimal standards of [state] due process." This right to a "fair hearing" or an impartial jury may be lost, however, when extensive pre-trial prejudicial publicity occurs in the community from which prospective jurors must be selected. It is admitted that the news media should be able to report general material about the alleged crime, descriptions of the suspect in order to help secure apprehension, and actual events in the criminal proceeding, such as arrest of the accused, and the charges brought against him. However, items of publicity such

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5. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

6. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions 578, 579 (1959), cited in Irvin v. Dowd, 366 U.S. 717, 722 (1961); Will, Free Press vs. Fair Trial, 12 De Paul L. Rev. 197, 199 n.7 (1963); Note, 60 Colum. L. Rev. 349 (1960). Cf. La. Const. art. I, § 9: "In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury in accordance with the provisions of this constitution . . . ." (As amended 1962.)


as pre-trial disclosures of confessions or of the fact that the accused has confessed,9 unounseled interviews with the accused,10 prior criminal records or activities,11 inadmissible evidence,12 pre-trial statements by witnesses,13 failure of the accused to take a lie detector test,14 pre-trial statements by counsel as to the merits of the case,15 sensationalism in reporting the facts of the case,16 denunciatory appellations of the accused,17 interviewing the public before trial on the question of guilt or innocence of the accused and possible punishment,18 and general editorial comments as to guilt or innocence19 are generally unde-


Since the jury is not entitled to know or to consider in its deliberation the fact that a defendant has confessed or the contents of his confession unless and until that confession is found to be voluntary and therefore admissible in evidence, the publication of his confession or even of the fact that he has confessed before its admission is prejudicial. See Comment, 57 Nw. U.L. Rev. 217, 241 (1963).


12. Neither in federal nor in state courts may a defendant be convicted by means of evidence obtained in violation of the constitutional prohibition against illegal search and seizure. Mapp v. Ohio, 367 U.S. 643 (1961). Obviously, if publicity makes the jury aware of such inadmissible evidence, this constitutional safeguard is irreparably damaged. However, publication of the discovery of inadmissible evidence, which does not connect the accused with the crime, should not constitute prejudicial publicity. See Comment, 57 Nw. U.L. Rev. 217, 243 (1963).

13. Where a newspaper publishes an out-of-court statement concerning the accused and the person making the statement is not called as a witness, the defendant's right of confrontation may be abridged. See Pointer v. Texas, 380 U.S. 400 (1965); Williams v. New York, 337 U.S. 241 (1949); In re Oliver, 333 U.S. 257 (1948). Even where the maker of the out-of-court statement is later called as a witness, the jury is liable to overestimate his credibility because of the prior publication, and consequently give the statement greater weight than evidence more favorable to the defendant which is brought out for the first time during the trial. See Comment, 57 Nw. U.L. Rev. 217, 243 (1963).


15. See 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).


sirable because of their inflammatory and prejudicial effects. Unfortunately, these items make "good copy" and have news value.20

B. Existing Remedies21

An accused, faced with prejudicial pre-trial publicity, has various procedural remedies available to help assure a fair and impartial trial. A brief examination of each of these remedies will reveal their inadequacies.

Change of Venue

Federal procedure22 and all state procedures23 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 federal and state courts, the motion for change of venue is addressed to the sound discretion of the trial court whose ruling will not be disturbed by the reviewing court unless it is clearly erroneous or an abuse of discretion.24 Often the trial court will postpone ruling on the motion until after the voir dire examination in order to ascertain whether a fair and impartial trial is available to the defendant.25

In Louisiana the defendant may apply to the trial court for a change of venue if he has good reason to believe that "by reason of prejudice existing in the public mind or some other sufficient cause, described by him, an impartial trial cannot be obtained in the parish wherein the indictment is pending."26 The

21. Because of the limited availability of contempt citations as an existing remedy, discussion of contempt process has been relegated to consideration of proposed solutions for prejudicial publicity. See discussion accompanying notes 143-157 infra.
22. FED. R. CRIM. P. 21(a): "The court upon motion of the defendant shall transfer the proceedings as to him to another district or division 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 in that district or division."
23. See Note, 60 COLUM. L. REV. 349, 360 (1960), where it is pointed out that the power of trial courts to grant changes of venue is embodied in the constitutions of twelve states and in all other states removal of criminal causes in certain specified situations has been authorized by statute or rule of court. Cf. LA. R.S. 15:289-301 (1950).
Louisiana Supreme Court has consistently held that the burden of establishing the existence of such prejudice as to preclude the possibility of a fair trial rests with the applicant for a change of venue, and inflammatory newspaper articles by themselves have not been deemed by the courts to be particularly strong evidence of such prejudice. The theory often advanced to demonstrate the supposed insignificance of such publicity is that these journalistic outbursts constitute the usual newspaper approach to getting a “good story,” rather than an indication of widespread public resentment or antagonism against the accused.

Louisiana follows the traditional approach that a motion for change of venue is addressed to the sound discretion of the trial court, whose ruling will not be overturned absent an affirmative showing of clear abuse of that discretion. The purpose of this language, as indicated by the Reporter's comments, is to assure that the criteria for granting a change of venue are not limited by the grounds for challenge of a prospective juror for cause: “[T]he change of venue concept should operate where the state of the public mind against the defendant is such that jurors will not completely answer honestly upon their voir dire.”

Procedure almost identically tracks the language of article 292, adding, however, a provision that “in deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence or the other reasons are such that they will affect the answers of jurors on the voir dire examination. . . .” Louisiana State Law Institute, Project of Code of Criminal Procedure art. 622 (1966). The purpose of this language, as indicated by the Reporter's comments, is to assure that the criteria for granting a change of venue are not limited by the grounds for challenge of a prospective juror for cause: “[T]he change of venue concept should operate where the state of the public mind against the defendant is such that jurors will not completely answer honestly upon their voir dire.” Id. comment (b).


28. State v. Lejeune, 181 So. 2d 392 (La. 1965); State v. Faciane, 233 La. 1028, 99 So. 2d 333 (1957); State v. Pearson, 224 La. 393, 69 So. 2d 512 (1953); State v. Roberson, 159 La. 562, 105 So. 621 (1925); State v. Rini, 153 La. 57, 95 So. 400 (1922). It should be noted, however, that this rule might not pertain where the pre-trial publicity was so inflammatory as to convince the court that the defendant's rights probably were prejudiced. See discussion of State v. Montgomery, 181 So. 2d 756 (La. 1966) in text accompanying notes 44-47 infra. In this case the Louisiana Supreme Court held that the denial of defendant's motion for a continuance, based on an atmosphere permeated with prejudice, was reversible error. Because the conviction had to be reversed on this ground, the court did not decide whether the denial of defendant's motion for change of venue was also error, stating that “at present we are unable to pass upon whether or not he will be entitled to a change of venue in the future.” Id. at 758.


dice than does the appellate court which has only a cold record.\textsuperscript{31} In upholding the denial of the motion for change of venue, emphasis has been placed on the fact that the defendant did not exhaust his peremptory challenges, thereby substantiating the conclusion that the prejudice was not so strong as to prevent a fair and impartial trial.\textsuperscript{32}

When faced with a motion for change of venue because of alleged prejudicial pre-trial publicity, a trial judge in Louisiana may call witnesses to testify whether they believe the defendant can obtain a fair and impartial trial despite the publicity, rather than postpone decision on the motion until after the \textit{voir dire} examination.\textsuperscript{33} A favorable indication by most of these witnesses will generally support a denial of the requested relief.

Change of venue is usually not an effective remedy. Aside from the fact that relief is sparingly granted,\textsuperscript{34} the defendant often cannot be sure that prejudicial publicity has not preceded him into the jurisdiction to which the trial has been moved.\textsuperscript{35} As one federal judge phrased it, "it is difficult to outrun the press."\textsuperscript{36} Moreover, at least in federal criminal proceedings, the defendant has a constitutional right to be tried by an impartial jury in the district wherein the crime was allegedly committed.\textsuperscript{37} As pointed out in \textit{Delaney v. United States}\textsuperscript{38} the defendant should not be forced to forego this right by having to move for a change of venue in order to avoid prejudicial publicity. In any event, if venue has to be changed to a location sufficiently distant to


\textsuperscript{32} \textit{E.g.}, State v. Washington, 207 La. 849, 22 So. 2d 193 (1945) (only nine of the twelve peremptory challenges exhausted); State v. Price, 192 La. 615, 188 So. 718 (1939) (one peremptory challenge not used).


\textsuperscript{34} See, \textit{e.g.}, Beck v. Washington, 369 U.S. 541 (1962); Meador v. United States, 341 F.2d 381 (9th Cir. 1965).


\textsuperscript{37} See note 5 supra.

\textsuperscript{38} Delaney v. United States, 199 F.2d 107, 116 (1st Cir. 1952).
relieve the effects of adverse publicity, the scene of the crime will usually be out of reach of the court during trial, thereby making it impossible for the judge and jury to view the scene should this be desirable.\textsuperscript{30} Finally, it must be recognized that an accused, who is forced to move for change of venue to avoid prejudicial publicity, is put to the additional expense of having to support his lawyer and witnesses away from their homes.\textsuperscript{40}

\textit{Continuance}

A defendant, in order to allow pre-trial publicity to abate, may move for a continuance in federal and most state criminal proceedings.\textsuperscript{41} As in the case of a motion for change of venue, decision on the motion for a continuance is within the sound discretion of the trial court, and is not reversible except when there has been an abuse of that discretion.\textsuperscript{42} Likewise, the trial court will usually look first at the \textit{voir dire} examination to determine whether an impartial jury can be obtained before ruling on the motion.\textsuperscript{43}

A recent Louisiana Supreme Court decision reflects a more liberal position on the part of that court with respect to the demonstration of prejudice required to support a motion for con-

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\item \textsuperscript{39} Comment, 44 Neb. L. Rev. 614, 619 (1965).
\item \textsuperscript{40} \textit{Free Press—Fair Trial} (A Report of the Proceedings of a Conference on Prejudicial News Reporting in Criminal Cases 14 (1964) (hereinafter cited as \textit{Free Press—Fair Trial}).
\item \textsuperscript{41} See Note, 60 Colum. L. Rev. 349, 367, 368 (1960), where it is pointed out that the power to postpone a trial is inherent in the court as an incident of the power to hear and determine causes, and only one state (Arizona) has not recognized the availability of continuance as a method of offsetting hostile sentiment in the community. For a liberal view toward granting continuance in federal prosecutions see Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). For Louisiana’s provisions on continuance see La. R.S. 15:318-326 (1950).
\item \textsuperscript{42} Beck v. Washington, 369 U.S. 541 (1962); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); cf. La. R.S. 15:320 (1950): “The granting or refusing of any continuance is within the sound discretion of the trial judge; provided, that any arbitrary or unreasonable abuse of such discretion may be reviewed by the proper appellate tribunal on appeal . . .”; State v. Martinez, 220 La. 899, 57 So.2d 888 (1952), \textit{cert. denied}, 344 U.S. 843 (1952); State v. Ford, 37 La. Ann. 443 (1885). The only exception in Louisiana to this discretionary nature of the granting or refusing of a continuance is La. R.S. 15:326 (1950), which provides that whenever an attorney employed as leading counsel is a member of the state legislature and is unable to attend court because the legislature is in session, a continuance must be granted. Except for the above situation and the case where both the state and the defendant request a continuance, the Revision of the Code of Criminal Procedure retains the rule that a motion for continuance, if timely filed, may be granted in the court’s discretion in any case if there is good ground therefor. See \textit{Louisiana State Law Institute, Project of the Code of Criminal Procedure} arts. 712, 713, and comments thereunder (1966).
\item \textsuperscript{43} See note 25 \textit{supra}.
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tinuance. In *State v. Montgomery* a Negro defendant was indicted for the murder of an East Baton Rouge Parish deputy sheriff. On January 22 the City-Parish Council, in order to promote contributions to a memorial fund for the victim's family, proclaimed January 27—the same date as that set for defendant's trial—as a day of memorial for the victim. The local newspapers carried stories about the fund-raising drive, including pictures of the widow. One newspaper article pointed out that the selected memorial day coincided with defendant's trial date. News accounts of the crime, when referring to the accused, frequently used the alias "Wolfman." Finally, there was a newspaper account of cross-burnings which had been occurring in the state, including one on the state capitol grounds. The Supreme Court recited the general rule that granting or refusing a continuance is within the sound discretion of the trial judge whose ruling will not be disturbed except where it is arbitrary or unreasonable, but held that under these circumstances the denial of defendant's motion for continuance violated substantial rights of the accused, thereby requiring reversal of his conviction. It is significant to note that there was no indication that the defendant had exhausted his peremptory challenges or that he had been forced to accept an obnoxious juror. Indeed, the court admitted that it could not state as a fact that the jury was not impartial, but such a finding was not a prerequisite for reversing the conviction.

The theory that the motion for a continuance is an effective remedy for pre-trial publicity is that with the passage of time the publicity will become stale and jurors will not give it much weight in view of the freshly presented evidence in court. The problem with this theory is that there is no assurance that prospective jurors will forget what has been written or broadcast, and even if they do, there is nothing to prevent the news media from renewing prejudicial comment as the new trial date ap-

44. 181 So. 2d 756 (La. 1966).
45. The general chairman of the fund testified that the date suggested for the memorial was merely an "appropriate time" and that he was not then aware that it coincided with the date set for trial. *Id.* at 761.
46. *Id.* at 762 (dissenting opinion).
47. *Id.* at 762: "We cannot say that the jury which rendered the instant verdict was not impartial . . . but we conclude that the substantial rights of the accused suffered as a result of the denial of his motion for a continuance. Therefore, no one could reasonably say that the verdict and the sentence were lawfully obtained."
48. See, e.g., United States v. Smith, 306 F.2d 596, 603 (2d Cir. 1962); Palakiko v. Harper, 209 F.2d 75, 98 (9th Cir. 1953).
approaches. A further difficulty is that the quality of the case for both sides may suffer with the passage of time, as witnesses become unavailable or their recollections become hazy, thereby creating a problem of preserving evidence. A possible constitutional issue exists, at least in federal courts, if the accused is forced to move for a continuance and thereby give up his right to a speedy trial.49 Finally, if a defendant is indigent and cannot obtain release through bail or upon his own recognizance, he must remain in custody during the continuance. These various difficulties demonstrate the inadequacy of this remedy.

Voir Dire

The theory behind the *voir dire* remedy is that an impartial jury can be obtained, despite pre-trial prejudicial publicity, through use of a combination of peremptory challenges and challenges for cause.50 The Louisiana Code of Criminal Procedure provides that the accused shall have twelve peremptory challenges where he is on trial for a crime punishable by death, or necessarily punishable with imprisonment at hard labor, and six peremptory challenges in all other criminal trials.51 The Code further provides that an accused may challenge a prospective juror for cause on the ground that he is not impartial; however, a mere opinion held by the prospective juror as to guilt or innocence is not sufficient ground for challenge unless the opinion is fixed, deliberately formed, would not yield to the evidence, or could not be changed.52 In applying this provision the Louisiana Supreme Court has been reluctant to overturn the decision of the trial judge denying the challenge for cause,53 largely because this disposition is within the sound discretion

49. See note 5 supra and L.A. Const. art. I, § 9, quoted in note 6 supra. Cf. L.A. R.S. 15:318 (1950): "In all criminal prosecutions the state, as well as the accused, shall have the right to a speedy public trial."
of the trial judge,\textsuperscript{54} and he alone has had the benefit of observing the prospective juror’s demeanor on voir dire examination.\textsuperscript{55} However, the Supreme Court has reversed convictions where it appeared from the voir dire record that an unsuccessfully challenged juror actually entered the case with an initial belief of guilt which would require evidence of innocence to change,\textsuperscript{56} where the juror qualified his fixed opinion by stating that it “would probably yield to the evidence,”\textsuperscript{57} and where the juror stated he “thought” his opinion would yield to the evidence presented.\textsuperscript{58}

Although these state standards are subject to the constitutional due process requirements which will be examined subsequently, it suffices to say that the voir dire examination, like the other procedural remedies, has its limitations. One disadvantage is that use of the voir dire compounds the prejudice by bringing the pre-trial publicity once again and more specifically to the jurors’ attention.\textsuperscript{59} Further, the voir dire covers only the particular pre-trial influences defense counsel and the judge ask about. Moreover, it uncovers only those influences the prospective juror both remembers and is not too embarrassed to

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  \item \textsuperscript{54} LA. R.S. 15:345 (1950). See also cases cited in note 48 supra, almost all of which invoke the discretionary rule.
  \item \textsuperscript{56} State v. Oliphant, 220 La. 489, 56 So. 2d 846 (1952).
  \item \textsuperscript{57} State v. Thornhill, 188 La. 762, 178 So. 343 (1937) (only an opinion which could definitely yield to the evidence would be acceptable).
  \item \textsuperscript{58} State v. Henry, 197 La. 999, 3 So. 2d 104 (1941) (opinion must readily yield to the evidence). The position adopted by the Revision is that a prospective juror cannot be challenged for cause merely because he has an opinion as to the guilt or innocence of the defendant, provided the court is satisfied that he is impartial, despite his opinion. If evidence will be required to overcome the opinion of guilt, however, the juror may be challenged for cause, because the accused is presumed innocent until proved guilty and he should therefore not have to bear the burden of overcoming the opinion. See LOUISIANA STATE LAW INSTITUTE, PROJET OF THE CODE OF CRIMINAL PROCEDURE art. 797 (1966) : “The state or the defendant may challenge a juror for cause on any of the following grounds: . . .
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    \item (2) That the juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground for challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence . . .” See also id. comment (b).
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admit. A half-forgotten headline may seem to a juryman too trivial to mention, yet it may have planted the seed that changes a vote in the jury room.  

Waiver of Jury Trial

If none of the preceding procedural remedies is available to the accused, or if he believes that none of them will be effective, the most drastic method of avoiding trial by a jury subjected to prejudicial pre-trial publicity is waiver of a jury trial. 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." Although the avowed purpose of this restriction is to protect the rights of the accused, in certain instances the statute may have the effect of compelling the defendant to proceed to trial before a prejudiced jury.

Reversal of Conviction

If it is found by a reviewing court that adverse publicity resulted in a lack of due process, or caused a federal trial to fall below the required standards for federal criminal justice, the accused may obtain a reversal of his conviction. Although this remedy will generally assure that the defendant is not convicted without having a fair trial, its greatest inadequacy is that it fails to provide any sanction against the offending news media. If a conviction is reversed because of a faulty ruling by the trial judge, or because of the conduct of attorneys prior to or during the trial, the reversal has the effect of penalizing the party who was in error by forcing him to do his work again. A reversal of a case solely because of adverse publicity, however, results in no such punishment to the news media, and indeed merely affords them another trial to publicize. Such reversals are merely "an expedient and not a cure."
Even assuming the existing procedural remedies could adequately counteract the adverse effects of pre-trial publicity, the defendant has the additional problem of qualifying for such relief.

In determining whether a prospective juror can meet the requirement of impartiality the test usually invoked is whether the juror can render a verdict based solely on the evidence presented in court.\(^{67}\) It has been recognized that to insist that a prospective juror know nothing about the case or have been exposed to no pre-trial publicity would be to establish an "impossible standard."\(^{68}\) With respect to a notorious criminal case, only the mentally deficient, or the most uninformed, would be unexposed to the pre-trial publicity, and these are not the most desirable jurors. Consequently, the fact that a prospective juror has formulated some preconceived notion as to the guilt or innocence of the accused is not per se sufficient to disqualify him from duty. Usually, if the juror is able to testify on voir dire examination that he can disregard his opinion and decide the case solely on the evidence presented during the trial he will be deemed to meet the requirements of impartiality.\(^{69}\) This traditional approach, however, of labeling a prospective juror "impartial" on the basis of his affirmative statement that he can disregard his preconceived opinion has recently been abandoned in certain instances where the prejudicial pre-trial publicity was intensive and extensive and the community prejudice was pervasive. To ascertain the present standards, a review of the jurisprudence will be helpful.

The first modern case to reach the United States Supreme Court involving contentions of deprivation of state due process because of prejudicial pre-trial publicity was *Shepherd v. Florida*, in 1951.\(^{70}\) A newspaper reported that the defendants had confessed to rape, and it named the sheriff as the source of the information. In a per curiam opinion the court reversed the convictions, apparently on the ground of racial discrimination in jury selection. Concurring Justices Jackson and Frankfurter

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69. Id. at 723.
70. 341 U.S. 50 (1951).
felt that reversal should have been on the basis of the pre-trial publicity. 71

In the following year the Supreme Court refused to reverse a murder conviction in Stroble v. California72 despite petitioner's claim that a fair trial was impossible owing to inflammatory newspaper articles. The press had published the accused's confession; had variously described him as a "werewolf," "fiend," and "sex-mad killer"; and had printed the prosecutor's pre-trial statement that the accused was guilty and sane. However, petitioner first raised his objection after conviction, had not moved for a change of venue,73 and did not attempt to prove that the jurors were in fact prejudiced by the publications. The Court held that petitioner failed to establish a denial of due process on the basis of the prejudicial publicity alone. This same standard was reiterated in United States ex rel. Darcy v. Handy.74 Petitioner sought habeas corpus on the basis that his state robbery conviction was unconstitutional owing to prejudicial pre-trial publicity. In denying relief the Court noted that petitioner had not exhausted his peremptory challenges, nor moved for a change of venue or a continuance; indeed, he raised the issue for the first time three years after the trial.75 The Court held petitioner had failed to establish partiality of the jury.

Thus, the standard for state due process seemed to be that the presence of prejudicial pre-trial publicity in and of itself was insufficient to establish that an accused had been denied a fair trial.

The Supreme Court in Irvin v. Dowd,76 however, was presented with a case of extreme pre-trial prejudicial publicity and with extensive, albeit fruitless, efforts on the part of the petitioner to obtain relief from the prejudice. The publicity included

71. Justice Jackson felt the Court's action stressed the trivial and ignored the important. He reasoned that even if there had been no discrimination in the jury selection, the community hostility was so great that as a practical matter no Negro juror would have dared to vote for acquittal. Id. at 54, 55.
72. 343 U.S. 181 (1952).
73. The Court said that defendant's failure to so move was not dispositive but was significant in determining whether there had been a denial of due process. Id. at 193, 194.
74. 351 U.S. 454 (1956).
75. The Court again stated that these omissions on the part of the defendant were not dispositive but were significant. Id. at 463.
accounts of the accused's prior criminal activity, his confession to the six murders, editorial commentary as to his lack of remorse and that he had been found sane by a court-appointed panel of doctors, an alleged offer by the accused to plead guilty for a life sentence, the determination of the prosecutor to obtain the death penalty, and other derogatory comments. Petitioner demonstrated that ninety per cent of the prospective jurors admitted having some preconceived opinion as to his guilt, and that eight of the twelve jurors selected felt he was guilty, although each of these eight stated he could render an impartial verdict. Petitioner had exhausted his peremptory challenges, and had made various unsuccessful motions for a change of venue and for a continuance. The Supreme Court struck down the state court conviction holding that the "pattern of deep and bitter prejudice" clearly reflected in the sum total of the *voir dire* examination required that the jurors' assertions of impartiality be disregarded.

Reasoning similar to that in *Irvin* had previously been applied by at least one lower federal court to a state conviction. In *United States* ex rel. *Sheffield v. Waller,*78 petitioner sought habeas corpus on the basis that his Louisiana conviction was unconstitutional and the United States District Court granted the requested relief.79 Petitioner was convicted of murdering a police officer, and his trial was preceded by extensive pretrial publicity, including alleged admissions by the accused of guilt and his lack of remorse. The federal court felt that these highly prejudicial news stories made it humanly impossible for the prospective jurors to be impartial, their answers on *voir dire* examination to the contrary notwithstanding.80

77. The defendant was granted a change of venue to the adjoining county, but was denied further changes of venue, despite his contentions that the prejudicial publicity had made a fair trial impossible in the new trial location, apparently because the pertinent state statute allowed only one change of venue. *Id.* at 720. Compare 1.A. R.S. 15:294 (1950) and construction thereof under similar circumstances by the Louisiana Supreme Court in *State v. Rideau,* 246 La. 451, 165 So. 2d 282 (1964).
79. The court concluded that the "totality of facts" indicated that petitioner did not receive due process of law. *Id.* at 546.
80. *Id.* at 542: "Whatever may have been the responses of the prospective jurors, on *voir dire,* as to the impressions these highly prejudicial news stories had made on their minds, in our judgment they humanly could not have divorced them from their thoughts." The state was given a limited time in which to continue proceedings against the accused; at a new trial defendant was again convicted of murder and sentenced to death. State v. *Sheffield,* 232 La. 53, 93 So. 2d 691 (1957); *cert. denied,* 354 U.S. 915 (1957), rehearing denied, 354 U.S. 943 (1957).
Purporting to apply the same standards used in *Irvin*, the Supreme Court in 1962 refused to reverse Dave Beck's grand larceny conviction in *Beck v. Washington*.²¹ Although petitioner had exhausted his peremptory challenges and had unsuccessfully moved for change of venue and for continuance, he had not challenged any of the selected jurors for cause as had petitioner in *Irvin*. The Court stated that this was "strong evidence" that he was convinced the jury was not prejudiced against him. Further, the Court held that petitioner had not demonstrated that "the pre-trial publicity was so intensive and extensive" that a court could not believe the answers of the jurors on *voir dire*.²²

Some lower federal courts have held that deviation from the standard of *Irvin* is permitted only in "extreme factual situations,"²³ and such a position is supportable when *Beck* is considered. However, other courts have rejected the "extreme factual situation" limitation.²⁴

The latest disposition by the Supreme Court in this area is *Rideau v. Louisiana*.²⁵ Rideau was tried for murder. Among the pre-trial publicity objected to was the televising of his "interview" with the sheriff at which he "confessed" to the alleged crimes. Having exhausted his peremptory challenges, the accused challenged three prospective jurors for cause because they admitted on *voir dire* examination that they had seen the televised "interview" at least once, but these challenges, as well as his motion for change of venue, were denied. The Court reversed the conviction, "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury,"²⁶ on the basis that due process was denied by the refusal to grant the requested change of venue.²⁷

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²¹. 369 U.S. 541 (1962).
²². The Court showed that only 14 out of 52 prospective jurors had preconceived opinions as to defendant's guilt, whereas in *Irvin* 90% of those examined on the point entertained some opinion as to guilt. *Id.* at 556, 557.
²⁶. It was this refusal by the majority to examine the *voir dire* record to determine whether the jurors' assurance of impartiality should be disregarded which provoked strong dissent from Justices Clark and Harlan. *Id.* at 727.
²⁷. *Id.* at 727: "[D]ue process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'"
It is clear, therefore, that where a jury is used in a state
criminal proceeding, failure to provide an impartial one con-
tirates denial of due process. In general, it will be held that im-
partiality can exist even though the prospective juror has formed
some preconceived opinion, provided he states on voir dire ex-
amination that he can disregard his opinion and decide the case
solely on the evidence presented. However, if in extent and
nature the pre-trial publicity is so prejudicial that the reviewing
court feels an impartial jury is objectively impossible, it will
reverse the conviction. More significance seemingly is being
placed on the prejudicial nature of the publicity itself; in cer-
tain instances the publicity per se will appear so prejudicial to
the court that it will presume partiality without looking to the
voir dire record for actual indications of bias. 88

As is to be expected, the standard in federal courts with
respect to an impartial jury in federal criminal proceedings
is somewhat higher than that required for state due process.
There has not yet been a Supreme Court decision explicitly deal-
ing with the problem of pre-trial prejudicial publicity in a fed-
eral prosecution. 89 What authority there is comes from federal
courts of appeals. Exercising their supervisory power over fed-
eral district courts, most appellate courts seemingly have re-
quired that the jurors have no preconceived opinions as to the
defendant's guilt or innocence, 90 although the fact that jurors
have read the prejudicial publicity will not per se disqualify
them, at least where the accused has not exhausted his per-
emptory challenges. 91 A few appellate cases have indicated that

88. State cases illustrating situations where newspaper accounts were held
to be so prejudicial that juror's assertions of impartiality had to be disregarded
include People v. Hryciuk, 5 Ill. 2d 176, 125 N.E.2d 61 (1954); State v. Bowden,
Pac. 730 (1925).

89. See Delaney v. United States, 199 F.2d 107, 113 (1st Cir. 1952). The
leading Supreme Court cases involving general supervisory power over federal
trials affected by publicity deal with prejudicial publicity during the trial. See
discussion of Marshall v. United States, 360 U.S. 310 (1959) and Janko v.
United States, 366 U.S. 716 (1961) under prejudicial publicity during the trial,
text accompanying notes 105, 106 infra.

90. No case was found where a prospective juror in a federal trial was allowed
to serve where he admitted having a preconceived opinion as to guilt or innocence.
The following cases took special note of the fact that none of the jurors finally
selected harbored any preconceived opinion: Meador v. United States, 341 F.2d
381 (9th Cir. 1965); United States v. Shaffer, 291 F.2d 689 (7th Cir. 1961),
cert. denied, 368 U.S. 915 (1961); Shushan v. United States, 117 F.2d 110 (5th
Cir. 1941), cert. denied, 313 U.S. 574 (1941), rehearing denied, 314 U.S. 706
(1942).

91. See, e.g., Meador v. United States, 341 F.2d 381 (9th Cir. 1965); United
the jury might even have to be composed of individuals who have not seen or read the prejudicial pre-trial publicity.92 One federal court of appeals has held that where the prejudicial pre-trial publicity was largely the responsibility of the federal government, a failure to grant the defendant's motion for a continuance was reversible error, even though he had not exhausted his peremptory challenges nor moved for a change of venue.93 In so holding, the court in effect presumed the selected jury had read the publicity and therefore was partial without looking at the voir dire for specific indications of partiality.

II. PUBLICITY ARISING DURING THE TRIAL

The basic problem encountered with prejudicial publicity arising during the trial itself is that information which ordinarily would not be revealed to the jury, because its inflammatory effect outweighs its value in the quest for truth, nevertheless is made available to the jury through the news media.94 Indeed, the prejudicial effect is probably greater for the fact noted by the Supreme Court that the revelation is "not tempered by protective procedures"95 such as cross-examination. Also, with this type of adverse publicity, the argument that the prejudice will abate with the passage of time is not applicable, for here the impression on the juror is immediate.

A. Existing Remedies96

Three procedural remedies have been used to counteract adverse publicity during the trial. However, like the remedies

93. Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).
94. Cases in which the court found publicity of proceedings from which the jury had been excluded to have been prejudicial to the rights of the accused include Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961); Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), cert. denied, 345 U.S. 997 (1952); United States v. Powell, 171 F. Supp. 202 (N.D. Cal. 1959).
96. See note 21 supra.
available for prejudicial pre-trial publicity, these also have disadvantages.

Cautionary Instructions

It is generally recognized that a trial judge should instruct the jury that it is not to read about or discuss the case, and that its deliberations should concern only matters presented during the trial itself. It has been held that failure so to instruct, at least when requested, is reversible error.\(^9\)

Although this device seems conceptually ideal, in practice it fails to protect the defendant's rights because jurors may disregard cautionary instructions and fail to admit it on interrogation for fear of condemnation by the court.\(^8\)

Isolation (Sequestration) of the Jury

Another procedural device which can be used to avoid prejudicial publicity during the trial is isolation or sequestration of the jury, which is intended to shield the jurors from any outside influence.

In capital cases Louisiana law requires automatic isolation of each juror from the moment of his acceptance until the rendition of verdict or entry of mistrial. In non-capital cases automatic isolation is required only after the jury has been charged; prior to the actual charging, isolation of the jurors is discretionary with the court.\(^9\)

It is safe to assume that where isolation or sequestration of each juror is automatic from the moment of his acceptance, the danger of exposure to prejudicial publicity arising during the trial is appreciably minimized, pretermitting discussion of those reported cases where, despite isolation, newspapers found their way into the jury room.\(^10\) The inconvenience to jurors and the

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\(^9\) See Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); Briggs v. United States, 221 F.2d 636 (6th Cir. 1955); King v. United States, 25 F.2d 242 (6th Cir. 1928).


\(^9\) See La. R.S. 15:394 (1950): "From the moment of the acceptance of any juror until the rendition of verdict or the entry of a mistrial, as the case may be, the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication; provided that in cases not capital the judge may, in his discretion, permit the jurors to separate at any time before the actual delivery of his charge."

\(^10\) See, e.g., United States v. Leviton, 193 F.2d 848, 857 (2d Cir. 1951).
additional expense for the state which result from such early mandatory isolation can perhaps be justified in capital cases, but most legislatures have not recognized such justification in cases less than capital. Consequently, mandatory isolation at such an early stage is generally found only in capital cases. In non-capital cases isolation of the jury prior to charging is discretionary with the court in most states, as in Louisiana. It is submitted that this position is sound, and that mandatory isolation of each juror should not automatically follow his selection in all criminal cases.

Where isolation of jurors upon acceptance is not mandatory, however, the efficacy of discretionary isolation as a remedy against prejudicial publicity during the trial is doubtful. Usually the defendant will be able to obtain this relief only by requesting it. Defendants, however, are ordinarily reluctant to request isolation of the jury during the trial from fear that jurors who are thus inconvenienced may bear resentment towards the accused or may compromise their verdict in order to end the trial quickly. Even if such reluctance did not exist, there is still the problem that in many cases it cannot be determined beforehand that this remedy will be needed; often the prejudicial publicity stems from a sudden incident during an otherwise proper trial.

Mistrial and Reversal of Conviction

If publicity during the trial becomes so intense and prejudicial that a fair trial is impossible, the trial judge may declare a mistrial. Also, as in the case of adverse pre-trial publicity, a reviewing court may reverse the conviction if the trial did not meet due process requirements or fell below the federal standard for criminal justice in federal proceedings. This type of remedy may well be the only effective one presently available to counteract prejudicial publicity arising during any type of criminal trial. Its greatest inadequacy, however, is that it provides only questionable deterrence to repeated instances of adverse publicity; there is little assurance that the new trial will not be marred in a similar way.

101. For an illustration of the additional expense borne by a state solely because of prejudicial publicity during a trial, see the opinion of a very displeased court in State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964), cert. denied, 380 U.S. 987 (1965).
102. See Free Press - Fair Trial at 20.
103. See Briggs v. United States, 221 F.2d 636 (6th Cir. 1955).
B. The Standards

As in the case of pre-trial publicity, an accused seeking relief from prejudicial publicity arising during the trial must demonstrate to the court's satisfaction the denial of due process. Although none of the Supreme Court decisions have dealt specifically with publicity arising during the trial in state courts, there is no reason why the standards of due process should be lower in this instance than those applicable to prejudicial pre-trial publicity, already discussed. Indeed, if a conclusion can be drawn from the apparent disparity of standards in federal courts between pre-trial publicity and publicity during the trial, it is possible that the Supreme Court will require higher standards with respect to prejudicial publicity during the trial. A possible justification for a higher standard, at least in some instances, is that prejudicial publicity during the trial potentially has an immediate adverse effect on the jurors while pre-trial publicity may abate by trial time.

Marshall v. United States\(^\text{105}\) is the leading case on publicity occurring during a federal trial. Seven of the jurors admitted reading with varying degrees of thoroughness newspaper accounts of alleged prior illegal activity of the defendant. Earlier the trial judge had ruled this very information inadmissible as evidence. Each of the exposed jurors individually told the judge that he would disregard the publicity and decide the case solely on the evidence presented. The Supreme Court quoted the general rule that the trial judge has great discretion in ruling on possible prejudice resulting from the reading by jurors of news articles concerning the trial. Recognizing that generalizations beyond this rule are unprofitable because each case must turn on its special facts, the Court, exercising its supervisory jurisdiction, reversed the conviction and granted a new trial. It held, in effect, that the mere exposure of jurors to inadmissible information constitutes prejudice to the accused, despite the jurors' assurances of impartiality. Two years later the Supreme Court reversed without opinion another federal conviction where the jurors during the trial had read newspaper accounts and had heard radio reports concerning prior convictions of the accused, even though the jurors stated that they would not be influenced by anything they had read or heard.\(^\text{106}\)

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104. See discussion in text accompanying note 114 infra.
Applying this supervisory standard, the federal courts of appeals have almost unanimously held that where the accused demonstrates that some of the jurors have been exposed to admittedly prejudicial information, which either was held inadmissible or would have been inadmissible if offered, he is entitled to a new trial, irrespective of assurances by the jurors that they have no opinion as to guilt or innocence. Only where there was some factual basis of distinction between the situation presented and that found in Marshall have the reviewing federal courts refused to reverse the conviction.

The federal standard seemingly requires, therefore, that jurors not even read admittedly prejudicial material, and the accused need only demonstrate that some of his jurors have in fact been exposed to the damaging publicity to obtain relief.\footnote{107 See Comment, 38 St. John's L. Rev. 136, 145 (1963), citing United States v. Dellanmura, 142 N.Y.L.J. p. 3, col. 3-4 (July 8, 1959), and Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961). See also United States v. Alker, 180 F. Supp. 661 (E.D. Pa. 1959).


109 The following cases, cited in note 108 supra, used the indicated factual bases of distinction: Adjmi v. United States (jurors read only headlines); United States v. Agueci (routine publicity only); United States v. Feldman (publicity read by jury not detrimental to accused); Cohen v. United States (no showing jurors read prejudicial publicity); United States v. Vita (merely innocuous publicity read by jurors); United States v. Carlucci (admittedly prejudicial publicity but jurors had not read the accounts but merely glanced at the headlines); United States v. Coduto (no showing jurors read the publicity); United States v. LaBarbara, 273 F.2d 547 (2d Cir. 1960) (no showing jurors read objectionable publicity).

110 It seems clear that the accused must demonstrate that some of his jury have been exposed to the prejudicial information (see United States v. Coduto, 284 F.2d 404 (7th Cir. 1961); cert. denied, 365 U.S. 881 (1961); Cohen v. United States, 297 F.2d 760 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962); United States v. LaBarbara, 273 F.2d 547 (2d Cir. 1960)), or at least that he attempted to demonstrate such exposure but was denied the opportunity by the court (see United States v. Accardo, 298 F.2d 133 (7th Cir. 1962), concurring opinion at 140, where it is pointed out in answer to the argument of the dissent that there was no affirmative proof that any juror had read any prejudicial publicity that the defendant took the only course open to him in moving that the trial judge ascertain whether any juror had been exposed to the information which the judge declined to do on the basis that his cautionary instructions would suffice).}
Apparently the only case in which a different standard was applied was United States v. Largo. There the federal court of appeals refused to reverse a conviction where admittedly prejudicial and inadmissible publicity was read by one juror, for the reasons that the juror assured the court that nothing he had read would affect his impartiality and there was “overwhelming proof of the defendant’s guilt.” A vigorous dissent criticized the varying of federal standards according to the degree of evidence of guilt as evaluated by reviewing appellate judges.

As most federal appellate courts have adopted the rule that with respect to pre-trial publicity a juror need not necessarily be disqualified merely because he has read the prejudicial material, the federal standard for publicity arising during the trial seems higher, if Largo is regarded as anomalous.

It should be noted that when federal reviewing courts reverse a federal conviction, the decree is usually pursuant to an exercise of supervisory power over lower federal courts rather than on the basis of a denial of due process. Consequently, in seeking to ascertain the applicable federal standard it is difficult to determine what constitutes due process in federal trials. It has been proffered that the apparent reluctance to declare what partiality of the jury renders a state trial violative of due process may well be due to this indefiniteness of the federal constitutional standard.

III. PROPOSED SOLUTIONS FOR PREJUDICIAL PUBLICITY

It should be apparent that none of the existing remedies for prejudicial publicity is thoroughly effective, either alone or in combination with others. Consequently, several possible solutions have been proposed.

111. 346 F.2d 253 (7th Cir. 1965), cert. denied, 86 Sup. Ct. 240 (1965).
112. Id. at 256.
113. Id. at 257: “If I understand the majority correctly, this court is holding that the standard of a fair trial in a criminal case varies with the degree of guilt which we, as appellate judges, believe the evidence indicates. If the evidence of guilt seems overwhelming, the standard is not as exacting as when the evidence appears less conclusive. Such a variable standard, in my opinion, is antithetic to the very concept of due process.”
114. See note 90 supra and accompanying text.
A. Curtailing Divulgence of Prejudicial Information

Many writers on the subject have propounded the view that the best way to eliminate the problem of prejudicial publicity is to strike at the sources of the information. Various methods of accomplishing this have been devised, depending upon the nature of the source of information and the character of the sanction to be employed.

Amendment and/or Enforcement of Canon 20

It is certain that prejudicial publicity is not the sole work of news reporters. Were it not for "leaks" to the news media from prosecuting and defense attorneys and law enforcement officers, much prejudicial information would never get into print or be broadcast. Canon 20 of the Canons of Professional Ethics purports generally to oppose divulgence by an attorney of information relative to a case awaiting trial. The canon, however, is written in equivocal language, which has not been clarified by the Committee on Professional Ethics and Grievances. Furthermore, there is apparently no case on record where disciplinary action was taken against an attorney for conduct amounting to a violation of canon 20. For these reasons it has been suggested that the Canons be amended so as to spell out specifically what types of information attorneys should be precluded from divulging, at least until disclosure at the trial.

The New York State Bar Association has amended its canon to this end; the Philadelphia Bar Association is now experimenting with a self-imposed plan of silence during criminal trials; and the American Bar Association has taken action which may result in nationwide amendment of canon 20. At least one case, however, has indicated that the present canon could be "interpreted" so as to provide the desired result.

There are many factors which make amendment and enforcement of the Professional Canons a desirable method of controlling prejudicial publicity. This approach reaches one of

120. Id. at 628 n.74.
121. Id. at 628 n.75.
the principal sources of prejudicial information. In addition, it avoids the charge of attacking the free press, as no sanctions are imposed against the news media. Third, by attempting to curtail misconduct of attorneys the bar will be in a better position to argue for self-restraint and higher standards on the part of the news media and law enforcement officers. Finally, such an approach is the most honorable, and best vindicates the integrity of the profession.  

Regulation of Law Enforcement Officers Without Contempt Process or Legislation

It has been urged that law enforcement officers should adopt standards, similar to those suggested for the bar, concerning information that may be divulged in criminal cases. Although the likelihood of such action on the state level may seem remote, the Justice Department has adopted a statement of policy governing what information will be made available to the press. This statement of policy, of course, is binding only on the named federal officials.

Contempt Process

It has been strongly advocated that contempt process be used against the primary sources of prejudicial information where voluntary standards of forbearance either are not adopted or are not complied with. Although successful contempt proceedings against the press may not be a realistic expectation, the contempt action in this instance would be directed against the divulers of prejudicial information rather than against the press for publishing such information. Attorneys, as officers of the court, are susceptible to judicial disciplinary action; their divulgence of damaging material hampers the fair administra-

125. See Katzenbach. According to the statement, the following types of information will not be released by the Justice Department: statements, admissions, confessions, or alibis attributable to a defendant; statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial; “editorializing” such as labeling the defendant a “mad dog sex killer,” or characterizing a forthcoming proceeding as “an open and shut case,” or publicly appraising the credibility of a witness.
127. See discussion accompanying notes 142-157 infra.
tion of justice.\textsuperscript{128} Law enforcement officers who release to the press undesirable information likewise interfere with the proper administration of justice, and such action constitutes conduct unbefitting a police officer, warranting discipline "at the hands of the proper authorities."\textsuperscript{129}

\textit{Legislation}

A final means suggested to curtail divulgence of prejudicial information is the adoption of appropriate legislation. The proposed legislation would make divulgence of prejudicial information either a distinct criminal offense or conduct punishable by contempt. An example of the latter type of legislation is the Morse Bill, which provides "contempt-of-court penalties for any federal employee or any defendant or defense lawyer" who divulges for publication any "information not already properly filed with the court which might affect the outcome of any pending criminal litigation."\textsuperscript{130} As in the case of contempt process, this proposed legislation is directed against the sources of prejudicial information, not against the news media.

\textbf{B. Curtailing Publication of Prejudicial Information}

\textit{Internal (Voluntary) Control of the Press}

It has been suggested that the press adopt a voluntary code of conduct regarding crime reporting.\textsuperscript{131} Such a solution would be very desirable in that it would avoid any interference with freedom of the press. Some journalists have indicated that if reasonable standards were prescribed most newspapers would

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964), \textit{cert. denied}, 380 U.S. 987 (1965).
\item \textsuperscript{129} Id.
\item \textsuperscript{130} S. No. 290, 89th Cong., 1st Sess. (1965) : "A bill to protect the integrity of the court and jury functions in criminal cases."
\item \textsuperscript{131} See Report of the Warren Commission on the Assassination of President Kennedy 47 (N.Y. Times ed. 1964) : "The Commission recommends that the representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."
\end{itemize}
\end{footnotesize}
gladly comply.\textsuperscript{132} However, it has been said that some newspapers believe they must emphasize morbid and shocking crime news in order to prosper;\textsuperscript{133} others justify extensive publicity on the basis that one obligation of their profession is to attempt to reduce crime.\textsuperscript{134} A further justification offered is that there is a constitutional guarantee of a public trial and the public has a "right to know."\textsuperscript{135} The answer to this latter contention is that the provision for a public trial is for the protection of the accused.\textsuperscript{136} The Federal Constitution mentions no other beneficiary of this right.\textsuperscript{137} The access of the press to a trial stems from the right of the defendant to a fair trial and the assumption that the press will further this end. It is a right which can and, at times, has been waived,\textsuperscript{138} in which event the public and the press may be excluded.\textsuperscript{139}

Assuming that such self-restraint would be accepted by most of the press, various methods could be used to assure extensive compliance. The use of a system of accreditation has been suggested whereby only news media and reporters who complied with the voluntary standards would be accredited and therefore extended courtroom privileges.\textsuperscript{140} A further sanction for compliance could be limiting membership in various newspaper organizations, such as the American Newspaper Publishers’ Association and the American Society of Newspaper Editors, to those who adhere to the voluntary standards.\textsuperscript{141}

\textsuperscript{133} Id. at 238 n.90.
\textsuperscript{134} Id. at 238 n.91.
\textsuperscript{135} See Will, \textit{Free Press v. Fair Trial}, 12 De Paul L. Rev. 197, 201 n.16 (1963).
\textsuperscript{137} The sixth amendment is the only constitutional provision which speaks of a right to a public trial and in that provision only the accused is afforded the right. See note 5 supra.
\textsuperscript{139} Id. at 204 n.22, citing United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).
\textsuperscript{140} See Wright, \textit{A Judge's View: The News Media and Criminal Justice}, 50 A.B.A.J. 1125, 1126 (1964). \textit{Query as to the constitutionality of this proposal.}
\textsuperscript{141} See Comment, 44 Neb. L. Rev. 614, 631 (1965), where this proposal is discussed and its effectiveness as a sanction is affirmed because of the many benefits membership in these organizations affords.
External Control of the Press

Contempt by Publication

The English judiciary forbids pre-trial and during-the-trial publication of much of the information about the accused, and it enforces these restrictions through its power of contempt.\textsuperscript{142} Because of the constitutional guarantee of freedom of speech and of the press, the contempt power of the courts has never been as pervasive in the United States, and in recent years it has met with even greater limitations. After the Supreme Court's interpretation of the contempt provision of the Judicial Code\textsuperscript{143} in \textit{Nye v. United States}\textsuperscript{144} federal courts, pursuant to statutory authorization can punish the press by contempt proceedings only if the contempt is committed either in the courtroom or in the vicinity of the court itself.\textsuperscript{145}

In state courts the contempt power was at first very broad,\textsuperscript{146} but it was severely limited by the Supreme Court in a series of decisions beginning with \textit{Bridges v. California},\textsuperscript{147} in 1941. The Court there held that the first amendment, made applicable to the states through the due process clause of 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" to the administration of justice. The Court stated that it would be the final judge of what constituted a "clear and present danger" and would determine this by examining the facts of each case.\textsuperscript{148} Comments directed at the trial judge sitting without a jury were held not to meet the required test.

The Supreme Court reaffirmed the "clear and present danger" test in \textit{Pennekamp v. Florida},\textsuperscript{149} \textit{Craig v. Harney},\textsuperscript{150} and more recently in \textit{Wood v. Georgia}.\textsuperscript{151} It is important to note,\textsuperscript{142, 143, 144, 145, 146, 147, 148, 149, 150, 151}
however, that none of these cases involved trial by jury.\textsuperscript{152} Indeed, special note was taken of this fact in two of the cases.\textsuperscript{153} It has been inferred from this language that the Court might require a less rigid test for upholding contempt-by-publication convictions where a jury trial is involved. In evaluating this possibility, however, it is necessary to consider \textit{Maryland v. Baltimore Radio Show}.\textsuperscript{154} A Maryland trial court adjudged a radio station in contempt for broadcasting news of the arrest, confession, and prior criminal record of the accused. The decision was reversed by the Maryland court of appeals on the basis that the broadcast was protected by \textit{Bridges}, \textit{Pennekamp}, and \textit{Craig}, in that it did not constitute a "clear and present danger" to the administration of justice. The Supreme Court denied certiorari,\textsuperscript{155} but Justice Frankfurter wrote an opinion carefully pointing out that a refusal to grant certiorari was not equivalent to affirmance.\textsuperscript{156}

At best, it is doubtful whether the Supreme Court will apply any standard other than the "clear and present danger" test when considering the validity of contempt-by-publication judgments. Even assuming \textit{arguendo} that a lesser standard might be applied where trial by jury was involved, serious doubt remains as to the desirability of this method as a deterrent to prejudicial publicity. As the Supreme Court has demonstrated,\textsuperscript{157} the validity of a contempt conviction will depend upon an examination of the particular facts of each case. The news media, therefore, would have no definitive standards by which to determine what constitutes a contumacious publication. Although

\textsuperscript{152} Although a grand jury was involved in \textit{Wood}, it was merely conducting a grand jury investigation into a matter of general community interest (alleged bloc vote purchasing by local political candidates), rather than deciding whether to bring charges against a particular defendant. \textit{Id.} at 389, 390.

\textsuperscript{153} \textit{Wood v. Georgia}, 370 U.S. 375, 389 (1962): “First it is important to emphasize that this case does not represent a situation where an individual is on trial; there was no ‘judicial proceeding pending’ in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding.”

\textit{Pennekamp v. Florida}, 328 U.S. 331, 348 (1946): “The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion.”

\textsuperscript{154} 193 Md. 300, 67 A.2d 497 (1949).

\textsuperscript{155} 338 U.S. 912 (1950).

\textsuperscript{156} \textit{Ibid.}

\textsuperscript{157} See note 148 \textit{supra} and accompanying text.
such a situation might lead to greater restraint on the part of the news media from uncertainty as to what type of publicity might constitute contempt, it is submitted that such a restraint is unnecessary and unwarranted. The success of a remedy for prejudicial publicity will depend in large measure upon cooperation by the news media and cooperation hardly will be engendered through such a use of contempt process.

_Legislation_

The more favored means of external control of the press is legislation. Of the various types of proposed statutes the usual pattern is to set forth specific types of publications which the legislature would consider a "clear and present danger" to the administration of justice. Publication of such matters would be a criminal offense, punishable by fine and/or imprisonment. By making the sanction a result only of criminal proceedings, rather than of use of the contempt power, it is argued that the legislation would more likely be sustained by the Supreme Court since the publisher would not be held responsible unless he had been proceeded against by indictment or information, been found guilty by a jury, and failed to receive relief after exercising his right of appeal. Such a statute has received "initial approval" by the Massachusetts legislature. It is improbable, however, that the Supreme Court will allow the states to determine what specific matters, if publicized, will constitute a "clear and present danger" to the administration of justice, rather than continue to hold that this determination rests ultimately with the Court itself.

_CONCLUSION_

It is submitted that prejudicial publicity must be recognized as a serious problem. The existing procedural remedies, including reversals of convictions, are inadequate for various reasons, even assuming greater liberality of the courts in granting them. It is felt that the better approach is to curtail the prejudicial

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160. With reference to determination of a clear and present danger see Whitney v. California, 274 U.S. 347, 374 (1927): "[W]here a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity." (Concurring opinion.)
publicity itself, rather than attempt to avoid its adverse effects on a criminal proceeding. There seems little justification for pre-trial disclosure of the confession of the accused, or even of the fact that he has confessed. The prejudicial effect such information may have upon the future jurors far outweighs the public value, if any, obtained from its publication. For the same reason it is submitted that revelation of a defendant's prior criminal activity before such information is disclosed during the trial itself is unjustified. Such publicity is antithetical to the fundamental concepts of criminal justice in this country. Unless the defendant's prior criminal activity is made known at trial for one of its limited purposes, it is irrelevant to the determination of his guilt or innocence. Unauthorized knowledge by the jurors of an alleged history of misconduct, is almost certain to jeopardize the defendant's right to a fair trial. The same rationale can be applied to other types of admittedly prejudicial publicity.

In considering the best means of avoiding such publicity, it is submitted that before direct control is attempted, there should be serious negotiations between representatives of the bar, the law enforcement services, and the news media. The purpose of these negotiations should be to determine whether certain types of publicity can be mutually recognized as undesirable and can therefore be avoided, either by voluntary codes of ethics or by acquiescence in legislative sanctions against both the divulgence and the publication of the undesirable publicity. It is felt that such an approach can go far toward achieving the necessary improvement, if it is recognized that failure to obtain a solution might result in court-made requirements and sanctions of possibly greater harshness.

Whether or not accord can be reached between the interests concerned, however, it is submitted that the bar must recognize its duty to adopt the necessary standards with respect to what types of information attorneys in a criminal proceeding may not divulge and to enact adequate sanctions to assure compliance. In the interests of justice the bar should recognize and accept the further duty to press for legislation aimed at curtailing other divulgence of prejudicial information and the dissemination of prejudicial publicity.

Paul H. Dué